

1995

West Valley City v. Curtis L. Dennies : Brief of Appellee

Utah Court of Appeals

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UTAH
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459

UTAH SUPREME COURT
BRIEF

IN THE UTAH COURT OF APPEALS
950427-CA

WEST VALLEY CITY,	:	
	:	
Plaintiff/Appellee,	:	
	:	Case No. 950427-CA
v.	:	
	:	Priority 2
CURTIS L. DENNIES,	:	
	:	
Defendant/Appellant.	:	

BRIEF OF THE APPELLEE

Appeal from the Third Circuit Court, West Valley Department,
in and for Salt Lake County, State of Utah;
the Honorable Edward A. Watson

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Attorney for Defendant/Appellant

FILED

DEC 11 1995

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TABLE OF CONTENTS

	<i>Page</i>
TABLE OF AUTHORITIES	iii
STATEMENT OF JURISDICTION	1
STATEMENT OF THE ISSUES	1
ISSUE 1: WAS SUFFICIENT EVIDENCE PRODUCED AT TRIAL TO SUPPORT DENNIES' CONVICTIONS FOR CARRYING A CONCEALED WEAPON AND POSSESSION OF DRUG PARAPHERNALIA?	1
ISSUE 2: DOES DENNIES HAVE STANDING TO CHALLENGE THE SEIZURE OF EVIDENCE USED AGAINST HIM DURING THE IMPOUND AND INVENTORY SEARCH OF THE VEHICLE?	2
DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND RULES	2
STATEMENT OF THE CASE	2
NATURE OF THE CASE	2
COURSE OF THE PROCEEDINGS	3
DISPOSITION IN TRIAL COURT	3
STATEMENT OF FACTS	3
SUMMARY OF THE ARGUMENT	5
POINT 1: THE EVIDENCE PRESENTED TO THE TRIAL COURT WAS SUFFICIENT TO SUSTAIN A GUILTY VERDICT ON THE CHARGES OF CARRYING A CONCEALED WEAPON AND POSSESSION OF DRUG PARAPHERNALIA.	5
POINT 2: DENNIES HAS NO STANDING TO CHALLENGE THE SEIZURE OF EVIDENCE USED AGAINST HIM DURING THE IMPOUND AND INVENTORY SEARCH OF THE VEHICLE. ALSO, THE STOP, IMPOUND, AND SUBSEQUENT INVENTORY SEARCH OF THE VEHICLE WERE VALID.	6

DETAIL OF THE ARGUMENT	6
POINT 1: THE EVIDENCE PRESENTED TO THE TRIAL COURT WAS SUFFICIENT TO SUSTAIN A GUILTY VERDICT ON THE CHARGES OF CARRYING A CONCEALED WEAPON AND POSSESSION OF DRUG PARAPHERNALIA.	6
POINT 2: DENNIES HAS NO STANDING TO CHALLENGE THE SEIZURE OF EVIDENCE USED AGAINST HIM DURING THE IMPOUND AND INVENTORY SEARCH OF THE VEHICLE. ALSO, THE STOP, IMPOUND, AND SUBSEQUENT INVENTORY SEARCH OF THE VEHICLE WERE VALID.	14
CONCLUSION	17
CERTIFICATE OF SERVICE	18
ADDENDUM	19
Exhibit A: Utah Code Ann. § 58-37a-5, "Unlawful acts"	
Exhibit B: Utah Code Ann. § 76-10-504, "Carrying concealed dangerous weapon"	

TABLE OF AUTHORITIES

	<i>Page</i>
 CASES	
<i>Rakas v. Illinois</i> , 439 U.S. 128; 58 L. Ed. 2d, 387; 99 S. Ct. 421	14
<i>State v. Davis</i> , 711 P.2d 232 (Utah 1985)	17
<i>State v. Germonto</i> , 868 P.2d 50 (Utah 1993)	8
<i>State v. Gray</i> , 851 P.2d 1217 (Utah App. 1993)	16
<i>State v. Hayes</i> , 860 P.2d 968 (Utah App. 1993)	8
<i>State v. Jackson</i> , 873 P.2d 1166 (Utah App. 1994)	2
<i>State v. Moosman</i> , 794 P.2d 474 (Utah 1990)	1
<i>State v. Perry</i> , 871 P.2d 576 (Utah App. 1994)	8
<i>State v. Salas</i> , 820 P.2d 1386 (Utah App. 1991)	12-14
<i>State v. Scott</i> , 860 P.2d 1005 (Utah App. 1993)	14-15
<i>State v. Talbot</i> , 792 P.2d 489 (Utah App. 1990)	16
<i>State v. Taylor</i> , 818 P.2d 1030 (Utah 1991)	1
<i>State v. Walker</i> , 743 P.2d 191, 192-93 (Utah 1987)	7
<i>State v. Williams</i> , 636 P.2d 1092 (1981)	10
 STATUTES	
Utah Code Ann. § 58-37a-5	2, 11
Utah Code Ann. § 76-10-504	2, 8
Utah Code Ann. § 78-2a-3(2)(f)	1

STATEMENT OF JURISDICTION

Appellate jurisdiction over this case is rested in the Utah Court of Appeals pursuant to Section 78-2a-3(2)(f), Utah Code Annotated.

STATEMENT OF THE ISSUES

ISSUE 1: WAS SUFFICIENT EVIDENCE PRODUCED AT TRIAL TO SUPPORT DENNIES' CONVICTIONS FOR CARRYING A CONCEALED WEAPON AND POSSESSION OF DRUG PARAPHERNALIA?

Standard of Review

When reviewing the findings of a trial judge sitting without a jury, an appellate court will overturn a guilty verdict only if the verdict is clearly erroneous. *State v. Taylor*, 818 P.2d 1030 (Utah 1991). Also, the Utah Supreme Court has stated:

When challenging the findings of fact of the trial court on appeal, the appellant must show that the findings of fact were clearly erroneous. In order to show clear error, the appellant must marshal all of the evidence in support of the trial court's findings of fact and then demonstrate that the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the findings against an attack.

State v. Moosman, 794 P.2d 474, 475-6 (Utah 1990) (footnotes omitted).

**ISSUE 2: DOES DENNIES HAVE STANDING TO CHALLENGE
THE SEIZURE OF EVIDENCE USED AGAINST HIM
DURING THE IMPOUND AND INVENTORY SEARCH
OF THE VEHICLE?**

Standard of Review.

The factual findings underlying the trial court's decision should be reviewed under a clearly erroneous standard. The trial court's conclusions of law based on those facts are reviewed for correctness. *State v. Jackson*, 873 P.2d 1166 (Utah App. 1994).

**DETERMINATIVE CONSTITUTIONAL PROVISIONS,
STATUTES, ORDINANCES, AND RULES**

STATUTES

Utah Code Ann. § 58-37a-5, "Unlawful acts":

See Exhibit A.

Utah Code Ann. § 76-10-504, "Carrying concealed dangerous weapon":

See Exhibit B.

STATEMENT OF THE CASE

NATURE OF THE CASE

This case involves a prosecution and conviction for violations of Section 76-10-504, Utah Code Annotated 1953, as amended, "Carrying concealed dangerous weapon," and Section 58-37a-5, Utah Code Annotated 1953, as amended, "Unlawful acts" related to drug paraphernalia, *i.e.*, possession of drug paraphernalia, both of which are class B misdemeanors.

COURSE OF THE PROCEEDINGS

Prosecution in this case was commenced with the arrest of Curtis L. Dennies on April 8, 1995. A bench trial was held before the Honorable Ronald E. Nehring in Third Circuit Court, West Valley Department, on June 15, 1995.

DISPOSITION IN TRIAL COURT

At trial, Dennies was convicted of carrying a concealed weapon and possession of drug paraphernalia. On July 31, 1995, Dennies was sentenced to pay a fine and serve a jail term. The court suspended a substantial portion of both the fine and jail term and placed Dennies on probation for twelve months. Dennies filed a Notice of Appeal in this case on June 27, 1995.

STATEMENT OF FACTS

1. On April 8, 1995, at approximately 3:30 a.m., Officer Hudson of the West Valley City Police Department stopped a vehicle in the vicinity of 4100 South 4000 West. Officer Hudson had observed that the vehicle had no taillights or brake lights. R. 31, 37.¹

2. The vehicle contained three occupants. Dennies was a passenger in the vehicle, and, at the time of the traffic stop, Officer Hudson observed that Dennies was sitting in the front passenger seat. R. 32-33, 40.

¹ "R" refers to the Record as paginated by the trial court clerk in accordance with Rule 11(b), Utah Rules of Appellate Procedure.

3. Upon investigation, Officer Hudson determined that none of the three occupants of the vehicle possessed a valid driver's license. R. 33, 37. He further testified that the driver of the vehicle said he did not know where the owner of the vehicle was. R. 37. Based upon that information, Officer Hudson had the vehicle impounded. R. 33.

4. At the time of the traffic stop, Officer Hudson did not observe a weapon inside the vehicle. R. 39.

5. Before the vehicle was towed to the impounded lot, Officer Gray of the West Valley City Police Department performed an inventory search of the vehicle. R. 42.

6. During the inventory search of the vehicle, Officer Gray found a knife, with a blade approximately six inches long, between the passenger seat and center console of the vehicle. R. 43. In this type of vehicle, a GMC Jimmy, a center console is located between the driver's seat and passenger's seat. R. 38.

7. During the inventory search of the vehicle, Officer Gray found, and both Officer Gray and Officer Hudson observed, a spoon lying on the floorboard of the vehicle in front of the passenger seat in which Dennies had been sitting. R. 39, 43. Officer Hudson testified that the spoon was of a type commonly used to ingest controlled substances, and that the spoon had a powder residue on it. R. 36. Officer Gray testified that he also observed a powder residue on the spoon, and, based upon his experience, that the

powder residue and scratches on the spoon indicated drug usage.
R. 43, 47.

8. Officers Hudson and Gray also found numerous syringes in the vehicle. R. 38, 44.

SUMMARY OF THE ARGUMENT

POINT 1: THE EVIDENCE PRESENTED TO THE TRIAL COURT WAS SUFFICIENT TO SUSTAIN A GUILTY VERDICT ON THE CHARGES OF CARRYING A CONCEALED WEAPON AND POSSESSION OF DRUG PARAPHERNALIA.

The Record reveals that there was adequate evidence produced at trial to support Dennies' conviction on the charges of Carrying a Concealed Weapon and Possession of Drug Paraphernalia. The testimony of the police officers established that the knife, which was found tucked between the side of the passenger seat and the center console of the vehicle, was concealed. Also, it is clear from the testimony that the weapon was within the control and the easy, immediate, and ready access of Dennies, who was seated in the passenger seat.

With respect to the drug paraphernalia, the officers testified that they recognized the dry powder residue and scratches on the spoon as being consistent with the use of the spoon in connection with the use of controlled substances. They also testified that the spoon was found on the floorboard of the vehicle in front of the passenger seat, a location clearly under the control of Dennies, who was seated in the passenger seat.

POINT 2: DENNIES HAS NO STANDING TO CHALLENGE THE SEIZURE OF EVIDENCE USED AGAINST HIM DURING THE IMPOUND AND INVENTORY SEARCH OF THE VEHICLE. ALSO, THE STOP, IMPOUND, AND SUBSEQUENT INVENTORY SEARCH OF THE VEHICLE WERE VALID.

Dennies was a passenger in the vehicle and asserted no possessory interest in either the vehicle, the knife, or the spoon. Because he did not demonstrate any interest in the property seized or an expectation of privacy in the place searched, he has no standing to contest the validity of the search.

Furthermore, the testimony at trial established that the stop, impound, and inventory search of the vehicle were valid. First, the stop was based upon the officer's observation that the vehicle had no taillights or brake lights. The impound of the vehicle was proper, since no one in the vehicle had a valid driver's license, and the driver told the officer that he did not know where the owner was. Finally, the inventory search was valid as a well settled exception to the normal warrant requirements of the Fourth Amendment of the United States Constitution.

DETAIL OF THE ARGUMENT

POINT 1: THE EVIDENCE PRESENTED TO THE TRIAL COURT WAS SUFFICIENT TO SUSTAIN A GUILTY VERDICT ON THE CHARGES OF CARRYING A CONCEALED WEAPON AND POSSESSION OF DRUG PARAPHERNALIA.

A challenge to the sufficiency of the evidence in a criminal case is governed by a clear and unambiguous standard. The Utah Supreme Court has articulated that standard as follows:

When reviewing the findings of a trial judge sitting without a jury, this court will overturn a guilty verdict only if it is clearly erroneous.

State v. Walker, 743 P.2d 191, 192-93 (Utah 1987).

The Supreme Court has defined the "clearly erroneous" standard as follows:

The definition of "clearly erroneous" in the federal rule comes from *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746 (1948):

A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

Further clarification is offered by Wright & Miller:

The appellate court . . . does not consider and weigh the evidence de novo. The mere fact that on the same evidence the appellate court might have reached a different result does not justify it in setting the findings aside. It may regard a finding as clearly erroneous only if the finding is without adequate evidentiary support or induced by an erroneous view of the law.

State v. Walker, 743 P.2d 191, 193 (Utah 1987).

Finally, the Utah Court of Appeals followed the guidance of the Utah Supreme Court by stating:

In considering the challenge to the sufficiency of the evidence, we review the evidence and all reasonable inferences drawn therefrom in the light most favorable to the verdict If, during our review, we find some evidence or inferences upon which

findings of all the requisite elements of the crime can reasonably be made, we affirm.

State v. Perry, 871 P.2d 576, (Utah App. 1994) (citing *State v. Germonto*, 868 P.2d 50, 55 (Utah 1993); citation omitted).

In this case, sufficient evidence was presented to the trial court to support a verdict of guilty on both the Carrying a Concealed Weapon charge and Possession of Drug Paraphernalia charge. When challenging the sufficiency of the evidence, Dennies has the burden of marshaling all of the evidence that supports the verdict and then showing that even when that evidence is viewed in a light most favorable to the verdict, the evidence is insufficient. *State v. Hayes*, 860 P.2d 968 (Utah App. 1993). Dennies simply has provided the court with a recitation of the facts that support his position and, thus, has failed to meet the "marshaling" burden.

The facts presented to the trial court, which support the verdicts, are as follows.

Concealed Weapon

In order to prove a violation of Section 76-10-504, Utah Code Annotated 1953, as amended, "Carrying concealed dangerous weapon," the evidence must support a conclusion that the dangerous weapon was "concealed" and also that Dennies was "carrying" the weapon. The Record of the trial indicates that evidence supporting those conclusions was presented to the trial court.

First, Officer Hudson testified that he made the initial traffic stop. At the time of the stop, Dennies was seated in the front passenger seat of the vehicle. R. 33. Officer Hudson testified that he approached the driver of the vehicle and asked for a driver's license. R. 32. Despite this relatively close contact with the vehicle and Dennies, Officer Hudson was not aware of the presence of the knife until it was later discovered during the inventory search conducted by Officer Gray. R. 34-35.

Officer Gray testified that while conducting an inventory search subsequent to impound of the vehicle, he located the knife between the front passenger seat and the center console of the vehicle. R. 43. The knife was discovered after Dennies had exited the vehicle and no one was sitting in the front passenger seat. Officer Gray testified that he was kneeling inside the vehicle, on the passenger side, when he first noticed the handle of the knife. R. 45. He further testified that based solely on the visibility of the handle, he thought the object might be a knife, but could not be sure. R. 45-46. Upon retrieving the knife, Officer Gray found the blade to be approximately six inches long. R. 43.

Based upon these facts and the reasonable inferences therefrom, the trial court concluded that the placement of the knife met the objective standard of concealment.

Based upon the same facts, Dennies was also correctly considered to be "carrying" the weapon. Utah case law is clear that a person does not have to have a weapon on his body in order

to be considered to be "carrying" the weapon. The Utah Supreme Court has stated:

To rule that the weapon must be on the person would make possible the carrying of a deadly weapon concealed on the seat of an automobile, where it would be more readily accessible than it would be if concealed on the person. No such result is contemplated or permitted by the statute.

State v. Williams, 636 P.2d 1092, 1095 (1981). The *Williams* court also stated:

As a factual matter, where the concealed weapon is shown to be under defendant's control and within his immediate, easy or ready access, he will be deemed to be "carrying" the weapon.

Williams, at 1094.

In this case, there can be no doubt that the knife was located within Dennies' immediate, easy, or ready access, since he was seated in the passenger seat, and the knife was tucked between that seat and the center console. Also, the clear inference from the facts presented at trial is that Dennies was the individual in control of the weapon. Based on the location in which the weapon was found, i.e., tucked down the side of Dennies' seat, he was the person in the vehicle who had the ability to quickly access and use the weapon. In fact, it can be inferred, based upon a normal configuration of vehicle seats and consoles, that the weapon was in a position where Dennies may have been in actual physical contact with the weapon at times. Also, the only other person seated in

the front of the vehicle, driver Terry Burgess, specifically denied any knowledge of the knife. R. 53.

Based on the foregoing, it is clear that there was adequate evidence presented to the trial court to support the conviction of Dennies.

Possession of Drug Paraphernalia

In order to find a violation of Section 58-37a-5, Utah Code Annotated 1953, as amended, "Unlawful acts" related to drug paraphernalia, the court must find that the spoon constituted drug paraphernalia and that Dennies possessed the spoon with intent to use a controlled substance. In this case, the evidence is more than adequate to support the trial court's conviction of Dennies.

Officer Hudson and Officer Gray both testified that the spoon was covered with a dry powder residue. R. 36, 43. Officer Hudson testified that the spoon was of a type commonly used to ingest controlled substances. R. 36. In describing the spoon, Officer Gray testified that, "Based on my prior experience and training as a police officer, I would judge that to be powder residue and scrapes and marks from use of controlled substances." R. 47. Officer Gray also testified that during the inventory search, he located numerous syringes in the vehicle. R. 44.

Based on the observations of experienced police officers and the fact that the spoon was found in close proximity to other drug paraphernalia, i.e., the syringes, the trial court correctly determined the spoon to be drug paraphernalia.

Dennies' possession of the spoon is based upon a theory of constructive possession. The Court of Appeals has stated:

It is well settled that the contraband need only be shown to have been subject to the dominion and control of the accused or, in other words, within the accused's constructive possession.

State v. Salas, 820 P.2d 1386, 1388 (Utah App. 1991).

Both Officer Hudson and Officer Gray testified that the spoon was found in plain sight on the floorboard in front of the front passenger seat of the vehicle. This is the exact location where Dennies was sitting at the time of the traffic stop and is clearly an area of the vehicle that was solely under the control of Dennies. It would be difficult for any other occupant of the vehicle to access this area without Dennies' exiting the vehicle, unless they virtually climbed over Dennies.

It is a fair inference, based upon the location of the spoon, that the spoon was solely in the possession of Dennies. The only testimony regarding ownership of the spoon was provided by Bryan Frew, the owner of the vehicle. Mr. Frew was not present at the time the vehicle was stopped, but testified that a friend of his had eaten a steak and some ice cream in the vehicle sometime prior to April 8, 1995, and had left the knife and spoon in the vehicle. R. 57. The trial court specifically stated that it found no credibility in Mr. Frew's testimony. R. 69.

Dennies' reliance upon the *Salas* case is misplaced. *Salas* is a case that has significantly different facts than this case. A

comparison of the *Salas* facts with the facts of this case lend support to the trial court's decision to find constructive possession by Dennies.

In the *Salas* case, the defendant was the driver of the vehicle. After being stopped by police, who conducted a search of the vehicle, drugs were found under a back seat where a passenger had been sitting. *Salas* was charged with possession of cocaine based solely on his ownership of the vehicle. The Court, in *Salas*, found that there was insufficient evidence that *Salas* was in possession of drugs. The Court found the following facts important: "One passenger had better access to the spot where cocaine was found than did defendant." *Salas*, at 1389. Also, "The drug itself was found in an area that was not easily accessible to the defendant. There had been a backseat passenger close to where the drug was found" *Salas*, at 1389. In the *Salas* case, defendant *Salas*' only connection with the drugs was his ownership of the vehicle. The facts lacking in *Salas* that caused the Court to find insufficient evidence of ownership are not lacking in this case.

In this case, the drug paraphernalia was found lying right at the feet of Dennies. Unlike *Salas*, Dennies did have sole access to the area of the vehicle in which the spoon was found. No other passengers in the vehicle had better access to the spoon than did Dennies, and, in fact, the spoon was found in an area that was not easily accessible to other passengers. These additional facts

distinguish this case from the *Salas* decision and support the conclusions of the trial court.

Based upon the foregoing, there is sufficient evidence in the Record that supports the trial court's verdict of guilty on the charge of Possession of Drug Paraphernalia.

POINT 2: DENNIES HAS NO STANDING TO CHALLENGE THE SEIZURE OF EVIDENCE USED AGAINST HIM DURING THE IMPOUND AND INVENTORY SEARCH OF THE VEHICLE. ALSO, THE STOP, IMPOUND, AND SUBSEQUENT INVENTORY SEARCH OF THE VEHICLE WERE VALID.

Dennies has no standing to challenge the constitutionality of the search, since he was only a passenger in the vehicle. This issue has been addressed by both the United States Supreme Court in *Rakas v. Illinois*, 439 U.S. 128; 58 L. Ed. 2d, 387; 99 S. Ct. 421 (1978), and the Utah Court of Appeals in *State v. Scott*, 860 P.2d 1005 (Utah App. 1993). In both cases, the defendants sought to suppress evidence found in vehicles in which they were passengers. The law in both cases states that in order to challenge the propriety of a search, a defendant must first establish a legitimate expectation of privacy in the place being searched, and, also, that Fourth Amendment rights are personal in nature and may not be vicariously asserted. *Scott*, at 1007.

In relying upon the *Rakas* decision, the Utah Court of Appeals stated:

Where a defendant asserts neither a property nor a possessory interest in the automobile, nor an interest in the property seized, he has

not demonstrated an expectation of privacy and thus has no standing to challenge the search.

Scott, at 1007.

The situation described by the *Scott* court is identical to the situation presented here. Dennies specifically disavowed any possessory interest in the drug paraphernalia spoon or the concealed knife. R. 59. Also, Dennies presented evidence from Mr. Frew that Mr. Frew was the owner of the vehicle. R. 56. Dennies asserted absolutely no property or possessory interest in the vehicle, the spoon, or the knife, and he therefore has no standing to challenge the search.

The Court in *Scott* also addressed the potential defense argument that since the City claims the items seized belong to Dennies, the City cannot argue otherwise with respect to the search. The Court stated:

Such an argument is not sufficient to meet defendant's burden; defendant bears the burden of proving his standing. Such proof is not made by pointing to an *allegation* made by the State, especially where, as here, that allegation is denied by defendant.

Scott, at 1008 (emphasis in original; citation omitted).

Even if Dennies was found to have standing, the stop, impound, and subsequent inventory search were valid exercises of police power. First, Officer Hudson testified that he initially stopped the vehicle because it had no taillights or brake lights. R. 31. Vehicle stops incident to traffic violations committed in an

officer's presence are clearly legal under Utah law. *State v. Talbot*, 792 P.2d 489 (Utah App. 1990).

Officer Hudson testified that once the vehicle had been stopped, no one in the vehicle could produce a valid driver's license, and the driver of the vehicle, Terry Burgess, said he did not know where the owner of the vehicle was. R. 33, 37. Officer Hudson further testified that given the situation, "By policy, we're required to generally impound the vehicle." R. 37. Based upon this evidence, there is no indication that the impound of the vehicle was in bad faith or in any way out of keeping with normal police department procedures.

Finally, the law is also well settled that inventory searches of automobiles are an exception to the normal warrant requirements of the Fourth Amendment of the United States Constitution. *State v. Gray*, 851 P.2d 1217 (Utah App. 1993).

Based upon the foregoing, it is clear that Dennies has no standing to challenge the constitutionality of the inventory search conducted on the vehicle in which he was a passenger. Furthermore, the evidence demonstrates that the vehicle stop, impound, and subsequent inventory search were conducted in a proper manner in conformance with existing law.


CONCLUSION

Based on the foregoing, it is clear that sufficient evidence was produced at trial to support the conviction of Dennies for Carrying a Concealed Weapon and Possession of Drug Paraphernalia. Also, Dennies has no standing to challenge the valid vehicle stop, impound, and inventory search. Finally, Dennies has failed to marshal the evidence supporting the verdict against him and then to demonstrate that the verdict was without any basis. Dennies' argument is based only on his interpretation of the evidence, which is not the only reasonable interpretation. Contradictory versions of the facts, without more, is not a ground for reversal. *State v. Davis*, 711 P.2d 232 (Utah 1985).

The City respectfully requests that Dennies' appeal be denied, and that the conviction of the trial court be affirmed.

DATED this 11th day of December, 1995.

WEST VALLEY CITY



J. Richard Catten, Senior Attorney
Attorney for Plaintiff/Appellee

CERTIFICATE OF SERVICE

I, J. Richard Catten, certify that on the 11th day of December, 1995, I served upon Mark J. Gregersen two (2) copies of the Brief of the Appellee, by causing said Briefs to be mailed to him, by first class mail, with sufficient postage prepaid, to the following address:

Mark J. Gregersen
L. BRUCE LARSEN & ASSOCIATES
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West Valley City, Utah 84119

WEST VALLEY CITY

A handwritten signature in black ink, appearing to read "JRC", is written over a horizontal line.

J. Richard Catten, Senior Attorney
Attorney for Plaintiff/Appellee

ADDENDUM

Exhibit A: Utah Code Ann. § 58-37a-5,
"Unlawful acts"

Exhibit B: Utah Code Ann. § 76-10-504,
"Carrying concealed dangerous weapon"

Exhibit A

58-37a-5. Unlawful acts.

(1) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body in violation of this chapter. Any person who violates this subsection is guilty of a class B misdemeanor.

(2) It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, any drug paraphernalia, knowing that the drug paraphernalia will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce a controlled substance into the human body in violation of this act. Any person who violates this subsection is guilty of a class A misdemeanor.

(3) Any person 18 years of age or over who delivers drug paraphernalia to a person under 18 years of age who is three years or more younger than the person making the delivery is guilty of a third degree felony.

(4) It is unlawful for any person to place in this state in any newspaper, magazine, handbill, or other publication any advertisement, knowing that the purpose of the advertisement is to promote the sale of drug paraphernalia. Any person who violates this subsection is guilty of a class B misdemeanor.

Exhibit B

76-10-504. Carrying concealed dangerous weapon.

(1) Any person, except those persons described in Section 76-10-503 and those persons exempted under Section 76-10-510, carrying a concealed dangerous weapon, as defined in this Part 5, is guilty of a class B misdemeanor, except that a firearm that contains no ammunition and is enclosed in a case, gun box, or securely-tied package shall not be considered a concealed weapon, but

(a) If the dangerous weapon is a firearm and contains no ammunition, he shall be guilty of a class B misdemeanor,

(b) If the dangerous weapon is a firearm and contains ammunition, he shall be guilty of a class A misdemeanor, or

(c) If the dangerous weapon is a sawed-off shotgun, or if the dangerous weapon is a firearm and is used to commit a crime of violence, he shall be guilty of a felony of the third degree

(2) Nothing in this Part 5 shall prevent any person, except persons described in Section 76-10-503, from keeping within his place of residence, place of business, or any vehicle under his control any firearm, except that it shall be a class B misdemeanor to carry a loaded firearm in a vehicle