

1992

State of Utah v. Lonnie Kirkland Masciantonio : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

R. Paul Van Dam; Attorney General; Kris Leonard; Assistant Attorney General; Attorneys for Appellee.

Gary W. Pendleton; Attorney for Appellant.

Recommended Citation

Brief of Appellee, *Utah v. Masciantonio*, No. 920466 (Utah Court of Appeals, 1992).
https://digitalcommons.law.byu.edu/byu_ca1/3430

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

~~UTAH
DOCUMENT
KFU
45.9
1:59
DOCKET NO.~~

BRIEF

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :

Plaintiff/Appellee, : Case No. 920466-CA

v. :

Priority No. 2

LONNIE KIRKLAND MASCIANTONIO, :

Defendant/Appellant.:

BRIEF OF APPELLEE

- - - - -

APPEAL FROM A CONVICTION OF FORGERY, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-501 (1990), IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR WASHINGTON COUNTY, STATE OF UTAH, THE HONORABLE JAMES L. SHUMATE, PRESIDING.

UTAH COURT OF APPEALS
BRIEF

UTAH
DOCUMENT
KFU
50
.A10
DOCKET NO.

920466

R. PAUL VAN DAM (3312)
Attorney General
KRIS LEONARD (4902)
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1022

Attorneys for Appellee

GARY W. PENDLETON (2564)
150 North 200 East, Suite 202
St. George, Utah 84770
Telephone: (801) 628-4411

Attorney for Appellant

FILED

OCT 13 1992

Mary T. ...
Cle. ...
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff/Appellee, : Case No. 920466-CA
v. :
Priority No. 2
LONNIE KIRKLAND MASCIANTONIO, :
Defendant/Appellant.:

BRIEF OF APPELLEE

- - - - -

APPEAL FROM A CONVICTION OF FORGERY, A SECOND
DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN.
§ 76-6-501 (1990), IN THE FIFTH JUDICIAL
DISTRICT COURT IN AND FOR WASHINGTON COUNTY,
STATE OF UTAH, THE HONORABLE JAMES L.
SHUMATE, PRESIDING.

R. PAUL VAN DAM (3312)
Attorney General
KRIS LEONARD (4902)
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1022

Attorneys for Appellee

GARY W. PENDLETON (2564)
150 North 200 East, Suite 202
St. George, Utah 84770
Telephone: (801) 628-4411

Attorney for Appellant

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.	ii
JURISDICTION AND NATURE OF PROCEEDINGS.	1
STATEMENT OF ISSUES PRESENTED ON APPEAL AND STANDARDS OF APPELLATE REVIEW.	1
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES	2
STATEMENT OF THE CASE	3
STATEMENT OF THE FACTS.	4
SUMMARY OF ARGUMENT	5
ARGUMENT	
POINT I THE PLAIN LANGUAGE OF UTAH CODE ANN. § 76-6- 501(3)(B) (1990) IS APPLICABLE TO DEFENDANT'S CONDUCT	6
POINT II THE DISTRICT COURT'S INTERPRETATION OF § 76- 6-501 MAY BE UPHELD UNDER THE PLAIN LANGUAGE OF THE STATUTE, NEGATING REVIEW OF ANY LEGISLATIVE HISTORY	13
POINT III THE LEGISLATIVE INTENT BEHIND § 76-6-501 IS CLEAR FROM THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE STATUTE, OBTIATING THE NEED FOR A REVIEW OF THE STATUTE'S LEGISLATIVE HISTORY TO INTERPRET ITS PLAIN LANGUAGE	14
CONCLUSION.	16
ADDENDA	

TABLE OF AUTHORITIES

CASES CITED

	Page
<u>Freund v. Utah Power & Light Co.</u> , 793 P.2d 362 (Utah 1990)	8
<u>North Carolina v. Alford</u> , 400 U.S. 25, 91 S. Ct. 160 (1970)	4
<u>People v. Korsen</u> , 459 N.Y.S. 2d 380 (1983)	8
<u>State v. Allegra</u> , 129 N.H. 720, 533 A.2d 338 (N.H. 1987)	8, 9
<u>State v. Bryan</u> , 709 P.2d 257 (Utah 1985)	15
<u>State v. Duran</u> , 772 P.2d 982 (Utah App. 1989)	15
<u>State v. Jaimez</u> , 817 P.2d 822 (Utah App. 1991)	1, 7, 13
<u>State v. Jones</u> , 735 P.2d 399 (Utah App. 1987)	7, 13
<u>State v. Moore</u> , 782 P.2d 497 (Utah 1989)	11
<u>State v. Serpente</u> , 768 P.2d 994 (Ut. App. 1989)	7
<u>State v. Sery</u> , 758 P.2d 935 (Utah App. 1988)	4
<u>State v. Shondel</u> , 22 Utah 2d 343, 453 P.2d 146 (1969)	6, 13, 15, 16
<u>State v. Singh</u> , 819 P.2d 356 (Utah App.), <u>cert.</u> <u>denied</u> , 832 P.2d 476 (Utah 1992)	1, 7, 8, 10, 13
<u>State v. Stromberg</u> , 783 P.2d 54 (Utah App. 1989).	16
<u>State v. Vogt</u> , 824 P.2d 455 (Utah App. 1991)	15
<u>Village Inn Apartments. v. State Farm Fire & Casualty Co.</u> , 790 P.2d 581 (Utah App. 1990)	8

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Code Ann. § 76-6-412 (1990)	14
Utah Code Ann. § 76-6-501 (1990)	1, 2, 3, 6, 8, 10, 13-15
Utah Code Ann. § 78-2a-3 (1992)	1

OTHER AUTHORITIES

WAYNE R. LAFAFVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL
LAW § 8.7 (1986)11

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff/Appellee, : Case No. 920466-CA
v. :
Priority No. 2
LONNIE KIRKLAND MASCIANTONIO, :
Defendant/Appellant.:

BRIEF OF APPELLEE
- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a judgment and sentence entered upon a no contest plea to the charge of forgery, a second degree felony, in violation of Utah Code Ann. § 76-6-501 (1990).

This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(f) (1992).

STATEMENT OF ISSUES PRESENTED ON APPEAL

AND STANDARDS OF APPELLATE REVIEW

The sole issue presented on appeal is whether the trial court abused its discretion in denying defendant's motion to quash the information based on its interpretation of Utah Code Ann. § 76-6-501 (1990). This Court reviews a trial court's statutory determination for correctness, according it no particular deference. State v. Singh, 819 P.2d 356, 359 (Utah App.), cert. denied, 832 P.2d 476 (Utah 1992); State v. Jaimez, 817 P.2d 822, 826 (Utah App. 1991).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Code Ann. § 76-6-501 (1990):

(1) A person is guilty of forgery if, with purpose to defraud anyone, or with knowledge that he is facilitating a fraud to be perpetrated by anyone, he:

(a) Alters any writing of another without his authority or utters any such altered writing; or

(b) Makes, completes, executes, authenticates, issues, transfers, publishes, or utters any writing so that the writing or the making, completion, execution, authentication, issuance, transference, publication or utterance purports to be the act of another, whether the person is existent or nonexistent, or purports to have been executed at a time or place or in a numbered sequence other than was in fact the case, or to be a copy of an original when no such original existed.

(2) As used in this section "writing" includes printing or any other method of recording information, checks, tokens, stamps, seals, credit cards, badges, trademarks, money, and any other symbols of value, right, privilege, or identification.

(3) Forgery is a felony of the second degree if the writing is or purports to be:

(a) A security, revenue stamp, or any other instrument or writing issued by a government, or any agency thereof; or

(b) A check with a face amount of \$100 or more, an issue of stocks, bonds, or any other instrument or writing representing an interest in or claim against property, or a pecuniary interest in or claim against any person or enterprise.

(4) Forgery is a felony of the third degree if the writing is or purports to be a check with a face amount of less than \$100; all other forgery is a class A misdemeanor.

The text of any other relevant constitutional, statutory, or rule provisions pertinent to the resolution of the issue presented on appeal is contained in the body of this brief.

STATEMENT OF THE CASE

Defendant, Lonnie Kirkland Masciantonio, was charged with forgery, a second degree felony, in violation of Utah Code Ann. § 76-6-501 (1990) (R. 1).¹ During the preliminary hearing, defendant presented a verbal motion to quash the information supported by a written memorandum, urging that the charged offense constituted a class A misdemeanor, not a second degree felony (R. 30). The court denied the motion, specifically finding that the offense was properly charged as a second degree felony because the written instrument represented "a pecuniary interest in or claim against any person or enterprise" pursuant to Utah Code Ann. § 76-6-501 (1990) (R. 20; Addendum A attached hereto). The court then bound the matter over to the district court (R. 30, 33-34).

Defendant renewed her motion to quash in the district court, filing a formal motion supported by two written memoranda (R. 35, 36-37, 38-41, 42-51).² The district judge took judicial notice of the evidence adduced at the preliminary hearing, over which he had presided (R. 53, 64; Arraignment Transcript [hereinafter Arr.] at 5), and explained his "clear recollection

¹ Defendant was married during the proceedings below, and the record was amended by interlineation to reflect her new name of Lonnie Kirkland Nielson (R. 20, 66).

² In the district court, defendant sought to have the information quashed absent the prosecutor's willingness to amend it to reflect a class A misdemeanor (R. 36). For consistency, this brief reflects the "motion to quash" terminology used below, although the State recognizes that the motion is more properly characterized as a motion to dismiss.

of the testimony offered by the State of Utah at the preliminary hearing" (Arr. at 5; Addendum B attached hereto). He then denied the motion, reiterating that the forged document represented "a pecuniary interest in or claim against the enterpris[e in] question here, which happened to be the St. George Radio Shack" (R. 53; Arr. 5-6).

Defendant thereafter entered a no contest plea conditioned on her right to appeal the district court's ruling on her motion in accordance with State v. Sery, 758 P.2d 935 (Utah App. 1988), and North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160 (1970) (R. 53, 54-60, 68; Arr. 17-18). The court accepted the plea (Arr. 18), stayed imposition of the sentence, and placed defendant on probation for 36 months (R. 66-67, 69-71).

STATEMENT OF FACTS

Between June 1990 and April 1991, defendant was employed as assistant manager at Radio Shack in St. George, Utah (Preliminary Hearing Transcript [hereinafter Prelim.] at 3-4). On April 4, 1991, Radio Shack's owner, Al Colf, discovered an invoice which reflected that defendant had put some speakers on layaway and had made a partial payment of \$70.22 to the store's manager on April 2, 1991 (Prelim. at 13, 25-27; see Addendum C for copies of all relevant invoices). A second invoice reflected a second payment of \$202.00, representing the balance owed on the speakers, allegedly made to the same manager on April 6, 1991, at 6:28 p.m. (Prelim. at 13-14, 27-28; Addendum C). Colf also discovered a third invoice which had been written seven minutes

before the second invoice (Prelim. at 10, 12, 14), and which appeared to reflect the signature of a customer, Leslie Church. It reflected that Church had returned to the same store manager two pieces of merchandise and had received a cash refund of \$227.79 (Prelim. at 10, 12, 14, 17; Addendum C). The manager in question was not working during any of the times indicated on the three invoices (Prelim. at 9-10, 15, 28-29, 30), and he denied receiving either of defendant's two payments or handling the Church transaction (Prelim. at 27). Defendant was working during the periods reflected on all the invoices (Prelim. at 10, 15). None of the invoices had been processed pursuant to standard company policy (Prelim. at 7-8), an original sales slip could not be found (Prelim. at 20), and the returned merchandise was missing (Prelim. at 8, 9, 17, 25). The store contacted Leslie Church who denied returning any merchandise to the store (Prelim. at 12, 31-32). The State charged defendant with forgery of the Church receipt, contending that she forged and submitted the receipt to Radio Shack to conceal her theft of cash or merchandise from the company (R. 62).

SUMMARY OF THE ARGUMENT

The district court properly found that the forged invoice represented "a pecuniary interest in or claim against" Radio Shack, thereby establishing the gradation of the offense. The language of § 76-6-501 is clear and unambiguous on its face and plainly proscribes defendant's conduct as a second degree felony. Consequently, the doctrine of eiusdem generis does not

apply, and the statute should be interpreted pursuant to its plain language without the need to look at its legislative history.

The Shondel doctrine does not apply because § 76-6-501 is clear and unambiguous in its application to defendant's offense. Further, the statute does not impose different penalties for identical conduct. Hence, defendant is not entitled to the lesser grade of offense.

ARGUMENT

POINT I

THE PLAIN LANGUAGE OF UTAH CODE ANN. § 76-6-501(3)(B) (1990) IS APPLICABLE TO DEFENDANT'S CONDUCT

In denying defendant's motion to quash, the district court held that the offense constituted a second degree felony because the invoice was an "instrument or writing representing . . . a pecuniary interest in or claim against any person or enterprise" as set forth in Utah Code Ann. § 76-6-501(3)(b) (1990) (R. 53; Arr. 5-6; Addenda A & B). Defendant argues that the phrasing of subsection (3)(b) necessarily limits the "other instrument or writing" to those documents of similar character as issues of corporate stock certificates or bonds (Br. of App. at 5). She contends that because the writing at issue is not of this character, she was entitled to have the charge against her reduced to a class A misdemeanor. This limited interpretation is without merit where the language of the statute is clear on its face and was properly applied by the district court.

This Court reviews a trial court's statutory interpretation for correctness. State v. Singh, 819 P.2d 356, 359 (Utah App.), cert. denied, 832 P.2d 476 (Utah 1992); State v. Jaimez, 817 P.2d 822, 826 (Utah App. 1991). The primary responsibility in statutory construction is "to give effect to the intent of the legislature." Singh, 819 P.2d at 359 (quoting State v. Jones, 735 P.2d 399, 402 (Utah App. 1987)). "Where statutory language is clear and unambiguous, we will not look further to divine legislative intent, but will construe the statute according to its plain language." Singh, 819 P.2d 356, 358; Jaimez, 817 P.2d at 826; Jones, 735 P.2d at 402.

Defendant's interpretation is based on her application of the doctrine of ejusdem generis. That doctrine provides that "where general words follow the enumeration of particular classes of things, the general words will be construed as applying only to things of the same general class as those enumerated." State v. Serpente, 768 P.2d 994, 997 (Ut. App. 1989) (quoting Black's Law Dictionary 464 (5th ed. 1979)). The doctrine only applies when

(1) the statute contains an enumeration by specific words; (2) the members of the enumeration suggest a class; (3) the class is not exhausted by the enumeration; (4) a general reference supplementing the enumeration, usually following it; and (5) there is not clearly manifested an intent that the general term be given a broader meaning than the doctrine requires. It is generally held that the rule of ejusdem generis is merely a rule of construction and is only applicable where legislative intent or language expressing that intent is unclear.

NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.18 (5th ed. 1992). The Utah Supreme Court has voiced agreement with this analysis, holding that the doctrine does not apply absent ambiguity. Freund v. Utah Power & Light Co., 793 P.2d 362, 367 (Utah 1990); Village Inn Apartments. v. State Farm Fire & Casualty Co., 790 P.2d 581, 538-84 & n.2 (Utah App. 1990); see, e.g., Singh, 819 P.2d at 359. Because there is no ambiguity in the statutory language defendant challenges, the doctrine does not apply in this case.

Subsection (3)(b) specifically enumerates 3 types of instruments: a check for \$100 or more, an issue of stocks, and an issue of bonds (see supra at 2 for complete text of statute). Defendant's argument ignores the significance of the legislature's intentional inclusion of a check and focuses only on the stocks and bonds language. However, it is essential to consider all of the language to determine the relevant legislative intent. As defendant points out, a check is not of the same character document as stocks or bonds (Br. of App. at 6-7). See People v. Korsen, 459 N.Y.S. 2d 380, 381-82 (1983) (bank checks are not to be included within a listing of "corporate stock certificates, bonds and the like"). However, all three instruments contain a common element which is identified in the remainder of the subsection: they all represent "an interest in or claim against property, or a pecuniary interest in or claim against any person or enterprise." Utah Code Ann. § 76-6-501(3)(b); see State v. Allegra, 129 N.H. 720, 533 A.2d 338, 341-

42 (N.H. 1987) (attributing the common characteristic noted in the statute to all three of the specifically listed documents). The statute then includes, without an exhaustive listing, all other instruments which possess the same common element. The language clearly indicates that the "other instruments" need only possess the single common characteristic. See Allegra, 533 A.2d at 342 (finding that a document does not fall within the described grade of offense where it is not one of the three documents specifically listed and does not represent the interest or claim identified in the statute and common in the listed documents).

As the district court found, the writing at issue in this case meets this requirement. In the normal course of business, a customer's signature on a properly drafted invoice for returned merchandise represents a claim against Radio Shack for the purchase price of the merchandise which has been returned. When the signed invoice is returned to the store employee, the purchase price is given to the customer in satisfaction of the claim or, if store funds are insufficient, the customer is sent to another location where, upon presentation, the invoice is paid (Prelim. at 6, 22-23). Consequently, an invoice for the return of merchandise represents, however briefly, the customer's pecuniary claim against the business. The forged invoice in this instance purports to represent such an interest and, hence, comes within

the type of instrument whose forgery is intended by the statute to be punished as a second degree felony.

Defendant contends that the invoice is not the type of instrument required by subsection (3)(b) because, unlike stocks and bonds, it was not and could not have been used or negotiated against Radio Shack, apparently because no money was actually paid by Radio Shack in exchange for the invoice (Br. of App. at 7). This argument fails for two reasons. First, the requirement of negotiability stems from defendant's contention that the instrument must be "similar to issues of corporate stock certificates or bonds" (Br. of App. at 5), which argument ignores the plain language of the statute as discussed above. The statute does not require that the forged writing be negotiable; merely that it be a "symbol[] of value, right, privilege, or identification." Utah Code Ann. § 76-6-501(2); cf. Singh, 819 P.2d at 359 (nothing in the statute "suggests that the legislature intended that an instrument be legally effective or complete"). Second, the instrument need not actually represent the interest identified in subsection (3)(b). It is sufficient if the writing "purports to be" an instrument representing the identified interests. Utah Code Ann. § 76-6-501(3). The invoice in this case not only purports to represent a claim by Church against Radio Shack for a refund of \$227.79, but purports to represent Radio Shack's payment of the claim as evidenced by the company's refund policy and the presence of the invoice in the company's records. Even assuming, as defendant claims, that it

factually represents only "an effort to conceal a theft through fabrication of a writing" (Br. of App. at 7), the district court could properly focus on what the invoice, on its face, purports to represent.

Defendant further distinguishes the invoice from the enumeration in subsection (3)(b) as representing the extinguishment of a claim (Br. of App. at 7). This argument appears to require that the forged instrument represent an outstanding interest or claim before it may give rise to a second degree felony charge. This argument is untenable as it would undermine the legislature's intent to punish forgeries of equal magnitude as second degree felonies. The statute's language reflects the legislature's exercise of its prerogative to define the elements and degree of punishment for the crime of forgery. See State v. Moore, 782 P.2d 497, 504-05 (Utah 1989).

Defendant's argument would require that any forged writing constituting a second degree offense which was negotiated or otherwise paid prior to prosecution would be punished as a class A misdemeanor. This is clearly contrary to both the statutory language and any realistic interpretation of the legislative intent behind the statute.

"Forgery is a crime aimed primarily at safeguarding confidence in the genuineness of documents relied upon in commercial and business activity." WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 8.7(5) (1986). The forged document fits within this primary concern as it was routinely

relied upon by the victim business in conducting its daily business activity. The form used to facilitate the forgery was the standard invoice form used by Radio Shack in all its sale and refund transactions. The invoices were used to maintain and update customer mailing lists (Prelim. at 11), to maintain accurate inventory counts (Prelim. at 21), to review individual salesman activity, and for other management purposes (Prelim. at 19). Although the charged offense represents a single transaction of \$227.79, the fact that this method of forgery could easily be conducted on a larger-scale is demonstrated both by the owner's concern for several invoices representing returns for which refunds had been given but no corresponding returned merchandise could be found (Prelim. at 8, 16, 30) and by the fact that the forgery occurred on a document which was readily available in an apparently unlimited supply to all store salesmen (Prelim. at 4, 6-7, 11). The number of forged invoices and the amount of each is limited only by the forger and the company's ability to screen for such forgeries.

Because the commercial invoice at issue in this case purports to represent a claim against and honored by Radio Shack, it satisfies the common condition required by the plain language of subsection (3)(b), and the offense constitutes a second degree forgery. Hence, the trial court properly exercised its discretion in denying defendant's motion to quash the information.

POINT II

THE LEGISLATIVE INTENT BEHIND § 76-6-501 IS
CLEAR FROM THE CLEAR AND UNAMBIGUOUS LANGUAGE
OF THE STATUTE, OBTIATING THE NEED FOR A
REVIEW OF THE STATUTE'S LEGISLATIVE HISTORY
TO INTERPRET ITS PLAIN LANGUAGE

In an argument closely related to her first point, defendant appears to contend that her conduct was not the type of large-scale forgery intended to be addressed by § 76-6-501(3), and that her small-scale forgery is adequately addressed by the theft statute; thus, because the alleged theft would be punishable as a class A misdemeanor, the forgery allegedly committed to conceal the theft should be punished as the same degree of offense (Br. of App. at 10).³

As previously established, the language of § 76-6-501(3)(b) is clear and unambiguous on its face. (See Point I.) Accordingly, this Court should construe the statute according to its plain language and not address the "legislative history" argument suggested by defendant. Singh, 819 P.2d at 358; Jaimez, 817 P.2d at 826; Jones, 735 P.2d at 402.

Defendant also argues that the State in fact seeks only to punish the taking of \$227.79 from Radio Shack and that the theft statute provides the appropriate punishment for a taking of

³ Defendant does not argue that the forgery and theft statutes both apply to prohibit the conduct with which she is charged, thereby entitling her to application of the theft statute pursuant to State v. Shondel, 22 Utah 2d 343, 346, 453 P.2d 146, 148 (1969). She simply equates the punishments for theft and forgery and contends that, based upon the amount of her forgery, she is entitled to the same punishment she would have received for theft of an equal value.

this amount (Br. of App. at 10, citing to Utah Code Ann. § 76-6-412(1)(c) (1990), providing that theft of property valued between \$100 and \$250 is a class A misdemeanor). The State charged and prosecuted defendant for forgery, not theft (R. 1). The fact that defendant may have committed the forgery to conceal the theft and may have realized no additional monetary benefit from the forgery does not require that she be punished solely on the basis of the theft. Further, the amount of the theft cannot be determined from the record on appeal, which contains only part of the three-day preliminary hearing below. Although the record suggests that defendant may have taken cash or merchandise in excess of \$227.79, the amount of the theft is not relevant to her prosecution for forgery. The suggestion that the legislature intended to correlate theft and forgery is further undermined where the forgery statute clearly provides that forgery of a check for less than \$100 constitutes a third degree felony (Utah Code Ann. § 76-6-501(4)), while theft of property valued at less than \$100 constitutes a class B misdemeanor (Utah Code Ann. § 76-6-412(1)(d) (1990)).

POINT III

DEFENDANT WAS PROPERLY SENTENCED FOR A SECOND
DEGREE FELONY IN LIGHT OF THE CLEAR AND
UNAMBIGUOUS LANGUAGE OF § 76-6-501

Defendant argues that because Utah Code Ann. § 76-6-501 is not clear and specific concerning whether her forgery constitutes a second degree felony under subsection (3)(b) or a class A misdemeanor under subsection (4), she is entitled to be

convicted of and sentenced for the class A misdemeanor pursuant to State v. Shondel, 22 Utah 2d 343, 346, 453 P.2d 146, 148 (1969). Shondel dealt with a situation where possession of LSD was punishable by two different statutes, one proscribing the conduct as a misdemeanor and the other as a felony. The Utah Supreme Court remanded the case for resentencing to the lesser penalty. Defendant relies upon the statement in Shondel that "where there is doubt or uncertainty as to which of two punishments is applicable to an offense an accused is entitled to the benefit of the lesser." Shondel, 453 P.2d at 148. Subsequent case law from the Utah Supreme Court and this Court has clarified the holding in Shondel as providing "that if two statutes are wholly duplicative as to the elements of the crime, the law does not permit a prosecutor to exercise the wholly unfettered authority to decide whether the crime should be charged as a misdemeanor or a felony." State v. Bryan, 709 P.2d 257, 263 (Utah 1985); see also State v. Voqt, 824 P.2d 455, 457 (Utah App. 1991); State v. Duran, 772 P.2d 982, 987 (Utah App. 1989) (quoting Bryan, 709 P.2d at 263) ("The application of Shondel is limited to situations where the statutes at issue are 'wholly duplicative as to the elements of the crime. . . .'").

As previously discussed, § 76-6-501 is clear and unambiguous in its application to defendant's offense. (See Point I.) Accordingly, Shondel does not apply, and defendant's argument must fail.

Further, the forgery statute does not impose different penalties for identical conduct where, by the express terms of the statute, conduct that constitutes a second degree felony pursuant to subsection (3) cannot also constitute a class A misdemeanor pursuant to subsection (4). Hence, Shondel does not entitle defendant to the lesser grade of offense. See State v. Stromberg, 783 P.2d 54, 61 (Utah App. 1989).

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm defendant's conviction and sentence.

RESPECTFULLY SUBMITTED this 13th day of October, 1992.

R. PAUL VAN DAM
Attorney General



KRIS C. LEONARD
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing Brief of Appellee was mailed, postage prepaid, to Gary W. Pendleton, attorney for appellant, 150 North 200 East, Suite 202, St. George, Utah 84770, this 13th day of October, 1992.



ADDENDA

ADDENDUM A

GARY W. PENDLETON (2564)
Attorney for Defendant
150 North 200 East, Suite 202
St. George, Utah 84770
Ph: 628-4411

FILED
FIFTH DISTRICT COURT

'92 MAY 27 PM 4 21

WASHINGTON COUNTY

BY

IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR
WASHINGTON COUNTY, STATE OF UTAH

STATE OF UTAH,)	FINDINGS OF FACT AND
)	CONCLUSIONS OF LAW
Plaintiff,)	RE: GRADATION OF OFFENSE
)	
vs.)	
)	
LONNIE KIRKLAND MASCIANTONIO,)	Case No. 911001904
)	(James L. Shumate)
Defendant.)	

The above-entitled matter came on for Preliminary Hearing on January 24, 1992, at which time the Court heard testimony from Richard L. Wright, questioned document examiner. The matter was thereafter continued in order to afford the State opportunity to conduct further investigation of the case and examination of other questioned documents. The matter came on again for Preliminary Hearing on April 30, 1992, during which hearing testimony from Richard L. Wright was concluded and the matter was again continued until on May 1, 1992. The Court having heard the testimony of the witnesses and having received into evidence certain documents, the Court concluded that the Defendant should be bound over for

trial on the charge of Forgery, a Second Degree Felony. In so concluding the Court made the following specific:

FINDINGS OF FACT

1. The alleged forgery is a document which was received as State's Exhibit No. 1, said document purporting to be a receipt signed by one Leslie Church purporting to acknowledge the payment of the sum of \$227.79.

2. The Court finds that there is probable cause to believe that the Defendant made and executed the receipt for the purpose of concealing the theft of cash and/or value from Radio Shack.

3. The Court specifically finds that the alleged forgery does not represent a "security, revenue stamp, or other instrument or writing issued by a government, or agency thereof" as set forth in U.C.A. 76-6-501(3)(a).

4. The court further specifically finds that the alleged forgery does not represent "a check with the face amount of \$100 or more, an issue of stock, bond, or other instrument or writing purporting to represent an interest in or claim against any property" as those terms are defined in U.C.A. 76-6-501(3)(b).

5. However, the Court finds that the alleged forgery does purport to represent "a pecuniary interest in or claim against any . . . enterprise": to wit: Colf's Plumbing, dba Radio Shack.

Based upon the foregoing Findings of Fact the Court make the following:

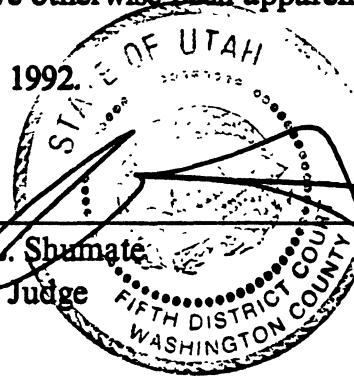
CONCLUSIONS OF LAW

1. The alleged forgery purports to represent "a pecuniary interest in or claim against [an] enterprise" and therefore constitutes a second degree felony.

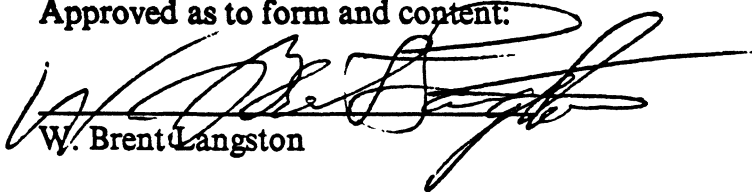
2. There is probable cause to believe that the Defendant made and/or executed said document with a purpose to defraud another, to-wit: for the purpose of concealing shortages in the Radio Shack till which would have otherwise been apparent.

DATED this 27 day of May, 1992.

James L. Shumate
District Judge



Approved as to form and content:


W. Brent Langston

ADDENDUM B

1 Court to do two things: I -- in the context of the way
2 proceedings are now handled in this district, this was the
3 Court that handled the preliminary hearing, and I would ask
4 the Court to first of all, if the Court finds the findings
5 and conclusions that I have prepared for the Court's
6 execution in connection with the bindover order as being
7 findings of fact that the Court did make and conclusions of
8 law that the Court did reach in connection with that
9 decision, to bind my client over to the District Court for
10 trial. And I would ask the Court to execute those findings
11 and conclusions and make them a part of this record.

12 I would also ask the Court, since this Court was the
13 committing magistrate and since the proceedings are -- the
14 preliminary hearing proceedings were in the same court, I
15 would ask the Court to take judicial notice of those
16 proceedings in ruling on the motion to quash. And the
17 reason I ask the Court to do that is that in the event where
18 there is an appeal taken and in the event that we feel some
19 need to supplement that record on appeal, I would like the
20 ability or the availability of the preliminary hearing
21 proceedings on the appeal to the extent that there's some
22 issue that maybe is not addressed in the findings and
23 conclusions, but is pivotal to the decision on appeal.

24 THE COURT: Because the only evidence before the
25 Court in the form of the sworn testimony is the preliminary

1 hearing transcript?

2 MR. PENDLETON: That's right.

3 THE COURT: All right, Mr. Langston, I don't see a
4 problem in following that course. Do you have any
5 difficulty with that?

6 MR. LANGSTON: No, I don't have any problem with
7 that.

8 THE COURT: Let me quickly review the findings and
9 conclusions regarding gradation of offense.

10 I think those findings specifically outline my findings
11 at the preliminary hearing, so I will execute findings of
12 fact and conclusions of law with respect to the findings at
13 the preliminary hearing.

14 Now, with respect with your motion to quash, Mr.
15 Pendleton, the Court specifically takes judicial notice of
16 the preliminary hearing as the District Judge in the Fifth
17 District. I sat as the committing magistrate in this
18 matter. I have a clear recollection of the testimony
19 offered by the State of Utah at the preliminary hearing in
20 this matter, and based upon that testimony at the
21 preliminary hearing, which is the evidentiary basis for the
22 Court's decision on the motion to quash, the Court having
23 specifically found its findings of fact with respect to that
24 issue, I again reiterate in respect to the motion to quash
25 that the forgery, which is the subject of this matter and

1 the prior focus at the preliminary hearing, the purported
2 receipt alleged to have been signed by one Leslie Church,
3 acknowledging the payment of \$227.79 was not a security,
4 revenue, stamp or other instrument in writing issued by the
5 government or agency thereof. It was not a check with a
6 face amount of \$100 or more, an issue of stock, bond or
7 other instrument or writing purporting to represent an
8 interest or claim against any property. I do, however, find
9 that that particular receipt allegedly signed Leslie Church
10 was a document which represented a pecuniary interest in or
11 claim against the enterprising question here, which happened
12 to be the St. George Radio Shack, which is a dba for Colf's
13 Plumbing.

14 And with that finding, your motion to quash is denied
15 based specifically upon the testimony at the preliminary
16 hearing.

17 I think that concludes your record adequately, counsel?

18 MR. PENDLETON: It does with one -- does the Court
19 have my statement of points and authorities in the file?

20 THE COURT: Your statement of points and
21 authorities is here in the file (inaudible, microphone not
22 working.)

23 MR. PENDLETON: Okay. I think that makes my
24 record.

25 It is our intent to enter into an agreement with the

ADDENDUM C

MAXIMUM LAYAWAY PERIOD: 90 DAYS.
 Goods have been removed from store stock and placed in layaway. Customer agrees to make one or more payments, to a total of at least 10% of the selling price, during each 30-day period. Further, customer agrees to pay the full amount due within 90 days from date of purchase, and understands that if customer fails to adhere to these terms, the goods may be returned to stock. Customer may cancel this Layaway at any time during the layaway period and receive a full refund of all payments made.
 The delivered price will be the lower of (a) the selling price on date of layaway or (b) the selling price on the date of payment. GOODS WILL BE RELEASED TO CUSTOMER ONLY UPON PAYMENT OF THE FULL PRICE.
 THE ITEMS HELD IN LAYAWAY

Radio Shack® FRANCHISE/DEALER STORE

STORE OWNED AND OPERATED BY

COLFS PLUMBING INC R/S DLR.
 787 SOUTH BLUFF STREET
 ST GEORGE UT 84770
 PHONE 801-628-4241

*** NO CASH REFUNDS AFTER 5 DAYS ***

SOLD TO

CUSTOMER # 5320
 I. MASCIANTONIO
 210 N. 100 E.
 WASHINGTON UTAH 84780

INVOICE NO.
STORE NO.
DATE
AMOUNT
SUB TOTAL
TAX
TOTAL

CAT NO	DESCRIPTION	QTY.	PRICE	AMOUNT
1RSJ0004032	MACH TWO SPEAKER	2.0	127.46	254.92

All merchandise returned for credit, refund or exchange must be in new and re-saleable condition in original cartons with original packing, accessories, guarantees and instructions, and must be accompanied by this sales slip. Non-Radio Shack merchandise for exchange or refund can only be returned to this store. The above store is an independently owned dealer/franchise. Policies regarding refunds and exchanges are determined by the owner. Radio Shack warranties are limited to the written limited warranty which accompanies merchandise manufactured by or for the Radio Shack Division of Tandy Corporation.

SUB TOTAL 254.92
 TAX 20.30
 TOTAL 270.22

CASH DEPOSIT 70.00
 BALANCE DUE 200.22

SALES OF COMPUTER EQUIPMENT AND SOFTWARE LICENSED ARE SUBJECT TO TERMS AND CONDITIONS IDENTIFIED ON BACK.

STORE COPY

Radio Shack® FRANCHISE/DEALER STORE

STORE OWNED AND OPERATED BY

COLPS PLUMBING INC R/S D.L.R.
 787 SOUTH BLUFF STREET
 ST. GEORGE UT 84770
 PHONE 801-628-4241

*** NO CASH REFUNDS AFTER 5 DAYS ***

TO CUSTOMER # 5320
 MASCIANTONIO
 210 N. 100 E.
 WASHINGTON UTAH 84780

Salesman 6

Time 18:28

INVOICE NO	96085
STORE NO	W872
DATE	04 06 81
TOTAL	

CAT. NO	DESCRIPTION	QTY.	PRICE	AMOUNT
	PREVIOUS PMTS			70.00
	PAYMENT ON LAYAWAY			200.22
	REMAINING BALANCE			-0.00

All merchandise returned for credit, refund or exchange must be in new and re-saleable condition in original cartons with original packing accessories, guarantees and instructions, and must be accompanied by this sales slip. Non Radio Shack merchandise for exchange or refund can only be returned to this store. The above store is an independently owned dealer/franchise. Policies regarding refunds and exchanges are determined by the owner. Radio Shack warranties are limited to the written limited warranty which accompanies merchandise manufactured by or for the Radio Shack Division of Tandy Corporation.

SUB TOTAL
 TAX



SALES OF COMPUTER EQUIPMENT AND SOFTWARE LICENSED ARE SUBJECT TO TERMS AND CONDITIONS IDENTIFIED ON BACK

STORE COPY

Radio Shack® FRANCHISE/DEALER STORE

STORE OWNED AND OPERATED BY

COLFS PLUMBING INC R S DIR.
787 SOUTH BLUFF STREET
ST GEORGE UT 84770
PHONE 801-628-4241

*** NO CASH REFUNDS AFTER 5 DAYS ***

SOLD TO

CHURCH I
SANTA CLARA HEIGHTS
SANTA CLARA UTAH 84765

Salesman 6 Time 18:21

CAT NO	DESCRIPTION	QTY	PRICE	AMOUNT
32001228	DEFECTIVE	-1.0	169.95	-169.95
RS33001070	PRO OMN DYN MKR	-1.0	44.95	-44.95
<i>Lester Church</i>				
				SUB TOTAL
				-214.90
				TAX
				-12.89
				TOTAL
				-227.79

All merchandise returned for credit, refund or exchange must be in new and re-saleable condition in original cartons with original packing, accessories, guarantees and instructions, and must be accompanied by this sales slip. Non-Radio Shack merchandise for exchange or refund can only be returned to this store. The above store is an independently owned dealer/franchise. Policies regarding refunds and exchanges are determined by the owner. Radio Shack warranties are limited to the written limited warranty which accompanies merchandise manufactured by or for the Radio Shack Division of Tandy Corporation.

CASH REFUNDED - 50%

CASH RETURN - RESTOCK CHARGE IN 999 OF

227.79

0.00



SALES OF COMPUTER EQUIPMENT AND SOFTWARE LICENSED ARE SUBJECT TO TERMS AND CONDITIONS IDENTIFIED ON BACK

8991 R1

CONTROL COPY

INVOICE NO
9-1-89
STORE NO
22-1110
DATE
01-01-89