

**Documents Communicating
Salt Lake County District Attorney's Office Policy
Regarding HB461**

1. June 5 Email from Chief Policy Advisor Will Carlson to First Assistant City Prosecutor Scott Fisher- Page 2
2. July 7 Recklessness v. Negligence memo from Scott Fisher to Salt Lake City Attorney's Office- Pages 3-6
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William Carlson

From: William Carlson
Sent: Monday, June 5, 2023 9:52 AM
To: Scott Fisher; Jeffrey William Hall
Cc: Paul Fuller; Paige Williamson
Subject: RE: Firearms at the airport

A person violates Section 76-10-529(2)(a)(ii) if the person recklessly possesses any dangerous weapon or firearm within a secure area of an airport. The “reckless” mental standard applies to both possessing the weapon and being in a secure area of the airport. Under Section 76-2-103(3) a person acts recklessly when the person “is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist...The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of person that an ordinary person would exercise under all the circumstances as viewed from the actor’s standpoint.”

Before last month, the statute also allowed for prosecution of negligent acts, or when the person “ought to be aware of a substantial and unjustifiable risk that the circumstances exist” which also required a gross deviation from an ordinary person’s standard of care.

So before May we prosecuted people who said they forgot the gun was in their luggage because we felt we could prove that person negligently had the gun at the airport. Now we must prove that they recklessly have the gun at the airport. Given the numerous signs at the airport about no weapons being allowed and the hypothetical statement of “I forgot it was in my luggage,” we still have evidence that the gun owner knew at some point the gun was in the luggage they intentionally brought to the airport and knew that they were in a secure area of the airport. So, they knowingly stored a gun in an object that they regularly use to travel through airports and later intentionally took that object to the airport. Doing so without removing the gun is a conscious disregard for a substantial and unjustifiable risk that their gun will end up at the airport. While we can’t prosecute a person who says “I have no idea why that gun is in my bag,” we can still prosecute people who claim they forgot they put the gun in a bag they later brought to the airport. Moreover, officers only need probable cause to issue a citation and “I forgot I put my gun there” still gives officers probable cause to believe the person recklessly brought their gun to the airport when they stored the gun in luggage they later intentionally brought to the airport. Based on that probable cause standard, even if our office ultimately declines to prosecute, the seizure of the weapon by police would be appropriate.

It sounds like one of our prosecutors may have told Captain Bennett they “*would not be prosecuting these cases.*” See email 2 of 4. That seems like an overstatement which understandably raised concerns at the airport. The gap between recklessness and negligence is the gap between twilight and dusk. Some previously filed cases will fall into that gap, but it’s not a large enough change to justify a blanket policy shift for every case by either our office or the police department.

I’m happy to meet to discuss further.

Sincerely,

Will Carlson

Deputy District Attorney
Chief Policy Advisor
35 East 500 South
Salt Lake City, Utah 84111
Tel 385-468-7684

MEMORANDUM

TO: SLC CITY ATTORNEYS' OFFICE, SLC POLICE, SLC AIRPORT POLICE

FROM: SLCO DAO VIA SLC CPO, First Assistant Scott Fisher

RE: AIRPORT WEAPONS ENFORCEMENT

DATE: _____

SLCO DAO POLICY STATEMENT, Courtesy of Will Carlson, SLCO DAO Senior Policy Analyst, as of 6/5/23:

"A person violates Section 76-10-529(2)(a)(ii) if the person recklessly possesses any dangerous weapon or firearm within a secure area of an airport. The "reckless" mental standard applies to both possessing the weapon and being in a secure area of the airport. Under Section 76-2-103(3) a person acts recklessly when the person "is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist...The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of person that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint."

"Before last month, the statute also allowed for prosecution of negligent acts, or when the person "ought to be aware of a substantial and unjustifiable risk that the circumstances exist" which also required a gross deviation from an ordinary person's standard of care.

"So before May we prosecuted people who said they forgot the gun was in their luggage because we felt we could prove that person negligently had the gun at the airport. Now we must prove that they recklessly have the gun at the airport. Given the numerous signs at the airport about no weapons being allowed and the hypothetical statement of "I forgot it was in my luggage," we still have evidence that the gun owner knew at some point the gun was in the luggage they intentionally brought to the airport and knew that they were in a secure area of the airport. So, they knowingly stored a gun in an object that they regularly use to travel through airports and later intentionally took that object to the airport. Doing so without removing the gun is a conscious disregard for a substantial and unjustifiable risk that their gun will end up at the airport. While we can't prosecute a person who says "I have no idea why that gun is in my bag," we can still prosecute people who claim they forgot they put the gun in a bag they later brought to the airport. Moreover, officers only need probable cause to issue a citation and "I forgot I put my gun there" still gives officers probable cause to believe the person recklessly brought their gun to the airport when they stored the gun in luggage they later intentionally brought to the airport. Based on that probable cause standard, even if our office ultimately declines to prosecute, the seizure of the weapon by police would be appropriate.

"* * * * The gap between recklessness and negligence is the gap between twilight and dusk. Some previously filed cases will fall into that gap, but it's not a large enough change to justify a blanket policy shift for every case by either our office or the police department."

The following memorandum is the work product of Landon Evans, Law Clerk, Salt Lake County District Attorneys' Office, reviewed by Scott Fisher, Salt Lake City Prosecutors' Office.

Recklessness v. Negligence

Recklessness: “Aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur.”¹

Negligence: “Ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur.”²

- *Substantial and unjustifiable risk:* “The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor’s standpoint.”
 - This is true for both negligence and recklessness.³

State v. Robinson: “The distinction...is merely one of the degree of perception of the risk”⁴

Recklessness examples:

1. *State v. Glosenger* (Court of Appeals of Utah)⁵
 - a. **Facts:** Defendant was driving from North Dakota to Utah. The defendant was trying to pass a semi-truck but failed to do so before the passing lane ended. She then found herself in the wrong lane and “felt the best option she had was to go into oncoming traffic and try to cross the road versus just applying the brakes and slowing down.” Defendant hit another vehicle head on leading to the deaths of three people.
 - b. **Outcome:** Defendant was found reckless because she made the conscious decision of continuing into oncoming traffic despite the risk even though she had the opportunity to brake and slow down.
2. *State v. Loeffel* (Court of Appeals of Utah)⁶
 - a. **Facts:** After police responded to a domestic dispute, the defendant refused to leave his home and talk to the officers outside. The defendant told the officers they were “fair game” and that “it’s on” if they attempted to approach or enter his home. After the defendant’s girlfriend left the house, the defendant slammed the door leading the officers to believe he had gone to retrieve his gun. The officers approached and found the defendant with his rifle raised and aimed towards them when they entered the house. Defendant was charged with three counts of aggravated assault.
 - b. **Outcome:** Defendant was at least reckless in his conduct because he referred to and raised his gun at police during an intense confrontation. He consciously disregarded the risk of making a show of force against the police.

¹ See UCA 76-2-103 (3)

² See UCA 76-2-103 (4)

³ See UCA 76-2-103 (3) & (4)

⁴ 2003 UT App 1, ¶ 6 n. 2, 63 P.3d 105

⁵ 521 P.3d 915, 919

⁶ 300 P.3d 336, 339.

3. *State v. Shepherd* (Court of Appeals of Utah)⁷
 - a. **Facts:** A woman bled to death in Pineview Reservoir after being hit by a boat. The occupants in the boat left the victim behind and did not stop to render aid. A witness testified that the men had stopped to talk to the victim, but they sped off.
 - b. **Holding:** The defendant was reckless because he was aware of the risk of harm to the woman if he left and he consciously disregarded that risk by failing to act.

Negligence examples:

1. *State v. Holm* (Court of Appeals of Utah)⁸
 - a. **Facts:** Defendant was running late for his early morning shift. He went 70-90 mph in a 50-mph zone and swerved in and out of lanes. His headlights were off. Defendant entered an intersection without noticing the red light and crashed into another vehicle. The young man in the other car died from his injuries. Defendant was convicted on negligent homicide.
 - b. **Outcome:** The court found that the defendant was negligent because he should have been aware of the risks his driving behavior would cause.
2. *State v. Boss* (Court of Appeals of Utah)⁹
 - a. **Facts:** Defendant was traveling westbound on a two-lane highway. The victim saw the defendant trying to pass two other cars by pulling into the victim's lane and increasing speed. The defendant's vehicle cut in and out eventually hitting the victim's vehicle, killing his four-year-old daughter.
 - b. **Outcome:** Defendant was found guilty of negligent homicide because "the substantial and unjustifiable risk of which a person ought to be aware of in a case of negligent homicide is death." The court found that the defendant should have been aware of the risks created by his traffic violations (driving head on into oncoming traffic)
 - i. **The difference between this case and *State v. Glosenger* is that Glosenger perceived the risk and continued onward anyways**
3. *State v. Warden* (Supreme Court of Utah)¹⁰
 - a. **Facts:** Doctor failed to monitor the condition of a premature newborn baby. The doctor knew that the baby suffered from a respiratory condition. The doctor did not notify the parents or hospitalize the baby.
 - b. **Outcome:** Doctor's behavior could be seen as repeated deviations from the appropriate standard of care which could be seen as a substantial and unjustifiable risk of harm or death.

⁷ 357 P.3d 598, 605

⁸ 467 P.3d 934, 941

⁹ 127 P.3d 1236

¹⁰ 813 P.2d 1146

Sim Gill

From: Sim Gill
Sent: Thursday, July 20, 2023 5:42 PM
To: Brown, Mike
Cc: William Carlson; Paul Fuller; Ralph Chamness
Subject: House Bill 461

Dear Chief Brown:

After our meeting yesterday, I wanted to follow up with you as both the City Prosecutor and SLCODA. I want to be very clear and memorialize as to what is our office position in regards to the enforcement of HB461.

1. The law has been changed to allow only two classifications: an Infraction for “reckless” mens rea and a Class A for a “knowing or intentional” violation. The latter cannot be issued by citation it must be screened with the DA’s office. The Infraction can be enforced by a citation upon the discretion of the officer if the elements of a violation are met under the law just like any other criminal infraction.
2. Citations, if issued, on the reckless standard must obviously meet the elements of reckless conduct and are not a substitute for “negligent conduct” that was eliminated by HB461. In other words, negligent conduct is not chargeable and is not a violation of the law.
3. As stated before in the June Memorandum and as I stated yesterday that if a person says something like “I have no idea that the gun was in my bag” that negligence would not be a violation of the law. The only violations for citations must meet the reckless standard in order to be issued.
4. If there is any question about charging, your officers can always ask our office to screen the matter as necessary without the issuance of the citation as you have done before in similar situations. Again there must be a good faith basis factually to believe there is a violation of the law.

Please share this with your staff as you see fit and if you have any further questions, please reach out to me.

Sim Gill
SLCODA/SLC Prosecutor

William Carlson

From: William Carlson
Sent: Friday, July 21, 2023 12:11 PM
To: Kittrell, Mark; Vickery, Hannah
Cc: Ralph Chamness; Sim Gill
Subject: final memo
Attachments: Recklessness v Negligence Memorandum 063023 (final).docx; DA Sim Gill's email to Chief Mike Brown July 20, 2023.pdf

Mark and Hannah,

I've gone over the memo. Other than some font and spacing adjustments, and a couple commas, this attached draft is the same as Scott sent on June 30. I've also attached Sim's email to Chief Brown yesterday which reiterates that while we will proceed with cases with evidence of recklessness, negligent conduct is no longer an offense. As always, we appreciate the role police play in making quick decisions on the ground based on the evidence and circumstances before them.



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