

2001

## Utah v. Douglas Doyle Dillon : Reply Brief

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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STATE OF UTAH,	)	BRIEF OF APPELLANT
	:	DILLON
Plaintiff/Appellee,	)	
	:	
vs.	)	Case No. 2000010384-CA
	:	
DOUGLAS DOYLE DILLON,	)	Argument Priority: (15)
	:	
Defendant/Appellant.	)	

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**I.**

**JURISDICTION**

Appellee agrees with the Appellant that jurisdiction is appropriate before the Utah Court of Appeals.

**II.**

**STATEMENT of FACTS**

There appears to be a disagreement as to the facts in this case. Particularly, whether or not Exhibits 13 and 14 were admitted into evidence at trial. The record and trial transcript are confusing on this point and defense counsel at least reported to this attorney that he believed that the exhibits were admitted. Since the trial transcript is not clear and the record seems to reflect from the exhibit list, see the

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record at page 79, that the exhibits were refused, counsel for Appellant concedes to the position of Appellee as to State's exhibits 13 and 14.

**III.**

**RESPONSE TO AND CLARIFICATION OF ARGUMENTS**

**POINT NO. I:**

**THE TRIAL COURT FAILED TO GIVE AN APPROPRIATE CAUTIONARY  
INSTRUCTION.**

The trial transcript is somewhat confusing as to what transpired at the jury trial in the above matter. There's no question that multiple attempts were made to try to introduce exhibits 13 and 14, pawn shop and swap meet receipts, and that the trial court upon the third attempt under the pretext of the State arguing an element of the crime stated that it was going to reverse itself from its prior two rulings during the trial. See the trial transcripts at pages 72-79. However, thereafter, while it is not clear whether or not the exhibits were reintroduced at trial, the purpose for which officer Gower was recalled in the State's case-in-chief, the focus of the examination shifted to Appellant's prior criminal convictions. Consequently, the evidence should have been assessed pursuant to Rule 404(b), Utah Rules of Evidence. Appellee maintains that the evidence is admissible as an element of the offense. However, the language of the provision seems to speak contrary to that. Wherein it states that

evidence of other crimes, wrongs or acts is not admissible to prove the character of the person in order to show action in conformity therewith. The provision does go on to state that the evidence is admissible for other purposes such as motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. However, the distinction in this case is a difference of knowledge of the present offense verse knowledge of a past offense which distinction makes the prior knowledge of the latter an issue of character being presented for the first time in the State's case-in-chief. Evidence to challenge a Defendant's character is typically not allowed as part of the State's case-in-chief.

POINT NO. II:

APPELLANT WAS ENTITLED TO A CAUTIONARY INSTRUCTION AND THE  
INSTRUCTIONS GIVEN DO NOT PROVIDE APPROPRIATE CAUTION.

Notwithstanding the fact that the evidence of prior criminal acts of the Appellant should have never been introduced as evidence in the State's case-in-chief, a cautionary instruction should have been given. See State v. Smith, 700 P.2d 1106 (1985). The instruction given as 14a does not address the area of concern. It merely instructs the jury that knowledge or belief that the property is stolen required by the receiving stolen property instruction is presumed in the case of actor who is found in possession or control of other property stolen on a separate

occasion. Hence, it is an instruction as to a statutory presumption raised against the Defendant regarding an element of the offense. In order for the instruction to have been cautionary, it would have needed to instruct the jury to use the evidence only for the specific purpose for which it was admitted and more particularly to not convict the Defendant for the present offense simply because he may have been found guilty of a prior criminal act. Notwithstanding the fact that the instructions given addressed legal principles of proof beyond a reasonable doubt and burden of proof, and in light of the fact that the statutory presumption created by instruction 14a is not adequately reconciled with the overall general presumption of innocence of the Defendant in conjunction with that burden of proof, the record shows that a cautionary instruction was not given to this jury.

POINT NO. III:

THE APPELLANT IS NOT A PAWN BROKER OR PERSON WHO OPERATES  
A BUSINESS IN COLLECTING USED OR SECOND HAND MERCHANDISE OR  
PERSONAL PROPERTY.

Because of the broad language used in the statute, it is easy to lose sight of what appears to be the expressed legislative intent of the statute with regard to receiving stolen property. This is in part revealed by the additional language of the section title; that is, duties of pawn brokers. Since the offense of receiving stolen



property was primarily directed toward pawn brokers and agents of pawn brokers, issues regarding prior knowledge and dealings in stolen property have a heightened concern because of the unique relationship of pawn brokers to the marketing of second hand merchandise. Consequently, the use of a statutory presumption provides an acceptable solution since the pawn broker holds certain duties to the public that would be considered as part of his doing business. However, to provide the same standard expected of a pawn broker to one who is not in the industry seems to go beyond the intent of the statute. In short, it gives rise to applying the statutory presumption in every second offense of receiving stolen property whether it involves a pawn broker or an individual. If that was the intent of the legislature, then the language used in the statute, particularly duties of a pawn broker, should have been duties of all. There must be inferred from the language used by the statute an intent to limit it to those in the business of being a pawn broker or in dealing with second hand merchandise. The application of the statute and particularly the statutory presumption raised by the same as applied in the instant case goes far beyond that.

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### **CONCLUSION**

On the grounds and for the reasons set forth above, and also for those reasons set forth in Appellant's brief, having replied to Appellee's brief, the Appellant prays that relief be granted in reversing the trial court's decision, or remanded ordering that the Appellant be acquitted together with such other and further relief as to this Court appears equitable and proper.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

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**J. BRYAN JACKSON,**  
**Attorney for Appellant Dillon**

**CERTIFICATE OF MAILING**

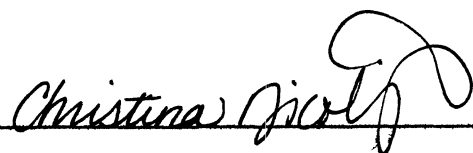
I hereby certify that on the 13<sup>th</sup> day of May, 2002, I  
did mailed a true and correct photocopy of the REPLY BRIEF OF APPELLANT  
DILLON, by way of U.S. mail, postage fully prepaid, thereon, to the following:

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