

2002

Utah v. Jerry Lynn Marshall : Brief of Appellant

Utah Court of Appeals

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Margret Sidwell Taylor; Attorney for Appellant.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

)

Plaintiff/Appellee,

)

Case No. 20020829

v.

)

**JERRY LYNN MARSHALL,
Defendant/Appellant,**

)

)

Priority: Defendant in Prison

**APPEAL FROM AN ORDER UPHOLDING A CHARGE OF
DRIVING UNDER THE INFLUENCE OF ALCOHOL, A THIRD
DEGREE FELONY UPON ENHANCEMENT WITH PRIORS
IN VIOLATION OF UTAH CODE ANN. SEC. 41-6-44 (SUPP 2001)
IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR
EMERY COUNTY, STATE OF UTAH, THE HONORABLE
BRYCE K. BRYNER, PRESIDING.**

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FILED
Utah Court of Appeals

JAN 16 2003

**Paulette Stagg
Clerk of the Court**

FOR YOUR INFORMATION

Date: _____

State v Marshall
Re: State v Soto

Court No.: _____

We enclose the following to keep you informed of the progress of this matter:

We are sending the required copies of the Marshall and Soto briefs, but we noticed too late to have them reprinted, that they are not copied on both sides of the paper. This is the first time we have used this particular printing company, and there was a miscommunication on how they needed to be done. We will have them reprinted tomorrow, and sent to you overnigh mail.

We apologize for this, but it is out of our hands at this point. Correct copies will follow.

Please contact us if you have any questions.

Lloyd Vance
Office Manager

Lloyd Vance

Margret Sidwell Taylor

LAWYER

TO

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HELPER, UTAH 84526
TELEPHONE (435) 472-5513
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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,)	
Plaintiff/Appellee,)	Case No. 20020829
v.)	
JERRY LYNN MARSHALL,)	Priority: Defendant in Prison
Defendant/Appellant,)	

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF JURISDICTION	1
STATEMENT OF ISSUE AND STANDARD OF REVIEW	1
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES.....	2
STATEMENT OF THE CASE	
FACTS OF THE CASE	4
NATURE OF THE CASE	4
TRIAL COURT RULING	5
SUMMARY OF ARGUMENT	6
STATUTORY ARGUMENT.....	6
CONSTITUTIONAL ARGUMENT.....	6
ANALYSIS AND ARGUMENT	
STATUTORY LAWS.....	7
CONSTITUTIONAL ISSUES.....	9
POINTS AND AUTHORITIES.....	9
 ADDENDUM ... DUI STATUTES	

TABLE OF AUTHORITIES

FEDERAL CASES

Barnes v Scott, Case # 98-6085	11, 15
Bouie v City Of Columbia, 378 U.S. 347	9, 11
California Dept. Of Corrections v Morales, 514 U.S. 499, 504	12
Collins v Youngblood, 497 U.S. 37, 42	12, 17
Femedeer v Haun, Case # 99-4082, 99-4093	11
Gryger v Burke, 384 U.S. 728	5
Henderson v Scott, Case # 00-6374	12
Miller v Florida, 482 U.S. 423, 423 (1987)	12
Smith v Scott, Case # 00-6021	11
United States v Harris, 347 U.S. 612	9, 14
Weaver v Graham, 450 U.S. 24	10, 11, 14

STATE CASES

State v Daniels 438 U.T. ADV. REP. 12	17
State v Lusk, 2001 U.T. 102	17
State v Pooler 456 U.T. ADV. 27.....	1

FEDERAL STATUTES

United States Constitution, Sec. 9 (3)	3, 11, 12, 14, 15
--	-------------------

STATE STATUTES

Utah Code Ann. § 78-2a-3 (2) (a)	1
Utah Code Ann. § 68-3-3	1, 3, 5, 8, 17
Utah Code Ann. § 41-6-44 (1990)	2
Utah Code Ann. § 41-6-44 (1993)	2
Utah Code Ann. § 41-6-44 (1996)	2
Utah Code Ann. § 41-6-44 (2000)	3
Utah Code Ann. § 41-6-44 (2001)	3
Utah Code Ann. § 41-6-44 (6) (a)	1
Utah Code Ann. § 41-6-44(6)(a)(1)2001.....	6
Utah Code Ann. § 41-6-44 6)(a)(A).....	13
Utah State Constitution, Sec. 18	3

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,)	
Plaintiff/Appellee)	Appellate Court # 20020829
)	
v.)	
)	
JERRY LYNN MARSHALL,)	Priority: Defendant Incarcerated
Defendant/Appellant)	

BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

The Utah Court of Appeals has appellate jurisdiction over a final order or decree resulting from adjudicated proceedings in the district court, pursuant to Utah Code Sec. 78-2a-3(2)(a).

STATEMENT OF ISSUE AND STANDARD OF REVIEW

The issue for review is whether the State can charge Defendant with a third degree felony pursuant to Utah Code Sec, 41-6-44(6))a) based on two (2) prior convictions for Driving Under the Influence of Alcohol which violations occurred on August 21, 1998, and on December 30, 1994, without violating UCA Sec. 68-3-3, and the *ex post facto* and due process provisions of the United States Constitution and the Constitution of Utah.

The standard of review by this Court is to review the trial court's factual findings for clear error and its conclusions of law for correctness. State v. Pooler, 456 Utah Adv.27.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES.

Utah Code Sec. 41-6-44 (1990):

- (6)(a) A third or subsequent conviction within six years under this section or under a local ordinance similar to this section adopted in compliance with Subsection 41-6-43(1) is a:
 - (i) class B misdemeanor if one or both of the prior convictions for an offense committed prior to April 23, 1990, and
 - (ii) class A misdemeanor if both of the prior convictions are for offenses committed after April 23, 1990.
- (7)(a) A fourth or subsequent conviction within six years under this section is a third degree felony if all three prior convictions are for offenses committed after April 23, 1990.

Utah Code Sec. 41-6-44 (1993)

- (6)(a) A third conviction for a violation committed within six years of two \ prior violations under this section is a:
 - (i) class B misdemeanor except as provided in Subsection (ii) and (7)
 - (ii) class A misdemeanor if both of the prior convictions are for violations committed after April 23, 1990.
- (7)(a) A fourth or subsequent conviction for a violation under this section is a third degree felony only if at least three prior convictions are for violations committed after April 23, 1990

Utah Code Sec. 41-6-44 (1996)

- (6)(a) A third or subsequent conviction for a violation committed within six years of two or more prior convictions under this section is a:
 - (1) class A misdemeanor, except as provided in Subsection (ii), and
 - (ii) third degree felony if at least:
 - (A) three prior convictions are for violations committed after April 23, 1990, or
 - (B) two prior convictions are for violations committed after July 1, 1996.

FILED
Utah Court of Appeals

FEB 20 2003

Paulette Stagg
Clerk of the Court

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

State of Utah,
Plaintiff and Appellant,
v.
Mario A. Soto,
Defendant and Appellee.

ORDER

Case No. 20020328-CA

State of Utah,
Plaintiff and Appellee,
v.
Jerry Lynn Marshall,
Defendant and Appellant.


Case No. 20020829-CA

The above captioned cases are before the court on a stipulated motion to consolidate the appeals for purposes of oral argument.

IT IS HEREBY ORDERED that the motion to consolidate is granted and the above captioned cases shall be consolidated oral argument.

Dated this 20th day of February, 2003.

FOR THE COURT:


Norman H. Jackson,
Presiding Judge

IN THE UTAH COURT OF APPEALS

FILED
Utah Court of Appeals

JAN 6 3 2003

Paulette Stagg
Clerk of the Court

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Case No. 20020829-CA

The above captioned cases are before the court on a stipulated motion to consolidate the appeals for purposes of oral argument. Briefing has not yet been completed in either case.

IT IS HEREBY ORDERED that a ruling on the motion to consolidate the appeals for oral argument is deferred until the briefs in each case have been submitted to the court.

Dated this 7th day of January, 2003.

FOR THE COURT:


Norman H. Jackson,
Presiding Judge

CERTIFICATE OF MAILING

I hereby certify that on January 8, 2003, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

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MARGRET SIDWELL TAYLOR
ATTORNEY AT LAW
147 S MAIN ST
HELPER UT 84526

Dated this January 8, 2003.

By Janet Alexander
Deputy Clerk

Case No. 20020328 & 20020829

IN THE UTAH COURT OF APPEALS

FILED
Utah Court of Appeals

JAN 08 2003

Pauletta Stagg
Clerk of the Court

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Dated this January 8, 2003.

By Janet Alexander
Deputy Clerk

Case No. 20020328 & 20020829

Utah Code Sec. 41-6-44 (2000)

(6)(a) A third or subsequent conviction for a violation committed within six years of two or more prior convictions under this section is a third degree felony.

Utah Code Sec. 41-6-44 (2001)

(6)(a) A conviction for a violation of Subsection (2) is a third degree felony if it is committed:

- (i) within ten years of two or more prior convictions under this section, or
- (ii) at any time after a conviction of:

(A) automobile homicide under Sec. 76-5-207 that is committed after July 1, 2001, or

(B) a felony violation under this section that is committed after July 1, 2001

Utah Code Sec. 68-3-3:

No part of these revised statutes is retroactive, unless expressly so declared.

Constitution of the Unites States.

Sec. 9 (3): No Bill of Attainder or ex post facto law shall be passed.

Amendment V: No person shall...shall not be deprived of life, liberty, or property without due process of law.

Constitution of the State of Utah.

Sec. 18: No bill of attainder, *ex post facto* law, or law impairing obligation of contracts shall be passed.

Sec. 7 :No person shall be deprived of life, liberty or property without due process of law.

STATEMENT OF THE CASE

FACTS OF THE CASE

The parties stipulated to the facts in this case.

The trial court set forth the stipulated facts as follows:

1. Sergeant Gayle Jensen of the Emery County Sheriff's Department observed the defendant purchasing a 12 -pack of beer at BK's in Huntington, Utah, on April 26, 2002.
2. It appeared to Sergeant Jensen that the defendant was intoxicated and told him that he should not drive. He also suggested to the defendant that he should call a friend to come and pick him up.
3. The defendant placed a phone call and Sergeant Jensen left the premises. However, Sergeant Jensen soon decided to return to BK's to make sure the defendant did not attempt to drive away.
4. Upon arriving at BK's, the sergeant observed the defendant drive away. The officer stopped the defendant and conducted field sobriety tests which led the officer concluding that the defendant was intoxicated. The defendant was arrested and given an intoxylizer test which test yielded a reading of .25. An open container was also found in the defendant's vehicle. R. 54-55

The State submitted two (2) prior DUI arrest and conviction dates as follows:

Arrest date: December 30, 1994, and conviction date of December 19, 1995 R.55

Arrest date: August 21, 1998, and conviction date of September 22, 1998 R.55.

NATURE OF THE CASE

Defendant does not argue that the 2001 DUI law is *per se* unconstitutional.

Defendant argues that as applied to him based on his two (2) prior DUI violations which occurred on December 30, 1994 and and August 21, 1998 and convictions on December 19, 1995 and September 22, 1998, respectively are violations or his Constitutional rights, particularly the due process clauses and the *ex post facto* prohibitions.

TRIAL COURT RULING

The court rejected defendant's claim that the 2001 amendment to the DUI law represents an ex post fact law as applied to defendant R.55

The court held that the 2001 amendment "merely provides that prior convictions may be used for the purpose of enhancing the seriousness of the the instant charge." R.55

The court held that the 2001 amendment "does not affect the status of the previous offenses or convictions and does not increase the severity or the penalty." R.55

The court held that the 2001 DUI law "doesn't punish against a former crime, but for the present offense gives a more severe penalty because of the prior convictions." R.56

The court cited the United States Supreme Court case of Gyger v. Burke, 384 US 728 for the proposition that "habitual criminal" laws are not ex post facto laws. R. 56

The court held that the 2001 DUI law does not violate due process by failing to place the defendant on notice that the prior convictions could be used for enhancement purposes, and that defendant was on notice as the effective date of the 2001 amendment, July 1, 2001, and that if defendant committed a DUI after that date, the charge could be enhanced by any DUI convictions within a 10 year period prior to the latest offense. R.56

The trial court held that defendant had almost ten months notice of the enhancement provision, and that the notice was "fair warning", which "satisfies the requirement of due process by giving adequate notice of the 2001 amendment." R.56

The trial court dismissed UCA 68-3-3 and held that "this section does not govern this case." And, the court held that Sec. 68-3-3 was enacted in 1953 at the time the entire Utah Code was revised and was meant to apply to those revisions. The court found that even if the section does apply, the ten year provision is an express provision creating "retroactivity". R.56

The trial court denied defendant's motion to dismiss the third degree felony charge. R.56

Defendant entered a conditional plea of “no contest”, with the agreement of counsel for the State and the trial court judge, on the condition that if the decision is in favor of the State, the plea will stand, and if the Court rules in favor of defendant, the case will be remanded to the trial court for sentencing on a Class B misdemeanor DUI. R. 62-64.

SUMMARY OF ARGUMENT

The issue in this appeal is where along the time line should this Court place the ten-year time period during which a defendant can be charged with a third degree felony based on two (2) prior convictions of DUI, pursuant to UCA Sec. 44-6-44 (6)(a)(1) (2001)

STATUTORY ARGUMENT

The evolution of the Utah DUI laws in the last ten (10) years is a riddle, the resolution of which is somewhat akin to working a crossword puzzle and a jigsaw puzzle, while playing chess and rowing a canoe.

Defendant will review the evolution of the DUI laws from 1990 to 2001, with particular focus on the number of violations, the dates of the violations, and the particular DUI law in effect at the time of each violation. Defendant will argue that the “time-line” begins on July 1, 1996, and continues prospectively for ten (10) years.

CONSTITUTIONAL ARGUMENT

The Constitution of the United States and the Utah Constitution have prohibitions against ex post fact laws. Similarly, both documents provide that “no person shall be deprived of life, liberty or property without due process of law.”

Defendant will argue that the *ex post facto* laws and the due process clauses of both Constitutions prohibit a violation and conviction for DUI prior to July 1, 1996, from being used to enhance the present DUI

ANALYSIS AND ARGUMENT

STATUTORY LAWS

The 1996 amendments to the DUI law added for the first the time a third degree felony DUI charge if a defendant had two prior DUI convictions for violations committed after July 1, 1996.

DUI laws since the July 1, 1996 date after which violations must have occurred have not been amended. The third degree charge, the number of violations, or the date of the violation have not been amended.

The only amendment to the 2001 DUI law is the addition of the provision increasing the time frame from the previous six (6) year period to a ten (10) year period.

No other amendments of the DUI statutes since the July 1, 1996 date has referred to a date after which “convictions for violations are committed”. Defendant argues that since there is no subsequent amendment regarding the date after which “convictions for violations are committed” that the default is July 1, 1996.

The 2000 DUI amendments provided simply: “A third or subsequent conviction committed within six years of two or more convictions under this section is a third degree felony.” The 2000 DUI statute is devoid of any reference to a specific date after which “convictions for violations are committed “. The default is. July 1, 1996.

The major change in the 2001 amendments to the DUI law is the addition of the ten (10) year time frame. But, the 2001 DUI statute, under which defendant is being prosecuted in this case, lacks any reference to the date after which “convictions for violations are committed”. Defendant again argues that the default is the 1996 DUI statute, i.e. July 1, 1996.

UCA Sec. 68-3-3 provides that “(N)o part of these revised statutes is retroactive, unless expressly so declared.

The retroactive prohibitions of of UCA Sec. 68-3-3 will be avoided if the Court holds that the 2001 DUI amendment providing for a ten (10) year time-frame is simply an extension of the previous six (6) year time frame which began on July 1, 1996

Defendant argues that the ten (10) year “time line” must begin on July 1, 1996, and apply prospectively for ten (10) years, and continuing thereafter until repealed or amended.

Defendant admits that his August 1, 1998 violation which resulted in a conviction on September 22, 1998, is within the ten (10) year “time-line” beginning July 1, 1996.

However, Defendant argues that his violation on December 30, 1994, and conviction of DUI on December 19, 1995, is prior to the July 1, 1996 amendments, and therefore, cannot be the basis of an enhancement of the charge from a Class B misdemeanor to a third degree felony.

The Constitutional *ex post facto* and due process implications will need not be considered if this Court holds that the ten (10) year addition of the 2002 DUI amendment merely extends the prior six (6) year time frame prospectively to a ten (10) year time frame beginning from the previous date of July 1, 1996

CONSTITUTIONAL ISSUES

Are the changes in the DUI law which came into effect on July 1, 2001, as applied to this Defendant, violations of the Due Process Clause and the *ex post facto* clause of the Constitution of the United States and contrary to the Laws of Utah?

POINTS AND AUTHORITIES

In 1954, Justice Warren wrote the opinion in the case of United States v. Harriss, 347 U.S. 612, and pronounced what has become a basic tenant of the criminal law:

The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed. Id. 617

The Harris case is quoted with favor in the 1964 case of Bouie v. City of Columbia, 378 U.S. 347, by Justice Brennan:

The basic principle that a criminal statute must give fair warning of the conduct that makes it a crime has often been recognized by this Court. Citing U.S. v Harris, *Supra*.

Justice Brennan continues:

“Thus we have struck down a state criminal statute under the Due Process Clause where it was not ‘sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to it’s penalties.

We have recognized in such cases that ‘a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law’ Id.

In 1981 the United States Supreme Court decided the case of Weaver v. Graham, 450 U.S. 24, and granted relief to petitioner on the grounds that the Florida statute was unconstitutional as an *ex post facto* law as applied to petitioner. Justice Marshall wrote the opinion and defined the criteria for an *ex post facto* violation.

For a criminal or penal law to be *ex post facto*, it must be retrospective, that it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it.

Justice Marshall continued:

Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and government restraint when the legislature increase punishment beyond what was proscribed when the crime was consummated.

Thus, even if a statute merely alters the penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense.

Black's Law Dictionary (4th Edition, 1957) at P. 662-663 defines "ex post facto" law as

"A law passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences, or relations of such fact or deed."

Black's cites the following examples of prohibited *ex post facto* laws:

"A statute which changes punishment which may be imposed for a crime theretofore committed is '*ex post facto*' only if it prescribes or permits imposition of a greater sentence."

"An '*ex post facto*' law aggravates a crime or makes it greater than when it was committed.

"An '*ex post facto*' law is one which makes an act punishable in a manner to which it was not punishable when it was committed, or which deprives accused of any substantial right or immunity possessed by him before the passage as to the prior offense."

“...the legislature shall not pass any law, after a fact done by the citizen, which shall have relation to that fact, so as to punish that which was innocent when done, or add to the punishment of that which was criminal, or to increase the malignity of a crime...”

The Tenth Circuit Court of Appeals has had occasion four (4) times in the last two years to consider various aspects of “*ex post facto*” claims. Following are excerpts from the cases which define the meaning of and requirements for holding that a law is or is not “*ex post facto*”.

The 10th Circuit Court discussed “*ex post facto*” laws in the case of Barnes v. Scott, decided on January 24, 2000, Case # 98-6085, as follows:

“The focus of the *ex post facto* inquiry is not whether a legislative change produces some ambiguous sort of “disadvantage” (to covered offenders).. but on whether such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable.”

The Tenth Circuit Court discussed the *Ex Post Facto Clause* in the case of Smith v. Scott, decided August 22, 2000, Case No.00-6021. The Court stated:

“When the current interpretation of a statute is foreseeable, there can be no *Ex Post Facto* Clause violation.”

The Tenth Circuit Court cited Bouie v. City of Colombia, 378 U.S. 347, 352-53, which applied the foreseeability as a test of the principle underlying the ‘*ex post facto*’ clause.

The Tenth Circuit Court also cited the United States Supreme Court case of Weaver v. Graham 450 U.S. 24, wherein the Supreme Court held that “lack of fair notice” is a critical element in obtaining *ex post facto* relief.

The Tenth Circuit in deciding the case of Femedeer v. Haun on August 28, 2000, Case Nos. 99-4082 and 99-4093 cited the Ex Post Facto Clause of the United States Constitution, “No... *ex post facto* Law shall be passed.”

The Court continued:

“Among those laws prohibited by the Ex Post Facto Clause are those that “make more burdensome the punishment for a crime, after it’s commission.” citing Collins v. Youngblood, 497 U.S. 37, 42.

The Tenth Circuit again considered a claim of violation of the Ex Post Facto Clause in the case of Henderson v. Scott, decided August 31, 2001, Case No.00-6374.

Regarding the Ex Post Facto Clause, the Court stated:

The United States Constitution prohibits States from passing any “ex post facto Law”. This Clause “is aimed at laws that retroactively alter the definition of crimes of increase the punishment for criminal acts.

Two critical elements must be present for a law to fall within the ex post facto prohibition: first, the law must be retrospective, that is, is must apply to events occurring before its enactment; and second, it must disadvantage the offender affected by it. Citing Cal. Dept of Corrections v Morales, 514 U.S. 499, 504 (1995), and Miller v. Florida, 482 U.S. 423, 423 (1987)

ANALYSIS AND ARGUMENT

A criminal prosecution begins with an arrest. The second step is filing the charge in an Information advising the defendant of the charges against him. The third step is either a conviction or an acquittal. And, in the event of a conviction, the next step is the imposition of the penalty.

The change in the 2001 DUI law which became effective July 1, 2001, could not only alter the penalty, but alter the charge, both to the detriment of Defendant. .

The 1996 DUI statute, *Section 41-6-44(6)(a)(A), Utah Code Annotated* provided notice to Defendant and all others that a third or subsequent conviction for a violation committed within six (6) years of two or more prior convictions could be charged as a Class A misdemeanor, and, could be charged as a third degree felony, if at least three prior convictions are for violations committed after April 23, 1990, or two prior convictions for violations committed after July 1, 1996.

Defendant's 1994 conviction occurred prior to the implementation of the 1996 statute, which statute specifically refers to "two prior convictions for violations committed after July 1, 1996.". This Defendant did not, at the time of the violation or conviction in 1994, have the necessary notice of the enhancement to a third degree felony which was later specified in the 1996 DUI law .

Defendant did have notice in 1998 prior to his DUI violation and subsequent conviction as provided by the 1996 statute, but the 1998 violation and conviction was the only offense within the six (6) year time frame set forth in the 1996 statute which began on July 1, 1996.

Defendant's present offense, along with his 1998 DUI conviction, puts this offense in the category of a Class B Misdemeanor, as a second violation within the six year time frame set forth in the 1996 Statute.

Defendant is charged in this case with a third degree felony based on the 2001 change in the DUI statute which directs that the charge be based on two (2) or more prior DUI convictions under the statute within ten (10) years. Defendant disputes the third degree felony charge on the grounds of due process and ex post facto violations.

At issue are the 2001 changes in the law which provides that the charge is a third degree felony if a defendant has two prior convictions within ten (10) years and/or with a prior felony conviction, even though both occurred prior to the implementation of the 2001 DUI Law. But, in neither instance could Defendant had known prior to the DUI Law of 2001 that the legislature would change the law and increase the charges in both cases.

According to Justice Warren in the *Harris* case, *supra*,

“The Constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his conduct is forbidden by the statute. “

Defendant or any other person of ordinary intelligence could not have, even with the wildest of guesses, foreseen that in the year 2001 the Utah State Legislature would pass a law by which his 1993 and 1994 convictions would be used to enhance this charge to a third degree felony.

Justice Brennan and the Court in the Harris case held that the Due Process Clause could be the basis for striking down a state criminal statute where it was not “sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.”

Defendant’s right to due process, i.e. notice of the consequences of any future violation, was not conveyed to him, and with this prosecution his right to due process has been violated.

Justice Marshall, writing for the United States Supreme Court in Weaver v. Graham defined the criteria for relief under the Ex Post Facto Clause of the United States Constitution, as follows:

For a criminal or penal law to be ex post facto, it must be retrospective, that it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it.

Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and government restraint when the legislature increases punishment beyond what was proscribed when the crime was committed. *id.*

In the case at bar, the 2001 DUI statute appears to retrospectively set forth a time period of ten (10) years, and that applies to an event which occurred prior to the enactment of the present statute.

The 2001 version of the DUI statute, implies that the violations and convictions can be applied retrospectively, and changes the legal consequences to a defendant in relation to previous convictions.

In truth, the only new amendment to the 2001 DUI statute increased the time for which this statute will apply from six (6) years to ten (10) years, but is silent on the question of when the ten years begins and ends.

The Tenth Circuit Court in Barnes v. Scott held:

The focus of the *ex post facto* inquiry is not whether a legislative change produces some ambiguous sort of 'disadvantage' (to covered offenders) but on whether the change alters the definition of criminal conduct or increases the penalty by which a crime is punishable.

The change in the 2001 DUI law alters the definition of criminal conduct and increases the penalty for which a violation is punishable. The charge becomes a third degree felony and the penalty becomes a prison term of from zero to five years in prison.

On June 30, 2001, the day before the 2001 DUI law became effective, the DUI Code provided that a third or subsequent violation committed within six (6) years of two or more prior convictions under this section to be a third degree felony. This prior DUI law has been on the books since 1996, and gave notice to all potential violators of its consequences.

The 1996 DUI law provided that a third or subsequent conviction committed within six years of two or more prior convictions was a Class A Misdemeanor, and a third degree felony if there were three prior convictions for violations committed after April 23, 1990, and two prior convictions for violations committed after July 1, 1996.

However, in 2001, the State in this case attempted to expand the retroactive time period from six (6) years to ten (10) years, and in effect, increase the charge and the penalty, and to punish an act which occurred not six (6) years earlier, but ten (10) years earlier.

The 2001 DUI law became effective on July 1, 2001, and attempts to make the charge a third degree felony if a conviction for a violation is committed within ten (10) years of two or more prior convictions. The legislature conveniently omitted the date from which notice was given, i.e. July 1, 1996.

The 2001 legislature could have simply added the default date of, July 1, 1996, and provided that the violations and convictions outlined in the statute be prospective, rather than retrospective.

A conviction for a violation of the DUI statute can still be a third degree felony if it is committed within ten (10) years, but limited to prospective, and not to retroactive violations committed prior to July 1, 1996.

The result would be to phase in the ten (10) year provision over a period of years beginning with July 1, 1996.. The inclusion the effective date of the statute as set forth in the 1996 DUI amendments would cure the Due Process and Ex Post Facto Clause prohibitions found in this present legislation.

As it stands now, the 2001 DUI legislature has attempted to create and the State is attempting to implement an ex post facto law, which is specifically prohibited by the Ex Post Facto Clause and the Due Process of the Constitution of the United States, and unconstitutional as applied to this Defendant.

This attempt by the legislature to enact these changes in the 2001 DUI law fails on other grounds set forth herein, and specifically the prohibition found in Utah Code Annotated Section 68-3-3 which states in pertinent part: "No part of these revised statutes is retroactive, unless expressly so declared." There is no such expression declared in this legislation.

In the recent case of State v. Daniels, 438 Utah Adv. Rep. 12, the Utah Supreme Court cited the United States Supreme Court case of Collins vs. Youngblood, 497 U.S. 37 (1990) as follows:

...one function of the Ex Post Facto Clause is to bar enactments which, by retroactive operation, increase the punishment for a crime after its commission. Id at 249-250.

The recent case of State v. Lusk, 2001 UT 102, decided on December 7, 2001, is instructive in the case at bar, particularly that part which sets forth the criteria regarding the retroactive application of a statute. The Court spoke to the issue of retroactive legislation:

We hold that a statutory amendment enlarging a statute of limitation will extend the limitations period applicable to a crime already committed only if the amendment becomes effective before the previous applicable statute of limitations has run, thereby barring prosecution of the crime.

The Court continued:

...a legislative enactment extending a statute of limitations will not be retroactively applied to a crime committed if prosecution of that crime would already be precluded by the running of the previously applicable statute of limitations.

In the case at bar, Defendant has prior convictions for DUI in 1998, and 1994. The 1998 DUI conviction is relevant here only as the basis for this case to be a second DUI offense. The 1998 conviction is the only conviction of this Defendant which occurred after the change in the 1996 DUI law. Defendant and all others became aware that a third conviction for violation of the DUI Law within six (6) years when committed after July 1, 1996, can be enhanced to a third degree felony.

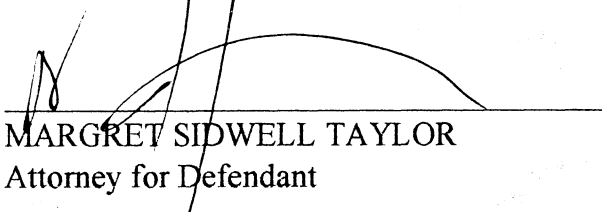
This Court should find that the 1994 conviction for an violation of the DUI law occurred prior to the enactment of the 1996. The Court should find that the 1994 DUI conviction of this defendant is no longer available for use as an enhancement to a third degree felony because it occurred prior to July 1, 1996, and the use of this conviction to enhance the charge of DUI to a third degree felony would be a violation of the due process clauses and the ex post facto clauses of the Constitution of the State of Utah and the Constitution of the United States.

WHEREFORE, Defendant prays that this Court dismiss the third degree felony charge of Driving Under the Influence in this case, and

Defendant prays that the Court remand the case to the district court for the imposition of sentence for a Class B misdemeanor

DATED THIS 16 day of January, 2002.

Respectfully submitted,


MARGRET SIDWELL TAYLOR
Attorney for Defendant

Certificate of Service

I hereby certify that on this 16 day of January, 2002, I caused to be mailed a true and correct copy of the above and foregoing Brief of Appellant, postage prepaid, to the Court and Plaintiff, addressed as follows:

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Lloyd Vance

ADDENDUM
DUI STATUTES FROM 1990 TO 2001

UCA 41-6-44 (1990)

- (6)(a) A third or subsequent conviction within six years under this section ...is a
- (i) class B misdemeanor if one or both of the prior convictions is for an offense committed prior to April 23, 1990; and
 - (ii) class A misdemeanor if both of the prior convictions are for offenses committed after April 23, 1990.

UCA 41-6-44 (1991)

- (6) (a) A third or subsequent conviction within six years of two prior violations under this section... is a:
- (i) class B misdemeanor except as provided in Subsections (6) (a) (ii) and (7); and
 - (ii) class A misdemeanor if both of the prior convictions are for violations committed after April 23, 1990.

UCA 41-6-44 (1992)

- (6) (a) A third conviction for a violation committed within six years of two prior violations under this section...is a:
- (i) class B misdemeanor except as provided in Subsections (6) (a) (ii) and (7); and
 - (ii) class A misdemeanor if both of the prior convictions are for violations committed after April 23, 1990.

UCA 41-6-44 (1993)

- (6) (a) A third conviction for a violation committed within six years of two prior violations under this section is a:
- (i) class B misdemeanor except as provided in Subsections (ii) and (7); and
 - (ii) class A misdemeanor if both of the prior convictions are for violations committed after April 23, 1990.

UCA 41-6-44 (1994)

- (6) (a) A third conviction for a violation committed within six years of two prior violations under this section is a:
- (i) class B misdemeanor except as provided in Subsections (ii) and (7);
 - and
 - (ii) class A misdemeanor if both of the prior convictions are for violations committed after April 23, 1990.

UCA 41-6-44 (1995)

- (6) (a) A third conviction for a violation committed within six years of two prior violations under this section is a:
- (i) class B misdemeanor except as provided in Subsections (ii) and (7);
 - and
 - (ii) class A misdemeanor if both of the prior convictions are for violations committed after April 23, 1990.

UCA 41-6-44 (1996)

- (6) (a) A third or subsequent conviction for a violation committed within six years of two or more prior convictions under this section is a:
- (i) class B misdemeanor except as provided in Subsection (ii) ; and
 - (ii) third degree felony if at least:
 - (A) three prior convictions are for violations committed after April 23, 1990; or
 - (B) two prior convictions are for violations committed after July 1, 1996.

UCA 41-6-44 (1997)

- (6) (a) A third or subsequent conviction for a violation committed within six years of two or more prior convictions under this section is a:
- (i) class B misdemeanor except as provided in Subsection (6) (a) (ii) ;
 - and
 - (ii) third degree felony if at least:
 - (A) three prior convictions are for violations committed after April 23, 1990; or
 - (B) two prior convictions are for violations committed after July 1, 1996.

3UCA 41-6-44 (1998)

- (6) (a) A third or subsequent conviction for a violation committed within six years of two or more prior convictions under this section is a:
- (i) class B misdemeanor except as provided in Subsection (6) (a) (ii) ;
 - and
 - (ii) third degree felony if at least:
 - (A) three prior convictions are for violations committed after April 23, 1990; or
 - (B) two prior convictions are for violations committed after July 1, 1996.

UCA 41-6-44 (1999)

- (6) (a) A third or subsequent conviction for a violation committed within six years of two or more prior convictions under this section is a third degree felony.

UCA 41-6-44 (2000)

- (6) (a) A third or subsequent conviction for a violation committed within six years of two or more prior convictions under this section is a third degree felony.

UCA 41-6-44 (2001)

- (6) (a) A conviction for a violation of Subsection (2) is a third degree felony if it is committed:
- (i) within 10 years of two or more prior convictions under this section; or
 - (ii) at any time after a conviction of:
 - (A) automobile homicide under.....
 - (B) a felony violation under this section that is committed after July 1, 2001.