

1995

West Valley City v. Kent R. Fullmer : Reply Brief

Utah Court of Appeals

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Boyd M. Fullmer; Attorney for Appellee.

Elliot R. Lawrence; Attorney for Appellant.

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IN THE UTAH COURT OF APPEALS

WEST VALLEY CITY,
Appellant,

vs.

KENT R. FULLMER,
Appellee.

Appellate Court No.: 950793-CA

Priority no.: 15

APPELLANT'S REPLY BRIEF

Appeal from the final judgment of the Third Circuit Court, State
of Utah, in and for Salt Lake County, West Valley Department.
The Honorable William A. Thorne

**UTAH COURT OF APPEALS
BRIEF**

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ELLIOT R. LAWRENCE — Bar no. 6917
Attorney for Appellant
West Valley City
City Attorney's Office
3600 South Constitution Blvd.
West Valley City, Utah 84119
Phone: (801) 963-3271
Fax: (801) 963-3366
Elawrenc@ci.west-valley.ut.us

BOYD M. FULLMER
Attorney for Appellee
3211 South 2045 East
Salt Lake City, Utah 84109

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ELLIOT R. LAWRENCE — Bar no. 6917
Attorney for Appellant
West Valley City
City Attorney's Office
3600 South Constitution Blvd.
West Valley City, Utah 84119
Phone: (801) 963-3271
Fax: (801) 963-3366
Elawrenc@ci.west-valley.ut.us

BOYD M. FULLMER
Attorney for Appellee
3211 South 2045 East
Salt Lake City, Utah 84109

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 2

 I. THE TRIAL JUDGE’S VERDICT WAS AN INCORRECT
 INTERPRETATION OF LAW, NOT A RULING ON THE FACTS OF
 THE CASE. 2

 II. THE RELEVANT LANGUAGE IN THE STATUTE HAS NOT
 CHANGED SINCE *WILLIAMS* WAS DECIDED, AND THE
 WILLIAMS DECISION IS STILL RELEVANT BECAUSE IT HAS
 BEEN CODIFIED INTO THE STATUTE. 3

 A. The Relevant Language of § 76-10-504 has not
 Changed Since *Williams* was Decided. 4

 B. The Utah Legislature Incorporated *Williams* into
 the Statute. 6

CONCLUSION 8

TABLE OF AUTHORITIES

Cases

State v. Williams 636 P.2d 1092 (Utah 1981) 3,4,7

Statutes

Utah Code Ann. § 76-10-501(2) (Supp. 1995) 6,7

Utah Code Ann. § 76-10-504 (Supp. 1995) 5-6

Utah Code Ann. § 76-10-504 (1995) 4-5

Utah Code Ann. § 76-10-504 (1978) 4

Miscellaneous

Brief of Appellee, *West Valley City v. Fullmer* 1,2,3

Transcript of Verdict, *West Valley City v. Fullmer* 2

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APPELLANT'S REPLY BRIEF

INTRODUCTION

APPELLANT, WEST VALLEY CITY, feels compelled to submit this Reply Brief in order to respond to new arguments raised by Appellee, Kent R. Fullmer ("Fullmer"). In his response, Fullmer argues that the trial judge's verdict was based on the facts of the case (see Brief of Appellee, *West Valley City v. Fullmer* at 4). However, the verdict was based on the judge's incorrect interpretation of § 76-10-504 of the Utah Code, and was not based on the adequacy of the facts.

In addition, Fullmer claims that the Utah Supreme Court's ruling in *State v. Williams*, 636 P.2d 1092 (Utah 1981) is no longer relevant. Fullmer argues that since the language of § 76-10-504 has changed since *Williams* was decided, the case is no longer precedent interpreting the statute. (Brief of Appellee at 4-5) However, the relevant language remains unchanged since 1981, and the Utah Legislature codified *Williams* into the present statute. Because of these facts, *Williams* remains a viable guide to interpret the statute.

ARGUMENT

I. THE TRIAL JUDGE'S VERDICT WAS AN INCORRECT INTERPRETATION OF LAW, NOT A RULING ON THE FACTS OF THE CASE.

The trial judge improperly dismissed the charge against Fullmer based on an incorrect interpretation of the applicable statute, not because the evidence had "credibility problems." The trial judge held that § 76-10-504 of the Utah Code requires that a concealed dangerous weapon must be moved in a vehicle in order to be "carried." (See Transcript of Verdict, *West Valley City v. Fullmer* at 2-3) This interpretation contradicts the plain meaning of the statute, and cases that have interpreted it.

In his brief, Fullmer clouds the issue by arguing irrelevant facts. The verdict, however, is based on an interpretation of the law. The facts that led to the charge at issue are undisputed. The police officers arrived on the scene, answering a call from a security guard. Fullmer was inside the passenger compartment of a vehicle. The officers requested identification from Fullmer, which he provided. The officers ran a routine check for outstanding warrants, which revealed that there were warrants for Fullmer. He was taken into custody, and his car searched as part of the lawful arrest. The gun was found on the front seat, under an arm rest. That is the basis of the charge of carrying a concealed dangerous weapon. These facts agree with Fullmer's Brief. (see Brief of Appellee at 2).

The trial judge did not expressly rule on the evidence, only on his interpretation of the law. While the judge alluded to "credibility problems" in the testimony, he quickly turned to his

analysis of the applicable statute, and held that by definition the crime had not been committed, because Fullmer's car had not moved while it contained the gun. The judge never ruled on the facts of the case. The verdict contains no ruling on whether the elements of the offense had been proven beyond a reasonable doubt, because the trial judge's incorrect interpretation of the law precluded a verdict on the facts.

The issue before the Court is whether the trial judge's interpretation of the law was incorrect, not a review of the evidence. As is discussed more fully in Appellant's Brief, the judge's interpretation of the law is not supported by the language of § 76-10-504 nor by the analysis given in *State v. Williams*, 636 P.2d 1092 (Utah 1981). Since the interpretation of the law is incorrect, the case should be retried.

II. THE RELEVANT LANGUAGE IN THE STATUTE HAS NOT CHANGED SINCE *WILLIAMS* WAS DECIDED, AND THE *WILLIAMS* DECISION IS STILL RELEVANT BECAUSE IT HAS BEEN CODIFIED INTO THE STATUTE.

Although the Utah Legislature modified the statute defining the offense of carrying a concealed dangerous weapon twice since 1981, the relevant language has remained unchanged since *State v. Williams* was decided. Fullmer argues that since the language has changed, *Williams* is no longer relevant precedent interpreting the statute. (Brief of Appellee at 4-5) However, the legislature incorporated *Williams* into the statute, so the case is still relevant as interpretative.

A. *The Relevant Language of § 76-10-504 has not Changed Since Williams was Decided.*

The statute in effect when *Williams* was decided retains the same relevant language today. In 1981, when the Utah Supreme Court decided *Williams*, § 76-10-504 read as follows:

76-10-504. Carrying a concealed dangerous weapon.— Any person, except those persons described in section 76-10-503, carrying a concealed dangerous weapon as defined in this part is guilty of a class B misdemeanor, and if the dangerous weapon is a firearm, or sawed-off shotgun he shall be guilty of a felony of the third degree.

UTAH CODE ANN. § 76-10-504 (1978) (emphasis added). The statute did not define "carrying a concealed dangerous weapon," only what a dangerous weapon was. The Utah Supreme Court determined that under that statute, "carrying" means having a concealed weapon within a person's "immediate, easy or ready access . . ." *State v. Williams*, 636 P.2d at 1094.

In 1982, the legislature added language to § 76-10-504, but kept the earlier definition:

76-10-504. Carrying a 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.

UTAH CODE ANN. § 76-10-504 (1995) (emphasis added). The relevant language, indicated above, remained unchanged from the earlier statute. The changes concerned the degree of the offense, and a provision protecting the right of persons to keep firearms. Again, there was no definition of what constituted "carrying a concealed dangerous weapon," but the statute did provide that a firearm could legally be carried in a secure package or case. This reflects the holding from *Williams*, by requiring that a firearm not be within immediate, easy, or ready access.

Finally, in 1995, the legislature significantly altered the statute, but still retained the relevant language:

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.

UTAH CODE ANN. § 76-10-504 (Supp. 1995) (emphasis added). The statute was expanded and a provision regarding hunting was added, but the language defining the offense remains the same. The legislature also defined "concealed dangerous weapon" to mean "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 available for immediate use." *Id.* § 76-10-501(2)(a). This definition is new to the statute, and it echoes *Williams's* definition of carried as meaning within immediate, easy, or ready access.

To conclude, the relevant language defining the offense of carrying a concealed dangerous weapon has remained unchanged since *State v. Williams* was decided in 1981. There have been additions which are not relevant to this case, and some that adopted the concepts of *Williams*. Since the relevant language of § 76-10-504 has not been changed, *Williams* is still precedent to interpret the statute.

B. *The Utah Legislature Incorporated Williams into the Statute.*

Furthermore, the Utah Legislature incorporated *Williams* into § 76-10-504. As has been discussed, the language of that section

and the definition section that accompanies it, echo the holding of *Williams*. The present statute defines a "concealed dangerous weapon" as one that is "covered, hidden, or secreted in a manner that the public would not be aware of its presence and is readily available for immediate use." *Id.* § 76-10-501(2)(a). This language is close to the holding in *Williams* that a weapon is carried when it is "within . . . immediate, easy or ready access. . ." *Williams*, 636 P.2d at 1094.

In addition, the legislature also defined "readily accessible for public use" as a "weapon [that] 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." UTAH CODE ANN. § 76-10-501(2)(l) (Supp. 1995). Again, the language reflects *Williams*. It also agrees with the purpose of the statute as explained by the Utah Supreme Court: "Clearly, the purpose of concealed weapons statutes is to protect the public by preventing an individual from having on hand a weapon of which the public is unaware and which the individual might use should he be so inclined." *Williams*, 636 P.2d at 1094.

In short, *Williams* is still relevant as a guide to what § 76-10-504 means. The relevant language, as has been seen, has changed little since 1981. Furthermore, the holding of *Williams* has been codified into the statute. There is no justification for abandoning the clear guidelines established by the Utah Supreme Court simply because the present statute contains some additional, and irrelevant, language.

CONCLUSION

This case is not about the adequacy of the facts. It is about the correctness of the trial judge's interpretation of the relevant law. The trial judge's ruling that § 76-10-504 requires that a concealed weapon be moved in a vehicle in order to be "carried" defies the language of the statute, and the interpretation given by the Utah Supreme Court. The trial judge's interpretation was wrong, and the verdict should be set aside, and the case retried.

Furthermore, *State v. Williams* must be followed as precedent interpreting § 76-10-504. In the first place, the relevant language of the statute has not changed since the case was decided. Secondly, the legislature codified *Williams* by adding language that is similar to the holding. Fullmer's contention that *Williams* is no longer a valid guide to the meaning of the statute is in error.

For these reasons, in addition to the reasons set forth in Appellant's Brief, the verdict of the trial judge should be set aside, and the case retried.

RESPECTFULLY SUBMITTED this 31st day of May, 1996.


ELLIOT R. LAWRENCE
Attorney for Appellant

CERTIFICATE OF MAILING

This certifies that two copies of the foregoing Appellant's
Reply Brief were mailed to the following address:

Boyd M. Fullmer
3211 South 2045 East
Salt Lake City, Utah 84109

DATED this 31st day of May, 1996.

A handwritten signature in cursive script, reading "Elliot R. Lawrence", is written over a horizontal line.