

2005

# State of Utah v. Gary Christian Davis : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,

Plaintiff and Appellee,

vs.

GARY CHRISTIAN DAVIS

Defendant and Appellant.

Case No. 20050952

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**REPLY BRIEF**

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APPEAL FROM CONVICTIONS OF POSSESSION OF A DANGEROUS WEAPON BY A RESTRICTED PERSON, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-10-503(2)(a); POSSESSION OF A CONTROLLED SUBSTANCE, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. §§ 58-38-8(2)(a)(i) and 58-37-8(4)(a); AND POSSESSION OF DRUG PARAPHERNALIA, A CLASS A MISDEMEANOR, IN VIOLATION OF UTAH CODE ANN. §§ 58-37a-5 and 58-37-8(4)(a), IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR WASHINGTON COUNTY, THE HONORABLE JAMES L. SHUMATE PRESIDING

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**REPLY BRIEF**

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**ARGUMENT**

THE ENACTMENT OF HOUSE BILL 178 DID NOT CHANGE THE RULE OF LAW APPLICABLE TO THE INSTANT CASE.

The State concedes that in *State v. Davis*, 711 P.2d 232 (Utah 1985), the Utah Supreme Court “carved out, but did not clearly define, an exception for ‘innocent handling’ of a dangerous weapon.” Appellee’s Brief at 10-11. However, the State contends that the defendant’s reliance on *Davis* is misplaced because the “innocent handling” of a weapon was criminalized by the intervening enactment of H.B. 178 in the general session of the 2003 Legislature. Laws of Utah 2003, chapter 235, § 1 (effective May 5, 2003). *See* Appellee’s Brief at 10.

When *Davis* was decided in 1985, Section 76-10-503(2), Utah Code Annotated 1953, read in relevant part as follows:

(a) Any person who is on parole for a felony . . . may not have in his possession or under his custody or control any dangerous weapon . . .

(b) Any person who violates this section is guilty of a third degree felony, and if the dangerous weapon is a firearm, . . . he is guilty of a second degree felony.

In 2000, the Legislature enacted H.B. 363 which repealed and reenacted Section 76-10-503, creating two categories of restricted persons. *See* Laws of Utah 2000, chapter 90, § 1 (effective May 1, 2000). Under this bill, a person who had been convicted of any violent felony or who was on probation or parole for any felony was classified as a Category I restricted person, while a person who had been convicted of any other felony or was under indictment for any felony was classified as a Category II restricted person. Subsection (2)(a), as then amended, went on to provide that a “Category I restricted person who purchases, transfers, possesses, uses, or has under his custody or control any firearm is guilty of a second degree felony. . . .”; and subsection (3)(a) provided that a “Category II restricted person who purchases, transfers, possesses, uses, or has under his custody or control any firearm is guilty of a third degree felony. . . .”

The State is apparently prepared to concede that this complete overhaul of Section 76-10-503 that occurred in 2000 was not calculated to eliminate what the State itself has characterized as the “exception for ‘innocent handling’ of a dangerous weapon.” Appellee’s Brief at 11. Instead, the State’s brief focuses on the 2003 amendments of Section 76-10-503, arguing that these amendments “clarifie[d] and narrow[ed] the ambiguous 1985 statute.” *See* Appellee’s Brief at 11.

The State's argument is based entirely upon the construction of the language of the 2003 amendments and avoids any reference to the legislative history. The 2003 legislation added the underscored language to subsection (2) of Utah Code Ann. § 76-10-503:

(2) A Category I restricted person who intentionally or knowingly agrees, consents, offers, or arranges to purchase, transfer, possess, use, or have under his custody or control, or who intentionally or knowingly purchases, transfers, possesses, uses, or has under his custody or control: (a) any firearm is guilty of a second degree felony; . . .

Just how the addition of this language is supposed to have criminalized the “innocent handling” of a dangerous weapon is not clear from the State's argument. *See* Appellee's Brief at 11-13. Indeed, the 2003 amendments appear to have been directed toward the criminalization of conspiratorial conduct, the conscious objective of which is the purchase, transfer, possession or use of a dangerous weapon.

Representative Ty McCartney, who sponsored HB 178, explained the legislative objectives as follows:

House Bill 178 modifies provisions related to weapons by expanding the restrictions on the purchased of firearms by Category I restricted persons.

\* \* \*

For those of you that don't know, I'm a detective with the Salt Lake Metro Gang Unit in my real life and what brought this bill to my attention is the inability to prosecute and arrest violent gang members that were attempting to purchase firearms for either themselves or other gang members. In order to prosecute and arrest them we would actually have to put an operational firearm in their hands to proceed with the case. This statute is similar to what the control substance

statute does that's been in place for 20 years. And that's what this bill is attempting to do.

Tape of House Floor Debates, 55th Legislature, General Session (Jan. 27, 2003).

Following Representative McCartney's introductory comments, the following discussion ensued:

REPRESENTATIVE CURTIS: Representative, in the criminal code you have a section in front of the code that deals with attempt and conspiracy. Why would this . . . would it not be an attempt to purchase a firearm from a Category I person underneath that definition of the code? Why would that not already cover this criminal section?

REPRESENTATIVE McCARTNEY: Well, as Mr. Boyden from the Statewide Association of Prosecutors explained to me, this is different because they're actually . . . at the new language here in this bill can be found online starting on line 36 and line 37. And that is Category I restricted person who agrees, consents offers, or arranges to purchase, transfer, possess, use, or have under his custody or control. This is not an attempt. This is, this is the act that we are trying to prosecute. Not the attempt to agree, or consent, or offer, or arrange.

REPRESENTATIVE CURTIS: So is it law enforcement's position that if I'm a Category I felon and I make arrangements with you in a bar to purchase a firearm and we agree to meet in the back of the bar and you show up with a firearm and I show up with cash and I give you two hundred dollars cash, that I actually have to take possession of the firearm in order to be guilty of a crime?

REPRESENTATIVE McCARTNEY: Under current law, yes. We have to actually place a firearm in your hands. Yes.

REPRESENTATIVE CURTIS: So that doesn't constitute . . . ? What about a conspiracy? If I sit in the bar and I talk with you about doing that and you tell me, "Yes I know where you can buy some weapons, and I have a third party that I can call

and get those,” that doesn’t constitute a conspiracy to commit that crime?

REPRESENTATIVE McCARTNEY: Then that’s a good question and I would actually like to consult with. . . . I don’t know. As far as conspiracy, this does not relate to the scenario that you just gave.

REPRESENTATIVE CURTIS: Thank you then. Mr. Speaker, the only -- the question I raise as representatives is, if you -- often times know we got to turn to our law and order expertise here, but what happens is if an individual is charged with attempted homicide or an attempt or a conspiracy to commit a crime, what it essentially does is that you don’t have all those crimes detailed out in the criminal code. What you have is the crime detailed out, for example, as homicide and then the attempt over here says if you take steps to do that or the conspiracy is if you work with others to conspire to commit this and so you can have attempt of just about any crime. You can have an attempt to assault somebody. You know attempted homicide. You can have an attempted robbery. All those different things can be an attempt or a conspiracy. So if you sit down with a group of people and you plan out how you’re going to rob a bank. And you go get plans and you do all those things and you decide how you’re going to do that, you’re guilty of a crime. Now what we’ve done here is we’ve taken this law and said okay we’re going to expand that and we’re going to make that the primary offense is attempt. So I guess the ultimate question would be is now if you put this in the law and it says you agree, a person agrees or arranges to purchase, so if I attempt to agree have I committed a crime? And I just -- I understand that this is what’s in the drug code. But I just struggle with the concept that they’re saying -- cuz I would disagree with our prosecutors, okay. If you make arrangements as a Category I person to purchase a firearm, you meet in the back of the bar and you give the guy two hundred dollars and then he flashes out a badge and says, “Sorry, Salt Lake Metro Gang,” ‘Kay. It’s not going to be much of a defense to say, “Well, I never touched that firearm.” ‘Kay. Cuz they don’t always show up in the drug code -- they don’t always show up with real drugs. If you think you’re buying real drugs, you give money for that and then they give you a white, powdery substance

that is not real drugs, guess what -- you're still guilty of a crime. 'Kay. And so let's make sure if we want to expand that or not. Thank you.

*Id.*

Following the debate, HB 178 failed to pass on a vote of 17 in favor of the proposed legislation and 51 opposed. The bill was revived on Day 12 of the session, where upon the sponsor offered the following amendments to the proposed legislation and the reasons therefor:

REPRESENTATIVE McCARTNEY: I'd like to move an amendment.

MR. SPEAKER: Proceed.

REPRESENTATIVE McCARTNEY: On line 36, insert after "who," "intentionally or knowingly." And on line 37, after "who," insert "intentionally or knowingly."

MR. SPEAKER: Intentionally or knowingly. 'Kay, we have that. Do you want to speak to the amendment?

REPRESENTATIVE McCARTNEY: Yes, after speaking to Representative Curtis and calling up his concerns also with prosecutor Paul Boyden with the Statewide Association of Prosecutors and also speaking with Utah Gun Owner's Association, this is all language that makes this palatable. This increases this to the highest degree of mens rea and also clarifies the culpability. This does not change the intent of the bill, it just satisfies the concerns that Representative Curtis had. With that I believe you know the intent of the bill and would appreciate your support this time.

MR. SPEAKER: Further discussion to the motion to amend. Seeing no further lights. Representative McCartney, for summation.

REPRESENTATIVE McCARTNEY: I'll waive.

MR. SPEAKER: Summation's waived. The motion to amend is found on lines 36 and line 37. After the word "who," in both instances, we insert the words "intentionally or knowingly." Those in favor of the motion to amend say "aye." Opposed say "no." Motion passes. The bill is for further discussion. Representative McCartney.

REPRESENTATIVE McCARTNEY: I just had one last comment on this bill. The initial intent of this bill was primarily focused on felonious gang members, but as I proceeded with this bill there was a Utah County detective whose worked numerous murder-for-hire cases, usually involving murder of spouses and he indicated that this would be a great bill for him, or a great law to have in place. Often times the people approaching him wanting, to either have their spouse killed is looking for a gun first and this would be at least a first step in addressing his concerns. So, with that being said, I would appreciate your support in moving this on to the Senate. Thank you.

Tape of House Floor Debates, 55th Legislature, General Session (Jan. 31, 2003).

With this amendment, the legislation was approved by the House of Representatives.

This is the history of the 2003 amendments. Clearly, this legislation was not enacted for the purpose of eliminating the "exception for 'innocent handling' of a dangerous weapon" which the Utah Supreme Court "carved out" in *State v. Davis*. See Appellee's Brief at 10-11. The Legislature overwhelmingly rejected the proposed legislation until it was amended to require proof of the highest blameworthy state of mind. Clearly, this legislation was not calculated as a measure that would override the policy recognized by the language of *State v. Davis* and would criminalize the brief handling of a weapon under circumstances which do not evidence "a willing and

knowing possession with the intent to control its use or management.” *Davis*, 711 P.2d at 233.

### CONCLUSION

Based upon the foregoing it is respectfully submitted that the defendant’s conviction of POSSESSION OF A DANGEROUS WEAPON BY A RESTRICTED PERSON must be reversed.

RESPECTFULLY SUBMITTED this \_\_\_\_ day of July, 2006.

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Gary W. Pendleton  
Attorney for Defendant and Appellant

### MAILING CERTIFICATE

I do hereby certify that on this \_\_\_\_ day July, 2006, I did personally mail or cause to be mailed, U.S. Mail, postage prepaid, two (2) true and correct copies of the above and foregoing **RELY BRIEF** to Joanne C. Slotnik, Assistant Utah Attorney General, Appeals Division, 160 East 300 South, 6th Flr., P.O. Box 140854, Salt Lake City, UT 84114-0854.

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Gary W. Pendleton