

2005

# Utah v. Wesley Ray Richardson : Reply Brief of Appellant

Utah Court of Appeals

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Frederic Voros Jr.; Assistant Attorney General; Mark L. Shurtleff; Utah Attorney General; Counsel for Appellee.

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,

Plaintiff/Appellee,

Vs.

WESLEY RAY RICHARDSON

Defendant/Appellant

Appellate case number 20050159

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REPLY BRIEF OF APPELLANT

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Appeal from an Order of the Eighth Judicial District Court  
Of Uintah County  
State of Utah  
Honorable John A. Anderson

---

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FILED  
UTAH APPELLATE COURTS  
JAN 12 2006

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## **ARGUMENT**

### **Point 1. This Court should give effect to the plain language of the escape statute and to the legislative intent for repealing the absconding statute.**

The State attempts to torture the escape statute by reading into it words and intent that are just not there. The state legislature specifically acted to take escape from parole out of the hands of the county prosecutors and place it under the Board of Pardons and Parole.

### **Point 2. Mr. Richardson was denied due process of law when he was not bound over nor arraigned.**

Utah Constitution Article I section 7 provides: "No person shall be deprived of Life, liberty or property without due process of law."

Riggins v. District Court of Salt Lake County, 51 P.2d 645 Utah 1935 reads in part:

" Due process of law requires that notice be given to the persons whose rights are to be affected. It "hears before it condemns, proceeds upon inquiry, and renders judgment only after trial." It is difficult to believe that the Legislature intended to empower the court to find "that the material allegations of the petition or complaint are true" without giving the defendant an opportunity to be heard. It is elementary that a court may not make findings binding upon a defendant without a hearing, or an opportunity to be heard. An act which authorized a court to make findings binding upon a defendant without giving him an opportunity to be heard must fail.

Affirmatively cited for this proposition in, Pangea Technologies, Inc. v. Internet

Promotions, Inc. 2004 WL 1092239 Utah, 2004 May 18, 2004.

## **REPLY TO THE STATES ARGUMENT REGARDING THE OFFENSE OF ESCAPE**

The state legislature has specifically addressed the issue presented. The Appellee asserts that the legislature could not have meant to exclude parolee's from the escape statute, despite the plain language of the statute. Appellee says "Moreover, reading the parole exception to modify only the fourth situation is the only reading that avoids the 'absurd result or [a result that] is 'unreasonable confused, inoperable, or in blatant contravention of the express purpose of a statute.'" quoting *Savage, 2004 UT 102*" (Appellee's brief at page 15.)

The entirety of that quote from the *Savage* case reads:

"2A Sutherland Statutory Constr. § 46:1 (6th ed.2004). An equally well-settled caveat to the plain meaning rule states that a court should not follow the literal language of a statute if its plain meaning works an absurd result or is "unreasonably confused, inoperable, or in blatant contravention of the express purpose of a statute." *Perrine v. Kennecott Mining Corp.*, 911 P.2d 1290, 1292 (Utah 1996). Above all, "[t]his court's primary objective in construing enactments is to give effect to the legislature's intent." *Gohler v. Wood*, 919 P.2d 561, 562 (Utah 1996)."

The *Savage* case involved the tort of negligent placement of a foster child.

As it turns out the legislature specifically meant to exclude parolee's from the escape statute as is clearly set forth. In fact the legislature had created a wholly new escape statute for persons under probation or parole status, that crime was called absconding. (Utah code section 76-8-309.5 [2000] repealed 2004).

That section was specifically repealed by Senate bill 0158 in the 2004 general session of the legislature. The oral presentation by the bill's sponsor Senator Bell clearly sets forth the intent of the legislature to not add an offense to persons who either escaped or absconded from parole.

A transcript of the passage of the bill follows:

“Senate Bill 158 criminal offense amendments Senator Bell”

“Thank you Mr. President Pro Tem

Ah this is an interesting little bill that may be of interesting only to defendants and criminal defense attorneys. But, a few years ago the criminal justice community approached the legislature and said that they wanted to strengthen the offense of absconding because they felt like that would dissuade criminals from escaping custody and this would be an additional felony in most cases. Well what has happened is that it's has dissuaded no one. And the actual defendants instead of being handled through the probation and parole system now have to come back for a whole new offense. We Feel like it is doubling up on beds in the sense that were adding charge on charge and a so hat in hand with the same community that advocated for this bill a few years ago came back and said it's not working we need to a to a liberalize this law so that People who escape will be handled for in most cases will be handled through the probation and parole system. And so, with that I would be open for questions.”

Opened for questions.

Senator Bell moved for the third reading

Roll call vote passed 23 aye votes no nay votes

As can clearly be seen the purpose and intent of Senator Bell who sponsored senate bill 0158 was to do away with absconding so that parolees who left supervision, escaped were not charged with additional offenses and were not subject to additional sanctions, except under the auspices of the probation and parole system. (Floor and committee debates on bills are not transcribed, therefore one must listen to the floor debate on the legislatures web site at “le.Utah.gov.” per the Legislative Webmaster please see exhibit A).

It is the Appellee who wishes an absurd interpretation of the clear language of the escape statute. Appellee suggests in his brief (page 12) that any person on parole status that commits a new offense for which he is arrested, who subsequently escapes, could not be charged with escape. That is an absurd reading, because the person is not on parole for the new offense, he is in official custody for that offense so of course the escape statute would apply. (Exhibit B is a copy of Senate Bill 158).

## **MR. RICHARDSON'S STATUS AS A PAROLEE NEVER CHANGED**

The interchange from the Preliminary Hearing is very instructive in this matter. Mr. John Beaslin, counsel for Mr. Richardson questioned Mr. James Murray on cross examination. From the interchange it is clear that Mr. Richardson is on Parole, under the jurisdiction/supervision of parole officer James Murray. The interchange is found on pages 12,13 and 14 of the transcript of preliminary hearing held September 1, 2004 and reads as follows:

Mr. Beaslin:

Q. Mr. Murray, based upon your conversation, as I understand it, what you did is in Duchesne County he got a class A DUI?

A. Correct.

Q. And at that point in time you then - that became a violation of his parole?

A. Correct.

Q. So in lieu of you sending him back to prison you said why don't you join - I'll give you 60 day Half-Way Back Program where you can go to work and you'll be housed in the Uintah County jail; is that right?

A. Yes.

Q. So during this entire time from then until now when he was later picked up in Salt Lake City, he is technically on Parole.

A. True.

Q. And so he can not - he has now been charged with escape. So he hasn't escaped from anybody other than to violate probation - his parole rather. I'm sorry, parole; right?

A. I don't know.

Q. Well, wouldn't that be true? He - what he did he violated his parole when he didn't come back on the Half -Way Back Program; right?

A. He did.

Q. So he essentially was picked up, he then now went to the prison - he went back to prison for a violation by the Board of Pardons; right?

A. He has been there, yes.

Q. And so your jurisdiction over him terminated at that point -

A. Terminated when? I still have jurisdiction over him.

Q. Here in Uintah County?

A. Here in Uintah County. He's still on parole.

Q. Right. But has the Board of Pardons done anything with reference to his violation to keep him out there?



A. He's ordered him held.

Q. Okay. So he's held until this hearing?

A. He's held until we have a revocation hearing.

Q. Oh, I see. Okay. That has not been done?

A. It hasn't done because of his charge pending. Also he has a - this DUI case that he had in Duchesne County which is falling under the Board of Pardons Jurisdiction. It is set for hearing - it supposed to be scheduled for hearing soon too. I don't know when though.

Q. So but you didn't violate him for that, did you? You notified them and you then put him in the Half-Way Back Program here in Uintah County for 60 days; is that right?

A. Well, we didn't ask for revocation.

Q. That's what I mean, yeah. So you -

A. We still - we still prepared a report. We sent in a waiver stating he agreed to do the program at the Uintah County Jail.

Q. I understand.

A. And as far as we're concerned he's an inmate at the county jail.

Q. Okay.

A. Giving a Half-Way - you know - given work - a work release -

Q. Right.

A. - even though he's on parole status.

Q. Okay. So his true status so is that a parole period.

A. Well, I think he has two statuses here. I think he has a status as a county inmate doing time pursuant to the Board of Pardons Hearing.

Q. Because he's -

A. He's also on parole.

Q. Yeah. So they were housing him here under that program.

A. Yes.

Q. But he didn't escape from the jail, did he?

A. He didn't return.

Q. I know.

A. And he was authorized - I mean he's authorized confined at the county jail.

Q. Right.

A. He was authorized to report to work from 5 a.m. until 10 p.m. He did not return.

Q. All right. So he violated his parole - your program that you had for him, the Half-Way Back.

A. Yeah.

There remains no question that Mr. Richardson was on parole, that the supervising agent was James Murray. Since there was no longer an absconding statute the escape statue was stretched/violated to punish Mr. Richardson in contravention to the intent of the law. His punishment for absconding was to be meted out by the Board of Pardons

under Utah law

**THE STATE OF UTAH ARGUED IN THEIR BRIEF THAT DEFENDANT  
WAIVED HIS RIGHT TO BE ARRAIGNED. DESPITE THE FACT THAT  
THERE IS NO SUCH WAIVER IN THE RECORD**

Rule 10 of the Utah Rules of Criminal Procedure requires that following the bind over by the magistrate, “the defendant shall forthwith be arraigned in the district court ”

In this case at preliminary hearing the defense objected to the charge of escape brought against the defendant since as a parolee the defendant was not properly charged (Index 107 transcript of preliminary hearing pages page 3 lines 6-17) The trial court did not issue its ruling on the issue until the day of the trial (Index 109 Trial transcript September 15, 2004, page 60 lines 13-24 {the correct date of the trial may be November 15, 2004) The written ruling on the issue is dated November 10, 2004 (Record pages 50 and 51) The record does not reflect that the defendant was either bound over nor arraigned at the preliminary hearing The preliminary hearing ended with the requirement that the parties brief the issues of escape and parole status (Record page 107 transcript of preliminary hearing page 17 lines 12-24) There were no hearings between November 10 and trial there is a minute entry of a hearing November 10, 2004, the minute entry reflects that Mr Richardson was not present (Record page 52) Mr Richardson was not bound over nor arraigned on the date of the trial either (Index 109 transcript of trial) Due process requires that following any bind over the defendant “shall forthwith be arraigned in the district court” (Rule 10 Utah Rules of Criminal Procedure) Utah Constitution Article I section 7 provides “No person shall be deprived of Life, liberty or property without due process of law ” The defendant is to be afforded an opportunity to be arraigned and plead

unless he waives that opportunity. Rule 11 of the Utah Rules of Criminal Procedure and State v. Jensen, 83 Utah 452, 30 P2d 203 (1934).

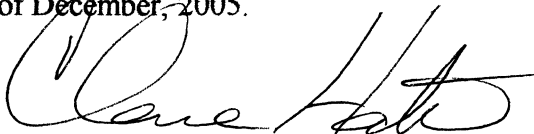
It is the burden of the defense to marshal the evidence in this instance to show the negative, to show that Mr. Richardson was not arraigned. It is the absence of any record of bind over or arraignment that is in place here. There appears in the record no bind over order oral or written, and there is no record of arraignment or even any hearing dates where the defendant was present, between the issuance of the written order and the commencement of the trial 5 days later. There appears in the record no other opportunity for an arraignment.

The failure to bind the defendant over or to arraign him is reversible error.

#### CONCLUSION

The Appellant herein seeks a ruling from this Court reversing his conviction for Escape. Dismissing the case or remanding it for further proceedings as may be appropriate. Such other and further relief as is just and appropriate.

Respectfully submitted this 29 day of December, 2005.

A handwritten signature in black ink, appearing to read 'Cleve Hatch', written over a horizontal line.

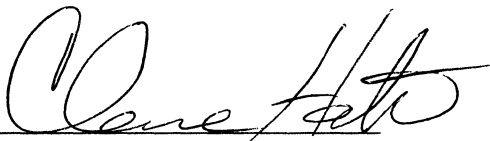
Cleve Hatch/Attorney for  
the Defendant/Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Reply Brief of Appellant, upon the Plaintiff/Appellee by placing two true and correct copies thereof in an envelope addressed to Mark Shirtiff, Attorney General, Fredric Voros Jr., Assistant

Attorney General 60 E 300 South, P.O. Box 140854, Salt Lake City, Utah, this ~~30~~<sup>17th</sup> day

~~of December, 2005.~~  
<sup>January 2006</sup>

  
Cleve J. Hatch

## **ADDENDUM**

Email from "Legislative webmaster" "Floor and committee debates are not transcribed.  
You can listen to floor debate on this bill at the web site "[le.utah.gov](http://le.utah.gov)."

**S.B. 158 Criminal Offense Amendments 2004 General Session**

## ADDENDUM

**Cleve Hatch**

---

**From:** "Legislative Webmaster" <legisweb@utah.gov>  
**To:** <clevelaw@UBTAnet.com>  
**Sent:** Friday, December 09, 2005 8:47 AM  
**Subject:** Re: senate bill 0158 2004 general session

Floor and committee debates are not transcribed. You can listen to floor debate on this bill at the web site "le.utah.gov."

Thank you for using our website.

Legislative Webmaster

>>> "Cleve Hatch" <clevelaw@UBTAnet.com> 12/8/2005 9:42 AM >>>

Dear Webmaster,

How do I obtain an official transcript of the reading and comments on this bill for use in an appellate court case.

Thank you.

Cleve Hatch

clevelaw@ubtanet.com

12/26/2005

**CRIMINAL OFFENSE AMENDMENTS**

2004 GENERAL SESSION

STATE OF UTAH

**Sponsor: Gregory S. Bell**

---

**LONG TITLE**

**General Description:**

This bill repeals the criminal provision of absconding and amends related provisions.

**Highlighted Provisions:**

This bill:

repeals the offense of absconding and amends criminal code and juvenile offender provisions affected by this repealer.

**Monies Appropriated in this Bill:**

None

**Other Special Clauses:**

This bill provides an effective date.

**Utah Code Sections Affected:**

**AMENDS:**

**62A-7-106 (Superseded 07/01/04)**, as last amended by Chapter 203, Laws of Utah  
2000

**62A-7-106 (Effective 07/01/04)**, as last amended by Chapter 171, Laws of Utah 2003

**76-8-306**, as last amended by Chapter 179, Laws of Utah 2003

**REPEALS:**

**76-8-309.5**, as last amended by Chapter 203, Laws of Utah 2000

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*Be it enacted by the Legislature of the state of Utah:*

Section 1. Section **62A-7-106 (Superseded 07/01/04)** is amended to read:





28           **62A-7-106 (Superseded 07/01/04). Aiding or concealing youth offender --**  
29   **Trespass -- Criminal penalties.**

30           (1) A person who commits any of the following offenses is guilty of a class A  
31 misdemeanor:

32           (a) entering, or attempting to enter, a building or enclosure appropriated to the use of  
33 youth offenders, without permission;

34           (b) entering any premises belonging to a secure facility and committing or attempting  
35 to commit a trespass or depredation on those premises; or

36           (c) willfully annoying or disturbing the peace and quiet of a secure facility or of a youth  
37 offender in a secure facility.

38           (2) A person is guilty of a third degree felony who:

39           (a) knowingly harbors or conceals a youth offender who has:

40           (i) escaped from a secure facility; or

41           (ii) absconded from:

42           (A) a facility or supervision~~[- as these offenses are defined in Subsections~~  
43 ~~76-8-309.5(1) and (2)]~~; or

44           (B) supervision of the Division of Youth Corrections; or

45           (b) willfully aided or assisted a youth offender who has been lawfully committed to a  
46 secure facility in escaping or attempting to escape from that facility.

47           (3) As used in this section:

48           (a) a youth offender absconds from a facility when he:

49           (i) leaves the facility without permission; or

50           (ii) fails to return at a prescribed time.

51           (b) A youth offender absconds from supervision when he:

52           (i) changes his residence from the residence that he reported as his correct address to  
53 another residence, without notifying the Division of Juvenile Justice Services or obtaining  
54 permission; or

55           (ii) for the purpose of avoiding supervision:

56           (A) hides at a different location from his reported residence; or

57           (B) leaves his reported residence.

58           Section 2. Section 62A-7-106 (Effective 07/01/04) is amended to read:

**62A-7-106 (Effective 07/01/04). Aiding or concealing youth offender -- Trespass -- Criminal penalties.**

(1) A person who commits any of the following offenses is guilty of a class A misdemeanor:

(a) entering, or attempting to enter, a building or enclosure appropriated to the use of youth offenders, without permission;

(b) entering any premises belonging to a secure facility and committing or attempting to commit a trespass or depredation on those premises; or

(c) willfully annoying or disturbing the peace and quiet of a secure facility or of a youth offender in a secure facility.

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

(a) knowingly harbors or conceals a youth offender who has:

(i) escaped from a secure facility; or

(ii) absconded from:

(A) a facility or supervision~~[- as these offenses are defined in Subsections 76-8-309.5(1) and (2)]~~; or

(B) supervision of the Division of Juvenile Justice Services; or

(b) willfully aided or assisted a youth offender who has been lawfully committed to a secure facility in escaping or attempting to escape from that facility.

(3) As used in this section:

(a) a youth offender absconds from a facility when he:

(i) leaves the facility without permission; or

(ii) fails to return at a prescribed time.

(b) A youth offender absconds from supervision when he:

(i) changes his residence from the residence that he reported as his correct address to another residence, without notifying the Division of Juvenile Justice Services or obtaining permission; or

(ii) for the purpose of avoiding supervision:

(A) hides at a different location from his reported residence; or

(B) leaves his reported residence.

Section 3. Section 76-8-306 is amended to read:

90           **76-8-306. Obstruction of justice -- Elements -- Penalties -- Exceptions.**

91           (1) An actor commits obstruction of justice if the actor, with intent to hinder, delay, or  
92 prevent the investigation, apprehension, prosecution, conviction, or punishment of any person  
93 regarding conduct that constitutes a criminal offense:

94           (a) provides any person with a weapon;

95           (b) prevents by force, intimidation, or deception, any person from performing any act  
96 that might aid in the discovery, apprehension, prosecution, conviction, or punishment of any  
97 person;

98           (c) alters, destroys, conceals, or removes any item or other thing;

99           (d) makes, presents, or uses any item or thing known by the actor to be false;

100           (e) harbors or conceals a person;

101           (f) provides a person with transportation, disguise, or other means of avoiding  
102 discovery or apprehension;

103           (g) warns any person of impending discovery or apprehension;

104           (h) conceals information that is not privileged and that concerns the offense, after a  
105 judge or magistrate has ordered the actor to provide the information; or

106           (i) provides false information regarding a suspect, a witness, the conduct constituting  
107 an offense, or any other material aspect of the investigation.

108           (2) (a) As used in this section, "conduct that constitutes a criminal offense" means  
109 conduct that would be punishable as a crime and is separate from a violation of this section,  
110 and includes:

111           (i) any violation of a criminal statute or ordinance of this state, its political  
112 subdivisions, any other state, or any district, possession, or territory of the United States; and

113           (ii) conduct committed by a juvenile which would be a crime if committed by an adult.

114           (b) A violation of a criminal statute that is committed in another state, or any district,  
115 possession, or territory of the United States, is a:

116           (i) capital felony if the penalty provided includes death or life imprisonment without  
117 parole;

118           (ii) a first degree felony if the penalty provided includes life imprisonment with parole  
119 or a maximum term of imprisonment exceeding 15 years;

120           (iii) a second degree felony if the penalty provided exceeds five years;

(iv) a third degree felony if the penalty provided includes imprisonment for any period exceeding one year; and

(v) a misdemeanor if the penalty provided includes imprisonment for any period of one year or less.

(3) The penalties for obstruction of justice are:

(a) a second degree felony if the conduct which constitutes an offense would be a capital felony or first degree felony;

(b) a third degree felony if:

(i) the conduct that constitutes an offense would be a second or third degree felony and the actor violates Subsection (1)(b), (c), (d), (e), or (f);

(ii) the conduct that constitutes an offense would be any offense other than a capital or first degree felony and the actor violates Subsection (1)(a); or

(iii) the obstruction of justice is presented or committed before a court of law; or

(c) a class A misdemeanor for any violation of this section that is not enumerated under Subsection (3)(a) or (b).

(4) It is not a defense that the actor was unaware of the level of penalty for the conduct constituting an offense.

(5) Subsection (1)(e) does not apply to harboring a youth offender, which is governed by Section 62A-7-106.

(6) Subsection (1)(b) does not apply to:

(a) tampering with a juror, which is governed by Section 76-8-508.5;

(b) influencing, impeding, or retaliating against a judge or member of the Board of Pardons and Parole, which is governed by Section 76-8-508;

(c) tampering with a witness, which is governed by Section 76-8-508; or

(d) extortion or bribery to dismiss a criminal proceeding, which is governed by Section 76-8-509.

(7) Notwithstanding Subsection (1), (2), or (3), an actor commits a third degree felony if the actor harbors or conceals an offender who has~~[-(a) absconded from a facility or from supervision as those offenses are defined in Section 76-8-309.5; or (b)]~~ escaped from official custody as defined in Section 76-8-309.

Section 4. Repealer.

152           This bill repeals:  
153           Section **76-8-309.5, Absconding -- Definitions -- Penalty.**  
154           Section 5. **Effective date.**  
155           (1) If approved by two-thirds of all the members elected to each house, this bill takes  
156 effect upon approval by the governor, or the day following the constitutional time limit of Utah  
157 Constitution Article VII, Section 8, without the governor's signature, or in the case of a veto,  
158 the date of veto override.  
159           (2) Section 62A-7-106 (Effective 07/01/04) takes effect July 1, 2004.

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**Legislative Review Note**  
as of 1-29-04 11:59 AM

A limited legal review of this legislation raises no obvious constitutional or statutory concerns.

**Office of Legislative Research and General Counsel**