

1992

State of Utah v. Demar W. Nilson : Addenda to Brief of Appellee

Utah Court of Appeals

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Jo-Carol Nessel-Sale; Haley & Stolebarger; Attorney for Appellee.

R. Paul Van Dam; Attorney General; Marian Decker; Assistant Attorney General; Attorneys for Appellant.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
	:	
Plaintiff/Appellant,	:	
	:	Case No. 920278-CA
v.	:	
	:	Priority No. 16
DEMAR W. NILSON,	:	
	:	
Defendant/Appellee.	:	

ADDENDA TO BRIEF OF APPELLEE

- - - - -

STATE'S APPEAL FROM AN ORDER QUASHING THE INFORMATION
BASED ON A FINDING OF DOUBLE JEOPARDY, ENTERED BY THE
THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH, THE HONORABLE RICHARD H. MOFFAT, PRESIDING

**UTAH COURT OF APPEALS
BRIEF**

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CKET NO. 920278

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ATTORNEYS FOR APPELLEE

FILED

OCT 29 1992

Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

ADDENDUM 1

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

FILED DISTRICT COURT
Third Judicial District

STATE OF UTAH,

MAR - 9 1992

PLAINTIFF,

By R. G. Gable
SALT LAKE COUNTY, UT

V.

CRIMINAL NO. 911901589

DEMAR W. NILSON,

DEFENDANT.

BEFORE THE HONORABLE JOHN A. ROKICH, JUDGE

JANUARY 17, 1992

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR THE STATE:

DAVID E. YOCOM
SALT LAKE COUNTY
ATTORNEY
BY RODWICKE YBARRA
DEPUTY SALT LAKE
COUNTY ATTORNEY

FOR THE DEFENDANT:

JO CAROL NESSET-SALE
ATTORNEY AT LAW
TENTH FLOOR WALKER CENTER
175 SOUTH MAIN STREET
SALT LAKE CITY, UT 84111

1 SALT LAKE CITY, UTAH; FRIDAY, JANUARY 17, 1992; P.M.

2 P R O C E E D I N G S

3 (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN
4 COURT, OUTSIDE OF THE PRESENCE OF THE JURY.)

5 (PRESENT WERE THE DEFENDANT WITH COUNSEL,
6 JO CAROL NESSET-SALE; AND ROD YBARRA REPRESENTING THE
7 STATE.)

8 * * *

9 THE COURT: THE COURT WILL RULE AT THIS
10 TIME.

11 THE COURT IS GOING TO DENY THE MOTION TO
12 AMEND ON THE GROUNDS THAT THE DEFENDANT IS PREJUDICED
13 BY THE FACT THAT WE HAVE ALLOWED DEFENSE TO PREPARE ON
14 THE BASIS THAT THIS MATTER OCCURRED IN THE YEAR 1989,
15 AND THE INTERROGATION OF THE DEFENDANT WILL BE HIGHLY
16 PREJUDICIAL, IN THIS COURT'S OPINION, IN THE MANNER IN
17 WHICH IT WAS ELICITED. AND I BELIEVE THAT DEFENSE
18 COUNSEL HAS A RIGHT TO DEFEND THE INDIVIDUAL TO THE
19 BEST OF HER ABILITY, AND I AM NOT SO SURE THAT TO ALLOW
20 IT TO HAPPEN, FOR HER NOT TO RAISE THAT ISSUE, THAT THE
21 ISSUE OF INEFFECTIVE COUNSEL MAY NOT BE RAISED.

22 AND SO, GIVING IT DUE THOUGHT, I'M GOING TO
23 MAKE THAT RULING. AND IF YOU HAVE ANYTHING TO ADD TO
24 IT, FINE, YOU MAY DO SO AT THIS TIME. OTHERWISE, I'LL
25 CALL THE JURY.

1 MS. NESSET-SALE: YOUR HONOR, I THINK YOU MAY
2 HAVE MISSPOKEN ONE WORD. TO MAKE THE RECORD CLEAR, BY
3 ELUCIDATION FROM THE "DEFENDANT," I BELIEVE YOU MEANT
4 THE "VICTIM."

5 THE COURT: VICTIM, I MEAN THE VICTIM. YES,
6 VICTIM.

7 MR. YBARRA: YOUR HONOR, BASED ON THAT
8 RULING, THAT PUTS THE STATE IN THE POSITION OF
9 ATTEMPTING TO PROVE SOMETHING WHICH AT THIS POINT, OF
10 COURSE, IS IMPOSSIBLE. OUR VICTIM, WHO IS THE ONLY
11 WITNESS THAT CAN ESTABLISH THE DATE, HAS NOW
12 UNEQUIVOCALLY COMMITTED HIMSELF TO 1990. SO,
13 THEREFORE, IT WOULD BE LUDICROUS FOR US TO CONTINUE
14 FORWARD WITH THAT, KNOWING WHAT THE VERDICT WOULD BE,
15 WHAT IT WOULD HAVE TO BE.

16 IN FACT, I SUPPOSE WE WOULD HAVE TO-- THE
17 COURT WOULD HAVE TO SUSTAIN A DIRECTED VERDICT ON
18 MOTION OF DEFENSE. SO, THEREFORE, OUR ONLY REASONABLE
19 COURSE IS FOR THE STATE TO MOVE TO DISMISS AND SIMPLY
20 REFILE, CHARGING THE CORRECT DATE.

21 MS. NESSET-SALE: I HAVE NO OBJECTION TO THE
22 MOTION TO DISMISS.

23 THE COURT: WELL, AND I ALREADY-- AND I
24 ANTICIPATED THAT AT THE CLOSE OF THE EVIDENCE THAT MAY
25 OCCUR, SO I WAS READY TO RULE ON THAT MATTER.

1 AND I AGREE WITH YOU, I WOULD HAVE NO OTHER
2 CHOICE BECAUSE OF THE CIRCUMSTANCES, AND I WOULD HAVE
3 TO GRANT A DIRECTED VERDICT.

4 SO BASED UPON YOUR MOTION TO DISMISS, I WILL
5 GO AHEAD AND DISMISS THE CASE.

6 BRING THE JURY IN AND I'LL TAKE CARE OF IT.

7 MS. NESSET-SALE: AFTER YOU EXCUSE THEM, I
8 WOULD LIKE TO MAKE A FURTHER RECORD ON THIS MATTER,
9 AFTER YOU HAVE EXCUSED THEM.

10 THE COURT: DO YOU WANT TO DO IT BEFORE?

11 MS. NESSET-SALE: NO.

12 THE COURT: IT CAN BE DONE AFTER. I WILL
13 EXCUSE THEM.

14 MS. NESSET-SALE: I'LL DO IT AFTER.

15 (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN
16 COURT IN THE PRESENCE OF THE JURY.)

17 THE COURT: LADIES AND GENTLEMEN OF THE
18 JURY, WHILE YOU WERE OUT A NUMBER OF THINGS HAVE
19 OCCURRED. AND WE HAVE HAD SOME MOTIONS MADE THAT HAD
20 TO BE HEARD OUTSIDE OF THE EARS OF THE JURORS.

21 BASED UPON THOSE MOTIONS AND MY RULINGS, THIS
22 CASE HAS COME TO A CONCLUSION, AND THE CASE HAS BEEN
23 DISMISSED.

24 AS A RESULT OF THE DISMISSAL, I'M GOING TO
25 EXCUSE YOU AND THANK YOU FOR BEING HERE. YOU HAVE BEEN

1 ATTENTIVE. IT HAS BEEN LONG AND HARD, BUT NEVERTHELESS
2 YOU WERE VERY COOPERATIVE IN THE MANNER IN WHICH YOU
3 CONDUCTED YOURSELVES. SO I HOPE I HAVE THE OPPORTUNITY
4 OF HAVING YOU BACK IN MY COURT AGAIN AT SOME FUTURE
5 DATE.

6 SO WITH THAT, YOU WILL BE EXCUSED AND YOU
7 WON'T HAVE TO APPEAR HERE AGAIN ON TUESDAY.

8 ALL RIGHT. I WAS GOING TO SAY IF THEY WANT
9 TO TALK WITH YOU ABOUT THE CASE, YOU CAN. BUT IN VIEW
10 OF THE CIRCUMSTANCES--

11 UNLESS THE TWO OF YOU DON'T WANT TO TALK TO
12 THEM ABOUT THE PROSECUTION OF THE CASE, THAT'S UP TO
13 THE TWO OF YOU, BECAUSE I USUALLY TELL THEM THEY CAN
14 TALK TO THE ATTORNEYS, IF THEY WANT TO, AND I RECOMMEND
15 THAT THEY DO. OTHERWISE, I SAY GO HOME.

16 MR. YBARRA: IF THE JURY HAS ANY QUESTIONS
17 FOR COUNSEL, I'LL BE GLAD TO STICK AROUND AFTER WE'RE
18 FINISHED HERE.

19 THE COURT: LET ME PUT IT THIS WAY TO YOU.
20 USUALLY I RECOMMEND THAT JURORS TALK TO THE ATTORNEYS
21 ABOUT THE CASE, BECAUSE THAT GIVES THEM SOME INSIGHT AS
22 TO HOW THEY PERFORMED, AND SO FORTH. BUT IF YOU DON'T
23 FEEL LIKE DOING THAT, YOU CAN GO HOME. IN FACT, YOU
24 DON'T HAVE TO TALK TO ANYONE ABOUT THIS CASE. IT'S
25 YOUR DECISION, IF YOU WANT TO.

00132

1 AND SO WITH THAT, YOU MAY BE EXCUSED. IF YOU
2 WANT TO REMAIN FOR THE REMAINDER OF WHATEVER IS GOING
3 TO HAPPEN, YOU MAY DO SO. YOU'RE NOT BANNED FROM THE
4 COURTROOM.

5 MS. NESSET-SALE: YOUR HONOR, THE ONLY THING
6 I WANTED TO MAKE SURE WAS CLEAR ON THE RECORD, I
7 BELIEVE THE COURT SAID THAT HAD THE STATE NOT MOVED TO
8 DISMISS THE CASE, THAT YOU WOULD HAVE GRANTED A MOTION
9 FOR A DIRECTED VERDICT AT THE END OF THE STATE'S CASE.
10 IS THAT WHAT THE COURT SAID?

11 THE COURT: I SAID IF I HAD TO ENTERTAIN THAT
12 MOTION, THAT IT APPEARED IN THIS CASE, BASED ON MY
13 RULING, THAT WOULD BE ABOUT THE ONLY ALTERNATIVE I
14 WOULD HAVE HAD.

15 MS. NESSET-SALE: BECAUSE THE STATE INDICATED
16 WE'RE GOING TO HAVE TO RETRY, AND APPARENTLY WE'RE
17 GOING TO HAVE A BATTLE OVER WHETHER DOUBLE JEOPARDY HAS
18 ATTACHED.

19 THE COURT: BASED ON IF WE HAD GONE FORWARD,
20 BUT IN AS MUCH AS THEY MOVED TO DISMISS, THAT ISSUE IS
21 MOOT.

22 MS. NESSET-SALE: CORRECT.

23 THE COURT: I WANT TO MAKE SURE--

24 MS. NESSET-SALE: IT IS MOOT AS FAR AS THIS
25 COURT. I UNDERSTAND THAT.

00133

1 THE COURT: I WANT YOU TO KNOW I ANTICIPATED
2 THAT WOULD HAVE OCCURRED HAD WE PROCEEDED FORWARD.

3 MS. NESSET-SALE: THANK YOU.

4 THE COURT: COURT'S IN RECESS.

5 (THE PROCEEDINGS WERE CONCLUDED.)
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C E R T I F I C A T E

I, KATHLEEN SCHULTZ, AN OFFICIAL COURT
REPORTER FOR THE THIRD JUDICIAL DISTRICT COURT IN AND
FOR SALT LAKE COUNTY, STATE OF UTAH, DO HEREBY CERTIFY
THAT I REPORTED THE ABOVE-ENTITLED MATTER ON JANUARY
17, 1992, AND THAT THE PRECEDING PAGES 1 THROUGH 6,
INCLUSIVE, COMPRISE A TRUE AND CORRECT REPORTER'S
PARTIAL TRANSCRIPTION OF SAID PROCEEDINGS.

DATED THIS 21ST DAY OF FEBRUARY, 1992,

— — — — —
KATHLEEN SCHULTZ, C.S.R.
OFFICIAL COURT REPORTER

ADDENDUM 2

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	MINUTE ENTRY
Plaintiff,	:	Case No. 921900188 FS
vs.	:	JUDGE RICHARD H. MOFFAT
DEMAR W. NILSON,	:	
Defendant.	:	

The Court having heard argument and considered the various briefs and cases submitted in relation to the Motion to Quash the Information herein based upon a defense of double jeopardy and now being fully advised in the premises makes this its:

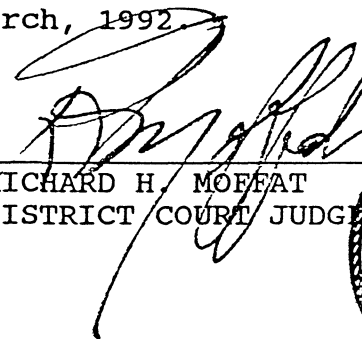
MINUTE ENTRY

The Court is of the opinion that double jeopardy in fact has attached in this case and that a second prosecution of the defendant for the same violation but alleged to be on a different date is in fact double jeopardy. The information herein shall therefore be quashed.

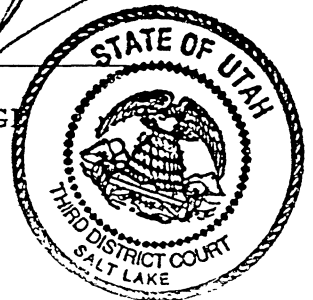
The Motion of the defendant also sought sanctions under Rule 11 of the Utah Rules of Civil Procedure. In reviewing all of the facts surrounding this instant case the Court is not of the opinion that the sanctions of Rule 11 should be applied to the prosecution. The actions of the prosector in filing the second infomration do not, in the Court's opinion, rise to the requisite level as required by Rule 11. Therefore, the Motion for Rule 11 Sanctions by the defendant is hereby denied.

Counsel for the defendant will prepare an appropriate order.

DATED this 9th day of March, 1992.



RICHARD H. MOFFAT
DISTRICT COURT JUDGE

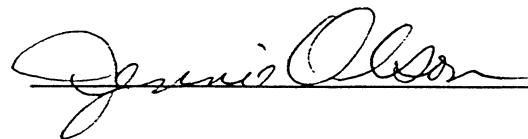


MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry & Order, postage prepaid, to the following, this 9 day of March, 1992:

Rodwicke Ybarra
Deputy County Attorney
Attorney for Plaintiff
231 East 400 South, Suite 300
Salt Lake City, Utah 84111

Jo Carol Nessel-Sale
HALEY & STOLEBARGER
Attorney for Defendant
10TH Floor, Walker Center
175 South Main Street
Salt Lake City, Utah 84111



ADDENDUM 3

MAR 24 1992

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SALT LAKE COUNTY
By R. Grate
Deputy Clerk

Attorneys for Defendant

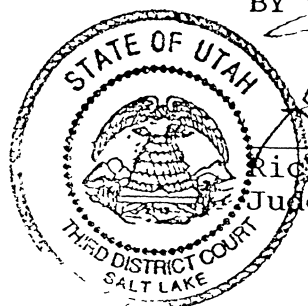
IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	ORDER QUASHING
	:	INFORMATION
Plaintiff,	:	
vs.	:	Case No. 921900188 FS
DEMAR W. NILSON,	:	Judge Richard H. Moffat
Defendant.	:	

Defendant's Motion to Quash the Information having come on regularly for hearing on February 26, 1992, and the Court having reviewed the memoranda and case law submitted by the parties and heard the arguments of counsel, and being fully advised in the matter, hereby QUASHES the Information in the above-entitled case on the basis of double jeopardy. Defendant's motion for Rule 11 sanctions is denied.

DATED this 24th day of March, 1992.

BY THE COURT:



Richard H. Moffat
Judge

00144

Approved as to form:

Rodwicke Ybarra

Rodwicke Ybarra
Deputy Salt Lake County Attorney
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 1992, four (4) true and correct copies of the foregoing Addenda to Brief of Appellee were hand-delivered to the following:

Marian Decker, Esq.
Utah Attorney General's Office
236 State Capitol
Salt Lake City, Utah 84114

