

2002

# Utah v. Thompson : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,	:	
	:	
Plaintiff/Appellant,	:	
	:	Case No. 20020144-CA
vs.	:	
	:	
DARWIN J. THOMPSON,	:	
	:	
Defendant/Appellee.	:	

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BRIEF OF APPELLEE

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APPEAL FROM A REFUSAL TO BIND OVER ON A CHARGE OF TAMPERING WITH A WITNESS, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. 76-8-508 (1999), IN THE FOURTH JUDICIAL DISTRICT COURT, UTAH COUNTY, STATE OF UTAH, THE HONORABLE GARY D. STOTT, PRESIDING.

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Attorney for Appellant

**FILED**  
Utah Court of Appeals

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BRIEF OF APPELLEE

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JURISDICTION OF THE UTAH COURT OF APPEALS

This Court has appellate jurisdiction in this matter under Utah Code Ann. 78-2a-3(2)(e).

ISSUES PRESENTED AND STANDARDS OF REVIEW

Was the evidence insufficient to support a bindover for trial and did the Trial Court properly dismiss the Information against Thompson because the prosecution could not establish probable cause that Thompson retaliated against a witness or informant? The standard of review is: "The ultimate decision of whether to bind a defendant over for a trial presents a question of law," *State v. Hutchings*, 950 P.2d 425, 429 (Utah App. 1997), which is reviewed "without deference to the court below." *State v. Clark*, 2001 UT 9, ¶8, 20 P.3d 300. This issue was preserved by the magistrate's order dismissing the charges (R. 23-25; 35: 28-30).

### CONTROLLING STATUTORY PROVISIONS

The following statute is relevant to the issue on appeal:

Utah Code Ann. 76-8-508. Tampering with witness – Retaliation against witness or informant – Bribery – Communicating a threat.

(2) A person is guilty of a third degree felony if he:

(a) commits any unlawful act in retaliation for anything done by another as a witness or informant

### STATEMENT OF THE CASE

Darwin Thompson was charged by Information filed in the Fourth Judicial Court on or about October 26, 2001, with Tampering With a Witness, a third degree felony, in violation of §76-8-508(2) Utah Code Annotated (R. 1).

A preliminary hearing regarding the charge was held on January 10, 2002 (R. 20). The trial Court found that the State failed to carry its burden to show that Thompson's act was in retaliation for anything done by the victim as a witness or informant and dismissed the charge (R. 23-4; 35: 29-20).

### STATEMENT OF FACTS

On June 23, 2001, Suzanne Christenson and Richard Cook attended a church-sponsored dance together at Utah Valley State College (R. 35: 5, 18-19). Between 300 and 400 people were in attendance (R. 35: 6). Christenson testified that she saw Darwin Thompson at the dance (R. 35: 8, 13). Christenson and Thompson were dating several years prior to the alleged incident (R. 35: 5).

At one point during the dance, someone pushed Christenson from behind and "she



lost her balance and fell” into Cook (R. 35: 8, 21). Christenson and Cook had been talking “on the edge of the dance floor” (R. 35: 20). After Cook helped Christenson regain her balance, she looked back and saw Thompson walk by and said, “Oh my gosh, it’s Darwin” (R. 35: 7, 19-20).

Neither Cook nor Christenson saw who pushed her (R. 35: 8, 22). Only after Christenson was pushed did she turn around and see Thompson nearby with a dance partner (R. 35: 8). Nothing was said between Christenson and Thompson, nor was there any eye contact as Thompson’s back was to Christenson (R. 35: 17). Cook testified that he and Christenson had been about two or three feet apart while talking (R. 35: 20). There were other people around them, at least six to ten people within a five-foot radius (R. 35: 8, 24).

Christenson did not report the alleged incident until two months later when an officer encouraged her to file a report (R. 35: 14). Before the alleged incident, Christenson was involved in a civil law suit with Thompson (R. 35: 9). At the time of the alleged incident, the civil suit had been resolved (R. 35: 9-10). Christenson was also the named victim in a criminal case involving Thompson (R. 35: 5, 10). The criminal case was still pending and Christenson was under subpoena to testify for the state (R. 35: 11).

#### SUMMARY OF ARGUMENT

The trial court properly found that the prosecution produced insufficient evidence to bind Thompson over for trial. The prosecution could only speculate that Thompson committed the offense described in the information. First, Christensen was bumped while at a dance, where between 300 or 400 people attended. No one saw who actually bumped

into Christensen. Thus, it is impossible to conclude that someone intentionally bumped into Christensen. Second, the prosecution could only speculate that Thomson was the individual that bumped into Christensen. Thompson was one of at least eight other people that were nearby when someone bumped into Christensen. Again, no one, not even Christensen saw who actually bumped into her. Thus, there is no reason to believe that one of the other people nearby actually bumped into Christensen instead of Thompson. Third, the prosecution can only speculate that Thompson bumped into Christensen because of a desire to retaliate against her for being a witness or informant against him. There is no reason to assume that someone will retaliate against another just because of legal proceedings. The prosecution failed to show that Thompson threatened Christensen prior to the alleged incident. In fact, the facts indicate that Thompson did not even look at or communicate a threat to Christensen. The prosecution must rely solely on speculation while there are numerous reasonable inferences that support that someone else accidentally bumped into Christensen. The trial Court's ruling should therefore be affirmed.

## ARGUMENT

### POINT I

THE MAGISTRATE CORRECTLY FOUND THAT THE STATE PRODUCED INSUFFICIENT EVIDENCE TO BIND THOMPSON OVER FOR TRIAL AT THE PRELIMINARY HEARING

"To bind a defendant over for trial, the State must show 'probable cause' at a preliminary hearing by 'presenting sufficient evidence to establish that the crime charged has been committed and that the defendant has committed it.'" *State v. Clark*, 2001 UT 9, ¶10, 20 P.2d 300 (quoting *State v. Pledger*, 896 P.2d 1226, 1229 (Utah 1995)). "To prevail

at a preliminary hearing, the prosecution must . . . produce believable evidence of all the elements of the crime charged.” *Clark*, 2001 UT 9, ¶15 (internal quotation marks and citations omitted).

The quantum of evidence necessary to support a finding of probable cause for a bindover is the same as that for obtaining an arrest warrant; however, in a pragmatic sense, “the State still has a higher bar at the preliminary hearing stage than at the arrest warrant stage.” *Id.* at ¶16, note 3. Thus, “the prosecution must present sufficient evidence to support a reasonable belief that an offense has been committed and that the defendant committed it.” *Id.* at ¶16.

In *State v. Clark*, 2001 UT 9, the Utah Supreme Court considered two separate cases with very similar factual backgrounds. Both defendants were charged with forgery for attempting to cash checks that had been reported stolen only hours previously. *Id.* at ¶1. In both situations, after the bank did not readily comply, the defendants left the checks and exited the bank. *Id.* In each case, the defendants were bound over for trial, but the bindover orders were subsequently quashed by the district court on the grounds that the State failed to demonstrate that the defendants acted with the requisite intent under the forgery statute. *Id.* at ¶18.

The Court viewed the evidence in the light most favorable to the prosecution, and determined that because both defendants attempted to cash forged checks just “hours after those checks were reported stolen,” and because the defendants both left the bank and the forged checks after the bank took too much time to approve the checks, “the facts give rise

to two alternative inferences.” *Id.* at ¶19-20.

The Court found that one could conclude either the defendants were unaware that the checks had been stolen or “one could reasonably infer an intent to defraud.” *Id.* at ¶20. The Court considered the first alternative and found that it was unreasonable because if the defendants were holders in due course, then either they would have waited for the check to clear or they would have taken the check with them to “take that up with the account holder.” *Id.* Considering the timing of the attempted transaction and the reasonable inference that the defendants had to know they were defrauding someone, the Supreme Court found that the state had shown probable cause. *Id.*

Unlike *Clark*, where the only reasonable inferences supported the charges, the case at bar is not based upon such reasonable inferences; it is based solely upon speculation. In fact, the prosecution’s assertion that Thompson bumped Christensen in retaliation for her being a witness or informant against him is based solely on speculation. The only reasonable inferences support the conclusion that Thompson did not bump Christensen in retaliation for her part in the court proceedings.

First, the prosecution speculates that someone intentionally bumped into Christensen. It is more likely that someone accidentally or inadvertently bumped into Christensen. The alleged incident occurred at a dance, with about 300 or 400 people in attendance (R. 35: 6). Christensen and Cook were “on the edge of the dance floor” (R. 35: 20). It is nearly impossible to be at a dance without bumping into someone, especially if it is a normal dance atmosphere. It is highly possible that another dancer or someone walking by not paying attention bumped into Christensen accidentally.

Second, the prosecution speculates that Thompson was the one that bumped into Christensen. If Thompson was near Christensen when someone bumped into her, he was only one of at least eight other people nearby (R. 35: 8, 24). Furthermore, neither Christensen nor Cook saw who bumped into her and there is no reason to believe that it was Thompson and not one of the other people that actually bumped into her. Even if Thompson did bump into Christensen, which the defense does not concede, it was more likely an accident. After Christensen lost her balance from the bump, she looked back and saw Thompson with his dance partner (R. 35: 8). So whoever bumped into Christensen, it was as likely an accidental contact due to dancing or just not paying attention.

Third, the prosecution speculates that because Thompson and Christensen had prior court proceedings against one another, he bumped into her in retaliation for her being a witness or informant against him (R. 35: 9-11). There is no evidence to support this conclusion. The fact that two people are involved in a court proceeding does not mean that one is bound to assault the other. All the reasonable inferences suggest otherwise. Prior to the alleged incident, Thompson never threatened or retaliated against Christensen in any manner. And at the dance the night the alleged incident occurred, Thompson did not make eye contact with Christensen, nor did he communicate any form of a threat to her.

All of the prosecution's evidence only supports a long string of speculation that does not satisfy the probable cause standard established in *Clark*. While *Clark* states that the evidence is to be viewed in the "light most favorable to the prosecution" and courts "must draw all reasonable inferences in favor of the prosecution," 2001 UT 9, ¶10, this certainly

does not encompass speculation. Speculation stacked on speculation does not make an inference reasonable. The probable cause standard is not: “to bind a defendant over for trial, the State must only speculate that defendant committed a crime.” Fortunately, our Constitution provides greater safeguards than this. The prosecution must at least present “sufficient evidence to establish that the crime charged has been committed and that the defendant has committed it,” and reasonable evidence that the defendant committed “all the elements of the crime.” *See Clark*, 2001 UT 9, ¶s 10, 15, 16.

Not only is the prosecution’s evidence speculative at most, the prosecution could not show probable cause of all the elements of the crime charged. The prosecution did not show probable cause that Christensen was assaulted. It is more likely that whoever bumped Christensen did so accidentally. Looking at all the evidence and considering that the bump occurred at a dance, it is reasonable to conclude that someone accidentally bumped her while dancing or just not watching where they were going.

The prosecution also did not show probable cause that Thompson intentionally bumped Christensen in retaliation for being a witness or informant. The prosecution could only speculate, drawing upon a very unlikely chain of events that Thompson committed the offense charged.

This Court should affirm the trial Court’s order refusing to bindover Thompson for trial because the prosecution failed to show probable cause that Thompson violated § 76-8-508, Utah Code Annotated.

#### CONCLUSION AND PRECISE RELIEF SOUGHT

For the foregoing reasons, Darwin Thompson asks this Court to affirm the trial

Court's factual findings and conclusions of law.

RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of September, 2002.

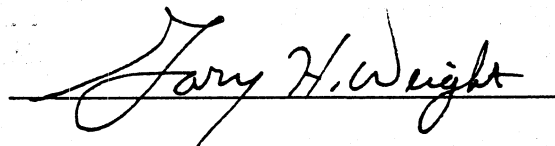
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MAILING CERTIFICATE

I hereby certify that I mailed, postage prepaid, this 18<sup>th</sup> day of September, 2002, two (2) copies of the foregoing Brief of Appellee to the following:

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ADDENDUM

Utah Code Ann., §76-8-508

Utah Code Ann., §78-2a-3(2)(e)



established solely through contradiction by the testimony of a single witness.

(2) In prosecutions for violation of Subsection 76-8-502(2) or 76-8-503(1)(b), it need not be alleged or proved which of the statements are false but only that one or the other is false and not believed by the defendant to be true.

(3) It is not a defense to a charge under this part that the oath or affirmation was administered or taken in an irregular manner. 1997

**76-8-506. Providing false information to peace officers, government agencies, or specified professionals.**

A person is guilty of a class B misdemeanor if he:

(1) knowingly gives or causes to be given false information to any peace officer with a purpose of inducing the officer to believe that another has committed an offense; or

(2) knowingly gives or causes to be given to any peace officer, any state or local government agency or personnel, or to any person licensed in this state to practice social work, psychology, or marriage and family therapy, information concerning the commission of an offense, knowing that the offense did not occur or knowing that he has no information relating to the offense or danger. 1998

**76-8-507. False personal information to peace officer.**

(1) A person commits a class C misdemeanor if, with intent of misleading a peace officer as to the person's identity, birth date, or place of residence, the person knowingly gives a false name, birth date, or address to a peace officer in the lawful discharge of the peace officer's official duties.

(2) A person commits a class A misdemeanor if, with the intent of leading a peace officer to believe that the person is another actual person, he gives the name, birth date, or address of another person to a peace officer acting in the lawful discharge of the peace officer's official duties. 2002

**76-8-508. Tampering with witness — Retaliation against witness or informant — Bribery — Communicating a threat.**

(1) A person is guilty of a third degree felony if, believing that an official proceeding or investigation is pending or about to be instituted, he attempts to induce or otherwise cause a person to:

- (a) testify or inform falsely;
- (b) withhold any testimony, information, document, or item;
- (c) elude legal process summoning him to provide evidence; or
- (d) absent himself from any proceeding or investigation to which he has been summoned.

(2) A person is guilty of a third degree felony if he:

- (a) commits any unlawful act in retaliation for anything done by another as a witness or informant;
- (b) solicits, accepts, or agrees to accept any benefit in consideration of his doing any of the acts specified under Subsection (1); or
- (c) communicates to a person a threat that a reasonable person would believe to be a threat to do bodily injury to the person, because of any act performed or to be performed by the person in his capacity as a witness or informant in an official proceeding or investigation. 2000

**76-8-508.5. Tampering with juror — Retaliation against juror — Penalty.**

(1) As used in this section "juror" means a person:

- (a) summoned for jury duty; or
- (b) serving as or having served as a juror or alternate juror in any court or as a juror on any grand jury of the state.

(2) A person is guilty of tampering with a juror if he attempts to or actually influences a juror in the discharge of the juror's service by:

(a) communicating with the juror by any means, directly or indirectly, except for attorneys in lawful discharge of their duties in open court;

(b) offering, conferring, or agreeing to confer any benefit upon the juror; or

(c) communicating to the juror a threat that a reasonable person would believe to be a threat to injure:

- (i) the juror's person or property; or
- (ii) the person or property of any other person in whose welfare the juror is interested.

(3) A person is guilty of tampering with a juror if he commits any unlawful act in retaliation for anything done by the juror in the discharge of the juror's service:

- (a) to the juror's person or property; or
- (b) to the person or property of any other person in whose welfare the juror is interested.

(4) Tampering with a juror is a third degree felony. 1992

**76-8-509. Extortion or bribery to dismiss criminal proceeding.**

(1) A person is guilty of a felony of the second degree if by the use of force or by any threat which would constitute a means of committing the crime of theft by extortion under this code, if the threat were employed to obtain property, or by promise of any reward or pecuniary benefits, he attempts to induce an alleged victim of a crime to secure the dismissal of or to prevent the filing of a criminal complaint, indictment, or information.

(2) "Victim," as used in this section, includes a child or other person under the care or custody of a parent or guardian. 1973

**76-8-510. Repealed.**

2001

**76-8-511. Falsification or alteration of government record.**

A person is guilty of a class B misdemeanor if he:

(1) Knowingly makes a false entry in or false alteration of anything belonging to, received, or kept by the government for information or record, or required by law to be kept for information of the government; or

(2) Presents or uses anything knowing it to be false and with a purpose that it be taken as a genuine part of information or records referred to in (1); or

(3) Intentionally and unlawfully destroys, conceals, or otherwise impairs the verity or availability of any such thing. 1973

**76-8-512. Impersonation of officer.**

A person is guilty of a class B misdemeanor who:

(1) impersonates a public servant or a peace officer with intent to deceive another or with intent to induce another to submit to his pretended official authority or to rely upon his pretended official act;

(2) falsely states he is a public servant or a peace officer with intent to deceive another or to induce another to submit to his pretended official authority or to rely upon his pretended official act; or

(3) displays or possesses without authority any badge, identification card, other form of identification, any restraint device, or the uniform of any state or local governmental entity, or a reasonable facsimile of any of these items, with the intent to deceive another or with the intent to induce another to submit to his pretended official authority or to rely upon his pretended official act. 1991

**76-8-513. False judicial or official notice.**

A person is guilty of a class B misdemeanor who, with a purpose to procure the compliance of another with a request

shall receive as additional compensation \$1,000 per annum or fraction thereof for the period served.

(2) The Court of Appeals shall sit and render judgment in panels of three judges. Assignment to panels shall be by random rotation of all judges of the Court of Appeals. The Court of Appeals by rule shall provide for the selection of a chair for each panel. The Court of Appeals may not sit en banc.

(3) The judges of the Court of Appeals shall elect a presiding judge from among the members of the court by majority vote of all judges. The term of office of the presiding judge is two years and until a successor is elected. A presiding judge of the Court of Appeals may serve in that office no more than two successive terms. The Court of Appeals may by rule provide for an acting presiding judge to serve in the absence or incapacity of the presiding judge.

(4) The presiding judge may be removed from the office of presiding judge by majority vote of all judges of the Court of Appeals. In addition to the duties of a judge of the Court of Appeals, the presiding judge shall:

- (a) administer the rotation and scheduling of panels;
- (b) act as liaison with the Supreme Court;
- (c) call and preside over the meetings of the Court of Appeals; and
- (d) carry out duties prescribed by the Supreme Court and the Judicial Council.

(5) Filing fees for the Court of Appeals are the same as for the Supreme Court. 1988

#### 78-2a-3. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

- (a) to carry into effect its judgments, orders, and decrees; or
- (b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

- (a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;
- (b) appeals from the district court review of:
  - (i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and
  - (ii) a challenge to agency action under Section 63-46a-12.1;
- (c) appeals from the juvenile courts;
- (d) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;
- (e) appeals from a court of record in criminal cases, except those involving a conviction or charge of a first degree felony or capital felony;
- (f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;
- (g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first degree or capital felony;
- (h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, parent-time, visitation, adoption, and paternity;

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63, Chapter 46b, Administrative Procedures Act, in its review of agency adjudicative proceedings. 2001

#### 78-2a-4. Review of actions by Supreme Court.

Review of the judgments, orders, and decrees of the Court of Appeals shall be by petition for writ of certiorari to the Supreme Court. 1986

#### 78-2a-5. Location of Court of Appeals.

The Court of Appeals has its principal location in Salt Lake City. The Court of Appeals may perform any of its functions in any location within the state. 1986

#### 78-2a-6. Appellate Mediation Office — Protected records and information — Governmental immunity.

(1) Unless a more restrictive rule of court is adopted pursuant to Subsection 63-2-201(3)(b), information and records relating to any matter on appeal received or generated by the Chief Appellate Mediator or other staff of the Appellate Mediation Office as a result of any party's participation or lack of participation in the settlement program shall be maintained as protected records pursuant to Subsections 63-2-304(16), (17), (18), and (33).

(2) In addition to the access restrictions on protected records provided in Section 63-2-202, the information and records may not be disclosed to judges, staff, or employees of any court of this state.

(3) The Chief Appellate Mediator may disclose statistical and other demographic information as may be necessary and useful to report on the status and to allow supervision and oversight of the Appellate Mediation Office.

(4) When acting as mediators, the Chief Appellate Mediator and other professional staff of the Appellate Mediation Office shall be immune from liability pursuant to Title 63, Chapter 30, Utah Governmental Immunity Act.

(5) Pursuant to Utah Constitution, Article VIII, Section 4, the Supreme Court may exercise overall supervision of the Appellate Mediation Office as part of the appellate process. 2002

## CHAPTER 3

### DISTRICT COURTS

#### Section

78-3-1 to 78-3-2. Repealed.

78-3-3. Term of judges — Vacancy.

78-3-4. Jurisdiction — Appeals.

78-3-5. Repealed.

78-3-6. Terms — Minimum of once quarterly.

78-3-7 to 78-3-11. Repealed.

78-3-11.5. State District Court Administrative System.

78-3-12. Repealed.

78-3-12.5. Costs of system.

78-3-13. Repealed.

78-3-13.4. Transfer of court operating responsibilities — Facilities — Staff — Budget.

78-3-13.5, 78-3-14. Repealed.

78-3-14.2. District court case management.

78-3-14.5. Allocation of district court fees and forfeitures.

78-3-15 to 78-3-17. Repealed.