

1959

## State of Utah v. Carl Mack Courtney : Brief of Defendant and Appellant

Utah Supreme Court

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Cotro-Manes & Cotro-Manes; Attorneys for Defendant and Appellant;

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UNIVERSITY UTAH  
IN THE SUPREME COURT

of the

STATE OF UTAH

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STATE OF UTAH,

Clerk Supreme Court, Utah

Plaintiff and )  
Respondent, )

vs. )

Case No. 9189

CARL MACK COURTNEY,

Defendant and )  
Appellant. )

BRIEF OF DEFENDANT AND APPELLANT

COTRO-MANES & COTRO-MANES  
Attorneys for Defendant and  
Appellant

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**IN THE SUPREME COURT  
OF THE STATE OF UTAH**

**STATE OF UTAH, )**

**Plaintiff and Respondent, )**

**vs )**

**CARL MACK COURTNEY, )**

**Defendant and Appellant. )**

**Case No.**

**9189**

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**BRIEF OF APPELLANT**

**STATEMENT OF FACTS**

**The Defendant was convicted of the crime of assault with a deadly weapon. Trial by jury took place in Heber County, Utah, the place where the offense allegedly occurred. Following the trial the jury returned a verdict of guilty and the court sentenced the**

defendant to not more than five years in the State Prison. A commitment order was duly signed by the trial judge and the defendant was incarcerated in the State Prison. The events leading up to the trial of the defendant are as follows.

The defendant, driving his automobile and accompanied by two young women, stopped at a stop sign at the intersection of Wall Avenue and Riverdale Road in Weber County, Utah (R-3). The complaining witness, Norman W. Irwin, driving his own automobile, stopped immediately behind the defendant and waited for the defendant to go forward. The defendant started off and apparently small rocks or loose gravel were spun from the wheels of the defendant's automobile and struck Irwin's car. This infuriated Irwin (R 4,16) who took off after the defendant.

pulled up along the right side of the defendant's car (R-24) and yelled over to Courtney and called him a "rotten son-of-a-bitch" and said if he did that again he would "punch him in the nose." (R-4,38)

Courtney, yelled back that if he (Irvin) thought he could do it, then for Irvin to pull over and stop. Irvin pulled over to the side of the road and started to stop. Courtney did likewise. Courtney stopped first; Irvin pulled up behind Courtney's car and got out. The time was approximately 7:15 PM. It was dark and the street was poorly lighted. Irvin testified that he got out of his car and started forward to punch Courtney in the nose and that he told Courtney to get ready to fight (R-6). As the two men came within about three feet of each other, Irvin saw that Courtney had a

beer bottle in his left hand, being held in the position that one would hold a bottle to drink from; and being held in Courtney's hand was a small revolver. Irwin testified that Courtney pulled the trigger three times and that he heard three clicks, but the gun did not fire. Irwin closed with Courtney and Courtney hit Irwin on the shoulder with the bottle, which then fell to the ground (R-8). Irwin grabbed the defendant's left arm and the defendant raised the gun over his head so that Irwin could not get hold of it. Irwin then let go of Courtney, went back to where the beer bottle lay, picked up the bottle and started after Courtney again, who backed around to the front of his car (R-8). Irwin testified that as he approached the front of the car, he told

told Courtney that he (Irwin) "would bash his brains in" with the beer bottle (R-9). At that time the first and only shot was fired. Irwin admitted on cross examination that he did not see whether or not the gun was pointed at him at the time the shot was fired (R-21, 22).

Irwin testified that Courtney told Irwin to leave him alone, keep away from him and that he (Courtney) did not mean to shower the car (R-27, R-28).

Following the shot, Irwin told Courtney that he would not fight him while Courtney had a gun and for him to get in his car and leave. Courtney replied that he would not get in his car while Irwin had the bottle, thereupon Irwin threw the bottle away and Courtney got into his car and left (R-9, 31).

**After Irwin dropped the bottle, Courtney**

made no threatening moves toward Irwin at all (R-32).

The testimony of the weapon's expert and the arresting officer revealed that the weapon, while old and in poor shape, was capable of being fired. The weapon was a single action .22 Calibre revolving pistol which held seven cartridges. The evidence showed that at the time that the weapon was seized by the arresting officers, the weapon contained six unfired cartridges and one fired cartridge (R-52). The testimony showed that the fired shell casing indicated a normal fall of the hammer (R-67) and that it had been hit only once with the hammer. (R-58) The weapon was in such a condition that with the cylinder in a certain position the trigger would have been pulled three times without a firing, but that there was

a very slight click; in fact the weapons' expert testified that there was no click (R-65). He testified that when a clicking was heard the weapon would have fired the first time the trigger was pulled (R-67).

The defendant was bound over from a preliminary hearing and an information was duly issued by the District Attorney in and for the Second Judicial District charging the defendant with the crime of assault with a deadly weapon.

The record shows that the defendant did not testify in his own behalf and that no evidence was offered by the defendant during his case in chief.

## **STATEMENT OF POINTS**

### **Point One**

The Second Judicial District Court in and for Weber County did not have jurisdiction over the defendant, and the judgment rendered, as a matter of law, is void and a nullity.

### **Point Two**

As a matter of law the defendant was entitled to an instruction to the jury as to the lesser included offenses, and the trial court in failing to so instruct the jury committed reversible error and the defendant is entitled to a new trial.

### **Point Three**

There was no evidence upon which the jury could have predicated a verdict of guilty.

## **ARGUMENT**

## **Point One**

**THE SECOND JUDICIAL DISTRICT COURT IN AND FOR WEBER COUNTY DID NOT HAVE JURISDICTION OVER THE DEFENDANT, AND THE JUDGMENT RENDERED AS A MATTER OF LAW, IS VOID AND A NULLITY.**

**The District Court failed to obtain jurisdiction over the defendant, Carl Mack Courtney in that the information filed by the District Attorney charging the defendant with the commission of a crime was fatally defective. The omission made by the District Attorney was that he failed to allege in the information the section, subsection or any statute of the State of Utah which the defendant had purportedly violated.**

**A copy of the information is set forth in this brief and marked as Exhibit A. In reading the information, one has no way of ascertaining whether the defendant is being**

charged under a City or County Ordinance,  
State Statute, or Federal Law.

The State of Utah has authorized the  
use of what is known as the short form  
indictment and information. Section 77-21-6  
sets forth the form of the information:

"77-21-6. Form of information.  
The information may be in substantially  
the following form:

In the district court of the  
\_\_\_\_\_ district, in and for the  
county of \_\_\_\_\_, State of Utah.

The State of Utah, plaintiff,  
vs A. B., defendant.

X. Y. the district attorney for  
the \_\_\_\_\_ district accuses A.  
B. of (here charge the offense in one  
of the ways mentioned in section 77-  
21-8--a. g. murder, assault with  
intent to kill, poisoning an animal  
contrary to section 76-5-12 of the  
Penal Code) and charges that (here  
the particulars of the offense may  
be added with a view to avoiding the  
necessity for a bill of particulars).

This form clearly shows that the section  
of the Utah Code violated is set forth.

Section 77-21-8 (2) also states that the section or subsection of the Utah law violated will be referred to in the information.

"77-21-8. Charging the offense.

(2) The information or indictment may refer to a section or subsection of any statute creating the offense charged therein, and in determining the validity or sufficiency of such information or indictment regard shall be had to such reference."

The constitutionality of 77-21-8 has been upheld by this court in the recent case of State vs Landrum, 3 U. 2d 372,284 P. 12d 693. The court in this case stated that the prerequisites to a valid information are:

"It charged the defendants with having committed a crime, known to the law, and it stated the act which defendants did, constituting that crime."

In the case now before the court, the information does not state the commission

of a crime "known to the law." It states that there is a crime of assault with a deadly weapon, but does not state that it is contrary to Utah law. There are many crimes. Some are religious in nature, some are against the laws of nature, some are moral, some are ethical and some are legal. Without the specific allegation of a crime "known to the law" there is no basis for jurisdiction of the court to try a person for a "crime."

The sufficiency of an information has been further passed upon in the case of State vs Hill, 100 U. 456, 116 P. 2d 392. The Utah court has used the New Mexico decision of State vs Roy, 40 N. M. 397, 60 P. 2d 646, 110 A.L.R. 1, as a precedent in determining the constitutionality of the short form of an information. It is to be noted in this case the information specifically set forth

that the defendant's actions were contrary to New Mexico statutes.

It is submitted that the form of information found under Section 77-21-6 of the Utah code is the bare minimum and anything less would not satisfy the requirement of the Constitution of Utah, Article 1, Section 7:

"No person shall be deprived of life, liberty or property, without due process of law."

The defendant has not been accorded "due process" because the district court did not acquire jurisdiction over him because of the failure of the District Attorney to allege the violation of any law punishable by the State of Utah and because he was none the less tried and convicted of the alleged "crime".

As the trial court did not acquire jurisdiction over the defendant, the trial was a nullity and the commitment to the State Prison was void and the defendant is being unlawfully and illegally incarcerated.

### Point Two

AS A MATTER OF LAW THE DEFENDANT WAS ENTITLED TO AN INSTRUCTION TO THE JURY AS TO THE LESSOR INCLUDED OFFENSES, AND THE TRIAL COURT IN FAILING TO SO INSTRUCT THE JURY COMMITTED REVERSABLE ERROR AND THE DEFENDANT IS ENTITLED TO A NEW TRIAL.

The court in instructing the jury failed and neglected to instruct them as to the lessor included offenses of "assault with a deadly weapon." The jury was given the choice of either convicting the defendant of assault with a deadly weapon or of acquitting him.

The record abounds with evidence that the defendant acted in self defense with just cause and excuse throughout the whole series of events which culminated in the commission of the alleged offense. The record further shows that the provoking party which brought about the situation was the complaining witness himself. The record shows that the defendant voluntarily broke off the engagement with the prosecuting witness and left the scene of the incident, when he could have inflicted bodily harm upon him. R-31, R-32. The record shows no intent to do bodily harm on the part of the defendant. The record further shows no direct evidence that the weapon at the time it was discharged was even aimed at the prosecuting witness (R-22). The record contains ample evidence upon which the defendant could have

been convicted of simple assault. In light of the evidence in the record, it was mandatory that the trial court instruct the jury as to the lesser included offenses of "assault with a deadly weapon."

The Utah Supreme Court has ruled in prosecutions for murder instructions of lesser offenses must be given. The court said:

"In passing this point we desire to say that a trial court should, in every case where there is any direct or inferential evidence with respect to the different degrees of murder, charge the jury with regard to all the degrees, and this rule should be followed where there may be any doubt with regard to whether the higher degree is established or not. This is contemplated by our statute which divides crimes into degrees and which requires the jury to find in the lesser degree in case of doubt."

State vs Mowhinney, 43 U. 135, 134 P. 632.

See also, State vs Thorne, 41 U. 414, 126 P.

286; Annotation, 21 A.L.R. 603

In a case very similar factually to the one now before the court, this court held that instructions of lesser included offenses to the charge of "assault with intent to do bodily harm" must be given, and if not given, reversible error has been committed.

In this case, *State vs Barkas*, 91 U. 574, 65 P. 2d 1130, the court stated:

There can be no doubt that a charge of assault with intent to do bodily harm includes also a simple assault, because that assault must be proved as a necessary element of the greater offense. It is not necessary that bodily harm should actually be inflicted to prove the crime set forth in the information in this case. The elements of the offense charged are: (1) An assault; (2) Use of a deadly weapon; and (3) An intent to do bodily harm. An assault is an "attempt coupled with the ability." If the attempt succeeds, it becomes battery, or perhaps mayhem, murder, or some other crime. And since "simple assault" is a necessary element of the offense charged or any

offense included therein, and since under the evidence the jury could have believed Cordova and found that was the only offense committed, it was error on the part of the trial court to refuse to submit that possible verdict to the jury. (Emphasis ours)

This case quotes from an earlier Utah case of State vs Hyams, 64 U. 285, 230 P. 349, wherein the court said:

"\*\*\* the courts, we think, without exception, have held that, where the accused is charged with a greater offense, he is nevertheless entitled to an instruction that the jury may convict him of a lesser offense if included within the greater; that is, he may be found guilty of simple assault, or assault and battery, unless the evidence is of such character as will necessarily require a finding that the greater offense was committed by him."

It is admitted by defendant that his counsel did not request any instruction as to the lesser included offenses. However, attention of the court is called to the Utah statute 77-31-5 which provides:

**"Doubt as to degree--Convicted only on lowest.--**

**When it appears that the defendant has committed a public offense and there is reasonable ground of doubt in which of two or more degrees he is guilty, he must be convicted of the lowest of such degrees only."**

It is submitted that this section of the Utah law makes it mandatory for the court to instruct as to the lesser included offenses. The early Utah case of *State vs Sullivan*, 73 U. 582, 276 P. 166 is distinguishable from the case now at bar in that in that case the defense requested an instruction which precluded the jury from finding a lesser offense. In that case the court cites authority which holds that where an instruction as to lesser offenses is not given reversible error is committed. The court relied heavily upon the proposition

that the defense had themselves precluded any instruction of the lesser crimes. In a subsequent case, State vs Ferguson, 74 U. 263, 279 P. 55, this court again, while stating the general rule that a request must be made by the defendant to instruct the jury as to lesser included offenses, went to some length to show that in this case there was no evidence upon which the court could predicate a charge to the jury of a lesser included offense. It is submitted that in these two Utah cases the court has justified its position by relying upon other factors than the fact that no request had been made for the instruction on the lesser included offenses.

It is submitted, however, that the substantive rights of the defendant require that the court give instructions as to any lesser included offenses, and where there is evidence

upon which the jury could reasonably predicate a verdict. If this is not the law in Utah today, then it is submitted that this should be the law and the Supreme Court should so rule. This is the rule in prosecutions for murder and therefore should be the rule for any criminal prosecution.

### Point Three

THERE WAS NO EVIDENCE UPON WHICH THE JURY COULD PREDICATE A VERDICT OF GUILTY.

The evidence shows beyond a doubt that the prosecuting witness provoked a fight with the defendant. The evidence shows that the prosecuting witness not only vocally told the defendant that he was going to fight him, but that he was going to bash in his brains (K-9). The record shows that the prosecuting witness backed up only once during the whole incident and that was to get the beer bottle

(R-32). The record shows however, that the defendant did not come after the prosecuting witness. (R-31)

The elements which must be proven before the jury could find the defendant guilty were:

- (1) Intent to do bodily harm
- (2) Without just cause or excuse
- (3) No considerable provocation
- (4) Commission of an assault
- (5) Deadly weapon

The record does not disclose any intent to do bodily harm. Had the defendant wished to, he could have clearly inflicted death or serious injury to the prosecuting witness, when the prosecuting witness disarmed himself. The defendant did not.

The record shows the provocation and the cause of the altercation. This was the prosecuting witness and only him. He was more than

a willing participant in the fight, he not only provoked it, but he was intent on doing serious bodily harm upon the defendant.

The record does not disclose any assault by the defendant. If there was an assault it was upon the person of the defendant and not upon that of the prosecuting witness. It is submitted that if the defendant is guilty of any crime, it is that of a misdemeanor as set forth in 76-23-3:

"Threatening with--Use in quarrel.-- Every person who, not in necessary self-defense, in the presence of two or more persons, draws or exhibits any deadly weapon in an angry and threatening manner, or who in any manner unlawfully uses the same in any fight or quarrel, is guilty of a misdemeanor."

After reviewing the entire record, it is inconceivable to the writer that the trial court could not only find a man guilty of a felony but sentence a man to prison for up to

to five years.

### SUMMARY

It is submitted that the trial court failed to obtain jurisdiction over the defendant because of the faulty information which failed to allege the violation of any law punishable by the courts of this state. As the court did not have jurisdiction over the defendant he has been restrained of his liberty without due process of law contrary to the Constitution of the United States and the Constitution of Utah. It is further submitted that the defendant's substantive rights have been violated by the court in not instructing the jury as to the lesser included offenses. In any event the record fails to show any evidence upon which the jury could predicate a verdict of guilty. The elements of the

crime allegedly committed by the defendant were not proved.

The defendant is entitled to an order of court dismissing the information or in the alternative to a new trial.

Respectfully submitted,

COTRO-MANES & COTRO-MANES

Attorneys for Defendant  
and Appellant

**EXHIBIT A**

**IN THE DISTRICT COURT  
OF THE SECOND JUDICIAL DISTRICT**

**In and for the County of Weber,  
State of Utah**

**THE STATE OF UTAH,        )**

**INFORMATION**

**vs                                )**

**No. 6383-1**

**CARL MACK COURTNEY,        )**

**\_\_\_\_\_ Defendant. \_\_\_\_\_ )**

**Carl Mack Courtney having heretofore  
been duly committed by Charles H. Sneddon, a  
committing magistrate of this County to this  
Court, to answer this charge, is accused by  
the District Attorney of this Judicial District,  
by this information, of the crime of assault  
with a deadly weapon committed as follows,  
to wit:**

**That the defendant assaulted Gorman W.  
Irwin with a deadly weapon, to-wit: a gun  
(a 22 cal. pistol).**

/s/ L. Roland Anderson  
**District Attorney,**  
**Second Judicial District**

**The names of the witnesses testifying on the**  
**part of the state, in the examination held**  
**before the Committing Magistrate:    September**  
**30, 1959**

<u>Gorman Irwin</u>	_____
<u>Connie Cracroft</u>	_____
_____	_____
_____	_____

**Recorded:    Information Record   7      Page  502**

**Form 61 2H 4-57**