2010

# Utah v. Dykes : Brief of Appellee

Utah Court of Appeals


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Case No. 20100582-CA

IN THE

# UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

vs.

JEREMY JAMES DYKES,
Defendant/Appellant.

## Brief of Appellee

Appeal from an interlocutory order denying a motion to dismiss the Information charging defendant with theft by receiving stolen property, a third degree felony, in the Third Judicial District Court of Utah, Salt Lake County, the Honorable Michelle Christiansen presiding


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Oral Argument Requested

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### STATEMENT OF JURISDICTION

Defendant appeals from an interlocutory order denying a motion to dismiss the Information charging him with theft by receiving stolen property, a third degree felony, in violation of Utah Code Ann. § 76-6-408 (West Supp. 2005). This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(d) (West 2009).

### STATEMENT OF THE ISSUE

Following a preliminary hearing, Defendant was bound over to stand trial for theft by receiving a stolen ATV four-wheeler. The theft was charged as a second degree felony based, not on value (no such evidence was introduced), but on the character of the stolen property as an "operable motor vehicle." In district court, Defendant moved to quash the bindover on the ground that an

ATV is not an "operable motor vehicle." The district court agreed and ruled that, because there was no evidence of value, Defendant could only be tried for class B misdemeanor theft. The court thereafter dismissed the case for lack of subject matter jurisdiction. The State then filed a new Information charging Defendant with third degree felony theft based on the value of the stolen property. Defendant moved to dismiss the case under *State v. Brickey*, 714 P.2d 644 (Utah 1986), but the magistrate denied the motion.

*Issue.* Does state due process, as articulated in *State v. Brickey*, 714 P.2d 644 (Utah 1986), and its progeny, bar the State from filing a new Information charging Defendant with theft by receiving stolen property, a third degree felony, based on the value of the stolen property?

*Standard of Review.* Whether state due process bars the filing of a criminal information is a question of law, reviewed for correctness. *See State v. Rogers*, 2006 UT 85, ¶7, 151 P.3d 171 (holding that "[t]he interpretation of case law presents a question of law, reviewed for correctness").

## CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following statutes are reproduced in Addendum A: Utah Code Ann. § 76-6-408 (West Supp. 2005); Utah Code Ann. § 76-6-412 (West 2004).

## STATEMENT OF THE CASE[1]

### Informations Charging Second Degree Felony Theft by Receiving

On April 7, 2009, Defendant was found driving a stolen ATV four-wheeler on Redwood Road in West Valley City. *See* 1R116. Three days later, the State charged Defendant with theft by receiving stolen property, a second degree felony. 2R115. However, the case was dismissed on June 25, 2009 when the State's key witness failed to appear for the preliminary hearing. *See* 2R115.

Two weeks later, on July 10, 2009, the State refiled the case against Defendant. *See* 1R2-3 (Addendum B). The theft was charged as a second degree felony under the alternative theories that "the value of the property was or exceeded $5,000 or the property stolen was a firearm or an operable motor vehicle." 1R2. However, at the preliminary hearing on September 3, 2009, the State proceeded only on the theory that the stolen ATV was an operable motor vehicle. *See* 1R116:18 (Addendum C). After taking evidence, the magistrate bound Defendant over for trial as charged. 1R13-14.

Once in district court, Defendant moved to quash the bindover, arguing that an ATV is not an operable motor vehicle under section 76-6-412 (West

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[1] The record on appeal includes the trial record in two district court cases: Case No. 091905392 FS ("1R"), and Case No. 101901771 FS ("2R").

2004). 1R18-43. The State countered that even if an ATV is not an "operable motor vehicle" under the statute, the Court should still bind the case over as a class A misdemeanor. *See* 1R48. In support, the State submitted an affidavit from the ATV's owner as evidence that its value "probably was between $300 and $1,000." 1R48,52-53. The district court concluded that an ATV is not an operable motor vehicle under the statute, refused to consider additional evidence, and reduced the felony charge to a class B misdemeanor. *See* 1R54. On Defendant's motion, the charges were thereafter dismissed in district court for lack of jurisdiction under Utah Code Ann. § 78A-5-102(8) (2008). 1R66-68.

**Information Charging Third Degree Felony Theft by Receiving**

On March 9, 2010, the State filed a new information charging Defendant with theft by receiving stolen property. 2R1-2 (Addendum B). This time, however, the theft was charged as a third degree felony under the theory that the stolen property "was or exceeded $1,000, but was less than $5,000." 2R1. Defendant moved to dismiss the Information, arguing that it was filed in violation of state due process under *State v. Brickey*, 714 P.2d 644 (Utah 1986). 2R21-81. After a hearing, the magistrate denied the motion to dismiss in a written Ruling and Order. 2R103-06 (Addendum D). This Court granted Defendant's petition for interlocutory appeal.

## SUMMARY OF ARGUMENT

The State originally charged Defendant with theft by receiving stolen property, i.e., a stolen ATV four-wheelera second degree felony. At the preliminary hearing, the State proceeded on the theory that the theft was a second degree felony based on the character of the stolen property—an ATV four-wheeler—as an operable motor vehicle. The magistrate bound Defendant over for trial as charged. In district court, Defendant moved to quash the bindover on the ground that an ATV is not an operable motor vehicle under the theft statute. The district court agreed and reduced the theft charge to a class B misdemeanor. It then dismissed the case for lack of jurisdiction. The State then filed a new Information in district court, but now alleged a third degree felony theft by receiving based on the value of the stolen ATV.

The magistrate correctly denied Defendant's motion to dismiss based on *State v. Brickey*, 714 P.2d 644 (Utah 1986). Because the State charged Defendant with third degree felony theft based on a different theory—value—than in the original case—operable motor vehicle—it cannot be said that it was earlier dismissed for insufficient evidence and thus *Brickey* does not apply. Even assuming arguendo that *Brickey* applies, the State's failure to produce evidence of value in the original case was no more than an innocent miscalculation where (1) the theft by receiving statute does not define motor vehicle, (2) no

Utah court has addressed the issue, and (3) Defendant did not challenge at the preliminary hearing the State's claim that an ATV is an operable motor vehicle. Accordingly, the refiling was justified by good cause.

## ARGUMENT

### STATE DUE PROCESS DOES NOT BAR THE STATE FROM CHARGING DEFENDANT WITH THIRD DEGREE FELONY THEFT BY RECEIVING STOLEN PROPERTY

In denying Defendant's motion to dismiss the March 2010 Information, the magistrate in this case ruled that the State had "good cause in refiling" because it "seemingly innocently miscalculated the evidence" in initially pursuing the theft charge as a second degree felony. *See* 2R104-05. The magistrate ruled that "[o]ther than [the State's] 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." 2R105. The magistrate concluded that the State "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 . . ., the charges are not groundless or improvident." 2R105. This Court should affirm.

### A. The *Brickey* rule bars refiling only when potential abusive practices are involved.

Under article I, section 13 of the Utah Constitution, "defendants [have] the right to a preliminary hearing for indictable offenses," which include felonies and class A misdemeanors. *State v. Hernandez*, 2011 UT 70, ¶¶21,29, ___ Utah Adv. Rep. ___. "At the preliminary hearing, the State bears the burden of presenting sufficient evidence to establish probable cause that the crime has been committed and that the accused has committed it." *State v. Pacheco-Ortega*, 2011 UT App 186, ¶10, 257 P.3d 498; *accord* Utah Const. art. I, § 12 (stating that unless otherwise provided by statute, "the function of that examination is limited to determining whether probable cause exists"). If the prosecution meets that burden, the magistrate binds defendant over for trial in district court. *See* Utah R. Crim. P. 7(i)(2). If, on the other hand, the prosecution fails to meet its probable cause burden, the magistrate must "dismiss the information and discharge the defendant." Utah R. Crim. P. 7(i)(3).

The purpose of the preliminary hearing is to eliminate unwarranted prosecutions and to "relieve the accused from the substantial degradation and expense incident to a modern criminal trial when the charges against him are unwarranted or the evidence insufficient." *State v. Anderson*, 612 P.2d 778, 784

(Utah 1980). In short, the preliminary examination "acts as a screening device to 'ferret out . . . groundless and improvident prosecutions.'" *State v. Brickey*, 714 P.2d 644, 646 (Utah 1986) (quoting *Anderson*, 612 P.2d at 783-84).

As a general proposition, a dismissal for insufficient evidence does "not preclude the State from instituting a subsequent prosecution for the same offense." Utah R. Crim. P. 7(i); *accord State v. Morgan*, 2001 UT 87, ¶10, 34 P.3d 767 (holding that rule 7 "permits refiling as a general proposition"). Nevertheless, "the State's ability to refile is not without bounds." *Pacheco-Ortega*, 2011 UT App 186, ¶10. In *State v. Brickey*, the Utah Supreme Court recognized that "unbridled prosecutorial discretion to refile charges carries an inherent potential for abusive practices, repugnant to a defendant's state due process right to fundamental fairness." 714 P.2d 644, 647 (Utah 1986). The Court in *Brickey* thus held that state "due process considerations 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 refiling." *Id.*

The Supreme Court has since "provided a working list of potentially abusive practices that bar refiling under the *Brickey* rule, including 'forum shopping, repeated filings of groundless and improvident charges for the purpose to harass, . . . withholding evidence, . . . [and] refil[ing] a charge after

providing no evidence of an essential and clear element of a crime.'" *State v. Rogers*, 2006 UT 85, ¶11, 151 P.3d 171. The *Brickey* rule "does not, however, indicate any intent to forbid refiling generally or preclude refiling where a defendant's due process rights are not implicated.'" *Morgan*, 2001 UT 87, ¶ 15. As explained in *Morgan*, "[t]he lodestar of *Brickey* . . . is fundamental fairness." 2001 UT 87, ¶ 15. "[W]hen potential abusive practices are involved, the presumption is that due process will bar refiling." *Id.* at ¶16. However, "[w]hen potential abusive practices are not involved, . . . there is no presumptive bar to refiling." *Id.*[2]

**B. The filing of a new Information charging Defendant with third degree felony theft did not involve a potential abusive practice.**

Under Utah law, a defendant is guilty of theft by receiving stolen property if he or she: (1) "receives, retains, or disposes of the property of

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[2] Other jurisdictions have likewise limited any bar to refiling to instances of bad faith. *See, e.g. State v. Elling*, 506 P.2d 1102, 1103 (Ariz. App. 1973) (permitting reprosecution where no forum shopping involved); *People v. Sabell*, 708 P.2d 463, 466 (Colo.1985) (permitting refiling where court found no oppressive tactics); *State v. Bacon*, 791 P.2d 429, 433-34 (Ida. 1990) (permitting re-prosecution unless there is evidence of bad faith or purposeful harassment); *Stockwell v. State*, 573 P.2d 116, 126 (Ida. 1977) (stating "refiling is not prohibited unless done without good cause or in bad faith"); *State v. Vargo*, 362 N.W.2d 840, 842-43 (Mich. App. 1985) (holding simple "neglect" rather than "deliberate attempt to harass defendant" justified refiling); *State v. Dail*, 424 N.W.2d 99, 102 (Neb. 1988) (permitting re-prosecution where no forum shopping was involved); *Chase v. State*, 517 P.2d 1142, 1143 (Okla.Ct.App.1973) (holding that mistaken testimony in first preliminary hearing justified refiling).

another," and (2) "know[s] that [the property] has been stolen, or believ[es] that it probably has been stolen." Utah Code Ann. § 76-6-408 (2008). After taking evidence at the preliminary hearing on the July 2009 Information, the magistrate found that the evidence was sufficient to establish probable cause of both theft elements and bound Defendant over to district court for trial on second degree felony theft as charged. *See* 1R116:18-19 ("finding probable cause to bind over" to district court).

On a subsequent motion to quash the bindover, the district court judge agreed that "the probable cause standard [for theft by receiving] was met based on the evidence that was provided" at the preliminary hearing. 2R117:15-16.[3] However, the court ultimately dismissed the case "without prejudice" for lack of jurisdiction because it concluded that the State had not presented sufficient evidence showing that the theft was a second degree felony. *See* 1R117:16; 1R118:5. At the preliminary hearing, the State successfully proceeded on the theory that the theft was "a second degree felony because the [stolen ATV] was an operable motor vehicle." 1R116:18-19; *see* 76-6-412(1)(a)(ii) (punishing theft as a second degree felony if the stolen property is "an operable motor vehicle"). The district court disagreed. It

[3] Defendant has not challenged this conclusion on appeal. *See* Aplt. Brf. at 14-23.

concluded that the off-road ATV was not a "motor vehicle" based on the definition of motor vehicle in section 76-6-410.5, which governs the theft of rental vehicles: "'a self-propelled vehicle that is intended primarily for use and operation on the highways.'" *See* 1R118:16 (quoting Utah Code Ann. § 76-6-410.5 (West 2004)).

Following the dismissal of the July 2009 Information, the State refiled the theft charge against Defendant—this time as a third degree felony based on the ATV's value. *See* 2R1-2. On appeal, Defendant argues that this refiling violated the *Brickey* rule for two reasons. First, he argues that "the State's newly proffered evidence [of value] was neither new nor previously unavailable—that is, it was available at the time of the preliminary hearing and the State was dilatory in assembling it." Aplt. Brf. at 16-17 (emphasis in original). Second, Defendant argues that the State "misinterpreted the elements of the [theft] offense and failed to produce any evidence on one of those elements—a practice . . . condemn[ed] as being potentially abusive." Aplt. Brf. at 17-23. Defendant's claims fail.

As noted, the *Brickey* rule bars "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." *Brickey*, 714 P.2d at 647. A *Brickey* claim, therefore, involves a two-

part inquiry. First, the Court must determine whether the subject criminal charges were "earlier dismissed for insufficient evidence." *Id.*; *Pacheco-Ortega*, 2011 UT App 186, ¶11 (observing that "the *Brickey* holding was expressly limited to instances where criminal charges have previously been dismissed for insufficient evidence"). If so, the Court must then determine whether refiling is justified based on "new or previously unavailable evidence" or whether "other good cause justifies refiling." *Id.*

**1. The third degree felony theft by receiving charge was not earlier dismissed for insufficient evidence of value.**

Defendant's claim fails at the outset because the theft by receiving offense—charged as a third degree felony based on the ATV's value—was not "earlier dismissed for insufficient evidence" of value. *See id.*

In pursuing the theft charge as a second degree felony, the State could proceed on any one of four different theories. Under section 76-6-412, a defendant is guilty of second degree felony theft 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 . . . at the time of the theft; or
> (iv) property is stolen from the person of another; . . . .

Utah Code Ann. § 76-6-412(1)(a) (West 2004). In its July 2009 Information, the State alleged the first two theories in the alternative—that "the value of the

property was or exceeded $5,000 or the property stolen was a firearm or an operable motor vehicle." 1R2. However, at the preliminary hearing, the State elected not to proceed on a theory based on value, but only on the theory that "[i]t's a second degree felony because the [ATV's] an operable motor vehicle." 1R116:18. As it turned out, the district court concluded that an ATV is not an operable motor vehicle, reduced the charge to a class B misdemeanor, and thereafter dismissed the case for lack of jurisdiction. *See* 1R117:16-18; 1R118:5. Accordingly, the second degree felony case was not dismissed for insufficient evidence of value. The State did not proceed on that theory. It relied solely on the theory that the ATV is an "operable motor vehicle" under section 76-6-412(1)(a)(ii). And it was on that basis that the district court reduced the charge to a misdemeanor.

On appeal, Defendant cites *State v. Redd*, where the Utah Supreme Court held that "[a] presumptively abusive practice occurs when a prosecutor refiles a charge after providing no evidence for an essential and clear element of a crime at a preliminary hearing." 2001 UT 113, ¶20, 37 P.3d 1160. *Redd* is inapposite. In *Redd*, the Supreme Court observed that to convict a person of disinterment of a dead human body, the State must establish the three "clear elements" of the offense: (1) "that the dead body was 'buried or otherwise interred,'" (2) "that the defendant disinterred the body," and (3) "that the

defendant acted intentionally when he or she disinterred the interred dead body." *Id.* at ¶14 (citation omitted). The Court held that because the State "failed to provide a scintilla of evidence" on the "clear element" of interment, the *Brickey* rule barred refiling absent a showing of good cause. *Id.* at ¶17.

Unlike interment under the disinterment statute, the value of stolen property is not an "essential" element of theft by receiving when charged as a felony. Whether theft is charged as a second degree felony or third degree felony *may* depend on value. *See, e.g.* Utah Code Ann. § 76-6-412(1)(a)(i) (second degree felony if value is $5,000 or more); Utah Code Ann. § 76-6-412(1)(b)(i) (third degree felony if value is $1,000 or more but less than $5,000).[4] For example, theft may be punishable as a second degree felony if the "value of the property or services is or exceeds $5,000"; *or if* the "property stolen is a firearm or an operable motor vehicle"; *or if* the defendant "is armed with a dangerous weapon . . . at the time of the theft"; *or if* the "property is stolen from the person of another." Utah Code Ann. § 76-6-412(1)(a). Theft may be punishable as a third degree felony if the "value of the property or services is or exceeds $1,000 but is less than $5,000"; *or if* the defendant "has been twice

[4] Section 76-6-412 was amended in 2010 and now provides that third degree felony theft requires a value of $1,500 or more but less than $5,000. *See* Utah Code Ann. § 76-6-412(1)(b)(i) (West Supp. 2010). Misdemeanor theft is dependent on value. *See* Utah Code Ann. § 76-6-412(1)(c) (West Supp. 2010).

before convicted of theft, any robbery, or any burglary with intent to commit theft"; *or if* the property taken is one of an enumerated list of animals. *See* Utah Code Ann. § 76-6-412(1)(b).

In charging second degree felony theft, the State may pursue any of the four available theories, and its decision to pursue a particular theory over the others does not preclude it from later pursuing an alternative theory. This is particularly true where, as here, the State has already established at the previous preliminary hearing the essential elements of the crime of theft by receiving. *Cf. Pacheco-Ortega*, 2011 UT App 186, ¶11 (holding that the *Brickey* bar to refiling is "expressly limited to instances where criminal charges have previously been dismissed for insufficient evidence").

**2. Even assuming, arguendo, that the third degree felony theft by receiving charge was earlier dismissed for insufficient evidence of value, "other good cause" justified refiling.**

Even if this Court were to assume, for argument's sake, that the third degree felony theft by receiving charge was earlier dismissed for insufficient evidence of value, the district court correctly ruled that good cause justified refiling.

As explained, criminal charges earlier dismissed may be refiled if "the prosecutor can show that new or previously unavailable evidence has surfaced or that *other good cause* justifies refiling." *Brickey*, 714 P.2d at 647 (emphasis

added). *Brickey's* "other good cause" provision "represents a broad category with 'new or previously unavailable evidence' as but two examples of subcategories that come within its definition." *Morgan*, 2001 UT 87, ¶19. In other words, "'[o]ther good cause' . . . simply means additional subcategories, other than 'new evidence' or 'previously unavailable evidence,' that justify refiling." *Id.*

In *Morgan*, the Utah Supreme Court recognized a prosecutor's "innocent miscalculation" of the evidence necessary for bindover as an additional subcategory of good cause. *Id.* In doing so, the Court "emphasize[d] that the miscalculation must be *innocent*, and further investigation must be nondilatory and not otherwise infringe on due process rights of a defendant." *Id.* (emphasis in original). The magistrate in this case correctly relied on the "innocent miscalculation" subcategory of good cause in concluding that the State was not barred from filing the new information charging Defendant with third degree felony theft by receiving. *See* 2R103-06.

As discussed, the prosecutor originally pursued the theft charge as a second degree felony based on the nature of the stolen property as an operable motor vehicle, not on the value of the stolen property. *See* 1R116:18. Although the prosecutor was successful in obtaining bindover from the magistrate, the district court later concluded that an off-road ATV was not a "motor vehicle"

for purposes of section 76-6-412. 1R117:16. Contrary to Defendant's claim on appeal, the magistrate in this case correctly concluded that the prosecutor innocently miscalculated the evidence necessary for a second degree felony bindover.

Section 76-6-412 makes it a second degree felony to knowingly receive a stolen, "operable motor vehicle," but does not define that term. *See* Utah Code Ann. § 76-6-412. In moving to quash the bindover, 1R22-24, Defendant argued—for the first time—that "motor vehicle" as used in section 76-6-412(1)(a)(ii), should be given the same meaning it is given in section 76-6-410.5, to wit, "a self-propelled vehicle that is intended primarily for use and operation on the highways." Utah Code Ann. § 76-6-410.5 (West 2004). The district court accepted this argument and, because no evidence of value was introduced at the preliminary hearing, reduced the charge to a class B misdemeanor. *See* 1R117:16-18. Notwithstanding the district court's ruling, it is far from clear that the Legislature intended that the term "motor vehicle" in section 76-6-412 have the same meaning that it is given in section 76-6-410.5. Indeed, this issue has never been decided by either this Court or the Utah Supreme Court.

The district court *may* have decided the issue correctly. As noted by that court, section 76-6-412 is in the same part of the Criminal Code as section 76-6-

410.5. *See* 1R117:16. Sometimes, this suggests that the terms should share the same meaning. But a review of Title 76, chapter 6, part 4 suggests otherwise. Part 4 includes a list of definitions for terms used in that part generally, but "motor vehicle" is not among them. *See* Utah Code Ann. § 76-6-401 (West 2004). That term is only defined under section 76-6-410.5, which defines the offense of theft of a rental vehicle. This would suggest that the definition used therein is specific to rental vehicle thefts. Otherwise, the definition would have been found in the list of definitions for part 4 generally. It would seem, therefore, that "motor vehicle" should be given its broader, ordinary meaning, i.e., a vehicle with a motor. *See Envirocare of Utah v. Utah State Tax Comm'n*, 2009 UT 1, ¶5, 201 P.3d 982 (holding that "[w]hen a term is not defined by statute, we look to its common usage to define it").[5]

Indeed, at the time of the preliminary hearing, the prosecutor proceeded on the theory that an off-road ATV is a motor vehicle under section 76-6-412.

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[5] Moreover, the State's review of the Utah Criminal Code reveals that only section 76-6-410.5 limits the definition of "motor vehicle" to self-propelled vehicles that are primarily for use on the highways. *See, e.g.*, Utah Code Ann. § 76-5-207(1)(b) (West Supp. 2009) (defining motor vehicle as a "self-propelled vehicle"); Utah Code Ann. § 76-5-207.5(1)(b) (West Supp. 2009) (same); Utah Code Ann. § 76-10-2202(1)(c) (West Supp. 2011) (same). As noted by Defendant in his motion to quash the bindover, in other provisions throughout the Code, "motor vehicle" is alternatively defined as either a self-propelled vehicle or a self-propelled vehicle primarily for use on the highways. *See* 1R23.

*See* 1R116:18. Counsel for Defendant did not argue otherwise and the magistrate agreed to bind the matter over as charged based on that theory. *See* 1R116:17-19. Defendant did not claim that an off-road ATV is not a motor vehicle under section 76-6-412 until after the bindover in district court. *See* 1R22-24. Had Defendant raised the issue at the preliminary hearing, rather than in a motion to quash in district court, the State could have sought a short continuance to secure evidence establishing this alternative theory. *See Rogers*, 2006 UT 85, ¶21 (holding that "it would be reasonable to grant a continuance when the prosecution, in good faith, fails to present sufficient evidence but the necessary evidence is reasonably available"). Defendant's failure to raise this challenge at a time when the prosecution could have responded also constitutes good cause justifying the filing of the new information.

## CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted November 21, 2011.

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## CERTIFICATE OF SERVICE

I certify that on November 21, 2011, two copies of the foregoing brief were ☒ mailed ☐ hand-delivered to:

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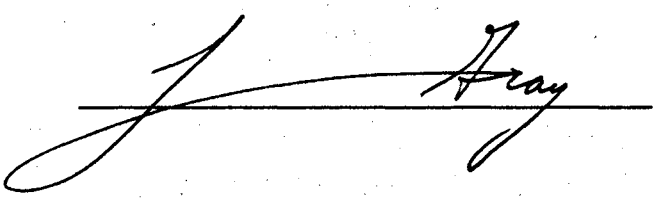

# Addenda

# ADDENDUM A

## Relevant Constitutional Provisions, Statutes, and Rules

**Utah Code Ann. § 76-6-408 (West Supp. 2005)**

(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. 76-6-412 (West 2004)**

(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.

# ADDENDUM B

## Informations
(dated July 10, 2009 and March 9, 2010)

LOHRA L. MILLER
District Attorney for Salt Lake County
CLIFFORD ROSS, Bar No. 2802
Deputy District Attorney
111 E. BROADWAY, SUITE #400
SALT LAKE CITY, UT 84111
Telephone: (801)363-7900

IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT

IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

| | |
|---|---|
| THE STATE OF UTAH<br>Plaintiff,<br>vs.<br><br>**JEREMY JAMES DYKES**<br>**DOB: 12/30/1979,**<br>**4172 West Paynter Cove**<br>**WVC, UT 84128**<br>OTN<br>SO# **0317266**<br>Defendant. | Screened by: CLIFFORD ROSS<br>Assigned to: CLIFFORD ROSS (Tuesday)<br>DAO# 09023068<br><br>Bail: $10,000<br>Warrant/Release: Non-Jail<br><br>**INFORMATION**<br><br>Case No.<br>091905392 |

The undersigned C. Lance - West Valley Police Department, Agency Case No. 091014357, upon a written affidavit states on information and belief that the defendant, JEREMY JAMES DYKES, committed the crime of:

COUNT 1
THEFT BY RECEIVING STOLEN PROPERTY, (345) 76-6-408 UCA, second degree felony, as follows: That on or about April 07, 2009 at 3725 South Redwood Road, in Salt Lake County, State of Utah the defendant 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.

THIS INFORMATION IS BASED ON EVIDENCE OBTAINED FROM THE FOLLOWING WITNESSES:

Danny Robb, Karen Robb, P. Plese, C. Lance, Dusty Ha, Wes Dudley, Mark Dell, Terrence Chen

4/7

AFFIDAVIT OF PROBABLE CAUSE:

Your affiant bases this Information upon the following:

The statement of Karen Robb, to Nephi City Police Officer W. Dudley, that she lives at 689 South 200 East, Nephi, Juab County, Utah. At approximately 7:00 p.m., on January 7, 2009, Ms. Robb's trailer with two 4-wheelers on it was parked in front of her home. When Ms. Robb checked the next morning, she found that the trailer and both 4-wheelers were missing. Ms. Robb further stated that one of the 4-wheelers, a 2004 Honda, belonged to her brother-in-law, Danny Robb.

The written report of West Valley City Police Officer P. Plese that on April 7, 2009, he observed a 4-wheeler being driven in traffic at 3725 South Redwood Road, Salt Lake County, Utah. Officer Plese had the driver, defendant Jeremy James Dykes, pull over. A records check revealed that the 4-wheeler was the one stolen from Danny Robb.

Pursuant to Utah Code Annotated § 46-5-101 (2007) I declare under criminal penalty of the State of Utah that the foregoing is true and correct to the best of my belief and knowledge.

Executed on: June 26, 2009

~~CLANCE~~ Clifford C. Ross, #2802
Affiant SLCo DA's Office
Prosecutor

Authorized for presentment and filing

LOHRA L. MILLER, District Attorney

Deputy District Attorney
26th day of June, 2009
GAM / DAO # 09023068

LOHRA L. MILLER. 6420
District Attorney for Salt Lake County
CLIFFORD ROSS, Bar No. 2802
Deputy District Attorney
111 E. BROADWAY, SUITE #400
SALT LAKE CITY, UT 84111
Telephone: (801)363-7900

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

| | |
|---|---|
| THE STATE OF UTAH,<br><br>Plaintiff,<br><br>-vs-<br><br>**JEREMY JAMES DYKES**<br>**DOB 12/30/1979,**<br>**AKA NONE**<br>**4172 West Paynter Cove**<br>**WVC, UT 84128**<br>D.L.# **159733669**<br>OTN<br>SO# **0317266**<br>Defendant. | Screened by: CLIFFORD ROSS<br>Assigned to: CLIFFORD ROSS (Tuesday)<br><br>DAO # 10007190<br><br>SUMMONS TO BE ISSUED<br>Warrant/Release: Non-Jail<br><br>**INFORMATION**<br><br>Case No.<br><br>101901771 |

The undersigned C. Lance - West Valley Police Department, Agency Case No. 09I014357, upon a written affidavit states on information and belief that the defendant, JEREMY JAMES DYKES, committed the crime of:

COUNT 1
THEFT BY RECEIVING STOLEN PROPERTY, (348) 76-6-408 UCA, third degree felony, as follows: That on or about April 07, 2009 at 3725 South Redwood Road, in Salt Lake County, State of Utah the defendant 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 said property was or exceeded $1,000, but was less than $5,000 or the defendant had been twice before convicted of theft, robbery, or any burglary with intent to commit theft.

THIS INFORMATION IS BASED ON EVIDENCE OBTAINED FROM THE FOLLOWING WITNESSES:

Terrence Chen, Mark Dell, Wes Dudley, Dusty Ha, C. Lance, P. Plese, Karen Robb, Danny Robb

AFFIDAVIT OF PROBABLE CAUSE:

Your affiant bases this Information upon the following:

The statement of Karen Robb, to Nephi City Police Officer W. Dudley, that she lives at 689 South 200 East, Nephi, Juab County, Utah. At approximately 7:00 p.m., on January 7, 2009, Ms. Robb's trailer with two 4-wheelers on it was parked in front of her home. When Ms. Robb checked the next morning, she found that the trailer and both 4-wheelers were missing. Ms. Dudley further stated that one of the 4-wheelers, a 2004 Honda, belonged to her brother-in-law, Danny Robb.

The written report of West Valley City Police Officer P. Plese that on April 7, 2009, he observed a 4-wheeler being driven in traffic at 3725 South Redwood Road, Salt Lake County, Utah. Officer Plese had the driver, defendant Jeremy James Dykes, pull over. A records check revealed that the 4-wheeler was the one stolen from Danny Robb.

Pursuant to Utah Code Annotated § 46-5-101 (2007) I declare under criminal penalty of the State of Utah that the foregoing is true and correct to the best of my belief and knowledge.

Executed on: 3/8/10

~~C. LANCE~~ J. Wright 1845
Affiant

Authorized for presentment and filing

LOHRA L. MILLER, District Attorney

Deputy District Attorney
3rd day of March, 2010
GAM / DAO # 10007190

# ADDENDUM C

## Transcript of Preliminary Hearing
(September 3, 2009)

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE

SALT LAKE COUNTY, STATE OF UTAH

| | |
|---|---|
| STATE OF UTAH, | : Case No. 091905392 FS |
| Plaintiff, | : Appellate Case No. 20100582 |
| vs. | : |
| JEREMY JAMES DYKES, | : |
| Defendant. | : |

PRELIMINARY HEARING SEPTEMBER 3, 2009

BEFORE

JUDGE ROBERT K. HILDER



CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
1775 East Ellen Way
Sandy, Utah 84092
801-523-1186

## APPEARANCES

For the Plaintiff: CLIFFORD C. ROSS, III
Assistant District Attorney

For the Defendant: ELIZABETH A. LORENZO
Attorney at Law

* * *

## INDEX

SALT LAKE CITY, UTAH - SEPTEMBER 3, 2009

JUDGE ROBERT K. HILDER

(Transcriber's note: speaker identification may not be accurate with audio recordings.)

P R O C E E D I N G S

THE COURT: You ready to go?

MR. ROSS: We are. Cliff Ross for the State.

THE COURT: This is in the matter of State v. Jeremy James Dykes. Is he in custody? I'm sorry, I couldn't see you. I'm used to looking another direction in my courtroom. Okay. This is case number 091905392. Mr. Clifford Ross for the state, Ms. Elizabeth Lorenzo for the defendant.

Do you waive reading today, counsel?

MS. LORENZO: Yes, Judge.

THE COURT: Thank you. Go ahead and call your witness.

MR. ROSS: Officer Plese, ask him to step forward.

MS. LORENZO: I'm sorry, just quickly before the record, before he takes the stand, we do have potentially one witness that we might call at trial, so I asked her to step outside the courtroom.

THE COURT: Thank you.

///

///

PATRICK PLESE

Having first been duly sworn, testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. ROSS:

Q Good morning.

A Good morning.

Q State your name and employment please?

A Patrick Plese. I work for West Valley Police Department.

Q And spell your last name.

A It's P-L-E-S-E.

Q And how long have you worked there?

A For West Valley since 1997.

Q And what are your duties in that work?

A Right now I'm a traffic enforcement officer on motor division.

Q Okay. Drawing your attention to April 7, 2009, at or near 3725 South Redwood Road, were you on duty in that location?

A Yes, I was.

Q And that location is within Salt Lake County?

A Yes, it is.

Q What occurred?

A I was monitoring traffic mainly north and

southbound on Redwood Road. I observed a four-wheeler coming through the intersection at 3800 South and Redwood. Four-wheeler was traveling actually eastbound from 38th South and turned northbound onto Redwood Road.

Q Okay. And what did you notice about the vehicle or the manner in which it was being operated?

A Well, it was an off-road vehicle and it turned northbound onto Redwood Road and turned into number three travel lane and proceeded northbound on Redwood Road.

Q Okay. Did it have plates or registration for being operated on the highways?

A Once I stopped it, no. I've never seen one. That type of four-wheeler can't be registered. There's no way to make it road legal in Utah.

Q Okay. So you determined that to be some type of violation?

A Yes, it was.

Q Okay. And you - did you observe the speed of the vehicle? Was there anything unusual about that or the manner-

A No.

Q - of it's operation?

A No, just the manner of the vehicle, it can't go on the road.

Q Okay. So you pulled it over?

A Yes, I did.

Q And how many people were on it?

A One.

Q And do you recognize that person in court today?

A I do.

Q Point him out please.

A He's sitting at the table there.

Q What's he wearing for the record?

A A plaid shirt, glasses, levis.

MR. ROSS: May the record reflect -

THE COURT: The record will reflect identification.

MR. ROSS: Thank you.

Q (BY MR. ROSS) Go on and describe what you observed and what occurred.

A I was on my motorcycle, I got off my motorcycle and just walked down into the number three travel lane. As the four-wheeler got closer and I just pointed to pull into the driveway where I was sitting, which it did.

Q Okay.

A As it pulled into the driveway I noticed it had - it had several different colors of paint, and some of the paint was peeling off. You could see the factory yellow that Honda has on a lot of their motorcycle and four-wheelers was still showing on part of the four-wheeler.

Q Okay. And what was the four-wheeler if you could

describe it in more detail? It was a brand name?

A It was a Honda. It wasn't brand new. It appeared to be a few years old. Appeared to be in decent condition.

Q Okay. So did you have any discussion with the driver at that point?

A Yes, I did.

Q What did he say? What did you say?

A Well, the first thing I did was get identification from him. I believe he provided a Utah driver's license with his name and a date of birth on it.

Q And that would be Jeremy James Dykes?

A Yes, date of birth 12/30/79.

Q Okay. Did you have any discussion with him about how he came to be riding that particular vehicle?

A Oh yeah, I asked him if it was his four-wheeler and he told me it was.

Q Okay. And did you investigate to determine who the record owner was?

A Yes, I did.

Q What did you do and what did you determine?

A I asked him if it was his four-wheeler, he said yes. I asked him if it was registered to him, and he said no.

Q Okay.

A So I asked him who it was registered to and I asked

him to find the registration on the vehicle for me. He did find the registration and he did give it to me.

Q Okay.

A I looked at the registration. He told me that the vehicle he had bought from the registered owner Gary Smith. The registration showed that it was registered to a Myrna Robb.

Q Okay. And how did you go about determining the registered owner?

A Well, I checked the VIN number on the registration against the VIN number on the four-wheeler and it matched.

Q Okay. I've - I've given you - did he - did the defendant say anything else in addition to that concerning how he came to be in possession of that ATV?

A No.

Q All right. I've shown you before you took the stand a witness statement signed by a Danny Robb?

A Yes.

Q And have you read through that and determined the VIN number and the description of the 2004 Honda factory yellow rancher model ATV was - was accurate and that this statement refers to that ATV?

A Yes.

MR. ROSS: Okay. Your Honor, I'd offer this under Rule 1102, statement of the owner.

THE COURT: Uh-huh (affirmative). Any objection, Ms. Lorenzo?

MS. LORENZO: I just object to the changing, I mean, things are written out or that's, you know, crossed off and then [inaudible].

THE COURT: The interlineations we like to say to be pompous. That one?

MS. LORENZO: Yes.

THE COURT: Okay.

MR. ROSS: The crossed out things were initialed, Your Honor.

THE COURT: I see they're initialed and I'm going to receive it for purposes of this hearing only.

(Plaintiff's Exhibit ? received)

MR. ROSS: All right.

Q (BY MR. ROSS) What else transacted there between you and the defendant? What else did he say? What else did you do before you left the scene?

A Well, I had dispatch check the VIN number for stolen.

Q And what did you learn?

A Dispatch told me it was listed as a stolen vehicle out of Nephi.

Q All right. Did you take the defendant into custody?

A Yes, I did.

Q All right. Did you, from reading the or from the statements from other officers involved in the case, did you get any information about what occurred in Nephi?

A A little bit, yes.

Q Okay. And this is from other officers in Nephi reporting or giving you that information?

A Yes.

Q What did you learn as far as the vehicle in question was concerned and what occurred to it in Nephi?

A I spoke on the phone to the officer from Nephi. He told me that two four-wheelers and a trailer had been stolen. And he told me he was on his way to Salt Lake County to try and interview the person that I had placed in custody.

Q All right.

Your Honor, I'd also offer at this time another Rule 1102 statement from Karen Robb who's the owner of the trailer and the other ATV, which together with the subject ATV were taken without her consent - were stolen basically from her home in Nephi. I've given counsel a copy.

MS. LORENZO: And, Your Honor, I just object to the stuff that's not relevant. He's not charged with anything with regards to those.

THE COURT: What is the relevance, counsel?

MR. ROSS: That he knew the property was stolen.

THE COURT: It appears he showed knowledge and intent, I guess. I'll receive it -

MR. ROSS: I'll submit it.

THE COURT: - for purposes of this hearing only. Cross-examine.

(Plaintiff's Exhibit ? received)

CROSS-EXAMINATION

BY MS. LORENZO:

Q The other ATV, not the one from Mr. Robb, but the other one - the other I think one plus a trailer, he wasn't found in possession of; is that correct?

A That's correct.

Q He was just with the one VIN number that you've seen referenced in the Danny Robb 1102?

A Yes.

Q And did you have someone go out and check his residence for those other ATVs?

A I did.

Q You did. And were they there?

A No.

Q Okay. So going back to your initial encounter with him, would you say it was unusual to see an ATV on the road?

A Very unusual.

Q And clearly caught your attention?

A Yes.

Q And that's why you initiated a traffic stop?
A Yes.
Q And when you did that, you I think you actually say you just pointed to the driver to pull over?
A Uh-huh (affirmative). Yes, ma'am.
Q And he followed your direction?
A Yes.
Q And he pulled over into a driveway before you even parked?
A Yes.
Q And is it fair to say he was cooperative with you?
A Yes.
Q He provided you with his driver's license?
A Yes.
Q He assisted you in trying to find a registration?
A Yes.
Q He - of which he actually didn't know where it was, the registration; is that fair to say?
A Yes, it took him a minute to find it.
Q And he had to go through some type of paperwork or not in the - he had to go get it out of a different compartment or something; is that correct?
A Yes, that's correct.
Q And I think you say it took him several minutes to find the registration.

A Yes.

Q But when you asked him initially he said that he bought it from Gary Smith,

A Yes.

Q And that it was his ATV.

A Yes.

Q Did you ever ask him if he'd seen the registration before?

A No.

Q So you don't know if he'd ever seen that it was registered to someone different?

A I have no idea.

Q And you would agree with me that in order to be guilty of this he has to either know that this was stolen or believe that it probably had been stolen?

MR. ROSS: A legal opinion. Objection.

THE COURT: The officer did make some determinations based on his training and experience, to the extent you wish to offer that opinion.

THE WITNESS: Yes, sir, as far as I understand the statute, you would need to know that it's a stolen vehicle.

Q (BY MS. LORENZO) And so, I mean, you arrested him for this?

A Yes.

Q What led you to believe that he knew it was a

stolen vehicle?

A Well, I - I can speak for myself. I don't get on any vehicle or drive any vehicle that I don't know where it came from or who owns it.

Q Okay. But not speaking for yourself, what about him? What led you to believe that he knew it was stolen?

A Well, he's an adult with a driver's license and he's driving the vehicle.

Q Okay. So the fact that he was in possession of it was the only reason you thought he knew?

A Sure.

Q Because you didn't - you didn't ask him about the registration of seeing it before?

A No.

Q Whether or not he'd seen it?

A No.

Q Did you ask him if he knew the Myrna Robb?

A No.

Q And so what you also indicated the fact that he was in possession, that was - that would be why you think he probably ought to have known it was stolen?

A Well, that's one - one small part. I can give you the - probably several different why I believe it was stolen right from the beginning.

Q Not why you believe but what he believed it was

stolen.

THE COURT: What he believed that he should have known?

MS. LORENZO: Right.

THE WITNESS: The way you're asking the question, all I can tell you is I would believe, not only as a police officer but as a person that drives any vehicle on the streets anywhere like most people -

Q (BY MS. LORENZO) Okay.

A - there's things that would lead me to believe that the vehicle is either should be on the road or shouldn't.

Q Okay. But what about with regards to Mr. Dykes?

A I can't tell you what he thinks.

Q So you don't know of any, I mean, you have no reason to think that he personally knew that it was stolen?

A Yes, I do.

Q What?

A The paint that was on that vehicle any reasonable person could have looked at that and realized that there's no reason to basically ruin the paint of a very nice vehicle the way it had been ruined.

Q But you have no idea if he put that paint on or how that paint go there?

A I have no idea.

Q Other than the paint, any other reason other than

the paint?

A I'm sorry, you're going to have to clarify that. I'm not exactly sure -

Q You said there were several reasons. I'm wondering if there's any other reason other than the paint?

A Yes. I have yet in my entire career to find an adult riding a vehicle like that that should be off-road on a seven-lane highway through the middle of the city. It's very, very abnormal.

Q I mean someone who is likely to get caught by doing that, right?

A I would think so.

Q Someone who is out in the open doing that is not thinking that I'm going to get, I mean, knowing that they're probably going to get pulled over by the police?

A If I was - I can answer this way. If I was riding that vehicle down Redwood Road, especially that time of day, I would expect to encounter a police officer.

Q And he wasn't trying to hide himself or his identity or himself on that vehicle?

A I don't think so.

Q Did you do any investigation as to Gary Smith?

A No.

Q So you - you didn't go to look and see if Gary Smith existed?

A Gary Smith, sure, I read him Miranda. I want to talk to him, he wouldn't talk to me. I can't do anything with the name Gary Smith.

Q Okay. But, okay, so you didn't investigate whether or not a Gary Smith, in fact, existed?

A No. I'm sure there's a Gary Smith in Utah, but there's a phone book full of them.

MS. LORENZO: May I have just one moment, Judge?

THE COURT: You may.

MS. LORENZO: I don't think I have anything further at this time.

THE COURT: Any re-direct on this one?

MR. ROSS: Briefly.

REDIRECT EXAMINATION

BY MR. ROSS:

Q Did the defendant produce a certificate of title showing he owned the vehicle?

A No.

Q And whose name was the registration, do you know?

A Yeah, it was the Myrna Robb.

Q Okay. Not Gary Smith?

A No.

Q Okay. Do you have any information from any record of any type connecting a Gary Smith to this vehicle?

A No.

Q You have this 1102 from the owner that said they owned it, they didn't give permission, don't you?

A Correct.

MR. ROSS: Nothing further. We'll submit it.

RE-CROSS EXAMINATION

BY MS. LORENZO:

Q Did you look for a Gary Smith that owned this vehicle?

A No, ma'am.

MS. LORENZO: All right. Nothing further.

THE COURT: Thank you, officer. You may step down, sir.

Any more witnesses for the State?

MR. ROSS: The State rests on the evidence.

THE COURT: Defense?

MS. LORENZO: Yes, Judge, I don't think that there's been sufficient evidence for a probable cause determination that my client either knew or probably should have known that this was stolen. He told the officer that he bought it from a Gary Smith. He knew that it wasn't registered in his name. He had, I mean, he knew that he had never looked at the registration before. I would think a paint job is sufficient to say that that's - we don't even know if he did the paint job or where that paint job came from, to say that someone probably ought to have known it's

stolen. I think that's the really only basis -

THE COURT: You don't think the paint job that maybe the officer's really saying something like the broken steering column, someone had punched out? One of those things [inaudible], this doesn't make sense?

MS. LORENZO: I think that -

THE COURT: Under the very lowest probable cause standard, but -

MS. LORENZO: Right. I mean, and he might be able to do that, but I don't think that that's sufficient. I mean, a paint job in and of itself coming is not probable cause that someone should have known it was stolen. And that's the point I just think that could have come from him or any other, you know, from when it was purchased by my client.

THE COURT: Uh-huh (affirmative).

MS. LORENZO: Additionally, I don't think there's been any evidence of value that's been submitted in this charge that's something to exceed $5,000. And so I don't think it should be bound over. For those two reasons that -

THE COURT: You don't think it should be bound over or not at that level. It certainly could be bound over at that level or - or [inaudible]?

MS. LORENZO: That's correct, Judge, because I don't think there's been probable cause that he knew or

probably should have known that it was stolen, and then I don't think there's been any evidence submitted of value.

THE COURT: Mr. Ross?

MR. ROSS: It's a second degree felony because the items an operable motor vehicle. Value is an alternative.

THE COURT: Not value based, an alternative?

MS. LORENZO: That's not how it's charged.

THE COURT: Let's have a look.

MR. ROSS: Well, theft by receiving on or about April 7 -

THE COURT: Well, the property stolen was a firearm or an operable vehicle. That's what the information says.

MR. ROSS: And the -

MS. LORENZO: I don't have that.

THE COURT: I don't think it's an amendment, but that's the information.

MS. LORENZO: Okay. Yes, Your Honor.

MR. ROSS: I'll submit it. I think the court has it in hand.

THE COURT: I think with that issue and that was interesting one on the value [inaudible] but you're absolutely right, there was no evidence. But with the operable motor vehicle as the officer said he couldn't operated it where it was, but it was operating, but I think the officer, actually I think that there's a number of

factors but the paint alone, I mean, this is something in the officer's experience or their basis to say now, why does that makes sense? It's certainly enough for the low cause - low level of proof requirement to bind over on a preliminary hearing, so I am finding probable cause to bind over setting it before Judge Christiansen for further proceedings.

COURT CLERK: September 25th, 9:00 a.m., Judge Christiansen.

THE COURT: Do you wish to withdraw the 1102's?

MR. ROSS: May I? Thank you.

THE COURT: Thank you.

MR. ROSS: May I excuse the officer?

THE COURT: You may.

And thank you, Officer.

(Whereupon the hearing was concluded)

-c-

CERTIFICATE

I HEREBY CERTIFY that the foregoing transcript in the before mentioned proceeding held Judge Robert Hilder was transcribed by me from an audio recording and is a full, true and correct transcription of the requested proceedings as set forth in the preceding pages to the best of my ability.

Signed November 8, 2010 in Sandy, Utah.

Carolyn Erickson
Certified Shorthand Reporter
Certified Court Transcriber

# ADDENDUM D

**Ruling and Order [on *Brickey* motion]**
(dated July 1, 2010)

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

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| STATE OF UTAH,<br><br>**Plaintiff,**<br><br>**vs.**<br><br>JEREMY JAMES DYKES,<br><br>**Defendant.** | **RULING AND ORDER**<br><br>Case No. 101901771<br><br>Judge Michele M. Christiansen<br><br>Date: July 1, 2010 |

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 refilling 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 exits. *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




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