

1989

The State of Utah v. NINE THOUSAND ONE HUNDRED AND NINETY NINE DOLLARS, UNITED STATES CURRENCY, ONE PAGER, SERIAL NO. 0701843, AND ONE 4-INCH SMITH AND WESSON .44 MAGNUM GUN, MODEL 29 : Brief of Appellee

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

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THE STATE OF UTAH, )  
Respondent, ) BRIEF OF RESPONDENT  
v. ) STATE OF UTAH  
NINE THOUSAND ONE HUNDRED )  
AND NINETY NINE DOLLARS, )  
UNITED STATES CURRENCY, )  
ONE PAGER, SERIAL NO. )  
0701843, AND ONE 4-INCH )  
SMITH AND WESSON .44 )  
MAGNUM GUN, MODEL 29, )  
Appellant. )

1258-8A

Case No. 880423  
Priority No. 14b

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APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT,  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JUDGE JAMES S. SAWAYA

---

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1. PARTIES

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#### 4. JURISDICTION

This court has jurisdiction pursuant to Section 78-2-2(j), Utah Code 1987-1988.

#### 5. NATURE OF PROCEEDINGS

The appeal was brought by the defendant pursuant to the Rules of the Utah Supreme Court, Rule 3(a). The State of Utah brought a forfeiture action in the Third Judicial District Court of Utah in an in rem proceeding against nine thousand one hundred and ninety nine dollars, U.S. currency, one pager and one Smith & Wesson gun on February 19, 1988. A trial was held before the Honorable James S. Sawaya on September 9, 1988. On October 13, 1988, an order was entered granting the state forfeiture against all defendants.

#### 6. THE ISSUES PRESENTED FOR REVIEW

1. When did the state's interest in the defendant currency vest?
2. Is the state entitled to forfeiture by a preponderance of the evidence?
3. Can forfeitable funds be used to pay attorney's fees?

#### 7. DETERMINATIVE STATUTE

The interpretation of Utah Code, Section 58-37-13, (1988) is determinative and is set forth as an addendum to this brief.

## 8. STATEMENT OF THE CASE

This case was brought by the state pursuant to a violation of the controlled substances act by Charles Goodson. The state initiated proceedings on February 19, 1988. Four attempts at service were unsuccessful at four different addresses. On April 1, 1988, service was perfected at the Salt Lake County Jail. Charles Goodson failed to respond to the notice and complaint and default was entered on May 2, 1988.

Charles Goodson's default was set aside, he filed an answer and counterclaimed against the state. On June 3, 1988, the state filed an answer to Charles Goodson's counterclaim. On June 13, 1988, Judge James S. Sawaya heard summary judgment arguments made by both parties. On June 20, 1988, Judge Sawaya denied both motions.

On July 13, 1988, plaintiff made a motion to amend its complaint and noticed it for August 1, 1988. At the request of the defendant, the motion was continued until August 8, 1988 when it could be heard with defendant's motion to dismiss. Judge Sawaya was out of town August 8th and heard the motions on August 22, 1988. Both motions were denied. Trial was set for September 9, 1988.

On September 9, 1988, Judge Sawaya took the matter under advisement and on September 13, 1988, ordered the defendant property forfeited to the State of Utah. Judgment



was entered on October 13, 1988.

On January 7, 1988, the Salt Lake County Sheriff's Office was executing a search warrant at 1545 S. Green Street Apartment 2. (R.4-5). Charles Goodson was present at that address. (R.5). Charles Goodson was seated leaning over a coffee table where cocaine was located and a propane torch was going with a cocaine bomb over it. (R.6-7). Charles Goodson was arrested and searched. (R.9).

Located on Charles Goodson's person was the defendant currency and cocaine. (R.10). Charles Goodson requested to have one final hit off the pipe before being transported to jail and offered to show the detectives how to cook cocaine. (R.11).

A loaded gun and beeper were confiscated. (R.12). The gun was located underneath Mr. Goodson's left side and the beeper from the coffee table Mr. Goodson was seated at. (R.12).

#### 9. SUMMARY OF ARGUMENTS

Procedural matters are directory not mandatory. Failure to set this for trial within 20 days of the answer should not be grounds for a dismissal. The defendant filed counterclaims and motions which delayed setting this matter for trial. There is no evidence that this case was not given priority by the trial judge. In fact, Judge Sawaya heard both counsel on various matters before trial. This case was

resolved as early as the calendar would permit.

The search of Charles Goodson's person was proper. He was arrested for committing a public offense in the presence of a peace officer. The search was no more intrusive than necessary and the officer was lawfully on the premises where the arrest took place.

Property that is used or intended for use in violation of Utah Code, Section 58-37-13 (1988) is forfeitable to the State of Utah to be disposed of in accordance with that statute. At the time of the illegal use, the state's title vests. This vesting precludes a subsequent transfer of the property to any person for any purpose.

At trial, the evidence clearly showed that the funds in question were used or intended for use to violate the controlled substances act. The state relied upon the rebuttable presumption afforded to it and the burden was upon the claimant to come forward with credible evidence. The trier of fact ruled that the claimant failed to come forward and ruled that by a preponderance of evidence the state was entitled to forfeiture.

The state's title to the seized items vested at the time of the illegal act. The property itself is tainted upon the commission of the offense and any attempted transfer is null and void. To allow otherwise would encourage violators to

transfer their title and effectively put the tainted property out of the reach of the state.

Forfeitable items may not be used to pay for attorney fees. Allowing a claimant to use illegally obtained funds to pay for attorney fees would be allowing him to profit from his wrongs. Any incentive to end the illegal behavior would be gone. Also, it does not violate a right to choice of counsel. This action is a civil proceeding. Mr. Goodson could have obtained counsel that he could afford if he wished to have an attorney represent him in this matter.

#### 10. DETAIL OF ARGUMENT

##### I. PROCEDURAL MATTERS ARE DIRECTORY NOT MANDATORY

Section 58-37-13(8)(g) of the Utah Code provides that "when an answer to a complaint or petition appears of record at the end of twenty (20) days, the court shall set the matter for hearing within twenty (20) days." The language of the statute is clearly directory and not mandatory.

Generally, where procedural steps are enumerated in a statute, they are construed liberally to permit the case to proceed on its merits. The Supreme Court of Idaho, when addressing the very same issue in interpreting the Idaho Controlled Substances Act, stated as follows:

Where the prescribed procedure is not  
the essence of the thing to be

accomplished the statute is generally considered directory and not mandatory. A contrary conclusion would be disruptive to an orderly administration of justice and would impair the flexibility the trial courts must have in setting cases for trial. In the absence of a showing of substantial prejudice the complaint should not be dismissed merely because it was not given priority over other civil cases, if in fact such priority was not given. State v. 1955 Willys, 595 P.2d 299, 303 (Id. 1979).

The Supreme Court of Utah in State v. 1983 Pontiac, 717 P.2d 1338, 1340 (Utah 1986) stated as follows: "The fact that the hearing was not set within twenty (20) days was clearly a fact that the court could consider in disposing of the petition."

A review of the file in this case shows that there has been no unnecessary delay and any delay that the defendant perceives was caused by the defendant. There is no allegation that the matter was not set as early as Judge Sawaya's calendar would allow.

The affidavits filed in support of the motion to dismiss indicate that the alleged unavailable witness left the jurisdiction as early as July 7, 1988. (Affidavit in Support of Motion to Dismiss). This would have been a mere twenty four days from the filing of the final verified answer in this case and eighteen days from the summary judgment order. Therefore,

defendant's argument that the hearing was not held within the twenty-day provision of the statute is clearly not grounds for a dismissal in this case.

II. THE STATE'S INTEREST IN THE DEFENDANT CURRENCY VESTED AT THE TIME OF THE ILLEGAL ACT

Richard Leedy, the attorney for the defendant property, claims that the currency was assigned to him for attorney's fees. (R.17).

Utah Code, Section 58-37-13 is clear:

"The following are subject to forfeiture, and no property right exists in them . . . everything of value furnished or intended to be furnished in exchange for a controlled substance in violation of this act, all proceeds traceable to any violation of this act, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this act."

A civil forfeiture proceeding is an in rem action against property. The property itself has committed the wrong. Because the property is considered tainted upon the commission of the wrongful act, the interest of the government vests at the time of the act. U.S. v. Nichols, 841 F.2d 1485, 1486 (10th Cir. 1988). "Illegal use immediately vests title to the property in the sovereign, and cuts off the rights of third parties to obtain legally protectable interests in the property." U.S. v. \$41,305.00 In Currency and Traveler's Checks, 802 F.2d 1339, 1346 (11th Cir. 1986). Therefore,

Charles Goodson had no interest to assign.

III. SEIZED PROPERTY MAY NOT BE USED  
FOR ATTORNEY'S FEES

The Tenth Circuit specifically held in U.S. v. Nichols, 841 F.2d at 1505 that "allowing a defendant to use illegally obtained assets to hire an attorney would adversely affect an important public interest. There is a public interest in stripping defendants of the economic power they derive from illegal activity and part of that undeserved power may be the ability to command high priced legal talent." That court further held that civil forfeiture does not violate the right to choice of counsel. U.S. v. Nichols, id at 1509.

IV. CHARLES GOODSON WAS SEARCHED  
PURSUANT TO AN ARREST

The Salt Lake County Sheriff's Office was executing a warrant at 1545 S. Green Street in Salt Lake County. (R.4-5). The officers were legally on the premises. Upon entering, Charles Goodson was found leaning over a lighted propane torch which was cooking cocaine. (R.6-7). Charles Goodson was arrested. (R.9). It is clear that a peace officer may make an arrest without a warrant when any public offense is committed in his presence or he has reasonable cause to believe a felony has been committed and the person arrested is believed to have committed it. Utah Code, Section 77-7-3 (1988).

It is clear that Charles Goodson was committing a public offense in the presence of Kendra Herlin, a peace officer of the state. (R.4, 7). He was smoking cocaine. (R.7). A person may be searched incident to an arrest. An individual in custody may be searched without a warrant to determine whether that individual has a weapon or possesses evidence which may be concealed or destroyed. The scope of such search incident to arrest is to insure against destruction of evidence and to protect an officer from harm. State v. Banks, 720 P.2d 1380 (Utah 1986). Therefore, the search of Charles Goodson was proper.

V. CHARLES GOODSON FAILED TO REBUT THE PRESUMPTION THAT THE DEFENDANT PROPERTY WAS DRUG RELATED

The search of Charles Goodson yielded cocaine and \$9,199.00 from his pockets (R.10). A beeper was located on the table in front of him. (R.12). Underneath the left side of Charles Goodson, a loaded .44 magnum was seized. (R.10). Utah Code, Section 58-37-13 (1988) provides that:

"everything of value furnished or intended to be furnished in exchange for a controlled substance in violation of this act, all proceeds traceable to any violation of this act, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this act; but:

\* \* \*

there is a rebuttable presumption that all money, coins, and currency found in

proximity to forfeitable controlled substances, drug manufacturing or distributing paraphernalia, or to forfeitable records of the importation, manufacture, or distribution of controlled substances are forfeitable under this section; the burden of proof is upon claimants of the property to rebut this presumption."

The record clearly indicates that the money seized was in proximity to cocaine. (R.10). The burden was upon the defendant to come forward with credible evidence to rebut the presumption of forfeiture. In Re Indian Trail Trunk Sewer v. City of Spokane, 670 P.2d 675, 677 (Wash. App. 1983).

Charles Goodson alleged that the \$7,500.00 was won in Wendover, gambling. (R.15). Judge Sawaya found that Charles Goodson's testimony was not credible. (Findings of Fact and Conclusions of Law, P.3). "Where the evidence is in conflict, we defer to the trial court's first-hand assessment of the witnesses' credibility and assume that the trial court believed those aspects of the evidence which support its findings." Hal Taylor Associates v. Union America, 657 P.2d 743, 749 (Utah 1982).

The gun was seized pursuant to Utah Code, Section 58-37-13(1)(i) which provides that property used for protecting a controlled substance is forfeitable. The forfeiture of the gun was not contested at trial and its forfeiture is not contested in this appeal.



The defendant beeper was seized from the coffee table directly in front of Charles Goodson. (R.12). The seizure was proper pursuant to Utah Code, Section 58-37-13(1)(b) which provides for forfeiture of equipment used for delivering a controlled substance. The forfeiture of the beeper is not disputed.

The record clearly demonstrates that all the defendant items are subject to seizure and forfeiture to the State of Utah. The trial court's decision is supported by the record, Utah law and case law.

#### VI. RICHARD LEEDY'S TESTIMONY WAS IMPROPER

Richard Leedy should not have been allowed to testify in the trial of this matter after the objection raised by the state's counsel. (R.22-28). Rule 3.7 of the Rules of Professional Conduct prohibit a lawyer from acting as advocate and witness unless he meets one of the exceptions. Richard Leedy did not claim he fell into any enumerated exception. (R.22-28).

Utah Code, Section 58-37-13(9)(h) provides that "proceedings of this section are independent of any other proceedings, whether civil or criminal, under this act or the laws of this state." Emphasis added. Mr. Leedy's testimony alleged that Howard Lemcke agreed to return the currency in exchange for a plea by Charles Goodson on criminal charges.

(R.24). If in fact an agreement existed, which the trial court did not find, then it was null and void.

11. CONCLUSION

For all the foregoing reasons, the State of Utah, respectfully requests that this court affirm the decision of the trial court allowing the forfeiture of the defendant currency.

DATED this 31 day of March, 1989.

DAVID E. YOCOM  
Salt Lake County Attorney



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RENA BARBIERO  
Deputy County Attorney  
Attorney for Respondent

12. ADDENDUM

- A. Utah Code, Section 58-37-13 (1988) et seq.
- B. Affidavit in Support of Motion to Dismiss.
- C. Findings of Fact and Conclusions of Law.

with federal and other state agencies in discharging their responsibilities concerning traffic in controlled substances and in suppressing the abuse of controlled substances. To this end, they are authorized to:

(a) Arrange for the exchange of information between governmental officials concerning the use and abuse of dangerous substances.

(b) Co-ordinate and co-operate in training programs in controlled substance law enforcement at the local and state levels.

(c) Co-operate with the Federal Bureau of Narcotics and Dangerous Drugs and the Utah Bureau of Investigation by establishing a centralized unit which will receive, catalog, file, and collect statistics, including records of drug-dependent persons and other controlled substance law offenders within the state, and make the information available for federal, state, and local law enforcement purposes.

(d) Conduct programs of eradication aimed at destroying the wild or illicit growth of plant species from which controlled substances may be extracted.

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#### 58-37-13. Property subject to forfeiture — Seizure — Procedure.

(1) The following are subject to forfeiture, and no property right exists in them:

(a) all controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this act;

(b) all raw materials, products, and equipment of any kind used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this act;

(c) all property used or intended for use as a container for property described in Subsections (1)(a) and (1)(b);

(d) all hypodermic needles, syringes, and other paraphernalia, not including capsules used with health food supplements and herbs, used or intended for use to administer controlled substances in violation of this act;

(e) all conveyances including aircraft, vehicles, or vessels used or intended for use, to transport, or in any manner facilitate the transportation, sale, receipt, simple possession, or concealment of property described in Subsections (1)(a) or (1)(b), except that:

(i) a conveyance used by any person as a common carrier in the transaction of business as a common carrier may not be forfeited under this section unless it appears that the owner or other person in charge of the conveyance was a consenting party or privy to violation of this act;

(ii) a conveyance may not be forfeited under this section by reason of any act or omission committed or omitted without the owner's knowledge or consent; and

(iii) any forfeiture of a conveyance subject to a bona fide security interest is subject to the interest of a secured party who could not have known in the exercise of reasonable diligence that a violation would or did take place in the use of the conveyance;

(f) all books, records, and research, including formulas, microfilm, tapes, and data used or intended for use in violation of this act;

(g) everything of value furnished or intended to be furnished in exchange for a controlled sub-

stance in violation of this act, all proceeds traceable to any violation of this act, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this act; but:

(i) An interest in property may not be forfeited under this subsection if the holder of the interest did not know of the act which made the property subject to forfeiture, or did not willingly consent to the act;

(ii) There is a rebuttable presumption that all money, coins, and currency found in proximity to forfeitable controlled substances, drug manufacturing or distributing paraphernalia, or to forfeitable records of the importation, manufacture, or distribution of controlled substances are forfeitable under this section; the burden of proof is upon claimants of the property to rebut this presumption;

(h) all imitation controlled substances as defined in the Imitation Controlled Substances Act; and

(i) all warehousing, housing, and storage facilities, or interest in real property of any kind used, or intended for use, in producing, cultivating, warehousing, storing, protecting, or manufacturing any controlled substances in violation of this chapter, except that:

(i) any forfeiture of a housing, warehousing, or storage facility or interest in real property is subject to the bona fide security interest of a party who could not have known in the exercise of reasonable diligence that a violation would take place on the property;

(ii) an interest in property may not be forfeited under this subsection if the holder of the interest did not know of the act which made the property subject to forfeiture, or did not willingly consent to the act;

(iii) unless the premises are used in producing, cultivating, or manufacturing controlled substances, a housing, warehousing, or storage facility or interest in real property may not be forfeited under this section unless cumulative sales of controlled substances on the property within a two-month period total or exceed \$1,000, or the street value of any controlled substances found on the premises at any given time totals or exceeds \$1,000. A narcotics officer experienced in controlled substances law enforcement may testify to establish the street value of the controlled substances for purposes of this subsection.

(2) Property subject to forfeiture under this act may be seized by any peace officer of this state upon process issued by any court having jurisdiction over the property. However, seizure without process may be made when:

(a) the seizure is incident to an arrest or search under a search warrant or an inspection under an administrative inspection warrant;

(b) the property subject to seizure has been the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceeding under this act;

(c) the peace officer has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(d) the peace officer has probable cause to believe that the property has been used or intended to be used in violation of this act.

(3) In the event of seizure under Subsection (2), proceedings under Subsection (4) shall be instituted promptly.

(4) Property taken or detained under this section is not repleviable but is in custody of the law enforcement agency making the seizure, subject only to the orders and decrees of the court or the official having jurisdiction. When property is seized under this act the appropriate person or agency may:

(a) place the property under seal;

(b) remove the property to a place designated by it or the warrant under which it was seized; or

(c) take custody of the property and remove it to an appropriate location for disposition in accordance with law.

(5) All substances listed in Schedule I that are possessed, transferred, distributed, or offered for distribution in violation of this act are contraband and shall be seized and summarily forfeited to the state. Similarly, all substances listed in Schedule I which are seized or come into the possession of the state are contraband and shall be summarily forfeited to the state if the owners are unknown.

(6) All species of plants from which controlled substances in Schedules I and II are derived which have been planted or cultivated in violation of this act, or of which the owners or cultivators are unknown, or are wild growths, may be seized and summarily forfeited to the state.

(7) Failure, upon demand by the department or its authorized agent, of any person in occupancy or in control of land or premises upon which species of plants are growing or being stored, to produce an appropriate license or proof that he is the holder of a license, is authority for the seizure and forfeiture of the plants.

(8) When any property is forfeited under this act by a finding of the court that no person is entitled to recover the property, it shall be deposited in the custody of the Division of Finance. Disposition of all property is as follows:

(a) The state may include in its complaint seeking forfeiture, a request that the seizing agency be awarded the property. Upon a finding that the seizing agency is able to use the forfeited property in the enforcement of controlled substances laws, the district court having jurisdiction over the case shall award the property to the seizing agency. The seizing agency shall pay to the prosecuting agency the legal costs incurred in filing and pursuing the forfeiture action. Property forfeited under this section may not be applied by the court to costs or fines assessed against any defendant in the case.

(b) The seizing agency, or if it makes no application, any state agency, bureau, county, or municipality, which demonstrates a need for specific property or classes of property subject to forfeiture shall be given the property for use in enforcement of controlled substances laws upon the payment of costs to the county attorney for legal costs for filing and pursuing the forfeiture and upon application for the property to the director of the Division of Finance. The application shall clearly set forth the need for the property and the use to which the property will be put.

(c) The director of the Division of Finance shall review all applications for property submitted under Subsection (8)(b) and, if the seizing

agency makes no application, make a determination based on necessity and advisability as to final disposition and shall notify the designated applicant or seizing agency, where no application is made, who may obtain the property upon payment of all costs to the appropriate department. The Division of Finance shall in turn reimburse the prosecuting agency or agencies for costs of filing and pursuing the forfeiture action, not to exceed the amount of the net proceeds received for the sale of the property. Any proceeds remaining after payment shall be returned to the seizing agency or agencies.

(d) If no disposition is made upon an application under Subsection (8)(a) or (b), the director of the Division of Finance shall dispose of the property by public bidding or where deemed appropriate, by destruction. Proof of destruction shall be upon oath of two officers or employees of the department having charge of the property, and verified by the director of the department or his designated agent.

(9) When any property is subject to forfeiture, a determination for forfeiture to the state shall be made as follows:

(a) A complaint verified on oath or affirmation shall be prepared by the county attorney where the property was seized or is to be seized and filed in the district court. The complaint shall describe with reasonable particularity:

(i) the property which is the subject matter of the proceeding;

(ii) the date and place of seizure, if known; and

(iii) the allegations which constitute a basis for forfeiture.

(b) Upon filing the complaint, the clerk of the district court shall forthwith issue a warrant for seizure of the property which is the subject matter of the action and deliver it to the sheriff for service, unless the property has previously been seized without a warrant, under Subsection 58-37-13(2).

(c) Notice of the seizure and intended forfeiture shall be filed with the county clerk, and served together with a copy of the complaint, upon all persons known to the county attorney to have a claim in the property by one of the following methods:

(i) upon each claimant whose name and address is known, at the last known address of the claimant, or upon each owner whose right, title, or interest is of record in the Division of Motor Vehicles, by mailing a copy of the notice and complaint by certified mail to the address given upon the records of the division, which service is deemed complete even though the mail is refused or cannot be forwarded; and

(ii) upon all other claimants whose addresses are unknown, but who are believed to have an interest in the property, by one publication in a newspaper of general circulation in the county where the seizure was made.

(d) Except under Subsection (8)(c), any claimant or interested party shall file with the court a verified answer to the complaint within 20 days after service has been obtained.

(e) When property is seized under this act, any interested person or claimant of the property, prior to being served with a complaint under this

section, may file a petition in the district court for release of his interest in the property. The petition shall specify the claimant's interest in the property and his right to have it released. A copy shall be served upon the county attorney in the county of the seizure, who shall answer the petition within 20 days. A petitioner need not answer a complaint of forfeiture.

(f) After 20 days following service of a complaint or petition for release, the court shall examine the record and if no answer is on file, the court shall allow the complainant or petitioner an opportunity to present evidence in support of his claim and order forfeiture or release of the property as the court determines. If the county attorney has not filed an answer to a petition for release and the court determines from the evidence that the petitioner is not entitled to recovery of the property, it shall enter an order directing the county attorney to answer the petition within ten days. If no answer is filed within that period, the court shall order the release of the property to the petitioner entitled to receive it.

(g) When an answer to a complaint or petition appears of record at the end of 20 days, the court shall set the matter for hearing within 20 days. At this hearing all interested parties may present evidence of their rights of release of the property following the state's evidence for forfeiture. The court shall determine by a preponderance of the evidence the issues in the case and order forfeiture or release of the property as it determines.

(h) Proceedings of this section are independent of any other proceedings, whether civil or criminal, under this act or the laws of this state.

(i) When the court determines that claimants have no right in the property in whole or in part, it shall declare the property to be forfeited and direct it to be delivered to the custody of the Division of Finance. The division shall dispose of the property under Subsection (8).

(j) When the court determines that property, in whole or in part, is not subject to forfeiture, it shall order release of the property to the proper claimant. If the court determines that the property is subject to forfeiture and release in part, it shall order partial release and partial forfeiture. When the property cannot be divided for partial forfeiture and release, the court shall order it sold and the proceeds distributed:

(i) first, proportionally among the legitimate claimants;

(ii) second, to defray the costs of the action, including seizure, storage of the property, legal costs of filing and pursuing the forfeiture, and costs of sale; and

(iii) third, to the Division of Finance for the General Fund.

(k) In a proceeding under this section where forfeiture is declared, in whole or in part, the court shall assess all costs of the forfeiture proceeding, including seizure and storage of the property, against the individual or individuals whose conduct was the basis of the forfeiture, and may assess costs against any other claimant or claimants to the property as appropriate. 1987

**58-37-14. Resort for illegal use or possession of controlled substances deemed common nuisance — District court power to suppress and enjoin.**

(1) Any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or other place to which users or possessors of any controlled substances, listed in schedules I through V, resort or where use or possession of any substances violates this act, or which is used for illegal keeping, storing, or selling any substances listed as controlled substances in schedules I through V shall be deemed a common nuisance. No person shall open, keep, or maintain any such place.

(2) The district court has the power to make any order necessary or reasonable to suppress any nuisance and to enjoin any person or persons from doing any act calculated to cause, or permit the continuation of a nuisance. 1971

**58-37-15. Burden of proof in proceedings on violations — Enforcement officers exempt from liability.**

(1) It is not necessary for the state to negate any exemption or exception set forth in this act in any complaint, information, indictment or other pleading or trial, hearing, or other proceeding under this act, and the burden of proof of any exemption or exception is upon the person claiming its benefit.

(2) In absence of proof that a person is the duly authorized holder of an appropriate license, registration, order form, or prescription issued under this act, he shall be presumed not to be the holder of a license, registration, order form, or prescription, and the burden of proof is upon him to rebut the presumption.

(3) No liability shall be imposed upon any duly authorized state or federal officer engaged in the enforcement of this act who is engaged in the enforcement of any law, municipal ordinance, or regulation relating to controlled substances. 1971

**58-37-16. Powers to order testimony of witnesses or production of evidence — Immunity of witness compelled to testify.**

If the prosecuting attorney or attorney general of the state of Utah determines that the testimony of any witness or the production of any book, paper, or other evidence by any witness before a grand jury or court of the state of Utah involving any violation of this chapter is necessary, he shall make application to the court that the witness be instructed to testify or produce evidence subject to the provisions of this section and upon order of the court the witness shall not be excused from testifying or producing books, papers, or other evidence on the ground that the testimony or evidence may tend to incriminate him or subject him to forfeiture. No witness shall be prosecuted or subjected to any penalty or forfeiture on account of any transaction, matter, or thing concerning which he is compelled to testify after having claimed his privilege against self-incrimination or produce evidence nor shall any such evidence be used in any criminal proceeding against him in any court except prosecutions described in this section. No witness is exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion. 1971

**58-37-17. Judicial review.**

(1) Any person aggrieved by a department's final order may obtain judicial review.

(2) Venue for judicial review of informal adjudicative proceedings is in the district court of Salt Lake County. 1987

Richard J. Leedy  
Attorney for Plaintiff  
230 East 3rd South  
Salt Lake City, Utah 84111  
Telephone: (801) 359-1767

AUG 02 1988

COUNTY ATTORNEY  
GOVERNMENT SERVICES

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,	)	
	)	
Plaintiff,	)	AFFIDAVIT IN SUPPORT OF
	)	MOTION TO DISMISS
vs.	)	
	)	
NINE THOUSAND ONE HUNDRED	)	
AND NINETY-NINE DOLLARS,	)	Civil No. C88-1078
UNITED STATES CURRENCY,	)	
ONE PAGER SERIAL #0701843,	)	
AND ONE 4" SMITH AND WESSON	)	
44 MAGNUM GUN MODEL 29,	)	
	)	
Defendant.	)	Honorable James S. Sawaya
	)	

COUNTY OF SALT LAKE	)	
	)	: ss.
STATE OF UTAH	)	

Charles Goodsen, being first put on his oath, deposes and says:

1. That I am an interested party;
2. That my prior girlfriend was Lisa Martinez.
3. She accompanied me on the day prior to seizure to Wendover, Nevada, where I won most of the money seized from in this matter.
4. She could corroborate my testimony regarding the source of the money seized in this matter being non-cocaine related.

5. Lisa Martinez was also the girl who delivered the Stipulation to Howard Lemcke in this matter.


6. She would dispute Mr. Lemcke's testimony that he ask her if the Stipulation involved the \$60.00 which was in his possession the second time I was arrested rather than the approximate \$10,000.00 which was on me the first time I was arrested.

7. She would, in fact, testify that Lemcke asked her if I had \$10,000.00 on me the second time I was arrested like the first time and she responded no, I had \$60.00.

8. Approximately two to three weeks ago, Lisa Martinez moved to Wisconsin; I have contacted her and she is unwilling to come to Salt Lake City to testify in my behalf and even if she were, neither she nor I have the funds to pay for her travel.

  
CHARLES GOODSSEN

Subscribed and sworn to before me this 28 day of  
July, 1988.

  
Notary Public

Residing in: Salt Lake County, UT

My Commission Expires:

4-4-97



FILED IN CLERK'S OFFICE  
SALT LAKE COUNTY, UTAH

OCT 13 3 37 PM '88

H. DUDON HINDLEY CLERK  
3rd DIST. COURT  
BY [Signature]  
DEPUTY CLERK

DAVID E. YOCOM  
Salt Lake County Attorney  
RENA BARBIERO #5033  
Deputy County Attorney  
2001 South State Street, S-3400  
Salt Lake City, Utah 84190-1200  
Telephone: 468-3421

---

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---

THE STATE OF UTAH,	)	
	)	FINDINGS OF FACTS
Plaintiff,	)	AND
	)	CONCLUSIONS OF LAW
v.	)	
NINE THOUSAND ONE HUNDRED	)	
AND NINETY NINE DOLLARS,	)	
UNITED STATES CURRENCY,	)	
ONE PAGER SERIAL #0701843,	)	Case No. C88-1078
AND ONE 4" SMITH AND WESSON	)	
44 MAGNUM GUN MODEL 29,	)	
	)	Judge James S. Sawaya
Defendant.	)	

---

Trial was held on the above-captioned case on the 9th day of September, 1988 before the Honorable James S. Sawaya, District Court Judge.

Plaintiff, State of Utah, was represented by Rena Barbiero, Deputy Salt Lake County Attorney. The claimant was represented by Richard J. Leedy.

The parties presented evidence and argument to the Court and the Court having fully considered the same now makes and enters the following:

FINDINGS OF FACTS

1. That jurisdiction is appropriate and this matter is properly before the court.

2. That on January 7, 1988 the property described above, was seized to-wit: \$9,199.00 in cash, cocaine a loaded 44 Magnum gun and pager were found upon and seized from Charles Goodson.

3. That Charles Goodson purported to assign to Richard Leedy the monies seized on January 10, 1988.

4. That Deputy Salt Lake County Howard Lemcke purportedly stipulated to release an unstated sum of money.

CONCLUSIONS OF LAW

Wherefore, having made the foregoing Findings of Fact, the Court now makes, adopts and enters the following:

1. The \$9,199.00, gun, and pager is properly before this court as items subject to forfeiture as defined by Utah Code Annotated, 58-37-13 (1987).

2. Charles Goodson was in possession of the defendant property.

3. The money seized was in close proximity to controlled substances, raising a rebuttable presumption that it is forfeitable.

4. Charles Goodson did not meet his burden of proof in overcoming the States presumption by clear and convincing evidence that the money was not drug related.

5. The State's right to the money vested at the time of seizure and any subsequent transfer or assignment of the money was null and void.

6. The gun was used to protect a controlled substance.

7. The pager was used to facilitate a violation of the Controlled Substances Act.

8. The forfeiture of the claimiant's property is granted.

9. That the Salt Lake County Attorney is entitled to \$1,380.00 to be paid by the Salt Lake County Sheriff's Office for costs incurred in pursuing said forfeiture.

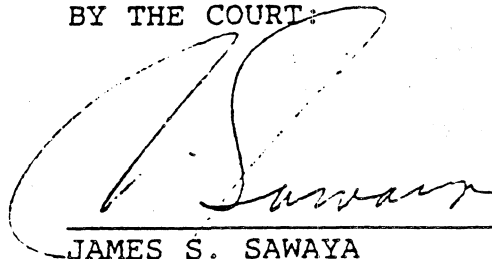
Findings of Facts and Conclusions of Law  
Civil No. C88-1078  
Page four

Let Judgment be entered accordingly:

Done in open Court this 13 day of Oct,

1988.

BY THE COURT:



JAMES S. SAWAYA  
DISTRICT COURT JUDGE

ATTEST  
H. DIXON HINCHLEY

Clerk

  
Deputy Clerk

Approved as to form:

\_\_\_\_\_  
Richard J. Leedy

2241/

AFFIDAVIT OF SERVICE

STATE OF UTAH                    )  
  : ss.  
County of Salt Lake            )

RENA BARBIERO, being duly sworn, states that she is the attorney for Respondent State of Utah and that she served four (4) copies of the Brief of Respondent State of Utah upon Richard J. Leedy, Attorney for Appellant, 245 Vine Street, Suite 302, Salt Lake City, Utah 84103, by delivering true copies thereof, on the 31 day of March, 1989.



RENA BARBIERO  
Deputy County Attorney  
Attorney for Respondent

Subscribed and sworn to before me this 31st day of March, 1989.



NOTARY PUBLIC  
Residing in the State of Utah

My commission expires:

~~November 23, 1990~~ 3-6-92