

1981

State of Utah v. Leonard Lipsky : Brief of Respondent

Utah Supreme Court

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Recommended Citation

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IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- :

LEONARD LIPSKY, :

Defendant-Appellant.

BRIEF OF RESPONSE

APPEAL FROM THE JUDICIAL DISTRICT COURT
JUDICIAL DISTRICT COURT
COUNTY, STATE OF UTAH
DAVID SAM, JUDGE

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IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

LEONARD LIPSKY,

Defendant-Appellant.

Case No.
17513

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE FOURTH
JUDICIAL DISTRICT COURT, IN AND FOR UTAH
COUNTY, STATE OF UTAH, THE HONORABLE
DAVID SAM, JUDGE, PRESIDING

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IN THE SUPREME COURT OF THE
STATE OF UTAH

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STATE OF UTAH, :
Plaintiff-Respondent, :
-vs- : Case No.
LEONARD LIPSKY, : 17513
Defendant-Appellant. :

- - - - - : - - - - -
BRIEF OF RESPONDENT
- - - - -

STATEMENT OF THE NATURE OF THE CASE

The appellant was originally charged with violation of § 76-5-103(b) of the Utah Code Annotated (1953, as amended). The information alleged that on or about the 16th day of October, 1978, he committed an aggravated assault upon the person of one Laurie Bacastow by attempting, with unlawful force or violence, to to bodily injury to Miss Bacastow by such means of force likely to produce death or serious bodily injury to Miss Bacastow.

DISPOSITION IN THE LOWER COURT

The appellant was arraigned on November 3, 1978, and pleaded not guilty to the charge against him. However, at the time set for trial, on November 14, 1978, he changed

his plea to guilty as charged, which plea was accepted by the Honorable Allen B. Sorensen, Judge, presiding in the Fourth Judicial District Court, in and for Utah County, State of Utah. Following a series of events which eventually led to this appeal, appellant was sentenced to one to five years in the State Penitentiary on August 29, 1980, by the Honorable David Sam, Judge, Fourth Judicial District Court in and for Utah County.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation of the sentence imposed by the Court below.

STATEMENT OF THE FACTS

Following the acceptance of appellant's plea of guilty on November 14, 1978, by Judge Sorensen, time for pronouncement of the judgment was set for December 8, 1978, and the matter was referred to Adult Probation and Parole Department for pre-sentence investigation, pursuant to Utah Code Ann. § 76-3-404 (1953, as amended).

On November 30, 1978, appellant requested the Court to order the disclosure of the pre-sentence report. At the time set for sentencing, December 8, 1978, the Court denied appellant's request for disclosure of the report. The appellant at that time was committed to the Department of Corrections for a ninety (90) day evaluation, pursuant to

Utah Code Ann. § 76-3-404 (1953, as amended).

On March 8, 1979, the appellant appeared for sentencing before the Honorable J. Robert Bullock in the District Court for the Fourth Judicial District in and for Utah County. At that time the 90-day diagnostic evaluation had been disclosed to the appellant, but access to the pre-sentence report had been prohibited. Appellant was then sentenced to be incarcerated in the Utah State Prison for a term not to exceed five years, and to make restitution to the victim in the sum of \$100.00.

Appellant was then extradited to the State of New York where he was tried for second degree murder of a person he had allegedly confessed to killing, which statements were taken while appellant was in custody in the State of Utah. The New York Court dismissed the jury's guilty verdict on March 24, 1980, and entered a verdict of acquittal. Appellant was thereafter returned to the Utah State Penitentiary.

On appeal in this case the Utah Supreme Court ruled, in State v. Lipsky, 608 P.2d 1241 (Utah 1980), that the appellant's sentence be set aside and that he be resentenced after the State had disclosed to him the contents of the pre-sentence report. After receiving a copy of said report and undergoing supplemental psychological analysis, appellant was resentenced to one to five years in the State

Penitentiary on August 29, 1980, in the Fourth Judicial District Court in and for Utah County, the Honorable David Same, Judge, presiding. That sentence is the subject of this appeal.

ARGUMENT

Before addressing appellant's points of argument, respondent feels that it is necessary to the disposition of this appeal to discuss briefly, in more detail, the colloquy which transpired on the day appellant was re-sentenced, August 29, 1980. At that time appellant's counsel expressed concern that reference to the murder charge in New York, of which appellant was acquitted, was made in the pre-sentence report (Transcript of Sentencing, pp.3-5). The reference was made in the pre-sentence report in the form of a statement by Ms. Betty Davies of the Provo office of the Adult Probation and Parole Department to the effect that appellant had admitted during an interview at the Utah State Hospital to having committed a homicide in the State of New York. Appellant further named the victim and the location of the homicide during his interview with Ms. Davies (Transcript of Sentencing, p.3). Because of the subsequent acquittal, appellant's counsel felt that any mention of that proceeding including appellant's reference and admission to the killing

during his interview with the Adult Probation and Parole Department, should be stricken from the pre-sentence report (Transcript of Sentencing, pp.3-7). The county attorney's response to appellant's motion was that the first intelligence gained on the subject of the murder charge in New York came from appellant's own mouth as he was interviewed by a member of the Adult Probation and Parole Department. As such, reference made by the appellant himself to the murder charge is relevant information and ought to be considered by the court. However, the county attorney stated that anything concerning the legal or trial aspects of the case in New York ought not to be considered by the court and that he felt that the court was entirely capable of sifting the irrelevant from the relevant (Transcript of Sentencing, p.7).

In denying appellant's motion for a new pre-sentence report omitting appellant's statements referring to the New York murder case, Judge Sam stated:

. . . It does appear to me counsel that any matter given by the defendant to the Adult Probation and Parole Department is a matter that is to be appropriately considered by the sentencing court and that matter having been given it does appear to me that it is a matter that is in the record. I understand Mr. Lipsky [appellant] that the matter, as counsel has accurately stated, has gone onto New York, that the New York court has acquitted you, that you have in fact been found not guilty by the New York court and all of those matters are in my documentation and have been considered by me.

Now I believe counsel that the matters have been given appropriate consideration . . . I understand that pursuant to the record that I have that he [appellant] made a statement to Betty Davies I believe as you have stated. That statement is in the file. It has been considered by the Court and I understand what has happened with that pursuant to the legal requirements of the law and those matters are before me and have been considered by me.

Now I believe that they are appropriate matters for consideration for what they are worth and I have considered that the Supreme Court or the Appellate Court of New York has found Mr. Lipsky not guilty. Now these matters are all in the file and I have them before me and I am giving what weight to those matters that I feel should be given weight to and the matter before me is the matter of the offense here in the State of Utah . . . (Transcript of Sentencing, pp.7-8).

The court further stated in addressing the appellant:

Mr. Lipsky, I have given consideration to your file. I understand that you have made remarkable progress. That you have great support from your family. You have support from many individuals who have come forward and have made statements in your behalf and I have considered all of those matters and I have given what weight I feel should be given to them . . . (Transcript of Sentencing, p.9).

Prior to announcing the sentence, the trial court gave a detailed explanation of the reasoning used to determine appellant's sentence:

Alright Mr. Lipsky let me advise you of the matter that is of most concern to the court. I certainly compliment you for the progress that apparently you have made. It appears from the file that I have that you have made good progress

and there are people who apparently have a great deal of faith in you and I feel that you have been if I might term it such a 'model prisoner' which I wish to commend you. It appears however to the court that the thing that is of most importance in all of these reports and I am not just discounting those letters of recommendation from your family, your loved ones, and people who are not maybe in that category who have had contact with you in the prison here or in New York and it appears that you have done a remarkable job, but the one item that is of most concern is the update of the psychological report which is I believe the thing that the court here has been interested in and interested in receiving and in getting that update. Now we do have an update in the file, dated July 28, 1980, received July 30, 1980, and it is part of the report and it is this report that I feel that I have to give considerable weight to and emphasis to. This report is signed by Richard T. Grow and in essence this is what he states in his concluding paragraph: 'In short we have test data which suggest that Leonard is temporarily improved, but not cured. Further, there are clear indications that Leonard periodically tends to lose proper intellectual control over his behavior. On such occasions he will display behavior which is impulsive, egocentered, oppositional and devoid of proper judgment.'

Now Mr. Lipsky the thing that of course I am concerned about is the interest that we have here and I am sure you understand those. You have your interest and we want you to become rehabilitated and I want you to continue to proceed and progress as you have and I am pleased from what I read, but the other interests that I must weigh as a sentencing judge in this matter is the interest of the public in this particular matter. This was a crime, a crime of violence which could have resulted in very very serious consequences and fortunately it did not go to the extent that maybe possibly it could have gone, but nevertheless the elements were there you see and so I must weigh those interests and the thing that I am concerned about is the update that I have in this particular report. Now--

MR. LIPSKY: Your Honor, if I may?

THE COURT: Yes you may.

MR. LIPSKY: Your Honor, I feel that I have gained quite a bit of progress from being in the prison situation. I have come to a number of realizations about myself. On the other hand, I feel that I have spent as much time growing in that particular situation as I possibly can and perhaps any further delay, any more time that I will be doing at the state prison could possibly be detrimental and most probably will not be helpful.

THE COURT: I understand Mr. Lipsky and that is the risk that I feel that I have to take in this matter and as I said to you Mr. Lipsky I don't relish having to be the sentencing judge, but on the other hand I must not shirk my responsibility and I must weigh these matters as I feel they should be weighed. Now in all due concern to these matters and there being no legal reason why judgment should not be pronounced at this time and having given consideration to the reports as I have seen them and what weight I feel I should give them and what relevancy I feel should be given to them, it is going to be my judgment that you be confined in the Utah State Prison for an indeterminate term . . . I am going to ask or recommend to the parole board that they consider your conduct in this matter your time that you have served, and that these considerations be given to you in any parole consideration so that if Mr. Lipsky can be given consideration relative to the time he may be considered for parole, that I would be happy as the sentencing judge to make this observation to them by way of letter if you would deem that appropriate.

Transcript of Sentencing, pp. 11-13.

POINT I

THERE HAS BEEN NO SHOWING THAT THE INFORMATION RELIED UPON BY THE LOWER COURT IN SENTENCING APPELLANT WAS NOT ACCURATE AND RELIABLE.

Respondent submits and fully agrees with appellant

that one convicted of a crime has a right to be sentenced on the basis of information that is accurate. State v. Lipsky, 608 P.2d 1241 (Utah 1980). Furthermore, any information which may be misleading should not be used by a judge without the defendant's knowledge and without providing him with an opportunity to refute or explain such information. State v. Harris, 585 P.2d 450 (Utah 1978).

Appellant has impliedly alleged in Point I of his argument that the information used as a basis for his sentencing was inaccurate and unreliable. He made no specific allegations to substantiate his argument, but merely states the law as set forth in the recent case of State v. Lipsky, supra, as well as federal law. No specific allegations of inaccuracy or unreliability having been set forth by appellant in Point I, respondent submits that any implied allegations of inaccuracy intended by appellant regarding information upon which his sentence was based not be considered by this Court.

POINT II

RESENTENCING OF APPELLANT BY THE
TRIAL COURT WAS PROPER AND BASED
UPON INFORMATION WHICH WAS PROPER
FOR CONSIDERATION

Appellant alleges that his statements to the Adult Probation and Parole Officer regarding the murder case in New York and any other reference to that charge should not have been considered by the trial court in sentencing. His reasoning is that the court has no basis for determining whether or not the allegations regarding appellant's statements are accurate. His argument also seemingly implies that since appellant was acquitted of the murder charge, any and all reference to that charge is inappropriate in the sentencing process, i.e., the incident should be treated as if it never occurred.

Though this Court has never specifically stated that crimes with which an accused has been tried and acquitted are not the subject of proper consideration in the sentencing process, case and statutory law of this State and other jurisdiction either impliedly (as is the case in Utah) or specifically approves (as is the case in Utah's sister states and federal courts) of the use of such information.

Utah Code Ann. § 76-3-404 (1953, as amended),

states in relevant part:

(1) In felony cases where the court is of the opinion that imprisonment may be appropriate but desires more detailed information as a basis for determining the sentence to be imposed than has been provided by the pre-sentence report, the court may, in its discretion, commit a convicted defendant to the custody of the division of corrections for a period not to exceed ninety days. The division of corrections shall conduct a complete study of the defendant during that time, inquiring into such matters as the defendant's previous delinquency or criminal experience, his social background, his capabilities, his mental, emotional and physical health, and the rehabilitative resources or programs which may be available to suit his needs . . . the court, prosecutor, and the defendant or his attorney shall be provided with a written report of results of the study . . . (Emphasis added.)

The legislature, in the wording of the statute, does not expressly limit the scope of the diagnostic study to a defendant's criminal convictions, but specifically uses the phraseology "defendant's previous delinquency or criminal experience." A criminal experience can range from arrest and subsequent release to arrest and subsequent trial proceedings resulting in conviction or acquittal. In State v. Siebert, 6 Utah 2d 198, 310 P.2d 388 (1957), this Court, in discussing the discretionary powers in the granting or denying of probation following conviction, stated:

. . . The granting or withholding of probation involves considering intangibles

of character, personality and attitude, of which the cold research gives little inkling. These matters, which are to be considered in connection with the prior record of the accused, . . . must of necessity rest within the discretion of the judge . . . 310 P.2d at 393 (Emphasis added.)

Thus a criminal experience most definitely includes a defendant's prior record. No limitation as to arrests which result in subsequent acquittals is placed upon the terms "criminal experience" or "prior record" either by statute or case law in this State.

It would seem that the legislature, in its enactment of § 76-3-404, intended for a sentencing judge to have as much reliable information as possible to make a sound determination which will both protect the general public's interests and at the same time help to rehabilitate the defendant. Many sources of information are required from which to acquire all the needed information to accomplish such a task. As stated in State v. Carson, 597 P.2d 862, 864 (Utah 1979):

. . . it should be noted that the sentencing judge's discretion in sentencing may be based on several sources of information . . .

Some of Utah's neighboring states have specifically ruled that the use of a defendant's record which includes

arrests resulting in acquittals is permissible during the sentencing process. State v. Stanley, 123 Ariz. 95, 597 P.2d 998 (1979). In State v. Kelly, 122 Ariz. 495, 595 P.2d 1040 (1979), the Arizona Court of Appeals said:

In making sentencing decisions, a trial court which is vested with discretion as to the limits of the sentence may consider all information possible about the defendant's past conduct. [cites omitted]. In performing this function, the trial judge is not necessarily restricted to considering only evidence admissible at trial. [cites omitted]. This broad discretion to consider all relevant information extends even so far as to allow consideration of evidence of crimes for which the defendant has been charged, tried and acquitted [cites omitted]. 595 P.2d at 1043, 1044 (emphasis added).

The courts in the State of Washington have held like the Arizona courts. State v. Hernandez, 20 Wash.App. 225, 581 P.2d 157 (1978); State v. Wilcox, 20 Wash.App. 617, 581 P.2d 596 (1978); State v. Dainard, 85 Wash.2d 624, 537 P.2d 760 (1975), stand for the proposition that an arrest without trial or conviction is a proper matter for consideration by the court at sentencing, wherein Hernandez and Wilcox follow the factual situation in State v. Kelly, supra, i.e., that an arrest and charge which result in subsequent trial and acquittal are proper matters for consideration of a trial court during sentencing. The Supreme Court of Washington shed some light on its reasoning for allowing consideration during sentencing of criminal activities which do not result in convictions. In State v. Dainard, supra, the Court said:

With regard to the question whether the court properly considered information regarding an arrest upon which no charges were filed, we recognize that an arrest, without charge, trial and conviction, is not proof of guilt. It is, however, evidence that the arresting officer considered that he had probable cause to make the arrest. The occurrence is one which has some relevance to the question before the court in a sentencing procedure. . . .

537 P.2d at 762.

The Federal Courts have also allowed a trial judge to use evidence of prior criminal conduct not resulting in

conviction during sentencing proceedings. United States v. Morgan, 595 F.2d 1134 (Ninth Circuit 1979); United States v. Washington, 586 F.2d 1147 (Seventh Circuit 1978); United States v. Smith, 551 F.2d 1193 (Tenth Circuit 1977); Billiteri v. United States Bd. of Pardons, 541 F.2d 938 (Second Circuit 1976); United States v. Cardi, 519 F.2d 309 (Seventh Circuit 1975); United States v. Sweig, 454 F.2d 181 (Second Circuit 1972); United States v. Weston, 448 F.2d 626 (Ninth Circuit 1971). In United States v. Sweig, supra, the sentencing court relied in part upon information regarding crimes for which defendant was acquitted. In upholding this procedure used by the trial court, the United States Second Circuit Court of Appeals said:

. . . just as the sentencing judge may rely upon information as to crimes with which the defendant has been charged but not tried, . . . so here the judge could properly refer to the evidence introduced with respect to crimes of which defendant was acquitted. Acquittal does not have the effect of conclusively establishing the untruth of all evidence introduced against the defendant. For all that appears in the record of the present case, the jury may have believed all such evidence to be true, but have found that some essential element of the charge was not proved. . . .

454 F.2d at 184.

Many of the Federal cases heretofore mentioned involve Rule 32(c)(2) of the Federal Rules of Criminal

Procedure, 18 U.S.C.A. That rule provides:

The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and other such information as may be required by the court. (Emphasis added.)

Respondent would also point out that 18 U.S.C.A. § 3577, enacted in 1970, which places few limitations on the information a sentencing federal judge has access to, has not been repealed or amended in any way by Congress.¹ It was interpreted by the United States Supreme Court in United States v. Tucker, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972). The court held that as a general rule, a federal district judge may, before sentencing, ". . . conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." 404 U.S. at 446. The court did,

1 18 U.S.C.A. § 3577, reads: "No limitation shall be placed on the information concerning the background, character and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

however, recognize one well-defined limitation to the rule, i.e., use or consideration of convictions obtained when the defendant was not afforded the benefit of counsel.

The United States Supreme Court, in Williams v. People of the State of New York, 337 U.S. 241 at 247, 69 S. Ct. 1079 at 1083, 93 L.Ed. 1760 (1949), stated the duties of the trial judge regarding sentencing:

. . . A sentencing judge . . . is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant--if not essential--to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. . . .

The federal cases are cited to emphasize the analogous situations that state and federal judges find themselves in when trying to obtain all information possible that will be helpful in fitting the punishment to the defendant as well as the crime.

In the instant case, the central issues is whether Judge Sam abused his discretionary powers in sentencing appellant to zero to five years in the state penitentiary. In State v. Gerrard, 584 P.2d 885 (Utah 1978), this Court stated, in quoting from Hicklin v. State, 535 P.2d 743 (Wyo. 1975):

. . . a judgment in a criminal case will not be disturbed because of sentencing procedures unless there is a showing of an abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play
. . . .

Id. at 751. The Utah Supreme Court then proceeded in its opinion to set down the test for ascertaining whether a trial judge abused his discretion:

Before this Court will overturn the sentence given by the trial court, it must be clear that the actions of the judge were so inherently unfair as to constitute abuse of discretion. . .

In State v. Harris, 10 Wash.App. 509, 518 P.2d 237 (1974), the court there said that the exercise of discretion in sentencing necessarily reflects the personal judgment of the court and the appellate court can properly find abuse only if it can be said that no reasonable man would take the view adopted by the trial court. . .

Whether or not the trial judge changed his mind due to the conduct of the defendant or to other reasons is not our concern. The sentence imposed. . . was the proper statutory penalty for the offense . . . and this Court will not reverse or modify a sentence prescribed by law unless it is clearly excessive or unless the trial court abused its discretion. . . .

584 P.2d at 887, 888.

In the present case, the sentence was the proper statutory penalty for the offense. Appellant was convicted of aggravated assault in violation of Utah Code Ann. § 76-5-103 (1953), as amended. Aggravated assault being a

felony of the third degree, Utah Code Ann. §§ 76-3-203 and 77-35-20 (1953), as amended, provide for a term of imprisonment "not to exceed five years." Of course, other sentencing alternatives are available pursuant to Utah Code Ann. § 76-3-201 (1953), as amended. Thus, Judge Sam was completely within his limits in imposing the prison term.

It cannot be said that given the information available to Judge Sam, that no reasonable man would take the view adopted by the trial court. The report submitted to the court stated that "there are clear indications that [appellant] periodically tends to lose proper intellectual control over his behavior. On such occasions he will display behavior which is impulsive, ego centered, oppositional and devoid of proper judgment." The appellant had already assaulted a young lady in Provo. He admitted to having committed a homicide in New York, though he was acquitted. Coupled with the diagnostic evaluation, it seems readily apparent that the interests of appellant and society were best served by further confinement in the penitentiary until such time as the Board of Pardons would consider the case.

POINT III

THE FORWARDING OF THE REPORT OF THE ADULT PROBATION AND PAROLE DEPARTMENT TO THE PAROLE BOARD DID NOT UNJUSTLY LENGTHEN APPELLANT'S TERM OF IMPRISONMENT.

Appellant alleges that the forwarding of the report about him prepared by the Adult Probation and Parole Department to the Board of Pardons has operated to lengthen his stay in prison.² The Board of Pardons had not met on appellant's case, thus any reasons for denial of probation at this point in time are purely speculative and not subject to appeal. Respondent submits that since the trial court has such wide latitude in considering all matters bearing upon the personal history and behavior of the appellant, including matters for which he had been tried and acquitted, the Board of Pardons, which is concerned with

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- 2 Utah Code Ann. § 77-62-8(c) (1953), as amended, compels the trial court to forward information he has regarding various aspects of appellant's sentence:

In cases where an indeterminate sentence is imposed, the judge imposing the sentence and the state's attorney prosecuting the case must each, within 30 days from the date of such sentence, mail to the executive secretary of the board of pardons a statement in writing setting out the terms for which, in their respective opinions, the prisoner so sentenced ought to be imprisoned, together with any information they may have regarding the character of the prisoner or any mitigating or aggravating circumstances connected with the offense for which the prisoner has been convicted, and any other information that will aid the board of pardons in passing upon the application for the termination or commutation of such sentence, or for parole or pardon. Such statements shall be presented to the board of pardons at the next regular meeting of the board, and shall be preserved in the files of the board.

all facets of a prisoner's character, make-up and behavior, is, a fortiori, entitled to be fully advised of the contents of the presentence report. Billiteri v. United States Board of Parole, 541 F.2d 938 (Second Circuit 1976). Thus appellant can claim no error on behalf of the Board of Pardons in not having granted the appellant his parole, since they (the Board of Pardons) are considering the same information as the trial judge considered.

The allegations of appellant regarding the Board of Pardons are strictly conjectural and have no foundation or basis for appeal and should thusly not be considered.

CONCLUSION

The appellant has not stated a claim on which this Court can find as a matter of law that the trial court abused its discretion in considering the confession by appellant in the presentence report. Nor has appellant shown that the trial judge abused his discretion in sentencing appellant to the penitentiary for the term provided by law. The claim that the forwarding of the report of the Adult Probation and Parole Department to the Parole Board lengthened appellant's sentence is unfounded and has no basis in this appeal. Respondent

therefore respectfully requests this Court to affirm the sentence of the lower court.

Respectfully submitted

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CERTIFICATE OF MAILING

Mailed two copies of the foregoing Brief of Respondent to Mr. W. Andrew McCullough, Attorney for Appellant, 930 South State Street, Suite 10, Orem, Utah 84057, this 17th day of June, 1981.


