

1986

# State of Utah v. John Shepard Davis : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH, :  
Plaintiff-Respondent, :  
-v- : Case No. 20996  
JOHN SHEPARD DAVIS, : Category No. 2  
Defendant-Appellant. :

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BRIEF OF RESPONDENT

APPEAL FROM SENTENCING ORDERS AND ORDER  
DENYING MOTION FOR A NEW TRIAL ENTERED IN THE  
FOURTH JUDICIAL DISTRICT COURT IN AND FOR  
UTAH COUNTY, STATE OF UTAH, THE HONORABLE DON  
V. TIBBS, JUDGE, PRESIDING.

~~SUPREME~~  
**BRIEF**

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1986 20996

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**FILED**

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Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

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Plaintiff-Respondent, :  
-v- : Case No. 20996  
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Defendant-Appellant. :

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STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Did the trial court abuse its discretion in denying defendant's motion for a new trial, and is that an issue defendant may raise in the instant appeal to this Court?

2. Are the issues raised by defendant concerning the propriety of certain sentencing orders now moot?

3. Is there a sufficient record on appeal upon which the Court can consider defendant's arguments regarding the restitution hearing?

STATEMENT OF THE CASE

Defendant, John Shepard Davis, was charged by information with theft, a second degree felony, under UTAH CODE ANN. §§ 76-6-404 and -412 (1978) (R. 3). A jury found him guilty as charged (R. 164). The trial court reduced defendant's conviction to one for a third degree felony, placed him on probation, and ordered restitution in an amount to be determined by a pending civil suit in the matter (R. 235-37). On appeal, this Court affirmed defendant's conviction in State v. Davis, 689 P.2d 5 (Utah 1984). On October 2, 1984, the Court denied defendant's petition for rehearing (R. 201).

### STATEMENT OF FACTS

The facts of defendant's crime and the proceedings on that offense in the trial court are set forth in State v. Davis, 689 P.2d 5, 7-12 (Utah 1984). The facts pertinent to defendant's instant appeal are as follows.

Although they are not contained in the record on appeal, in November 1984 defendant apparently filed a motion to amend a minute entry that reflected the trial court's sentencing order of November 26, 1982 (R. 184) and an amended motion for a new trial and arrest of judgment. See Addendum to Brief of Appellant. In a series of three orders dated in July and October 1985, the trial court denied both of defendant's motions, terminated the supervision of the Department of Adult Probation and Parole over defendant except for the matter of restitution, and ordered the Utah County Attorney's Office to provide defendant with copies of documents and affidavits that would be presented at a restitution hearing before the court on October 28, 1985 (R. 232-33, 235-37, 243-45). According to an unsigned minute entry, the trial court, after holding a restitution hearing on October 28, ordered defendant to pay restitution in the amount of \$73,461.45 to the victims of his crime (R. 246-47).

### SUMMARY OF ARGUMENT

Because this Court resolved the issue concerning a transcript of a deposition of defendant in defendant's previous appeal, the trial court did not abuse its discretion in not reconsidering that issue; and the Court should not again entertain the question in the instant appeal.

The alleged errors regarding the sentencing orders entered by the trial court in July and October 1985 are moot issues insofar as defendant's probation is concerned. This is so because defendant has completely served his probationary period and the trial court has formally terminated probation.

Because the record on appeal does not contain a final order from the trial court on the restitution question and is otherwise insufficient to support defendant's assignments of error, the Court should refuse to consider his arguments relating to a restitution order.

#### ARGUMENT

##### POINT I

THE ISSUE CONCERNING A DEPOSITION OF DEFENDANT HAVING BEEN RESOLVED IN DEFENDANT'S PREVIOUS DIRECT APPEAL, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN NOT RECONSIDERING THAT ISSUE; AND THIS COURT SHOULD NOT AGAIN ENTERTAIN THE QUESTION.

Defendant argues that the trial court abused its discretion in not granting his amended motion for a new trial made in the trial court after this Court had issued a decision in defendant's direct appeal--State v. Davis, 689 P.2d 5 (Utah 1984). That motion, which is not contained in the record on appeal, apparently asked the trial court to grant a new trial based upon defendant's claim that a transcript of his deposition, marked as Exhibit P-1, was erroneously taken into the jury room at his trial. Presented with precisely the same argument on direct appeal, this Court disposed of the issue on the ground that defendant had waived it by failing to interpose "a proper and seasonable objection." Davis, 689 P.2d at 15. Under these



circumstances, the trial court properly denied defendant's latest motion for a new trial, and this Court should not again entertain the deposition issue here.

#### POINT II

THE ALLEGED ERRORS REGARDING THE SENTENCING ORDERS ENTERED BY THE TRIAL COURT IN JULY AND OCTOBER 1985 ARE MOOT ISSUES INSOFAR AS DEFENDANT'S PROBATION IS CONCERNED.

Defendant alleges that a number of errors occurred when the trial court entered certain sentencing orders in July and October 1985. However, because defendant has completed his sentence and received a formal termination of probation from the trial court, the issues concerning the sentencing orders are moot insofar as defendant's probation is concerned. In that defendant has served his sentence, this Court cannot affect his rights in that regard. As noted in Spain v. Stewart, 639 P.2d 166 (Utah 1981):

[Where the requested judicial relief can no longer affect the rights of the litigants, the case is moot and a court will normally refrain from adjudicating it on the merits.

639 P.2d at 168. See also Duran v. Morris, 635 P.2d 43 (Utah 1981). And, this case does not present the circumstances set forth in Wickham v. Fisher, 629 P.2d 896 (Utah 1981), as typical of those cases for which an exception to the mootness doctrine should be made. Accordingly, the Court should not consider the merits of defendant's arguments. State v. Dickson, Utah Sup. Ct. No. 19685, filed June 13, 1985 (unpublished opinion).

POINT III

THE MINUTE ENTRY PERTAINING TO THE AMOUNT OF RESTITUTION DEFENDANT MUST PAY TO HIS VICTIMS, WHICH IS UNSIGNED BY THE TRIAL COURT AND IS THE ONLY RECORD OF THE RESTITUTION PROCEEDING THAT IS BEFORE THIS COURT, DOES NOT CONSTITUTE A FINAL, APPEALABLE ORDER.

Defendant claims that several irregularities which occurred before and during the restitution hearing held on October 28, 1985 should invalidate the trial court's restitution order. However, the only record of that proceeding is an unsigned minute entry; there is no written order or judgment of the court or transcript of the proceeding. Because the unsigned minute entry does not constitute a final, appealable order, defendant's appeal on this point is without jurisdiction and should be dismissed. Utah State Tax Commission v. Erekson, \_\_\_ P.2d \_\_\_, 28 Utah Adv. Rep. 16 (1986), citing Wisden v. City of Salina, 696 P.2d 1205 (Utah 1985); State v. Hutchings, 672 P.2d 404 (Utah 1983); Wilson v. Manning, 645 P.2d 655 (1982).

CONCLUSION

Because the issues raised by defendant are not subject to review due to prior resolution by the Court, mootness, or lack of a final, appealable order in the record, the Court should dismiss the instant appeal.

RESPECTFULLY submitted this 8<sup>th</sup> day of April, 1986.

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CERTIFICATE OF MAILING

I hereby certify that four true and exact copies of the foregoing Brief were mailed, postage prepaid, to John Shepard Davis, Appellant Pro Se, 1068 N. Grand Circle, Provo, Utah 84604, this 8<sup>th</sup> day of April, 1986.

David B. Thompson