

1978

State of Utah v. Gayle Lee Boone : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

GAYLE LEE BOONE,

Defendant-Appellant.

:
:
:
Case No.
15275
:
:
:

BRIEF OF RESPONDENT

APPEAL FROM A JURY VERDICT OF GUILTY OF
UNLAWFUL DISTRIBUTION OF A CONTROLLED
SUBSTANCE FOR VALUE IN THE THIRD JUDICIAL
DISTRICT COURT, IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH, THE HONORABLE JAMES S. SAWAYA,
JUDGE, PRESIDING

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FILED

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TABLE OF CONTENTS

	Page
STATEMENT OF THE NATURE OF THE CASE-----	1
DISPOSITION IN THE LOWER COURT-----	1
RELIEF SOUGHT ON APPEAL-----	2
STATEMENT OF FACTS-----	2
ARGUMENT	
POINT I: THE UNITED STATES CONSTITUTION AND UTAH CODE ANN. §§ 76-9-401, 402 (SUPP. 1977), ALLOW WARRANT- LESS ELECTRONIC EAVESDROPPING WHERE THE TRANSMITTER IS ATTACHED TO A WILLING INFORMANT- PARTICIPANT-----	4
POINT II: AS VARIOUS RULINGS BY THE TRIAL COURT WERE IN ACCORD WITH LAW, APPELLANT RECEIVED A FAIR TRIAL--	15
POINT A: THE TRIAL COURT PROPERLY RECEIVED INTO EVIDENCE THE UNDERCOVER AGENT'S FULL VERSION OF THE EVENTS WHICH OCCURRED DURING THE PRO- TRACTED NARCOTICS TRANSACTION; SUSTAINING APPELLANT'S OBJECTIONS AND THE GIVING OF APPROPRIATE JURY INSTRUCTIONS CURED OTHER IMPERFECTIONS-----	15
POINT B: THE ALLEGED PROSECUTORIAL MIS- CONDUCT IN CLOSING ARGUMENT WAS ACTUALLY PROPER REBUTTAL IN AN ANALYSIS OF THE TOTAL EVIDENCE PRESENTED AT TRIAL-----	20
POINT C: THE ATTORNEY-CLIENT PRIVILEGE HAVING BEEN CLAIMED FOR VALID REASONS BY BRADLEY RICH, THE TRIAL COURT ACTED PROPERLY IN REFUSING TO REQUIRE THE ATTORNEY TO TESTIFY-----	27
POINT D: THE GRANTING OF A CONTINUANCE RESTS IN THE SOUND DISCRETION OF THE TRIAL JUDGE-----	31
POINT E: AS NO SIGNIFICANT ERRORS OCCURRED IN THE CONDUCT OF THE TRIAL, THERE WAS NO PREJUDICIAL, CUMULATIVE EFFECT-----	33
CONCLUSION-----	34

TABLE OF CONTENTS
(Continued)

CASES CITED	Page
A. v. District Court of Second Judicial District, 550 P.2d 315 (Colo. 1976)-----	29
Goldman v. United States, 316 U.S. 129, 86 L.Ed. 1322 (1942)-----	6
Griffin v. California, 380 U.S. 609, 14 L.Ed.2d 106 (1965)-----	22
Hoffa v. United States, 385 U.S. 293, 17 L.Ed.2d 374 (1966)-----	8-10
Katz v. United States, 389 U.S. 347, 19 L.Ed.2d 576 (1967)-----	5-8
Lewis v. United States, 385 U.S. 206, 17 L.Ed.2d 312 (1966)-----	8-10
Lopez v. United States, 373 U.S. 427, 10 L.Ed.2d 462 (1963)-----	8,10-11
Olmstead v. United States, 277 U.S. 438, 72 L.Ed. 944 (1928)-----	6
People v. Beavers, 393 Mich. 554, 227 N.W.2d 511 (1975), cert. den. 423 U.S. 878, 46 L.Ed.2d 111-----	14
People v. Gilmer, 110 Ill.App.2d 73, 249 N.E.2d 129 (1969)-----	25
People v. Lyons, 50 Cal.2d 245, 324 P.2d 556 (1958)-----	20
People v. Mahan, 1 Utah 205 (1875)-----	29
Salazar v. State, 559 P.2d 66 (Alaska 1976)-----	32,33
State v. Eaton, 569 P.2d 1114 (Utah 1977)-----	22,23,24
State v. Henderson, 205 Kan. 231, 468 P.2d 136 (1970)-----	30
State v. Hodges, 30 Utah 2d 367, 517 P.2d 1323 (1974)-----	16,18,19
State v. Kazda, 540 P.2d 949 (Utah 1975)-----	22
State v. Mitchell, 571 P.2d 1351 (Utah 1977)-----	18,24
State v. Moosman, 542 P.2d 1093 (Utah 1975)-----	32
State v. St. Clair, 3 Utah 2d 230, 282 P.2d 323 (1955)-----	34
State v. Trusty, 28 Utah 2d 317, 502 P.2d 113 (1972)-----	16
State v. White, Utah Case No. 15210, filed March 13, 1978-----	22
State v. Winger, 26 Utah 2d 118, 485 P.2d 1398 (1971)-----	20
United States v. White, 401 U.S. 745, 28 L.Ed.2d 453 (1965)-----	5-11

TABLE OF CONTENTS (Continued)

Page

STATUTES CITED

Utah Code Ann. § 58-37-8(a) (1953), as amended-----	1
Utah Code Ann. § 76-9-401 (Supp. 1977)-----	4,13
Utah Code Ann. § 76-9-402 (Supp. 1977)-----	4,13
Utah Code Ann. § 77-54-1 (1953), as amended-----	13
Michigan Compiled Laws 780.653-----	14

OTHER AUTHORITIES CITED

Jury Instruction No. 6-----	25
Jury Instruction No. 10-----	21
McCormick on Evidence, 2d Ed., 1973, Chap. 1, § 9, p. 15-----	24
Utah Rules of Evidence, Rule 26-----	27-30
Utah Rules of Evidence, Rule 37-----	27
Utah Rules of Evidence, Rule 45-----	18,33
Utah Rules of Evidence, Rule 47-----	18
Utah Rules of Evidence, Rule 48-----	18
Utah Rules of Evidence, Rule 55-----	17

IN THE SUPREME COURT OF THE
STATE OF UTAH

----- : -----
STATE OF UTAH, :
Plaintiff-Respondent, :
-vs- : Case No.
GAYLE LEE BOONE, : 15275
Defendant-Appellant. :

----- : -----
BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with Unlawful Distribution of
a Controlled Substance for Value in violation of Utah Code
Ann. § 58-37-8(a) (1953), as amended.

DISPOSITION IN THE LOWER COURT

Appellant was tried by a jury in the court of the
Honorable James S. Sawaya, Judge, in the Third Judicial
District Court, in and for Salt Lake County, State of Utah.
On June 17, 1977, appellant was found guilty as charged and
sentenced to a term of zero to ten years in the Utah State
Prison.

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmance of the verdict below.

STATEMENT OF FACTS

In January, 1977, Detective Tom Carlson of the Bountiful Police Department met Kayle Shaw, a former drug user, who was incarcerated in the Salt Lake County Jail. Shaw informed Carlson that he wanted to be an undercover narcotics agent (T.17,256). After his release from jail, Shaw had given the narcotics agents a list of approximately fourteen names of persons he had bought drugs from and whom he would help prosecute through controlled narcotics purchases (T.128). During the months of February, March and April, Shaw, known undercover as Mike Days, made controlled buys from nine different persons (T.261).

One such controlled buy was arranged on April 20, 1977, when Shaw and appellant agreed that Shaw would pay the \$1,000 price quoted by appellant for an ounce of THC (T.27,29) (THC is the street name for tetrahydrocannabinol, the active ingredient in marijuana).

On April 27, 1977, at about 5:00 p.m., Shaw called appellant at The Gym, 2827 South 2300 East, an exercise

establishment frequented by appellant (T.346, 350), and asked if appellant had the THC (T.25). Appellant repoded that he had it and told Shaw to come to The Gym to get it (T.25).

Shaw then telephoned Tom Carlson at the office of the State Narcotics Law Enforcement Division at the Utah State Fairgrounds and told him the delivery was set (T.26). On arrival at the Fairgrounds office, Shaw was strip-searched, provided with \$1,000 in bills which had been xeroxed and whose numbers had been separately listed, wired with a hidden, electronic transmitter and given a code phrase to use to report that the buy had been made; all standard procedures for undercover narcotics purchases (T.26, 173,175). Detective Carlson also searched Shaw's car and found no narcotics secreted there (T.173). At approximately 5:45 p.m. Shaw drove directly to The Gym, with six cars and twelve agents following close behind (T.30,174). On arrival at The Gym, appellant told Shaw to take a break because "his man" had not arrived yet (T.35). Shaw drove to the 7-11 Store at 3300 South 2300 East, followed by Agent Allred and Detective Carlson (T.36,180). Once again Shaw was patted down before returning to the exercise club (T.26,180), where appellant remarked that his delivery man would be driving a white Continental. A white Continental Mark IV arrived at 7:15; Shaw went inside the building (T.47). A few minutes later

appellant entered the club and gave Shaw a plastic bag which contained a brown powder (proven to be PCP [phencyclidine, an animal tranquilizer]) (T.308), after Shaw had counted out and given appellant (identified by Shaw at T.28) \$1,000 (T.51). Shaw transmitted the pre-arranged signal to show that the buy had been made (T.52), and appellant and Shaw left the building. Appellant got into the passenger side of the white Continental driven by a man identified by Agent Allred as David Albo, co-defendant in the trial (T.187). Narcotics agents swarmed over the scene, appellant and Albo were arrested, Agent Fullmer recovered from Albo \$980.00 of the money supplied to Shaw, and Shaw was placed under mock arrest (T.53,188,189,288). Agent Moore and Shaw initialed the baggie containing the PCP, sealed it in a yellow packet, and Moore stored it in the evidence locker until it was dispatched to Bruce Beck for a toxicological analysis (T.296,300-301).

ARGUMENT

POINT I

THE UNITED STATES CONSTITUTION AND UTAH CODE ANN. §§ 76-9-401, 402 (SUPP. 1977), ALLOW WARRANTLESS ELECTRONIC EAVESDROPPING WHERE THE TRANSMITTER IS ATTACHED TO A WILLING INFORMANT-PARTICIPANT.

Appellant argues that the plurality opinion of Justice White in United States v. White, 401 U.S. 745, 28 L.Ed.2d 453 (1971), is a misstatement and misanalysis of the law concerning privacy and electronic eavesdropping. He urges this Court to reject this Supreme Court interpretation of case law and constitutional standards and asks this Court to hold that warrantless electronic monitoring of a volunteer participant in a controlled drug purchase violates the constitutional right of privacy and is unreasonable search and seizure of the conversation. Respondent submits that the White decision is correct and logical and represents the current law in the area of privacy and warrantless electronic searches.

In White, a case very similar to the instant case, the trial court overruled appellant's objections to testimony by government agents regarding conversations between the accused and an informant which the agents overheard by monitoring the frequency of a radio transmitter concealed on the informant. The prosecution was unable to locate and produce the informant at trial. Relying on Katz v. United States, 389 U.S. 347, 19 L.Ed.2d 576 (1967), which held inadmissible recordings of conversations made by government agents by means of a listening device attached to the outside of a public

telephone booth, the Seventh Circuit Court of Appeals reversed White's conviction. On certiorari, the United States Supreme Court reversed the Circuit decision.

In an opinion joined by Burger, Chief Justice, Stewart, Justice, and Blackmun, Justice, Mr. Justice White confronted the issue of:

" . . . whether the Fourth Amendment bars from evidence the testimony of governmental agents who related certain conversations which had occurred between defendant White and a government informant, Harvey Jackson, and which the agents overheard by monitoring the frequency of a radio transmitter and concealed on his person." 28 L.Ed.2d at 456.

(Mr. Justice Black concurred and quickly disposed of the Fourth Amendment claim, citing his dissent in Katz v. United States, 389 U.S. at 591, wherein he stated that the framers of the Constitution had not intended to restrict or outlaw use of evidence obtained by eavesdropping, with wiretapping merely a sophisticated form of eavesdropping.)

The Court acknowledged that Katz v. United States, 389 U.S. 347, 19 L.Ed.2d 576 (1967), overruled Olmstead v. United States, 277 U.S. 438, 72 L.Ed. 944 (1928), and Gold v. United States, 316 U.S. 129, 86 L.Ed. 1322 (1942), which held that an actual physical trespass or invasion was required before the Fourth Amendment protections against unreasonable

searches and seizures arose, therefore exempting wiretapping and electronic eavesdropping which originated beyond the curtilage of a home. Katz, supra, held inadmissible recordings obtained from a listening device placed on the outside of a phone booth without defendant Katz's knowledge or consent, where the government agents had not obtained a search warrant, thereby violating the privacy on which Katz had justifiably relied.

The White Court distinguished and limited Katz, noting that Katz did not involve the use of a government informant who reported the conversation content to the government. Nor did the Katz Court:

" . . . indicate in any way that a defendant has a justifiable and constitutionally protected expectation that a person with whom he is conversing will not then or later reveal the conversation to police." 28 L.Ed.2d 457.

Therefore, Katz with its warrant requirement is limited to those circumstances not involving a participating informant. Katz only applies to occasions in which the government seeks to surreptitiously monitor phone calls and/or conversations in private places. Consequently, Katz is inapplicable to the case at bar, for here the state's chief witness, who agreed to wear a concealed transmitter, was a volunteer undercover agent participating in the controlled drug buy with appellant.

Unlike Katz, in which the recordings were made for the purpose of obtaining evidence of criminal activity, the instant case included the use of a transmitter primarily to provide protection for Kayle Shaw, the undercover agent (T.171). Should a narcotics dealer learn that the intended purchaser is actually a narcotics agent, the agent's life is placed in serious immediate jeopardy; a transmitter allows supporting police officers to move in quickly if the transmission reveals that the undercover agent is in trouble.

Appellant alleges that Justice White misconstrued earlier cases on the informant eavesdropping or electronic monitoring topic, particularly Hoffa v. United States, 385 U.S. 293, 17 L.E.2d 374 (1966); Lewis v. United States, 385 U.S. 206, 17 L.Ed.2d 312 (1966); and Lopez v. United States, 373 U.S. 427, 10 L.Ed.2d 462 (1963). Although these pre-Katz opinions arose in the trespass analysis era of the United States Supreme Court, United States v. White, supra, found all three cases to be unaffected by Katz. The Court in Hoffa, supra, announced in clear language that the Fourth Amendment offers no protection to a defendant who relies upon a colleague's trust, only to learn that the "trusted colleague" is a government agent who reports regularly to

the authorities.

"Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." 17 L.Ed.2d at 382.

Since no electronic monitoring occurred in Hoffa, the only question presented to the Hoffa court which has relevance to this case was the admissibility of the informant's testimony. Any attempt to determine from the opinion how the Court would have treated the admissibility of testimony of an electronically eavesdropping government agent if such a person had existed is unproductive speculation.

Lewis v. United States, supra, concerned the admissibility of narcotics purchased from the defendant at his home by an undercover federal narcotics agent. Appellant alleged that the deception violated his Fourth Amendment rights but the Court rejected the claim, stating:

"Were we to hold the deceptions of the agent in this case constitutionally prohibited, we would come near to a rule that the use of undercover agents in any manner is virtually unconstitutional per se. Such a rule would, for example, severely hamper the government in ferreting out those organized criminal activities that are characterized by covert dealings

with victims who either cannot or do not protest. A prime example is provided by the narcotics traffic." 17 L.Ed.2d at 316.

While neither Hoffa nor Lewis involved electronic eavesdropping, they do support the general propositions that (1) the enforcement of narcotics laws requires stealth covert operations, and the participation and cooperation of informants or undercover agents and (2) Fourth Amendment protections do not extend to defendants who knowingly violate the criminal laws and who seek acquittal solely because they shared incriminating information and/or engaged in criminal activity with a person who was a covert government agent; subsequently testified against them.

The third case cited by White in supporting its holding and more nearly on point to the instant case and to the White facts is Lopez v. United States, 373 U.S. 421, 10 L.Ed.2d 462 (1963). In Lopez, the appellant was convicted of attempting to bribe an Internal Revenue Service agent, the offer of the bribe had been secretly recorded by the agent during a meeting at Lopez's office. Appellant claimed that the recording should not have been admitted into evidence, but the Court rebuffed his challenge, observing that the recording device had not been planted during a trespass but had been carried in and out by an agent who

was there with petitioner's assent, and that the device neither saw nor heard more than the agent himself. The Court then focused on appellant's real complaint:

"Stripped to its essentials, petitioner's argument amounts to saying that he has a constitutional right to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment. For no other argument can justify excluding an accurate version of a conversation that the agent could testify to from memory. We think the risk that petitioner took in offering a bribe to Davis fairly included the risk that the offer would be accurately reproduced in court, whether by faultless memory or mechanical recording." 10 L.Ed.2d at 471.

In allowing evidence of the recorded conversation the Court in Lopez reasoned that if the conduct and revelations of an agent operating without electronic equipment do not violate a defendant's constitutionally justifiable privacy expectations:

". . . neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks." 28 L.E.2d at 458.

Given the antecedent case law analyzed in White, the plurality opinion harmonized the surviving cases in the

eavesdropping area and arrived at several reasonable conclusions, which while aiding law enforcement safeguard constitutional rights of citizens. These conclusions are: (1) as the law does not protect a wrongdoer whose trusted accomplice is a police agent, neither should it protect him when the same agent records or transmits the conversation, which is later offered into evidence; (2) having resolved any doubts about an accomplice being an informant, a wrongdoer is unlikely to distinguish between probable informers on one hand and probable informers with transmitters on the other to the extent requiring discrete constitutional recognition of those differences; (3) the courts should be wary of erecting constitutional barriers to relevant and probative evidence which is also accurate and reliable, recognizing that a defendant who has no right to exclude an agent's testimony ought not be allowed to exclude a more accurate version of the events; (4) it would be untenable to find that while the undercover agent without a warrant has acted "reasonably," once he straps on a transmitter his "reasonable" activities are suddenly transformed into an "unreasonable" investigation in violation of Fourth Amendment guarantees.

Respondent asserts that in the instant case a reasonable, legal investigation and arrest occurred.

Although Kayle Shaw was wired with a transmitter for his own protection, it was reasonable, proper and in accord with applicable law to admit the tape recording and allow the jurors to hear the best evidence of what actually transpired in The Gym.

This position is fully supported by Utah law. The privacy section of Utah Code Ann. § 76-9-401 (Supp. 1977), provides the following definition:

"(2) 'Eavesdropping' means to overhear, record, amplify, or transmit any part of a wire or oral communication of others without the consent of at least one party thereto by means of any electronic, mechanical, or other device." (Emphasis added.)

This provision certainly provides for and protects the use of wired, undercover operatives, and as Kayle Shaw had consented to the attachment of the transmitter to his person, no violation of Section 76-9-402 occurred.

Finally, under Utah Code Ann. § 77-54-1 (1953), as amended, it is doubtful if a search warrant could have been issued. Warrants are limited to the seizure of personal property and considerable imagination and judicial creativity would have to be employed to equate the sound vibrations of a person's voice with personal property.

As noted by appellant, Michigan is a state which has decided that a search warrant is required in these

circumstances. See People v. Beavers, 393 Mich. 554, 227 N.W.2d 511 (1975), cert. den. 423 U.S. 878, 46 L.Ed.2d 111. However, the Michigan search warrant statute, Mich. Compiled Laws 780.652, is unlike the Utah statute in that it authorizes the seizure of personal property and "other thing[s]." Perhaps because sound waves can be categorized as "other thing[s]" they are therefore seizable, but no such exception is codified in Utah. While acknowledging that this court has the power to provide an individual with greater protection under the state constitution than he enjoys under the federal constitution, respondent urges the Court not to adopt the minority Michigan view. Instead, this Court should uphold the admissibility of the tapes. Such a decision would acknowledge both the genuine individual protections of the Fourth Amendment and societal protection against abandoning the Fourth Amendment to lawbreakers who use it primarily to shield themselves from criminal culpability. In United States v. White, the Court weighed and balanced the needs of effective law enforcement against the right of an individual to be free from unreasonable search and seizures. Respondent believes that the White analysis is correct and appellant's conviction should therefore be affirmed.

POINT II

AS VARIOUS RULINGS BY THE TRIAL COURT WERE IN ACCORD WITH LAW, APPELLANT RECEIVED A FAIR TRIAL.

POINT A

THE TRIAL COURT PROPERLY RECEIVED INTO EVIDENCE THE UNDERCOVER AGENT'S FULL VERSION OF THE EVENTS WHICH OCCURRED DURING THE PROTRACTED NARCOTICS TRANSACTION; SUSTAINING APPELLANT'S OBJECTIONS AND THE GIVING OF APPROPRIATE JURY INSTRUCTIONS CURED OTHER IMPERFECTIONS.

During the direct examination of Kayle Shaw, he was questioned about the conversation that he had with appellant while the two men awaited the delivery of the drugs. Shaw testified that appellant told him that "he still has an ounce of Angel Dust down in his crib [apartment]." (T.39) Appellant then moved for a mistrial and the trial court denied the motion, stating that while it was a close question as to whether this conversation was part of the crime, appellant had not been prejudiced enough for a mistrial (T.43-45).

Later Shaw made the statement that he doubted if he would still be alive if appellant had known that Shaw was an informant. An objection to the statement was made and sustained, the remark stricken, and the jury admonished to disregard the answer of the witness (T.140).

The final complaint concerning Kayle Shaw's testimony is that he said that he had fired his attorney because he believed that she was conspiring with appellant to "set him up [for assassination]." (T.142). Appellant's motion for a mistrial was denied and the trial judge said that he didn't think the appellant had been prejudiced and that it is highly unlikely that the jury's verdict would be based on this one statement (T.146). Shaw admitted on cross-examination that appellant had never threatened him (T.153).

Utah case law provides the proper standard for determining when a motion for a mistrial should be granted. The standard is established in several recent cases, among them State v. Hodges, 30 Utah 2d 367, 517 P.2d 1323 (1974), and State v. Trusty, 28 Utah 2d 317, 502 P.2d 113 (1972). In these cases unanimous courts affirmed the decisions of the lower courts to deny motions for mistrial. This Court noted that a mistrial should be granted if the trial judge believes that an error has been made and that "in light of the total proceeding there has been such prejudice that the defendant cannot have a fair and impartial determination of his guilt or innocence." 517 P.2d at 1324.

On review this Court considers these two propositions and should reverse only if it appears that (1) error did occur

and(2) substantial prejudice resulted to the extent that there is a reasonable likelihood that, but for the error, there would have been a different result. 502 P.2d at 114. In reviewing the facts this Court acknowledges the authority and advantaged position of the trial judge and will not upset his ruling unless it clearly appears that he had abused his discretion. 517 P.2d at 1324 and 502 P.2d at 114.

Respondent submits that on review of the record and in light of analysis below, this Court will find that the trial court carefully and thoughtfully made his rulings and he did not abuse his discretion.

The trial court did not actually determine if the first alleged error was in fact error, rather calling it a close question, and finding that even if it were error, there had not been enough prejudice to warrant a mistrial. Implicit in this finding is the determination that the verdict of the jury does not hinge on Shaw's reference to appellant's possession of Angel Dust. Respondent further submits that under Rule 55 of the Utah Rules of Evidence, the inclusion within Shaw's testimony of appellant's statement that he was in possession of Angle Dust was proper. While not admissible as proof of guilt of the crime charged, it is admissible as tending to show intent,

plan and lack of mistake.¹

Additional support for admission of the statement comes from State v. Mitchell, 571 P.2d 1351 (Utah 1977). In reversing a lower court conviction on other grounds, the majority rebuffed appellant's claim that testimony was admitted in violation of Rule 55:

"The testimony concerning the other allegedly criminal acts [the robbery of other persons] committed by the defendant during the course of the commission of the crime with which he was charged, were, in fact, eyewitness descriptions of the events that occurred." 571 P.2d at 1353.

On this basis a narration of the conversation between appellant and Shaw as they awaited delivery of the PCP was proper, even if it included a minor reference to other drugs to be sold, such a reference not being sufficiently prejudicial to require exclusion from Shaw's chronological account of the events at the meeting.

Regarding the second incident, the sustaining of the objection to the improper response and the cautionary admonition to the jury cured any potential prejudice. As the Hol

¹RULE 55, OTHER CRIMES OR CIVIL WRONGS. Subject to Rule 4, evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his disposition to commit crime or civil wrong as the basis for an inference that he committed another crime or civil wrong on another specified occasion but, subject to Rules 45 and 48, such evidence is admissible when relevant to prove some other material fact including absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge or identity.

court remarked:

"In the absence of something persuasive to the contrary, we assume that the jurors were conscientious in performing to [sic] their duty, and that they followed the instructions of the court." 517 P.2d at 1324.

Respondent submits that because no evidence was offered to support the claim of prejudice and in deference to the trial court's authority, this Court should affirm the trial court's ruling.

In reference to the third allegation, that a mistrial should have been declared after Shaw's remark about his previous attorney, respondent urges the Court to sustain the action of the trial court in denying the motion. Having found no prejudice, the trial judge could not grant a mistrial. The credibility of a witness is for the jury to determine, and it is unlikely that jurors would have seriously considered Shaw's claim that his former attorney, a member in good standing of the Utah Bar, would have been involved in an assassination plot. The trial judge stated that he did not believe that the testimony was damaging or prejudicial to appellant, the issue was a collateral one with no bearing on the main issue of appellant's guilt in distributing a controlled substance for value, and he did not believe the jurors would give it another thought (T.403-404). Given this inherent incredibility of

the testimony, there was little likelihood that Shaw's remarks would have substantial impact on the jury, as to alter the verdict, and the motion for mistrial was properly denied.

POINT B

THE ALLEGED PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT WAS ACTUALLY PROPER REBUTTAL IN AN ANALYSIS OF THE TOTAL EVIDENCE PRESENTED AT TRIAL.

Appellant made no objections to statements in the prosecutor's closing argument, and the general rule is that a failure to raise objections at trial precludes the consideration of those issues on appeal unless such exceptional circumstances exist that a miscarriage of justice would result if the matter were not considered. State v. Winger, 26 Utah 2d 118, 485 P.2d 1398 (1971). Appellant cites a California case People v. Lyons, 50 Cal. 2d 245, 324 P.2d 556 (1958), as proving the exceptions relied upon. Namely, (1) grave doubts about defendant's guilt and (2) the inability to obviate or cure the alleged error. Respondent contends that evidence in the instant case was not evenly divided, so as to make the issue of appellant's guilt a close question. Appellant presented no evidence at all while the state produced overwhelming evidence of guilt. Respondent also submits that even if error occurred during the argument stage, it was minor,

and the trial judge was fully equipped to obviate any potential prejudice with appropriate admonishments and further cautionary instructions.

Counsel for appellant included in his closing argument a statement (partially Jury Instruction No. 10) which informed the jury of the appellant's constitutional right not to testify and that no presumption of guilt should arise from the exercise of that privilege. He noted that a defendant may have several reasons for not testifying - among them his satisfaction with the evidence presented or his reluctance to be cross-examined (T.458).

During his argument the prosecutor alluded to defense counsel's comments:

"He read the instruction about the defendant not testifying and not creating a presumption against him and he said the reason why the defendant did not testify--he said I am a skilled prosecutor and I would have had a chance to cross-examine him. No question about that. I would suggest that maybe that is the reason." (T.483)

Mr. Yocum then observed that Kayle Shaw was cross-examined for two and one-half hours by two very skilled attorneys, yet came through it very successfully, while acknowledging that Shaw had admitted possessing LSD on occasion.

Respondent contends that the prosecutor's remarks were wholly proper. They were in harmony with the argument

guidelines of State v. Kazda, 540 P.2d 949 (Utah 1975), and State v. Eaton, 569 P.2d 1114 (Utah 1977), and State v. White (Utah Case No. 15210, filed 3/13/78), and in accord with the constitutional mandate that the prosecution must not comment on the failure of the defendant to testify. See Griffin v. California, 380 U.S. 609, 14 L.Ed 2d 106 (1965).

In State v. Kazda, supra, the prosecutor had stated during closing argument, "The defense has presented no evidence as to why the defendant was out there. What was he doing out there?" As in the instant case, Kazda neither testified nor called witnesses. After noting that trial counsel have both a right and a duty to analyze all aspects of the evidence, including what it is or isn't and what it shows and doesn't show, the court found the prosecutor's comment to be proper.

In State v. Eaton, supra, we find an overzealous prosecutor who crossed the line between commenting on the evidence and commenting specifically on the defendant's failure to testify. That case also involved a controlled drug buy and during closing argument the prosecutor stressed the fact that only the state's chief witness and the defendant "really know [sic] what took place in that house" and then asked "What do the defendant tell us?" Later he referred again to the defendant's failure to testify and explain. The defendant in Eat

received a new trial.

The facts of Eaton are not similar to the instant case. Here the prosecutor's emphasis was not on appellant's failure to testify, where he merely supported defense counsel's comments, rather it was on the thoroughness and consistency of Kayle Shaw's testimony.

The most recent Utah case on this issue, State v. White, supra, makes clear that in appropriate circumstances the prosecutor may make an observation on a defendant's silence, as long as the purpose is not to encourage the jury to draw inferences of guilt from what was not said, but to see the total picture of the evidence. In White, also a drug case, the defendant was asked on direct examination only his name, address, and occupation. During closing argument the prosecutor said that because the scope of cross-examination is limited by the direct examination, he could not ask the defendant about how he came to be in possession of heroin and cocaine, how much he was being paid for it, etc. In affirming the conviction, the Court found the remarks a proper part of the prosecutor's analysis of the evidence and that the prosecutor merely pointed out what the jury already knew--that the defendant had purposely limited his testimony to avoid saying anything about his involvement or non-involvement.

When compared with these three fact patterns, it is abundantly clear that the prosecutor's remarks in this case were proper and completely within the guidelines of constitutionally permissible evidence analysis. Even if this Court finds them to be error, they would be harmless under Hodges, supra, and Mitchell, supra.

Appellant also alleges that the trial court committed further error by allowing Mr. Yocum to read from a transcript of the tape recording when the transcript had earlier been refused admission into evidence. However, the prosecutor had personally listened to the tape, which had been admitted into evidence, and in refreshing his memory of what was on the tape, he is allowed to use any writing to jog his memory. McCormick on Evidence, 2d Ed., 1973, Chap. 1, § 9, p. 15. The transcript accurately represented what he heard and he was therefore properly using the transcript for memory refreshing only and so stated at T. 487. The judge's actual ruling is unclear; he initially found Mr. Yocum's use of the transcript objectionable, but after the prosecutor argued present recollection refreshed, the judge agreed that Mr. Yocum could refer to what was on the tape (T.487). Moreover, a prosecutor's closing

argument is not evidence and the jury in this case was so advised (T.434).

Respondent rejects appellant's contention that the jurors probably drew the inference that the transcript of the tape which was available, probative evidence, had been kept from them by the court. The jury heard the tape during their deliberations and decided for themselves what the voices were saying, cognizant that Agent Allred had also listened to it and typed a transcription (T.191). Jury Instruction No. 6 clearly charged the jury to consider only the evidence, both offered and admitted, and the presumption is that the jury did its duty and followed its instructions.

Nevertheless, cases cited by appellant do not support his claim. In People v. Gilmer, 110 Ill.App.2d 73, 249 N.E.2d 129, 133 (1969), the court found the "determining factor was whether there was a reasonable possibility that improperly introduced evidence might have contributed to the conviction." Respondent contends that it is substantially unlikely that the refusal of the court to allow the jury to see a transcript that one narcotics officer had made of a

tape which the jurors would themselves listen to, combined with an earlier remark about the prosecutor's cross-examination skills, affected the jury's verdict. Unless appellant can show that but for these occurrences, if deemed error, the jury would likely have returned a not guilty verdict, the conviction must stand. Since appellant has not met the burden of State v. Eaton, supra, respondent urges the Court to reject appellant's arguments, no substantial evidence having been offered to support an acquittal.

POINT C

THE ATTORNEY-CLIENT PRIVILEGE HAVING BEEN CLAIMED FOR VALID REASONS BY BRADLEY RICH, THE TRIAL COURT ACTED PROPERLY IN REFUSING TO REQUIRE THE ATTORNEY TO TESTIFY.

For a period of two months in 1977, Bradley Rich of the Salt Lake Legal Defender Association represented Kayle Shaw, who was facing three charges of aggravated robbery (T.20,74).

With the jury absent, appellant called Mr. Rich to testify and after several preliminary questions asked the witness if he ever had occasion to discuss Shaw's work as an undercover agent for the State of Utah. Mr. Rich refused to answer the question on the ground that a response would require him to divulge a confidence of a client (T.357). The attorney's refusal was in complete accord with Rule 26(1) of the Utah Rules of Evidence, which provides:

"Subject to Rule 37 and except as otherwise provided by paragraph 2 of this rule communications found by the judge to have been between lawyer and his client in the course of that relationship and in professional confidence, are privileged, and a client has a privilege (a) if he is the witness to refuse to disclose any such communication, and (b) to

prevent his lawyer from disclosing it, and (c) to prevent any other witness from disclosing such communication if it came to the knowledge of such witness (i) in the course of its transmittal between the client and the lawyer, or (ii) in a manner not reasonably to be anticipated by the client, or (iii) as a result of a breach of the lawyer-client relationship. The privilege may be claimed by the client in person or by his lawyer, or if incompetent, by his guardian, or if deceased by his personal representative. The privilege available to a corporation or association terminates upon dissolution."

The exceptions to this general rule are detailed in 26(2) and it is specifically upon 26(2)(a) that appellant bases his allegation that the privilege was improperly claimed by Mr. Rich and sustained by the court. Rule 26(2)(a) states:

"Such privileges shall not extend (a) to a communication if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the legal service was sought or obtained in order to enable or aid the client to commit or plan to commit a crime or tort."

The record shows that Mr. Rich was hired to represent Shaw on robbery charges and his January 10th appointment occurred weeks before Shaw made overtures to Detective

Carlson about the possibility of becoming an agent. There is no evidence to suggest that Shaw hired Mr. Rich to aid him in the commission of a crime, and therefore no exception under 26(2)(a) exists, and the witness properly invoked the attorney-client privilege on behalf of Kayle Shaw.

Appellant urged the court to require Mr. Rich to respond in camera, stating that the judge could then determine for himself whether the communication was privileged (T.360). The court refused and deferred to Mr. Rich's judgment and knowledge of the facts allowing him to claim the privilege if he determined that answering would violate a confidence (T.363).

No Utah case supports appellant's claim. A. v. District Court of Second Judicial District, 550 P.2d 315 (Colo. 1976), is distinguishable. It concerned the work product exception in a grand jury proceeding. People v. Mahan, 1 Utah 205 (1875), is also inapplicable as that defendant had consulted with the attorney for the sole purpose of learning the legal effect of signing another's name to a note. Noteworthy here is the excerpt cited by appellant, in which Lord Chief Baron is quoted as having said:

"Where the original ground
of communication is malum in se
. . . this can never be included
within . . . professional
confidence." (Emphasis added.)

Once again the focus is on the motive for seeking legal help, and Kayle Shaw's retention of counsel to represent him in felony trials is a legitimate motive.

Finally, the Kansas case, State v. Henderson, 205 Kan. 231, 468 P.2d 136 (1970), is also distinguishable as the defendant was the attorney's client, and the attorney spoke up in an attempt to withdraw as counsel because his client was uncooperative and insisted on giving perjured testimony. It must be noted, however, that the duty owed to the court by a defendant's attorney is intrinsically different from the duty owed by the former attorney of a witness. That the former may have a higher obligation to keep perjured testimony from being given is no evidence that the latter has the same responsibility.

Rule 26 allows an attorney to claim the privilege on behalf of his client and makes no provision for a separate determination by the court that the matter actually is privileged. The trial court, therefore, properly allowed Mr. Rich to claim the privilege and refused to testify about confidences shared during his professional relationship with Kayle Shaw.

POINT D

THE GRANTING OF A CONTINUANCE RESTS IN THE
SOUND DISCRETION OF THE TRIAL JUDGE.

Appellant contends that the trial court erred in not granting a continuance over a weekend so that Carolyn Nichols, Kayle Shaw's former attorney, could testify. Appellant wanted to question Ms. Nichols about Shaw's statement that she and appellant were planning to have Shaw murdered. After considerable argument (T.400-404), the court made the following ruling in denying appellant's request:

"THE COURT: I can't see that that testimony or that evidence is that damaging or prejudicial to the defendant, frankly. We spent considerable time on collateral matters that didn't even bear on the main issue of this trial and it seems to me that that was one of them. I don't feel that the Jurors are going to give any attention to that particular part of the testimony. They will see if [sic] for what it was and that was just simply a conclusion or a statement of the witness and I think he was more or less pressured into saying something on the stand and that just happened to be it. I don't feel that--if your witness was available I would consent to certainly let you reopen for the purpose of putting her on the stand and attempting to elicit her testimony but I just feel in the interest of -- in the interest of time and for an orderly trial we should proceed until

conclusion. I don't think we can finish today. In fact, we have discussed it so long now that I am sure that we can't. I would deny the motion to continue it until Monday which is past the weekend and we will proceed in the morning." (T.403-404).

State v. Moosman, 542 P.2d 1093, 1094 (Utah 1975), announced the standard of review in determining if the refusal to grant a continuance was prejudicial error:

"The granting of a continuance of a case is a matter resting in the sound discretion of the trial judge, and that discretion will not be interfered with on appeal except where the court clearly abused its discretion in the matter."

It is clear from the trial judge's statement that he found that whole area of testimony for which the continuance was sought to be collateral to the main issue, in no way damaging or prejudicial to appellant, and time consuming and inconvenient to the court. These findings rebut appellant's claim that the testimony would have been material, likely to have affected the jury's verdict, and of little inconvenience to the court, three factors which he cites as necessary under a 1976 Alaska decision, Salazar v. State, 542 P.2d 66 (Alaska 1976). In that case the appellant, convicted of murder, was granted a new trial because the court found that the expected testimony of an absent police officers that he could see the victim's car from the road would be

material to appellant's defense, where the state's theory of the case was that the deceased's car could not be seen from the road and appellant knew it was there only because he had committed the killing.

The crucial nature of the denied testimony, so clearly apparent in Salazar, is not present in the instant case. Here, the trial judge reasonably concluded that the jurors would not take seriously Shaw's allegations of a death plot.

The trial court made reasonable, proper findings in his refusal to deny a weekend continuance pursuant to his authority under Rule 45 of the Utah Rules of Evidence, which allows the exclusion of admissible evidence, and therefore did not abuse his discretion. Respondent urges the court to reject appellant's claim.

POINT E

AS NO SIGNIFICANT ERRORS OCCURRED IN THE CONDUCT OF THE TRIAL, THERE WAS NO PREJUDICIAL, CUMULATIVE EFFECT.

Respondent submits that the trial court conducted a fair trial for appellant and has offered evidence and case law in previous sections which demonstrate that neither the prosecutor nor the court committed prejudicial error.

State v. St. Clair, 3 Utah 2d 230, 282 P.2d 323 (1955) cited as support by appellant is not analogous to the instant case. Paul St. Clair had been convicted of murder and sentenced to death, and the court then, as now, scrupulously searched the record in death-penalty cases for significant error, whether raised on appeal or not. The errors complained of in that case were individually significant, though not prejudicial, and the court decided that significant errors can have a cumulative prejudicial effect. In the instant case there were no significant errors.

Appellant has not shown that the outcome would have been different even if claimed errors had not occurred and his conviction should therefore be affirmed.

CONCLUSION

Because warrantless, electronic monitoring of an undercover narcotics agent is allowed by the United States Supreme Court and authorized by the need to protect the lives of the agents, and because no prejudicial errors were committed at trial, respondent urges an affirmation of the verdict.

Respectfully submitted,

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