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American Fork City v. Everett D. Robinson : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

AMERICAN FORK CITY Plaintiff and Appellee, vs. **EVERETT D. ROBINSON** Defendant and Appellant.	**REPLY BRIEF OF THE APPELLANT** Appellate Case No. 20110845 - CA District Court No. 111100670 by appeal from the Fourth Judicial District Court of Utah County in the State of Utah Judge Christine S. Johnson

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I. Table of Contents

On the attached compact disc is a copy of this Reply Brief in PDF Format.

II. Table of Authorities

Utah Cases:

III. Argument

The Appellant will be referred to hereinafter as the "Defendant", and the Appellee will be referred to as the "City".

A. The City presents a distorted view of the evidence.

1. The City claims that the Defendant was commanded "No, sir, you're detained." (Appellee's Brief, pg. 1, paragraph 6.) The City fails to present the evidence to the contrary. Detective Paul was asked by the Defendant to view the video and "tell me the time that someone told me that I was detained". (Transcript, pg. 34 lines 14-15.) After viewing the video, Detective Paul was asked: "What did you say that informed me that I was being detained?" (Id., lines 22-23.) Although initially his response was: "You can hear Detective Forr's voice in there that says, Sir, you are detained", he followed that with the testimony that "There's two other voices that are talking, so it may be difficult to hear. But if you'd like me to come and re-wind it and [I'll] pick it out of everything." (Transcript, pg. 34 line 24 to pg. 35 line 3.) As the City's characterization of informing the Defendant that he was being detained relies entirely upon this "difficult to hear" statement of Detective Forr, the City cannot show that show that the Defendant was effectively informed he was being detained.

2. Lacking a vocal expression of informing the Defendant he was detained, the City relies upon physical force applied by the officers as reason for informing the Defendant of his detention. (Appellee's Brief, pg. 1, paragraph 9.) The City claims that the Defendant tried to "pull away" after an attempt by the detectives to physically restrain him. Again, the City fails to present the evidence to the contrary. Detective Paul admitted that he had taken one arm of the Defendant, with another detective on the other arm. (Transcript, pg. 29 lines 18-22.) Detective Paul then admitted that it was possible that he had grabbed the Defendant at the same time as the other detective (Transcript, pg. 30 lines 2-3.) Then, when asked if it was "possible that the force of one detective applied was felt by the detective on the other side", Detective Paul answered "In certain cases, yes, it would be possible." (Transcript, pg. 30 lines 4-13.) The City's claim that the Defendant tried to "pull away" was shown to be lacking against the admission of the City's witness that the force felt could have been that of the second detective grabbing the Defendant on the other arm, and there is nothing else to show that the Defendant resisted after being grabbed.

3. The account of the "facts" presented by the City is less than accurate. As examples: (1) the Defendant was already leaving the building when confronted by the detectives (against Appellee's Brief, pg. 1, paragraph 4), (2) there is nothing in the transcript to show the "authoritative" tone of voice used by the detectives in their commands (Appellee's Brief, pg. 1, paragraph 5), and there is nothing in the evidence to show that the officers

ordering the Defendant to "come back with us right now" intended to conduct an investigation (Appellee's Brief, pg. 7 lines 3-4). Defendant respectfully requests that this Court carefully review the validity of the City's statements to detect such colorations not supported by the evidence.

4. The Appellee paints a picture of the Defendant as having "provoked an incident", with "confrontational and contentious" and "obnoxious" behavior. (Appellee's Brief, pg. 1, paragraph 2). The City then justified the clerk's actions because they were "disturbed". (Appellee's Brief, pg. 1, paragraph 3). The City further relies upon the intent of the officers present to justify their actions. (Appellee's Brief, pg. 1, paragraph 8). Although all of that might provide an excuse for the behavior of the clerks and the detectives, all of that is irrelevant to the Defendant's guilt or innocence on the charge of violating U.C.A. § 76-8-305 and should be disregarded.

B. The Defendant's arguments are consistent with *American Fork v. Pena-Flores*, 2002 UT 131, 63 P.3d 675 (Utah 2002).

The City relies upon *American Fork v. Pena-Flores*, 2002 UT 131, 63 P.3d 675 (Utah 2002) (hereinafter "Pena") and *State v. Trane*, 2002 UT 97, 57 P.3d 1052 (Utah 2002) (hereinafter "Trane") to answer the Defendant's arguments relating to the requirement of a lawful arrest or detection as stated in U.C.A. § 76-8-305. Again, this statute states that:

76-8-305. Interference with arresting officer.

A person is guilty of a class B misdemeanor if he has knowledge, or by the exercise of reasonable care should have knowledge, that a peace officer is seeking to effect a lawful arrest or detention of that person or another and interferes with the arrest or detention by:

(1) use of force or any weapon;

(2) the arrested person's refusal to perform any act required by lawful order:

(a) necessary to effect the arrest or detention; and

(b) made by a peace officer involved in the arrest or detention; or

(3) the arrested person's or another person's refusal to refrain from performing any act that would impede the arrest or detention.

The language of the statute plainly requires "seeking to effect a lawful arrest or detention" using "a reasonable care" standard as seen from the perspective of the accused. (We "avoid interpretations that will render portions of a statute superfluous or inoperative." *Hall v. State Dep't of Corr.*, 2001 UT 34, ¶ 15, 24 P.3d 958.) Pena and Trane must therefore provide interpretation of what this essential language means.

The City begins its argument by stating that beginning on page 17 of the Appellant's Brief with its main premise that "Robinson incorrectly argues that a person can only be guilty of Interference with Arresting Officer if he knows the arrest or detention was lawful." (Appellee's Brief, pg. 4, last paragraph.) Respectfully, that is not what the Defendant argued. As the City now introduces Pena and Trane, the Defendant will now answer in reference thereto and in reference to his prior arguments.

1. The requirements of American Fork v. Pena-Flores.

The City is substantially correct in part of its analysis and presentation of Pena and Trane, that the Utah Supreme Court has found that a defendant's actual, subjective belief of an arrest or detection being unlawful is not relevant to a finding of guilt or innocence under U.C.A. § 76-8-305. However, Pena and Trane do not give peace officers carte blanche protection to make arrests and detentions as they desire.

Paragraph 13 of Pena confirms that "the fact that a [peace officer's] attempted arrest or detention was later found to be unlawful does not divest the officer of his authority." However, that paragraph also states that: "The plain meaning of the 'seeking to effect' language makes it clear that the reach of the statute is not contingent on the lawfulness of the underlying arrest or detention, but rather, as the court of appeals correctly concluded, the 'officer…acting within the scope of his or her authority and the detention or arrest … [having] the indicia of being lawful." So to meet its burden of proving a violation of U.C.A. § 76-8-305, the City must show that it was "seeking to effect a lawful arrest or detention" by showing (1) action within the scope of the officer's authority and (2) the action having the indicia of being lawful. This interpretation is confirmed by Trane. (See Trane, paragraphs 14 and 17.)

2. The Defendant's position against the standard of American Fork v. Pena-Flores.

The Defendant's position is consistent with Pena and Trane. The Defendant argued that, for a conviction, the Court must find that his detention was objectively lawful from the viewpoint of a person exercising reasonable care. (Appellant's Brief, pg. 17.) If the actions of the officers against him had had the needed "indicia of being lawful", they would have been objectively lawful under the reasonable care standard as recited by U.C.A. § 76-8-305.

The City relies upon the statement of Pena that "if a person has an objection to the legality of an arrest or detention, '[t]he fine question of legality must be determined in subsequent judicial proceedings, not in the street.'" (Appellee's Brief, pg. 5, last paragraph.) However, the City completely ignores the second requirement of Pena that the prosecution show the indicia of lawfulness of the detention or arrest. Even if the Defendant did not refer to the precise language of Pena, the Defendant's arguments effectively address this requirement to show the indicia of the lawfulness of the detention. The Defendant argued that the findings of the lower court lacked a reasoning for "the lawfulness of the detention" (Appellant's Brief pg. 17.) The Defendant then explained several reasons why the actions of the detaining officers were not lawful from the objective viewpoint of a person exercising reasonable care, which is equivalent to a showing of a lack of the required indicia of lawfulness under Pena.

The Defendant referred to Utah statute, which must provide a basis of whatever "indicia of being lawful" is present in the acts of the detaining officers. The Defendant argued that: "U.C.A. §§ 77-7-2, 77-7-6 and 77-7-15 give perhaps the best stated requirements that persons making an arrest, detention or stop must meet before they can lawfully act. Thus, those sections provide an expectation to the general public of circumstances in which they could be arrested or detained, and upon which a peace officer might take lawful action the interference of which would be a crime under U.C.A. § 76-8-305. Situations outside of those circumstances would leave a law-abiding citizen with an expectation that he would not be involved in a detention or an arrest." (Appellant's Brief, pg. 22) The Defendant then brought up the notice requirement of U.C.A. § 77-7-2(1) which requires that a detained individual be informed of the peace officer's "intention, cause, and authority to arrest him" unless there is present one of the exceptions of (1) a danger of safety, (2) a danger of escape, or (3) where the arrestee is pursued during or immediately after the commission of an offense. This notice requirement is not optional in the absence of these exceptions for an arrest, and similarly such notice would be an important part of the "indicia of being lawful" were the standards of Pena applied for a detention as well.

The Defendant then argued that: "But where a person is not given notice, has not committed a crime, does not pose a danger, and has already given his name, address and

an explanation of his actions under U.C.A. § 77-7-15 as the Defendant had, from his reasonable perspective there is no lawful reason for his arrest or detention." (Appellant's Brief, pg. 23) As all of that was true at the time the Defendant was seized, then from the objective viewpoint of a person exercising reasonable care in the Defendant's position, there was no lawful reason for detention under U.C.A. § 76-8-305 and correspondingly the detention made lacks the required indicia of lawfulness under Pena.

The Defendant also argued that the actions of the officers were legally improper against the standard of *Utah v. Hansen*, 2002 UT 125, 63 P.3d 650. (Appellant's Brief, pgs. 18-20.) The Defendant then argued that the reasoning of the officers behind his detention was "only to see that the Defendant was forced to retrieve his paper, and was not concerned whether he was charged with a crime", which was supported by the testimony of the detaining officers. (Appellant's Brief, pg. 21) The Defendant continued: "It was apparent that the purpose of any initial investigative stop was concluded, and by law the Defendant 'must be allowed to depart.' (*Hansen* ¶ 31.)" Any indicia of lawfulness recognized under Pena cannot be extended beyond the limits of a level-two encounter as recognized by *Utah v. Hansen*, 2002 UT 125.

3. The City's lack of notice of a detention to the Defendant.

Both Pena and Trane are distinguishable from the present case in that in those cases, the defendant was put on notice that he was being detained or arrested. Above, the Defendant showed that the City's claim that he was told "you are detained" was at best "difficult to hear" as admitted by one of the officers involved, and there is no other event that informed the Defendant of an investigation or detention. Therefore, the City cannot show that the Defendant was effectively informed he was being detained such as U.C.A. § 77-7-2(1) required for the arrests of Pena and Trane. Had effective notice to the Defendant been given, the City might have been able to show the "indicia of being lawful" of the detention. Here, where the City could not show that it had informed the Defendant of its intent to detain, it clearly lacked this indicia and the lower court should not have found the officers actions to be lawful under U.C.A. § 76-8-305 in light of Pena.

C. The City's mistaken reliance upon the policy of the City to show lawfulness under U.C.A. § 76-8-305.

U.C.A. § 76-8-305(2) requires for a conviction a finding that a defendant "by the exercise of reasonable care should have knowledge, that a peace officer is seeking to effect a lawful arrest or detention of that person or another and interferes with the arrest or detention by ... (2) the arrested person's refusal to perform any act required by lawful

order: (a) necessary to effect the arrest or detention; and (b) made by a peace officer involved in the arrest or detention". Thus the conviction of the Defendant requires a finding of a refusal to obey a lawful order, again from the objective viewpoint of a person in the position of the Defendant exercising "reasonable care". As the Defendant showed above, Pena expresses a first requirement that the Prosecution show that the officer was "acting within the scope of his or her authority".

Not having a statutory basis for the lawfulness of its action, the City turns to its policy: "Judge Johnson specifically found that the officers were acting in the scope of their authority, when she said, 'I think both detectives described well the policy of the City where, even in an case like this disorderly conduct where obviously, there wasn't a public threat or menace that was being investigated, they were nevertheless investigating a complaint, their intent was to separate Mr. Robinson from the secretary or the clerk and try to get to the bottom of what had happened.'" (Appellee's Brief, pg. 5). As there is no other legal authority given by either the City or Judge Johnson, the meeting of this first requirement of Pena relies entirely upon whatever apparent authority is given to the officers under the policy of the City.

But, as the Defendant argued, the perspective of a reasonable person in the position of the accused must be applied. (Appellant's Brief, pgs. 25-26.) This is only logical. For a person to consider "by the exercise of reasonable care" whether he is being ordered to

perform a lawful order, that order potentially possessing the indicia of being lawful, he must apply the knowledge of the law known to an ordinary, reasonable person. In answer to the City's argument, the Defendant argues that the policies of the City aren't known to ordinary persons, and cannot by themselves form a basis for a finding under U.C.A. § 76-8-305(2) of a refusal to obey a lawful order. The City made no showing of what its policies were at trial, and no showing that its policies were known to ordinary persons. As there is no other legal basis given by the City or the Court for the meeting of the first requirement of Pena of action "within the scope of his or her authority", and as a person exercising reasonable care would not be aware of any authority given under the policy of the City, the conviction of the Defendant under U.C.A. § 76-8-305(2) must fail.

D. The lack of credibility in the City's final arguments.

The City first argues that the Defendant now raises a challenge under the Fourth Amendment to the Constitution. (Appelle's Brief, pgs. 6-7.) The Defendant did refer to the Fourth Amendment in an explanation of Utah Law, but the actual challenge was to the objective lawfulness of the detention under U.C.A. § 76-8-305 (Appellant's Brief, pg. 17.) The City's attempt to avoid the Defendant's true challenge should be disregarded.

The City then claims that the Defendant "maintains that he did not understand and misunderstood that [what] the officers were doing". What the Defendant actually argued

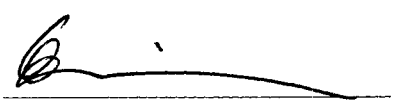
is: "If the Defendant was not told and could reasonably misunderstand that he was being asked to stay for a criminal investigation, then it cannot be shown that he was capable of possessing the knowledge or forming the intent required for a violation of U.C.A. § 76-8-305 of a person exercising reasonable care." (Appellant's Brief, pg. 28.) The Defendant showed above that the City's claim that he was told "you are detained" was at best "difficult to hear" as admitted by one of the officers involved, and the City cannot show that show that the Defendant was effectively informed he was being detained. The Defendant's argument continues: "The Lower Court fails to consider that a person exercising reasonable care might hear first a command 'to come and get your paper too' followed by another command to 'come on back in here' and another command to 'come back, right now' to be all tied to the same purpose. Nowhere does anyone indicate to the Defendant that he is being investigated for a crime or even that a crime might have been committed; he only knows that the attendant police want him to come back and get his paper." (Appellant's Brief, pg. 28.) As the City's argument fails to present an accurate view of the evidence and the Defendant's position, that argument should be disregarded.

The remaining arguments of the City relate to a claim that "the detectives had reasonable suspicion to detain Robinson to investigate the disorderly conduct". However, none of the events claimed to support a charge of disorderly conduct occurred in the presence of any officer, but rather occurred before the officers responded. When Det. Paul was asked what the grounds were for detaining the Defendant, his response was: "Well, obviously, a

disturbance had occurred, okay? … Based on the totality of the circumstances and the alarm that was caused … I feel that I had probable cause to detain you for further investigation into possible disorderly conduct charges." (Transcript, pg. 35 line 24 to pg. 36 line 5.) This is also easily seen by a review of pages 6 and 7 of the transcription of track 2 of Appellant's Exhibit B, the video of the incident. The events purportedly supporting reasonable suspicion for an investigation did not occur in the presence of the officers, and the City's application of State v. Trane here is improper.

IV. Conclusion

Appellant maintains his requests stated in his Appeal Brief.



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Date: May 17, 2012

CERTIFICATE OF SERVICE

I certify that a copy of the attached Reply Brief of the Appellant was served upon the following parties listed below by mailing it by first class mail, personal delivery, or fax to the following addresses:

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