

2010

# Utah v. Dykes : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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THE STATE OF UTAH, :  
Plaintiff/Appellee, :  
v. :  
JEREMY DYKES, : Case No. 20100582-CA  
Defendant/Appellant. : Appellant is incarcerated.

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**BRIEF OF APPELLANT**

Interlocutory appeal from a denial of a Motion to Quash Information on one count of Theft by Receiving Stolen Property, a Third Degree Felony, in violation of Utah Code section 76-6-408, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Michelle Christiansen, presiding.

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**JURISDICTIONAL STATEMENT**

This is an interlocutory appeal from a denial of a Motion to Quash Information on one count of Theft by Receiving Stolen Property, a Third Degree Felony, in violation of Utah Code section 76-6-408, in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Michelle Christiansen, presiding. This Court has jurisdiction under Utah Code section 78A-4-103(2)(d). See Addendum A (Order Granting Permission to Appeal).

**ISSUE AND STANDARD OF REVIEW**

Issue: Whether the district court violated the rule announced by the Utah Supreme Court in State v. Brickey<sup>1</sup> and Mr. Dykes's due process rights when it denied Mr. Dykes's Motion to Quash, even though the State, without new or previously unavailable evidence, refiled a charge that was previously found to be unsupported by sufficient

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<sup>1</sup> 714 P.2d 644 (Utah 1986)

evidence after a preliminary hearing where no evidence was presented on an element of the offense.

Standard of Review: A lower court's application of the Brickey rule is an interpretation of case law that this Court reviews for correctness, according no deference to the lower court's legal conclusion. See State v. Redd, 2001 UT 113, ¶ 13, 37 P.3d 1160.

Preservation: This issue is preserved in the Record from District Court Case No. 101901771, at 21–81<sup>2</sup> (Motion to Quash Information); R71:102 (Minutes from Motion to Quash Hearing); R71:114 (Transcript from Motion to Quash Hearing); R71:103–05 (Ruling and Order Denying Motion to Quash).

### **CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES**

The following provisions are determinative of the issue on appeal. Their text is provided in full in Addendum B.

Utah Const. art. 1, sec. 7.

Utah Code Ann. § 76-6-408 (LexisNexis 2008).

Utah Code Ann. § 76-6-412 (LexisNexis 2008).

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<sup>2</sup> Because this case involves multiple dismissals and refilings of charges filed under different case numbers in the district court each time, the record on appeal contains separately paginated pleadings and transcripts under two different district court case numbers—Case No. 091905392 and Case No. 101901771. For ease of reference, each separately paginated portion of the record will be cited as “R” for record followed by the last two numbers of the district court case number—either “71” or “92”—followed by a colon and the page number in the record. If the record cite is to the first page of a transcript, any pincite to individual pages of that transcript will be preceded by a second colon.

## STATEMENT OF THE CASE

The State charged Mr. Dykes by information with one count of Theft by Receiving Stolen Property, a Second Degree Felony, in violation of Utah Code section 76-6-408. See R71:21, 30. At a preliminary hearing before the Third District Court, the court dismissed the charge without prejudice because the State's witnesses were not present. See R71:21, 33, 115:3.

The State refiled the charge in the Third District Court, again charging Mr. Dykes with Theft by Receiving Stolen Property, a Second Degree Felony, in violation of Utah Code section 76-6-408. R92:2; R71:22, 36. After a preliminary hearing, the magistrate found probable cause to bind Mr. Dykes over on the charge. R71:22, 39; R92:116:19.

Mr. Dykes moved to quash the bindover because, among other reasons, the item he was alleged to have stolen was not an operable motor vehicle under Utah Code section 76-6-408, the Theft by Receiving Stolen Property Statute, and, therefore, did not aggravate the offense to the level of a Second Degree Felony. R92:18–25. The Second Degree Felony variant of this offense requires as an element that the item alleged stolen be either an operable motor vehicle, a firearm, or valued at over \$5,000. See Utah Code Ann. § 76-6-412(1)(a) (2008). At the hearing on this motion, the district court did not quash the bindover, but agreed that there was insufficient evidence to bind Mr. Dykes over on a Second Degree Felony and ordered the Theft by Receiving Stolen Property charge bound over as a Class B Misdemeanor. R92:54, 117:15–16. The State responded with two motions—first to bind the charge over as a Class A Misdemeanor, and second,



to reopen the preliminary hearing to present additional evidence. R92:54, 117:17. The district court denied these motions. R92:54, 117:17–18.

Mr. Dykes then moved the district court to dismiss the Class B Misdemeanor charge, arguing that the district court lacked subject matter jurisdiction over Class B Misdemeanors and that Class B Misdemeanor charges should instead be filed in the appropriate justice court. R92:66–67. The district court granted the motion and dismissed the charge without prejudice. R92:68; 118:5.

The State refiled the Theft by Receiving Stolen Property charge in the Third District Court, this time as a Third Degree Felony, in violation of Utah Code section 76-6-408. R71:1–2. At the time of the alleged offense, Theft by Receiving Stolen Property was a third degree felony if the allegedly stolen property was valued between \$1,000 and \$5,000. See Utah Code Ann. § 76-6-412(1)(b)(i) (2008). Mr. Dykes filed a motion to quash the information, arguing that the State’s refiling of charges violated his due process rights as outlined by the Utah Supreme Court in State v. Brickey, 714 P.2d 644 (Utah 1986). R71:21–27. At the hearing on this motion, the State offered two exhibits as evidence of the value of the allegedly stolen item. R71:114:11; 120–21. The same judge who denied the State’s earlier motions to bind Mr. Dykes over on a Class A Misdemeanor and reopen the preliminary hearing denied Mr. Dykes’s Motion to Quash the Information. R71:103–06; see Addendum C (Ruling and Order).

Mr. Dykes filed a petition for permission to file an interlocutory appeal asking this Court to review the district court’s denial of his Motion to Quash. See R71:107. This Court granted that petition on October 19, 2010. See Addendum A. This appeal follows.

## **STATEMENT OF FACTS**

On April 10, 2009, the State charged Mr. Dykes by Information with one count of Theft by Receiving Stolen Property, a second degree felony in violation of Utah Code section 76-6-408 and Utah Code section 76-6-412(1)(a). See R71:21, 30. The district court dismissed the case without prejudice when the State's witnesses failed to appear for a preliminary hearing on June 25, 2009. See R71:21, 33, 115:3.

On July 10, 2009, the State refiled the case, again charging Mr. Dykes by Information with one count of theft by receiving stolen property, a second degree felony in violation of Utah Code section 76-6-408. R92:2–3. The charging document alleged that the level of offense was a Second Degree Felony because the value of the stolen property “was or exceeded \$5,000 or the property stolen was a firearm or an operable motor vehicle.” R92:2; see also Utah Code Ann. § 76-6-412(1)(a) (LexisNexis 2008). The probable cause statement alleged that Mr. Dykes was in possession of a stolen 4-wheeler ATV. R92:3.

At the preliminary hearing, the State called one witness, West Valley Police Officer Patrick Plese. R92:116:2–16. Officer Plese testified that on April 7, 2009, he was monitoring traffic near 3800 South and Redwood Road when he saw an ATV turn onto Redwood Road. R92:116:2–3. He determined that it must be some type of violation to drive an ATV on the road since it was not possible to make that type of four-wheeler road legal, so he requested that the driver, Mr. Dykes, pull into a driveway. R92:116:3–4. Officer Plese noticed that the ATV was a few years old, in decent condition and that the factory yellow paint had been partially repainted. R92:116:4–5. Mr. Dykes told Officer

Plese that he owned the ATV and that he bought it from someone named Gary Smith. R92:116:5–6. He also told Officer Plese that he had not yet registered the ATV in his name and that he thought it was still registered to Gary Smith. See R92:116:5–6. Mr. Dykes found the ATV's registration and provided it to Officer Plese. R92:116:6. Officer Plese determined that the ATV was a 2004 Honda Rancher registered to Myrna Robb, and that the ATV was reported stolen out of Nephi, Utah. R92:116:6–7. Officer Plese then arrested Mr. Dykes. R92:116:7–8.

Officer Plese further testified that he went to Mr. Dykes's residence to try and locate an additional ATV and trailer that were reported stolen at the same time as the 2004 Honda Rancher ATV, but found nothing. R92:116:8–9. Officer Plese admitted he did not do any investigation into the existence of Gary Smith. R92:116:14–15.

In addition to Officer Plese's testimony, the State introduced two 1102 statements. R92:50–53, 116:6, 8. The first statement was from Danny Robb. R92:50–51. The statement provided that Danny Robb and his wife Myrna Robb are the owners of the 2004 Honda Rancher ATV Mr. Dykes was driving on April 7, 2009, that on or about January 8, 2009, Mr. Robb's 2004 Honda Rancher ATV, along with his sister-in-law Karin Robb's 2004 Honda Rubicon ATV and trailer, were stolen from Karin's residence in Nephi, Utah. R92:50–51. Danny Robb stated that he did not know Mr. Dykes and never gave Mr. Dykes permission to use his 2004 Honda Rancher ATV. R92:50–51. The statement also stated that the 2004 Honda Rancher ATV had been partially repainted. R92:50–51. The statement did not give the value of the 2004 Honda Rancher ATV. R92:50–51. Indeed, no evidence of the value of the 2004 Honda Rancher ATV was

presented at the preliminary hearing either by way of testimony or any 1102 statement.

R92:116:17.

The second 1102 statement was from Karin Robb. R92:52–53, 116:8. This statement provided that she owned a 2004 Honda Rubicon ATV and a trailer and that on or about January 8, 2009, her ATV and trailer, and Danny Robb's ATV, were stolen from her residence. R92:52. As part of Karin Robb's statement, a receipt for her 2004 Honda Rubicon ATV was submitted, which showed the 2004 Honda Rubicon ATV was purchased for \$5,849.19. R92:53. Karin Robb also averred that Mr. Dykes did not have permission to be in possession of her 2004 Honda Rubicon ATV. R92:52. However, Mr. Dykes was never in possession of the 2004 Honda Rubicon ATV, and he was never charged with a crime related to this ATV.

At the close of the preliminary hearing, defense counsel argued against bindover because there was not sufficient evidence to support a reasonable belief that Mr. Dykes knew or probably believed the ATV was stolen and because no evidence was presented on the element of the value of the 2004 Honda Rancher ATV. R92:116:16–17. The State responded that there was no evidence of value because an ATV is an operable motor vehicle and value was an alternative, and the State had otherwise presented sufficient evidence for bindover. R92:116:18. The magistrate acknowledged that there was no evidence of value presented but bound Mr. Dykes over as charged nonetheless. R92:116:18–19.

Mr. Dykes filed a motion to quash the bindover, arguing that factually, there was insufficient evidence to bind the defendant over for trial when no evidence, beyond pure

speculation, was presented that Mr. Dykes believed that the ATV had probably been stolen. R92:18–22. In addition, Mr. Dykes argued for the trial court to quash the bindover because there was no evidence of value presented at the preliminary hearing and, under the theft statute, an ATV is not an operable motor vehicle. R92:22–25.

The district court held a hearing on Mr. Dykes’s motion to quash. R92:117. In addition to arguing the evidence was insufficient, defense counsel argued that an ATV is not an operable motor vehicle, and, since there was no evidence of value presented, the court should quash the bindover. R92:117:1–6. Specifically, defense counsel argued that since the term “operable motor vehicle” is not defined anywhere in the theft statutes under which Mr. Dykes was charged, the Court should look to the definition of “motor vehicle” provided in Utah Code section 76-6-410.5(1)(a), Theft of a Rental Vehicle, which is under the same Chapter (Offenses Against Property) and Part (Theft) as the offense of theft by receiving stolen property. R92:23–24, 117:4–5; Utah Code Ann. § 76-6-408. That definition, which states “motor vehicle means a self-propelled vehicle that is intended primarily for use and operation on the highways,” does not include an ATV, which is intended primarily for use and operation off of the highways. See Utah Code § 76-6-410(1)(a) (2008).

In response, the State sidestepped the argument of whether an ATV is an operable motor vehicle and moved to amend the charge to a class A misdemeanor.<sup>3</sup>

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<sup>3</sup> At the time of the alleged offense, theft by receiving stolen property qualified as a class A misdemeanor under Utah Code section 76-6-412(1)(c) if the value of the

R92:117:11,17. In support of its motion, the State argued that it would be reasonable for the court to assume that the value of the 2004 Honda Rancher ATV was more than \$300 and less than \$1,000. R92:117:11–12. Since the district court did not have any evidence of the value of the 2004 Honda Rancher ATV, it denied the State’s motion to amend the charge to a class A misdemeanor. R92:117:16–17.

The district court concluded that an ATV is not an operable motor vehicle for purposes of the theft by receiving stolen property statute and, since there was no evidence of value presented at the preliminary hearing, the court bound the charge over as a class B misdemeanor:<sup>4</sup>

Motor vehicle is defined as . . . a self-propelled vehicle that is intended primarily for use and operation on the highways. An ATV is not intended primarily for use and operation on the highway. That’s just a matter of common sense that we follow and can take note of. . . . And so to bind this over as a second degree felony, the State would have to have presented evidence of value of the vehicle. I don’t find that the information provided . . . is sufficient to either bind it over as a second degree felony or as a third degree felony. . . . [A]s it stands right now from the information that was provided at the preliminary hearing, I don’t have any information about the value of this item and will bind it over as a Class B misdemeanor.

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property was or exceeded \$300 but was less than \$1,000. Utah Code Ann. § 76-6-412(1)(c) (LexisNexis 2008).

<sup>4</sup> At the time of the alleged offense, theft by receiving stolen property qualified as a class B misdemeanor under Utah Code section 76-6-412(1)(d) when the property had some value but that value was less than \$300. Utah Code Ann. § 76-6-412(1)(d) (LexisNexis 2008).

R92:117:16–17 (emphasis added). After the trial court announced its ruling, the State moved to reopen the preliminary hearing in order to present evidence of the value of the 2004 Honda Rancher ATV. R92:117:17. After hearing argument on the motion, the trial court denied the State’s motion to reopen the preliminary hearing and again stated that the case was going to be bound over as a class B misdemeanor. R92:117:18.

In reliance on the district court’s previous rulings denying the State’s motion to reopen the preliminary hearing, and denying the State’s motion to amend the charge to a class A misdemeanor, defense counsel moved to have the class B misdemeanor dismissed. R92:66–67. The basis for the motion was that, pursuant to Utah Code section 78A-5-102(8), the district court did not have subject matter jurisdiction over a single class B misdemeanor and that the charge was instead appropriately adjudicated in a justice court. R92:66–67; see also R92:118:3–5. The trial court agreed that it lacked subject matter jurisdiction and dismissed the charge without prejudice. R92:68, 118:5.

Rather than filing the charge as a class B misdemeanor in a justice court, the State refiled the case for a third time, this time as a third degree felony in the district court. R71:1–2. The Information and accompanying probable cause statement do not allege any new evidence of value. R71:1–2.

Defense counsel moved to have the case set before the judge who dismissed the previous filing of charges so that she could determine whether the third refile violated the standards set forth in State v. Brickey, 714 P.2d 644 (Utah 1986), for cases refiled after the State fails to produce sufficient evidence for bindover at a preliminary hearing.

R71:20. Both parties submitted written motions on the validity of the third refile, and the matter was set for a motion hearing. R71:21–102.

At the motion hearing, defense counsel argued that refiling the charge as a third degree felony violated the standards set forth in Brickey, since any evidence of value presented by the State did not constitute new or previously unavailable evidence since it could have been, with ordinary diligence, produced at the previous preliminary hearing. R71:114:5–11. Counsel for Mr. Dykes also argued that pursuant to State v. Redd, 2001 UT 113, ¶ 17, 37 P.3d 1160, the State’s failure to present any evidence on an essential element of the charged offense at the previous preliminary hearing did not constitute an innocent miscalculation or good cause to refile, and that absent new or previously unavailable evidence, the refile as a third degree felony violated Mr. Dykes’s due process protections under Brickey. R71:114:8.

Counsel for Mr. Dykes also argued that the State should be prohibited from refiling the charge as a third degree felony under the doctrine of res judicata,<sup>5</sup> since the trial court previously denied the State’s motion to reopen the preliminary hearing, and denied the State’s motion to amend the charge to a class A misdemeanor, and instead amended the charge to a class B misdemeanor and dismissed the case for lack of jurisdiction. R71:114:4–5. Counsel for Mr. Dykes asked the trial court to dismiss the case with prejudice. R71:114:11.

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<sup>5</sup> Although counsel for Mr. Dykes never used the term res judicata in argument, the legal concepts of res judicata and the related doctrine of the law of the case were argued to the trial court.



In response, the State offered evidence of value, two documents printed off of the Kelley Blue Book website the day prior to the hearing, showing suggested retail values of two different 2004 Honda Rancher ATVs.<sup>6</sup> R71:114:11; R71:120–21. The prosecutor did not try to argue that this evidence was new or previously unavailable. R71:114:14. In fact the prosecutor admitted, “I overlooked this evidence and this is—this is not— anybody could have looked this up. A diligent lawyer on either side could have consulted Kelley. I made a mistake.” R71:114:14–15. Instead, the prosecutor argued that pursuant to State v. Morgan, 2001 UT 87, 34 P.3d 767, his mistake constituted an innocent miscalculation of the quantum of evidence needed for bindover. R71:114:11–17. The State conceded that an ATV is not an operable motor vehicle for purposes of the theft by receiving stolen property statute, but instead argued that the alleged victims of the crime should not be punished because the State made a mistake. R71:114:12, 20–21.

The district court denied Mr. Dykes’s Motion to Quash the Information. R71:103–05; Addendum C (Ruling and Order). Even though the State did not present any evidence at the preliminary hearing on the element of the value of the allegedly stolen 2004 Honda Rancher ATV, and even though the district court recognized that the State’s Kelley Blue Book printouts were not new or previously unavailable evidence, the court held that the State innocently miscalculated the quantum of evidence necessary for bindover, and, since the defense did not show that the prosecution engaged in abusive practices in

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<sup>6</sup> These two documents were not part of the charging documents for the third refile or otherwise included in the discovery; rather, they were provided to defense counsel at the motion hearing. R71:114:5.

miscalculating the evidence, dismissal was not appropriate. R71:103–05; Addendum C. Mr. Dykes petitioned this Court for interlocutory review of this order and this Court granted that petition. See Addendum A. This appeal follows.

### **SUMMARY OF ARGUMENT**

The State is prohibited by the due process clause of the Utah Constitution from refiling Class A Misdemeanor and Second and Third Degree Felony charges against Mr. Dykes. Unless the State offers new or previously unavailable evidence or otherwise demonstrates good cause, due process considerations bar refiling charges if those charges have been dismissed due to insufficient evidence after a preliminary hearing. State v. Brickey, 714 P.2d 644, 647 (Utah 1986). One type of “good cause” exists when a prosecutor “innocently miscalculates the quantum of evidence necessary to bind over a defendant.” State v. Redd, 2001 UT 113, ¶ 13, 37 P.3d 1160 (citing State v. Morgan, 2001 UT 87, ¶ 19, 34 P.3d 767). But such good cause does not exist when the State “refiles a charge when it has been dismissed for the State’s failure to provide any evidence on a clear element of the relevant criminal statute.” Id. ¶ 17 (emphasis added). Rather, in that situation, “a potentially abusive practice exists” such that “the presumption is that the State has violated the due process rights of [the] defendant and is barred from refiling . . . excepting new or previously unavailable evidence or other good cause.” Id.

This court should reverse the district court’s denial of Mr. Dykes’s Motion to Quash Information because refiling charges against Mr. Dykes despite failing to present a scintilla of evidence on an essential element of the offense at a previous preliminary hearing is a potentially abusive practice that violates Mr. Dykes’s right to due process

under the Utah Constitution. Specifically, at Mr. Dykes's preliminary hearing, the State failed to present any evidence of the value of the allegedly stolen property Mr. Dykes allegedly received. Although the prosecutor may have misunderstood the law, the prosecutor did not innocently miscalculate the evidence necessary to bind over the defendant; instead, the prosecutor presented no evidence on an essential element of the offense. Under Redd, refiling charges after presenting no evidence on an essential element of those charges is a violation of Mr. Dykes's due process rights and this Court should reverse the district court's denial of Mr. Dykes's Motion to Quash Information. 2001 UT 113, ¶ 17.

## ARGUMENT

### **I. REFILING FELONY CHARGES DISMISSED FOR INSUFFICIENT EVIDENCE VIOLATES MR. DYKES'S DUE PROCESS RIGHTS BECAUSE THE STATE HAS NO NEW OR PREVIOUSLY UNAVAILABLE EVIDENCE OR GOOD CAUSE TO REFILE**

The district court erred when it denied Mr. Dykes's Motion to Dismiss because the State engaged in a potentially abusive practice without good cause when the prosecutor refiled charges against Mr. Dykes after failing to produce any evidence on an essential element of the offense at a previous preliminary hearing. The Utah Rules of Criminal Procedure permit the State to refile charges against a criminal defendant even though a magistrate has found at a preliminary hearing that there is no probable cause to bind the defendant over and, accordingly, has dismissed the information. Utah R. Crim. P. 7(i)(3). But a prosecutor's discretion to refile is not boundless. Because of "the potential for abuse inherent in the power to refile criminal charges," the due process clause of the Utah

Constitution “prohibit[s] a prosecutor from refiling criminal charges earlier dismissed for insufficient evidence unless the prosecutor can show that new or previously unavailable evidence has surfaced or that other good cause justifies refiling.” State v. Brickey, 714 P.2d 644, 647. So, absent new or previously unavailable evidence, Brickey prohibits the State from refiling charges dismissed after a preliminary hearing without good cause. See id.

In this case, after the preliminary hearing, the district court quashed bindover on Mr. Dykes’s felony charge because the State had not presented evidence that the allegedly stolen item was either an operable motor vehicle or valued at over \$5,000—an element of the offense. See R92:117:16. Thus, because Mr. Dykes’s felony charge was dismissed for insufficient evidence, under Brickey, the State may only refile felony charges if it presents new or previously unavailable evidence or if good cause justifies refiling. This brief will first show in Part A that the State has not presented new or previously unavailable evidence that might justify refiling. Part B then illustrates that good cause does not otherwise exist to refile even though the prosecutor might have mistakenly believed that an ATV is an “operable motor vehicle” under the theft by deception statute. Because the State has neither new or previously unavailable evidence, nor good cause to refile, refiling felony charges violates Mr. Dykes’s due process rights under Brickey and the Utah Constitution and this Court should reverse the district court and quash the information.

**A. As Found by the District Court, The State's Refiling of Felony Charges Is Not Justified by the Presence of New or Previously Unavailable Evidence.**

In this instance, it is not seriously disputed that the State's newly proffered evidence was neither new nor previously unavailable—that is, it was available at the time of the preliminary hearing and the State was simply dilatory in assembling it. Evidence is not “new” if the evidence “could have been discovered before the . . . preliminary hearing in the exercise of normal diligence.” State v. Fisk, 966 P.2d 860, 865 (Utah Ct. App. 1998). And evidence is not “unavailable” if the State is “simply dilatory in assembling it.” State v. Rogers, 2005 UT App 379, ¶ 25, 122 P.3d 661, rev'd on other grounds, 2006 UT 85, 151 P.3d 171; see also Morgan, 2001 UT 87, ¶ 21 (recognizing that an officer's testimony that could have been offered at a previous preliminary hearing “was not new or unavailable at the first hearing”). The State has argued in its opposition to Mr. Dykes's Motion to Quash that evidence “which was not presented at the preliminary hearing due to the prosecutor's innocent miscalculation or error in tactic” constitutes “new” evidence. R71:89. But this conception of “new” evidence is inconsistent with Utah appellate courts' definition of the term, which does not excuse lack of diligence in assembly by the State—even if the State's error might still give rise to good cause for refiling. See Morgan, 2001 UT 87, ¶ 21; Fisk, 966 P.2d at 865. The State's newly proffered evidence of estimated value consists of two printouts from the Kelley's Blue Book website. R71:120–21. These printouts can be obtained by simply visiting the website and following a series of links and selecting the year, make, and model of the ATV—a 2004 Honda Rancher. The State has not argued that it could not have consulted Kelley's Blue Book or its website before

the preliminary hearing and in fact conceded the opposite at the hearing on the motion to quash. R71:114:12 (“[W]e ended up with no admissible evidence due to my mistake.”); R71:114:14–15 (“I overlooked this [Kelley’s Blue Book] evidence and this is—this is not—anybody could have looked this up. A diligent lawyer on either side could have consulted Kelley. I made a mistake.”). Thus, the district court’s finding in its Ruling and Order that the State has not provided new or previously unavailable evidence is correct and the Kelley Bluebook printouts do not justify refileing under Brickey. R71:104; Brickey, 714 P.2d at 647; Morgan, 2001 UT 87, ¶ 21.

**B. The State Does Not Otherwise Have Good Cause to Refile Felony Charges.**

Without new or previously unavailable evidence, under Brickey, the State may only refile charges against Mr. Dykes if “other good cause justifies refileing,” which is lacking in this case. 714 P.2d at 647. Although the State has asserted that the prosecutor made an “innocent miscalculation” that constitutes “good cause” to refile charges against Mr. Dykes, R71: 86–87, the State misapplies Utah Supreme Court case law to reach this result. Specifically, the State cites a narrow statement from State v. Morgan, 2001 UT 87, ¶ 14, 34 P.3d 767—that a prosecutor has good cause to refile when he innocently miscalculates the quantum of evidence necessary to establish probable cause—for the proposition that any error that a prosecutor might characterize as an innocent miscalculation is good cause to refile. The district court erred when it adopted this reasoning in its Ruling and Order.

The issue of when an innocent evidentiary miscalculation might constitute good cause to refile charges dismissed for insufficient evidence was addressed by the Utah

Supreme Court in State v. Morgan, 2001 UT 87, 34 P.3d 767. In that case, a magistrate found at a preliminary hearing that a police officer did not have sufficient training to render an opinion about whether a certain quantity of methamphetamine found in the possession of the defendant was evidence of intent to distribute the drug. Id. ¶ 4. As a result, the court bound the defendant over on a lesser, third degree felony charge of possession rather than a second degree felony charge of possession with intent to distribute as the information alleged. Id. In response, the prosecutor moved to dismiss without prejudice so that the State could refile the higher charge and present additional evidence of intent to distribute. Id. After that motion was granted, the State refiled and offered the testimony of a more experienced police officer, who provided additional support for why the evidence seized was consistent with intent to distribute. Id. ¶ 5. Finding that the new evidence established probable cause of the intent to distribute, the magistrate bound the defendant over on the higher charge. Id. ¶ 6.

The defendant responded by filing a Brickey motion that asked the trial court to dismiss the charge. Id. ¶ 7. In the Brickey motion, the defendant argued that the officer had been available at the first preliminary hearing, so his testimony was not new or previously unavailable evidence under Brickey. Id. ¶ 7. The district court denied the motion and, after being convicted, the defendant appealed. Id. ¶ 8. On appeal, the State argued that, despite not having new or previously unavailable evidence, “the prosecutor’s ‘innocent miscalculation’ of the evidence, i.e., the inadequate evidence to support a finding of intent to distribute, constituted ‘other good cause’ sufficient . . . to refile the case.” Id. ¶ 9 (emphasis added).

The Utah Supreme Court held that, even without new or previously unavailable evidence, good cause for refiling exists ““when a prosecutor innocently miscalculates the quantum of evidence required to obtain a bindover.”” See id. ¶ 14 (emphasis added) (quoting Brickey, 714 P.2d at 647 n.5). But the court carefully limited this holding, “emphasiz[ing] that the miscalculation must be innocent, and that further investigation must be nondilatory and not otherwise infringe on due process rights of a defendant.” Id. ¶ 19. Further, the exception is not so broad as to encompass every kind of conceivable error a prosecutor might characterize as an innocent miscalculation. Rather, the term “innocent miscalculation” has a legal definition and is context specific—it relates only to innocent miscalculations of the quantum of evidence necessary for bindover; that is, innocent mistakes relating to how much evidence is necessary to establish probable cause. See id. ¶¶ 14, 17, 25.

The Utah Supreme Court further addressed the limitations of the “innocent miscalculation of evidence” doctrine in State v. Redd, 2001 UT 113, 37 P.3d 1160. In that case, the court held that a failure to provide any evidence on an element of a charged offense is not an innocent miscalculation of the quantum of evidence necessary for bindover and is not good cause to refile charges. Id. ¶ 17. Rather, the court held “that a potentially abusive practice exists where the State refiles a charge when it has been dismissed for the State’s failure to provide any evidence on a clear element of the relevant criminal statute.” Id. (emphasis added). Indeed, it stands to reason that a prosecutor cannot have innocently miscalculated the quantum of evidence necessary to bind a defendant over when no evidence was presented on an element of an offense



because regardless of how little evidence a prosecutor might innocently believe is necessary to establish probable cause, it is patently unreasonable to believe that a complete lack of evidence might satisfy the standard.

Thus, in Redd, when the State refiled a charge of desecration of a dead human body after the court of appeals had held that the State had presented no evidence “on an essential element of the crime charged” at the preliminary hearing, the Utah Supreme Court held that refiling was not justified by good cause and constituted a potentially abusive practice. Id. ¶¶ 16–17. “Accordingly, the presumption [was that] the State ha[d] violated the due process rights of [the] defendant and [wa]s barred from refiling in [that] instance excepting new or previously unavailable evidence or other good cause.” Id. ¶ 17.

And despite being faced with facts nearly identical to those in this case—where the State misinterpreted the elements of the crime charged—the court held that such misinterpretation did not constitute good cause to refile. See id. ¶¶ 14, 17. A prima facie case of desecration of a dead human body requires the proof of three elements: a dead body that is buried or otherwise interred, disinterment of that body, and an “intentional” mens rea. Id. ¶ 14. The State argued that the first and second elements of the crime were indistinguishable, such that it did not need to present evidence of burial or interment. Id. ¶ 15. This Court rejected that interpretation and the Utah Supreme Court concurred with this Court’s reasoning. Id. ¶¶ 14–15. Here, the Supreme Court stated “[a]though not labeled first through third in the statute, the State’s experienced legal counsel should have been able to extrapolate these three simple elements and provide evidence sufficient for a bindover.” Id. ¶ 14.

Thus, while miscalculating the amount of evidence necessary to establish probable cause on each of the elements of an offense is good cause to refile a charge, misunderstanding what those elements are under the law and not presenting any evidence on one of them is not good cause to refile; rather, it is a potentially abusive practice that presumptively violates the due process rights of a defendant. Because the State did not present new or previously unavailable evidence and there was no good cause to refile, the Supreme Court affirmed the lower court's dismissal of the charge. Id. ¶ 17.

Here, as in Redd, the State failed to present evidence on a clear element of the offense charged in the information. The information charged Mr. Dykes with Theft by Receiving Stolen Property, a second degree felony. R92:2–3. It alleged that Mr. Dykes

received, retained or disposed of property of another, knowing that the property had been stolen or believing that it probably had been stolen, or concealed, sold or withheld or aided in concealing, selling or withholding the property, knowing the property had been stolen, intending to deprive the owner thereof, and the value of the property was or exceeded \$5,000 or the property stolen was a firearm or an operable motor vehicle.

R92:2. At the preliminary hearing, the State presented no evidence that the ATV's value exceeded \$5,000, that it was a firearm, or that it was an operable motor vehicle. Instead, by the State's own admission, it relied on a prosecutor's overly broad interpretation of the felony theft statute that attempted to characterize an ATV as an "operable motor vehicle." R71:114:12, 20–21 ("The second case was dismissed because I made a mistake. I did. I erroneously asserted that it's a motor vehicle. . . . The issue here is what kind of an error is it and what was the result. This was not an error of not enough evidence resulting in a

dismissal for—for not binding over. This is an error, counsel's error in his legal strategy . . ."). This may have been a strategic mistake—even an innocent strategic mistake—but this is not like Morgan where the prosecutor innocently miscalculated of the quantum of evidence needed to bind the defendant over; instead, this is like Redd, where no evidence was presented on a crucial element of the offense because the State relied on a mistaken understanding of the elements of the crime, as admitted by the prosecutor at the motion hearing below. Redd, 2001 UT 113, ¶¶ 14, 17.

Regardless of the quantum of evidence the State produced to show that Mr. Dykes was in possession of an ATV, that evidence could never prove that he stole an operable motor vehicle under the theft statute because an ATV is not an operable motor vehicle under the theft statute. There could never be a situation, as in Morgan, where the State could mistakenly think that an inexperienced officer's testimony might be sufficient to establish that an ATV is an operable motor vehicle because as a matter of law, an ATV is not an operable motor vehicle. This is a situation, as in Redd, where the prosecutor has misunderstood the very conduct that is prohibited by the law he is using to charge a defendant and, as a result, has "failed to provide a scintilla of evidence on the element of" the offense he misunderstood. Redd, 2001 UT 113, ¶ 17. Under Redd, this is not an innocent miscalculation constituting good cause to refile; this is a potentially abusive practice that presumptively violates Mr. Dykes's due process rights. Id. And the Supreme Court's distinction does not elevate form over substance. When the State misunderstands what conduct is prohibited by the code and attempts to prosecute defendants for conduct that is not prohibited by the code, or conduct that is punished less excessively under the

code, the defendant bears the burden of the State's "creativity" by being subjected to multiple refilings.

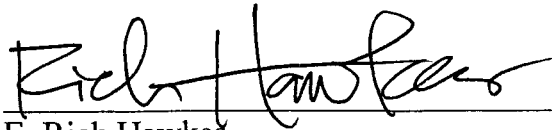
Thus, the reasoning underpinning the district court's ruling and order—that the State had good cause to refile because it "seemingly miscalculated the evidence in filing the original Second Degree felony charges"—is fatally flawed. R71:105. The State did not innocently miscalculate the quantum of evidence necessary to bind Mr. Dykes over for allegedly receiving a stolen car, as Morgan requires for refiling charges; rather, it misinterpreted the elements of the offense and failed to produce any evidence on one of those elements—a practice Redd condemns as being potentially abusive. As a result, the State has presumptively violated Mr. Dykes's due process rights and, having presented no new or previously unavailable evidence or good cause, is prohibited by the due process clause of the Utah Constitution from refiling any charge higher than the Class B Misdemeanor for which he was bound over. Redd, 2001 UT 113, ¶ 17; Brickey, 714 P.2d at 645, 647–48. Thus, this Court should reverse the district court's denial of Mr. Dykes's Motion to Quash Information.

### CONCLUSION

This Court should reverse the district court's denial of Mr. Dykes's Motion to Quash Information because the State has refiled charges previously dismissed for insufficient evidence without presenting new or previously unavailable evidence or

otherwise demonstrating good cause to refile. This violates Mr. Dykes's due process rights under the Utah Constitution and requires reversal.


SUBMITTED this 9 day of June, 2011.

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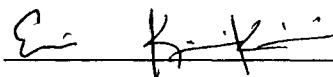
E. Rich Hawkes  
Attorney for Defendant/Appellant

## CERTIFICATE OF DELIVERY

I, E. Rich Hawkes, hereby certify that I have caused to be hand-delivered an original and 7 copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and 4 copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114, this 9 day of June, 2011.

  
E. Rich Hawkes

DELIVERED to the Utah Attorney General's Office and the Utah Court of Appeals as indicated above this 9 day of June, 2011.

  
\_\_\_\_\_

Tab A

FILED  
UTAH APPELLATE COURTS  
OCT 19 2010

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

State of Utah, )  
 )  
Plaintiff and Respondent, )  
 )  
v. )  
 )  
Jeremy J. Dykes, )  
 )  
Defendant and Petitioner. )

ORDER

Case No. 20100582-CA .

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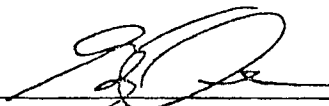
Before Judges Orme, Thorne, and Roth.

This matter is before the court on a petition for permission to appeal from an interlocutory order filed pursuant to Rule 5 of the Utah Rules of Appellate Procedure.

IT IS HEREBY ORDERED that the petition for permission to appeal is granted. This court will notify the parties upon setting a briefing schedule.

Dated this 19<sup>th</sup> day of October, 2010.

FOR THE COURT:

  
\_\_\_\_\_  
Gregory K. Orme, Judge



CERTIFICATE OF SERVICE

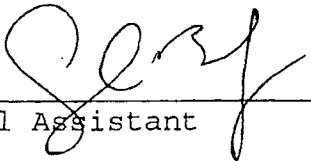
I hereby certify that on October 19, 2010, a true and correct copy of the foregoing ORDER was deposited in the United States mail or placed in Interdepartmental mailing to be delivered to:

TERESA L. WELCH  
ELIZABETH A LORENZO  
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SALT LAKE CITY UT 84111

LAURA B DUPAIX  
ASSISTANT ATTORNEY GENERAL  
160 E 300 S 6TH FL  
PO BOX 140854  
SALT LAKE CITY UT 84114-0854

THIRD DISTRICT, SALT LAKE  
ATTN: MARINA DAVIS & SUSAN NORBY  
450 S STATE ST BX 1860  
PO BOX 1860  
SALT LAKE CITY UT 84114-1860

Dated this October 19, 2010.

By   
Judicial Assistant

Case No. 20100582  
THIRD DISTRICT, SALT LAKE, 101901771

Tab B

**UTAH CONST. ART. 1, § 7**

Article I. Declaration of Rights

**Sec. 7. [Due process of law]**

No person shall be deprived of life, liberty or property, without due process of law.

**UTAH CODE ANN. 1953 § 76-6-408**

**§ 76-6-408. Receiving stolen property—Duties of pawnbrokers**

(1) A person commits theft if he receives, retains, or disposes of the property of another knowing that it has been stolen, or believing that it probably has been stolen, or who conceals, sells, withholds or aids in concealing, selling, or withholding the property from the owner, knowing the property to be stolen, intending to deprive the owner of it.

(2) The knowledge or belief required for Subsection (1) is presumed in the case of an actor who:

(a) is found in possession or control of other property stolen on a separate occasion;

(b) has received other stolen property within the year preceding the receiving offense charged; or

(c) is a pawnbroker or person who has or operates a business dealing in or collecting used or secondhand merchandise or personal property, or an agent, employee, or representative of a pawnbroker or person who buys, receives, or obtains property and fails to require the seller or person delivering the property to:

(i) certify, in writing, that he has the legal rights to sell the property;

(ii) provide a legible print, preferably the right thumb, at the bottom of the certificate next to his signature; and

(iii) provide at least one positive form of identification.

(3) Every pawnbroker or person who has or operates a business dealing in or collecting used or secondhand merchandise or personal property, and every agent, employee, or representative of a pawnbroker or person who fails to comply with the requirements of Subsection (2)(c) is presumed to have bought, received, or obtained the property knowing it to have been stolen or unlawfully obtained. This presumption may be rebutted by proof.

(4) When, in a prosecution under this section, it appears from the evidence that the defendant was a pawnbroker or a person who has or operates a business dealing in or collecting used or secondhand merchandise or personal property, or was an agent, employee, or representative of a pawnbroker or person, that the defendant bought, received, concealed, or withheld the property without obtaining the information required in Subsection (2)(d), then the burden shall be upon the defendant to show that the property bought, received, or obtained was not stolen.

(5) Subsections (2)(c), (3), and (4) do not apply to scrap metal processors as defined in Section 76-10-901.

(6) As used in this section:

(a) "Dealer" means a person in the business of buying or selling goods.

(b) "Pawnbroker" means a person who:

(i) loans money on deposit of personal property, or deals in the purchase, exchange, or possession of personal property on condition of selling the same property back again to the pledge or depositor;

(ii) loans or advances money on personal property by taking chattel mortgage security on the property and takes or receives the personal property into his possession and who sells the unredeemed pledges; or

(iii) receives personal property in exchange for money or in trade for other personal property.

(c) "Receives" means acquiring possession, control, or title or lending on the security of the property.

**UTAH CODE ANN. 1953 § 76-6-412**

**§ 76-6-412. Theft—Classification of offenses—Action for treble damages**

- (1) Theft of property and services as provided in this chapter shall be punishable:
- (a) as a felony of the second degree if the:
    - (i) value of the property or services is or exceeds \$5,000;
    - (ii) property stolen is a firearm or an operable motor vehicle;
    - (iii) actor is armed with a dangerous weapon, as defined in Section 76-1-601, at the time of the theft; or
    - (iv) property is stolen from the person of another;
  - (b) as a felony of the third degree if:
    - (i) the value of the property or services is or exceeds \$1,000 but is less than \$5,000;
    - (ii) the actor has been twice before convicted of theft, any robbery, or any burglary with intent to commit theft; or
    - (iii) in a case not amounting to a second-degree felony, the property taken is a stallion, mare, colt, gelding, cow, heifer, steer, ox, bull, calf, sheep, goat, mule, jack, jenny, swine, poultry, or a fur-bearing animal raised for commercial purposes;
  - (c) as a class A misdemeanor if the value of the property stolen is or exceeds \$300 but is less than \$1,000; or
  - (d) as a class B misdemeanor if the value of the property stolen is less than \$300.
- (2) Any person who violates Subsection 76-6-408(1) or Section 76-6-413, or commits theft of property described in Subsection **76-6-412(1)(b)(iii)**, is civilly liable for three times the amount of actual damages, if any sustained by the plaintiff, and for costs of suit and reasonable attorneys' fees.

Tab C

JUL 01 2010

SALT LAKE COUNTY

Deputy Clerk

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

---

STATE OF UTAH,

Plaintiff,

vs.

JEREMY JAMES DYKES,

Defendant.

## RULING AND ORDER

Case No. 101901771

Judge Michele M. Christiansen

Date: July 1, 2010

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The above matter came before the court for decision on Defendant's Motion to Dismiss submitted June 22, 2010 on the grounds that it was re-filed in violation of the *State v. Brickey*, 714 P.2d 644 (Utah 1986). Being fully advised, the court makes the following ruling:

The Court finds that because the prosecutor innocently miscalculated the quantum of evidence and the defense is unable to show that the prosecution engaged in abusive practices in miscalculating the evidence, dismissal pursuant to *State v. Brickey* is inappropriate because no presumptive bar to refiling exists.

Utah R. Crim. P. 7(h)(3) allows a magistrate to dismiss and discharge a defendant if the State's evidence fails to establish probable cause to believe that the defendant has committed the charged crime, but Rule 7 also allows the State to refile as "dismissal and discharge do not preclude the State from instituting subsequent prosecution for the same offense." However, state due process protections prohibit a "prosecutor from refiling criminal charges earlier dismissed for insufficient evidence unless the prosecutor can show that new or previously unavailable



evidence has surfaced or that other good cause justifies refilling.” *State v. Brickey* 714 P.2d 644, 647 (Utah 1986).

The primary purposes underlying the *Brickey* rule is to preclude a prosecutor from seeking an unfair advantage over a defendant through forum shopping by harassing a defendant through repeated filings of *groundless and improvident charges*, or from withholding evidence. *State v. Morgan*, 2001 UT 87, ¶ 15, 34 P.3d 767 (emphasis added).

The *Brickey* analysis indicates that “new or previously unavailable evidence” and “good cause” represent two broad categories that allow for refilling and “other good cause.” The Utah Supreme Court has held that “good cause” may exist “when a prosecutor innocently miscalculates the quantum of evidence” required to obtain a bind over. *Morgan*, 2001 UT 87, ¶ 14. And while the Utah Supreme Court has held that a prosecutor’s innocent miscalculation of the necessary quantum of evidence is sufficient grounds to refile, due process violations are not necessarily implicated when charges are refilled as long as the miscalculation is innocent and further investigation does not violate due process rights of the defendant. *Id.* at ¶ 19.

The State first filed charges against the defendant in April 2009, but the case was dismissed without prejudice because the State’s witnesses were not present. At the September 3, 2009, preliminary hearing, the second time the State filed charges against the defendant, the Judge found probable cause to bind the matter over as charged as a Second Degree Felony. After the Court denied the State’s request to re-open the Preliminary Hearing and bound the case over as a class B misdemeanor, the State filed the current matter a third time as a Third Degree Felony. And while the defense has not received new or previously unavailable evidence, *Brickey* allows for refiling for “other good cause.” Here, the prosecution has good cause in refiling as they seemingly innocently miscalculated the evidence in filing the original Second Degree felony

charges that subsequently led to the State filing the charges as a Third Degree Felony. This Court originally found that the matter would not be bound over as a second degree felony because an ATV is not an operable motor vehicle, and when the case was bound over as a class B misdemeanor, the court granted Defense Counsel's Motion to dismiss based on lack of jurisdiction. Other than certain doggedness to refile this matter, ostensibly to protect the rights of the victim, the facts do not indicate that the prosecution engaged in abusive practices in refiling the charges. The Court determines that the prosecution has not engaged in forum shopping, the refiling does not appear to be a tactic to withhold evidence from the defense, and, based upon the original bindover by Judge Hilder, the charges are not groundless or improvident.

### CONCLUSION

The Court denies the motion to dismiss, for while *Brickey* limits the State's ability to refile charges that have been dismissed for insufficient evidence, it does not intend to preclude refiling where a defendant's due process rights are not implicated. Absent abusive practices (e.g. forum shopping, groundless and improvident charges, withholding evidence), no presumptive bar to refile exists. *Morgan*, 2001 UT 87 ¶ 16. And while a prosecutor's mistake may inconvenience the defense, due process is not concerned with ordinary levels of inconvenience because the "nature of the criminal justice system necessarily inconveniences those individuals who have been accused of crimes." *Id.* at ¶ 22 (quoting *People v. Noline*, 917 P.2d 1256, 1264 (Colo. 1996)).

DATED this 1 day of July, 2010.

BY THE COURT:

  
MICHELE M. CHRISTIANSEN  
DISTRICT COURT JUDGE



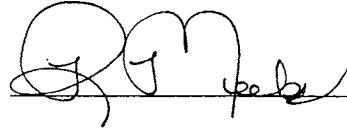
CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 101901771 by the method and on the date specified.

MAIL: STATE OF UTAH 111 East Broadway Suite #400 Salt Lake City, UT 84111

MAIL: TERESA L WELCH MISDEMEANOR 424 E 500 S STE 300 SALT LAKE CITY UT 84111

Date: 7/1/10



Deputy Court Clerk