

2010

Utah v. Campbell : Reply Brief

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Mark Shurtleff; Attorney General; Christopher Ballard; Assistant Attorney General; Counsel for Appellee.

Douglas J. Thompson; Utah County Public Defender Association; Counsel for Appellant.

Recommended Citation

Reply Brief, *Utah v. Campbell*, No. 20100840 (Utah Court of Appeals, 2010).
https://digitalcommons.law.byu.edu/byu_ca3/2558

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff / Appellee,

vs.

JAMES ERROL CAMPBELL,

Defendant / Appellant.

Case No: 20100840-CA

REPLY BRIEF OF APPELLANT

APPEAL FROM THE FOURTH DISTRICT COURT, UTAH COUNTY, STATE OF UTAH, FROM THE JUDGMENT, SENTENCE AND COMMITMENT ON ONE COUNT OF POSSESSION OF A CONTROLLED SUBSTANCE, A THIRD DEGREE FELONY, BEFORE THE HONORABLE JUDGE SAMUEL McVEY

CHRISTOPHER BALLARD (8497)

Assistant Attorney General

MARK SHURTLEFF (4666)

Utah Attorney General

160 East 300 South, Sixth Floor

P.O. Box 140854

Salt Lake City, UT 84114

Counsel for Appellee

DOUGLAS J. THOMPSON (12690)

Utah County Public Defender Association

Appeals Division

51 South University Ave., #206

Provo, UT 84601

Telephone: (801) 852-1070

Counsel for Appellant

ORAL ARGUMENT REQUESTED

FILED
UTAH APPELLATE COURTS

NOV 14 2011

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff / Appellee,

vs.

JAMES ERROL CAMPBELL,

Defendant / Appellant.

Case No: 20100840-CA

REPLY BRIEF OF APPELLANT

APPEAL FROM THE FOURTH DISTRICT COURT, UTAH COUNTY, STATE OF UTAH, FROM THE JUDGMENT, SENTENCE AND COMMITMENT ON ONE COUNT OF POSSESSION OF A CONTROLLED SUBSTANCE, A THIRD DEGREE FELONY, BEFORE THE HONORABLE JUDGE SAMUEL McVEY

CHRISTOPHER BALLARD (8497)

Assistant Attorney General

MARK SHURTLEFF (4666)

Utah Attorney General

160 East 300 South, Sixth Floor

P.O. Box 140854

Salt Lake City, UT 84114

Counsel for Appellee

DOUGLAS J. THOMPSON (12690)

Utah County Public Defender Association

Appeals Division

51 South University Ave., #206

Provo, UT 84601

Telephone: (801) 852-1070

Counsel for Appellant

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT

I. The trial court should have granted Campbell’s request to instruct the jury on possession of drug paraphernalia as a lesser included offense 1

 A. The elements of possession of a controlled substance and the elements of possession of drug paraphernalia overlap in this circumstance 1

 B. Based on the evidence at trial there was a rational basis for the jury to acquit Campbell of possession of a controlled substance and convict him of possession of drug paraphernalia. 3

CONCLUSION AND PRECISE RELIEF SOUGHT. 5

TABLE OF AUTHORITIES

STATUTORY PROVISIONS

UTAH CODE ANN. § 58-37a-5 4

CASES

State v. Baker, 671 P.2d 152 (Utah 1983) 1,2,3

State v. Williams, 2007 UT 98, 175 P.3d 1029 2,3

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff / Appellee,

vs.

JAMES ERROL CAMPBELL,

Defendant / Appellant.

Case No: 20100840-CA

REPLY BRIEF OF APPELLANT

ARGUMENT

I. THE TRIAL COURT SHOULD HAVE GRANTED CAMPBELL'S REQUEST TO INSTRUCT THE JURY ON POSSESSION OF DRUG PARAPHERNALIA AS LESSER INCLUDED OFFENSE

A. The elements of possession of a controlled substance and the elements of possession of drug paraphernalia overlap in this circumstance

The State begins its brief by claiming that Campbell has failed to meet the first prong of the *State v. Baker*, 671 P.2d 153 (Utah 1983), test because “none of the statutory elements overlap.” Appellee Brief at 12. The main thrust of the State’s position is that the object of the paraphernalia statute is paraphernalia and the object of the possession statute is controlled substance. This argument is overly simplistic and ignores the actual elements of the two statutes and the case law interpreting the relationship between the two.

The State claims that the “Utah Supreme Court has recognized that the elements of possession of a controlled substance and possession of drug paraphernalia do not overlap” in *State v. Williams*, 2007 UT 98, 175 P.3d 1029, however, a review of that case demonstrates the exact opposite, that the element of the two statutes, while not identical for *Shodel* purposes, do in fact overlap. Appellee Brief at 10.

In *Williams* the defendant claimed his charges for possession of a controlled subject should have been reduced to possession of drug paraphernalia after the police discovered a plastic bag with methamphetamine residue in his pocket. (These facts are very similar to the facts in this case, although, Campbell asserts that the facts in this case are even more compelling because of the scientific testimony about the extremely small amount of residue in his case). The defendant claimed he was entitled to the lesser charge “because the evidence could sustain a charge of either felony possession or misdemeanor paraphernalia possession...” *Williams*, 2007 UT 98, ¶ 3. The State was granted an interlocutory appeal on the magistrates bindover order and the Supreme Court reviewed this Court’s application of the *Shondel* doctrine.

That *Shondel* analysis does not apply here and the State’s reference to it is misplaced; as the Court noted “[c]learly, the elements of the two offenses are not identical.” *Id.*, at ¶ 6. The importance of *Williams* to this case, however, is the repeated discussion of overlap between the two statutes in an almost identical factual situation. The Court did conclude that “Utah’s felony possession statute and misdemeanor possession of paraphernalia statute do not *sufficiently* overlap to trigger the protections afforded by the *Shondel* doctrine.” *Williams*, at ¶ 23 (emphasis added). But that

conclusion contradicts the State's claim that the element of the two statutes do not overlap at all, as would be required fail the first prong of *Baker*. In fact the Court noted that "[b]ecause we conclude that the possession of a controlled substance and the possession of drug paraphernalia statutes do not overlap *fully*, the *Shondel* doctrine does not apply." *Id.*, at ¶ 19 (emphasis added). While the elements of the two statutes do not overlap to the degree that the two are identical, as required by *Shondel*, the two do overlap insofar as they both contain elements proved by proof of residue of a controlled substance.

Both this Court and the Utah Supreme Court have determined, in a case with very similar facts, the elements of possession of drug paraphernalia overlap with the elements of possession of a controlled substance (when the entirety of that substance is the residue found in an otherwise legal object) overlap. The State's argument, that these two statutes do not overlap, is at odds with the facts presented in this case and the very case law the State offers in support. Therefore, Campbell has met the first prong of *Baker*.

B. Based on the evidence presented at trial there was a rational basis for the jury to acquit Campbell of possession of a controlled substance and convict him of possession of drug paraphernalia

In its brief the State misconstrues the rational basis upon which the jury could have found to convict Campbell of paraphernalia and acquit him of possession. The State argues that the theory was not argued at trial and even if it were it would have been a admission of guilt on the possession charge rather than a basis to acquit. Appellee Brief at 13. Obviously, the theory was not argued at trial because the trial court prevented the

jury from being instructed on the theory. The question is not whether the defendant argued it to the jury, the question is whether the facts support a rational basis upon which to acquit on the charged offense and conviction on the included offense if the defendant were allowed to make the argument, and that question has been satisfied by the evidence presented at trial.

The rational basis upon which the jury could have convicted for paraphernalia and acquitted for possession is that, because of its small amount, Campbell did not knowingly possess heroin, but because Campbell possessed the cotton ball and it contained residue the jury could have reasonably believed Campbell intended to use the cotton to “introduce a controlled substance into the human body...” UTAH CODE ANN. § 57-37a-5(1).

The statement in Appellant’s opening brief that “the jury likely believed that Campbell used heroin at some earlier time” is not an admission to the charged offense, it is merely conjecture about what a reasonable jury may suspect where the State lacked any definite proof of knowing possession or use. Campbell does not now, nor has he ever admitted to possessing or using heroin at any time. The purpose of the statement is simply to show that the jury could have reasonably believed Campbell did not know he possessed heroin at any time the State presented evidence that he in fact did possess heroin yet still account for the possession of a cotton ball that was shown to have traces of heroin inside it.

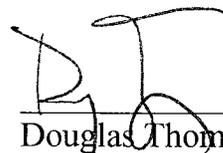
The State also claims that because the officer testified the cotton not only filters impurities but also filters “unliquified pieces of heroin”, therefore Campbell could not

have reasonably believed that the cotton ball did not contain heroin. Appellee's Brief at 15. This claim contradicts the testimony of the State's lab technician who testified that even her scientific equipment could not measure the amount of heroin in the cotton and that there were no solid material. R. 202: 119-20. If the lab technician testified the amount was so small (less than 100 milligrams or less than .003 ounces) that it could not be weighed surely the jury could have found it was not unreasonable that Campbell could not detect it. The jury could easily have believed, based on that testimony, that Campbell was unaware that there was any heroin in the cotton ball and that is a rational basis upon which to acquit Campbell of possession.

CONCLUSION AND PRECISE RELIEF SOUGHT

The trial court incorrectly refused to instruct the jury on the included offense of possession of drug paraphernalia where, under the circumstances, the two statutes clearly overlap, and there was a rational basis upon which the jury could have acquitted on the charged offense and convicted on the included offense. For that reason, Appellant asks this Court to reverse his conviction and remand to the trial court with an order to instruct the jury on the included offense of possession of drug paraphernalia.

RESPECTFULLY SUBMITTED this 14th day of November, 2011.



Douglas Thompson
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing brief were mailed postage paid to Christopher Ballard, Assistant Attorney General, Utah Attorney General, Appeals Division, P.O. Box 140854, Salt Lake City, UT 84114-0854 on this 14th day of November 2011.

A handwritten signature in black ink, appearing to be 'D. J.', is written above a horizontal line.