2000

Utah v. Kension : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH	:	
Plaintiff/Appellee,	:	Case No. 2000152-CA
v.	:	
JACOB LYMAN KENISON,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

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APPEAL FROM CONVICTIONS FOR TWO COUNTS OF CRIMINAL MISCHIEF, THIRD DEGREE FELONIES, IN VIOLATION OF UTAH CODE ANN. § 76-6-106 (1999), IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE WILLIAM H. BARRETT, PRESIDING.

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from convictions for two counts of criminal mischief, third degree felonies, in violation of Utah Code Ann. § 76-6-106 (1999), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable William H. Barrett, presiding. This Court has jurisdiction of this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(e) (1996).

STATEMENT OF THE ISSUE ON APPEAL AND STANDARD OF APPELLATE REVIEW

The sole issue in this case is:

Did the trial court correctly deny defendant's motion to correct an illegal sentence under Utah Code Ann. § 76-6-106 (1999)? A trial court's interpretation of a statute is reviewed for correctness with no deference accorded to the trial court's conclusions of law. *State v. Brooks*, 908 P.2d 856, 859 (Utah 1995). "This court will 'sustain a trial

court's evidentiary ruling on any available ground, even though it may be one not advanced below.'" *State v. Pearson*, 943 P.2d 1347, 1353 (Utah 1997) (citation omitted).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The recent reenactments to Utah Code Ann. § 76-6-106 (1999), determinative of the issue in this case, are attached at Addendum A.

STATEMENT OF THE CASE

Defendant, Jacob Lyman Kenison, was charged with two counts of criminal mischief (Counts I and II), two counts of burglary (Counts III and IV), and two counts of release of fur-bearing animals (Counts V and VI) [R. 14-16]. He pled guilty to Counts I and II, and the remaining charges were dismissed [R. 35-32]. The trial court sentenced defendant to concurrent statutory zero-to-five year terms in the Utah State Prison [R. 44-46]. The court suspended defendant's commitment to prison and instead ordered defendant confined and imprisoned in the Salt Lake County Jail for nine months, after which defendant was to be placed on probation for thirty-six months [R. 5, 44-46]. When defendant completed the required credits for his high school diploma, the court ordered his release from jail [R. 7, 65]. However, when defendant violated the reporting requirements of his probation, it was revoked and he was committed to the Utah State Prison [R. 7, 79-80]. Defendant filed a motion to correct an illegal sentence [R. 83-87]. The motion was denied [R. 135-6]. Defendant timely appealed to this Court [R. 137].

STATEMENT OF THE FACTS

The Factual Background - Defendant Committed Criminal Mischief

On or about June 22, 1996, defendant trespassed onto the Beckstead Mink farm, belonging to Lee Beckstead and Craig Thompson, and released mink [R. 15, 36]. Also, on or about July 17, 1996, defendant trespassed onto the Holt Mink farm, belonging to Ryan Holt, and released mink [R. 16, 36]. The two farms sustained $200,000 in damage from the release of the mink and from vandalism to the farm [R. 16].

The Procedural Background - The Relevant Portion of the Statute, Applicable Both When Defendant Committed Criminal Mischief And When He Moved to Correct His Sentence, Made the Offense a Third Degree Felony.

Prior to May 4, 1998, and in force at the time of the offense, Utah Code Ann. § 76-6-106 (1)(c) (Supp. 1997), provided that "[a] person commits criminal mischief if the person . . . intentionally damages, defaces, or destroys the property of another." Under subsection (2)(c)(i) of the pre-1998 statute, a violation of subsection (1)(c) was a "felony of the second degree if the actor's conduct causes or is intended to cause pecuniary loss equal to or in excess of $5,000 in value." Under subsection (2)(c)(ii), a violation of subsection (1)(c) was a "felony of the third degree if [it] causes or is intended to cause pecuniary loss equal to or in excess of $1,000 but is less than $5,000 in value."

Effective May 4, 1998, section 76-6-106 was amended at subsection (2)(b) to read, "[a] violation of Subsection 1(b) **or (c)** is a class A misdemeanor" (emphasis added).

On May 11, 1998, defendant was charged in a six count information with two

counts of criminal mischief, both second degree felonies, in violation of section 76-6-106 [R. 14-16]. He was also charged with two counts of burglary and two counts of release of fur-bearing animals [R. 15]. The information, in Count I (criminal mischief), stated that defendant "intentionally damaged, defaced, or destroyed the property of Craig Thompson and Lee Beckstead, causing a pecuniary loss . . . equal to or in excess of $5,000 in value" [R. 14]. Count II (criminal mischief) stated that defendant "intentionally damaged, defaced, or destroyed the property of Ryan Holt, causing a pecuniary loss . . . equal to or in excess of $5,000 in value." [R. 14].

On October 28, 1998, defendant pled guilty to amended Counts I and II, as third degree felonies [R. 35]. The information was accordingly amended to read "causing a pecuniary loss . . . in excess of $1,000 but less than $5000." [R. 14]. The State agreed to dismiss the other charges [R. 38].

On December 7, 1998, defendant was ordered to serve not more than five years in the Utah State Prison on each Count. The court suspended defendant's commitment to the Prison and instead ordered defendant confined and imprisoned in the Salt Lake County Jail for nine months, after which defendant was to be placed on probation for thirty-six months [R. 5, 44-46].

Effective May 3, 1999, the legislature excised the words "or (c)" from section 76-6-106 (2)(b), thereby restoring the statute to precisely the same meaning it had on the date of the offense.

On January 18, 2000, the court found that defendant had violated the terms of his probation and re-sentenced him to an indeterminate term not to exceed five years, on both counts [R. 79-80].

On January 20, 2000, defendant submitted a motion to correct an illegal sentence [R. 83]. Defendant asserted that "at the time the defendant was charged, the legislature had made the crime of criminal mischief a misdemeanor . . . regardless of value," and that based on the rule of lenity "his . . . convictions [should be] recorded as Class A Misdemeanors and the sentences imposed by this Court should be amended." [R. 83-87].

On February 9, 2000, almost a year after the criminal mischief statute had been restored to its pre-offense form, the court denied defendant's motion [R. 135-36].

SUMMARY OF ARGUMENT

Defendant is not entitled to the benefit of the rule of lenity and to have his sentence for criminal mischief imposed as a class A misdemeanor rather than a third degree felony. Based on the reasonable assumption that statutory amendments reflect the legislature's deliberate intent, the rule justly directs a trial court to impose a lesser penalty if the amendment has become effective before a defendant is sentenced. However, the rule of lenity is based on the legislature's deliberate decision to reduce the penalty of an offense.

The legislature apparently did reduce the penalty associated with the form of criminal mischief defendant committed from a third degree felony to a class A misdemeanor in 1998, before he was sentenced. However, prior to defendant's moving to

correct his sentence, the legislature reamended the criminal mischief statute in 1999, clarifying that the offense was a second degree felony. In so doing, the legislature expressly acknowledged that the 1998 amendment was a typographic computer error and that the legislature never intended to reduce the type of criminal mischief defendant committed to a class A misdemeanor. Because the legislature never intended the apparent reduction in penalty, the rule of lenity does not apply in the unique circumstances of this case. Consequently, allowing defendant to receive a lesser penalty for an offense the legislature deemed a third degree felony, both at the time he committed the offense and when he moved the court to correct his sentence, would result in an unwarranted windfall for defendant.

ARGUMENT

BECAUSE THE LEGISLATURE RESTORED THE STATUTORY PENALTY FOR CRIMINAL MISCHIEF TO A THIRD DEGREE FELONY PRIOR TO THE TIME DEFENDANT MOVED TO CORRECT HIS SENTENCE, THE RULE OF LENITY DOES NOT APPLY TO HIM

Defendant claims that because at the time he was charged and sentenced criminal mischief was a class A misdemeanor, rather than a third degree felony as the statute formerly provided, he should have received the lesser sentence under the rule of lenity. Aplt. Br. 5-11.

This argument would be unassailable if the legislature had not expressly recognized that reducing the particular form of criminal mischief applicable to defendant

to a class A misdemeanor was simply a computer error. In consequence, before defendant moved to correct the illegal sentence, the legislature cured the error by reenacting the statutory language precisely as it had been before defendant was charged and sentenced. Because the progressive policy underlying the rule of lenity is founded on the reasonable assumption that statutes reflect the *deliberate intent* of the legislature, that rule has no application in the circumstances of this case. Therefore, the imposition of a zero-to-five term for defendant's plea to a third degree felony should be upheld.

A. The Rule of Lenity, Founded on the Legislature's *Deliberate* Action, Does Not Apply Because the 1998 Reduction in Penalty For Criminal Mischief Statute was Merely an Inadvertent Error.

1. The Rule of Lenity is Generally Applicable Because Legislative Enactments and Naturally Assumed to be Conscious and Deliberate.

Relying on the rule of lenity, defendant argues that he was entitled to a class A misdemeanor sentence apparently in effect at the time of sentencing, rather than the third degree felony sentence in effect at the time he committed criminal mischief. Aplt's Br. at 5-11. As defendant notes, *see* Aplt's Br. at 6-11, Utah's appellate courts have repeatedly applied the rule of lenity, recognizing that, in appropriate circumstances, criminal defendants "'are entitled to the benefit of the lesser penalty afforded by an amended statute made effective prior to their sentencing.'" *State v. Patience*, 944 P.2d 381, 385 (Utah App. 1997). Explaining the rationale for the rule, this Court stated:

> A legislative mitigation of the penalty for a particular crime represents a ***legislative judgment*** that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law. Nothing is to be

> gained by imposing the more severe penalty after such a pronouncement; the excess in punishment can, by hypothesis, serve no purpose other than to satisfy a desire for vengeance.

Id. (quoting *Belt v. Turner*, 25 Utah 2d 230, 279 P.2d 791, 793, *aff'd on reh'g*, 25 Utah 380, 483 P.2d 45 (1971)) (emphasis added). Thus, the most important policy behind the rule "'is that it is the prerogative of the legislature, expressing ***the will*** of the people, to fix the penalties for crimes; and the courts should give effect to the enactment and the effective date thereof as so declared.'" *Id.* (quoting *State v. Tapp*, 26 Utah 2d 392, 490 P.2d 333, 336 (Utah 1971)) (emphasis added). Accordingly, in both *Patience* and *Tapp*, in which the penalties for the offenses at the time of commission were reduced prior to the defendants' sentencing, the appellate courts found that the lesser punishments should have been imposed. *See* Aplt's Br. at 9-11 (citing *Tapp*, 490 P.2d at 135-36; *Patience*, 944 P.2d at 388).

However, decisions applying the rule of lenity are based on the natural and reasonable assumption that legislative enactments are the fruit of conscious and deliberate consideration. The above-quoted language from *Patience*, 944 P.2d at 385 ("A legislative mitigation of the penalty for a particular crime represents a legislative judgment . . . ."), and *Tapp*, 490 P.2d at 336 ("expressing the will of the people"), supports this obvious assumption.[1] Other decisions, relied on by both *Patience* and *Tapp*,

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[1] *See* WEBSTER'S NEW WORLD DICTIONARY 1672 (College Ed. 1957) (defining "will" as "the power of conscious and deliberate action or choice").

are even more explicit in recognizing the dependency of the rule on ***deliberate*** legislative action. In *State v. Yates*, 918 P.2d 136 (Utah App. 1996), this Court repeatedly acknowledged the purposiveness of legislative action in applying the rule of lenity:

> "A new policy ***having been adopted*** by the legislature concerning the punishment for the offense we are here concerned with . . . should inure to the defendant's benefit even though the offense had been committed . . . prior to the amendatory legislation." [Emphasis added.]
> . . . .
> "***The rationale underlying the rule*** . . . was set forth in *Belt*. . . .
> Second, ***if the legislature finds*** a reduction in the penalty for a given crime necessary and appropriate to meet the goals of deterrence, rehabilitation, and removal from society, then the lesser penalty should be granted to all defendants sentenced subsequent to modification." [Emphasis added.]

Id. at 138-39 (quoting *Belt*, 479 P.2d at 792-93).[2] The Court in *Yates*, also stated:

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[2] Defendant also argues that his claim is supported by Utah Code Ann. § 76-1-103 (1999). Aplt's Br. at 9. That section states:

> (1) The provisions of this code shall govern the construction of, the punishment for, and defenses against any offense defined in this code or, except where otherwise specifically provided or the context otherwise requires, any offense defined outside this code; provided such offense was committed after the effective date of this code.
> (2) Any offense committed prior to the effective date of this code shall be governed by the law, statutory and non-statutory, existing at the time of commission thereof, except that a defense or limitation on punishment available under this code shall be available to any defendant tried or retried after the effective date. An offense under the laws of this state shall be deemed to have been committed prior to the effective date of this act if any of the elements of the offense occurred prior thereto.

In support, defendant relies solely on *State v. Saxton*, 30 Utah 456, 519 P.2d 1340 (1974). However, in the Utah Supreme Court in *Saxton* applied section 76-1-103 because the defendant correctly recognized that the pre-Code penalty for his offense, a third degree felony, had been superceded by the 1973 Code, which made his offense a

> "In the case of the . . . statute involved here, the ***legislature decided*** it was time to revise the . . . law. ***Legislative history reveals the amendments were necessary*** . . . . Thus, ***the legislature found*** a reduction in penalties appropriate, and the trial court should have sentenced [defendant] pursuant to that ***legislative mandate***." [Emphasis added.]

Id. at 139 (citing tape of House Floor Debates). *See also Belt*, 479 P.2d at 792 ("As to a mitigation of penalties, then, it is safe to assume, as the modern rule does, that it was ***the legislative design*** that the lighter penalty should be imposed in all cases that subsequently reach the courts.") (emphasis added). In *In re Estrada*, 408 P.2d 948 (Cal. 1965), the California Supreme Court stated:

> The problem . . . is . . . trying to ascertain the ***legislative intent*** did [sic] the [l]egislature intend the old or new statute to apply?
>
> . . . When the Legislature amends a statute so as to lessen the punishment it has ***obviously expressly determined*** that its former penalty was too severe and that a lighter punishment is proper . . . . ***It is an inevitable inference that the Legislature must have intended that the new statute imposing the lighter penalty . . . should apply.*** [Emphasis added.]

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class A misdemeanor at the time of sentencing. *Id.* at 1342. *See* Utah Code Ann. § 76-1-102 (1999) (the effective date of the Utah Criminal Code is July 1, 1973). Since defendant in this case did not commit the offense prior to the effective date of the Code, section 76-1-103 is irrelevant here. The State recognizes that this Court does apply section 76-1-103 in support of its application of the rule of lenity in *Yates*. *See Yates*, 918 P.2d at 138. No post-1973 case involving the rule of lenity, other than *Yates*, has applied section 76-1-103. Moreoever, in view of the plain language of section 76-1-103, the State contends that section 76-1-103 is not applicable in such a case. Moreover, even if section 76-1-103 were relevant, *Saxton*'s application of the statute is still rooted in the rationale of *Belt* and *Tapp*. *Id.* at 1342 ("The 'non-statutory' law 'existing at the time of commission' [referred to in section 76-1-103(2)] of this crime included the rule [of *Belt* and *Tapp*] stated above: that if the penalty for a crime is reduced before sentence, the defendant is entitled to the lesser penalty.").

Id. at 951 (cited with approval in *Belt*, 479 P.2d at 793 n.1; *Tapp*, 490 P.2d at 336 n.3, 5). In sum, the Utah rule of lenity is plainly based only on the assumption that changes in the law reflect conscious legislative action.

2. *Because the Floor Debates on the Amendments to Section 76-6-106 Show that the Legislature Never Intended to Reduce the Form of Criminal Mischief Committed by Defendant to a Class A Misdemeanor, Defendant Should Not Receive the Benefit of the Rule of Lenity.*

Application of the rule in this case would undermine the very rationale behind it. Defendant here committed criminal mischief in June and July of 1996. At that time, Utah Code Ann. § 76-6-106 (1)(c) (Supp. 1997), provided that "[a] person commits criminal mischief if the person . . . intentionally damages, defaces, or destroys the property of another" (pre-1998 statute attached at Addendum A).[3] Under subsection (2)(c)(ii), a violation of subsection (1)(c) was a "felony of the third degree if [it] causes or is intended to cause pecuniary loss equal to or in excess of $1,000 but is less than $5,000 in value."

Effective May 4, 1998, section 76-6-106, was amended at subsection (2)(b) to read "[a] violation of Subsection 1(b) **or (c)** is a class A misdemeanor" (emphasis added)

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[3] Specifically, the pre-1998 statute and all of its successor reenactments identify four general ways in which criminal mischief may be committed at subsections (1)(a) (destruction of property to defraud an insurer), (1)(b) (tampering with property which thereby endangers human life or impairs public utility service), ***(1)(c) (intentional damage, defacement, or destruction of another's property)***, and (1)(d) (shooting at a cars, boats, trains, etc.). Subsection (2)(a) provides that a violation of subsection (1)(a) is a third degree felony; subsection (2)(b) provides that a violation of subsection (1)(b) is a class A misdemeanor. Thereafter, subsection (2)(c) provides: ***"Any other violation of this section*** is a [second or third degree felony, or a class A or B misdemeanor, depending on the amount of pecuniary loss]." [Emphasis added.]

(attached at Addendum A).[4] The amendment, along with other changes in the statute, was contained in House Bill 49. The second and third reading of the bill show that the changes to the existing law were not discussed (Transcript of Floor Debates, attached at Addendum B).

On May 11, 1998, defendant was charged with, among other offenses, two counts of criminal mischief, "second degree felonies," in violation of section 76-6-106, for having "intentionally damaged, defaced, or destroyed the property [of others] . . . ." [R. 14-16].

On October 28, 1998, defendant pled guilty to the two counts of criminal mischief, reduced to third degree felonies [R. 35]. Thus, all parties and the trial court agreed to a

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[4] Thus, under amended subsection (2)(b), all violations of subsection (1)(c) were penalized as class A misdemeanors and were no longer related to the extent of pecuniary damage caused by the actor. The hearing on defendant's motion to correct an illegal sentence reveals that the trial court considered the pecuniary damage caused by defendant in denying the motion. In contravention of the Rules of Appellate Procedure, defendant has failed to make either the videotape or a transcript of the hearing part of the record on appeal. Rule 11, Utah Rules of Appellate Procedure, provides:

> If the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion. Neither the court nor the appellee is obligated to correct appellant's deficiencies in providing the relevant portions of the transcript.

Utah R. App. P. 11(e)(2). However, because the State urges a different reason for affirming defendant's sentence, defendant's failure to bring up the record is not crucial to his appeal. *See Pearson*, 943 P.2d at 1353 ("This court will 'sustain a trial court's evidentiary ruling on any available ground, even though it may be one not advanced below.'" (quoting *State v. Rimmasch*, 775 P.2d 388, 400 (Utah 1989)).

plea, evidently unaware of the 1998 amendment. On December 7, 1998, in accord with the plea, the court sentenced defendant to a zero-to-five year term of imprisonment, part of which was stayed pursuant to a probation order [R. 5, 44-46].

However, effective May 3, 1999, the legislature excised the words "or (c)" from section 76-6-106 (2)(b), thereby restoring the statute to precisely the same meaning it had on the date of the offense (current statute at Addendum A). Thus, criminal mischief statute again penalized "intentionally damag[ing], defac[ing], or destroy[ing] the property of another" by reference to the pecuniary damage done by the actor. This again made "intentionally damag[ing], defac[ing], or destroy[ing] the property of another" a third degree felony, if it caused or was intended to cause pecuniary loss between $1,000 and $5,000.

Unlike the 1998 amendment, the floor debates to the 1999 amendment plainly reveal that adding "or (c)" to subsection (2)(b), presumably making defendant's form of criminal mischief a class A misdemeanor, was a simple typographic error. The 1999 amendment was contained in House Bill 15 (Transcript of Floor Debates attached at Addendum C). On the second reading of the bill, its sponsor, Bryan Holladay, stated:

> This is a very simple correction of a bill we worked on last year. No one knows for sure [inaudible] bill was placed back in for writing. Apparently there was a change [inaudible] on page two, line twenty-eight, violation of subsection (1)(b), and then "or (c)" was put in there. That takes that away from being a more serious offense and being able to assess the dollar amount shown on the handout that I've given you. We don't really know where this took place and so we think we can effectively blame the computers. ***It was never designed this way and the original law was not***

set up this way. [Emphasis added.]

53rd Leg., H.B. 15, second reading, Jan. 19, 1999.

The third reading of the bill again acknowledges the inadvertent, typographic mistake in the 1998 amendment and its correction in the 1999 amendment (attached at Addendum C).

On January 20, 2000, almost a year after the legislature clarified that defendant's offenses were third degree felonies, defendant submitted a motion to correct an illegal sentence, which the trial court denied [R. 83, 135-36].

Thus, unlike the typical case in which a statutory amendment actually represents the intent of the legislature, the 1998 amendment is plainly an anomalous mistake. Moreover, it was a mistake at the time of defendant's sentencing, even though proof of that fact may have been difficult at that time. However, at this point in time, there is no question that the 1998 amendment was a mistake, and defendant should not be permitted to take advantage of a judicial rule that is plainly based on a rationale that has no application in the circumstances of this case.

The rapid correction of a statute admittedly contrary to legislative intent is so unusual that the State has been unable to find any case with similar facts. However, in an analogous situation the United States Supreme Court recognized that allowing a defendant to take advantage of law that no longer applied to his case would result in an unwarranted "windfall." *See Lockhart v. Fretwell*, 506 U.S. 364, 113 S. Ct. 838, 841

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August 14, 2000

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UTAH COURT OF APPEALS
450 South State Street
Salt Lake City, UT 84111

Re: State of Utah v. Jacob Lyman Kenison
Case No. 20000152-CA

Dear Ms. Stagg:

Enclosed are seven copies and one original of page 15 of the Brief of Appellee in the above-mentioned case. Page 15 was inadvertantly left out of the brief when it was copied. Please distribute the attached pages as necessary.

I apologize for any inconvenience this may have caused you. Please contact me with any questions you may have.

Sincerely,

KENNETH A. BRONSTON
Assistant Attorney General

KAB:dej

Attachments

(1993).

In *Fretwell* , the defendant was convicted of capital murder and sentenced to death based on the jury's finding the aggravating factor that the murder, which occurred during a robbery, was committed for pecuniary gain. *Id.* 113 S. Ct. at 841. After failing in his direct appeal and state post-conviction proceedings, the defendant claimed on federal habeas corpus that his counsel was ineffective in failing to raise an objection under then-existing precedent which prohibited the use of an aggravating factor which duplicated an element of the underlying offense, and the federal court of appeals upheld the reversal of his sentence. *Id.* at 841.

The Supreme Court reversed the court of appeals, disregarding its finding that if trial counsel made the objection the trial court would have sustained it and the jury would not have sentenced the defendant to death. *Id.* at 842. Considering the prejudice prong of defendant's ineffective assistance claim under *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2064, (1984), the Court held a defendant must show that his counsel's errors are so serious as to deprive him of a trial whose result is fair or reliable, i.e., deprivation of a substantive or procedural right, not merely that the outcome would have been different. *Id.* The Court held that the defendant was not deprived of such right because at the time the federal court of appeals heard his petition, the precedent forming the basis of his ineffective assistance claim had been overruled. *Id.* at 842-44. Most significantly, the Court rejected the defendant's claim that "prejudice," as opposed to

deficient performance, should be determined at the time of trial, *see id.* at 844, holding instead that prejudice is established at the time at which the ineffective assistance of counsel claim was heard. *Id.* at 845 (O'Connor, J., concurring) ("Specifically, today we hold that the court making the prejudice determination may not consider the effect of an objection it knows to be wholly meritless under current governing law, even if the objection might have been considered meritorious at the time of its omission."). Therefore, where the result in the sentencing proceeding was not unreliable or fundamentally unfair as a result of a failure to make an objection, granting a reversal of the sentence would result in a "windfall" to which the defendant was not entitled. *Id.* at 841, 843.

Similarly, a defendant's notice to a trial court that a statute reducing the penalty of his offense at the time of sentencing should result in his being sentenced under the more lenient statute. *See Belt*, 479 P.2d at 793. However, when the objection, i.e., the motion to correct an illegal sentence, is made under a statute that no longer applies and is in direct contradiction to the intent of the current statute, defendant is not prejudiced when that motion is denied. Rather, defendant would reap a "windfall" if he received the benefit of a mistaken law under a rule whose rationale did not apply to his case.

The rule of lenity is a matter of mercy, not a matter of right accorded by statute.[5] *See Tapp*, 490 P.2d at 336 ("[A fundamental principle engrained in the law] is that to

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[5] *See* discussion of inapplicability of section 76-1-103, *supra* note 2

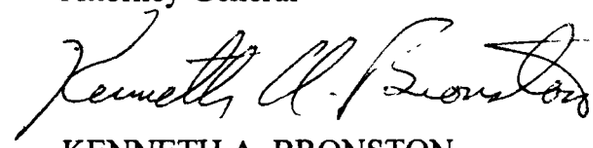
insist on the prior existing harsher penalty is a refusal to accept and keep abreast of the process which has been continuing over the years of ameliorating and modifying the treatment of antisocial behavior by changing the emphasis from vengeance and punishment to treatment and rehabilitation.") (footnotes omitted). In accord with the analysis applied in *Fretwell*, and given that the circumstances of defendant's case do not naturally appeal to a reasonable person's sense of justice and mercy, this Court should find that the rule of lenity does not apply in the unique circumstances of this case and that the trial court correctly denied defendant's motion to correct an illegal sentence.

CONCLUSION

Based on the foregoing discussion, the State respectfully requests that defendant's conviction be affirmed.

RESPECTFULLY SUBMITTED this 10th day of July, 2000.

JAN GRAHAM
Attorney General



KENNETH A. BRONSTON
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to Walter F. Bugden and Tara L. Isaacson, Bugden, Collins & Morton, attorneys for defendant, 623 East 2100 South, Salt Lake City, Utah 84106, this 10th day of July, 2000.

Kenneth A. Brereton

ADDENDA

ADDENDUM A

76-6-106. Criminal mischief.

(1) A person commits criminal mischief if the person:

(a) under circumstances not amounting to arson, damages or destroys property with the intention of defrauding an insurer;

(b) intentionally and unlawfully tampers with the property of another and as a result:

(i) recklessly endangers:

(A) human life; or

(B) human health or safety; or

(ii) recklessly causes or threatens a substantial interruption or impairment of:

(A) any public utility service; or

(B) any service or facility that provides communication with any public, private, or volunteer entity whose purpose is to respond to fire, police, or medical emergencies;

(c) intentionally damages, defaces, or destroys the property of another; or

(d) recklessly or willfully shoots or propels a missile or other object at or against a motor vehicle, bus, airplane, boat, locomotive, train, railway car, or caboose, whether moving or standing.

(2) (a) A violation of Subsection (1)(a) is a felony of the third degree.

(b) A violation of Subsection (1)(b) is a class A misdemeanor, except that a violation of Subsection (1)(b)(i)(B) is a class B misdemeanor.

(c) Any other violation of this section is a:

(i) felony of the second degree if the actor's conduct causes or is intended to cause pecuniary loss equal to or in excess of $5,000 in value;

(ii) felony of the third degree if the actor's conduct causes or is intended to cause pecuniary loss equal to or in excess of $1,000 but is less than $5,000 in value;

(iii) class A misdemeanor if the actor's conduct causes or is intended to cause pecuniary loss equal to or in excess of $300 but is less than $1,000 in value; and

(iv) class B misdemeanor if the actor's conduct causes or is intended to cause pecuniary loss less than $300 in value.

(3) In determining the value of damages under this section, or for computer crimes under Section 76-6-703, the value of any computer, computer network, computer property, computer services, software, or data shall include the measurable value of the loss of use of the items and the measurable cost to replace or restore the items.

CHAPTER 142
H. B. 264
Passed February 27, 1996
Approved March 12, 1996
Effective April 29, 1996

GRAFFITI AMENDMENTS

Sponsor: Ron Bigelow

AN ACT RELATING TO THE CRIMINAL CODE; CREATING A NEW SECTION ON GRAFFITI; INCLUDING LIABILITY FOR REMOVAL COSTS OF GRAFFITI; AND PROVIDING FOR THE VOLUNTARY REMOVAL OF GRAFFITI BY THE RESPONSIBLE PERSON.

This act affects sections of Utah Code Annotated 1953 as follows:

AMENDS:
76-6-106, as last amended by Chapter 291, Laws of Utah 1995
76-6-206, as last amended by Chapter 14, Laws of Utah 1992
78-11-20, as last amended by Chapter 1, Laws of Utah 1996
78-11-20.7, as last amended by Chapter 1, Laws of Utah 1996

ENACTS:
76-6-107, Utah Code Annotated 1953

Be it enacted by the Legislature of the state of Utah:

Section 1. Section 76-6-106 is amended to read:

76-6-106. Criminal mischief.

(1) A person commits criminal mischief if the person:

(a) under circumstances not amounting to arson, damages or destroys property with the intention of defrauding an insurer;

(b) intentionally and unlawfully tampers with the property of another and thereby:

(i) recklessly endangers human life; or

(ii) recklessly causes or threatens a substantial interruption or impairment of any public utility service;

(c) intentionally damages, defaces, or destroys the property of another[~~, including the use of graffiti as defined in Subsection 78-11-20(2)~~]; or

(d) recklessly or willfully shoots or propels a missile or other object at or against a motor vehicle, bus, airplane, boat, locomotive, train, railway car, or caboose, whether moving or standing.

(2)(a) A violation of Subsection (1)(a) is a felony of the third degree.

(b) A violation of Subsection (1)(b) is a class A misdemeanor.

(c) Any other violation of this section is a:

(i) felony of the second degree if the actor's conduct causes or is intended to cause pecuniary loss equal to or in excess of $5,000 in value;

(ii) felony of the third degree if the actor's conduct causes or is intended to cause pecuniary loss equal to or in excess of $1,000 but is less than $5,000 in value;

(iii) class A misdemeanor if the actor's conduct causes or is intended to cause pecuniary loss equal to or in excess of $300 but is less than $1,000 in value; and

(iv) class B misdemeanor if the actor's conduct causes or is intended to cause pecuniary loss less than $300 in value.

Section 2. Section 76-6-107 is enacted to read:

76-6-107. Graffiti defined — Penalties — Removal costs — Reimbursement liability.

(1) "Graffiti" means any form of unauthorized printing, writing, spraying, scratching, affixing, or inscribing on the property of another regardless of the content or nature of the material used in the commission of the act.

(2) "Victim" means the person or entity whose property was defaced by the graffiti and bears the expense for its removal.

(3) Graffiti is a:

(a) second degree felony if the damage caused is in excess of $5,000;

(b) third degree felony if the damage caused is in excess of $1,000;

(c) class A misdemeanor if the damage caused is equal to or in excess of $300; and

(d) class B misdemeanor if the damage caused is less than $300.

(4) Damages under Subsection (3) include removal costs, repair costs, or replacement costs, whichever is less.

(5) The court, upon conviction or adjudication, shall order restitution to the victim in the amount of removal, repair, or replacement costs.

(6) An additional amount of $1,000 in restitution shall be added to removal costs if the graffiti is positioned on an overpass or an underpass, requires that traffic be interfered with in order to remove it, or the entity responsible for the area in which the clean-up is to take place must provide assistance in order for the removal to take place safely.

(7) A person who voluntarily and at his own expense, removes graffiti for which he is responsible may be credited for the removal costs against restitution ordered by a court.

Section 3. Section 76-6-206 is amended to read:

76-6-206. Criminal trespass.

(1) For purposes of this section "enter" means intrusion of the entire body.

(2) A person is guilty of criminal trespass if, under circumstances not amounting to burglary as defined in Section 76-6-202, 76-6-203, or 76-6-204:

CHAPTER 25
H. B. 49
Passed February 11, 1998
Approved March 2, 1998
Effective May 4, 1998

EMERGENCY SERVICES AMENDMENTS

Sponsor: Bryan D. Holladay

AN ACT RELATING TO THE CRIMINAL CODE; AMENDING THE OFFENSES OF CRIMINAL MISCHIEF AND EMERGENCY TELEPHONE ABUSE AS THEY RELATE TO REPORTING OF EMERGENCIES; CREATING THE OFFENSE OF DAMAGING OR INTERRUPTING A COMMUNICATION DEVICE USED TO REPORT AN EMERGENCY; AND PROVIDING CRIMINAL PENALTIES FOR THE OFFENSE.

This act affects sections of Utah Code Annotated 1953 as follows:

AMENDS:
76-6-106, as last amended by Chapter 300, Laws of Utah 1997
76-9-202, as enacted by Chapter 196, Laws of Utah 1973

ENACTS:
76-6-108, Utah Code Annotated 1953

Be it enacted by the Legislature of the state of Utah:

Section 1. Section 76-6-106 is amended to read:

76-6-106. Criminal mischief.

(1) A person commits criminal mischief if the person:

(a) under circumstances not amounting to arson, damages or destroys property with the intention of defrauding an insurer;

(b) intentionally and unlawfully tampers with the property of another and ~~[thereby: (i)]~~ as a result:

(i) recklessly endangers:

(A) human life; or

(B) human health or safety; or

(ii) recklessly causes or threatens a substantial interruption or impairment of:

(A) any public utility service; or

(B) any service or facility that provides communication with any public, private, or volunteer entity whose purpose is to respond to fire, police, or medical emergencies;

(c) intentionally damages, defaces, or destroys the property of another; or

(d) recklessly or willfully shoots or propels a missile or other object at or against a motor vehicle, bus, airplane, boat, locomotive, train, railway car, or caboose, whether moving or standing.

(2) (a) A violation of Subsection (1)(a) is a felony of the third degree.

(b) A violation of Subsection (1)(b) or (c) is a class A misdemeanor, except that a violation of Subsection (1)(b)(i)(B) is a class B misdemeanor.

(c) Any other violation of this section is a:

(i) felony of the second degree if the actor's conduct causes or is intended to cause pecuniary loss equal to or in excess of $5,000 in value;

(ii) felony of the third degree if the actor's conduct causes or is intended to cause pecuniary loss equal to or in excess of $1,000 but is less than $5,000 in value;

(iii) class A misdemeanor if the actor's conduct causes or is intended to cause pecuniary loss equal to or in excess of $300 but is less than $1,000 in value; and

(iv) class B misdemeanor if the actor's conduct causes or is intended to cause pecuniary loss less than $300 in value.

(3) In determining the value of damages under this section, or for computer crimes under Section 76-6-703, the value of any computer, computer network, computer property, computer services, software, or data shall include the measurable value of the loss of use of such items and the measurable cost to replace or restore such items.

Section 2. Section 76-6-108 is enacted to read:

76-6-108. Damage to or interruption of a communication device.

(1) As used in this section:

(a) "Communication device" means any device, including a telephone, cellular telephone, computer, or radio, which may be used in an attempt to summon police, fire, medical, or other emergency aid.

(b) "Emergency" means any situation in which:

(i) property or human health or safety is in jeopardy; and

(ii) the prompt summoning of aid is essential to the preservation of the property or human safety or health.

(2) A person is guilty of damage to or interruption of a communication device if the actor attempts to prohibit or interrupt, or prohibits or interrupts, another person's use of communication equipment when the other person is attempting to summon emergency aid or has communicated a desire to summon emergency aid, and in the process the actor:

(a) uses force, intimidation, or any other form of violence;

(b) destroys, disables, or damages communication equipment; or

(c) commits any other act in an attempt to prohibit or interrupt the person's use of a communication device to summon emergency aid.

CHAPTER 31
H. B. 15
Passed February 17, 1999
Approved March 15, 1999
Effective May 3, 1999

CRIMINAL MISCHIEF AMENDMENTS

Sponsor: Bryan D. Holladay

AN ACT RELATING TO THE CRIMINAL CODE; AMENDING THE PENALTY PROVISIONS REGARDING CRIMINAL MISCHIEF.

This act affects sections of Utah Code Annotated 1953 as follows:

AMENDS:
76-6-106, as last amended by Chapter 25, Laws of Utah 1998

Be it enacted by the Legislature of the state of Utah:

Section 1. Section 76-6-106 is amended to read:

76-6-106. Criminal mischief.

(1) A person commits criminal mischief if the person:

(a) under circumstances not amounting to arson, damages or destroys property with the intention of defrauding an insurer;

(b) intentionally and unlawfully tampers with the property of another and as a result:

(i) recklessly endangers:

(A) human life; or

(B) human health or safety; or

(ii) recklessly causes or threatens a substantial interruption or impairment of:

(A) any public utility service; or

(B) any service or facility that provides communication with any public, private, or volunteer entity whose purpose is to respond to fire, police, or medical emergencies;

(c) intentionally damages, defaces, or destroys the property of another; or

(d) recklessly or willfully shoots or propels a missile or other object at or against a motor vehicle, bus, airplane, boat, locomotive, train, railway car, or caboose, whether moving or standing.

(2) (a) A violation of Subsection (1)(a) is a felony of the third degree.

(b) A violation of Subsection (1)(b) [~~or (c)~~] is a class A misdemeanor, except that a violation of Subsection (1)(b)(i)(B) is a class B misdemeanor.

(c) Any other violation of this section is a:

(i) felony of the second degree if the actor's conduct causes or is intended to cause pecuniary loss equal to or in excess of $5,000 in value;

(ii) felony of the third degree if the actor's conduct causes or is intended to cause pecuniary loss equal to or in excess of $1,000 but is less than $5,000 in value;

(iii) class A misdemeanor if the actor's conduct causes or is intended to cause pecuniary loss equal to or in excess of $300 but is less than $1,000 in value; and

(iv) class B misdemeanor if the actor's conduct causes or is intended to cause pecuniary loss less than $300 in value.

(3) In determining the value of damages under this section, or for computer crimes under Section 76-6-703, the value of any computer, computer network, computer property, computer services, software, or data shall include the measurable value of the loss of use of [~~such~~] the items and the measurable cost to replace or restore [~~such~~] the items.

ADDENDUM B

TRANSCRIPT OF FLOOR DEBATE

Second Reading of House Bill 49: January 22, 1998

House Law Enforcement & Criminal Justice Standing Committee

SPEAKER: Representative Holladay. House Bill 49.

HOLLADAY: Thank you Mr. Chairman [inaudible]. House Bill 49 was originally designed and set forth just to kind of clarify some issues with 911. I think most of us have always thought or believed that if you dial 911 and tie up the lines and do it in a malicious manner, and messing around or whatever, that it's a fairly heavy penalty. This actually helps to clarify some of those circumstances under which that would be the case. We would also now add a couple of items as it relates to other crimes. For example if a person is committing domestic violence, this would enable the prosecutors [inaudible] police officers [inaudible] to have a little bit more power in prosecuting and in bargaining with a perpetrator in regards to also having that penalty keeping someone from making emergency phone calls. It's interesting to note [inaudible] received a sheet that shows some of the needs for this bill. Currently it is a crime to threaten the interruption or [inaudible] of a public utility service but not actually a line or [inaudible]. What this legislation does is it makes it a class A misdemeanor to disrupt an emergency services facility by tampering with the property of someone else. Also it makes it a class B misdemeanor [inaudible] or to falsely report an emergency knowing that one does not exist, and three, to tamper with the property of another resulting in recklessly endangering human health and safety. For example, if you [inaudible] and then someone was not able to make a call [inaudible]. The people who support this legislation are the Attorney General's Office, the Statewide Association of Public Attorneys, and as far as I can determine the police officers do too. In fact I really don't want to go into too much detail. I think I've kind of capsulized what it does and I would be open to questions.

Various questions

SPEAKER: Motion carries unanimously.

Third Reading of House Bill 49: January 28, 1998

52 Leg., Day 10, Side 1, Counter No. 687

SPEAKER: [inaudible] consideration of bills on our consent calender.

CLERK: House Bill 49; Emergency Services Amendments; Brian D. Holladay. Committee vote: 8 Yes; 0 No; 3 Absent.

SPEAKER: Representative Holladay.

HOLLADAY: Thank you Mr. Speaker. We voted on this bill once before but by mistake it was on the calender a little bit too soon. This just essentially puts interruption of 911 services for a commission of a crime, domestic violence, or even for malicious mischief, gives it a little more definition, and more of a defined crime. I would urge your support.

SPEAKER: Thank you. Voting is open on House Bill 49.

SPEAKER: Seeing all present, having voted [inaudible] we'll close the vote. House Bill 49 averaging 68 Yes votes and 0 No votes passes this body and we forward it to the Senate for their consideration.

Second Reading of House Bill 15 January 19, 1999

House Judiciary Committee

HOLLADAY. Thank you Mr. Chairman. This is a very simple correction of a bill we worked on last year. No one knows for sure [inaudible] bill was placed back in for writing. Apparently there was a change [inaudible] on page two, line twenty-eight, violation of subsection (1)(b), and then "or (c)" was put in there. That takes that away from being a more serious offense and being able to assess the dollar amount shown on the handout that I've given you. We don't really know where this took place and so we think we can effectively blame the computers. It was never designed this way and the original law was not set up this way. It has the potential of really limiting the amount of punishment a person can receive for a very serious [inaudible] of the criminal mischief code. So it doesn't really change anything, nor does it change the intent of anything that was done before. With that I'm open to clarifying questions or whatever you want.

Third Reading of House Bill 15: January 26, 1999

53 Leg., Day 5, Side 1, Counter No. 828

CLERK: House Bill 15; Criminal Mischief Amendments; Brian D. Holladay. Judiciary Committee vote: 7 Yes; 0 No; 4 Absent.

SPEAKER: Representative Holladay.

HOLLADAY: Thank you Mr. Speaker. House Bill 15 was really just a mistake in the numbering of a bill. It made certain criminal penalties just a class A misdemeanor. The Attorney General's Office doesn't want to take credit for it. We're not going to blame our legislative staff. It's not my fault. We're just going to blame the computers. But it was a glitch in the system, and it's a good bill. Please vote for it.

SPEAKER: Thank you Representative Holladay. Voting is now open on House Bill 15.

SPEAKER: Seeing all present having voted, voting will be closed. House Bill 15 having received 67 Yes votes and 0 No votes, passes from this body and will be referred to the Senate for further action.