

1995

# West Valley City v. Kent R. Fullmer : Brief of Appellee

Utah Court of Appeals

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**BRIEF**

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IN THE UTAH COURT OF APPEALS

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WEST VALLEY CITY,	:	
	:	
Appellant,	:	Appellate No. 950793-CA
	:	
vs.	:	
	:	Priority No. 15
	:	
KENT R. FULLMER,	:	
	:	
Appellee.	:	
	:	

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BRIEF OF APPELLEE

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Appeal from the final judgement of the Third Circuit Court, State of Utah, in and for Salt Lake County, West Valley Department.

The Honorable William A. Thorne

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IN THE UTAH COURT OF APPEALS

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WEST VALLEY CITY,	:	
	:	
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IN THE UTAH COURT OF APPEALS

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WEST VALLEY CITY,

Appellant,

vs.

KENT R. FULLMER,

Defendant.

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Appellate No. 950793-CA

Priority No. 15

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BRIEF OF APPELLEE

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JURISDICTION

This case is an appeal from a final judgement of the Third Circuit Court, and Defendant does not contest the jurisdiction recital of the City under Section 78-2a-3(2) (d), Utah Code Annotated.

STATEMENT OF THE ISSUE

ISSUE: Did the trial judge correctly dismiss the charge against Appellee in finding that the vehicle must be moving, and are there other grounds to support the verdict as recited by the Judge?

STATEMENT OF THE CASE

The City centers its Appeal around the finding of the Court that the vehicle was not moving, but ignores other statements in the ruling of the Court, which appear to be sufficient grounds to support the ruling independent of the "moving-not moving" statement.

RELEVANT FACTS

It is unfortunate that the entire proceedings were not transcribed. The Defendant had gone to the apartment to retrieve some personal property at a friends residence, including this gun, which he stated "that he was told by the person from whom he acquired the gun that it did not work, or words to that effect". He had not tested the gun and was retrieving it for the purpose of having a gunsmith determine what needed to be repaired. He found that some of the running lights on

the vehicle were not working and proceeded to attempt to make them work by getting under the dashboard to find a fuse or some bad connection or whatever it was. He had placed the gun on the front seat and removed it from the box in which it had been stored, and placed the box on the rear seat, and the gun on the front seat, where, from his moving around and hitting or bumping into the seat, the gun fell under the armrest (and may have fallen between the seats in front).

It was in this situation that the officers arrived on the scene and one talked to him and loaned him a flashlight to work on the wiring and held it while Mr. Fullmer worked on the wiring under the dash. At this point, the car had not been moved, and there was no evidence that I recall which put him sitting on the front seat, although the City states only that Kent was in the passenger compartment of the vehicle.

I do not recall if he got the lights fixed, but it was after these events that the officers requested identification, ultimately resulting in the finding of an outstanding warrant for some other cause. They then searched the vehicle, after arresting Mr. Fullmer on the warrant, although I believe the car was released to Mr. Fullmer's father, or the owner of it.

In the ruling on the Verdict, the Court determined that the evidence which Mr. Fullmer gave was not sufficient to take the gun out of the statutory definition.

The Court also ruled concerning all evidence that the testimony "has credible-credibility problems."

The Court in its ruling also set a standard that to be accessible under 501 (2) (L) (Utah Code Annotated)-- "anything in the vehicle that's within certainly arms length----- could be said to be carried." This would be under the statute, according to the Ruling, the equivalent of being carried on the person or in such close proximity (as to constitute a carrying or concealment).

The Court also commented "that to place the gun in a stationary car is the same as placing it in a room someplace."

The evidence showed that he intended to drive the car home that evening, but when he found the not working light problem, he changed his intention to be to not drive the car until the lights worked, and he was working on the lights when the officers arrived. I do not recall

that he ever did get the lights working satisfactorily, and he was arrested before he could make a determination of whether or not to drive.

Incidentally, the security officer for the apartment apparently called the police, but no evidence of "suspicion" was given by him or the officers for them to check his Identification. It was the equivalent of a single isolated unwarranted stop. There was no further evidence as to whether or not he intended to recase the gun before he moved the car. (Suspicion being no articulable reason)

It was for all of these and other pieces of the evidence that the Court made its negative finding of lack of credibility of the evidence.

#### SUMMARY OF THE ARGUMENT

THE TRIAL JUDGE PROPERLY FOUND THE DEFENDANT NOT GUILTY FOR THE GUN NOT BEING "CARRIED", FOR THE REASON THAT THE EVIDENCE WAS NOT CREDIBLE AND DID NOT PROVE BEYOND A REASONABLE DOUBT THE DEFENDANT WAS WITHIN ARMS LENGTH OR READILY ACCESSIBLE TO THE GUN, AND THAT THE GUN BEING IN AN UNMOVED VEHICLE WAS JUST ANOTHER STORAGE PLACE UNTIL THE VEHICLE WAS MOVED.

In order to find a defendant guilty, the Court must find in accordance with Section 76-1-501, Utah Code Annotated, that the evidence proves beyond a reasonable doubt the elements of the crime, and that the defendant has the culpable mental state. The City charged him under a week old statute. Inadequate or no evidence put him on the drivers seat or within arms reach or readily accessible to the weapon. There was no testimony on intent except the fact of the gun and he being in the vehicle.

The Court also found the vehicle to be like a room, until the vehicle was moved.

Under those facts and the Courts ruling, the ruling was proper by itself without consideration of the discussion that the vehicle must be moving. There is no testimony about whether or not the arm rest was fixed or hinged, so as to make the gun readily accessible, if the defendant was on the front seat.

The ruling of the court is consistent with the reality of the fact situations of cars and weapons. It is clear that there was no evidence of his intent to conceal a weapon in the car. It accidentally got concealed. At some point it is lawful to carry the weapon and place it in the car, and at what point does it become



unlawful to have a gun in a car and to take it out to look at it (out of its case or holster). Does that constitute a crime? or is there not a crime until the defendant is in the car on the seat readily accessible to the gun, and determines with finality to be in the car with the gun encased or not encased. A citizen would have difficulty dealing with this statute, as to know what to do.

#### ARGUMENT

THE TRIAL JUDGE PROPERLY ACQUITTED THE DEFENDANT  
BECAUSE THE CITY DID NOT PROVE THE ELEMENTS OF THE  
CRIME BEYOND A REASONABLE DOUBT.

The City has the burden of proof beyond a reasonable doubt. Section 76-1-501 Utah Code Annotated. The Court determined and made a finding that the evidence was with "---credibility problems." If the evidence is not credible, a reasonable doubt exists. If the evidence is not credible, the City has failed to prove all of the elements of the crime. The evidence was therefore not credible as to the question as to the "---readily accessible---" element in the statute. The Court also ruled that to be readily accessible that the gun must be within arms length, and the evidence was not credible as to whether or not the defendant was on the drivers seat, or in front of the drivers seat, and under the steering wheel, and obviously not within arms length, and when he was working under the dash, that would be a cramped position and the readily accessible test would fail, without adequate testimony.

The Statute on Intent is 76-2-304, Utah Code Annotated.

The expression by the Court in the Verdict to the effect that the "---testimony that certainly has credible--credibility problems." is a negative statement about credibility of the testimony, otherwise the Court would not have expressed the word "problems", if that is not true, then the Court would be expected to state that the testimony was all credible. Credibility is defined in WELISKA'S Case 1926, 131 Atl. 860 at 862. (headnote #5)

The credibility of testimony, its capacity for being believed, is one of the things to be settled before weighing it. If the testimony has not this quality there is no occasion for weighing it.

As these facets of the case are presented, I feel that the finding and Ruling of the Court are sufficient on these grounds alone. As to the statutory wording being changed, and some still being similar or unchanged, all of the words of the statute are

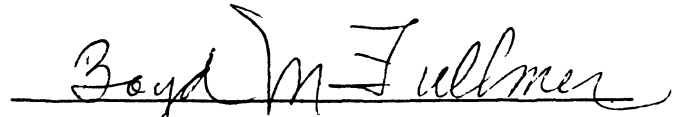
are not the same, and are subject to interpretation of all of the words. If the words changed, then the elements must have changed. The Williams case 636 P2d 1092-1981, as quoted is now 16 years old and the Legislature is still trying to place a fair law upon the Statutes. The statute as written leaves much to the discretion of the police officer and prosecutor attempting to enforce it, especially as to what point of time, in a case like this, does the actor commit the conduct proscribed and thence do a criminal act.

Counsel speaks about injury to the public, but the officers on the scene had no expressed concern for their safety

#### CONCLUSION

The evidence being "--with credibility problems--", the burden of proof having failed to be met, the elements and intent having failed to have been proven, the finding of the Court of Not Guilty should be sustained by this Court.


RESPECTFULLY SUBMITTED THIS 2nd day of May, 1996.

  
Boyd M. Fullmer  
Attorney for the Appellee

#### Certificate of Mailing

I certify that I mailed a copy of the foregoing Brief of Appellee to the City prosecutor at the following address and with postage prepaid and deposited in the U S Mail on this 3 day of May, 1996.

Mr. Elliot R. Lawrence  
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West Valley City, Utah 84119.

  
Boyd M. Fullmer

## ADDENDA

(5) If the district court on motion after verdict or judgment, or an appellate court on appeal or certiorari, shall determine that there is insufficient evidence to support a conviction for the offense charged but that there is sufficient evidence to support a conviction for an included offense and the trier of fact necessarily found every fact required for conviction of that included offense, the verdict or judgment of conviction may be set aside or reversed and a judgment of conviction entered for the included offense, without necessity of a new trial, if such relief is sought by the defendant. 1974

**76-1-403. Former prosecution barring subsequent prosecution for offense out of same episode.**

(1) If a defendant has been prosecuted for one or more offenses arising out of a single criminal episode, a subsequent prosecution for the same or a different offense arising out of the same criminal episode is barred if:

(a) The subsequent prosecution is for an offense that was or should have been tried under Subsection 76-1-402(2) in the former prosecution; and

(b) The former prosecution:

(i) resulted in acquittal; or

(ii) resulted in conviction; or

(iii) was improperly terminated; or

(iv) was terminated by a final order or judgment for the defendant that has not been reversed, set aside, or vacated and that necessarily required a determination inconsistent with a fact that must be established to secure conviction in the subsequent prosecution.

(2) There is an acquittal if the prosecution resulted in a finding of not guilty by the trier of facts or in a determination that there was insufficient evidence to warrant conviction. A finding of guilty of a lesser included offense is an acquittal of the greater offense even though the conviction for the lesser included offense is subsequently reversed, set aside, or vacated.

(3) There is a conviction if the prosecution resulted in a judgment of guilt that has not been reversed, set aside, or vacated; a verdict of guilty that has not been reversed, set aside, or vacated and that is capable of supporting a judgment; or a plea of guilty accepted by the court.

(4) There is an improper termination of prosecution if the termination takes place before the verdict, is for reasons not amounting to an acquittal, and takes place after a jury has been impanelled and sworn to try the defendant, or, if the jury trial is waived, after the first witness is sworn. However, termination of prosecution is not improper if:

(a) The defendant consents to the termination; or

(b) The defendant waives his right to object to the termination;

(c) The court finds and states for the record that the termination is necessary because:

(i) It is physically impossible to proceed with the trial in conformity with the law; or

(ii) There is a legal defect in the proceeding not attributable to the state that would make any judgment entered upon a verdict reversible as a matter of law; or

(iii) Prejudicial conduct in or out of the courtroom not attributable to the state makes it impossible to proceed with the trial without injustice to the defendant or the state; or

(iv) The jury is unable to agree upon a verdict; or

(v) False statements of a juror on voir dire prevent a fair trial. 1974

**76-1-404. Concurrent jurisdiction — Prosecution in other jurisdiction barring prosecution in state.**

If a defendant's conduct establishes the commission of one or more offenses within the concurrent jurisdiction of this

state and of another jurisdiction, federal or state, the prosecution in the other jurisdiction is a bar to a subsequent prosecution in this state if (1) the former prosecution resulted in an acquittal, conviction, or termination of prosecution, as those terms are defined in Section 76-1-403, and (2) the subsequent prosecution is for the same offense or offenses. 1973

**76-1-405. Subsequent prosecution not barred — Circumstances.**

A subsequent prosecution for an offense shall not be barred under the following circumstances:

(1) The former prosecution was procured by the defendant without the knowledge of the prosecuting attorney bringing the subsequent prosecution and with intent to avoid the sentence that might otherwise be imposed; or

(2) The former prosecution resulted in a judgment of guilt held invalid in a subsequent proceeding on writ of habeas corpus, coram nobis, or similar collateral attack. 1973

**PART 5**

**BURDEN OF PROOF**

**76-1-501. Presumption of innocence — "Element of the offense" defined.**

(1) A defendant in a criminal proceeding is presumed to be innocent until each element of the offense charged against him is proved beyond a reasonable doubt. In absence of such proof, the defendant shall be acquitted.

(2) As used in this part the words "element of the offense" mean:

(a) The conduct, attendant circumstances, or results of conduct proscribed, prohibited, or forbidden in the definition of the offense;

(b) The culpable mental state required.

(3) The existence of jurisdiction and venue are not elements of the offense but shall be established by a preponderance of the evidence. 1973

**76-1-502. Negating defense by allegation or proof — When not required.**

Section 76-1-501 does not require negating a defense:

(1) By allegation in an information, indictment, or other charge; or

(2) By proof, unless:

(a) The defense is in issue in the case as a result of evidence presented at trial, either by the prosecution or the defense; or

(b) The defense is an affirmative defense, and the defendant has presented evidence of such affirmative defense. 1973

**76-1-503. Presumption of fact.**

An evidentiary presumption established by this code or other penal statute has the following consequences:

(1) When evidence of facts which support the presumption exist, the issue of the existence of the presumed fact must be submitted to the jury unless the court is satisfied that the evidence as a whole clearly negates the presumed fact;

(2) In submitting the issue of the existence of a presumed fact to the jury, the court shall charge that while the presumed fact must on all evidence be proved beyond a reasonable doubt, the law regards the facts giving rise to the presumption as evidence of the presumed fact. 1973

**76-1-504. Affirmative defense presented by defendant.**

Evidence of an affirmative defense as defined by this code or other statutes shall be presented by the defendant. 1973

**76-2-303. Entrapment.**

(1) It is a defense that the actor was entrapped into committing the offense. Entrapment occurs when a law enforcement officer or a person directed by or acting in cooperation with the officer induces the commission of an offense in order to obtain evidence of the commission for prosecution by methods creating a substantial risk that the offense would be committed by one not otherwise ready to commit it. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

(2) The defense of entrapment shall be unavailable when causing or threatening bodily injury is an element of the offense charged and the prosecution is based on conduct causing or threatening the injury to a person other than the person perpetrating the entrapment.

(3) The defense provided by this section is available even though the actor denies commission of the conduct charged to constitute the offense.

(4) Upon written motion of the defendant, the court shall hear evidence on the issue and shall determine as a matter of fact and law whether the defendant was entrapped to commit the offense. Defendant's motion shall be made at least ten days before trial except the court for good cause shown may permit a later filing.

(5) Should the court determine that the defendant was entrapped, it shall dismiss the case with prejudice, but if the court determines the defendant was not entrapped, such issue may be presented by the defendant to the jury at trial. Any order by the court dismissing a case based on entrapment shall be appealable by the state.

(6) In any hearing before a judge or jury where the defense of entrapment is an issue, past offenses of the defendant shall not be admitted except that in a trial where the defendant testifies he may be asked of his past convictions for felonies and any testimony given by the defendant at a hearing on entrapment may be used to impeach his testimony at trial.

1973

**76-2-304. Ignorance or mistake of fact or law.**

(1) Unless otherwise provided, ignorance or mistake of fact which disproves the culpable mental state is a defense to any prosecution for that crime.

(2) Ignorance or mistake concerning the existence or meaning of a penal law is no defense to a crime unless:

(a) Due to his ignorance or mistake, the actor reasonably believed his conduct did not constitute an offense, and

(b) His ignorance or mistake resulted from the actor's reasonable reliance upon:

(i) An official statement of the law contained in a written order or grant of permission by an administrative agency charged by law with responsibility for interpreting the law in question; or

(ii) A written interpretation of the law contained in an opinion of a court of record or made by a public servant charged by law with responsibility for interpreting the law in question.

(3) Although an actor's ignorance or mistake of fact or law may constitute a defense to the offense charged, he may nevertheless be convicted of a lesser included offense of which he would be guilty if the fact or law were as he believed.

1974

**76-2-304.5. Mistake as to victim's age not a defense.**

(1) It is not a defense to the crime of child kidnapping, a violation of Section 76-5-301.1; rape of a child, a violation of Section 76-5-402.1; object rape of a child, a violation of Section 76-5-402.3; sodomy upon a child, a violation of Section 76-5-403.1; or sexual abuse of a child, a violation of Section 76-5-404.1; or an attempt to commit any of those offenses, that

the actor mistakenly believed the victim to be 14 years of age or older at the time of the alleged offense or was unaware of the victim's true age.

(2) It is not a defense to the crime of unlawful sexual intercourse, a violation of Section 76-5-401, or an attempt to commit that crime, that the actor mistakenly believed the victim to be 16 years of age or older at the time of the alleged offense or was unaware of the victim's true age.

1983

**76-2-305. Mental illness — Use as a defense — Influence of alcohol or other substance voluntarily consumed — Definition.**

(1) It is a defense to a prosecution under any statute or ordinance that the defendant, as a result of mental illness lacked the mental state required as an element of the offense charged. Mental illness is not otherwise a defense.

(2) The defense defined in this section includes the defenses known as "insanity" and "diminished mental capacity."

(3) A person who is under the influence of voluntarily consumed or injected alcohol, controlled substances, or volatile substances at the time of the alleged offense is not excused from criminal responsibility on the basis of mental illness.

(4) "Mental illness" means a mental disease or defect that substantially impairs a person's mental, emotional, or behavioral functioning. A mental defect may be a congenital condition, the result of injury, or a residual effect of a physical or mental disease and includes, but is not limited to, mental retardation. Mental illness does not mean a personality or character disorder or abnormality manifested only by repeated criminal conduct.

(5) "Mental retardation" means a significant subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior, and manifested during the developmental period as defined by the current Diagnostic and Statistical Manual of the American Psychiatric Association

1990

**76-2-306. Voluntary intoxication.**

Voluntary intoxication shall not be a defense to a criminal charge unless such intoxication negates the existence of the mental state which is an element of the offense; however, if recklessness or criminal negligence establishes an element of an offense and the actor is unaware of the risk because of voluntary intoxication, his unawareness is immaterial in a prosecution for that offense.

1973

**76-2-307. Voluntary termination of efforts prior to offense.**

It is an affirmative defense to a prosecution in which an actor's criminal responsibility arises from his own conduct or from being a party to an offense under Section 76-2-202 that prior to the commission of the offense, the actor voluntarily terminated his effort to promote or facilitate its commission and either:

(1) gave timely warning to the proper law enforcement authorities or the intended victim; or

(2) wholly deprives his prior efforts of effectiveness in the commission.

1995

**76-2-308. Affirmative defenses.**

Defenses enumerated in this part constitute affirmative defenses.

1973

**PART 4****JUSTIFICATION EXCLUDING CRIMINAL RESPONSIBILITY****76-2-401. Justification as defense — When allowed.**

Conduct which is justified is a defense to prosecution for any offense based on the conduct. The defense of justification may be claimed:

primers and boosters, R.D.X., P.E.T.N., electric and nonelectric blasting caps, exploding cords commonly called detonating cord, detcord, or primacord, picric acid explosives, T.N.T. and T.N.T. mixtures, nitroglycerin and nitroglycerin mixtures, or any other chemical mixture intended to explode with fire or force;

(ii) any explosive bomb, grenade, missile, or similar device; and

(iii) any incendiary bomb, grenade, fire bomb, chemical bomb, or similar device, including any device, except kerosene lamps, if criminal intent has not been established, which consists of or includes a breakable container including a flammable liquid or compound and a wick composed of any material which, when ignited, is capable of igniting the flammable liquid or compound or any breakable container which consists of, or includes a chemical mixture that explodes with fire or force and can be carried, thrown, or placed.

(b) "Explosive, chemical, or incendiary device" shall not include rifle, pistol, or shotgun ammunition.

(c) "Explosive, chemical, or incendiary parts" means any substances or materials or combinations which have been prepared or altered for use in the creation of an explosive, chemical, or incendiary device. These substances or materials include:

(i) timing device, clock, or watch which has been altered in such a manner as to be used as the arming device in an explosive;

(ii) pipe, end caps, or metal tubing which has been prepared for a pipe bomb; and

(iii) mechanical timers, mechanical triggers, chemical time delays, electronic time delays, or commercially made or improvised items which, when used singly or in combination, may be used in the construction of a timing delay mechanism, booby trap, or activating mechanism for any explosive, chemical, or incendiary device.

(d) "Explosive, chemical, or incendiary parts" shall not include rifle, pistol, or shotgun ammunition, or any signaling device customarily used in operation of railroad equipment.

(2) The provisions in Subsections (3) and (6) shall not apply to:

(a) any public safety officer while acting in his official capacity transporting or otherwise handling explosives, chemical, or incendiary devices;

(b) any member of the armed forces of the United States or Utah National Guard while acting in his official capacity;

(c) any person possessing a valid permit issued under the provisions of Uniform Fire Code, Article 77, or any employee of such permittee acting within the scope of his employment;

(d) any person possessing a valid license as an importer, wholesaler, or display operator under the provisions of the Utah Fireworks Act, Sections 11-3-3.2 and 11-3-3.5; and

(e) any person or entity possessing or controlling an explosive, chemical, or incendiary device as part of its lawful business operations.

(3) Any person who knowingly, intentionally, or recklessly possesses or controls an explosive, chemical, or incendiary device is guilty of a felony of the second degree.

(4) Any person who knowingly, intentionally, or recklessly:

(a) uses or causes to be used an explosive, chemical, or incendiary device in the commission of or an attempt to commit a felony; or

person or property through the use of an explosive, chemical, or incendiary device, is guilty of a felony of the first degree.

(5) Any person who knowingly, intentionally, or recklessly removes or causes to be removed or carries away any explosive, chemical, or incendiary device from the premises where said explosive, chemical, or incendiary device is kept by the lawful user, vendor, transporter, or manufacturer without the consent or direction of the lawful possessor is guilty of a felony of the second degree.

(6) Any person who knowingly, intentionally, or recklessly possesses any explosive, chemical, or incendiary parts is guilty of a felony of the third degree. 1993

#### **76-10-307. Delivery to common carrier, mailing, or placement on premises.**

Every person who delivers or causes to be delivered to any express or railway company or other common carrier, or to any person, any explosive, chemical, or incendiary device, knowing it to be the device, without informing the common carrier or person of its nature, sends it through the mail, or throws or places it on or about the premises or property of another or in any place where another may be injured thereby in his person or property, is guilty of a felony of the second degree. 1993

#### **76-10-308. Explosive, chemical, or incendiary device — Venue of prosecution for shipping.**

Any person who knowingly, intentionally, or recklessly delivers any explosive, chemical, or incendiary device to any person for transmission without the consent or direction of the lawful possessor may be prosecuted in the county in which he delivers it or in the county to which it is transmitted. 1993

#### **76-10-309. Repealed.**

1993

### **PART 4**

#### **FENCES**

#### **76-10-401. Fencing of shafts and wells.**

Any person who has sunk or shall sink a shaft or well on the public domain for any purpose shall inclose it with a substantial curb or fence, which shall be at least four and one-half feet high. Any person violating the provisions of this section is guilty of a class B misdemeanor. 1973

### **PART 5**

#### **WEAPONS**

#### **76-10-501. Uniform law — Definitions.**

(1) (a) The individual right to keep and bear arms being a constitutionally protected right, the Legislature finds the need to provide uniform laws throughout the state. Except as specifically provided by state law, a citizen of the United States or a lawfully admitted alien shall not be:

(i) prohibited from owning, possessing, purchasing, transporting, or keeping any firearm at his place of residence, property, business, or in any vehicle under his control; or

(ii) required to have a permit or license to purchase, own, possess, transport, or keep a firearm.

(b) This part is uniformly applicable throughout this state and in all its political subdivisions and municipalities. All authority to regulate firearms shall be reserved to the state except where the Legislature specifically delegates responsibility to local authorities. Unless specifically authorized by the Legislature by statute, a local authority may not enact or enforce any ordinance, regulation, or rule pertaining to firearms.

## (2) As used in this part:

- (a) (i) "Concealed dangerous weapon" means a dangerous weapon that is covered, hidden, or secreted in a manner that the public would not be aware of its presence and is readily accessible for immediate use.
- (ii) A dangerous weapon shall not be considered a concealed dangerous weapon if it is a firearm which is unloaded and is securely encased.
- (b) "Crime of violence" means aggravated murder, murder, manslaughter, rape, mayhem, kidnapping, robbery, burglary, housebreaking, extortion, or blackmail accompanied by threats of violence, assault with a dangerous weapon, assault with intent to commit any offense punishable by imprisonment for more than one year, arson punishable by imprisonment for more than one year, or an attempt to commit any of these offenses.
- (c) "Criminal history background check" means a criminal background check conducted by a licensed firearms dealer on every purchaser of a handgun through the division or the local law enforcement agency where the firearms dealer conducts business.
- (d) "Dangerous weapon" means any item that in the manner of its use or intended use is capable of causing death or serious bodily injury. The following factors shall be used in determining whether a knife, or any other item, object, or thing not commonly known as a dangerous weapon is a dangerous weapon:
  - (i) the character of the instrument, object, or thing;
  - (ii) the character of the wound produced, if any;
  - (iii) the manner in which the instrument, object, or thing was used; and
  - (iv) the other lawful purposes for which the instrument, object, or thing may be used.
- (e) "Dealer" means every person who is licensed under crimes and criminal procedure, 18 U.S.C. 923 and engaged in the business of selling, leasing, or otherwise transferring a handgun, whether the person is a retail or wholesale dealer, pawnbroker, or otherwise.
- (f) "Division" means the Law Enforcement and Technical Services Division of the Department of Public Safety, created in Section 53-5-103.
- (g) "Firearm" means a pistol, revolver, shotgun, sawed-off shotgun, rifle or sawed-off rifle, or any device that could be used as a dangerous weapon from which is expelled a projectile by action of an explosive.
- (h) "Fully automatic weapon" means any firearm which fires, is designed to fire, or can be readily restored to fire, automatically more than one shot without manual reloading by a single function of the trigger.
- (i) "Firearms transaction record form" means a form created by the division to be completed by a person purchasing, selling, or transferring a handgun from a dealer in the state.
- (j) "Handgun" means a pistol, revolver, or other firearm of any description, loaded or unloaded, from which any shot, bullet, or other missile can be discharged, the length of which, not including any revolving, detachable, or magazine breech, does not exceed 12 inches.
- (k) "Prohibited area" means any place where it is unlawful to discharge a firearm.
- (l) "Readily accessible for immediate use" means that a firearm or other dangerous weapon is carried on the person or within such close proximity and in such a manner that it can be retrieved and used as readily as if carried on the person.
- (m) "Sawed-off shotgun" or "sawed-off rifle" means a shotgun having a barrel or barrels of fewer than 18 inches in length, or in the case of a rifle, having a barrel or barrels of fewer than 16 inches in length, or any danger-

ous weapon made from a rifle or shotgun by alteration, modification, or otherwise, if the weapon as modified has an overall length of fewer than 26 inches.

(n) "Securely encased" means not readily accessible for immediate use, such as held in a gun rack, or in a closed case or container, whether or not locked, or in a trunk or other storage area of a motor vehicle, not including a glove box or console box.

1995

**76-10-502. When weapon deemed loaded.**

(1) For the purpose of this chapter, any pistol, revolver, shotgun, rifle, or other weapon described in this part shall be deemed to be loaded when there is an unexpended cartridge, shell, or projectile in the firing position.

(2) Pistols and revolvers shall also be deemed to be loaded when an unexpended cartridge, shell, or projectile is in a position whereby the manual operation of any mechanism once would cause the unexpended cartridge, shell, or projectile to be fired.

(3) A muzzle loading firearm shall be deemed to be loaded when it is capped or primed and has a powder charge and ball or shot in the barrel or cylinders.

1990

**76-10-503. Purchase or possession of dangerous weapon/handgun — Persons not permitted to have — Penalties.**

(1) (a) Any person who has been convicted of any crime of violence under the laws of the United States, this state, or any other state, government, or country, or who is addicted to the use of any narcotic drug, or who has been declared mentally incompetent may not own or have in his possession or under his custody or control any dangerous weapon as defined in this part.

(b) Any person who violates this subsection is guilty of a class A misdemeanor, and if the dangerous weapon is a firearm or sawed-off shotgun, he is guilty of a third degree felony.

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

(b) Any person who violates this subsection is guilty of a third degree felony, but if the dangerous weapon is a firearm, explosive, or incendiary device he is guilty of a second degree felony.

(3) (a) A person may not purchase, possess, or transfer any handgun described in this part who:

(i) has been convicted of any felony offense under the laws of the United States, this state, or any other state;

(ii) is under indictment;

(iii) is an unlawful user of a controlled substance as defined in Section 58-37-2;

(iv) is a drug dependent person as defined in Section 58-37-2;

(v) has been adjudicated as mentally defective, as provided in the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993), or has been committed to a mental institution;

(vi) is an alien who is illegally or unlawfully in the United States;

(vii) has been discharged from the Armed Forces under dishonorable conditions; or

(viii) is a person who, having been a citizen of the United States, has renounced such citizenship.

(b) Any person who violates Subsection (3) is guilty of a third degree felony.

1994

**76-10-504. Carrying concealed dangerous weapon.**

(1) Except as provided in Section 76-10-503 and in Subsections (2) and (3):

(a) a person who carries a concealed dangerous weapon which is not a firearm on his person or one that is readily accessible for immediate use which is not securely encased, as defined in this part, in a place other than his residence, property, or business under his control is guilty of a class B misdemeanor.

(b) a person without a valid concealed firearm permit who carries a concealed dangerous weapon which is a firearm and that contains no ammunition is guilty of a class B misdemeanor, but if the firearm contains ammunition the person is guilty of a class A misdemeanor.

(2) A person who carries concealed a sawed-off shotgun or a sawed-off rifle is guilty of a second degree felony.

(3) If the concealed firearm is used in the commission of a crime of violence as defined in Section 76-10-501, and the person is a party to the offense, the person is guilty of a second degree felony.

(4) Nothing in Subsection (1) shall prohibit a person engaged in the lawful taking of protected or unprotected wildlife as defined in Title 23 from carrying a concealed weapon or a concealed firearm with a barrel length of four inches or greater as long as the taking of wildlife does not occur:

(a) within the limits of a municipality in violation of that municipality's ordinances; or

(b) upon the highways of the state as defined in Section 41-6-1. 1995

#### **76-10-505. Carrying loaded firearm in vehicle, on street, or in prohibited area.**

(1) Unless otherwise authorized by law, a person may not carry a loaded firearm:

(a) in or on a vehicle;

(b) on any public street; or

(c) in a posted prohibited area.

(2) A violation of this section is a class B misdemeanor. 1990

#### **76-10-505.5. Possession of a dangerous weapon, firearm, or sawed-off shotgun on or about school premises — Penalty.**

(1) A person may not possess any dangerous weapon, firearm, or sawed-off shotgun at a place that the person knows, or has reasonable cause to believe, is on or about school premises.

(2) (a) Possession of a dangerous weapon on or about school premises is a class B misdemeanor.

(b) Possession of a firearm or sawed-off shotgun on or about school premises is a class A misdemeanor.

(3) This section applies to any person, except persons authorized to possess a firearm as provided under Sections 53-5-704, 53-5-705, 53A-3-502, 76-10-510, 76-10-511, 76-10-523, and Subsection 76-10-504(2) and as otherwise authorized by law.

(4) This section does not prohibit prosecution of a more serious weapons offense that may occur on or about school premises. 1993

#### **76-10-506. Threatening with or using dangerous weapon in fight or quarrel.**

Every person, except those persons described in Section 76-10-503, who, not in necessary self defense in the presence of two or more persons, draws or exhibits any dangerous weapon in an angry and threatening manner or unlawfully uses the same in any fight or quarrel is guilty of a class A misdemeanor. 1992

#### **76-10-507. Possession of deadly weapon with intent to assault.**

Every person having upon his person any dangerous weapon with intent to unlawfully assault another is guilty of a class A misdemeanor. 1973

#### **76-10-508. Discharge of firearm from a vehicle, near highway, or in direction of any person, building, or vehicle.**

(1) (a) A person may not discharge any kind of dangerous weapon or firearm:

(i) from an automobile or other vehicle;

(ii) from, upon, or across any highway;

(iii) at any road signs placed upon any highways of the state;

(iv) at any communications equipment or property of public utilities including facilities, lines, poles, or devices of transmission or distribution;

(v) at railroad equipment or facilities including any sign or signal;

(vi) within Utah State Park buildings, designated camp or picnic sites, overlooks, golf courses, boat ramps, and developed beaches; or

(vii) without written permission to discharge the dangerous weapon from the owner or person in charge of the property within 600 feet of:

(A) a house, dwelling, or any other building; or

(B) any structure in which a domestic animal is kept or fed, including a barn, poultry yard, corral, feeding pen, or stockyard.

(b) It shall be a defense to any charge for violating this section that the person being accused had actual permission of the owner or person in charge of the property at the time in question.

(2) A violation of any provision of this section is a class B misdemeanor unless the actor discharges a firearm under any of the following circumstances not amounting to criminal homicide or attempted criminal homicide, in which case it is a third degree felony:

(a) the actor discharges a firearm in the direction of any person or persons, knowing or having reason to believe that any person may be endangered;

(b) the actor, with intent to intimidate or harass another or with intent to damage a habitable structure as defined in Subsection 76-6-101(2), discharges a firearm in the direction of any building; or

(c) the actor, with intent to intimidate or harass another, discharges a firearm in the direction of any vehicle.

(3) This section does not apply to a person:

(a) who discharges any kind of firearm when that person is in lawful defense of self or others; or

(b) who is performing official duties as provided in Sections 23-20-1.5 and 76-10-523 and as otherwise provided by law. 1995

#### **76-10-509. Possession of dangerous weapon by minor.**

(1) A minor under 18 years of age may not possess a dangerous weapon unless he:

(a) has the permission of his parent or guardian to have the weapon; or

(b) is accompanied by a parent or guardian while he has the weapon in his possession.

(2) Any minor under 14 years of age in possession of a dangerous weapon shall be accompanied by a responsible adult.

(3) Any person who violates this section is guilty of:

(a) a class B misdemeanor upon the first offense; and

(b) a class A misdemeanor for each subsequent offense. 1993 (2nd S.S.)

#### **76-10-509.4. Prohibition of possession of certain weapons by minors.**

(1) A minor under 18 years of age may not possess a handgun.

(2) Except as provided by federal law, a minor under 18 years of age may not possess the following:



whether, so far as appears from the note in question was "in reality \* \* \* a contract by her as surety for her husband," saying that, if it was such a contract, "then, without regard to its form, it would be void under the Act of June 8, 1893 (P. L. 344)."

After reading the evidence, written and oral, we find no abuse of discretion.

The order appealed from is affirmed.

### BENNETT v. HATHORN et al.

(Supreme Judicial Court of Maine. Feb. 5, 1926.)

Evidence  $\S$  584(3)—Weight to be given evidence depends; not on number of witnesses, but on quality of testimony.

The weight to be given evidence depends not so much on number of witnesses as on the quality or power of their testimony to convince of the truth.

On Motion from Superior Court, Penobscot County, at Law.

Action by Milton C. Bennett against F. Herbert Hathorn and another. On general motion by defendants for a new trial. Motion overruled.

Argued before WILSON, C. J., and PHILBROOK, DUNN, MORRILL, STURGIS, and BASSETT, JJ.

Pattangall, Locke & Perkins, of Augusta, for plaintiff.

Fellows & Fellows, of Bangor, for defendants.

PER CURIAM. This is an action to recover stipulated compensation as the pastor of the "Klan Church," so called, in Brewer and Bangor, under an alleged contract between the plaintiff and the defendants. The action is based upon a typewritten letter, dated at Brewer, December 19, 1923, signed with a typewriter, "F. Herbert Hathorn, Brewer, D. D. Terrill, Bangor," in which the period of employment is fixed at 18 months, and the compensation at \$45 per week and house rent. The plea is the general issue. There was no denial of signature by affidavit under rule X. The case is before the law court upon a general motion by defendants for a new trial.

Under the general issue the defendants introduced evidence which they assert supports the following defenses: (1) That they did not contract with the plaintiff to serve as pastor of the "Klan Church"; that they neither signed, nor authorized any person to affix their names to, the letter in question, and that neither of them saw or knew of the letter until several months after its date; (2)

"Klan Church" on July 23, 1924, in Brewer, and on July 24, 1924, in Bangor, and that his resignation was accepted; (3) that on October 25, 1924, he was paid the amount of back salary due him to that date. On the brief defendants' counsel has argued another point, viz. that by accepting the office of "Kleagle," and performing the duties thereof, the plaintiff had himself broken the contract, or at least had abandoned his position of pastor, and renounced the contract.

We need only to say that an examination of the record discloses so many improbabilities, inconsistencies, and contradictions in the evidence that the jury were fully warranted in accepting the plaintiff's version of the transactions in question. We take occasion to repeat, as frequently stated on former occasions, that the weight to be given to evidence presented depends not so much on the number of witnesses as upon the quality or power of their testimony to convince of the truth.

Motion overruled.

### WELISKA'S CASE.

(Supreme Judicial Court of Maine. Feb. 5, 1926.)

1. Master and servant  $\S$  388—Conclusive presumption under statute that dependency of child under 18 years is entire.

Though Laws 1921, c. 222, § 1, relating to dependents, is ambiguous, one intended meaning is that, when no dependent parent survives deceased employee, conclusive presumption is that dependency of decedent's less than 18 year old legitimate child is entire, providing state of child when parent died was that of reliance on him for subsistence.

2. Master and servant  $\S$  388 — Dependency condition of compensation:

Dependency is condition precedent to award of compensation.

3. Master and servant  $\S$  388—Test of child's dependency stated.

Mere giving of assistance by divorced father living apart from daughter does not of itself make daughter dependent, but further test is whether she had necessity therefor in her life station, and whether she counted on such contributions for her livelihood.

4. Evidence  $\S$  596(1)—"Vague and unsatisfactory" testimony defined.

"Vague and unsatisfactory" testimony is that which is dim and shadowy and fails to relieve the mind of the trier of facts from doubt or uncertainty.

5. Evidence  $\S$  588—"Credibility" of testimony must be decided before weighing it.

"Credibility" of testimony, which is its capacity for being believed, must be settled be-

fore weighing it, since there is no occasion for weighing it if it has not this quality.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Credible—Credibility.]

**6. Master and servant §417(7)—Industrial Accident Commission's decision of facts conclusive.**

Where Industrial Accident Commission had decided certain evidence was vague and unsatisfactory, *held*, province of such commission, which has exclusive right to decide facts, cannot be invaded by arbitrary unauthorized court order that such testimony must be accepted as involving both persuasion and decision.

On Appeal from Supreme Judicial Court, Hancock County, in Equity.

Proceeding under the Workmen's Compensation Act by Mary Weliska for the death of Stanley Weliska, her father, claimant, opposed by the Lincoln Pulp Wood Company. From an order of the Industrial Accident Commission denying compensation, claimant appeals. Appeal dismissed and decree affirmed.

Argued before WILSON, C. J., and PHILBROOK, DUNN, MORRILL, STURGIS, and BARNES, JJ.

Peter M. McDonald and Aretas E. Stearns, both of Rumford, for appellant.

Louis C. Stearns, of Bangor, for appellee.

DUNN, J. The net result of the record is that the appeal from the decree denying compensation to the child of the fatally injured workman, on the ground of the lack of proof of dependency, must be dismissed.

[1] The statute applicable appears to be ambiguous. After defining "dependents" as members of an employee's family or next of kin, whom he was sustaining either wholly or partly by his earnings when he was injured, there is, relationally to the conclusive presuming of the total dependency of children, in the case of an employee deceased, the clause following:

"(c) A child or children, including adopted and step-children under the age of eighteen years (or over said age, but physically or mentally incapacitated from earning) upon the parent with whom he is or they are living, or upon whom he is or they are dependent at the time of the death of said parent, there being no surviving dependent parent. In case there is more than one child thus dependent, the compensation shall be divided equally among them." 1921 Laws, chap. 222, § 1.

Resolving it, that legislation, by the accepted use of language, has for one intended meaning this: When no dependent parent is surviving a deceased employee, conclusive presumption is that the dependency of the dead man's less than 18 year old legitimate child is entire, providing the state of the

child when the parent died, and notwithstanding they were living apart from one another, was that of reliance upon him for subsistence.

[2, 3] "Dependency," said Chief Justice Cornish, in words that still are living, "is a condition precedent to award of compensation." Henry's Case, 124 Me. 104, 126 A. 286. The mere receiving of assistance, on the authority of the same decision, does not of itself make the recipient a dependent. Granting that there were contributions, the yet further test for dependency is: Had the accepting one necessity therefor in his life station, and were they counted on by him for his means of livelihood?

While Stanley Weliska was working regularly for, and because and out of his employment by, the Lincoln Pulp Wood Company, in the Hancock county woods, on June 3, 1924, the limb of a falling tree accidentally struck his skull and fractured it. He died that very day.

Four years before his wife had divorced him, for utter desertion over the three-year period immediately preceding her libel, in Oxford county. At the same time, the one child of the marriage which met judicial dissolution was decreed by the court in care and custody of the mother with whom she always had lived, and now is living in the mother's new marriage home in Massachusetts. This child, aged 12 years, is the petitioner in these proceedings. The divorced husband never remarried. If he died leaving living parents, for anything that is shown, they are self-supporting.

At the hearing, there was but one issue, fit of the petitioner's dependency; the respondent's answer raising nothing else. Mitchell's Case, 121 Me. 455, 118 A. 287, 33 A. L. R. 1447; McCollor's Case, 122 Me. 136, 119 A. 194.

There is evidence that the father at odd intervals, to within three or four months of the fateful day, came from Rumford or elsewhere in Maine, as the place of his employment was, to Lawrence in the other state, and meeting his child more or less slyly and clandestinely from her mother, made to the child gifts of money, the most of which has been appropriated toward, and some of which is in saving for, her maintenance.

So the child attested. And her mother and a neighbor witnessed similarly. but with not so much detail.

[4] The Industrial Accident Commission, Chairman Thayer sitting, characterized the testimony as "vague and unsatisfactory." This is taken to mean that it was dim and shadowy and failed to relieve the mind of the trier of facts from doubt or uncertainty. No other evidence being offered on the indispensable point of dependency, the petition was denied.

Argument is for or against the proposition

that, as the testimony was uncontradicted, a consenting mind ought to have received it, and on reflection found it sufficient for the awarding of compensation.

The appellant loses.

[5] The credibility of testimony, its capacity for being believed, is one of the things to be settled before weighing it. If the testimony has not this quality there is no occasion for weighing it. The testimony pressed upon attention was tested and found wanting. For probatory purpose it was as light as nothingness, in the faithful though perhaps erroneous judgment of the commission, and hence negative decision was recorded.

That decision ended controversy.

[6] As the compensation law is, the right to decide facts is invested exclusively in the Industrial Accident Commission, and the province of that tribunal may not be invaded by an arbitrary unauthorized court order that certain testimony must be accepted as involving both persuasion and decision. *Orff's Case*, 122 Me. 114, 119 A. 67.

Appeal dismissed.

Decree below affirmed.

# LIBBY et al. v. YORK SHORE WATER CO.

(Supreme Judicial Court of Maine. Feb. 5, 1926).

1. Mandamus  $\Leftrightarrow$ 154(2)—Petition addressed to individual member of Supreme Judicial Court.

Petition for mandamus should be addressed personally to individual member of Supreme Judicial Court, distinguishably from him presiding as justice in term time, in view of Rev. St. c. 107, § 17.

2. Mandamus  $\Leftrightarrow$ 171—Limitary provisions affect neither time and place of hearing nor notice to others concerned.

Limitary provisions affect neither time and place of hearing petition for mandamus, nor previous notice which others concerned shall have, but corrective means will reach discretion unmistakably abused.

3. Mandamus  $\Leftrightarrow$ 159—Hearing petition has to do with "alternative writ."

Hearing of petition for mandamus has to do with granting or denying of "alternative writ," which determines nothing in favor of either party, but has resemblance to interlocutory order to show cause, and is obeyed by answering.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Alternative Writ.]

4. Mandamus  $\Leftrightarrow$ 164(2)—Requirements of return stated.

Where return, which is answer to alternative writ, does not show compliance with mandate or command of such writ, it must either

deny facts which writ sets out or state other facts sufficient in law to defeat petitioner's claim.

5. Mandamus  $\Leftrightarrow$ 165—Petitioner may demur to return.

Petitioner may, instead of challenging some matter of fact alleged by opposite party, demur to return to alternative writ of mandamus advancing issue which, as if raised by traverse, he must maintain, in view of Rev. St. c. 107, § 18.

6. Mandamus  $\Leftrightarrow$ 187(4)—Justice may reserve questions of law for full court.

Justice hearing petition for mandamus may reserve questions of law for full court.

7. Mandamus  $\Leftrightarrow$ 187(4,9)—Exceptions arguable only after judgment and decree; in arguing exceptions, erroneous ruling in law or misuse of discretionary control must be shown.

Exceptions saved in mandamus proceeding are arguable on certification of Chief Justice only after judgment and decree, in view of Rev. St. c. 107, § 17, and excepter must show, not merely granting or withholding of writ, but erroneous ruling in law or patent misuse of discretionary control.

8. Mandamus  $\Leftrightarrow$ 187(4)—There is no authority for deciding disputed facts by full court.

A mandamus case may not be brought to full court before ordering peremptory writ, since there is no authority for deciding disputed facts in mandamus proceeding by full court.

9. Mandamus  $\Leftrightarrow$ 187(4)—Proceeding not considered by full court on reservation of question of issuing alternative writ.

Full court will not review proceedings in mandamus when brought up by reservation of question whether alternative writ is issuable on agreed facts, since such proceedings must stay where they begin till they run their compass.

On Motion from Supreme Judicial Court, York County, at Law.

Petition by Fred M. Libby and others for mandamus against the York Shore Water Company. Motion to dismiss was made, and question whether alternative writ was discretionally issuable was reserved for the law court. Report discharged.

Argued before WILSON, C. J., and PHILBROOK, DUNN, MORRILL, and BASSETT, JJ.

Stewart & Hawkes, of York Village, for petitioners.

Frank D. Marshall and Charles J. Nichols, both of Portland, for defendant.

DUNN, J. The overt phase of this case is that of nonconformity to statutable procedure in mandamus proceedings. This aspect will be seen against the history and the rule.

These petitioners own certain land in the town of York. They are desirous that their property have the use of water. The public