

1984

## The State of Utah v. Dennis A. Heap : Brief of Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

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THE STATE OF UTAH, :  
Plaintiff and Respondent, :  
-v- : Case No. 19254  
DENNIS A. HEAPS, :  
Defendant and Appellant. :

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BRIEF OF RESPONDENT  
- - - - -

APPEAL FROM A CONVICTION OF POSSESSION OF A  
DANGEROUS WEAPON BY A RESTRICTED PERSON, A  
SECOND DEGREE FELONY, IN VIOLATION OF UTAH  
CODE ANN. § 76-10-503 (1978), IN THE THIRD  
JUDICIAL DISTRICT COURT, IN AND FOR SALT  
LAKE COUNTY, STATE OF UTAH, THE HONORABLE  
ERNEST F. BALDWIN, JUDGE, PRESIDING

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether a defendant on appeal can allege as error the exclusion of testimony sought to be elicited by him at trial when he failed to inform the trial court of the grounds upon which he now claims for the first time the testimony was admissible.

II. Whether the trial court abused its discretion by excluding hearsay testimony of defendant's witness when defendant failed to inform the trial court of the grounds for possible admission of the testimony, when the proposed testimony was not sufficiently reliable to warrant its admission under an exception to the hearsay rule, and when defendant was not prejudiced by the exclusion of the proposed testimony in light of the overwhelming evidence of his guilt.

III. Whether defendant waived any objection to the admissibility of the gun by failing to make a pre-trial motion regarding the same in accordance with Rule 12, Utah Rules of Criminal Procedure, despite his interposing an objection at trial at the end of the State's case-in-chief.

IV. Whether defendant can challenge on appeal issues that he failed to develop adequately at trial in the discharge of his burden of proof.

V. Whether defendant as a mere passenger had a legitimate expectation of privacy in the passenger compartment of David McCoy's pickup truck such that defendant has standing to



challenge the constitutionality of the search of McCoy's pickup truck.

VI. Whether defendant's conviction is supported by sufficient evidence.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Rule 5, Utah Rules of Evidence (1977):

A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless (a) it appears of record that the proponent of the evidence either made known the substance of the evidence in a form and by a method approved by the judge, or indicated the substance of the expected evidence by questions indicating the desired answers, and (b) the court which passes upon the effect of the error or errors is of the opinion that the excluded evidence would probably have had a substantial influence in bringing about a different verdict or finding.

Rule 12, Utah Rules of Criminal Procedure (Utah Code

Ann. § 77-35-12(1982)):

(a) An application to the court for an order shall be by motion. A motion other than one made during a trial or hearing shall be in writing unless the court otherwise permits. It shall state with particularity the grounds upon which it is made and shall set forth the relief sought. It may be supported by affidavit or by evidence.

(b) Any defense, objection or request, including request for rulings on the admissibility of evidence, which is capable of determination without the trial of the general issue may be raised prior to trial by written motion. The following shall be raised at least five days prior to the trial:

(1) Defenses and objections based on defects in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense, which objection shall be noticed by the court at any time during the pendency of the proceeding;

(2) Motions concerning the admissibility of evidence;

(3) Requests for discovery where allowed;

(4) Requests for severance of charges or defendants under rule 9; or

(5) Motions to dismiss on the ground of double jeopardy.

(c) A motion made before trial shall be determined before trial unless the court for good cause orders that the ruling be deferred for later determination. Where factual issues are involved in determining a motion, the court shall state its findings on the record.

(d) Failure of the defendant to timely raise defenses or objections or to make requests which must be made prior to trial or at the time set by the court shall constitute waiver thereof, but the court for cause shown may grant relief from such waiver.

(e) Except in justices' courts, a verbatim record shall be made of all proceedings at the hearing on motions, including such findings of fact and conclusions of law as are made orally.

(f) If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that bail be continued for a reasonable and specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect provisions of law relating to a statute of limitations.

(g)(1) In any motion concerning the admissibility of evidence or the suppression of evidence pursuant to this section or at trial, upon grounds of unlawful search and seizure, the

suppression of evidence shall not be granted unless the court finds the violation upon which it is based to be both a substantial violation and not committed in good faith. The court shall set forth its reasons for such finding.

(2) An unlawful search or seizure shall in all cases be deemed substantial if one or more of the following is established by the defendant or applicant by a preponderance of the evidence:

(i) The violation was grossly negligent, willful, malicious, shocking to the conscience of the court or was a result of the practice of the law enforcement agency pursuant to a general order of that agency;

(ii) The violation was intended only to harass without legitimate law enforcement purposes.

(3) In determining whether a peace officer was acting in good faith under this section, the court shall consider, in addition to any other relevant factors, some or all of the following:

(i) The extent of deviation from legal search and seizure standards;

(ii) The extent to which exclusion will tend to deter future violations of search and seizure standards;

(iii) Whether or not the officer was proceeding by way of a search warrant, arrest warrant, or relying on previous specific directions of a magistrate or prosecutor; or

(iv) The extent to which privacy was invaded.

(4) If the defendant or applicant establishes that the search or seizure was unlawful and substantial by a preponderance of the evidence, the peace officer or governmental agency must then, by a preponderance of the evidence, provide the good faith actions of the peace officer.