

1992

Logan City v. Lowell D. Carlsen : Brief of Appellant

Utah Court of Appeals

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Lowell D. Carlsen; pro se.

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IN THE UTAH COURT OF APPEALS

LOGAN CITY,	:	
Plaintiff-Appellee,	:	
-vs-	:	Case No. 920739-CA
	:	Case Type: APPEAL
LOWELL D. CARLSEN,	:	Priority No. 2
Defendant-Appellant.	:	

BRIEF OF APPELLANT

AN APPEAL FROM THE FIRST CIRCUIT
COURT OF THE STATE OF UTAH, COUNTY OF CA
LOGAN CITY DEPARTMENT, THE HONORABLE
K. ROGER BEAN, JUDGE PRESIDING

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IN THE UTAH COURT OF APPEALS

LOGAN CITY,	:	
STATE OF UTAH,	:	
Plaintiff(s)-Appellee(s),	:	Case No. 920739-CA
-vs-	:	Case Type: APPEAL
LOWELL D. CARLSEN,	:	Priority No. 2
Defendant-Appellant.	:	

JURISDICTIONAL STATEMENT

This is an appeal from a criminal judgment in the First Circuit Court, County of Cache, State of Utah, Logan City Department pursuant to the provisions of Rule 26 of the Utah Rules of Criminal Procedure, and U.C.A. § 77-18a-1, (1953 as amended), and jurisdiction is invoked upon this Court under the provisions of U.C.A. § 78-2a-3(d) and § 78-4-11, (1953 as amended).

STATEMENT OF ISSUES PRESENTED

1. Whether the Ordinance under which the defendant was charged, Section 9.24.040 of the Revised Ordinances of Logan City violates the provisions of Article XI, § 5 of

the Utah Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The standards of review to review this issue are as follows: Court of Appeals reviews the trial court's decision on the constitutionality of the statute for correctness, according no deference to its legal conclusions. State v. James, 819 P.2d 781, 796 (Utah 1991); City of Monticello v. Christensen, 788 P.2d 513, 516 (Utah), cert. denied, _____ U.S. _____, 111 S.Ct. 120 (1990).

2. Whether the trial court erred in granting the prosecution's motion to amend the Information at trial for the following reasons:

(a). The original Information was fatally defective in that it charged the defendant for violating an unconstitutional and invalid Ordinance and could not be cured by amendment at trial.

(b). The prosecution by the State of Utah was barred under the Double Jeopardy and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 12 of the Utah Constitution.

(c). The Logan City Prosecutor lacked any authority to prosecute the defendant in the name of the State of Utah.

(d). The substantial rights of the defendant were

prejudiced by the amendments.

The standards of review to review these issues are as follows: To determine nature of trial court's ruling, Court of Appeals looks at substance of ruling rather than label attached to it by the trial court. State v. Workman, 806 P.2d 1198, 1202 (Utah Ct. App. 1991). On appeal, Court of Appeals accords trial court's conclusions of law no particular deference, but reviews them for correctness and is free to render its independent interpretation. Faulkner v. Farnsworth, 714 P.2d 1149, 1150 (Utah 1986); and Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985).

3. Whether the statute under which the defendant was convicted, U.C.A. § 76-10-104, (1953 as amended) is unconstitutionally vague in violation of the Due Process Clauses under Article I § 7 of the Utah Constitution and the Fourteenth Amendment to the United States Constitution.

The standards of review to review this issue are as follows: Court of Appeals is to construe statutes and ordinances so as to carry out legislative intent while avoiding constitutional defects. In re Criminal Investigations, 754 P.2d 633, 640 (Utah 1988). Court of Appeals will not rewrite a statute or ignore its plain language in order to reach a constitutional construction. Provo City Corp., v. Willden, 768 P.2d 455, 458 (Utah 1989).

4. Whether the evidence adduced at trial was insufficient to sustain the defendant's conviction.

The standards of review to review this issue are as follows: In reviewing a claim of insufficiency of the evidence, Court of Appeals will review the evidence and all inferences which may reasonably drawn from it in the light most favorable to the verdict of the jury. Court of Appeals will reverse a jury conviction for insufficient evidence only when the evidence so viewed is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he [or she] was convicted. State v. Verde, 770 P.2d 116, 124 (Utah 1989); and State v. Petree, 659 P.2d 443, 445 (Utah 1983).

5. Whether the trial court lacked jurisdiction to impose sentence because of an unreasonable delay between trial and sentencing.

The standards of review to review this issue are as follows: To determine nature of trial court's ruling, Court of Appeals looks at substance of ruling rather than label attached to it by the trial court. State v. Workman, 806 P.2d 1198, 1202 (Utah Ct. App. 1991). On appeal, Court of Appeals accords trial court's conclusions of law no particular de-

ference, but reviews them for correctness and is free to render its independent interpretation. Faulkner v. Farnsworth, 714 P.2d 1149, 1150 (Utah 1986); and Scharf v. BMG Corp., 700 P.2d 1068, 1970 (Utah 1985). Court of Appeals will review the sufficiency of the trial court's findings of fact for correctness. State v. Ramirez, 817 P.2d 774, 782 (Utah 1991).

DETERMINATIVE LAWS

Section 9.24.040 of the Revised Ordinances of Logan City. (See addendum)

Section 1.16.010 of the Revised Ordinances of Logan City. (See addendum)

U.C.A. § 76-10-104, (1953 as amended). (See addendum)

U.C.A. § 76-2-101, (1953 as amended). (See addendum)

U.C.A. § 76-2-102, (1953 as amended). (See addendum)

U.C.A. § 76-2-303, (1953 as amended). (See addendum)

U.C.A. § 76-2-304, (1953 as amended). (See addendum)

U.C.A. § 77-1-5, (1953 as amended). (See addendum)

U.C.A. § 10-3-928, (1953 as amended). (See addendum)

U.C.A. § 78-7-25, (1953 as amended). (See addendum)

Rule 4.(d) of the Utah Rules of Criminal Procedure. (See addendum)

Rule 22.(a) of the Utah Rules of Criminal Procedure. (See addendum)

Rule 23 of the Utah Rules of Criminal Procedure. (See addendum)

Article I, § 7 of the Utah Constitution. (See addendum).

Article I, § 12 of the Utah Constitution. (See addendum).

Article I, § 18 of the Utah Constitution. (See addendum).

Article VIII, § 16 of the Utah Constitution. (See addendum).

Article XI, § 5 of the Utah Constitution. (See addendum).

Article I, § 9 & § 10 of the United States Constitution. (See addendum).

Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. (See addendum).

Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. (See addendum).

STATEMENT OF THE CASE

A.

NATURE OF PROCEEDINGS

This is an appeal from defendant's criminal conviction for the offense of Selling Tobacco Products to a person under age nineteen in violation of U.C.A. § 76-10-104, (1953 as amended).

B.

COURSE OF PROCEEDINGS

The defendant was tried in a jury trial held in the

First Circuit Court of the State of Utah, County of Cache, Logan City Department on the 16th day of January, 1992. Defense counsel after the jury was impanelled and sworn moved the trial court for dismissal of the Information filed in the case of Logan City v. Lowell D. Carlsen on grounds that the penalty for violating the ordinance under which defendant was charged conflicted with the penalty for an identical offense under State statute, Allgood v. Larson, 545 P.2d 530 (Utah 1976). The Logan City Prosecutor, Scott L. Wyatt then moved the court to amend the Information changing the name of the prosecuting party from Logan City to the State of Utah, from a charge of violating a municipal ordinance to a charge of violating U.C.A. § 76-10-104, (1953 as amended), and from a violation of a Class B misdemeanor to a Class C misdemeanor. The trial court over defense counsel objections granted the prosecutor's motion to amend the Information and thereafter instructed the jury as to such amendments (Trial Tr. 50-53, 88-93). The trial court took defense counsel's motion to dismiss based upon Allgood v. Larson under advisement. The trial court denied defense counsel's motion to dismiss at the sentencing held on the 6th day of October,

1992. The trial court at sentencing after the jury had rendered a guilty verdict in the case of State of Utah v. Lowell D. Carlsen, on its own initiative amended the Information by changing the name of the prosecuting party from the State of Utah to Logan City by denying the prosecutor's motion to amend the Information at trial changing the name of the prosecuting party (Sentencing Tr. 4). Prior to imposing sentence, defense counsel moved the trial court for dismissal on grounds that the court lacked jurisdiction to impose sentence because of an unreasonable delay between trial and sentencing (Sentencing Tr. 9-10). The trial court took this matter under advisement and imposed sentence. A Notice of Appeal was filed by defense counsel on the 4th day of November, 1992. A Memorandum of Decision denying defendant's motion raised during sentencing of an unreasonable delay between trial and sentencing was filed on the 28th day of December, 1992. A second Notice of Appeal was filed with the Clerk of the trial court by defendant on the 20th day of January, 1993 in the case of Logan City, State of Utah v. Carlsen.

C.

DISPOSITION IN TRIAL COURT

The trial court imposed judgment and sentence on the 6th day of October, 1992 in the case of Logan City v. Lowell D. Carlsen, sentencing the defendant for the offense of selling tobacco products to a minor to pay a fine of \$ 300.00 and serve 30 days in jail at Logan, but placed the defendant on six months informal probation. The trial court suspended a hundred dollars of the fine and all of the jail sentence on the condition that defendant satisfactorily completed the probation, (Sentencing Tr. 12).

D.

RELEVANT FACTS

The defendant, Lowell D. Carlsen, owns and operates a business in Logan, Utah under the assumed name of Carlsen's Gas for Less which sells gasoline, soda pop, candy, cigarettes, and among other things has a self-serve car wash.

The defendant was issued a citation by Logan City Police Officer, J.G. Geier on the 8th day of November, 1991 for the offense of selling cigarettes to a minor in violation of U.C.A. § 76-10-104, (R. 117), (Trial Tr. 81-82).

The defendant was charged by an Information filed in the First Circuit Court on the 9th day of December, 1991 for the offense of SELLING TOBACCO TO A MINOR (CLASS B MISDEMEANOR), (R. 46), at Logan, Utah on 11/8/91 in violation of the following

sections of the revised Ordinances of Logan City: 9.24.040. That contrary to Logan City Ordinances, Defendant's acts constituting the offense(s) were: That the Defendant did sell, give or furnish any cigar, cigarettes or tobacco in any form to a person under nineteen years of age. Class B misdemeanor.

This Information was signed and authorized for presentment and filing with the trial court by Jeffrey "R" Burbank, Logan City Prosecutor. Mr. Burbank at the time of preparing and filing of the Information held two positions. Mr. Burbank served as a part time Logan City Prosecutor and as a part time Deputy Cache County Attorney for the Cache County Attorney's Office.

At trial, the defendant, Lowell D. Carlsen testified that he was working at his place of business at approximately 6:30 PM on the 8th day of November, 1991 when a person approached the cashier's window and asked for a pack of camel light cigarettes. The defendant asked him if he was nineteen and the person responded in the affirmative (Trial Tr. 96). The defendant then asked him his date of birth and the person gave him a date of birth which appeared to be over the age of nineteen (Trial Tr. 97). The defendant further testified that the person (Jerren Barson) appeared to him to be over the age of nineteen (Trial Tr. 96). The defendant thereupon sold him

the cigarettes (Trial Tr. 98).

The defendant's testimony was corroborated by the statements he made at the time of the incident to Logan City Police Officer, J.G. Geier who issued the citation to the defendant for the offense of selling cigarettes to a minor (Trial Tr. 81-87).

Jerren Barson testified that he was 16 years old and on the night in question he was working as an operative for the Logan City Police Department and under the directions of Officer Tim Gil Duron (Trial Tr. 5-6). He testified that when he approached the cashier's window at Carlsen's Gas for Less and asked for a pack of camel light cigarettes that the defendant did in fact asked him if he was nineteen years of age (Trial Tr. 77). He testified that he did not answer the question and defendant sold him the cigarettes (Trial Tr. 77).

Tim Gil Duron testified that he was the Logan City Police Officer in charge of the operation on November 8, 1991 and that Jerren Barson was working under his directions. He admitted on cross-examination that on November 8, 1991, he was under a criminal investigation being conducted by the Federal Bureau of Investigation on an alleged police brutality complaint filed by defendant's son involving an incident at

defendant's place of business on May 19, 1991.

The undisputed testimony of the defendant at the entrapment hearing was that after he was issued the citation, Logan City Police Officer, Tim Gil Duron drove past the cashier's building in a westerly direction and put he head out of the car window and laughed at the defendant real loud (Trial Tr. 21-22).

During jury deliberations, the jury had a note delivered to the trial judge which stated as follows:

What does the LAW State about I.D. for tobacco sales?
Does a merchant have to ask for other information?
Does a merchant need to prove age?

The trial judge responded with writing on the same note and returning it to the jury which stated as follows:

You have received all the information which you can receive on these points. You should proceed to decide the case on the evidence & the instructions you have received.

(A copy of this note and request for additional instructions was not included in the trial court's records and the records on appeal. A true and exact copy of the note is included in the addendum to appellant's brief).

The jury thereafter rendered a verdict of guilty against the defendant.

SUMMARY OF ARGUMENT

1. The Ordinance under which the defendant was charged,

Section 9.24.040 of the Revised Ordinances of Logan City violates the provisions of Article XI, § 5 of the Utah Constitution because the penalty conflicts with the general laws of the State and deprived defendant of Equal Protection of Law as secured under the Fourteenth Amendment to the United States Constitution.

2. The trial court erred in granting the prosecution's motion to amend the Information at trial because:

(a) The original Information was fatally defective in that it charged the defendant for violating an unconstitutional and invalid Ordinance and could not be cured by major amendments at trial.

(b) The prosecution by the State of Utah was barred under the Double Jeopardy and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 12 of the Utah Constitution.

(c) The Logan City Prosecutor lacked any authority to prosecute the defendant in the name of the State of Utah.

(d) The substantial rights of the defendant were prejudiced by the major amendments.

3. The statute under which the defendant was convicted, U.C.A. § 76-10-104, (1953 as amended) is unconstitutionally vague, both facially and as applied in violation of the Due Process Clauses under Article I, § 7 of the Utah Constitution and the Fourteenth Amendment to the United States Constitution.

4. The evidence adduced at trial was insufficient to sustain the defendant's conviction.

5. The trial court lacked jurisdiction to impose sentence because of an unreasonable delay of over 8 months between trial and sentencing.

ARGUMENT

POINT I

THE ORDINANCE UNDER WHICH THE DEFENDANT WAS CHARGED, SECTION 9.24.040 OF THE REVISED ORDINANCES OF LOGAN CITY VIOLATES ARTICLE XI, § 5 OF THE UTAH CONSTITUTION AND EQUAL PROTECTION OF LAWS.

Defense counsel after the jury was impanelled and sworn, moved the trial court for dismissal of the Information because the penalty for violating Section 9.24.040 of the Revised Ordinances of Logan City was in conflict with the penalty for a violation of an identical offense under U.C.A. § 76-10-104, (1953 as amended), (Trial Tr. 48-50). The trial court at the sentencing hearing denied defense counsel's motion (Sentencing Tr. 4-7).

The Washington Court of Appeals in the case of State v. Hodgson, 722 P.2d 1336 at 1340 (Wash Ct.App. 1986) held that prosecutorial discretion to seek varying degrees of punishments from proving identical elements of a crime violates the Equal Protection Clause.

The prosecutor in the instant case, Jeffrey "R" Burbank who prepared, authorized, presented, signed and filed

the Information with the trial court had the discretion to seek varying degrees of punishment against the defendant by proving identical elements of a criminal offense.

As pointed out earlier in the Statement of the Case, Mr. Burbank serves two part time positions one as a Logan City Prosecutor and the other as a Deputy Cache County Attorney. As a Deputy Cache County Attorney, Mr. Burbank had the discretion to file an Information as per the citation issued to defendant for the offense of selling tobacco products to a minor in violation of U.C.A. § 76-10-104, a class C misdemeanor. As a Logan City Prosecutor, Mr. Burbank had the discretion to and did file an Information for the identical offense of selling tobacco products to a minor in violation of Section 9.24.040 of the Revised Ordinances of Logan City, a class B misdemeanor.

The pertinent part of U.C.A. § 76-10-104, provides as follows:

Any person who sells, gives or furnishes any cigar, cigarette, or tobacco in any form, to any person under 19 years of age, is guilty of a class C misdemeanor on the first offense, a class B misdemeanor on the second offense, and a class A misdemeanor on subsequent offenses.

The pertinent part of Section 9.24.040 of the Revised Ordinances of Logan City provides as follows:

It is unlawful for any person to sell, give or

furnish any cigar, cigarette or tobacco in any form to any person under nineteen years of age.

Section 9.24.040 of the Revised Ordinances of Logan City does not provide for any penalty. The penalty for violating Section 9.24.040 is under an omnibus clause, Section 1.16.010 of the Revised Ordinances of Logan City which provides as follows:

All violations of this municipal code of which no lesser penalties are provided, are classified as class B misdemeanors, punishable by a fine not to exceed the sum of one thousand dollars, or by imprisonment in the county jail not to exceed six months or by both such fine and imprisonment.

Defense counsel pointed out to the trial court that the Information itself was defective because it failed to charge the defendant with a second violation for selling tobacco products to a minor (Trial Tr. 49). When defense counsel moved the Court for dismissal of the Information, the prosecutor moved to amend the Information to charge the defendant for violating U.C.A. § 76-10-104, a class C misdemeanor (Trial Tr. 52-53).

It would certainly be a grave injustice to allow a prosecutor the discretion to seek and obtain a class B misdemeanor conviction for the first offense of selling tobacco products to a minor under a municipal ordinance and once having obtained a class B conviction, to seek and obtain a class A misdemeanor conviction for a second offense under

a state statute, U.C.A. § 76-10-104, thus circumventing legislative intent that the first offense be a class C misdemeanor, a second offense be a class B misdemeanor, and any subsequent offense be a class A misdemeanor.

The prosecutor filing an Information charging the defendant for the offense of selling tobacco products to a minor in violation of Section 9.24.040 of the Revised Ordinances of Logan City, a class B misdemeanor violated the defendant's rights to Equal Protection of the Laws.

The defendant further contends that Section 9.24.040 of the Revised Ordinances of Logan City violates the provisions of Article XI, § 5 of the Utah Constitution.

The Utah Supreme Court in Allgood v. Larson, 545 P.2d 530 at 532 (Utah 1976) held that: If the ordinance penalty conflicts with that of the general law of the state covering the same subject, the ordinance penalty is void. The charter or ordinance penalty cannot exceed that of the state law.

The ordinance penalty in the instant case for violating Section 9.24.040 of the Revised Ordinances of Logan City is a class B misdemeanor. This penalty exceeds that which the defendant could be charged for an identical offense under a statute, U.C.A. § 76-10-104 of a class C misdemeanor.

Justice Crockett in his dissenting opinion in Allgood, 545 P.2d 530 at 533, stated as follows:

Further, without conceding, or intimating, any view on my part that the ordinance should be declared unconstitutional, I also observe that I can see no justification whatever for declaring the whole ordinance invalid. Nothing about it could possibly be invalid except only the jail sentence part, which can be regarded as severable.

There is a clear distinction in the instant case and this Court's more recent decision in Richfield City v. Walker, 790 P.2d 87 at 90 (Utah App. 1990) where this Court held that the challenged ordinance in that case did not conflict with the state statute because both the ordinance and the statute described class B misdemeanors.

The instant case differs because the ordinance describes a class B misdemeanor and the state statute of an identical offense describes a class C misdemeanor for the first offense.

The ordinance under which the defendant was charged, Section 9.24.040 of the Revised Ordinances of Logan City conflicts with the provisions of Article XI, § 5 of the Utah Constitution and the trial court erred in denying the defendant's motion to dismiss the Information.

POINT II

THE TRIAL COURT ERRED IN GRANTING THE PROSECUTION'S

MOTION TO AMEND THE INFORMATION AT TRIAL.

The Logan City Prosecutor, Scott L. Wyatt at trial and after the jury was impanelled and sworn moved the trial court to amend the Information (Trial Tr. 50-52).

Pointing out at page 90 of the Trial Transcript, the proceedings went as follows:

Mr. HULT: That sounds fine, your Honor. The only thing I want to do because I'm uncertain as to whether I did previously, is to place on the record our objection to the motion to amend. I think we discussed it, but I'm not sure if I stated outright that we object--

THE COURT: All right.

MR. HULT: --to the motion to amend.

THE COURT: All right. The record will show you objection, and I've treated that as if it had been stated.

Mr. Wyatt, is there anything you want to add to what we've said?

MR. WYATT: No. I think that everything's been said. Thank you.

THE COURT: All right. The Court now grants the prosecution's motion to amend, to substitute the State of Utah in place of Logan City as the prosecuting agency, and grants the motion to amend to refer to the State statute as the governing legal provision, specifically Section--can't find it here. Thank you. 76-10-104 of the Utah Code, and grants the motion to identify it as a Class C misdemeanor.

And the Court does that, as I say, for the purpose of getting the issue to the jury in the proper form, at least tentatively, and then if that's--if that's not correct, a later decision by the Court will remedy that. It it--if it can be done, and it's correct, we won't have wasted the jury's time and the witnesses' and counsel's and everyone's time. So, I think that's the best way to proceed, and the Court grants that motion.

The court continues and keeps under advisement defendant's motion, however, to dismiss, because of the conflict between the ordinance and the State statute.

Pointing out at page 109 of the Trial Transcript, the trial court thereafter instructed the jury as follows:

THE COURT: There are a couple of things we've done. We've amended the pleadings to show State of Utah as the plaintiff. We won't explain to you all of the reasons for this. It shows State of Utah as the plaintiff in the action rather than Logan City. Mr. Wyatt's role here is as a representative of the State of Utah, and that's permitted under the statute at this present time.

Another change is that the offense is a Class C misdemeanor, and you'll be instructed in these instructions to that effect rather than a Class B misdemeanor. I think preliminarily that's all that I need to tell you.

The jury after deliberations, returned a verdict of guilty in the case of the State of Utah v. Lowell D. Carlsen (R. 55).

The defendant contends that the trial court erred in granting the prosecution's motion to amend the Information for the following reasons:

A.

THE ORIGINAL INFORMATION WAS FATALLY DEFECTIVE IN THAT IT CHARGED THE DEFENDANT FOR VIOLATING AN UNCONSTITUTIONAL AND INVALID ORDINANCE AND COULD NOT BE CURED BY MAJOR AMENDMENTS AT TRIAL.

The defendant contends that the original Information filed in this case was fatally defective in that it charged him for violating an unconstitutional and invalid ordinance as per defendant's argument under Point I herein and could

not be cured by amendment at trial. This contention is consistent with the holdings of the Arizona Court of Appeals in State V. Bollander, 484 P.2d 219-220 (Ariz. App. 1971).

The defendant further contends that the original Information filed in this case could not be cured by amendment at trial because of the major amendments of changing the name of the plaintiff and prosecuting party from Logan City to the State of Utah; from charging the defendant for violating Section 9.24.040 of the Revised Ordinance of Logan City to charging defendant with violating U.C.A. § 76-10-104; and from a class B misdemeanor to a class C misdemeanor.

This contention is consistent with the holdings of the Colorado Supreme Court in Cervantes v. State, 715 P.2d 783 at 786 (Colo. 1986) where that Court in citing Bustamante v. People, 317 P.2d 885,887 (1957) held that the sufficiency of an information is a matter of jurisdiction, so any conviction based on an information requiring major amendment is void.

B.

THE PROSECUTION BY THE STATE OF UTAH WAS BARRED UNDER THE DOUBLE JEOPARDY AND DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, § 12 OF THE UTAH CONSTITUTION.

The defendant contends that the prosecution in the name of the State of Utah was barred by the Double Jeopardy and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 12 of the Utah Constitution.

The pertinent part of U.C.A. § 77-1-5, (1953 as amended) provides as follows:

A criminal action for any violation of a state statute shall be prosecuted in the name of the State of Utah. A criminal action for violation of any county or municipal ordinance shall be prosecuted in the name of the governmental entity involved.

Pointing out at page 91-92 of the Trial Transcript, the proceedings went as follows:

THE COURT: I'm not sure but what the motion of the defendant is well taken, that you have a conflict here between the City ordinance and the State statute and it's too late to cure it. I think that's what Mr. Hult's position is; that the jury's been sworn and defendant's in jeopardy, and I think what he's saying is, if that's a bad approach to the prosecution, then it can't be brought again. I suppose that would be your argument.

MR. HULT: Yes, if there was a refiling, but more particularly, at this point in time, that that one statute giving them authority to prosecute State statutes doesn't apply to something that occurred before January 1st, in addition to the prejudice that the defendant's suffering at this late stage of the proceedings.

The Utah Supreme Court in State v. Strand, 674 P.2d 109 at 114 (Utah 1983) held that a criminal Information could not be amended if the amendment places the defendant twice in jeopardy.

The United States Supreme Court in Waller v. Florida, 397 U.S. 487, 25 L.Ed.2d 435, 90 S.Ct. 1184 (1970) held that a prosecution by a municipal government for violating a municipal ordinance bars a subsequent prosecution by a State government for an identical offense under a State statute under the Double Jeopardy and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

The question then in the instant case is whether the defendant was sufficiently placed in jeopardy in the prosecution by Logan City, a municipal government for violating a municipal ordinance of selling tobacco products to a minor in violation of Section 9.24.040 of the Revised Ordinances of Logan City to bar prosecution by the State of Utah for an identical offense of selling tobacco products to a minor in violation of a State statute, U.C.A. § 76-10-104, (1953 as amended).

The Utah Supreme Court in Boyer v. Larson, 433 P.2d 1015 at 1016 (Utah 1967) held that jeopardy attaches to a defendant in a jury trial when the jury is impaneled and sworn. This Court in the more recent decision in State v. Nilson, 214 Utah Adv. Rep. 45 at 47 (Utah App. 1993) held that jeopardy attaches to a defendant in a jury trial when the jury is impaneled and sworn. The United States Supreme

Court in Crist v. Bretz, 437 U.S. 28, 57 L.Ed.2d 24, 98 S.Ct. 2156 (1978) held that under the Double Jeopardy Clause of the Fifth Amendment and applicable to the States under the Due Process Clause of the Fourteenth Amendment, that jeopardy attaches to a defendant in a jury trial when the jury is impaneled and sworn.

The trial court granted the prosecution's motion to amend the information after the jury was impaneled and sworn, and the prosecutor had presented his case in chief in the case of Logan City v. Lowell D. Carlsen for the offense of selling tobacco products to a minor in violation of Section 9.24.040 of the Revised Ordinances of Logan City. The amendments to the Information authorizing the State of Utah to prosecute the defendant for the identical offense of selling tobacco products to a minor in violation of U.C.A. § 76-10-104 was barred by the Double Jeopardy and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. The verdict rendered by the jury in the case of the State of Utah v. Lowell D. Carlsen should therefore be declared null and void by this Honorable Court.

C.

THE LOGAN CITY PROSECUTOR LACKED ANY AUTHORITY TO PROSECUTE THE DEFENDANT IN THE NAME OF THE STATE OF UTAH.

The defendant contends that Logan City Prosecutor, Scott L. Wyatt lacked any authority to prosecute him in the name of the State of Utah for two reasons. First, is that the statute authorizing city attorneys and prosecutor's to prosecute criminal offenses in the name of the State of Utah, U.C.A. § 10-3-928 (Effective January 1, 1992) is ex post facto legislation. Second, U.C.A. § 10-3-928, (Effective January 1, 1992) is in conflict with the provisions of Article VIII, § 16 of the Utah Constitution.

The city prosecutor in this case claimed authority to represent the State of Utah and charge the defendant with violating a state statute under an amendment to U.C.A. § 10-3-928 which became effective January 1, 1992. Trial was held in this case on January 16, 1992 but the alleged offense occurred on November 8, 1991 and the original Information was filed with the trial court on December 8, 1991.

Permitting the city prosecutor to prosecute violations of state statutes which occurred prior to this grant of authority constitutes a violation of defendant's rights against ex post facto laws under Article I, § 9 & § 10 of the United States Constitution and Article I, § 18 of the Utah Constitution.

While it is discretionary with the legislature when granting, limiting, or redistributing jurisdiction in criminal cases, to include past offenses, Post v. United States, 161 U.S. 583, 40 L.Ed. 816, 16 S.Ct. 611, no such grant of authority has been made by the legislature in this case. There is no relaxation of the ex post facto prohibition even in the area of changes of jurisdiction of the prosecuting authority unless specifically granted. The new authority of the city prosecutor to prosecute state offenses in the name of the State of Utah can only apply to offenses committed within the municipal boundaries on or after January 1, 1992.

The Utah Supreme Court in Footnote 1 in Doe v. Utah Dept. of Public Safety, 782 P.2d 489 at 490 (Utah 1989) stated as follows:

Both Utah Code Ann. § 77-18-2 and § 67-15-10.5 were amended subsequent to the initiation of this action. The later amendments have no application in this case, and we do not assess their legal force or effect. See generally Utah Const. art. I, § 18; U.S. Const. art. I, §§ 9, 10 (ex post facto law constitutional prohibitions).

Logan City Prosecutor, Scott L. Wyatt had no authority to prosecute the defendant in the name of the State of Utah when this action was initiated by the filing of the Information on December 8, 1991 (R. 46).

The Utah Constitution requires that prosecutions for criminal actions in the name of the State of Utah be by elected public prosecutors. Thus, the prosecution of the defendant in this case under a State statute in the name of the State of Utah by a city attorney, an appointed official, violates the provisions of Article VIII, § 16 of the Utah Constitution which provides as follows:

The Legislature shall provide for a system of public prosecutors who shall have primary responsibilities for the prosecution of criminal actions brought in the name of the State of Utah and shall perform such other duties as may be provided by statute. Public prosecutors shall be elected in a manner provided by statute, and shall be admitted to practice law in Utah. If a public prosecutor fails or refuses to prosecute, the Supreme Court shall have power to appoint a prosecutor pro tempore.

It is clear from this provision that the public prosecutors given responsibility for bringing criminal actions in the name of the State of Utah are to be elected officials, not appointed officials. See, Footnote 2 in Searle v. Briggs, 800 P.2d 804, 806 (Utah 1990). There is no statutory provision in Utah providing for the elections of city attorneys. Rather, they are appointed. U.C.A. § 10-3-809 and § 10-3-902, (1953 as amended). Also, as demonstrated under the argument of Point I of this Brief, U.C.A. § 10-3-928 gives city attorneys the discretion to seek varying degrees of punishment by proving identical elements of a crime and the discretion to prosecute under

a municipal ordinance or a State statute for an identical offense but different penalties violates Equal Protection of the Laws. Hence, the amendments to prosecute the defendant in the name of the State of Utah under a State statute by the Logan City Prosecutor was invalid.

D.

THE SUBSTANTIAL RIGHTS OF THE DEFENDANT WERE
PREJUDICED BY THE AMENDMENTS.

The pertinent part of Rule 4(d) of the Utah Rules
of Criminal Procedure provides as follows:

The court may permit an indictment or information to be amended at any time before verdict if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced. After verdict, an indictment or information may be amended so as to state the offense with such particularity as to bar a subsequent prosecution for the same offense upon the same set of facts.

The defendant contends that his substantial rights were prejudiced by the amendments in the instant case.

State v. Ramon, 736 P.2d 1059 (Utah App. 1987), cert. denied 765 P.2d 1277 (Utah 1988).

First, the substantial rights of the defendant not to be twice placed in jeopardy for the same offense were prejudiced by the amendments. Secondly, the defendant's right to trial by a fair and impartial jury secured under Article I, § 12, Utah Constitution were prejudiced. State v. Durand, 569 P.2d 1107, 1109 (Utah 1977). The jury in this case may

have been mislead and improperly influenced by the numerous and major amendments to the Information. The amendments may have created the false impression in the minds of the jurors that defendant may have committed or was charged with numerous offenses, both against the State of Utah and Logan City. The amendments to the Information in this case after the original information was read to the jury, deprived defendant of his rights to a fair and impartial jury trial. Third, the lack of any prior notice that the defendant would be prosecuted for violating U.C.A. § 76-10-104, deprived the defendant of the opportunity to challenge in the trial court, the constitutionality of the statute as per the argument of the defendant under Point III of this Brief.

POINT III

U.C.A. § 76-10-104 IS UNCONSTITUTIONALLY VAGUE.

The defendant contends that the statute under which he was convicted, U.C.A. § 76-10-104, (1953 as amended) is unconstitutionally vague, both facially and as applied in this case in violation of the Due Process Clauses under Article I, § 7 of the Utah Constitution and the Fourteenth Amendment to the United States Constitution. United States v. National Dairy Products, 372 U.S. 29, 9 L.Ed2d 83, 83 S.Ct. 594 (1963).

The defendant submits that this issue was not raised before the trial court. Defendant contends that because of the plain error and exceptional circumstances involved in this case that the issue may be raised for the first time on appeal. State v. Brown, 201 Utah Adv. Rep. 4,5 (Utah 1992); and State v. Archambeau, 820 P.2d 920, 922 (Utah App. 1991). The exceptional circumstances in this case being that defendant was not given adequate notice that he would be prosecuted under the statute and the validity of the ordinance under which he was originally charged was challenged on other grounds. Defense counsel objected to the amendment to the Information and to the prosecution under U.C.A. § 76-10-104 (Trial Tr. 90). There was plain error because the error should have been obvious to the trial court that it was committing error, and the error in this case affected the substantial rights of the defendant.

The defendant was convicted for violating the provisions of U.C.A. § 76-10-104, which provides as follows:

Any person who sells, gives or furnishes any cigar, cigarette, or tobacco in any form, to any person under 19 years of age, is guilty of a class C misdemeanor on the first offense, a class B misdemeanor on the second offense, and a class A misdemeanor on subsequent offenses.

U.C.A. § 76-10-104 is unconstitutionally vague not

only in the sense that it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," United State v. Harriss, 347 U.S. 612, 98 L.Ed. 989, 74 S.Ct. 808; but lacks any ascertainable standards of guilt, Papachristou v. City of Jacksonville, 405 U.S. 156, 165-166, 31 L.Ed. 2d 110, 117-118, 92 S.Ct. 839 (1972); but also fails to establish minimal guidelines to govern law enforcement, Smith v. Goguen, 415 U.S. 566, 39 L.Ed.2d 605, 94 S.Ct. 1242 (1974); and the statute's vagueness encourages arbitrary and erratic arrests and convictions, Thornhill v. Alabama, 310 U.S. 88, 84 L.Ed. 1093, 60 S.Ct. 736.

The United States Supreme Court in Kolender v. Lawson, 461 U.S. 352, 357-358, 75 L.Ed.2d 903, 909, 103 S.Ct. 1855 (1983) stated as follows:

As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. - - - -[citation omitted] Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement." Smith, 415 U.S. at 574, 39 L.Ed.2d 605, 94 S.Ct. 1242. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policeman, prosecutors, and juries to pursue their personal predilections." *Id.*, at 575, 39 L.Ed.2d 605, 94 S.Ct. 1242.

The Utah Legislature in enacting the provisions of U.C.A. § 76-10-104, failed to establish such minimal guidelines to govern law enforcement as required under Smith and Kolender, thus allowing the police, prosecutors and juries to pursue their own personal predilections. This can be demonstrated in the instant case by the issues and questions of law raised by the jury during their deliberation.

During jury deliberations, the jury had a note delivered to the trial judge which stated as follows:

What does the LAW State about I.D. for tobacco sales?
Does a merchant have to ask for other information?
Does a merchant need to prove age?

The trial judge responded with writing on the same note and returning it to the jury which stated as follows:

You have received all the information which you can receive on these points. You should proceed to decide the case on the evidence and the instructions you have received.

The lack of such minimal guidelines to govern law enforcement required the jury in the instant case to pursue their own personal predilections.

This can further be demonstrated by comparing U.C.A. § 76-10-104 with other statutes involving businesses and minors. For example, U.C.A. § 76-10-103, (1953 as amended) which provides as follows:

It is a class C misdemeanor for the proprietor of any place of business to knowingly permit persons under age nineteen to frequent a place of business while they are using tobacco.

The prosecution under the provisions of § 76-10-103 has the burden of proving beyond a reasonable doubt that the proprietor of a business knowingly permitted persons under age nineteen to frequent the business while they are using tobacco.

An identical situation exists involving sales of alcoholic beverages to minors, U.C.A. § 32A-12-203(b), (1953 as amended). The prosecution has the burden of proving beyond a reasonable doubt that a person knowingly sold or furnished alcoholic beverages to a person under the age of 21.

What is lacking in the challenged statute in the instant case, § 76-10-104 is the requirement for the prosecution to prove beyond a reasonable doubt that a person knowingly sold or furnished tobacco products to a person under the age of nineteen. The prosecution need only to prove that a person sold or furnished cigarettes to a person who happens or turns out to be under the age of nineteen. The prosecution has no burden to prove any mens rea, knowledge or criminal intent. A merchant or cashier who sells cigarettes to a person who appears to be nineteen and furnishes the

merchant or cashier with false Identification which appears to be valid and showing their age to be nineteen could be arrested, prosecuted and conviction under the provisions of U.C.A. § 76-10-104. Or the application of § 76-10-104 to the facts of the instant case.

The defendant testified at trial that when he sold the cigarettes to Jerren Barson on November 8, 1991, Jerren Barson appeared to him to be of the age between 20 and 22. (Trial Tr. 96). The defendant further testified that he asked Jerren Barson if he was nineteen and Jerren Barson responded in the affirmative. (Trial Tr. 96). The defendant then asked Jerren Barson his date of birth and Jerren Barson responded by stating December, 71. (Trial Tr. 97). The defendant's testimony is corroborated by the statements he made at the time of the incident to Logan City Police Officer, J.G. Geier. (Trial Tr. 81-87).

The Federal Courts have held that Due Process requires that knowledge and intent be essential elements of a crime. Landry v. Daley, 280 F.Supp. 968 (D.C. Ill. 1968).

The Nebraska Court has held that elimination of criminal intent as element necessary for violation of a statute may violate due process when penalty for violation of statute is severe or conviction for violation of statute

may irreparably damage the defendant's reputation.

State v. Pettit, 445 N.W.2d 890 (Neb. 1989).

A conviction for violating U.C.A. § 76-10-104 which can ultimately result in a class A misdemeanor conviction, punishable by a year imprisonment and a fine of \$ 2,500.00 is a severe penalty requiring the inclusion of knowledge or criminal intent as a necessary element of the offense.

The trial court instructed the jury in this case under Instruction No. 6 as follows:

Before you may find the defendant guilty of the crime of Selling Tobacco to a Minor, you must find from the evidence, beyond a reasonable doubt, all of the following elements of that crime, to-wit:

1. That the defendant did sell tobacco to another person.
2. That the other such person was under the age of 19 years.
3. That the act did take place on or about November 8, 1991.
4. That the act did take place in Logan City, Cache County, State of Utah.

If you believe that the evidence establishes each and all of the essential elements of the offense beyond a reasonable doubt, it is your duty to convict the defendant of this offense. On the other hand, if the evidence has failed to so establish one or more of the said elements, then you should find the defendant not guilty of this offense.

Clearly, by this Instruction, defendant was not con-

victed by the jury of knowingly selling tobacco to a person under the age of nineteen. Instruction No. 7 given to the jury by the trial court merely gives the legal definition of knowledge and criminal intent as defined under the provisions of U.C.A. § 76-2-103, (1953 as amended), and the instruction does not state that such knowledge or criminal intent was an essential element of the offense in order to convict.

The Utah Supreme Court in State v. Blue, 17 Utah 175, 53 P. 978 (Utah 1898) held that a public officer was not punishable for an act committed innocently without criminal intent, where statute, with no reference to mental state, made private appropriation of public money a felony.

U.C.A. § 76-10-104 should not be construed to be a strict liability statute because it does not clearly indicate a legislative purpose to impose criminal responsibility for commission of the conduct prohibited by the statute without requiring proof of any culpable mental state. State v. Elton, 680 P.2d 727 (Utah 1984); and Morrisette v. United States, 342 U.S. 246, 96 L.Ed. 288, 72 S.Ct. 240 (1952).

The United States Supreme Court under Footnote 7
in Kolender, 461 U.S. 352, 358, 75 L.Ed.2d 903, 909
stated as follows:

Our concern for minimal guidelines finds its roots
as far back as our decision in United States v.
Reese, 92 U.S. 214, 221, 25 L.Ed. 563 (1876):
"It would certainly be dangerous if the legislature
could set a net large enough to catch all possible
offenders, and leave it to the courts to step in-
side and say who could be rightfully detained, and
who should be set at large. This would, to some
extent, substitute the judicial for the legislative
department of government."

U.C.A. § 76-10-104 is incapable of any valid
application because of the lack of knowledge or criminal
intent being essential elements of the offense and is
therefore facially invalid. Greenwood v. City of North Salt
Lake, 817 P.2d 816, 819 (Utah 1991); and State v. Pharris,
204 Utah Adv. Rep. 39, 45 (Utah App. 1993). Furthermore,
§ 76-10-104 is invalid as applied to the facts of this
case both in the sense of the lack of fair notice but also
the lack of minimal guidelines to govern law enforcement in
violation of the Due Process Clauses under Article I, § 7
of the Utah Constitution and the Fourteenth Amendment to
the United States Constitution.

The Utah Supreme Court has held that the Courts will

not rewrite a statute or ignore its plain language in order to reach a constitutional construction. Provo City Corp. v. Willden, 768 P.2d 455, 458 (Utah 1989).

U.C.A. § 76-10-104 lacks minimal guidelines to govern law enforcement because of the lack of any standards relating to Identification requirements for merchants in the business of selling tobacco products, thus allowing the police, prosecutors and juries to pursue their own personal predilections as to such Identification requirements. The jury's request in the instant case for additional instructions shows that four persons of ordinary intelligence could not reasonably understand the conduct proscribed under the provisions of U.C.A. § 76-10-104. This Court should therefore declare the provisions of U.C.A. § 76-10-104 to be unconstitutionally vague and reverse the conviction of the defendant.

POINT IV

THE EVIDENCE ADDUCED AT TRIAL WAS INSUFFICIENT TO SUSTAIN THE DEFENDANT'S CONVICTION.

It is the defendant's contention that the evidence adduced at trial was insufficient to sustain the conviction.

The United States Supreme Court in Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979) held that a criminal conviction violates the Due Process Clause when viewing the evidence as a whole in the light most

favorable to the prosecution, no rational trier of fact could have found the defendant guilty of each and every essential element of the offense beyond a reasonable doubt.

The Utah Supreme Court in State v. Knoll, 712 P.2d 211 at 214 (Utah 1985) stated as follows:

This Court has in numerous cases stated that in presenting defenses in criminal cases a defendant does not bear the burden of persuasion. It is sufficient for acquittal that the evidence or lack thereof creates a reasonable doubt as to any element of the crime. State v. Wilson, 565 P.2d 66 (Utah 1977); State v. Curtis, 542 P.2d 744 (Utah 1975); and State v. Jackson, 528 P.2d 145 (Utah 1974). The ultimate burden of proving the defendant's guilt beyond a reasonable doubt remains on the state, whether defendant offers any evidence in an effort to prove affirmative defenses or not. State v. Curtis, supra.

Defense counsel in the instant case submitted a written request and proposed instruction with the trial court requesting the Court to instruct the jury on Mistake of Fact as defined under the provisions of U.C.A. § 76-2-304, (1953 as amended). (R. 52-54). The trial court decline to give the jury the requested instruction (R. 53). When the jury requested the trial court for additional instructions on identification requirements on tobacco sales, the trial court failed to give the jury the requested instruction. State v. Couch, 635 P.2d 89 (Utah 1981).

The Utah Supreme Court in State v. Elton, 680 P.2d 727, 731 (Utah 1984) held that mistake of fact as to the age

of an alleged victim is a defense to a criminal prosecution.

The evidence adduced at trial in the instant case shows a clear mistake of fact as to the age of Jerren Barson. The defendant testified at trial that when he sold the cigarettes to Jerren Barson on November 8, 1991, Jerren Barson appeared to him to be of the age between 20 and 22. (Trial Tr. 96). The defendant further testified that he asked Jerren Barson if he was nineteen and Jerren Barson responded in the affirmative. (Trial Tr. 96). The defendant further testified that he then asked Jerren Barson his date of birth, and Jerren Barson without batting an eye responded by stating December, 71. (Trial Tr. 97). The defendant's testimony is corroborated by the statements he made at the time of the incident to Logan City Police Officer, J.G. Geier. (Trial Tr. 81-87).

Jerren Barson testified that the defendant did in fact asked him if he was 19 years of age. (Trial Tr. 77). He further testified that defendant proceeded to sell the cigarettes to him without waiting for an answer or reponse (Trial Tr. 77). This testimony of Jerren Barson suggests that the defendant acts differently than any other merchant or cashier in the retail business. For example, will this be cash or charge? Is it the norm for a cashier to sell an item or product without waiting for a response from the customer? This testimony of Jerren Barson is so inherently improbable, that

no reasonable minds could believe it. State v. Meyers, 606 P.2d 250, 253 (Utah 1980); State v. Workman, 806 P.2d 1198, 1204 (Utah App. 1991), affirmed _____ P.2d _____ (Utah 1993).

The prosecution in the instant case failed to establish and prove beyond a reasonable doubt that the defendant had a culpable mental state or a criminal state of mind as required under U.C.A. § 76-2-101, (1953 as amended); State v. Elton, 680 P.2d 727, 728 (Utah 1984); and State v. Blue, 17 Utah 175, 53 P. 978, 980 (Utah 1898), to sell cigarettes to a person under the age of nineteen in violation of U.C.A. § 76-10-104. The evidence adduced at trial was sufficiently inconclusive as to justify and warrant the reversal of the defendant's conviction by this Court. State v. Petree, 659 P.2d 443 (Utah 1983); and State v. Verde, 770 P.2d 116 (Utah 1989).

POINT V

THE TRIAL COURT LACKED JURISDICTION TO IMPOSE SENTENCE BECAUSE OF AN UNREASONABLE DELAY BETWEEN TRIAL AND SENTENCING.

The defendant next contends that the trial court lacked jurisdiction to impose sentence because of an unreasonable delay between trial and sentencing.

Defense counsel at the sentencing hearing held on

October 6, 1992, moved for dismissal on grounds of the delay between trial and sentencing. (Sentencing Tr. 9). The defendant submits that this was a jurisdictional question and actually a motion in arrest of judgment under Rule 23 of the Utah Rules of Criminal Procedure. State v. Merritt, 67 Utah 325, 247 P. 497 (Utah 1926). The trial court took the matter under advisement and denied the motion in a Memorandum of Decision filed on December 28, 1992 (R. 72). A second Notice of Appeal was filed by defendant from this decision. (R. 82).

The defendant without being advised of his right to be sentenced not less than two nor more than 30 days as provided under Rule 22(a) URCrimP, agreed to be sentenced in a five or six week period or the end of February, 1992. (Trial Tr. 112-113). The postponement of sentencing was to allow the trial judge to take under advisement, defendant's motion to dismiss raised at trial and the trial court agreed to issue a memorandum decision on the motion within said period of time. (Trial Tr. 113). No written memorandum decision was issued by the trial court and defendant was not sentenced until October 6, 1992.

The Utah Supreme Court in State v. Helm, 563 P.2d 794 (Utah 1977) held that the time limits are directory, not mandatory, and trial court's failure to comply with them does

not divest it of jurisdiction to pass sentence; where sentence is imposed within reasonable time so that the delay does not amount to an abuse of the court's powers or adversely affect the defendant.

The failure of the trial court to pass sentence in the instant case was a clear abuse of the court's power because of the trial court's failure to render a decision and issue a written memorandum as to the issue under advisement within the 60 day period as required under U.C.A. 78-7-25 (1988 Amendment).

Furthermore, the defendant was adversely affected by the delay because of the frustration of his right to appeal the verdict of jury and his conviction. Cochran v. Kansas, 316 U.S. 255, 86 L.Ed. 1453 (1942). The defendant in the instant case stood convicted by a jury for a period of over eight months prior to imposition of sentence to allow him to appeal his conviction.

Clearly, defendant's consent to be sentence within a five or six week period should not be construed to be a waiver for a period of over eight months.

Furthermore, the trial court's amendment of the Information at sentencing by changing the name of the prosecuting party after verdict from the State of Utah to Logan City violated Rule 4(d) of the Utah Rules of Criminal Pro-

cedures and U.C.A. § 77-1-5, (1953 as amended).

CONCLUSION

The defendant-appellant respectfully submits that based upon the foregoing, his conviction for the offense of Selling Tobacco to a Minor should be reversed and remanded to the trial court with instructions to enter an Order dismissing the original Information with prejudice or other proceedings consistent with this Court's decision.

DATED this 2 day of July, 1993.


LOWELL D. CARLSEN

CERTIFICATE OF SERVICE

I certify that I mailed two true and exact copies of the Brief of Appellant and Addendum to Appellant's Brief to Scott L. Wyatt, Attorney for Appellee, located at 255 North Main, Logan, Utah, 84321, postage prepaid and by placing the same in a U.S. Mailbox on this 2 day of July, 1993.


LOWELL D. CARLSEN

A D D E N D U M

codified in this chapter, is described as follows: One and one-half to one and three-fourths inches in diameter, the impression of which represents an eagle perched on a beehive and the inscription "Corporate Seal of Logan City," and two stars in the margin, is declared to have been, that it is now, and hereafter shall be the corporate seal of the city. (Prior code §1-4-1)

1.12.020 City name. The official name of the city shall hereafter be styled as "The City of Logan." (Prior code §1-4-2)

Chapter 1.16

GENERAL PENALTY

Sections:

- 1.16.010 Violation--Class B misdemeanor.
- 1.16.020 Violation--Misdemeanor.
- 1.16.030 Continuing violation.
- 1.16.040 Liability--Officer, agent or servant of corporation.
- 1.16.050 Accessories.
- 1.16.060 Prisoner labor.

1.16.010 Violation--Class B misdemeanor. All violations of this municipal code for which no lesser penalties are provided, are classified as class B misdemeanors, punishable by a fine not to exceed the sum of one thousand dollars, or by imprisonment in the county jail not to exceed six months or by both such fine and imprisonment. (Added during 1989 codification)

9.24.040 Persons under the age of nineteen years--Sale of tobacco to. It is unlawful for any person to sell, give or furnish any cigar, cigarette or tobacco in any form to any person under nineteen years of age. (Prior code §12-7-4)

76-10-103. Permitting minors to use tobacco in place of business.

It is a class C misdemeanor for the proprietor of any place of business to knowingly permit persons under age nineteen to frequent a place of business while they are using tobacco.

History: C. 1953, 76-10-103, enacted by L. 1973, ch. 196, § 76-10-103.

COLLATERAL REFERENCES

Am. Jur. 2d. — 42 Am. Jur. 2d Infants § 18.
C.J.S. — 43 C.J.S. Infants §§ 92, 95.
Key Numbers. — Infants ⇐ 13.

76-10-104. Furnishing cigars, cigarettes or tobacco to minors — Penalties.

Any person who sells, gives, or furnishes any cigar, cigarette, or tobacco in any form, to any person under 19 years of age, is guilty of a class C misdemeanor on the first offense, a class B misdemeanor on the second offense, and a class A misdemeanor on subsequent offenses.

History: C. 1953, 76-10-104, enacted by L. 1974, ch. 32, § 39; 1989, ch. 194, § 1.

Repeals and Reenactments. — Laws 1974, ch. 32, § 39 repealed former § 76-10-104, as enacted by L. 1973, ch. 196, § 76-10-104, relating to use of cigars, cigarettes or tobacco in enclosed public place, and enacted present § 76-10-104.

Amendment Notes. — The 1989 amendment, effective July 1, 1989, added "on the first offense, a class B misdemeanor on the second offense, and a class A misdemeanor on subsequent offenses" at the end of the section and made a minor stylistic change.

COLLATERAL REFERENCES

Am. Jur. 2d. — 42 Am. Jur. 2d Infants § 16.
C.J.S. — 43 C.J.S. Infants §§ 92, 95.

A.L.R. — Civil liability for tobacco sales to minors, 55 A.L.R.4th 1238.
Key Numbers. — Infants ⇐ 13.

76-10-105. Buying or possessing cigars, cigarettes, or tobacco by minors — Penalty — Compliance officer authority — Juvenile court jurisdiction.

(1) Any person under the age of 19 years who buys, accepts, or has in his possession any cigar, cigarette, or tobacco in any form is guilty of a class C misdemeanor, or may be subject to the jurisdiction of the juvenile court.

(2) A compliance officer appointed by a board of education under Section 53A-3-402 may issue citations for violations of this section committed on school property. Cited violations shall be reported to the appropriate juvenile court.

76-2-304. Ignorance or mistake of fact or law.

(1) Unless otherwise provided, ignorance or mistake of fact which disproves the culpable mental state is a defense to any prosecution for that crime.

(2) Ignorance or mistake concerning the existence or meaning of a penal law is no defense to a crime unless:

(a) Due to his ignorance or mistake, the actor reasonably believed his conduct did not constitute an offense, and

33

78-7-25. Decisions to be rendered within sixty days — Procedures for decisions not rendered.

(1) A judge of a trial court shall decide all matters submitted for final determination within 60 days of submission, unless circumstances causing the delay are beyond the judge's personal control.

(2) The Judicial Council shall establish reporting procedures for all matters not decided within 60 days of final submission.

History: L. 1969, ch. 249, § 1; 1977, ch. 77, § 67; 1988, ch. 248, § 47.

Amendment Notes. — The 1988 amendment, effective April 25, 1988, subdivided and rewrote the section which had read "No judge of the circuit court or district court shall keep in his possession any matter in controversy not

decided by him which has been finally submitted for his consideration and determination beyond a sixty-day period unless circumstances causing such delay are beyond his personal control."

Cross-References. — Circuit courts, Chapter 4 of this title.

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77-1-5. Prosecuting party.

A criminal action for any violation of a state statute shall be prosecuted in the name of the state of Utah. A criminal action for violation of any county or municipal ordinance shall be prosecuted in the name of the governmental entity involved.

History: C. 1953, 77-1-5, enacted by L. 1980, ch. 15, § 2.

Cross-References. — Prosecutions to be

conducted in name of "the State of Utah," Utah Const. Art. VIII, § 16.

COLLATERAL REFERENCES

Key Numbers. — Criminal Law ⇐ 12.

—Time.

Time fixed by statute was not jurisdictional. *Rose v. District Court*, 67 Utah 526, 248 P. 486 (1926).

The time fixed by the statute was not jurisdictional and since it was regarded as merely directory the further provision that a judgment *should be rendered within a reasonable time* has been judicially read into the statute. *State v. Fedder*, 1 Utah 2d 117, 262 P.2d 753 (1953).

Time limits are directory, not mandatory, and trial court's failure to comply with them does not divest it of jurisdiction to pass sentence; where sentence is imposed within a reasonable time so that the delay does not amount to an abuse of the court's powers or adversely affect the defendant, he is not entitled to go free but only to have a correct sentence imposed, with due consideration given for any time served because of the delay. *State v. Helm*, 563 P.2d 794 (Utah 1977).

Defendant who was convicted in March,

Failure to object to delay in pronouncing judgment waived the right to object. *Rose v. District Court*, 67 Utah 526, 248 P. 486 (1926).

Statements before sentencing.

—Defendant.

Requirement that defendant be asked whether he has any cause why judgment *should not be pronounced against him* was substantially complied with by question as to whether he or his counsel had anything to state prior to sentencing. *State v. McClendon*, 611 P.2d 728 (Utah 1980).

The defendant's due process right of allocution was satisfied when the sentencing hearing was held in his presence, where he was addressed by the judge and elected to speak; an amended judgment subsequently entered by the trial court, at which the defendant was not present nor represented by counsel, reflected only a correction of a clerical mistake in his sentence. *State v. Lorrain*, 761 P.2d 1388 (Utah 1988).

COLLATERAL REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d Criminal Law § 526 et seq.

C.J.S. — 24 C.J.S. Criminal Law § 1556 et seq.

A.L.R. — Consideration of accused's juvenile court record in sentencing for offense committed as adult, 64 A.L.R.3d 1291.

Loss of jurisdiction by delay in imposing sentence, 98 A.L.R.3d 605.

Propriety of sentencing justice's consideration of defendant's failure or refusal to accept plea bargain, 100 A.L.R.3d 834.

Accused's right to sentencing by same judge who accepted guilty plea entered pursuant to plea bargain, 3 A.L.R.4th 1181.

Key Numbers. — Criminal Law ⇐ 977 to 996.

Rule 23. Arrest of judgment.

At any time prior to the imposition of sentence, the court upon its own initiative may, or upon motion of a defendant shall, arrest judgment if the facts proved or admitted do not constitute a public offense, or the defendant is mentally ill, or there is other good cause for the arrest of judgment. Upon arresting judgment the court may, unless a judgment of acquittal of the offense charged is entered or jeopardy has attached, order a commitment until

32A-12-203. Unlawful sale or supply to minors.

(1) A person may not sell, offer to sell, or otherwise furnish or supply any alcoholic beverage or product to any person under the age of 21 years.

(2) Except as otherwise provided in Subsection (1), a person who knowingly sells, offers to sell, or otherwise furnishes or supplies any alcoholic beverage or product to any person under the age of 21 years is guilty of a class A misdemeanor.

(3) This section does not apply to the furnishing or supplying of an alcoholic beverage or product to a minor for medicinal purposes by the parent or guardian of the minor or by the minor's physician or dentist, in accordance with this title.

History: C. 1953, 32A-12-8, enacted by L. 1985, ch. 175, § 1; renumbered by L. 1990, ch. 23, § 132; 1991, ch. 49, § 1; 1991, ch. 241, § 30.

Amendment Notes. — The 1991 amendment by ch. 49, effective March 13, 1991, added present Subsection (2) designated former Sub-

tion of the section a class A misdemeanor and provided a minimum mandatory fine of \$500.

The 1991 amendment by ch. 241, effective April 29, 1991, substituted "class B" for "class A" in the first sentence in former Subsection (3).

This section is set out as reconciled by the

tence; and made various stylistic and phraseology changes throughout the section.

The 1987 amendment by ch. 228 added Subsection (6) and made minor changes in phraseology and punctuation throughout the section.

The 1989 amendment, effective July 1, 1989, rewrote this section, which formerly provided for municipal justices of the peace.

The 1991 amendment, effective January 1, 1992, designated the formerly undesignated language as Subsection (1), added Subsections (2) through (8), and deleted "that is not a municipal department or a primary location of the circuit court" after "municipality" in Subsection (1).

10-3-928. Attorney duties — Deputy public prosecutor [Effective until January 1, 1992].

(1) The city attorney may prosecute violations of city ordinances and has the same powers in respect to violations of city ordinances as are exercised by a county attorney in respect to violations of state law, including, but not limited to, granting immunity to witnesses for violations of city ordinances.

(2) The city attorney may be sworn as a deputy public prosecutor by the attorney general, the county attorney of the county in which the city is situated, or any other public prosecutor having jurisdiction within the city limits. Appointments as deputy public prosecutor shall be for a period of time as specified at the time of oath taking but shall not exceed one year and shall be subject to renewal. Upon such oath, the city attorney may prosecute, in the name of the state of Utah, any class A misdemeanor enumerated as such by the Legislature and committed within the territorial limits of the city.

Attorney duties — Deputy public prosecutor [Effective January 1, 1992].

In cities with a city attorney, the city attorney may prosecute violations of city ordinances, and under state law, infractions and misdemeanors occurring within the boundaries of the municipality and has the same powers in respect to the violations as are exercised by a county attorney, including, but not limited to, granting immunity to witnesses. The city attorney shall represent the interests of the state or the municipality in the appeal of any matter prosecuted in any trial court by the city attorney.

History: C. 1953, 10-3-931, enacted by L. 1977, ch. 48, § 3; redes. as 10-3-928; 1987, ch. 140, § 1; 1991, ch. 268, § 2.

Amended effective January 1, 1992. — Laws 1991, ch. 268, § 2 amends this section effective January 1, 1992. See amendment notes below.

Amendment Notes. — The 1987 amendment designated the existing language as Subsection (1); added Subsection (2); and made minor stylistic changes in Subsection (1).

The 1991 amendment, effective January 1,

1992, deleted the Subsection (1) designation and former Subsection (2), relating to appointments of city attorneys as deputy public prosecutors, rewrote the first sentence, which read "The city attorney may prosecute violations of city ordinances and has the same powers in respect to violations of city ordinances as are exercised by a county attorney in respect to violations of state law, including, but not limited to, granting immunity to witnesses for violations of city ordinances," and added the second sentence.

ART. I, § 7

CONSTITUTION OF UTAH

Gun control laws, validity and construction of, 28 A. L. R. 3d 845.

Bear Arms, Lucilius A. Emery, 28 Harv. L. Rev. 473.

Law Reviews.

Restrictions on the Right To Bear Arms—State and Federal Firearms Legislation, 98 U. Pa. L. Rev. 905.

The Constitutional Right to Keep and

Sec. 7. [Due process of law.]

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

Comparable Provision.

Montana Const., Art. III, § 27.

body, or agency authorized by law to determine the questions; (b) an inquiry into the merits of the

Sec. 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Comparable Provision.

—acquittal notwithstanding defect in information or indictment 77.94.19

Sec. 24. [Uniform operation of laws.]

All laws of a general nature shall have uniform operation.

Cross-Reference.

State v. J. B. & R. E. Walker, Inc., 100

Prohibition on private or special laws

U. 523 116 P. 2d 766

Art. VIII, § 16

CONSTITUTION OF UTAH

COLLATERAL REFERENCES

Key Numbers. — Judges ⇐ 10, 11.

Sec. 16. [Public prosecutors.]

The Legislature shall provide for a system of public prosecutors who shall have primary responsibility for the prosecution of criminal actions brought in the name of the State of Utah and shall perform such other duties as may be provided by statute. Public prosecutors shall be elected in a manner provided by statute, and shall be admitted to practice law in Utah. If a public prosecutor fails or refuses to prosecute, the Supreme Court shall have power to appoint a prosecutor pro tempore.

History: Const. 1896; L. 1984 (2nd S.S.), S.J.R. 1.

Compiler's Notes. — Former Article VIII contained no comparable provisions.

Secs. 17 to 28. [Repealed.]

Repeals — See the compiler's note follow-

Section		Section	
76-2-305.	Mental illness — Use as a defense — Influence of alcohol or other substance voluntarily consumed — Definition.	76-2-402.	Force in defense of person — Forcible felony defined.
76-2-306.	Voluntary intoxication.	76-2-403.	Force in arrest.
76-2-307.	Voluntary termination of efforts prior to offense.	76-2-404.	Peace officer's use of deadly force.
76-2-308.	Affirmative defenses.	76-2-405.	Force in defense of habitation.
		76-2-406.	Force in defense of property.

Part 4

Justification Excluding Criminal Responsibility

76-2-401.	Justification as defense — When allowed.
-----------	--

PART 1

CULPABILITY GENERALLY

76-2-101. Requirements of criminal conduct and criminal responsibility.

No person is guilty of an offense unless his conduct is prohibited by law and:

- (1) He acts intentionally, knowingly, recklessly, with criminal negligence, or with a mental state otherwise specified in the statute defining the offense, as the definition of the offense requires; or
- (2) His acts constitute an offense involving strict liability.

These standards of criminal responsibility shall not apply to the violations set forth in Title 41, Chapter 6, unless specifically provided by law.

History: C. 1953, 76-2-101, enacted by L. 1973, ch. 196, § 76-2-101; 1983, ch. 90, § 1; 1983, ch. 98, § 1.

NOTES TO DECISIONS

PRINCIPLES OF CRIMINAL RESPONSIBILITY

76-2-103

dangerous drugs as contributing to the delinquency of a minor, 36 A.L.R.3d 1292.

Key Numbers. — Criminal Law ⇐ 23.

76-2-102. Culpable mental state required — Strict liability.

Every offense not involving strict liability shall require a culpable mental state, and when the definition of the offense does not specify a culpable mental state and the offense does not involve strict liability, intent, knowledge, or recklessness shall suffice to establish criminal responsibility. An offense shall involve strict liability if the statute defining the offense clearly indicates a legislative purpose to impose criminal responsibility for commission of the conduct prohibited by the statute without requiring proof of any culpable mental state.

History: C. 1953, 76-2-102, enacted by L. 1973, ch. 196, § 76-2-102; 1983, ch. 90, § 2.

NOTES TO DECISIONS

ANALYSIS

Depraved indifference.
Cited.

Depraved indifference.

In a prosecution for second degree murder, although the court's jury instruction did not expressly treat the element of knowledge, there was no error since the other jury instructions and the evidence of the defendant's ac-

tions left little room for the jury to misunderstand that the defendant must have been aware that his conduct created a grave risk of death to another, within the definitions contained in the instructions. *State v. Fontana*, 680 P.2d 1042 (Utah 1984).

Cited in *State v. Whitehair*, 735 P.2d 39 (Utah 1987); *In re Estate of Wagley*, 760 P.2d 316 (Utah 1988); *State v. Padilla*, 776 P.2d 1329 (Utah 1989).

UTAH COURT OF APPEALS NO.
FIRST CIRCUIT COURT NO. 911001337
LOGAN CITY V. LOWELL CARLSEN

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(UBDER SEPARATE COVER)

TRANSCRIPT OF SENTENCING
PARTIAL TRANSCRIPT OF JURY TRIAL

☐ STATE OF UTAH
☐ COUNTY OF CACHE
☒ CITY OF LOGAN

THE DEFENDANT IS HEREBY
GIVEN NOTICE TO APPEAR BEFORE

1ST CIRCUIT COURT JUDGE _____

LOCATED AT 140 NO 100 W

ON OR BEFORE THE 26 DAY OF NOV, 1991

AT THE HOUR OF 9:30 A.M. / P.M.

IN THE CIRCUIT COURT.

FOR COURT USE ONLY

Date of Conviction/Forfeiture _____

Fine _____ Suspended _____

Jail _____ Suspended _____

Surcharge \$ _____

PLEA/FINDING

☐ Guilty
☐ Not Guilty
☐ Forfeited Bail

SEVERITY

☐ Minimum
☐ Intermediate
☐ Maximum

LOGAN CITY POLICE DEPARTMENT

UNIFORM CITATION OR INFORMATION
AND NOTICE TO APPEAR

CASE NO. 911001337

CITATION NO. A 1363

Name (Last)	(First)	(Middle)
<u>CARLSON</u>	<u>LOWELL</u>	<u>D.</u>
Address (City) (State) (Zip)		Phone
<u>120 N. 400 E. LOGAN, UT</u>		<u>752-6800</u>
Place of Birth	DOB	Social Security Number
<u>Logan, UT</u>	<u>8/9/25</u>	<u>529 345 468</u>
Driver License No	State	Vehicle License No
<u>1887007</u>	<u>UT</u>	<u>150 RLR W</u>
Picture ID	Vehicle Color	Vehicle Year
<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No		
Vehicle Make	Type	Model
Accident		
<input type="checkbox"/> R <input type="checkbox"/> N		

THE ABOVE NAMED DEFENDANT IS CHARGED WITH VIOLATING:

UTAH	COUNTY	CITY	Misd Cit	Traf
<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
<u>76-10-124 SELLING</u>				
<u>CIGARETTES TO</u>				
<u>MINOR</u>				

Location	Mile Post No	Interstate	Direction
<u>600 NO. 100 CARLSON'S GAS</u>		<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	<u>N S E W</u>
Date	Military Time	Speeding	MPH Over
<u>11-8</u>	<u>1830</u>	<u>in a</u>	<u>9</u>

WITHOUT ADMITTING GUILT, I PROMISE TO APPEAR AS DIRECTED HEREIN

SIGNATURE X James A. Seien 9

I CERTIFY THAT COPY OF THIS CITATION OR INFORMATION WAS DULY SERVED UPON THE DEFENDANT ACCORDING TO LAW ON THE ABOVE DATE AND I KNOW OR BELIEVE AND SO ALLEGE THAT THE ABOVE NAMED DEFENDANT DID COMMIT THE OFFENSE HEREIN SET FORTH CONTRARY TO LAW. I FURTHER CERTIFY THAT THE COURT TO WHICH THE DEFENDANT HAS BEEN DIRECTED TO APPEAR IS THE PROPER COURT PURSUANT TO SECTION 77-7-19

OFFICER James A. Seien ID # 248

COMPLAINANT _____ ID # _____

DATE 11-8, 1991

DLD
USE

MISD. CIT.-BCI
TRAFFIC - COURT

Date Sent to DLD

Docket No

RIGHT INDEX

91 DEC 9 PM 3 38
IN THE CIRCUIT COURT, STATE OF UTAH
COUNTY OF CACHE, LOGAN CITY DEPARTMENT

LOGAN CITY,)	
)	
Plaintiff)	I N F O R M A T I O N
)	
vs.)	
)	
CARLSEN, Lowell)	
720 North 400 East)	No. 911001337
Logan, Utah)	
8/9/25)	
Defendant)	

The undersigned, C Andrews, under oath, states on the information and belief that the above named Defendant committed the crime(s) of:
SELLING TOBACCO TO A MINOR (CLASS B MISDEMEANOR)
at Logan, Utah on 11/8/91 in violation of the following sections of the Revised Ordinances of Logan City:
9.24.040

That contrary to Logan City Ordinances, Defendant's acts constituting the offense(s) were:
That the Defendant did sell, give or furnish any cigar, cigarette or tobacco in any form to a person under nineteen years of age. Class B Misdemeanor

This information is based on evidence obtained from the following witnesses:

J. G. GEIER, LCPD
T. G. DURON, LCPD
K. HAWKES, LCPD
T. Barson
J. Barson

Authorized for presentment & filing



Logan City Prosecutor/Attorney

DAMAGES: YES NO



COMPLAINANT

Subscribed & sworn to before me
this 9 day of Dec 1991.



CIRCUIT COURT JUDGE

Case No. #03

DEC 12 1991

By 

What does the LAW
State about ID for tobacco
sales? Does a merchant have
to ask for other information?
Does a merchant need to prove age?

1-16-92
You have received all the information which
you can receive on these points. You should proceed
to decide the case on the evidence & the instructions
you have received.

K. Roger Bean
Judge

State of Utah
~~LOGAN CITY,~~

Plaintiff,

vs

LOWELL CARLSEN,

Defendant,

INSTRUCTIONS TO JURY

CASE NO. 911001337

MEMBERS OF THE JURY:

It is the duty of the Court to instruct you in the laws that apply to this case, and it is your duty as jurors to follow the laws as the Court states them to you, regardless of what you personally believe the laws are or ought to be. On the other hand, it is your exclusive province to determine the facts in the case, and to consider and weigh the evidence for that purpose.

INSTRUCTION NO: 1

The Defendant, Lowell Carlsen is charged with the crimes of Selling Tobacco to a Minor, a Class ^C ~~B~~ Misdemeanor, to wit:

That the Defendant did sell, give or furnish any cigar, cigarette or tobacco in any form to a person under nineteen years of age.

INSTRUCTION NO. 6.

Before you may find the defendant guilty of the crime of Selling Tobacco to a Minor, you must find from the evidence, beyond a reasonable doubt, all of the following elements of that crime, to-wit:

1. That the defendant did sell tobacco to a another person.
2. That the other such person was under the age of 19 years.
3. That the act did take place on or about Noveber 8, 1991.
4. That the act did take place in Logan City, Cache County, State of Utah.

If you believe that the evidence establishes each and all of the essential elements of the offense beyond a reasonable doubt, it is your duty to convict the defendant of this offense. On the other hand, if the evidence has failed to so establish one or more of the said elements, then you should find the defendant not guilty of this offense.

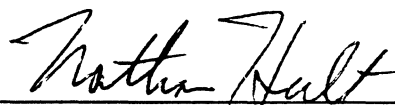
Nathan Hult - 4704
Attorney for Defendant
P.O. Box 543
110 North 100 East
Logan, Utah 84321
Telephone: (801) 753-7400

IN THE FIRST CIRCUIT COURT, STATE OF UTAH
COUNTY OF CACHE, LOGAN CITY DEPARTMENT

LOGAN CITY,	*	REQUEST FOR JURY INSTRUCTIONS
Plaintiff,	*	
vs.	*	
LOWELL D. CARLSEN,	*	Case No. 911001337
Defendant.	*	

The Defendant requests that the following jury instructions be given in addition to appropriate stock instruction.

Dated this 15 day of January, 1992.



Nathan Hult

CERTIFICATE OF HAND-DELIVERY

I hereby give notice that I hand-delivered a copy of the foregoing: REQUEST FOR JURY INSTRUCTIONS to the below named individual on Jan. 16, 1992.

Scott Wyatt
Logan City Prosecutor
255 North Main
Logan, UT 84321



INSTRUCTION NO. _____

An act committed or an omission made under an ignorance or mistake of fact which disproves the culpable mental state is a defense for that crime.

Thus a person is not guilty of a crime if he commits an act or omits to act under an honest and reasonable belief in the existence of certain facts and circumstances which, if true, would make such act or omission lawful.

*Declined.
KRB.*

RCUIT COURT, STATE OF UT
CACHE COUNTY, LOGAN CITY DEPARTMENT

~~LOGAN CITY,~~
State of Utah

Plaintiff

VS

VERDICT

NO. 911001337

LOWELL CARLSEN,

Defendant

We, the jurors in the above case, find the defendant, Lowell Carlsen, Guilty of Selling Tobacco to a Minor, a Class C Misdemeanor.

Dated: Jan 16 92

Tracy V. Jenkins
Foreperson

First Circuit Court, State of Utah, County of Cache,
Logan Department

STATE OF UTAH

LOGAN CITY

JUDGMENT

Plaintiff

No. 211031337

vs.
Howell Carlson

Defendant

Defendant (having been adjudged) (entered a plea of) GUILTY to the charge of

Count No. 1 Furnish Tab Prod. to Minor a Class _____

Count No. 2 _____ a Class _____

Count No. 3 _____ a Class _____

Count No. 4 _____ a Class _____

Misdemeanor, and no legal reason having been shown why judgment should not be pronounced, and Defendant being present (with) (having waived) Counsel. It is the judgment and sentence of the Court as follows:

Count No. 1 Defendant is fined \$ 300 plus surcharge of \$ _____
less the following suspended \$ 100
TOTAL TO BE PAID \$ 200

and to be imprisoned for 30 days in the Cache County Jail with 30 days to be suspended on payment of fine.

Count No. 2 Defendant is fined \$ _____ plus surcharge of \$ _____
less the following suspended \$ _____
TOTAL TO BE PAID \$ _____

and to be imprisoned for _____ days in the Cache County Jail with _____ days to be suspended on payment of fine.

Count No. 3 Defendant is fined \$ _____ plus surcharge of \$ _____
less the following suspended \$ _____
TOTAL TO BE PAID \$ _____

and to be imprisoned for _____ days in the Cache County Jail with _____ days to be suspended on payment of fine.

Count No. 4 Defendant is fined \$ _____ plus surcharge of \$ _____
less the following suspended \$ _____
TOTAL TO BE PAID \$ _____

and to be imprisoned for _____ days in the Cache County Jail with _____ days to be suspended on payment of fine.

Stay of Execution to FRIDAY _____ at 4:30 p.m. and the defendant is ordered to appear in Court at said time. Fine to be paid in installments of \$ _____ per _____ beginning

Oct. 7 4 PM 1995

Defendant may appeal this judgment within 30 days to Court of Appeal in Salt Lake City, Utah.

Dated

11-6-92

K Roger Bean
CIRCUIT JUDGE

6 months probation

Case No. FLS
SP 450084

Nathan Hult - 4704
Attorney for Defendant
110 North 100 East
P.O. Box 543
Logan, Utah 84323-0543
Telephone: (801) 753-7400

CIRCUIT
'92 NOV 4 PM 4 50

IN THE CIRCUIT COURT FOR THE FIRST JUDICIAL DISTRICT,
COUNTY OF CACHE, STATE OF UTAH

CITY OF LOGAN,	*	
	*	NOTICE OF APPEAL AND
Plaintiff,	*	REQUEST FOR RECORD
	*	
vs.	*	
	*	
LOWELL CARLSEN,	*	Case No. 911001337
	*	
Defendant.	*	

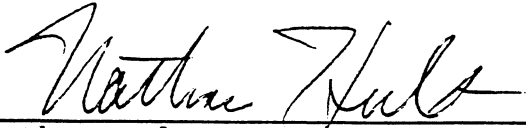
TO THE CLERK OF THE CIRCUIT COURT OF CACHE COUNTY:

The Defendant hereby gives notice of his appeal from the judgment and sentence entered on October 6, 1992.

You are hereby requested to prepare, certify and transmit to the Court of Appeals of the State of Utah, with reference to the Notice of Appeal filed herewith, the record in the above case, prepared and transmitted as required by law, and the rules of said Court, and to include in said record, the following documents:

ALL FILES AND TRANSCRIPTS PERTAINING TO THIS RECORD.

DATED this 4 day of November, 1992.



Nathan Hult
Attorney for Defendant

Case No. 911001337

NOV 5 1992

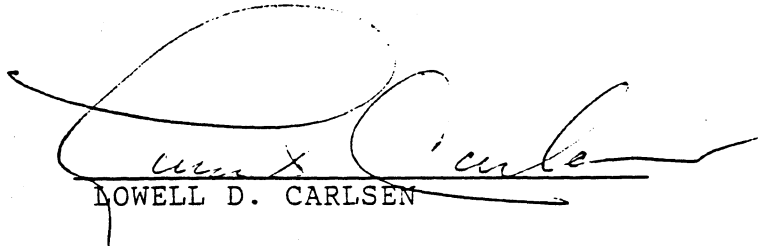
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LOWELL D. CARLSEN
Defendant in Pro Se
720 North 400 East
Logan, Utah 84321

CIRCUIT COURT, STATE OF UTAH
COUNTY OF CACHE, LOGAN CITY DEPARTMENT

LOGAN CITY,	:	
STATE OF UTAH,	:	CERTIFICATE OF MAILING
Plaintiff(s),	:	
-vs-	:	
LOWELL D. CARLSEN	:	Case No. 911001337
Defendant.	:	

I certify that I mailed a true and exact copy of the Notice of Appeal filed by Nathan Hult on November 4, 1992 in the above-entitled matter to Scott L. Wyatt, Logan City Prosecutor, located at 255 North Main, Logan, Utah on this 4th day of February, 1993.


LOWELL D. CARLSEN

NATHAN HULT

ATTORNEY AT LAW

PHONE (801) 753-7400 OFFICE
(801) 752 7538 HOME
(801) 753-7447 FAX

110 NORTH 100 EAST
LOGAN UTAH 84321

March 11, 1992

Judge K. Roger Bean
437 Wasatch Drive
Layton, UT 84041

RE: State of Utah v. Lowell Carlsen
Case No. 911001337

Dear Judge Bean:

Enclosed is a copy of Memorandum in Support of Motion to Dismiss which we have filed with the court in the above noted case.

If the court declines to grant our Motion to Dismiss, a conflict has arisen with the Sentencing date of March 30. Judge Pat Brian has scheduled State of Utah vs. Steven James, a murder trial, to begin on March 30 and continue for three weeks. Could we reschedule this Sentencing date for either before that time or after the trial concludes?

Thank you for your consideration of this matter.

Sincerely,



Nathan Hult

NH/sk

Enclosure

cc: Scott Wyatt

FIRST CIRCUIT COURT, STATE OF UTAH
92 DEC 28 AM 10 13
CACHE COUNTY, LOGAN DEPARTMENT

MEMORANDUM OF DECISION

LOGAN CITY

Plaintiff,

No. 911001337

vs.

Date 10-13-92

LOWELL D. CARLSEN

Defendant

Judge Bean

MATTER: DEFENDANT'S MOTION TO DISMISS

At the sentencing herein on October 6, 1992, defense counsel moved the court to dismiss the charge on the ground that Defendant had not agreed to postpone sentencing beyond the 30 day period provided in Rule 22(a), URCrimP. That Rule provides:

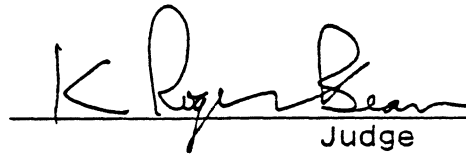
Upon the entry of a plea or verdict of guilty or plea of no contest, the court shall set a time for imposing sentence which shall be not less than two nor more than 30 days after the verdict or plea, unless the court, with the concurrence of the defendant, otherwise orders.

The cases cited in the annotation following the Rule are to the effect that the time fixed is directory, not jurisdictional.

But in any event, it is clear from a review of the judge's trial notes that Defendant concurred in setting sentencing in this case beyond the 30 day period. Because the sentencing was to be by a visiting judge, various dates beyond the 30 day limit were first discussed without objection from the defense, but no date could be agreed on. It was the clerk's office which actually set the date, and there can be no doubt it cleared it with defense counsel's office first. On the date for sentencing, defense counsel's secretary telephoned the judge asking for a continuance because counsel was involved in a trial in Salt Lake that day. She agreed to call again later

that day or the next, presumably to reset the matter for sentencing. That call did not come.

In light of the foregoing, Defendant's Motion to Dismiss is denied.



Judge

LOWELL D. CARLSEN
Defendant in Pro Se
720 North 400 East
Logan, Utah 84321

RECEIVED
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CIRCUIT COURT, STATE OF UTAH

COUNTY OF CACHE, LOGAN CITY DEPARTMENT

LOGAN CITY,
STATE OF UTAH,

Plaintiff,

-VS-

LOWELL D. CARLSEN,

Defendant.

:
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:
:
:

NOTICE OF APPEAL

Case No. 911001337

NOTICE is hereby given that the above-named defendant, Lowell D. Carlsen hereby appeals to the Utah Court of Appeals from the written Memorandum of Decision and Order denying Defendant's Motion to Dismiss presented at sentencing. Said written Memorandum of Decision and Order denying Defendant's Motion was filed with the Clerk of the above-entitled Court on the 28th day of December, 1992 and received by defense counsel on the 30th day of December, 1992. (A copy attached hereto and made a part hereof). The defendant requests that this appeal be consolidated with the appeal currently pending in the Utah Court of Appeals under case no. 920739-CA from

a Notice of Appeal filed within 30 days after the sentencing of the defendant. Judgment and sentence was imposed and entered on the 6th day of October, 1992.

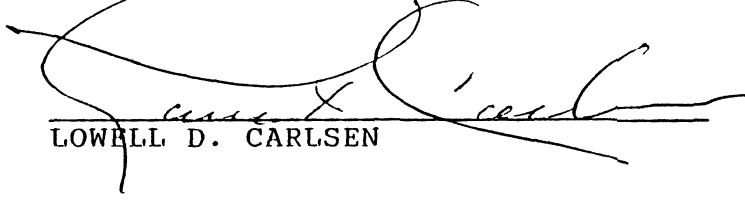
DATED this 19 day of January, 1993.



LOWELL D. CARLSEN

CERTIFICATE OF MAILING

I certify that I mailed a true and exact copy of the foregoing Notice of Appeal to Scott L. Wyatt, Logan City Prosecutor, located at 255 North Main, Logan, Utah, 84321, postage prepaid and by placing the same in a U.S. Mailbox on this 19 day of January, 1993.



LOWELL D. CARLSEN

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STATE OF UTAH,
LOGAN CITY,

[illegible]

vs.

PARTIAL TRANSCRIPT OF
JURY TRIAL

Defendant.

COPY

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A P P E A R A N C E S

SCOTT L. WYATT
Logan City Prosecutor
255 North Main
Logan, Utah 84321

NATHAN HULT
Attorney at Law
110 North 100 East
Logan, Utah 84321

PENNY C. ABBOTT, C.S.R.
3241 SOUTH 4840 WEST
WEST VALLEY CITY, UTAH 84120
PHONE. 966-4862

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I N D E X

State of Utah/City of Logan vs. Lowell D. Carlsen

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MOTION TO DISMISS BY MR. HULT

WITNESSES FOR THE DEFENDANT

JERREN BARSON

Direct Examination by Mr. Hult 5

LOWELL D. CARLSEN

Direct Examination by Mr. Hult 7

Cross-Examination by Mr. Wyatt 13

Redirect Examination by Mr. Hult 15

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DEFENDANT RESTS 25

* * *

JURY TRIAL 35

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MOTION TO DISMISS BY MR. HULT 48

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WITNESSES FOR THE CITY/STATE

JERREN BARSON

Direct Examination by Mr. Wyatt 70

Cross-Examination by Mr. Hult 75

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J.G. GEIER

Direct Examination by Mr. Wyatt 80

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State of Utah/City of Logan vs. Lowell D. Carlsen

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J.G. GEIER (Continuing)

Cross-Examination by Mr. Hult 83

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WITNESS FOR THE DEFENDANT

LOWELL D. CARLSEN

Direct Examination by Mr. Hult 93

Cross-Examination by Mr. Wyatt 101

DEFENDANT RESTS 108

VERDICT 111

* * *

1 witness stand, and was examined and testified as follows:

2 DIRECT EXAMINATION

3 BY MR. HULT:

4 Q Would you please state your name for the record?

5 A I'm Jerren Barson.

6 Q Okay. And would you spell your last name for
7 the record?

8 A B-a-r-s-o-n.

9 Q Where do you reside?

10 A Clarkston.

11 Q Clarkston?

12 A Utah.

13 Q Cache Valley, Utah?

14 A Yeah.

15 Q And how old are you?

16 A Sixteen.

17 Q Drawing to your attention an incident that
18 occurred on or about November 8th, 1991. Did you have
19 occasion to be present at Carlsen's gas station and car
20 wash in the City of Logan?

21 A Yes.

22 Q And were you at that time acting in cooperation
23 with a law enforcement officer?

24 A Yes.

25 Q Who was that law enforcement officer?

1 A Gil D--Durand or whatever.

2 Q Gil Durand?

3 A Yeah.

4 Q Is he the officer seated at the table next to the

5 prosecutor?

6 A Yes.

7 Q Did he make a request of you that you attempt to

8 buy tobacco at the Carlsen Gas and Car Wash?

9 A Yes. Well, yeah.

10 Q Okay. And did you in fact go to the Carlsen Gas

11 and Car Wash?

12 A Yes.

13 Q And while you were there, did you meet Lowell

14 Carlsen, who is seated here at the defense table?

15 A Yes.

16 Q Did you make a purchase of tobacco from him?

17 A Uh huh (affirmative).

18 MR. HULT: Okay. Those are the only questions I

19 have for this witness at this time, your Honor.

20 THE COURT: Thank you.

21 Mr. Wyatt, any questions?

22 MR. WYATT: No, not at this time.

23 THE COURT: Not at this time?

24 You may step down. Thank you, Mr. Darson--is

25 it B-a-r?

1 MR. WYATT: Your Honor, I--may I object? This is--
2 this is conduct that occurred after the purchase and
3 surely it's not relevant to entrapment.

4 These questions we're leading into are all post-
5 date the time of the time. I simply--

6 THE COURT: Well, I can't tell for sure at this
7 point whether or not they would cast--cast some--perhaps
8 some other evidence we have heard or might hear, in a light
9 that would have a bearing.

10 I'll overrule it at this time and you may go ahead,
11 Mr. Hult.

12 Q (By Mr. Hult) Did you see where Officer Geier
13 went after he left?

14 A Yes. He ran up the street, up where they had a--
15 they had a car, a police car parked about a half a block up
16 the street.

17 Q Okay.

18 A On the north side of the street.

19 Q And did you see other individuals in that police
20 car after Officer Geier went up there?

21 A Yes. Because after he had cited me and everything,
22 the police car come--after I was cited and everything was
23 done, the police car come down this way. This--Mr. Duron
24 put his head out the window and laughed at me real loud.

25 Q Okay. Were there--

1 A I couldn't figure what he was laughing at me for,
2 I didn't see what was funny, what he'd done that was so
3 funny.

4 Q Were there other individuals in the car?

5 A Yes. There was a person on the other side. The
6 only one I recognized is him, but there was one on the other
7 side and one in the back seat.

8 Q Okay. Thank you.

9 MR. HULT: I have no further questions.

10 THE WITNESS: Okay.

11 THE COURT: Thank you.

12 Further cross?

13 MR. WYATT: Yes.

14 RECROSS-EXAMINATION

15 BY MR. WYATT:

16 Q This particular individual, you indicated you had
17 a hard time remembering exactly who he was for sure.

18 A Yes. All I can remember is the appearance--

19 Q And--

20 A --at the time, that he was old, because I do not
21 sell--

22 Q Now--

23 A --cigarettes to minors.

24 Q You do not sell cigarettes--

25 A No.

1 THE COURT. --1001337, Logan City vs. Carlsen,
2 and that all of our jurors are present. Mr. Carlsen is
3 present and both counsel are present.

4 Let's see, members of the jury, I think our next
5 step appropriately, is to have you stand and receive an
6 oath from the clerk to well and truly try the case, and
7 would you do that, please, stand and raise your right
8 hands.

9 (Whereupon, the jury panel was duly sworn
10 by the clerk of the Court.)

11 THE COURT: Thank you. And you may be seated
12 again.

13 Judge Judkins follows a procedure in his cases
14 of giving some of the instructions to the jury preliminarily,
15 that is, ahead of the evidence, and I'm going to follow
16 that procedure this morning.

17 These instructions that I'm going to read to you,
18 you will have with you when you go to the jury room, you
19 may refer to them again, and I'll try to read them to you
20 in a way that won't put you to sleep, but we'll just ask
21 you to be as attentive to them as you can.

22 Members of the jury, you've been selected and
23 sworn in as the jury to try the case set forth above.
24 This is a criminal case.

25 The Information reads as follows: Circuit Court,

1 back in the Court shortly.

2 (Whereupon, the jury was excused from the
3 courtroom.)

4 THE COURT: I believe if you're able to take this
5 jury to the jury room, just leave us on the record and we'll
6 be all right. Let's do that.

7 We have good security--thank you. We have good
8 security in this building.

9 The record will show that our jurors have left
10 the courtroom. Mr. Carlsen and both counsel are present.

11 Mr. Hult, would you like to speak to your motion.
12 So that we're sure the record picks it up, our conference
13 at the bench had this microphone facing away from you,
14 your motion is--well, why don't you go ahead and restate
15 it?

16 MR. HULT: Yes, your Honor. The defendant has
17 been charged under City ordinance 9.24.040, sale of
18 tobacco to a person under 18--under 19 years of age.

19 There is--and it has been charged as a Class B
20 misdemeanor as provided by City ordinance 1.16.010--

21 THE COURT: Excuse me. Let me interrupt you for
22 just a moment.

23 Do you need to communicate with the Bailiff?

24 THE CLERK: I did.

25 THE COURT: All right. They're in your care then?

1 Thank you. All right.

2 Please go ahead, Mr. Malt.

3 MR. MALT: That latter ordinance providing that
4 all violations for which no lesser penalty is provided in
5 the municipal code will be a Class B misdemeanor, and the
6 information shows in fact that he is charged with a Class B
7 misdemeanor.

8 There is a state statute that covers the same
9 offense of furnishing tobacco to a person under the age of
10 18, Utah Code 76-10-104. That particular statute makes it
11 a Class C misdemeanor on the first offense, Class B
12 misdemeanor on the second offense, and Class A misdemeanor
13 on any subsequent offense.

14 No particular number of offenses charged in the
15 information which is, in and of itself, a significant
16 defect; but in the--this particular case, where no second
17 or third offense is charged, it can be no more than a
18 Class C misdemeanor under the State statute.

19 Now, what do you do when you have two statu--a
20 State statute and a City ordinance that are in conflict?
21 Under the State of Allgood vs. Larson, 545 P.2d 530, a
22 case dealing with a conviction of trespassing under a Salt
23 Lake City ordinance, the Utah Supreme Court said that the--
24 that the City ordinance is void.

25 In this particular case, the provision that the

1 City has made in their ordinance with which they're charging
2 the defendant is void, because it's in direct conflict with
3 the State statute.

4 THE COURT: Thank you. Mr. Wyatt?

5 MR. WYATT: Your Honor, if this is a concern, the
6 legislature has given city prosecutors the authority to
7 prosecute directly under State law, and I would just move to
8 amend the Information. The language is the same under
9 both ordinances, and move to amend the Information which I
10 can do by interlineation to charge the defendant with
11 violating Utah Code 76-10-104.

12 THE COURT: All right. Thank you.

13 Could the problem be cured, Mr. Hult, simply by
14 having him amend it to show a Class C misdemeanor?

15 MR. HULT: Your Honor, we are opposed to the
16 amendment in this case charging him with a violation of a
17 State law rather than a City ordinance, albeit that the--
18 they cover the same ground or the same material.

19 I think at this late date, that an amendment is
20 improper. In addition, I think that given the fact that
21 they've chosen to proceed under the City ordinance rather
22 than the State statute is another reason that they should
23 not be permitted to amend at this time.

24 THE COURT: Well, let me ask one other question.
25 If--if defendant--if the trial proceeds and the defendant

1 were to be convicted, if the penalty were simply limited,
2 the sentence limited to a Class C misdemeanor sentence,
3 would that cure the problem?

4 MR. HULT: Your Honor, the--the way that I read
5 Allgood vs. Larson is that--

6 THE COURT: Do you have the year of that case,
7 Mr. Hult?

8 MR. HULT: Yes. It's 1976.

9 THE COURT: All right.

10 MR. HULT: It's a decision by Justice Maughan.
11 The specific language that they quote from the McQuillin is--
12 well, just to back up a moment. Under the--the matter was
13 brought as a petition for a writ of habeas corpus and--
14 and the Court said that the conviction was invalid. And
15 they quote McQuillin as saying if the ordinance penalty
16 conflicts with that of the general law of the state
17 governing the same subject, the ordinance penalty is void.
18 The charter ordinance penalty cannot exceed that of the
19 State law.

20 THE COURT: Well, that's the question I was just
21 addressing, when it says the penalty is void, that's
22 different than saying the ordinance is void.

23 MR. HULT: It is; however, in this particular
24 case, they didn't just overturn the punishment, but they
25 overturned the conviction.

1 A No, I didn't.

2 Q How did you get his attention?

3 A He just looked up when I got there. He was just--

4 could like see both ways.

5 Q Okay. Was he sitting or standing, at that time?

6 A He was sitting.

7 Q Okay. You didn't have to say anything to get his

8 attention?

9 A No.

10 Q After you had asked him for Camel Lights, you say

11 that he asked you if you were 19 years of age?

12 A Yes.

13 Q And what did you do then?

14 A I did not answer him.

15 Q You didn't answer?

16 A Huh uh (negative).

17 Q What did he do next?

18 A Then he just reached down and got them.

19 Q Without asking you any more questions?

20 A Yeah. I didn't answer when he asked me if I was

21 19.

22 Q Why do you think he asked you if you were 19?

23 A To--I don't know.

24 Q The rest of the sales took place inside that

25 night, you say?

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CROSS-EXAMINATION

BY MR. HULT:

Q I assume that when you're saying the individual with the brown suit jacket, you're referring to the dark brown rather than the light brown?

A Correct. I'd say yours is tan.

Q In your--did you indicate that you did not have a view of Jerren at the window, but you only had a view of the shed?

A I saw him approach the shed and it was clear that he was on the other side of the shed, but I was--I did not have visual contact during the actual transaction, no.

Q Okay. When you came, was it minutes later or less than a minute later after Jerren had made the purchase and told Carlsen what had happened, and he was extremely upset when he heard that?

A Would you ask that again?

Q Okay.

A I'm not sure I understand.

Q It sounds like--I think I asked you a compound question.

A Yeah, you did.

Q How soon after Jerren made his purchase did you show up at the window?

A Within--within a minute.

1 Q Okay. And you told Mr. Carlsen that you were
2 there because he had just sold somebody--tobacco to somebody
3 who was under age?

4 A Correct.

5 Q And did he immediately get quite upset when he
6 heard that?

7 A Well, he--he got on the defensive, if you would,
8 as far as his conversation went.

9 Q Okay. Now, what he told you specifically was
10 that the person looked 19, that he'd asked him three times
11 if he was 19, and that he said he was 19?

12 A That's correct.

13 Q Do you recall him going beyond that and telling
14 you that in fact he'd asked the kid what month and what year
15 he was born in?

16 A No. I don't recall that.

17 Q Okay. Now, when you said--you said you asked him
18 if he had requested an I.D. and Mr. Carlsen said he had not?

19 A Correct.

20 Q You would agree, would you not, with Todd Barson,
21 that the State law does not state that a seller of tobacco
22 has to require an I.D.?

23 A That the law--say that again.

24 Q Okay. The State statute does not require a
25 seller of tobacco to require an I.D. prior to a sale, does

1 it?

2 A I believe that's true, yes.

3 Q Okay. Is it not true that Mr. Carlsen asked you
4 to see this individual that had--that had just allegedly
5 bought the tobacco from him?

6 A I do not recall that, either.

7 Q What was your purpose in going back to the car?

8 A To talk with Officer Duron.

9 Q Okay. Is it not true, though, that before you
10 went back to that car, Carlsen said there is no way that
11 that kid who had bought the tobacco from him was less than
12 19 years of age, he looked 19 years of age, and he wanted
13 to see him?

14 A No. I never--don't remember any context of that
15 kind--

16 Q Okay.

17 A --in the conversation.

18 Q Do you recall any time that evening, either prior
19 to going back to Officer Duron's vehicle, or when you came
20 back again and issued the citation, Mr.--telling Mr. Carlsen,
21 you can see him in court?

22 A I do recall making a statement to him because of--
23 because of the way the conversation was eventually going,
24 that after I made a determination to issue the citation,
25 I informed him that--that he would need to take it before

1 the judge and before the Court--

2 Q Okay.

3 A --if he felt that it was unjust.

4 Q But in that context, is it not correct that
5 Mr. Carlsen did not believe the person that he had sold to
6 looked anything less than 19 years of age, and wanted to
7 see him right then and there, see what he looked like?

8 A Well, his initial argument, as I stated, was--
9 was to the effect that his basis for selling it was that he
10 thought he was 19, he looked 19 in his judgment, and that
11 he'd asked--made inquiry three times as to his age. And he
12 stated to me that Jerren had stated he was 19.

13 Now, in talking with Jerren at the time, prior to
14 making contact--

15 Q Well--

16 A --he had denied that.

17 Q Okay. But getting back to my question. You, at
18 some point, indicated that Mr. Carlsen could see him in
19 Court and--

20 A No, I never said that.

21 Q Okay. You--you--I take it you--

22 A I would not have said that. I did not--

23 Q You don't at this point recall Mr. Carlsen
24 asking to see this person that had bought the tobacco
25 that night?

1 A No. I do not.
2 That's not to say he didn't ask, but I don't
3 recall.
4 Q Okay.
5 MR. HULT: I don't have any further questions.
6 THE COURT: Thank you.
7 Further direct?
8 MR. WYATT: No, your Honor.
9 THE COURT: You may step down, Mr. Geier.
10 MR. WYATT: Your Honor, if I could have just 30
11 seconds.
12 THE COURT: You may. We'll go off the record.
13 (Off the record.)
14 MR. WYATT: The City would rest at this time.
15 THE COURT: All right. We'll go back on the
16 record, if we're not already.
17 The City has rested.
18 Mr. Hult, you may go ahead.
19 MR. HULT: Your Honor, I wonder if, at this time,
20 it would be appropriate for me to renew my motion that I
21 have made previously, or if the Court would wish us to
22 proceed at this time.
23 THE COURT: Let's see. Maybe it's appropriate to
24 take a recess. Let's excuse the jury and take the time we
25 need to address that legal question, and then we'll take our

1 don't all waste our time, that's maybe the best way to do
2 it.

3 Does that sound all right, Mr. Hult?

4 MR. HULT: That sounds fine, your Honor. The
5 only thing I want to do because I'm uncertain as to
6 whether I did previously, is to place on the record our
7 objection to the motion to amend. I think we discussed it,
8 but I'm not sure if I stated outright that we object--

9 THE COURT: All right.

10 MR. HULT: --to the motion to amend.

11 THE COURT: All right. The record will show your
12 objection, and I've treated that as if it had been stated.

13 Mr. Wyatt, is there anything you want to add to
14 what we've said?

15 MR. WYATT: No. I think that everything's been
16 said. Thank you.

17 THE COURT: All right. The Court now grants the
18 prosecution's motion to amend, to substitute the State of
19 Utah in place of Logan City as the prosecuting agency, and
20 grants the motion to amend to refer to the State statute as
21 the governing legal provision, specifically Section--can't
22 find it here. Thank you. 76-10-104 of the Utah Code, and
23 grants the motion to identify it as a Class C misdemeanor.

24 And the Court does that, as I say, for the
25 purpose of getting the issue to the jury in the proper form,

1 at least tentatively, and then if that's--if that's not
2 correct, a later decision by the Court will remedy that.
3 If it--if it can be done, and it's correct, we won't have
4 wasted the jury's time and the witnesses' and counsel's
5 and everyone's time. So, I think that's the best way to
6 proceed, and the Court now grants that motion.

7 The Court continues and keeps under advisement
8 defendant's motion, however, to dismiss, because of the
9 conflict between the ordinance and the State statute.

10 MR. HULT: One matter, other matter of clarification.
11 Does the--the amendment also include changing the
12 plaintiff?

13 THE COURT: I think I did say that, yes, that the
14 motion includes substituting the State of Utah in place of
15 Logan City as the prosecuting agency.

16 MR. WYATT: One question that I would have, your
17 Honor. You indicated you were reserving the motion to
18 dismiss based on the inconsistency.

19 THE COURT: Uh huh (affirmative). Well, I guess
20 what I'm saying is, I'm not sure you have the right to
21 amend at this point.

22 MR. WYATT: Oh.

23 THE COURT: I'm not sure but what the motion of
24 the defendant is well taken, that you have a conflict here
25 between the City ordinance and the State statute and it's

1 too late to cure it. I think that's what Mr. Hult's
2 position is; that the jury's been sworn and defendant's in
3 jeopardy, and I think what he's saying is, if that's a bad
4 approach to the prosecution, then it can't be brought
5 again. I suppose that would be your argument.

6 MR. HULT: Yes, if there was a refiling, but
7 more particularly, at this point in time, that that one
8 statute giving them authority to prosecute State statutes
9 doesn't apply to something that occurred before January 1st,
10 in addition to the prejudice that the defendant's suffering
11 at this late stage of the proceedings.

12 THE COURT: All right. You're not abandoning any
13 position that the defendant may be prejudiced by the
14 amendment at this stage. I--

15 MR. HULT: No. No. No, we're--

16 THE COURT: I imagine you're still claiming that?

17 MR. HULT: We certainly aren't abandoning that.

18 THE COURT: All right. All right. Thank you.

19 Well, let's go ahead and take our recess, and then
20 I'm going to instruct the jury that we've changed the name
21 of the case to that extent, and go ahead and finish up.

22 MR. WYATT: Okay.

23 THE COURT: All right. Court's in recess.

24 (Whereupon, the recess was taken.)

25 (Whereupon, discussion on jury instructions

1 asked for--I can't remember what brand it was, no.

2 Q Okay. May--might he have asked for a particular
3 brand?

4 A Yes. Probably did. I didn't pay any attention
5 to it.

6 Q What--why did you ask him if he was 19?

7 A Well, I just had been asking everyone, unless
8 they were 40.

9 Q Okay. What did he respond to you?

10 A When I asked him how old he was?

11 Q Yes.

12 A He said he was 19.

13 Q Okay. How old did he look to you?

14 A He looked between 22, 23 years old, to me.

15 Q Did you observe the individual that was--identified
16 himself as Jerren, that testified here earlier?

17 A Yes. I looked at him here in the Court, uh huh
18 (affirmative).

19 Q Did he appear any different to you that night than
20 he appears in Court now?

21 A Certainly did, he seemed like he was a lot older,
22 he looked a lot bigger than he did here.

23 Q Did you notice anything different about him in
24 particular that night?

25 A Well, it looked like he had a little growth,

1 actually a little growth of beard there or something, a
2 little like he hadn't shaved or something.

3 Q Did you notice anything else different about him?

4 A No. Just--

5 Q Okay.

6 A His hair seemed to be a little different, a lot
7 different than it was today, seemed to be a shorter cut and--

8 Q What happened after you asked him if he was 19?

9 A Well, then I asked him what month and year he
10 was born, and he--

11 Q Okay. Let me back up a minute. He did respond
12 when you asked him if he was 19?

13 A Yes, uh huh (affirmative).

14 Q Do you recall exactly what he said?

15 A He said he was 19.

16 Q Okay. Do you remember what his words were?

17 A You mean when I asked him how old he was?

18 Q Yeah.

19 A He said, "I'm 19".

20 Q What happened then after you asked him what month
21 and year he was born?

22 A He didn't bat an eye, he said December '71.

23 Q Okay. Why did you ask him that question?

24 A Well, if they're--if there is anything wrong,
25 they're surely not going to remember exactly what year; they

1 might say '73, '74, most people don't know.

2 Q Okay. What happened after he responded to that
3 question?

4 A I just told him you're almost 20 years old then
5 and he said--he nodded his head, that he--like that.

6 Q Okay. And then what--what after you--what
7 happened after you made that comment to him?

8 A Well, then, I just give him the cigarettes, sold
9 him the cigarettes.

10 Q Okay. You had earlier been informed, possibly two
11 months earlier, of the law of selling tobacco to minors?

12 A Oh, yes, I've known for 42 years that they've got
13 to be 19 to buy cigarettes.

14 Q Okay.

15 A It was nothing new to me, I know they've got to be
16 19.

17 Q And do you recall Mr. Barson coming around to
18 you?

19 A Yes, uh huh (affirmative).

20 Q And gave you a little sign to put up in your
21 window?

22 A Yes. And I put it right on the front window,
23 while he was there, I believe.

24 Q Okay. After this--this person left that you sold
25 the cigarettes to, what happened next?

1 A Well, then an officer just a minute or two minutes,
2 three minutes, four minutes, an officer came around to the
3 window.

4 Q Okay. Was that--do you recall if that was the
5 same Officer Geier that testified here?

6 A Same one. Officer Geier, uh huh (affirmative).

7 Q What did he say when he came around?

8 A He said that I'd just sold cigarettes to a minor.

9 Q What did you respond?

10 A I told him it wasn't a minor, that guy was 19.
11 I asked him first, I says, was it that person that just
12 left here? And he says yes, and I says, that person is 19.

13 Q What did he say then?

14 A He said that he wasn't 19, and I says, well, I
15 told him he was as big as he was, looked just the same age
16 as he was.

17 Q What happened after that?

18 A Well, then they--he--I said--just insisting that
19 he was 19, I told him about, that I'd asked him the month
20 and year and all about, so he says, just a minute, and he
21 left and went up the street. And then he, a few minutes
22 later, he came back, and he says, the boy said he--you
23 didn't ask him his age.

24 Q Had you asked him his age?

25 A The boy?

1 Q Yeah.

2 A Yes.

3 Q What did you--what did you next ask the officer,
4 then?

5 A Well, then, I--

6 Q Or I should say, did you make a request of the
7 officer then?

8 A Yes. I requested that he bring the boy back, I
9 wanted to see him standing to the side of the officer to--
10 'cause I told him he was just as big as he was.

11 Q Uh huh (affirmative).

12 A Every bit as big, and just--looked just as old.

13 Q When you asked him to bring the kid back, what
14 did he say?

15 A He says, You can see him in Court.

16 Q Okay. And I take it he didn't bring the kid
17 back for you to see what he looked like that night?

18 A No, he said he wouldn't bring him back, he just
19 said, you can see him in Court.

20 Q Okay.

21 MR. HULT: Thank you. I have no further
22 questions.

23 THE COURT: Thank you.

24 You may cross-examine.

25 ★

1 CROSS-EXAMINATION

2 BY MR. WYATT:

3 Q If I understand it, you did sell cigarettes to
4 this individual?

5 A Yes.

6 Q And from your--what you've indicated to us, your
7 conversation with him was limited to a couple short
8 questions?

9 A Just a few questions.

10 Q You asked him, How old are you?

11 A Yes.

12 Q And what you're telling us is that he answered
13 19?

14 A Yes, sir.

15 Q And then you asked him what his birthday was?

16 A I asked him month and year of his birth.

17 Q And why did you do that?

18 A Just to--

19 Q Double-check?

20 A --double-check.

21 Q To make sure?

22 A That that was how old he was.

23 Q But you thought he looked 21 or 22 or 23?

24 A Yeah, along in there, uh huh (affirmative), 22,
25 23.

1 CROSS-EXAMINATION

2 BY MR. WYATT:

3 Q If I understand it, you did sell cigarettes to
4 this individual?

5 A Yes.

6 Q And from your--what you've indicated to us, your
7 conversation with him was limited to a couple short
8 questions?

9 A Just a few questions.

10 Q You asked him, How old are you?

11 A Yes.

12 Q And what you're telling us is that he answered
13 19?

14 A Yes, sir.

15 Q And then you asked him what his birthday was?

16 A I asked him month and year of his birth.

17 Q And why did you do that?

18 A Just to--

19 Q Double-check?

20 A --double-check.

21 Q To make sure?

22 A That that was how old he was.

23 Q But you thought he looked 21 or 22 or 23?

24 A Yeah, along in there, uh huh (affirmative), 22,
25 23.

1 THE COURT: All right. It's in the hands of the
2 jury.

3 Court's in recess.

4 (Whereupon, the recess was taken.)

5 THE COURT: We've returned to File 911001337,
6 Layton City against--pardon me, Logan City, also the State
7 of Utah, against Lowell D. Carlsen.

8 Our jurors have returned, they've indicated that
9 they've reached a verdict. I'll ask the bailiff to
10 retrieve the verdict, bring it to the bench. Thank you.

11 The record should also reflect that Mr. Carlsen
12 and both counsel are present.

13 The verdict is in proper form. I'll ask the
14 clerk to read the verdict.

15 THE CLERK: We, the jurors in the above case,
16 find the defendant, Lowell Carlsen, guilty of selling
17 tobacco to a minor, a Class C misdemeanor. Signed, Troy
18 Jenkins, foreperson.

19 THE COURT: Thank you.

20 Members of the jury, you've taken time, as we
21 said before, out from busy lives, to make it possible for
22 our system to work. We express thanks to you.

23 We're going to address some sentencing considera-
24 tions and motion considerations that have arisen previously.
25 We excuse you now. You also get to keep that large check,

1 but you had to work harder for it. We thank you for your
2 service in this case. Thank you very much.

3 Counsel, that moves us on to the next stage.
4 Mr. Hult, would you be willing to postpone sentencing
5 while the Court considers the questions that you've raised
6 in your earlier motions that are under advisement?

7 MR. HULT: We would prefer postponing sentencing,
8 would we not, until the Judge has had a chance to rule on
9 the motions?

10 MR. CARLSEN: Yes.

11 THE COURT: I think that might be the best. All
12 right. Thank you.

13 Is that agreeable, Mr. Wyatt, to--

14 MR. WYATT: That's fine.

15 THE COURT: --the City, State, whichever it turns
16 out to be.

17 MR. WYATT: Whoever I am.

18 THE COURT: As--whoever you are; has no objection
19 to that, I'm sure.

20 All right. Let's see, so that we don't just
21 absolutely lose it, if I set a date for sentencing and then
22 get back and get busy on this, maybe that's the best thing
23 to do. What, 60 days from now, and I don't expect it to
24 take that long, but let me give you a sentencing date, if
25 that's all right, Mr. Hult.

1 What dates normally would the Judge do--use for
2 sentencing here?

3 THE CLERK: (Inaudible)

4 THE COURT: All right. Sometimes that is a good
5 day.

6 THE CLERK: Would you like me to--

7 THE COURT: Yes, would you do that? Let's look
8 at something five or six weeks away, toward the end of
9 February.

10 I've got one or two things under advisement, but
11 I want to move right out on this one, I don't want it to
12 drag, so I'll try to get at it and see where we are on those
13 legal points, and what I'll do is issue a written memorandum
14 of decision and send counsel a copy of it. I assume we've
15 got addresses in the file?

16 MR. WYATT: Should have, we--

17 THE COURT: Mr. Hult, Post Office Box 543, 110
18 North 100 East, Logan.

19 MR. HULT: Yes.

20 THE COURT: And, let's see, Mr. Wyatt, I'm not
21 sure I've got anything with your--

22 MR. WYATT: My--my objection to motions to
23 dismiss.

24 THE COURT: Oh, yes, that'll be in here. Okay.
25 Right. 255 North Main, Post Office 527. All right.

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STATE OF UTAH,
LOGAN CITY,

Case No. 911001337

SENTENCING

Defendant.

COPY

BE IT REMEMBERED that on the 6th day of October, 1992, the above-entitled action was held before the HONORABLE ROGER BEAN, sitting as Judge in the above-named Court, and that the following proceedings were had.

APPEARANCES

SCOTT L. QUATE
Logan City Prosecutor
255 North Main
Logan, Utah 84321

NATHAN HULT
Attorney at Law
110 North 100 East
Logan, Utah 84321

PENNY C. ABBOTT, C.S.R.
3241 SOUTH 4840 WEST
WEST VALLEY CITY, UTAH 84120
PHONE: 966-4862

P R O C E E D I N G S

THE COURT: We'll go ahead with the matter before the Court, which is a sentencing, and the Clerk reminds me, Mr. Hult, that I did not--with respect to the two motions that were before the Court at the conclusion of the trial, I did not issue a formal opinion and I think I had indicated to you by setting the sentencing earlier, that the Court's decision would be consistent with that, that is with a--imposing a sentence; and so perhaps it is appropriate at this time that I go ahead and briefly announce a decision on those two motions.

The Court had some reservation at the time that the prosecution move to amend, that they--that it needed to do that, that that was an appropriate motion and it raised a question, I think, at that time, and then of course, kept under advisement that motion and the defense motion to dismiss.

And you have since, and I appreciated your doing that, you have since filed with the Court a memorandum of law referring to the Allgood case and to some other authorities, and I've considered those and actually done considerable research in February and March on this question and was prepared to state at the bench, as I am now, at the time of sentencing, the Court's decision on those two

1 motions, and then of course, that sentencing was continued
2 and the case kinda got into the backwaters and didn't get
3 back on the main track, and so it came to my attention the
4 other day and I asked the clerk to reset it.

5 Is there any question you have that, before we
6 go to sentencing or any comment you'd like to make on any
7 of the matters before the Court imposes sentence?

8 MR. HULT: Your Honor, I do not know whether
9 Mr. Carlsen would wish to take an appeal, but it seems
10 that, and particularly where one of the issues that we
11 raised is an issue of Constitutional proportion, that some
12 findings and--and conclusions be entered. We'd be glad to
13 prepare those for the Court.

14 I think I might need the Court's guidance a
15 little bit in that, and I wonder if this might be an
16 appropriate time for me just to ask several questions that
17 I have in that regard.

18 THE COURT: All right. And you're welcome to do
19 that. It's perhaps my fault that the prosecutor isn't here
20 and maybe the prosecution is entitled to some input at this
21 point; but let me have you go ahead and state the questions
22 that you have. I'll make notes on those, and see if we
23 can address those even right here at this point.

24 MR. HULT: Your Honor, I believe that with regards
25 to the first issue that we raised that the substantial rights

1 of the defendant were prejudiced by the amendments, both
2 charging a State offense rather than a City offense and
3 changing the party from being the City of Logan to the
4 plaintiff being the State of Utah, that the Court finds
5 that those do not substantially prejudice the rights of the
6 defendant.

7 THE COURT: Yes. I find that the procedure we
8 followed at the time of trial did not substantially prejudice
9 defendant's rights.

10 Let me comment on that if I may. As I say, I had
11 some question in my mind whether or not the prosecution
12 needed to make--to move to amend to prosecute in the name of
13 the State and took under advisement that motion.

14 The pleadings, I think, at the time the jury was
15 instructed did reflect the State of Utah. That was a
16 tentative decision; what I mean is, we had to do one or the
17 other. But that was not--the Court did not intend that to
18 be reflective of a decision to grant the prosecution's
19 motion to amend.

20 And as I indicated earlier, the Court has
21 concluded that the appropriate thing to do here is both to
22 deny Logan City's motion to amend to prosecute in the State
23 of Utah and to deny defendant's motion to dismiss. And
24 perhaps our discussion here ought to address the questions
25 that the defense has in light of those two decisions.

1 In other words, I didn't think--I felt somewhat
2 sure that the--that the prosecution needed to amend; never-
3 theless, we went ahead and in the event that motion was
4 granted, the pleadings were denominated in the State of
5 Utah, but the Court by this decision denying Logan's motion
6 to amend really makes it appropriate that the pleadings
7 should have remained in Logan City's name, but I don't
8 think defendant's been prejudiced by that--that change to
9 the State of Utah, and in effect, it was--as I say, you had
10 to do one or the other, and I really hadn't made a decision
11 on that motion. So, the clerk was simply instructed to go
12 ahead and put them in the State of Utah.

13 MR. HULT: The State had two motions. The first
14 being amending the charge changing it from the City
15 ordinance to a charge under the State statute, although the
16 charging language remained the same, except that it was
17 changed from a Class B misdemeanor, or the amendment was to
18 amend from a Class B misdemeanor to a Class C. Was that
19 motion granted to that limited extent?

20 THE COURT: No.

21 MR. HULT: Okay.

22 THE COURT: I think--I think that the City's
23 motion to amend was unnecessary and for that reason, and
24 of course, you called to the attention of the Court and
25 Logan City's counsel that the State amendment had made the

1 same offense a Class C misdemeanor, and I'm very much
2 aware of that.

3 Mr. Malt, my reading of the Allgood case indicates
4 and I think in your memorandum you correctly stated this,
5 at the time of trial, it was not correctly stated. My notes
6 reflect that the argument was that the ordinance is void.
7 And then in your memorandum, I think you more accurately
8 stated that it's the penalty of the ordinance that's void
9 under the Allgood decision.

10 And that is consistent with other cases the Court
11 has looked at, back in--in February and March, and I could
12 cite some of those to you, if it would be of help. Let me
13 see if I can find this research note here.

14 For example, in State against Lancaster, a Utah
15 case decided in 1988, at 765 P.2d 872, the defendant there
16 was charged with aggravated assault by a prisoner. The
17 wrong statute was cited. It was corrected by interlineation.

18 The appellate court, in this case, the Utah
19 Supreme Court, held that the charge, both before and after
20 the amendment was the same, it was aggravated assault by a
21 prisoner; that only the statutory reference was changed,
22 the text of the Information was not altered and there was
23 no prejudice to defendant in that case in preparation for
24 trial, as evidenced by the trial record.

25 And the Court went on to state that the amendment

1 actually reduced the severity of the charge, which of
2 course, wasn't necessarily favorable, as I recall, to the
3 defendant, but it didn't prejudice him.

4 In--there's another case, State against Colston,
5 C-o-l-s-t-o-n, it's a Utah decision in 1964, at 396 P.2d
6 405. In that case, the defendant was charged with having
7 an overweight truck on the road.

8 He was convicted in the Price City Court, it was
9 affirmed in the District Court; but at the District Court
10 level, the Court amended the statute to refer to a different
11 statute that was not before the Court in the City Court in
12 Price.

13 It happened that the statute the District Court
14 used still was not the correct statute or correct section.
15 The appellate court held, again the Utah Supreme Court
16 held that, citing earlier decisions, that a misnaming of
17 the statute would not void the Information where there is a
18 sufficient detailing of facts that constitute the offense
19 in the body of the Information, so that the defendant is
20 fully apprised of the nature of the charge against him.

21 The Court cited cases there, and I've looked at
22 cases from other states. There's a case, Richfield City
23 against Walker that I think is pertinent, that's a Utah
24 Court of Appeals decision in 1990. The citation is 790
25 P.2d 87, in which the Court, in language that, although it's

1 not our same fact situation, indicates that the--the
2 proceeding on the Information such as it was here in this
3 case, the Court infers, I guess is what I should say, from
4 the Richfield vs. Walker case, the Court infers that the
5 procedure here is the appropriate procedure.

6 We have other cases saying that the Legislature
7 can authorize cities to legislate on subjects within the
8 purview of the State laws, and I think maybe there's no
9 dispute about that.

10 Certainly in Code Section 76-10-104, the State
11 statute makes this a Class C misdemeanor. But the Court's
12 conclusion from considering all of these decisions and what
13 occurred at the trial court level during the trial, con-
14 cludes that if the Court sentences Mr. Carlsen within the
15 parameters of the Class C statute, that he is not prejudiced.
16 And that's what I intend to do at this time, and so I
17 believe that the fact that it denominated a Class F
18 misdemeanor is not prejudicial to defendant.

19 Now, that's probably the long answer to your
20 question and maybe you have some more, but--

21 MR. HULT: Your Honor, I believe in light of
22 denying the City's motion to amend, then that the second
23 and third issues that we had raised become irrelevant or
24 beside the point. Those issues were raised on the basis of
25 the amendments that had been requested by the City.

1 THE COURT: Yes. I think that's probably correct
2 procedurally.

3 MR. HULT: The only other issue that we have
4 then that we want to address before the Court proceeds with
5 sentencing is--and here again, I should say we appreciate
6 the Court's care and concern with the issues that we have
7 raised.

8 We don't specifically recall waiving the right to
9 be sentenced within 30 days, and--and believe that without
10 having waived that right to sentence within 30 days, that
11 the Court should consider dismissing the charge against
12 Mr. Carlsen rather than proceeding with sentence.

13 THE COURT: I can't specifically remember, but I
14 thought that at the time we set the sentencing originally
15 for March 30th that we discussed that delay and I thought
16 that the defense agreed to that.

17 MR. HULT: I don't have a specific memory on
18 that, your Honor. I--

19 THE COURT: Let me see if my notes show anything.

20 MR. HULT: Mr. Carlsen, this morning when he came
21 to Court, said that he couldn't remember it, and therefore--
22 therefore, we're raising that question.

23 THE COURT: We can go off the record for just a
24 moment.

25 (Off the record.)

1 THE COURT: Mr. Hult, I've looked at my notes, and
2 I can't see anything one way or the other here, but it kinda
3 rings a bell in my mind that we did talk about that, because
4 I think we set the March 30th date for sentencing at the
5 time of the trial, at the conclusion; and of course, that
6 would have been beyond the 30 days at that time.

7 But in any event, my suggestion is that I listen
8 to the tapes or ask one of the clerks to listen to the
9 tapes and we'll find out what was done at that time, and
10 that we proceed with sentencing this morning, subject to
11 your motion, which I'll take under advisement. And if it
12 looks like it's a well-taken motion, then I'll vacate that
13 sentencing and grant the motion.

14 MR. HULT: Okay. We would appreciate that.

15 THE COURT: But that would save everybody a
16 trip back, and I think maybe that's the best way to do that.

17 I might observe parenthetically that the
18 Constitutional issues that you've raised and your memorandum
19 sent to the Court, I think some time after, or about the
20 time of the earlier sentencing date, were, I thought,
21 pertinent, but they--those same issues were not raised at
22 the time of trial.

23 And I don't mean to belabor that point. Even so,
24 the Court did have the motion at that time under advisement
25 and so I think they were appropriate, but I have concluded

1 as I state^d here a few minutes ago.

2 Is there anything that you or Mr. Carlsen would
3 like to tell the Court further relative, more directly to
4 the facts of the offense or the offense itself, before
5 sentence is imposed?

6 MR. HULT: Just--just a few things, your Honor,
7 and I'm not sure if the Court would feel that they're
8 exactly appropos; but Mr. Carlsen called me some time ago
9 and--to let me know that this kid that the police had used
10 and we felt that it was in the nature of entrapment,
11 regularly sits at a local restaurant here called Angie's
12 with older friends of his, smokes cigarettes, pals around
13 with them, and--and appears to be one of an older set of
14 kids.

15 And he really felt that he was taken advantage
16 of by the appearance of the--of the boy on this occasion.
17 And he does want the Court to know that he has never had
18 any prior convictions, either for this particular offense,
19 nor for any criminal offenses of any nature.

20 THE COURT: All right. Thank you.

21 Mr. Carlsen, you're entitled under the statute to
22 add anything you would like to what Mr. Hult has told the
23 Court. You're not required to, of course, and you have an
24 able spokesman and an articulate spokesman in your lawyer.

25 Is there anything you do want to add?

1 MR. CARLSEN: Nothing other than what he said,
2 that I did really think the boy was plenty of age, you
3 know, when I sold those cigarettes. I didn't do it to try
4 to sell to a minor. I've always avoided trying to sell to
5 minors.

6 THE COURT: All right. I appreciate that.

7 MR. CARLSEN: That's all I have to say.

8 THE COURT: Mr. Carlsen, the Court sentences you
9 then on the offense of selling tobacco to a minor to pay a
10 \$300 fine and serve 30 days in the jail at Logan, but
11 places you on 12 months informal probation--well, I'll make
12 it six months informal probation to the Court. And suspends
13 a hundred dollars of your fine and suspends all of the jail
14 time, if you complete the probation satisfactorily, the
15 conditions of which are that you pay the fine balance, and
16 that includes the State assessment, I'm not adding it
17 separately, of \$200, that you 'e a law-abiding person in
18 general, minor traffic charges don't count against that,
19 but other Federal and State and local laws would.

20 And specifically that you don't sell tobacco to
21 underage people as a specific condition of probation, and
22 those are all of the conditions of probation and sentence.

23 Now, I don't know, Mr. Hult, whether we need to
24 talk about his ability to pay that or the convenience of
25 paying it or whether he needs an extension, or whether we

1 should listen to the tape first and determine whether he
2 waived, at the time of the trial, the 30-day provision.
3 What is your preference about that?

4 MR. CARLSEN: It doesn't matter to me. I haven't
5 got a checkbook now, but I could pay it.

6 THE COURT: Well, if you pay it, I'll ask the
7 clerk to hold it in trust, and then we'll apply it to a
8 sentence if the motion's denied. If the motion's granted,
9 it'll be returned to you. Is that okay?

10 MR. CARLSEN: That's fine.

11 THE COURT: All right. And we--

12 MR. CARLSEN: I'll have to get my checkbook before
13 I could pay it.

14 THE COURT: Sure. We'll grant you, what's today?
15 Tuesday? You could have it done by tomorrow afternoon?

16 MR. CARLSEN: Oh, yes.

17 THE COURT: Grant you until 1.00 p.m. then
18 tomorrow to pay that into the clerk and--

19 MR. CARLSEN: Just pay that down here?

20 THE COURT: Yes. At the clerk's counter there in
21 the foyer, and--thank you.

22 I'm not sure the best way to do that. It may be
23 that I'd have time to listen to that tape if the clerk can
24 provide facilities before I go back to Layton, because I
25 do have a calendar back there. And I understand you have

1 to leave for the Salt Lake area.

2 MR. HULT: I'm going down to Layton in fact for a
3 1:30 arraignment, so...

4 THE COURT: Oh. Is that right? Okay.

5 MR. HULT: Too bad we can't share rides.

6 THE COURT: Yes. But let me try to do that. I'll
7 try and get hold of the tape and listen to it.

8 MR. HULT: It should be at the very end, I would
9 imagine.

10 THE COURT: We'll go to the end, back it up and
11 see what happened in that colloquy there, and then I can
12 make a decision and notify you and the prosecutor. All
13 right.

14 MR. HULT: We appreciate that.

15 THE COURT: Thank you very much.

16 (Whereupon, this sentencing was concluded.)
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