

1992

Logan v. Carlsen : Reply Brief

Utah Court of Appeals

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BRIEF

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DOCKET NO. 920739

IN THE UTAH COURT OF APPEALS

LOGAN CITY, :

Plaintiff-Appellee, : Case No. 920739-CA

-vs- : Case Type: APPEAL

LOWELL D. CARLSEN, : Priority No. 2

Defendant-Appellant. :

REPLY BRIEF OF APPELLANT'S

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

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FILED
Utah Court of Appeals

AUG 26 1993


Mary T. R.
Clerk of the Court

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IN THE UTAH COURT OF APPEALS

LOGAN CITY,	:	
STATE OF UTAH,	:	
Plaintiffs-Appellees,	:	Case No. 920739-CA
-vs-	:	Case Type: APPEAL
	:	Priority No. 2
LOWELL D. CARLSEN,	:	
Defendant-Appellant.	:	

REPLY BRIEF OF APPELLANT'S

STATEMENT OF FACTS

The Brief of Appellee, page 2-3 states the following:

1. Jerren Barson, a 16 year-old boy, acting under the direction of the State Health Department and the Logan City Police department attempted to purchase cigarettes from 20 stores in Logan City during a routine compliance check (Transcript p. 71-75).

3. None of the other 19 business sold cigarettes to Jerren Barson despite his requests for the same. (Transcript p. 75).

This testimony of Jerren Barson is contradicted by Plaintiff's Exhibits entered into evidence during the course

of the trial.

Pointing out at page 75 of the trial transcript,
Jerren Barson testified as follows:

Q. Do you recall how many stores you went to in all?

A. I think it was around ten, I--around ten.

Q. Would that have been just that night, or--

A. Yeah. That night. All together, it was 20.

Pointing out at page 78-79 of the trial transcript,
Jerren Barson testified as follows:

Q. (By Mr. Wyatt) Jerren, I've--it's two pieces of
two pages, and I've marked them as Plaintiff's Exhibit 4.

A. Uh huh (affirmative).

Q. I just want to show that to you and ask you if
you can identify that.

A. Yes.

Q. What is--

A. This is what I wrote after I got back to the
police station.

The written statement of Jerren Barson which was marked
as Plaintiff's Exhibit 4 at trial is enclosed in the addendum.
It shows that on the night of November 8, 1991, Jerren Barson
attempted to buy cigarettes at six and not the 10 stores that
he testified to under oath. [Of the four exhibits entered

into evidency by the Plaintiff at trial, none are available to Defendant and have not been transmitted to this Court for the purpose of this appeal, one of the Exhibits, a newspaper article published in the Herald Journal further contradicts Jerren Barson's testimony at trial].

The testimony of Jerren Barson also shows that he did not misrepresent his age when attempting to buy cigarettes at the other stores in Logan, Utah. (Trial Tr. 70-79).

DETERMINATIVE LAWS

Rule 12 of the Utah Rules of Criminal Procedure. (See Addendum).

ARGUMENT

POINT I

THE PLAINTIFF FAILED TO RESPOND TO DEFENDANT'S CLAIM THAT HE WAS DEPRIVED EQUAL PROTECTION OF THE LAWS.

The Defendant in his Brief, Brief of Appellant, page 14-16 raised the issue that he was deprived of Equal Protection of the Laws as secured under the Fourteenth Amendment to the United States Constitution by being charged by Information with a Class B misdemeanor offense under Section 9.24.040 of the Revised Ordinances of Logan City rather than with a Class C misdemeanor offense as per the citation issued to Defendant

on November 8, 1991 under U.C.A. § 76-10-104, (1953 as amended).

The Plaintiff in its Brief has failed to respond and provide this Court with any rational basis as to why the Defendant was singled out and arbitrarily charged by Information and intentionally prosecuted for a Class B misdemeanor offense in violation of Section 9.24.040 of the Revised Ordinances of Logan City rather than a Class C misdemeanor offense under U.C.A. § 76-10-104, (1953 as amended) as per the citation issued to Defendant. The Defendant being intentionally charged by Information and prosecuted for a Class B misdemeanor rather than a Class C misdemeanor was a denial of Equal Protection of the Laws and grounds for dismissal of the Information. Murguia v. Municipal Court for Bakerfield J.D., 540 P.2d 44 (Cal. 1975).

POINT II

THE DEFENDANT COULD NOT BE CRIMINALLY PROSECUTED AND PUNISHED FOR A MUNICIPAL ORDINANCE WHICH DID NOT PROVIDE A VALID CRIMINAL PENALTY.

The Plaintiff in its Brief, Brief of Appellee at page 8 concedes that Section 1.16.010 is admittedly inconsistent and should be voided in this case. Section 1.16.010 of the Revised Ordinances of Logan City provides the penalty

for violating Section 9.24.040 of the Revised Ordinances of Logan City. Clearly, if the penalty for violating a municipal ordinance is void than any prosecution under the ordinance would be wholly frivolous. The trial court in the instant case had no constitutional authority under the separation of powers provisions of Article V, § 1 of the Utah Constitution to enact or legislate a penalty provision for Section 9.24.040 of the Revised Ordinances of Logan City. State v. Gallion, 572 P.2d 683 (Utah 1977); State v. Green, 793 P.2d 912 (Utah App. 1990); Matheson v. Ferry, 641 P.2d 674 (Utah 1982).

Thus, the prosecution of the Defendant in the instant case was wholly frivolous and the penalty imposed against him was totally void.

POINT III

THE TRIAL COURT DID NOT TAKE THE PROSECUTION'S MOTION TO AMEND THE INFORMATION UNDER ADVISEMENT.

The Plaintiff in its Brief, Brief of Appellee, page 8-9 states that the trial court took the prosecution's motion to amend the Information under advisement. The Plaintiff's claim is misplaced and not supported by the trial court record.

The record does show that the trial court took the Defendant's Motion to Dismiss the Information and Defense Counsel's objections to the trial granting the prosecution's motion to amend the Information under advisement.

Pointing out at pages 88-90 of the trial transcript the proceedings went as follows:

THE COURT: All right. Thank you.

Let me respond without calling on Mr. Wyatt. As we've gone along in evidence, I've thought about because of the Court's uncertainty about the status of the law, the Court feels that the best way perhaps to handle the mechanics of handling the question at this point, since I have the motion under advisement, would be to grant tentatively, at least, the motion of the City to amend.

One of two things is true. Either they have the right to amend and treat it as a Class C and instruct the jury on a Class C misdemeanor, or they don't have that right. If they don't have that right, you get a dismissal anyhow. If they do have that right, that's the proper way to go to the jury, rather than to let it go as a Class B.

And so it seems to the Court maybe that that's the thing to do, advise the jury that it's prosecuted and the Court's going to allow an amendment, that it's prosecuted in the State-- name of the State of Utah as a Class C misdemeanor, we'll simply interline on their copy of the instructions, the State of Utah in place of Logan City.

And then if that's a proper way to go, then see what the jury does. If that's not a proper way to go, it won't make any difference, because the Court's going to--going to make a decision and if the Court concludes that's not correct, it's going to dismiss the Information and that'll take care of it.

So it seems to me that procedurally, that's--so we don't waste our time, that's maybe the best way to dot it.

Does that sound all right, Mr. Hult?

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 your objection, and I've treated that as if it had been stated.

The Brief of Appellee at page 9 further states:

At the conclusion of the trial the court indicated it would announce a decision on the 2 motions, both Appellant's motion to dismiss and Appellee's motion to amend, at sentencing which was to be set at some time in the future.

Again, the Plaintiff's claim is misplaced and is not supported by the trial court record.

Pointing out at page 112 of the trial transcript, the proceedings after the jury returned a verdict went as follows:

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

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 App. 1991). 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).

When reviewing the substance of the trial court's decision and findings of fact for correctness in relation to the prosecution's motion to amend the Information. There can only be one conclusion that the trial court did in fact grant the prosecution's motion to amend the Information subject to a later dismissal if the amendments were not correct. The jury in the instant case did in fact find the Defendant guilty of the offense of Selling Tobacco to a Minor in violation of U.C.A. § 76-10-104, (1953 as amended) in the case of the State of Utah v. Lowell D. Carlsen. (R.55). It is the Plaintiff's claim and argument in the instant case that is misplaced and not supported by law or the record of the trial court.

The Utah Supreme Court in State v. Hyams, 230 P. 349, 350 (Utah 1924) held that the judgment of the court must in all cases be based upon the verdict of the jury, and the verdict of the jury must be responsive to the issue joined by the indictment or information and the plea of the person

on trial thereto, otherwise the court is without jurisdiction to render judgment thereon.

Thus, the trial court in the instant case lacked jurisdiction to render a judgment in the case of Logan City v. Lowell D. Carlsen which was not based upon the verdict of the jury in the case of State of Utah v. Lowell D. Carlsen which was responsive to the Amended Information but was not responsive to the original Information charging Defendant with violating Section 9.24.040 of the Revised Ordinances of Logan City.

POINT IV

THE APPELLANT IS NOT PRECLUDED FROM RAISING THE ISSUE OF THE CONSTITUTIONALITY OF U.C.A. § 76-10-104 FOR THE FIRST TIME ON APPEAL.

The Plaintiff claims in the Brief of Appellee, that the Defendant is precluded from raising the constitutionality of U.C.A. § 76-10-104 for the first time on appeal. The Plaintiff does this by claiming that the Defendant was not convicted under the statute but under Section 9.24.040 of the Revised Ordinances of Logan City, Brief of Appellee, pages 10-12.

The Defendant can challenge for the first time on appeal the constitutionality of the statute or ordinance under which he was convicted.

The pertinent part of Rule 12 (b) of the Utah Rules of Criminal Procedure provides as follows:

(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 trial:

(1) defenses and objections based upon 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 proceedings.

A challenge to the validity of a statute under which a defendant was convicted constitutes a challenge to the court's subject matter jurisdiction which can not be waived and can be raised for the first time on appeal. Arrington v. United States, 585 A.2d 1342, 1344 (D.C. App. 1991); State v. Morrey, 64 P. 764-765 (Utah 1901); State v. Beddo, 63 P. 96 (Utah 1901).

The Court in Arrington v. United States, supra, n. 2 at 1344 observed as follows:

2. The government's contention that only appellant Arrington has, in Appeal No. 89-637, preserved this issue for appeal, is meritless. Appellants' challenge to the validity of the Act, that the statute had become invalid and ceased to exist, raises a jurisdictional issue. In the absence of a valid statute their prosecutions could not be maintained under the Act. Challenges to a court's subject matter jurisdiction

cannot be waived. See, Super.Ct.Crim.R. 12(b)(2); see also Gooding v. United States 529 A.2d 301, 304n. 4 (D.C. 1987); Adair v. United States, 391 A.2d 288, 290 (D.C. 1978); Smith v. United States, 304 A.2d 28, 31 (D.C.) cert. denied 414 U.S. 1114, 94 S.Ct. 846, 38 L.Ed.2d 741 (1973).

It is the Plaintiff's contention in the instant case that because U.C.A. § 76-10-104, (1953 as amended) or Section 9.24.040 of the Revised Ordinances of Logan City fails to establish minimum guidelines or standards relating to the Identification requirements relating to tobacco sales that the police and prosecutor in the instant case can set their own standards.

Pointing out at page 84 of the trial transcript, Logan City Police Officer, J.G. Geier testified as follows:

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

A. That's correct.

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

A. No. I don't recall that.

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

A. Correct.

Q. You would agree, would you not, with Todd Barson, that the State law does not state that a seller of tobacco

has to require an I.D.?

A. That the law--say that again.

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

A. I believe that's true, yes.

Pointing out at page 85-86 of the trial transcript,
Officer Geier further testified as follows:

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

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

Q. Okay.

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

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

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

The basis for the citation issued on November 8, 1991
and the prosecution of the Defendant in the instant case

was because the Defendant failed to ask for an I.D. when he sold a pack of cigarettes to a person that he thought was 19, appeared to be 19, and represented himself to be 19 years of age. Plaintiff's claim, Brief of Appellee, page 15 that the evidence is sufficient to sustain the conviction because Defendant did not ask Jerren Barson for his Driver License.

The United States Supreme Court was faced with a similar issue relating to identification requirements in Kolender v. Lawson, 461 U.S. 352 (1983). The Supreme Court held the statute in that case to be unconstitutionally vague and facially invalid because the statute failed to set minimum standards relating to identification requirements and because the statute allowed police officers to set their own standards as to such identification requirements.

The instant case has little or no difference to the issue resolved by the Supreme Court in Kolender. There being no valid ordinance or statute in which to maintain the prosecution of the Defendant in this case, the trial court lacked subject matter jurisdiction to prosecute the Defendant.

POINT V

THE DEFENDANT HAS MARSHALLED ALL RELEVANT EVIDENCE TO CONSIDER HIS CLAIM OF INSUFFICIENT EVIDENCE.

The Plaintiff's claim, Brief of Appellee, page 13-14 that the Defendant has failed to marshall all the relevant

evidence before this Court on Defendant's claim of insufficient because Defendant did not have the testimony of Todd Barson and former Logan City Police Officer, Gil Duron transcribed.

The Defendant did not have their testimony transcribed because it is not relevant to the Defendant's claim of insufficient evidence. Furthermore, these two witnesses involvement in this case was testified to by J.G. Geier and Jerren Barson. Both Officer Geier and Jerren Barson testified that Todd Barson and former Logan City Police Officer, Gil Duron were parked in a vehicle over a one-half block away when Jerren Barson attempted to buy cigarettes at Carlsen's Gas for Less on November 8, 1991. (Trial Tr. 72, 80-81).

The Defendant's guilt or innocence in the instant case must be determined as if the facts were as he perceived them. People v. Beardslee, 806 P.2d 1311 (Cal. 1991).

The California Court of Appeals in People v. Rivera, 203 Cal.Rptr. 842 (Cal. App. 4 Dist. 1984) at 846 observed as follows:

A person does not act unlawfully where he commits an act under an honest and reasonable belief in the existence of certain facts and circumstances which, if true, would make the act lawful. [Citation omitted]. "When a person commits an act based on a mistake of fact, his guilt or innocence is determined as if the

facts were as he perceived them. (People v. Osborne, (1978) 77 Cal.App.3d 472, 479 [143 Cal.Rept. 582].)"

Thus, when viewing the facts of the instant case as perceived by the Defendant, the Defendant sold a pack of cigarettes to Jerren Barson under an honest and reasonable belief that Jerren Barson was 19 years of age. Therefore, based upon the evidence adduced at trial of the testimony of Defendant which is also corroborated by the testimony of Officer Geier, there is not sufficient evidence to sustain the conviction of the Defendant.

CONCLUSION

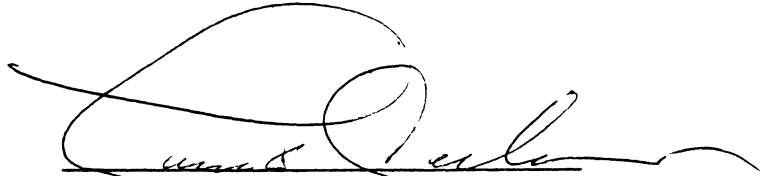
There is no theory of the law or a legal basis which is based upon the record of this case in which the Defendant's conviction could be affirmed and the Defendant therefore respectfully submits that his conviction should therefore be reversed.

DATED this 26th day of August, 1993.


LOWELL D. CARLSEN
Appellant in Pro Se

CERTIFICATE OF SERVICE

I certify that I mailed two copies of the foregoing Reply Brief of Appellant's 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 26th day of August, 1993.



LOWELL D. CARLSEN

A D D E N D U M

tered, that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt, and that the plea is an admission of all those elements,

(5) the defendant knows the minimum and maximum sentence, and if applicable, the minimum mandatory nature of the minimum sentence that may be imposed for each offense to which a plea is entered including the possibility of the imposition of consecutive sentences,

(6) if the tendered plea is a result of a prior plea discussion and plea agreement, and if so, what agreement has been reached,

(7) the defendant has been advised of the time limits for filing any motion to withdraw the plea, and

(8) the defendant has been advised that the right of appeal is limited

(f) Failure to advise the defendant of the time limits for filing any motion to withdraw a plea of guilty, no contest or guilty and mentally ill is not a ground for setting the plea aside, but may be the ground for extending the time to make a motion under Section 77 13-6

(g) (1) If it appears that the prosecuting attorney or any other party has agreed to request or recommend the acceptance of a plea to a lesser included offense, or the dismissal of other charges, the agreement shall be approved by the court

(2) If sentencing recommendations are allowed by the court, the court shall advise the defendant personally that any recommendation as to sentence is not binding on the court

(h) (1) The judge shall not participate in plea discussions prior to any plea agreement being made by the prosecuting attorney

(2) When a tentative plea agreement has been reached, the judge, upon request of the parties, may permit the disclosure of the tentative agreement and the reasons for it, in advance of the time for tender of the plea. The judge may then indicate to the prosecuting attorney and defense counsel whether the proposed disposition will be approved

(3) If the judge then decides that final disposition should not be in conformity with the plea agreement the judge shall advise the defendant and then call upon the defendant to either affirm or withdraw the plea

(i) With approval of the court and the consent of the prosecution, a defendant may enter a conditional plea of guilty, guilty and mentally ill, or no contest, reserving in the record the right, on appeal from the judgment, to a review of the adverse determination of any specified pre-trial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea (Amended effective May 1, 1993)

Rule 12. Motions.

(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

Rule 13. Pretrial conference.

(a) The trial court, in its discretion, may hold a pretrial conference, with trial counsel present, to consider such matters as will promote a fair and expeditious trial. The accused shall be present unless he waives his right to appear

(b) At the conclusion of the conference, a pretrial order shall set out the matters ruled upon. Any stipulations made shall be signed by counsel, approved by the court and filed, and shall be binding upon the parties at trial, on appeal, and in postconviction proceedings unless set aside or modified by the court

Rule 14. Subpoena.

(a) A subpoena to require the attendance of a witness or interpreter before a court, magistrate or grand jury in connection with a criminal investigation or prosecution may be issued by the magistrate with whom an information is filed, the county attorney on his own initiative or upon the direction of the grand jury, or the court in which an information or indictment is to be tried. The clerk of the court in which a case is pending shall issue in blank to the defendant, without charge, as many signed subpoenas as the defendant may require

(b) A subpoena may command the person to whom it is directed to appear and testify or to produce in court or to allow inspection of records, papers or other objects. The court may quash or modify the subpoena if compliance would be unreasonable

(c) A subpoena may be served by any person over the age of 18 years who is not a party. Service shall be made by delivering a copy of the subpoena to the witness or interpreter personally and notifying him of the contents. A peace officer shall serve any subpoena delivered to him for service in his county

Selling tobacco to minors

11- 22-91

Merchants charged after sting

By Christopher Williams
staff writer

Local officials said they weren't blowing smoke when it came to the illegal sale of tobacco to minors. Following a three-month effort by the Logan City Police and Bear River Health departments, seven merchants have recently been charged with selling tobacco to minors.

That was the final step in a three-step process by the agencies to curb the availability of smokes to those under the age of 19.

During an August sweep of 10 Logan stores, a 16-year-old male undercover buyer came out of six of the local businesses with a pack of cigarettes in hand. Logan City Police School Resource Officer Gil Duron and Health Educator Todd Barson weren't surprised by the 60 percent non-compliance rate, but hoped that follow-up meetings with

owners and managers of 28 local stores would increase that compliance rate.

After that initial sweep, during which no one was cited for violations, Duron and Barson set up interviews with store personnel, shared what happened, explained the state's tobacco laws, the health issues associated with tobacco use and possible penalties employees and employers could face if minors were allowed to buy tobacco.

Following that education process, Duron, Barson and the undercover juvenile again hit the streets in October and November. Of the 28 stores hit during that second sweep, only seven sold tobacco to the 16-year-old. However, of those seven stores that sold the tobacco, five of them were the same that violated the state's tobacco laws back in August.

According to Duron, four of those seven charged with the class C misdemeanor offense have pleaded guilty, two have pleaded

not guilty and another has a scheduled court appearance.

"Ninety-nine percent of the stores we've worked with have been nothing but positive about this," Duron said. "We did have one gentleman say he was 'set up,' and I agree, yes, he was set up. But we told everyone that we'd be sending another individual in with the understanding that if a violation was committed, legal action would take place."

Although merchants were cited for violating tobacco laws, Barson said the main thrust of the effort was to educate retailers about the law and that cigarettes "are the leading cause of preventable death and illness."

"We're just trying to prevent illness, disease, death and other drug use," Barson said, citing a National Institute on Drug Abuse study that showed 92 percent of adolescent marijuana smokers were also regular cigarette smokers.

See SALES on page 2

Sales

Continued from page 1

He also cited a DePaul University study that indicated that minors turn to retail merchants 74 percent of the time to purchase smokes, and rely on family and friends 26 percent of the time.

Smith's Store Director Rod Howell had nothing but compliments for the program this morning although one of his checkers has been fined for selling to the undercover minor.

"My employees have really become aware of the situation and we're ID'ing a lot more people," Howell said. "It used to be that (police) came down on the store. But now that they're coming down on the employees, my employees realize the money (for fines) comes out of their own pocket."

In accordance with Smith's store policy, the checker found violating the law has received a written warning, Howell said, adding a second violation would result in a week off without pay and a third violation would result in termination.

Duron and Barson now plan to send letters of commendation to store owners and employees they found complying with tobacco laws and said another undercover sweep could again occur within a few months.

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Statement

Nov. 8, 1991 6:30 P.M. Carlson Car Wash 600 W. Main
Today's Date Time of Incident Location of Incident

Jerren Barson 7/21/91 16 (M) F
Name Date of Birth Age

642 3005 Clarkston Ut 563-5868
Address City State Telephone Home/Work

Please describe what you saw, heard or know of this incident.

Tonight I was assisting Todd Barson and T. Gil Duron with cigarettes buys. Tonight I went to '11 oil, Valley Discount, Jardine Coraco, Island Market, Logan Lanes, and Carlson's car wash. All the stores at Carlson's asked for I.d. I did not have any I.D. on me all I had was a ten dollar bill. At Carlson's I went to the window and asked for a pack of Camel Lights. The clerk was a old man with black hat, he looked at 70 years old and he was tall but skinny. He asked me if I was 19. I didn't say anything then he sold

Signature

the Camel Lights and gave
a book of matches. I gave him
10 dollar bill and he gave me
5 and 3 one and 1 dime. I
was searched by Gil.

Jerren Barron

Nov. 8 91

7:29

1 Q Do you recall how many stores you went to in all?

2 A I think it was around ten, I--around ten.

3 Q Would that have been just that night, or--

4 A Yeah. That night. All together, it was 20.

5 Q And those 20 stores, how many individuals sold
6 you?

7 A One.

8 Q And that one was?

9 A Carlsen's.

10 Q Okay.

11 MR. WYATT: That's all that I have. Thank you.

12 THE COURT: Thank you.

13 MR. WYATT: Oh, I'm sorry.

14 THE COURT: Mr. Hult?

15 MR. WYATT: No. I am done.

16 THE COURT: You may cross.

17 MR. HULT: Thank you.

18 CROSS-EXAMINATION

19 BY MR. HULT:

20 Q I understand that this particular store that you
21 went to, you have to remain on the outside of the building
22 and the person's on the inside; is that the case with the
23 other stores that you were to that night?

24 A No. They were all inside, sort of a desk thing.

25 Q Okay. This is the only one where you stay on the

1 A Yes.

2 Q Thanks.

3 MR. HULT: I have no further questions.

4 THE COURT: Thank you.

5 Further direct?

6 MR. WYATT: Yeah.

7 REDIRECT EXAMINATION

8 BY MR. WYATT:

9 Q Jerren, why was it that you didn't answer his
10 question when he asked you how old you were?

11 A I don't know, just--nothing really, sat there.

12 Q Did you have any instructions as to what you were
13 supposed to say?

14 A Yes. I was just not supposed to answer, I wasn't
15 supposed to tell him any age. I wasn't supposed to say I
16 was 19 or--if he asked.

17 Q I want to--I want to show you something--

18 MR. WYATT: Maybe I should mark it just so that
19 I can keep track.

20 Q (Ey Mr. Wyatt) Jerren, I've--it's two pieces of--
21 two pages, and I've marked them as Plaintiff's Exhibit 4.

22 A Uh huh (affirmative).

23 Q I just want to show that to you and ask you if
24 you can identify that.

25 A Yes.

1 Q What is--

2 A This is what I wrote after I got back to the
3 police station.

4 Q And would that have been immediately after this
5 incident?

6 A Yes.

7 Q Okay.

8 MR. WYATT: That's all. Thank you.

9 I have no further questions.

10 THE COURT: Further cross?

11 MR. HULT: No further cross.

12 THE COURT: You may step down, Mr. Barson, thank
13 you.

14 MR. WYATT: Your Honor, I'd call Officer Geier.

15 UNIDENTIFIED SPEAKER: Scott, they want to know if
16 they can be excused?

17 THE COURT: I think the Court's preference would
18 be that they not be excused at this point. All right.
19 Thank you.

20 J.G. GEIER,
21 called as a witness by and on behalf of the City in this
22 matter, after having been first duly sworn, assumed the
23 witness stand, and was examined and testified as follows:

24 *

25 *

1 DIRECT EXAMINATION

2 BY MR. WYATT:

3 Q Let me ask you initially if you could tell us
4 what your name and occupation is for the record.

5 A My names is James Geier, I'm a patrol sergeant
6 with the Logan City Police Department.

7 Q Okay. Sergeant Geier, I'm going to ask you if
8 you recall the events of November 8th of this past year?

9 A Yes. I do.

10 Q And do you recall being at the Carlsen's gas
11 station on that evening?

12 A Yes, sir.

13 Q What was the purpose of your being there?

14 A I was assisting Officer Duron when they contacted
15 Carlsen's in reference to a tobacco sale.

16 Q Okay.

17 MR. WYATT: I don't think we could get nosier
18 doors if we specifically tried to get them that way.

19 THE COURT: There is one nosier.

20 Please go ahead.

21 Q (By Mr. Wyatt) What I'd ask you, where were you
22 located at that time, when you were stationed at Carlsen's?

23 A During the transaction?

24 Q Yes.

25 A 600 North and about 50 East on the north side of

1 the road, facing west, in my patrol car.

2 Q And did you have a view of Jerren Barson?

3 A I had a view of the shed, but not of Jerren at
4 the window. Is it Jerren? I guess, yes.

5 Q Yeah. What did you do that particular evening?

6 A I made contact with Mr. Lowell, after the
7 individual had come back, with the tobacco in hand.

8 Q Okay. And can you indicate to the jury what your
9 conversation with the defendant was?

10 A I just informed Mr. Lowell my reason for being
11 there and informed him that he had just sold tobacco to a
12 juvenile of the age of 16, and we had some further
13 conversation. He made a statement to the fact that he
14 looked 19, and that he had asked him three times how old
15 he was, and then had gone on to say that he had--Jerren had
16 told him that he was 19. And I asked him if he'd ever
17 asked for any identification or anything to ascertain his
18 age, and he indicated to me that he had not.

19 He was quite upset and--over the circumstances
20 and--and so I had another conversation with Officer Duron.

21 Q And after the second conversation, then what did
22 you do?

23 A After I had a clear understanding of what
24 Officer Duron's intentions were and the program that he
25 had made efforts on, then I returned to Carlsen's Shamrock,

1 within minutes, and told him at that time that I was going
2 to issue him a misdemeanor citation, and did so.

3 Q Okay. At any time during this conversation with
4 the defendant, did he--did he deny selling the cigarettes
5 to this individual?

6 A No. He did not.

7 Q In fact, what did he tell you?

8 A That he had looked 19 and that he'd asked him on
9 three occasions how old he was, and had made a statement
10 that Jerren had said that he was 19. And I told him that
11 my information was different, and based on the circumstances
12 that he'd be issued a citation.

13 Q Okay. The person that you've been discussing,
14 can you identify him just for the record?

15 A Yes. It's the gentleman to the right, with the
16 brown suit coat on.

17 Q Okay. The defendant in this case?

18 A Yes.

19 Q Mr. Carlsen?

20 THE COURT: The record will show the witness
21 indicates Mr. Carlsen at counsel table.

22 You may go ahead.

23 MR. WYATT: That's all that I have. Thank you
24 very much.

25 THE COURT. You may cross-examine.

1
2 CROSS-EXAMINATION

3 BY MR. HULT:

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

7 A Correct. I'd say yours is tan.

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

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

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

18 A Would you ask that again?

19 Q Okay.

20 A I'm not sure I understand.

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

23 A Yeah, you did.

24 Q How soon after Jerren made his purchase did you
25 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 recess, too, and then talk about instructions and have the
2 jury back and be ready to go.

3 Members of the jury, you've heard it before.
4 Please don't make up your minds about the case until it's
5 finally submitted to you. Please don't talk among yourselves
6 yet about the subject matter of the case, or to anyone else
7 about that, or allow them to talk to you about that, and
8 please don't be in the company of anybody that is or could
9 be connected with the case. And the bailiff will take you
10 out for--to begin your recess.

11 The record will show our jurors have left.

12 Mr. Hult?

13 MR. HULT: Your Honor, before presenting the
14 defendant's case, and it being usually the time to request a
15 directed verdict or dismissal on the basis of lack of
16 evidence, if there is a lack; our request at this time is
17 for the Court to reconsider the motion that we have made for
18 dismissal, and arguments that we have already presented.

19 I don't have anything more that I want to present
20 at this time, but I just thought that this might be an
21 opportune time to see if the Court would consider that at
22 this time.

23 THE COURT: All right. Thank you.

24 Let me respond without calling on Mr. Wyatt. As
25 we've gone along in evidence, I've thought about because of

1 the Court's uncertainty about the status of the law, the
2 Court feels that the best way perhaps to handle the mechanics
3 of handling the question at this point, since I have the
4 motion under advisement, would be to grant, tentatively, at
5 least, the motion of the City to amend.

6 One of two things is true. Either they have the
7 right to amend and treat it as a Class C and instruct the
8 jury on a Class C misdemeanor, or they don't have that
9 right. If they don't have that right, you get a dismissal
10 anyhow. If they do have that right, that's the proper way
11 to go to the jury, rather than to let it go as a Class B.

12 And so it seems to the Court maybe that that's
13 the thing to do, advise the jury that it's prosecuted and
14 the Court's going to allow an amendment, that it's
15 prosecuted in the State--name of the State of Utah as a
16 Class C misdemeanor, we'll simply interline on their copy
17 of the instructions, the State of Utah in place of Logan
18 City.

19 And then if that's a proper way to go, then see
20 what the jury does. If that's not a proper way to go, it
21 won't make any difference, because the Court's going to--
22 going to make a decision and if the Court concludes that's
23 not correct, it's going to dismiss the Information and
24 that'll take care of it.

25 So it seems to me that procedurally, that's--so we

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 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.