

2005

Utah v. Terry Arnold Messer, Jr. : Reply Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Respondent,

v.

TERRY ARNOLD MESSER, JR.,

Defendant/Appellant.

REPLY BRIEF OF APPELLANT

Case No. 20050309-CA

Appeal from a final order, the “Second Amended Judgment, Sentence, and Commitment” entered on or about March 18, 2005, in the Fifth Judicial District Court, in and for Iron County, State of Utah, after jury trial, the Honorable James L. Shumate, District Judge, presiding.

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The Defendant/Appellant is incarcerated.

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I.

The Appellee argues on p. 18 of its brief, regarding Appellant's first issue as to the failure to instruct on a lesser included charge, that there is no overlap between the charges at issue.

To the contrary, in analyzing the two statutes at issue, U.C.A. §58-37d-4 (1953, as amended) (Unlawful Possession of Laboratory Equipment or Supplies) and U.C.A. §58-37c-10(k) (1953, as amended) (Unlawful Possession of a Controlled Substance Precursor), it is clear that the elements of the two crimes overlap. One of the two elements necessary to convict a Defendant of Unlawful Possession of Laboratory Equipment or Supplies, and included in the jury instructions as presented to the jury, is that the Defendant "possess a controlled substance precursor with the intent to engage in a clandestine methamphetamine laboratory operation." R. at 826. The statute associated with the lesser included offense of Unlawful Possession of a Controlled Substance Precursor reads defines unlawful conducts as

obtaining or attempting to obtain or to *possess any controlled substance precursor* or any combination of controlled substance precursor or any combination of controlled substance precursors *knowing or having a reasonable cause to believe that the controlled substance precursor is intended to be used in the unlawful manufacture of any controlled substance.*

U.C.A. 58-37c-10(k) (1953, as amended). Both crimes require the element of possessing a controlled substance with the intent of using the controlled substance precursor to illegally produce a controlled substance.

II.

Regarding the issue of second-look searches, the Appellee correctly points out that the

Appellant's brief has not cited a Utah second-look search case – that's because it is an issue of first impression in Utah. The Appellant's position is that each search must be independently justified by either a search warrant or recognized exception to the search warrant requirement. When the inventory has already occurred, the inventory exception cannot justify further, secondary searching of the items. *See United States v. Khoury*, 901 F.2d 928 (11th Cir. 1990).

III.


With respect to the Appellee's point, on page 39 of its brief, that the Defendant testified that he helped to purchase the iodine tincture from Overson, it should be noted that Defendant only testified following the erroneous denial of his motion to suppress.

CONCLUSION

Defendant conviction should be overturned and the case remanded for retrial.

Dated this 30th day of May, 2006,

BARNES & ALLEN, LLP



Randall C. Allen

CERTIFICATE OF SERVICE

I hereby certify that on this the 32th day of May, 2005, I
did cause two copies of this brief to be sent by US mail to:

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