

1989

# State of Utah v. Steven Wade Foster, Charles Clyde Rushton, and Gordon William Thomas : Brief of Appellant

Utah Court of Appeals

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BRIEF

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CASE NO. 89-0677

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	)	
	)	
Plaintiff-Respondent,	)	Case Nos. 890669-CA
	)	890670-CA
	)	890677-CA
vs.	)	
	)	
STEVEN WADE FOSTER,	)	Classification Priority 2
CHARLES CLYDE RUSHTON, and	)	
GORDON WILLIAM THOMAS,	)	
	)	
Defendants-Appellants.	)	

BRIEF OF APPELLANT ACCOMPANYING MOTION FOR LEAVE TO WITHDRAW

Appeal from Judgments, Sentences, and Commitments in the Fifth District Court for Iron County, State of Utah, the Honorable Douglas L. Cornaby presiding, following a jury trial in which all three Defendants were convicted of escape, a second-degree felony.

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Salt Lake City, Utah 84114

DEPOSITED BY THE  
STATE OF UTAH  
AUG 20 1990

MAR 27 1990

OF APP.

OFFICE OF  
THE ATTORNEY GENERAL



STATE OF UTAH

R. PAUL VAN DAM - ATTORNEY GENERAL

236 STATE CAPITOL • SALT LAKE CITY, UTAH 84114 • TELEPHONE: 801-538-1015 • FAX NO. 801-538-1121

JOSEPH E. TESCH  
CHIEF DEPUTY ATTORNEY GENERAL

April 20, 1990

Mary T. Noonan  
Clerk of the Court  
Utah Court of Appeals  
400 Midtown Plaza  
230 South 500 East  
Salt Lake City, Utah 84111


Re: State v. Steven Wade Foster, Case 890669-CA  
State v. Charles Clyde Rushton, Case No. 890670-CA  
State v. William Thomas, Case No. 890677-CA

Dear Ms. Noonan:

The appellant's attorney in the above entitled case, in harmony with Anders v. California, 386 U.S. 738 (1967), has stated, in the Brief of Appellant, that it is his opinion that the issues raised on appeal are not sound and has requested that he be allowed to withdraw. Appellee believes that the brief filed by appellant's counsel is in substantial compliance with the requirements of State v. Clayton, 639 P.2d 168 (Utah 1981). Under these circumstances, it would be futile to respond to a brief of this nature when the only assistance we could lend the Court would be to repeat appellant's counsel's assertion that the issue raised is frivolous on its face.

Appellee requests the Court to accept this letter as a formal response in lieu of filing a brief and either proceed to dismiss the appeal on its merits or in harmony with Anders v. California. If the Court desires a further response, our office will gladly comply upon request.

Very truly yours,

  
DAN R. LARSEN  
Assistant Attorney General  
Criminal Appeals Division

DRL:bks

cc: James L. Shumate

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,	)	
	)	
Plaintiff-Respondent,	)	Case Nos. 890669-CA
	)	890670-CA
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vs.	)	
	)	
STEVEN WADE FOSTER,	)	Classification Priority 2
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	)	
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BRIEF OF APPELLANT ACCOMPANYING MOTION  
FOR LEAVE TO WITHDRAW

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Appeal from Judgments, Sentences, and Commitments in the Fifth District Court for Iron County, State of Utah, the Honorable Douglas L. Cornaby presiding, following a jury trial in which all three Defendants were convicted of escape, a second-degree felony.

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IN THE UTAH COURT OF APPEALS

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THE STATE OF UTAH, )  
 )  
 Plaintiff-Respondent, )  
 ) Case Nos. 890669-CA  
 vs. ) 890670-CA  
 ) 890677-CA  
 )  
 STEVEN WADE FOSTER, )  
 CHARLES CLYDE RUSHTON, and )  
 GORDON WILLIAM THOMAS, )  
 )  
 Defendants-Appellants. )

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JURISDICTION OF THE COURT OF APPEALS

The Jurisdiction of the Court of Appeals is established by 78-2a-3(2)(f), Utah Code Annotated, 1953, as amended.

NATURE OF THE PROCEEDINGS

This is an appeal from a Judgment, Sentence, and Commitment from the Fifth District Court for Iron County following a conviction of escape, a Second-Degree Felony, on each of the three Defendants.

ISSUES PRESENTED ON APPEAL

This appeal is prosecuted under the specific requests of the Defendants, and each of them, after their counsel, the author of this Brief has instructed the Defendant-Appellants that in his opinion, the case does not contain sufficient cause to prosecute an appeal. However, the undersigned has been instructed by his clients to pursue the appeal, and the Defendants themselves have indicated that they would file Notices of Appeal on their own. Under these circumstance, the

undersigned is submitting an "Anders" brief, Anders v. State of California, 386 US 738, in support of a Motion for Leave to Withdraw. The potential issues for review of the court are the sufficiency of the evidence to support the conviction for a second-degree felony offense of escape as opposed to the the class-B misdemeanor offense of escape and the constitutionality of the statute making escape a second-degree felony or a class-B misdemeanor, depending upon the status of the Defendant.

#### DETERMINATIVE STATUTES OR RULES

The statute which is believed to be determinative in this matter is 76-8-309, Utah Code Annotated, 1953, as amended. This statute is reproduced in total as the addendum to this brief.

#### NATURE OF THE CASE

This is an appeal from the Judgment, Sentence and Commitment for the offense of escape, a second-degree felony from the Fifth District Court of Iron County.

#### COURSE OF THE PROCEEDINGS

The Defendants were charged with escape, a second-degree felony, and injury to a jail, a third-degree felony. At the trial of the matter the Defendants were acquitted by a jury of the charges of injury to a jail but were convicted of escape, a second-degree felony.

#### DISPOSITION AT TRIAL COURT

At the trial court the Defendants were convicted of escape, a second-degree felony, and sentenced to consecutive one



to fifteen year terms of incarceration at the Utah State Prison to be served following the present sentences that they are serving. The Defendants were acquitted of the count in the information alleging a third-degree felony injury to a jail.

#### STATEMENT OF FACTS

On April 7, 1989, the three Defendants were incarcerated in the Iron County/Utah State Correctional Facility. ( T.46-49) On that date, the personnel at the Correctional Facility conducted a count of the inmates in the facility and found that the three Defendants-Appellants were missing. (T.76-77) The Defendants were apprehended at the truck stop located adjacent to I-15 in Summit, Utah, some eight and one-half miles north of the Iron County/Utah State correctional Facility, approximately seventeen hours after they were reported missing. (T.82-83)

#### SUMMARY OF ARGUMENT

It is believed that these Defendants-Appellants would contest the constitutionality of the statute outlining escape, for the reason that the level of offense between a Class B Misdemeanor and a Second-Degree Felony is unclear.

The Defendants would also contest that there was insufficient evidence to support their conviction for the reason that the facility that they left was the Iron County Jail and not the Utah State Prison.

## ARGUMENT

### POINT I

THESE APPELLANTS CONTEND THAT THEY WERE DEPRIVED OF DUE PROCESS OF LAW BECAUSE THE STATUTE UNDER WHICH THEY WERE CONVICTED WAS UNCONSTITUTIONALLY VAGUE.

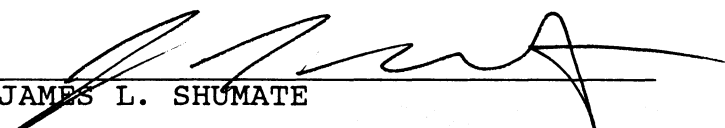
The Defendant-Appellants would argue to the court that the definition of "official custody" and the level of offense are ambiguous and unconstitutionally vague. In subsection 2 of 76-8-309, Utah Code Annotated, 1953, as amended, escape from official custody is specified as a class-B misdemeanor. The offense is made a second-degree felony if the person escapes from the State Prison. At the present time, there is only one Utah State Prison--the facility located at Draper, Utah. The Iron County/Utah State Correctional Facility is located in Cedar City, Utah, and is run separately and apart from the Utah State Prison; and while that facility houses State inmates and is governed by the Iron County Commission and the Utah State Department of Corrections under a joint agreement, the Iron County/Utah State Correctional Facility is not the Utah State Prison. It would appear, therefore, under subparagraph 2 of the statute that the Defendants' escape could only be a class-B misdemeanor. The only way to make this offense a second-degree felony is for the persons to be deemed to be confined in the Utah State Prison because they had been sentenced and committed to that institution and the sentences were not terminated or voided and the Defendants were not on parole. This definition is found in subparagraph 3 of the statute. These defendants would assert

that this statutory language is unconstitutionally vague because it is confusing to them making it impossible to determine whether they are guilty of a misdemeanor or a felony if they escape from the Iron County/Utah State Correctional Facility.

CONCLUSION

The undersigned respectfully notes to the court that present rules of the Utah Court of Appeals do not provide for the situation faced by appointed counsel, such as the author of this brief, wherein the client insists upon the pursuit of a frivolous appeal. The undersigned requests leave to withdraw from this matter and files with the court herein potential points for review by the appellate court.

DATED this 26 day of March, 1990.

  
\_\_\_\_\_  
JAMES L. SHUMATE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the above and foregoing BRIEF OF APPELLANT ACCOMPANYING MOTION FOR LEAVE TO WITHDRAW to Mr. Paul Van Dam, Utah Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114, this 26 day of March, 1990, first class postage fully prepaid.

  
\_\_\_\_\_  
JAMES L. SHUMATE

**76-8-309. Escape — Term for escape from state prison.**

(1) A person is guilty of escape if he escapes from official custody.

(2) The offense is a felony of the second degree if:

(a) The actor employs force, threat, or a deadly weapon against any person to effect the escape; or

(b) The actor escapes from confinement in the state prison. Otherwise, escape is a class B misdemeanor.

(3) "Official custody," for the purpose of this section, means arrest, custody in a penal institution, jail, an institution for confinement of juvenile offenders, or other confinement pursuant to an order of the court. For purposes of this section a person is deemed to be confined in the Utah state prison if he has been sentenced and committed and the sentence has not been terminated or voided or the prisoner is not on parole.

(4) The term imposed upon a person escaping confinement in the state prison shall commence from the time the actor would otherwise have been discharged from the prison on the term or terms which he was serving.

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