

1992

## Salt Lake City v. Richard Copier : Reply Brief

Utah Court of Appeals

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Robert H. Copier; Attorney for Appellant.

Marsha S. Atkin; Salt Lake City Prosecutor's Office; Attorneys for Appellee.

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**BRIEF**

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DOCKET NO. ~~920777CA~~ IN THE UTAH COURT OF APPEALS

CITY OF SALT LAKE,	)	
	)	
Plaintiff and	)	<b>APPELLANT'S REPLY BRIEF</b>
Appellee,	)	
	)	
vs.	)	
	)	
RICHARD COPIER,	)	Appeal No. 920777-CA
	)	
Defendant and	)	(Argument Priority 2)
Appellant.	)	
	)	

APPEAL FROM THE THIRD CIRCUIT COURT, SALT LAKE DEPARTMENT  
JUDGE FUCHS

ROBERT H. COPIER - #727  
Attorney for Defendant/Appellant  
243 East 400 South, Suite 200  
Salt Lake City, Utah 84111  
Telephone: (801) 531-0099

MARSHA S. ATKIN - #5246  
Assistant Salt Lake City Prosecutor  
Attorney for Plaintiff/Appellee  
451 South 200 East, #125  
Salt Lake City, Utah 84111  
Telephone: (801) 535-7767

**FILED**  
Utah Court of Appeals

AUG 27 1993

  
Mary T. Noonan  
Clerk of the Court



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## STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction under U.C.A. §78-2a-3(2)(d) and (f).

## STATEMENT OF THE ISSUE

Issue for review and standard of review: The issue on appeal is whether alcohol content of "0.08%" or greater by weight" constitutes a public offense now that the state enabling statute has been amended to remove the percentage weight standard and establish an actual measurement standard. The Appellate Court reviews such questions of law for correctness, giving no deference to the trial court. Reeves v. Gentile, 813 P.2d 111 (Utah 1991).

## DETERMINATIVE LAW

### STATUTES

U.C.A. Sec. 41-6-43(1)

U.C.A. Sec. 41-6-44(1)

## **STATEMENT OF THE CASE**

Defendant was convicted of driving with a "blood or breath alcohol content" of "0.08% or greater by weight". The Court denied Defendant's Motion to Arrest Judgment in open court on September 23, 1992, and entered Judgment September 30, 1992.

## **SUMMARY OF REPLY ARGUMENT**

Salt Lake City's brief asks this court to exceed its judicial power and encroach upon a core legislative function reserved to the Utah Legislature.

## **ARGUMENT**

THE BRIEF OF APPELLEE URGES THIS COURT TO DISREGARD THE ROLE OF THE UTAH LEGISLATURE IN ORDER TO JUSTIFY SALT LAKE CITY'S DISREGARD FOR THE ROLE OF THE UTAH LEGISLATURE.

Effective June 5, 1987, the Utah Legislature substituted "concentration of .08 grams or greater as shown by a chemical test" for "content of .08% or greater by weight as

shown by a chemical test" in U.C.A. Sec. 41-6-44(1). The former law was stated as a percentage by weight while the current law sets forth an absolute gram amount by volume.

Salt Lake City has yet to explain why it has never made its DUI ordinance consistent with the 1987 law, even though local DUI ordinances are subject to the heightened requirements of U.C.A. Sec. 41-6-43(1) providing that such ordinances "shall be consistent" with state DUI laws which govern the same matters.

Instead, Salt Lake City asks this court to interpret the new law as not being materially different from the old law and asks this court to speculate that the jury might have based a guilty verdict solely on the part of the ordinance that is not materially different from the new law.

Even though the state legislature found it necessary to put the new law into effect effective June 5, 1987, Salt Lake City takes the position that it need not comply with the mandate of U.C.A. Sec. 41-6-43(1), and now enlists the help of this court in interpreting the state law effective June 5, 1987, out of existence.

Salt Lake City has exceeded its municipal power and is asking this court to exceed its judicial power. The definition of a crime is an essential legislative function reserved to the state legislature. In State v. Green, 793 P.2d 912, 915, (Utah App. 1990), this court wrote:

The Utah Supreme Court pointed out in Gallion, 572 P.2d at 687, that article VI section 1 of the Utah Constitution, which vests legislative power in the Utah Legislature, limits the legislature's ability to delegate that power to others. Reiterating that there are certain "essential legislative functions" that cannot be delegated, id. at 688, the Gallion court held that the "determination of the elements of a crime and the appropriate punishment therefore are, under our [Utah] Constitutional system, judgments, which must be made exclusively by the legislature." Id. at 690; see also State v. Johnson, 44 Utah 18, 137 P. 632 (1913) (it is for the legislature, not the courts, to define what constitutes criminal conduct).

The trial judge below stated that the defense had raised a legitimate issue over Salt lake City's failure to comply with the state DUI enabling law, but that it was an issue for the Utah Court of Appeals, not for the Salt Lake Department of the Third Circuit Court.

The issue is now before the Utah Court of Appeals, and the reversal of one DUI conviction in order to secure municipal compliance with state DUI enabling law is certainly



preferable to compounding municipal disregard for the role of the state legislature with judicial interpretation that renders core legislative activity meaningless.

Just as Salt Lake City's request to have the trial court take post-jury trial judicial notice of alleged facts in this criminal case was improper, so is it also improper for Salt Lake City to attempt to justify its own disregard for the role of the state legislature by asking this court to exceed the judicial role reserved to this court and encroach upon the state legislature's core role of defining a crime.

Inexplicably, Salt Lake City's brief makes repeated reference to some kind of need for evidence or marshalling of evidence to find the meaning of the words used by the legislature in the new law effective June 5, 1987. This belies the fact that statutory language presents a question of law, not fact, and while evidentiary marshalling is an appellant's burden when challenging findings of fact, the argument is misplaced in a case of determining the meaning of words used in statute, a question of law.

Exercising its core legislative function of defining a crime, the Utah Legislature changed the law from one of

percentage by weight to one of weight by volume. No evidence is needed to demonstrate what this means, but for the convenience of Salt Lake City, defendant has annexed hereto a weights and measurements chart from a Franklin Quest Ready Reference, in honor of Salt Lake City's recent naming of the Derks Field replacement.

Under federal law, a motion to arrest judgment presents a pure issue of law. Moore's Federal Practice Sec. 34.02, Motion to Arrest Judgment, states:

Like a Rule 29(c) motion for acquittal after a jury verdict of guilty, or a Rule 22 motion for new trial following conviction, a Rule 34 motion for arrest of judgment is a possible avenue for post-trial relief from a judgment adverse to the criminal defendant. Post-trial motions for new trials or for acquittals are based on evidentiary grounds, i.e., that newly discovered evidence is materially exculpatory or that the existing evidence is not sufficient, beyond a reasonable doubt, to convict. By contrast, a Rule 34 motion asserts that the prior verdict, judgment, or plea of guilty or nolo contendere is not valid for reasons apart from the sufficiency of the evidence. The motions for arrest of judgment may be granted only if the verdict, judgment or plea of guilty or the plea of nolo contendere is insufficient as a matter of law for one of two reasons: the indictment or information does not charge an offense or the district court lacked subject matter jurisdiction over the crime.

Since Rule 34 motions for arrest of judgment primarily address these essentially legal, non-factual issues the district court should properly determine the motion solely from a study of the face of the indictment and the applicable law without resort to the evidence adduced at trial.

Utah law is different than federal law. In State v. Larsen, 934 P.2d 586 (Utah App. 1992), this court wrote:

An arrest of judgment is based on a finding that the facts proved do not constitute a public offense. Under common law and the federal rule, "a judgment can be arrested only on the basis of error appearing on the 'face of the record', and not on the basis of proof offered trial." United States v. Sisson, 399 U.S. 267, 281, 90 S.Ct. 2117 2125, 26 L.Ed.2d 608 (1970). The Utah rule is not as limiting and requires a trial court to "arrest judgment if the facts proved or admitted do not constitute a public offense, or the defendant is mentally ill, or there is other good cause for the arrest of judgment." Utah R.Crim.P. 23. The Utah rule allows a judge to look beyond the face of the record at the facts actually proved or admitted in determining whether the alleged conduct was prohibited. See Workman, 806 P.2d at 1202. But see State v. Owen 753 P.2d 976, 978 (Utah App. 1988) (suggesting Utah rule does not allow the trial court to go beyond the fact of the record to consider "proof offered or adduced at trial").

In this case, a single charge of DUI was stated in the alternative and was proven at trial. The charge did not constitute a public offense. Had the ultra vires language in the ordinance appeared in a different and unrelated section, the charge might survive under the analysis in State v. Sawyers 819 P.2d 806 (Utah App. 1991):

[3] Sawyers also contends that he was convicted under a statute that has been ruled unconstitutional. Although portions of the Controlled Substances Act were found to be unconstitutional delegations of legislative authority in State v. Gallion 572 P.2d 683 (Utah 1977), Sawyers was convicted under Utah Code Ann.

§§58-37-4(2)(a)(iii)(L) and 58-37-8 (Supp.1990). These portions of the Act were not affected by Gallion and therefore have not been ruled unconstitutional. See State v. Green, 793 P.2d 912 (Utah App.1990)

Unlike State v. Sawyers, this case involves a sole charge stated in the alternative that did not constitute a public offense, and the trial court should have arrested judgment in this case based on Salt Lake City's disregard of the Utah Legislature's exercise of its core legislative role of defining crime.

To hold otherwise would give license to municipalities throughout the state to adopt not-one-drop zero tolerance measures and tests not authorized by state statute and couple them with the generalized "incapable of safely operating" language that does appear in both the state statute and the Salt Lake City ordinance. They could then argue on appeal, as Salt Lake city is attempting to do, that the jury might have disregarded the measures and tests and convicted based on the generalized language.

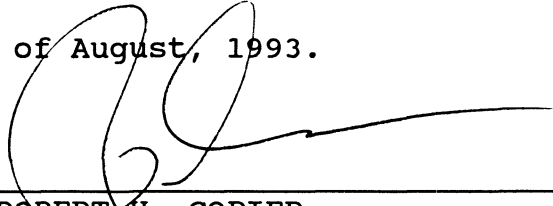
While this would undoubtedly be politically popular in a number of Utah municipalities, and might even suit the personal preferences of some judges on or off of this court, the state legislature's constitutional authority to define

crime would thereby be seriously, improperly, and unconstitutionally infringed upon, and this court should reject Salt Lake City's attempts to have this court so hold.

**CONCLUSION**

Judgment should be reversed.

DATED this 27 day of August, 1993.

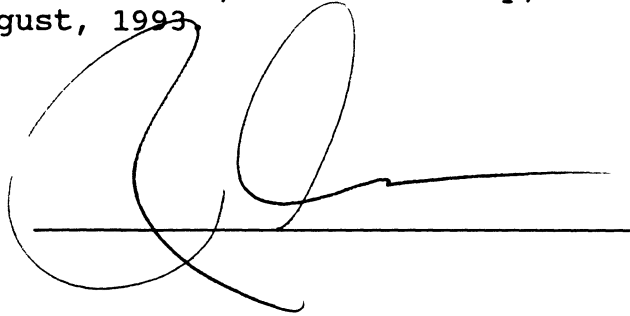


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ROBERT H. COPIER  
Attorney for Defendant

**CERTIFICATE OF SERVICE**

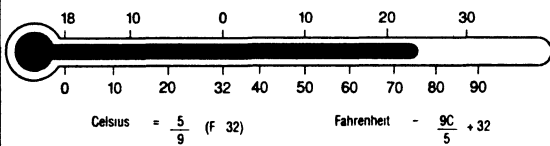
This is to certify that true and correct copies of the foregoing Appellant's Reply Brief were hand-carried, to Salt Lake City Prosecutor, 451 South 200 East, Salt Lake City, Utah 84111, this 27 day of August, 1993.

A handwritten signature in black ink, consisting of a large, stylized initial 'Q' followed by a horizontal line extending to the right.

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WEIGHTS AND MEASUREMENTS					
Conversion Table					
To Convert	Into	Multiply By	To Convert	Into	Multiply By
Centimeters	Inches	394	Meters	Centimeters	100
	Feet	0328		Feet	3 281
	Meters	01		Inches	39 37
	Millimeters	10		Kilometers	001
Feet	Centimeters	30 48	Miles	Miles	0006214
	Inches	12 00		Millimeters	1000
	Meters	3048		Yards	1 093
	Miles	0001894		Feet	5 280
	Yards	3333		Yards	1 760
Gallons	Pints	8 0	Ounces	Grams	28 35
	Liters	3 785		Pounds	0625
	Quarts	4 0		Kilograms	028
Grams	Ounces	035	Pints	Liters	473
	Pounds	002		Quarts	50
	Kilograms	001		Gallons	0125
Inches	Centigrams	2 54	Pounds	Grams	453 59
	Feet	0833		Ounces	16 0
	Meters	0254		Kilograms	454
	Yards	0278			
Kilograms	Grams	3 000	Quarts	Pints	2 0
	Ounces	35 274		Liters	946
	Pounds	2 205		Gallons	25
Kilometers	Feet	3281	Yards	Inches	36 00
	Meters	1000		Feet	3 00
	Miles	621		Meters	914
	Yards	1093		Miles	0005682
Liters	Cups	4 226			
	Pints	2 113			
	Gallons	264			
	Milliliters	1000			
	Quarts	1 057			

**Temperature**



**WEIGHT AND MEASUREMENTS**

Metric System	U.S. Customary System
<b>Linear Measure</b>	<b>Linear Measure</b>
10 Millimeters = 1 Centimeter	12 inches = 1 foot
10 Centimeters = 1 Decimeter	3 feet = 1 yard
10 Decimeters = 1 Meter	5 1/2 yards = 1 rod
10 Meters = 1 Dekameter	40 rods = 1 furlong
10 Dekameters = 1 Hectometer	8 furlongs = 1 mile
10 Hectometers = 1 Kilometer	3 land miles = 1 league
<b>Area Measure</b>	<b>Area Measure</b>
100 Sq Millimeters = 1 Sq Centimeter	144 sq inches = 1 sq foot
10 000 Sq Centimeters = 1 Sq Meter	9 sq feet = 1 sq yard
1 000 000 Sq Millimeters = 1 Sq Meter	30 1/4 sq yards = 1 sq rod
100 Sq Meters = 1 Are (a)	160 sq rods = 1 acre
100 Ares = 1 Hectare (ha)	640 acres = 1 sq mile
100 Hectares = 1 Kilometer	1 sq mile = 1 section
1 000 000 Sq Meters = 1 Kilometer	36 sections = 1 township
<b>Volume Measure</b>	<b>Liquid Measure</b>
1 liter = 0 001 cubic meter	4 gills (2 cups) = 1 pint
10 milliliters = 1 centiliter	2 pints = 1 quart
10 centiliters = 1 deciliter	4 quarts = 1 gallon
10 deciliters = 1 liter	
10 liters = 1 dekaliter	<b>Dry Measure</b>
10 dekaliters = 1 hectoliter	2 pints = 1 quart
10 hectoliters = 1 kiloliter	8 quarts = 1 peck
	4 pecks = 1 bushel
<b>Weight</b>	<b>Weight</b>
10 milligrams = 1 centigram	27 11/32 grains = 1 dram
10 centigrams = 1 decigram	16 drams = 1 ounce
10 decigrams = 1 gram	16 ounces = 1 pound
10 grams = 1 deka gram	100 pounds = 1 hundredweight
10 deka grams = 1 hectogram	20 hundredweight = 1 ton
10 hectograms = 1 kilogram	
1 000 kilograms = 1 metric ton	
	<b>Kitchen Measurements</b>
	3 tsp = 1 tbsp
	4 tbsp = 1/4 cup
	5 1/3 tbsp = 1/3 cup
	16 tbsp = 1 cup
	2 cups = 1 pint
	4 cups = 1 quart
	2 pints = 1 quart

ADDENDUM