

1978

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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| Plaintiff-Respondent, | : | |
| | : | |
| v. | : | |
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| GAYLE LEE BOONE, | : | Case No. 15275 |
| | : | |
| Defendant-Appellant. | : | |

BRIEF OF APPELLANT

Appeal from a jury verdict of guilty of Unlawful Distribution of a Controlled Substance for Value in the Third Judicial District in and for Salt Lake County, State of Utah, the Honorable James S. Sawaya, presiding.

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellant, GAYLE LEE BOONE, appeals from a conviction of Unlawful Distribution of a Controlled Substance for Value in the Third Judicial District in and for Salt Lake County, State of Utah, the Honorable James S. Sawaya, presiding.

DISPOSITION IN THE LOWER COURT

The appellant, Gayle Lee Boone, was charged with Unlawful Distribution of a Controlled Substance for Value in violation of Utah Code Ann. §58-37-8(a) (1953 as amended). On the 17th day of June, 1977, the appellant was found guilty of the offense as charged by a jury. Subsequently, the appellant was sentenced to incarceration in the Utah State Prison for the indeterminate term of zero to ten years.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the conviction and judgment rendered below and a remand of the case to the Third Judicial District Court for a new trial.

STATEMENT OF FACTS

On the afternoon of April 27, 1977, Kayle Shaw, Junior contacted the appellant and arranged to meet with him later in that day at an establishment called "The Gym" (T.21). At that time, Shaw was working as an undercover agent for the Utah State Liquor and Narcotics Enforcement Division (T.170). Several months earlier Shaw had been released from the Salt Lake County Jail where he was being held pending trial on three counts of Aggravated Robbery, felonies of the first degree, and another felony charge of Unlawful Possession of a Controlled Substance with Intent to Distribute for Value (T.20). At the time of this action Shaw was still awaiting trial on those charges (T.20).

Upon being released from jail Shaw reported to Tom Carleson of the Bountiful City Police Department (T.80). Carleson then introduced Shaw to agents of the State Liquor and Narcotics Control Division (T.81) and then put him to work as an undercover agent (T.170). At that time Shaw told the State agents that he "wanted to bust Gayle Boone" (T.82).

After contacting the appellant on April 22, 1977, Shaw contacted the State Narcotics Division where he talked to Tom Carleson

Fairgrounds where he was searched (T.26) and supplied with one thousand dollars worth of twenty dollar bills (T.27). An electronic device was then attached to Shaw's body (T.32). The device transmitted sounds originating in the immediate area to police radios (T.33-34)

Shaw then drove his own car to the Gym, but he was followed there by twelve other agents driving another six cars (T. 174). Shaw contacted the appellant at "The Gym" (T.34). Shaw then testified that some time later a transaction took place in which he exchanged the thousand dollars for a package containing a brown substance (T.54). When the officers listening to their radios heard a prearranged signal from Shaw they arrested Shaw, the appellant and the co-defendant, David Edward Albo (T.185-186).

ARGUMENT

POINT I

THE WARRANT CLAUSE OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 14 OF THE CONSTITUTION OF UTAH PROHIBITS UNAUTHORIZED MONITORING BY GOVERNMENT AGENTS OF CONVERSATIONS TRANSMITTED BY MEANS OF ELECTRONIC DEVICES.

The appellant moved to suppress a recording of a conversation between himself and the State's informant, Kayle Shaw, Jr. (R.54). The motion was denied and the tape was received into evidence (T.333). The tape was made by recording a broadcast of the conversation transmitted by an electronic device secreted on the informant's person (T.32). The broadcast was heard by some police officers who had followed and were observing Shaw, although there was some question about what they heard.

The State agents who were in charge of Shaw's activities did not bother to obtain a search warrant prior to the transmission and recording of the conversation. Such a failure violated the appellant's constitutional protection against unreasonable searches and seizures guaranteed in Article I, Section 14 of the Constitution of Utah and the Fourth Amendment to the United States Constitution as it is applied to the States through the Due Process Clause of the Fourteenth Amendment. This is not to say that officials cannot use such devices and make such recordings, but only that before doing so, the authorities must obtain a warrant issued on the basis of a determination by a neutral and detached magistrate after showing that there is probable cause to believe that a crime is being or will be committed.

POINT A

THE FOURTH AMENDMENT AND ARTICLE I, SECTION 14 OF THE CONSTITUTION OF UTAH PROTECT THE PRIVACY OF UTAH CITIZENS AND PROHIBIT THE WARRANTLESS SURVEILLANCE AND SEIZURE OF THEIR CONVERSATIONS THROUGH USE OF ELECTRONIC DEVICES.

The Fourth Amendment and Article I, Section 14 of the Constitution of Utah protect privacy of people, not specified places. Katz v. United States, 389 U.S. 347 (1967); State v. Kent, 20 Utah 2d 1, 432 P.2d 64 (1967). In other words, there is no need for a physical intrusion or trespass to have a violation of this right to privacy. In the majority opinion in Katz v. United States, supra, Justice Stewart described the nature of this right.

What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. [citations omitted]. But what he seeks to preserve as private, even in the area accessible to the public, may be constitutionally protected. [citations omitted] 389 U.S. at 351-352.

In a concurring opinion, Justice Harlan gave a more detailed description of this right of privacy:

As the Court's opinion states, "the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place". My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and second, that the expectation be one that society is prepared to recognize as "reasonable".
389 U.S. at 362 Harlan, J. Concurring.

In Katz v. United States, supra, the Court held that a person's conversations were within this expectation of privacy and the overhearing of such conversations constituted a seizure within the meaning of the Fourth Amendment. The protection of this aspect of privacy is accomplished by means of the warrant clause of the Fourth Amendment (and Article I, Section 14 of the Constitution of Utah). The purpose of the warrant clause is to place limitations on official activities. These limitations include: The requirement that officials must present their estimate of probable cause for the detached scrutiny of a neutral magistrate. Secondly, during a search, a warrant compels officers to observe precise limits established in advance by specific court order. Finally, after the search has been conducted officers will be required to notify an unauthorized magistrate of all that has been seized.

In Katz v. United States, supra, a transmitter was placed in a phone booth enabling police to overhear the defendant's conversation. Even though it was operated only when the defendant was using the phone and in a limited means, the court refused to uphold the search stating:

[T]his Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end. 389 U.S. at 356-357.

As noted above this Court also recognizes that the Fourth Amendment and Article I, Section 14 of the Constitution of Utah are aimed at the protection of a person's privacy. State v. Kent, supra. Furthermore, by enacting Utah Code Ann. §76-9-402 (1973), the State legislature has recognized the need to protect the privacy of people. This statute provides:

76-9-402. Privacy violation—(1) A person is guilty of privacy violation if, except as authorized by law, he:

- (a) Trespasses on property with intent to subject anyone to eavesdropping or other surveillance in a private place; or
- (b) Installs in any private place, without the consent of the person or persons entitled to privacy there, any device for observing, photographing, recording, amplifying, or broadcasting sounds or events in the place or uses any such unauthorized installation; or
- (c) Installs or uses outside of a private place any device for hearing, recording, amplifying, or broadcasting sounds originating in the place which would not ordinarily be audible or comprehensible outside, without the consent of the person or persons entitled to privacy there.

(2) Privacy violation is a Class B misdemeanor.

An important aspect of this statute is the exception of "except as authorized by law". Obviously, this is intended to allow such invasions of privacy if done by judicial authorization-- a valid search warrant.

POINT B

A CITIZEN'S RIGHT TO BE FREE FROM WARRANTLESS SURVEILLANCE AND SEIZURE OF HIS CONVERSATIONS THROUGH USE OF ELECTRONIC DEVICES IS NOT WAIVED MERELY BECAUSE SUCH CONVERSATION IS WITH A GOVERNMENT AGENT.

In United States v. White, 401 U.S. 745 (1971) the Supreme Court was faced with a fact situation very similar to the case at hand. Four of the justices distinguished Katz v. United States, supra, and upheld the search; Justice Black concurred on the basis of his dissent in Katz v. United States, supra, (he believed that the Fourth Amendment applied only to tangible, not communicative evidence). Justice Brennan refused to apply Katz v. United States, supra, retroactively, and Justice Harlan authored a strong dissent that the two other justices concurred in.

The basic argument of Justice White's plurality opinion is that the petitioner had waived the protection of his privacy by talking to a third person, who incidentally was wired to broadcast the conversation to government agents. To be able to reach this conclusion the case of Katz v. United States, supra, had to be distinguished. Justice White found two distinguishing factors: (1) in Katz neither party to the conversations knew that the government was eavesdropping; and (2) even in Katz there was no justifiable and constitutionally protected expectation that the person with whom

one is conversing will not later reveal the conversation to the police. To support this second distinguishing feature Justice White cited Lopez v. United States, 373 U.S. 427 (1963), Lewis v. United States, 385 U.S. 206 (1966), and Hoffa v. United States, 385 U.S. 293 (1966). The theme that Justice White erroneously extracted from these three cases was that the Fourth Amendment does not protect a person from "misplaced confidence" in a friend or informer. He then went on to hold that if the conduct and revelations of an undercover agent do not invade one's "constitutionally justifiable expectations of privacy," then a simultaneous recording or electronic transmission to others likewise does not invade one's privacy. Stated otherwise, "a constitutional license to employ secret agents generates the correlative right to electronically eavesdrop without prior judicial authorization." Comment, Electronic Eavesdropping and the Right to Privacy, 52 Boston University Law Review 831 (1972).

There are two problems with Justice White's opinion: The first is that he misstated the legal basis that leads to his conclusion of waiver; the second is that he fails to correctly analyze the interests that are at stake. The misstated legal basis will be discussed first.

The case that Justice White cites to stand for the proposition that electronic devices such as recorders and transmitters will not constitute an invasion of privacy is Lopez v. United States.⁵⁰ In that case the defendant was found guilty of attempting to bribe a government agent. The offer of the bribe had been recorded by the agent who had been recording the defendant's conversation with the person at the time of

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the offer. Two of the major factors that the court found to be the basis of its holding were that at the time the recording was being made it was not being transmitted to third persons and secondly, the defendant had assumed the risk of government intrusion because he was attempting to bribe a person who he knew to be a government agent. Obviously, the factual basis of the holding in this case is clearly distinguishable from the facts both in United States v. White, supra, and the facts in the case at bar. In both United States v. White, supra, and in the case at hand the conversations were broadcast to third persons and in both there was no expectation of direct governmental involvement.

In both Lewis v. United States, supra, and in Hoffa v. United States, supra, the court based its decision on a trespass analysis. That type of analysis had been strongly rejected in Katz v. United States, supra. In Hoffa the court held that an informer who was an invited guest could not be found to have committed a trespass (at that time Fourth Amendment questions were analyzed in terms of trespass). It is doubtful, however, under the trespass analysis that the invitation would have extended to uninvited third party government agents who were listening by means of electronic devices.

In Lewis v. United States, supra, a government agent purchased narcotics at the defendant's residence then arrested him. The court held that the Fourth Amendment does not protect one who voluntarily converts a constitutionally protected area into a commercial center. This case did not involve any electronic transmitters or recorders. It did not even involve any communications to third parties. It simply

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is not applicable as a legal basis for the holding in White v. United

States, supra.

The analytical problems with White v. United States, supra, are discussed in Justice Harlan's dissenting opinion. Justice White's opinion is analytically incorrect with respect to his interpretation of both the privacy and waiver issues. The privacy question will be discussed first.

The first problem with White's analysis of the privacy issue is that the interests simply are not the same when there is misplaced confidence in an individual who turns out to be an informant and when a conversation is electronically broadcast to third persons who are government agents. Typically, when one person engages another in conversation there are two considerations: who will hear the conversation and how will the conversation be reported to others. Before entering a conversation of a private nature the speaker will usually analyze these concerns in terms of his subjective belief that the listener will not broadcast the content of this conversation to others and his knowledge of the credibility of the listener (in case the listener does make such a broadcast). If there is a substantial risk that conversations expected to be private are broadcast to third persons, an individual's freedom to make his own choice of who he will speak with and what he will say will be substantially impaired.

Likewise, if people are subject to the fear that their conversations will be broadcast to government agents other interests will be affected. These interests were eloquently described by

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supra. His description is well worth repeating:

The impact of the practice of third-party bugging, must, I think, be considered such as to undermine that confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens in a free society. It goes beyond the impact on privacy occasioned by the ordinary type of "informer" investigation upheld in Lewis and Hoffa. The argument of the plurality opinion, to the effect that it is irrelevant whether secrets are revealed by the mere tattletale or the transistor, ignores the differences occasioned by third-party monitoring and recording which insures full and accurate disclosure of all that is said, free of the possibility of error and oversight that inheres in human reporting.

Authority is hardly required to support the proposition that words would be measured a good deal more carefully and communication inhibited if one suspected his conversations were being transmitted and transcribed. Were third-party bugging a prevalent practice, it might well smother that spontaneity—reflected in frivolous, impetuous, sacrilegious, and defiant discourse—that liberates daily life. Much offhand exchange is easily forgotten and one may count on the obscurity of his remarks, protected by the very fact of a limited audience, and the likelihood that the listener will either overlook or forget what is said, as well as the listener's inability to reformulate a conversation without having to contend with a documented record. All these values are sacrificed by a rule of law that permits official monitoring of private discourse limited only by the need to locate a willing assistant [footnote omitted] 401 U.S. at 787-789, Harlan J. dissenting.

Another significant effect of this fear of third person official monitoring is that people will lose an important medium for relieving social tension. Tension is often relieved by such things as making idle threats, boasting about fictitious acts or even falsely claiming responsibility for the commission of well publicized crimes. In such conversation little harm is done, and it serves as a healthy outlet for various tensions. But if the conversation is suppressed the tensions will remain, and these tensions will be compounded by the belief that any comment may be overheard by some government agent. This is the chilling effect

on the exercise of free speech would be an understatement. The Orwellian nightmare of 1984 will become a cruel reality. In any conversation it would become reasonable to believe that there are government agents listening somewhere. The protection that is built into our federal and state constitutions against such omnipresence is the warrant clause of the Fourth Amendment and Article I, Section 14 of the Constitution of Utah which prohibits searches and seizures without a warrant. The protection simply is that government agents must show to a neutral and detached magistrate that there is probable cause to believe that a crime is being or will be committed before government agents are allowed to listen to a person's personal conversations by means of a transmitter attached to the body of an informant.

Some might argue that the government may act with self restraint and respect for privacy. This argument was expressly rejected in Katz v. United States, supra. The Fourth Amendment was not premised on good faith and self-restraint of the police. The Fourth Amendment was premised on the abuses of power in King George's writs of assistance during Colonial times. The Fourth Amendment functions as a check on the abuses of authority and the worst tendencies of government.

With respect to the waiver question, Justice White's analysis hinges on the underlying proposition that a risk of bugging will have no behavioral effect on a person contemplating a crime once he decides to trust a confederate. His argument is in terms of the typical criminal. This breaks down when it is the innocent citizen

that is used as the model. With an innocent citizen the risks of surveillance are not assumed by the actor. The risks come to that actor when the police decide to "bug" an informer. This means that any unconventional behavior as well as behavior that is on the borderline of illegality will arouse the curiosity of the authorities. Once that curiosity is aroused the authorities are allowed to attach a transmitter to a confidant of the speaker and listen to any and all conversations that their suspect engages in. This can be done even if there is little or no reason to believe that there is any criminal activity involved.

Such imposition of hidden and unforeseen risks on the citizenry were expressly prohibited by Katz v. United States, supra. Following the analysis in Katz it is reasonable to assume that a person speaking to another about possible criminal activities subjectively does not expect that other person to broadcast the content of the conversation to third persons. However, using a reasonable person test, it is quite likely that the content of the conversation will be told to others. But it is quite unlikely that any reasonable person would believe that his conversation is being simultaneously broadcast to some government agent listening to his radio in his car. Stated simply, a person does not waive his interest that a conversation will not be simultaneously broadcast to government agents simply because he reveals information to a person in whom he has misplaced his trust.

POINT C

EFFECTIVE POLICE INVESTIGATION IS NOT HAMPERED BY REQUIRING THAT A WARRANT BE OBTAINED BEFORE GOVERNMENT AGENTS CAN ENGAGE IN THIRD PERSON MONITORING; CONSEQUENTLY ANY SUCH MONITORING WITHOUT A WARRANT IS UNCONSTITUTIONAL.

In People v. Beavers, 393 Mich. 554, 227 N.W.2d 511 (1975) the Supreme Court of Michigan rejected Justice White's analysis and legal basis in United States v. White, supra, and held that a warrant must be obtained before government agents could monitor conversations between an informant and a suspect if any evidence of that conversation, other than the informant's version, is to be used in court. The Michigan court accepted Justice Harlan's view that a person's expectation of privacy should not be subject to the possibility that communications directed to particular persons are simultaneously being intercepted by third party government agents. It is also important to note that the Michigan Legislature has enacted provisions in its penal code ¹ that are similar to those

1. §28.807(2) Trespassing for eavesdropping or surveillance purposes] Sec. 539b. A person who trespasses on property owned or under the control of any other person to subject that person to eavesdropping or surveillance is guilty of a misdemeanor.

§28.807(3) Using device to eavesdrop upon conversation] Sec. 539c. Any person who is present or who is not present during a private conversation and who wilfully uses any device to eavesdrop upon the conversation without the consent of all parties thereto, or who knowingly aids, employs or procures another person to do so, in violation of this section, is guilty of a felony punishable by imprisonment in a state prison for not more than 2 years or by a fine of not more than \$2,000 or both.

§28.807(4) Installing surveillance or eavesdropping devices] Sec. 539d. A person who installs in any private place, without the consent of the person or persons entitled to privacy there, any device for observing, photographing, or eavesdropping upon the sounds or events in such place, or uses any such unauthorized installation, is guilty of a felony punishable by imprisonment in a state prison for not more than 2 years or by a fine of not more than \$2,000 or both.

of Utah Code Annotated §76-9-402 (1973).² The same primary interests receive protection in both Utah and Michigan.

Most of this argument has dealt with the probability of abuse if this type of surveillance is not subjected to the warrant requirement. Undoubtedly, the government will argue that this type of surveillance is necessary for police investigation. There is no question that this technique is necessary for investigation. However, the government officials are not the people who should make the determination of which people will be subjected to surveillance. The Fourth Amendment requires that such a determination will ultimately be made by a neutral and detached magistrate. The magistrate can make an objective determination of whether the government agents have probable cause to believe that a crime is being committed. This is the means by which our founding fathers saw fit to curb the abuses of the English monarchy - such abuses, incidentally, were a major cause of the revolutionary war. In the case at hand, the fact that a warrant was not obtained must be taken as an admission of lack of probable cause at the time the drug buy was supposed to have taken place. The government agents had taken elaborate precautions

§ 76-9-402. Privacy violation. - (1) A person is guilty of privacy violation if, except as authorized by law, he:

(a) Trespasses on property with intent to subject anyone to eavesdropping or other surveillance in a private place; or

(b) Installs in any private place, without the consent of the person or persons entitled to privacy there, any device for observing, photographing, recording, amplifying, or broadcasting sounds or events in the place of uses by such unauthorized installation; or

(c) Installs or uses outside of a private place any device for hearing, recording, amplifying, or broadcasting sounds originating in the place which is not primarily be audible or comprehensible outside, without the consent of the person or persons entitled to privacy there.

to set up a drug buy. The buy was set up in advance through the informant. (T. 171) The informant was subjected to a skin search and search of his vehicle. The electronic transmitter was taped to his body. (T. 173) The agents made photocopies of all the bills that were to be used in the purchase. (T. 175) The informant was searched a second time, and the money was counted a second time when the informant left the gym to get something to eat. (T. 180) Finally, there were about a dozen other officers in six cars monitoring the conversation. (T. 174) With all of these elaborate precautions the government agents did not see fit to obtain a warrant - a very simply procedure if there is in fact probable cause to believe a crime is being or will be committed. Stated otherwise, the government agents took elaborate precautions to protect the interests of the State, but did not even take the slightest precaution to protect the constitutional rights of the appellant.

The reasonableness of not obtaining a warrant prior to conducting a search is determined by balancing the interests of the State against those interests that an individual has in requiring that a warrant be obtained. State v. Folkes, 565 P.2d 1125 (Utah, 1977). The competing interests were described in State v. Beavers, supra;

We are acutely sensitive to the fundamental interests involved when prevailing law enforcement techniques are balanced against protections guaranteed citizens under the state and Federal constitutions. With the advent of increasingly sophisticated electronic surveillance equipment, the evolving body of law which seeks to reconcile the need for effective police investigative practices in combatting criminal activity with the ominous spectre of the Orwellian Big Brother is fraught with complexities.

227 NW 2d at 514.

In resolving these two conflicting interests the Michigan court then reasoned;

Participant monitoring is practiced extensively throughout the country and represents a vitally important investigative tool of law enforcement. Equally significant is the security and confidence enjoyed by our citizenry in knowing that the risk of intrusion by this type of electronic surveillance is subject to the constitutional protection against unreasonable searches and seizures. By interposing the search warrant requirement prior to engaging in participant monitoring, the risk that one's conversation is being intercepted is rightfully limited to circumstances involving a party whose conduct has provided probable cause to an independent magistrate to suspect such party's involvement in illegal activity. The warrant requirement is not a burdensome formality designed to protect those who would engage in illegal activity, but, rather a procedure which guarantess a measure of privacy and personal security to all citizens. The interests of both society and the individual should not rest upon the exercise of the unerring judgment and self-restraint of law enforcement officials. Our laws must ensure that the ordinary, law-abiding citizen may continue to engage in private discourse, free to speak with the uninhibited spontaneity that is characteristic of our democratic society. 227 NW 2d at 515.

Absent a specific finding of probable cause either in the issuance of a warrant or in a pretrial suppression motion the seizure of this evidence must be deemed to be unreasonable. Furthermore, this court is prohibited from reviewing the record at the trial to find probable cause. Beck v. Ohio, 379 U.S. 89 (1964). Consequently, the tape recording used in the trial constituted a violation of the appellant's Fourth Amendment rights. The tape must have been suppressed and the failure to do so requires a reversal of the verdict rendered below. Mapp v. Ohio, 367 U.S. 643 (1961) The case must be remanded to the Third District Court for a new trial.

POINT II

THE APPELLANT'S RIGHT TO A FAIR TRIAL WAS DENIED BY THE CUMMULATIVE ERROR COMMITTED BY THE TRIAL COURT.

Each of the errors in the following points constitutes prejudicial error that would require a reversal of the judgment of the court below. But these errors must also be considered to have had a cumulative effect on the outcome of the trial. Even if the individual errors are not prejudicial in and of themselves this court may determine if the appellant's case was prejudicial by the cumulative effect of the error State v. St. Clair, 3 Utah 2d 230, 282 P.2d 323 (1955).

POINT A

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ALLOWING THE STATE TO INTRODUCE EVIDENCE OF OTHER BAD ACTS BY THE APPELLANT.

In the course of the direct examination of Kayle Shaw, Jr. the prosecutor elicited statements that connected the appellant with other bad acts and statements that disparaged the appellant's character (T.39, 140 and 142). At no time did the appellant introduce any evidence about his character.

On direct examination of Shaw by the prosecutor, the following exchange took place:

Q: So this conversation took place over about forty minutes?

A: About forty minutes.

Q: Did you have any conversation with Boone -- Mr. Boone about purchasing any other narcotics from him?

A: Yes, I did.

Q: About what time did that take place in the course of these conversations?

A: About ten to seven.

Q: And what did that consist of?

A: Angel Dust.

Q: And just tell me what you said and what he said.

A: Can you repeat that?

Q: Just tell me what you said and what he said.

A: He told me he still has an ounce of Angel Dust down in his crib.

Q: Now, can you translate that for us what "an ounce of Angel Dust in his crib" means?

MR. KELLER: Your Honor, at this point I am going to interpose an objection. I have a motion to make outside the presence of the Jury. I ask the Court allow us to do so at this time. (T.39)

As counsel for the appellant pointed out and as is reflected

in the record, a mistrial had been granted the day before this exchange on the basis that Shaw had volunteered a statement on cross-examination that he had purchased narcotics from the appellant prior to the date of the purchase that is the subject of this case.

(T.40, R.50)

Later, in redirect examination of Shaw by the prosecutor,

the following exchange took place:

Q: Could you have made the buy from Mr. Boone on the 27th had you told him the truth that you were working as an undercover agent?

A: No, I didn't.

Q: You couldn't -- I said, could you have bought from him?

A: If I told him?

Q: Yeah.

A: I don't if I would be alive right now.

MR. KELLER: Your Honor, I object to the response. It's unresponsive. It's unduly prejudicial. I have a motion to make outside the presence of the Jury and I would ask the Court to allow me to do that at the proper recess.

THE COURT: Very well. The objection is sustained and the answer is stricken and the Jury admonished to disregard the answer of the witness. (T.140)

Later in redirect examination the prosecutor elicited a statement from Shaw that he had fired his attorney because she was working with the appellant and she said the appellant was going to set Shaw up (T.142). Out of the presence of the jury a motion for a mistrial was denied (T.146).

With respect to the first statement about the appellant possessing other drugs, there was a motion for a mistrial that was denied (T.45). In denying the motion the court seemed to indicate that it was improper for the statement to be elicited, but he felt that the evidence was not prejudicial (T.43, 45), the same basis was given for the second motion for a mistrial (T.146). The Court did not give any instruction to disregard the statement when the jury had returned (T.46, 147).

The standard for the trial court to use in determining when a mistrial should be granted is given in Justice Maughan's dissenting opinion in State v. Maestas, 560 P.2d 343 (Utah 1977). The test is:

Upon a motion for mistrial the court must weigh the danger of prejudice, to the defense, against the practicability of reducing or eliminating that danger by choosing a new jury. The essence of judicial discretion in dealing with a misadventure is to so manage matters so as to control the danger of jury prejudice, to the extent practicable [footnote omitted], §560 P.2d at 346, Maughan J. dissenting.

As for the danger of prejudice, the factors to consider are whether statements as a whole cast the appellant in a bad light

The statements about other drugs and firing his attorney appear to have been elicited intentionally. Those statements were never stricken and the jury was not instructed to disregard them. Finally, it must be remembered that the statements were made during the testimony of the first witness.

Evidence of other crimes or civil wrongs is inadmissible unless it fits within one of the exceptions to that rule. Rule 55 of the Utah Rules of Evidence is the codification of that rule. It provides:

Subject to Rule 47 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.

The only exceptions that fit this case would be to prove intent or plan. Both the intent and plan in the case at hand were to distribute a controlled substance for value. The statement that the appellant was in possession of a different type of substance has little or no probative value in the case at hand. It only shows that the appellant was allegedly violating the law allowing the jury to infer on the basis of the appellant's bad character that he made the sale in the case at hand. Under Rule 55 of the Utah Rules of Evidence such evidence is clearly inadmissible. With respect to the second remark, admittedly the court did all that it could to reduce its

judicial notice. Nevertheless, the jury did hear the remark and its

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resulting prejudice must be considered in conjunction with the previous remark. The substance of the final remark is that the appellant is interfering with Shaw's right to counsel. This does nothing but cast the appellant in a bad light as the statement would not be admissible for any purpose under Rule 55 of the Utah Rules of Evidence.

The case law provides examples of when statements are so prejudicial in and of themselves to require the reversal of a case on appeal. Evidence that the defendant had been charged with a crime in the past, even though never tried on the charge is prejudicial error, State v. Dickson, 12 Utah 2d 8, 361 P.2d 412 (1961). Testimony about a prior arrest for a similar crime than was charged required reversal, State v. Kazda, 14 Utah 2d 266, 382 P.2d 407 (1963). Since the statement here involved acts that were illegal and somewhat related to the charge in the case at hand they were just as prejudicial as the remarks in State v. Dickson, supra, and State v. Kazda, supra.

Another factor that substantially contributes to the prejudicial nature of the remarks was that some of them had been intentionally elicited from the witness. This is easily seen by the context in which they were raised, (T.39, 142) and the prosecutor's arguments to make the statement admissible (T.40-41, 42-43, 144-145). The rule given by this court is that a mistrial is to be granted when the prosecutor intentionally elicits inadmissible statements from a witness. In State v. Hartman, 101 Utah 298, 119 P.2d 112 (1941), this court stated,

Were it shown to be an attempt to get in evidence the prejudicial reference to another crime, such purpose might well have moved the court to declare a mistrial not only on this point but on all points. The court should have declared such tactics

This rule is followed in State v. St. Clair, 3 Utah 2d 230, 282 P.2d 100 (1955); and in State v. Case, 547 P.2d 221 (Utah, 1976). The State cannot claim that the prosecutor lacked notice. This is because a mistrial had been granted on the previous day because Shaw had made a statement about another drug purchase from the appellant. It is quite obvious that evidence of a prior sale is much more probative of the intent or plan to sell narcotics than a statement about present possession of narcotics or that the appellant had interfered with the witness' relationship with his attorney.

There was further prejudice because the court failed to instruct the jury to disregard the first and third statements (T.46, 147). Without an instruction of that nature the evidence is left in for the jury's consideration, State v. St. Clair, supra. Such an instruction also tends to cure the prejudicial nature of the statement, State v. Hartman, supra; State v. Hodges, 30 Utah 2d 367, 517 P.2d 1322 (1974).

The final factor that contributed to the prejudicial nature of the statements was the time at which they were elicited.

The first was elicited in the first several hours of testimony (T.39). The second and third statements came on the morning of the second day of trial. Since they came at times when relatively little other information had been given to the jury, the appellant was cast in a bad light from the outset.

When all of these factors are taken together, the nature of the statements, the intentional eliciting of the statements, the lack of an instruction from the court and the time in the trial when they were made, all add up to their being substantially prejudicial.

Since the statements were made so early in the trial — both were made by the very first witness — the inconvenience of a mistrial would have been minimal. The trial court should have granted a mistrial.

The standard for review of an erroneous failure to grant a mistrial was given in State v. Hodges, supra. In that case this Court stated:

Nevertheless, the processes of justice should not be distorted simply for the purpose of censuring a mistake. the critical inquiry should be whether there is a reasonable likelihood that the incident so prejudiced the jury that in its absence there might have been a different result. Due to his advantaged position and consistent with his responsibilities as the authority in charge of the trial, the inquiry is necessarily addressed to the sound discretion of the trial court. He should view such an episode in the light of the total proceeding, and if he thinks that there has been such prejudice that there is a reasonable probability that the defendant cannot have a fair and impartial determination of his guilt or innocence, he should of course grant a mistrial. But inasmuch as this is his primary responsibility, when he has given due consideration and ruled upon the matter, this court on review should not upset his ruling unless it clearly appears that he has abused his discretion. [footnotes omitted] 577 P.2d at 1324.

With regard to the nature of the discretion of the trial judge, this court has stated "if this discretion is reasonably used, and is not shown to have been abused, arbitrary, or capricious, the judgment of the trial court should not be disturbed", [footnote omitted]. State v. Chambers, 533 P.2d 876 (1975).

The trial court acted in an arbitrary and capricious manner. When the trial in this case was originally commenced the court granted a mistrial because Kayle Shaw stated that he had made a prior purchase

of narcotics from the appellant. Such a statement is highly prejudicial. The effect of the statements here taken standing alone or in combination is just as prejudicial as the statement made that resulted in the first mistrial. The trial court's two decisions cannot be reconciled and consequently must be regarded as arbitrary and capricious. The judgment must be reversed and the case remanded to the Third District Court for a new trial.

POINT B

IN CLOSING ARGUMENT THE PROSECUTOR ENGAGED IN MISCONDUCT BY COMMENTING ON THE APPELLANT FAILING TO TESTIFY AND BY PRESENTING INADMISSIBLE EVIDENCE TO THE JURY AND THIS MISCONDUCT RESULTED IN PREJUDICE TO THE APPELLANT.

In the course of the rebuttal portion of the prosecutor's argument to the jury, the prosecutor made the following remarks:

[Kayle Shaw] is given his presumption of innocence and that rides with him until he is tried on August the 1st. Counsel for some reason opened this and I am even very, very reluctant to go into it but it is still open.

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 skillful 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. I don't know but, you know, Kayle Shaw testified and Kayle Shaw was subjected to cross-examination. Kayle Shaw was subjected to cross-examination for almost two and a half hours by two very skillful attorneys. He submitted himself to cross-examination and he succeeded. Succeeded one hundred percent in that cross-examination. Kayle Shaw is a criminal. I don't know, because he had some -- he wasn't convicted of the offense that he had admitted on the stand he committed: The possession of narcotics, LSD. Sixty-eight hits of LSD is a heck of a lot less than a thousand dollars of Phencyclidine, animal tranquilizer, as you heard the chemist testify. A thousand dollars an ounce. Man, how many times that could be cut and distributed and redistributed. A thousand dollars and it is hard to believe that an ounce of anything of that kind is even more

expensive than gold. Pretty expensive stuff.

Well, because Kayle Shaw is caught with sixty-eight hits of acid in his car and some marijuana he is a "criminal." We are dealing, if I can use the phrase, with bigger crooks than Kayle Shaw on a thousand dollars an ounce worth of PCP or Phencyclidine. (T. 483-484)

The argument of defense counsel that the prosecutor claimed he was responding to was:

The defendant in any criminal case as the Court has informed you has an absolute right not to take the stand and testify if he does not want to. That's a Constitutional Right and the Court has instructed you that the mere fact that a defendant has not availed himself of the privilege which the law gives him should not prejudice him in any way. It should not be considered as any indication either of his guilt or his innocence. The failure of the defendant to testify is not even a circumstance against him and no presumption of guilt can be indulged in the minds of the Jury. Why? Because a defendant may be satisfied with the evidence as it has been presented. The defendant may have other reasons. As you can see, Mr. Yocom is a skilled prosecutor, a skilled cross-examiner and it is -- there are numerous reasons why the defendant may not want to testify and it is for that reason that the law -- the Court instructs you that the law in our system of justice is that you may not even assume that he is guilty because he has not testified. The burden at all times remains upon the State. (T.458)

Although counsel for the appellant did comment on the fact that the appellant had not taken the stand, he did so within the bounds of Constitutional Law. The prosecutor's comments however, were clearly comments intended to cause the jury to draw adverse conclusions as to why the defendant did not testify.

It was an unfavorable comment on the appellant's exercise of his Fifth Amendment privilege against self-incrimination.

In Griffin v. California, 380 U.S. 609 (1965), the Supreme Court held that it is a violation of a defendant's Fifth Amendment privilege against self incrimination to allow a prosecutor to comment on an accused's failure to testify. The reasons that the court gave for this holding were that such a comment, if allowed by the courts, becomes the equivalent of an offer of evidence; it is also a remnant of the inquisitorial system of justice where an accused was forced to testify or face a penalty of contempt. Finally, the court reasoned that in allowing such a comment the court would be penalizing a defendant in a criminal case for exercising his Fifth Amendment privilege.

In State v. Eaton, 569 P.2d 1114 (Utah 1977), this court found that a prosecutor's comments that the defense had not presented any evidence was a violation of both the Fifth Amendment to the United States Constitution and Article I, Section 12 of the Constitution of Utah. With respect to a prosecutor's closing argument the court commented,

We approve and reaffirm that duty and privilege of analyzing the whole evidence as a general proposition. However, there is a point beyond which it must not go in regard to the defendant's constitutional right just referred to; and this includes that it should not be impaired or destroyed by making comments on the failure of the defendant to take the witness stand.
569 P.2d at 1116

The court went on to distinguish the case of State v. Kazda, 569 P.2d 949 (Utah 1975). In State v. Kazda, supra, the court found that the prosecutor has a prerogative and a duty to argue all aspects of the case so long as there is no direct reference to the

failure to testify. The court then recognized that

Upon a fair analysis of the prosecutor's remarks here, the conclusion cannot be escaped that it was but a thinly disguised attempt to do indirectly what the prosecutor knew could not properly be done directly: that is, to comment on the fact that the defendant had chosen not to take the witness stand; and to persuade the jury to draw inferences as to his guilt because of his exercise of that constitutional privilege.

[footnote omitted] 569 P.2d at 1116.

Although counsel for appellant failed to object to this comment this court is not precluded from reviewing this issue. The issue is reviewable with a showing of exceptional circumstances, State v. Winger, 26 Utah 2d 118, 485 P.2d 1398 (1971). In People v. Perez, 23 Cal. Rptr. 569, 373 P.2d 617 (1962), the Supreme Court of California listed two circumstances under which it would review a statement made in summation for which there had been no objection registered. The first of these exceptions arises

"Where the case is closely balanced and there is grave doubt of the defendant's guilt, and the acts of misconduct are such as to contribute materially to the verdict, a miscarriage of justice results requiring a reversal. [Citations omitted] the other exception is where the act done or remark made is of such a character that a harmful result cannot be obviated or cured by any retraction of counsel or instruction of the court. In such cases the misconduct will furnish ground for reversal of the judgment, even where proper admonitions are given by the court" 373 P.2d at 627 quoting People v. Lyons, 50 Cal. 2d 245, 324 P.2d 556 (1958).

The harm that results from a comment on a defendant's refusal to take the stand is a denial of his Fifth Amendment privilege against self incrimination. Griffin v. California, supra. Even though the court may instruct the jury to disregard the comment, it still has been presented to the jury and the juror's attention has been

a juror to disregard such a remark. Consequently, it could be cured neither by a retraction nor by an instruction; such an error is subject to review by this court even if there was no objection registered at trial.

Further error was committed by allowing the prosecutor to read from the transcript of the tape recording of the conversation between Kayle Shaw and the appellant. (T.478) Counsel objected to this reading (T.487) because the court had previously refused to admit the transcript into evidence (T.333).

As was previously stated, the general rule is that counsel has both a privilege and a duty to analyze evidence in his argument to the jury State v. Eaton, supra; State v. Kazda, supra; however, a corollary to this rule is that counsel may not present matters to the jury which were excluded from evidence. Garris v. United States, 390 F.2d 864 (D.C. 1968); People v. Perez, supra; People v. Rosenfeld, 11 N.Y. 2d 290, 183 N.E. 2d 636 (1962); People v. Marthole, 51 Ill. App. 3d 919, 366 N.E. 2d 606 (1977). See also 75 Am Jur. 2d 331, Trials §253.

The reason why such a presentation is not allowed is that the jury may infer that this evidence was available and useful or probative, but the defendant has prevented the jury from seeing or hearing it. People v. Gilmer, 110 Ill. App. 2d 73, 249 N.Ed. 1119 (1969). The probability that the jurors drew this inference and if this is taken in conjunction with the prosecutor's remark that the appellant failed to take the stand leaves the strong

impression that the appellant was hiding evidence from the jury. Such an inference, in the context of a case of this nature, can have an extremely prejudicial effect. The test to determine if a statement in a closing argument is harmless or prejudicial was given in State v. Eaton, supra, where the court stated,

Consistent with the nature of criminal proceedings and the protections accorded those accused of crime under our law, including the presumption of innocence and the burden of the state to prove the defendant's guilty beyond a reasonable doubt, we believe that, on appeal, when there is a reasonable doubt as to whether the error below was prejudicial, that doubt should be resolved in favor of the defendant. This is especially true where the error involved is one which transgresses against the exercise of a constitutional right. Consequently, the rule which we have numerous times stated is that if the error is such as to justify a belief that it had a substantial adverse effect upon the defendant's right to a fair trial, in that there is a reasonable likelihood that in its absence there may have been a different result, then the error should not be regarded as harmless; and conversely, if the error is such that it is clear beyond a reasonable doubt that it was harmless in that the result would have been the same, then the error should not be deemed prejudicial and warrant, granting a new trial. [footnotes omitted] 569 P.2d at 1116 (

Since the appellant's whole defense was that he had been set up by Kayle Shaw, the inference that the appellant was trying to keep probative evidence from the jury would tend to discredit that defense. Since the defense of the appellant was discredited by the error, there is a reasonable likelihood that the result would have been different if these errors had not been committed; consequently the error was prejudicial. On this basis, the judgment must be reversed and the case remanded to the Third District Court for a new trial.

POINT C

BY REFUSING TO REQUIRE A WITNESS' FORMER ATTORNEY TO TESTIFY AFTER THE ATTORNEY CLAIMED THE ATTORNEY-CLIENT PRIVILEGE THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BECAUSE A CLIENT'S PLAN TO COMMIT PERJURY IS EXCEPTED FROM THAT PRIVILEGE.

In the course of Kayle Shaw's testimony it was established that he had three charges of aggravated robbery, felonies of the first degree, pending against him (T.20). It was also established that Bradley P. Rich of the Salt Lake Legal Defender Association had represented Shaw on these charges (T.74). Shaw testified that he had retained private counsel whom he had just fired (T.74). Shaw also testified that he never stated that he was willing to perjure himself (T.74). The appellant called Mr. Rich as a witness for the purpose of establishing that Shaw had told Mr. Rich that he (Shaw) was willing to perjure himself in trial on the aggravated robbery charges (T.362). Mr. Rich claimed the attorney-client privilege pursuant to Rule 26 of the Utah Rules of Evidence (T.364). The court allowed Mr. Rich to claim the privilege for Shaw (T. 364).

There is no question that the assertion of the privilege fit within the general rule described in Rule 26 (1)³ of the Utah

General Rule. 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.

Rules of Evidence. However, the privilege may not be properly claimed if it fits within one of the numerous exceptions described in Rule 26(2)⁴ of the Utah Rules of Evidence. The important exception here is Rule 26(2)(a) which provides:

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 a tort.

It is obvious that in order to assert this exception "the secret must be told in order to be kept," but this is a reasonable method of reconciling the competing policies of the attorney-client privilege and the search for truth in a trial, A. v. District Court of Second Judicial District, 550 P.2d 315 (Colorado, 1976).

Since perjury is a crime in Utah⁵, the plan to commit perjury is covered by Rule 26(2)(a) of the Utah Rules of Evidence and

4. Exceptions. 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 said client to commit or plan to commit a crime or a tort, or (b) to a communication relevant to an issue between parties all of whom claim through the client, regardless of whether the respective claims are by testate or intestate succession or by inter vivos transaction, or (c) to a communication relevant to an issue of breach of duty: lawyer to his client, or by the client to his lawyer, or (d) to a communication relevant to an issue concerning an attested document of which the lawyer is an attesting witness, or (e) to a communication relevant to a matter of common interest between two or more clients if made by any of them to a lawyer whom they have retained in common when offered in an action between any of such clients.

5. 76-8-502. False or inconsistent material statements.—A person is guilty of a crime of the second degree if in any official proceeding:

(1) He makes a false material statement under oath or affirmation or swears or affirms the truth of a material statement previously made and he does not believe the statement to be true; or

(2) He makes inconsistent material statements under oath or affirmation both within the period of limitations, one of which is false and not believed by him to be true. In a prosecution under this section, it need not be alleged or proved which or the statements is false but only that one or the other was false and not believed by the defendant to be true.

consequently is not privileged. The only previous occasion that the Utah Supreme Court has had to rule in this question was in People v. Mahon, 1 Utah 205 (1875). In that case, the defendant claimed error because an attorney was required to testify about a plan to commit forgery that the defendant had consulted the attorney about. The court held that the attorney-client privilege could not be asserted. The court stated the general rule that "confidential communications between the attorney and client are not to be revealed at any time" 1 Utah at 208, the court then reasoned:

But do all matters come within the scope of professional employment? Are there not matters of such a nature, that the law will not permit the relation of Attorney and Client to exist in regard to them? While a member of the Bar may be Counsel for, and keep the secrets of, one who has committed a crime, can he be permitted to sustain any such relation to one who proposes to commit a crime? Were he to attempt to give aid and assistance, in the case last approved, would not the law regard him as an accessory before the fact, rather than as a Counselor at Law? Is it not the duty of a member of the Bar, as much as of any other citizen, to expose contemplated crime, so as, if possible, to prevent it? What do the books say?

Lord Chief Baron Gilbert says: "Where the original ground of communication is malum in se, as if he be consulted on an intention to commit a forgery or perjury, this can never be included within the compass of professional confidence; being equally contrary to his duty in his profession, his duty as a citizen, and as a man." (1 Gilbert's Law of Ev. 277).

1 Utah at 209

More recently, in State v. Henderson, 205 Kan. 231, 468 P.2d 16 (1970), the Supreme Court of Kansas found there was no violation of the attorney-client privilege when the court-appointed attorney informed the Court that his client was uncooperative and planned to commit perjury. The court held:

We perceive nothing violative of the confidentiality inherent in the attorney-client relation by Mr. Anderson's making known to the court defendant's avowed intention of presenting perjured testimony. While as a general rule counsel is not allowed to disclose information imparted to him by his client or acquired during their professional relation, unless authorized to do so by the client himself [citation omitted] the announced intention of a client to commit perjury, or any other crime is not included perjury, or any other crime, is not included within the confidences which an attorney is bound to respect.

468 P.2d at 141

This evidence was obviously admissible because its purpose was to impair the credibility of a witness⁶ and in the course of his testimony that witness had denied making such a statement (T.72)⁷ Consequently it was error for the court to allow Mr. Rich to assert the attorney-client privilege, thus preventing the appellant from effectively impeaching the credibility of the State's primary witness.

The error was prejudicial because there is a reasonable likelihood that if it had not been committed the verdict may have been different, State v. Eaton, supra. This is because the appellant's defense was that he did not sell the narcotics to Kayle Shaw, rather, he was collecting a past debt from Shaw. In order to do this it was crucial that Shaw was shown to be a person who's testimony completely lacked even a modicum of credibility. To do this it was of the utmost importance that the appellant be able to show that Shaw was willing to perjure himself. After making this showing the inference could be drawn that Shaw was willing to be under oath; therefore, he would be more

6. Rule 20 of the Utah Rules of Evidence: Subject to Rules 21 and 22, for the purpose of impairing or supporting the credibility of a witness, any party including the party calling him may examine him and introduce extrinsic evidence concerning any statement or conduct by him and any other matter relevant upon the issues of credibility.

7. Rule 22(b) of the Utah Rules of Evidence. Extrinsic evidence of prior contradictory statements, whether oral or written, made by the witness, may in the discretion of the court be introduced unless the party offering the evidence has given the witness an opportunity to identify, explain or deny the statement.

than willing to lie about buying drugs from the appellant, that inference may have been enough to create a reasonable doubt of the appellant's guilt in the minds of the jurors. The error was prejudicial, absent this error there is a reasonable likelihood that the verdict may have been different. The judgement must be reversed and the case remanded to the Third District Court for a new trial.

POINT D

THE FAILURE TO CONTINUE THE TRIAL TO ALLOW THE APPELLANT TO SECURE THE ATTENDANCE OF A CRUCIAL WITNESS DENIED THE APPELLANT HIS RIGHT TO COMPULSORY PROCESS FOR WITNESSES AS GUARANTEED IN THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 12 OF THE CONSTITUTION OF UTAH.

In the course of re-direct examination the prosecutor elicited the following testimony with respect to the aggravated robbery charges that the witness, Kayle Shaw, was facing at the time:

Q: And what was the name of your lawyer at that time?

A: Carolyn Nichols.

Q: And did you have personal contact with her at that time?

A: Yes.

Q: And why did you discharge her at that time?

A: She was defending Louis Rashado, somebody I had set up.

Q: Has Mr. Rashado been charged with the distribution of narcotics also?

A: Yes.

Q: And she is representing him?

A: Yes.

Q: Was there any other reason that you fired her other than this conflict of interest?

A: Yes.

while they were driving in the area. The two of them then removed some articles from the burned out car. The state's theory was that the defendant knew where the car was and directed his friend to it. The friend testified that he did not see the car at the place where the defendant saw it.

The defendant disclaimed any knowledge of the homicide, and testified that he could see the burned out car from the road. Since the wreckage had been moved, a police officer who conducted the investigation was called by the defendant to give the exact location of where the car was found and he testified that it could be seen from the road. The officer's attendance could not be secured immediately because he was out of town and was unable to fly to the location of the trial due to bad weather. The trial was continued for one day, but the weather did not break and the court refused to grant any further continuances and the trial was concluded. The defendant was convicted as charged. After analyzing a great number of cases the Alaska court found seven factors that must be met before a court grants a mid-trial continuance to secure the attendance of a witness. These factors are:

1. The evidence must be material;⁸
2. The evidence cannot be elicited from any other source;

⁸ Requirement given in State v. Hartman, supra.

3. The evidence must not be cumulative;

4. It is probable that the witness can be secured in a reasonable time;

5. There will be little inconvenience to the court and to others;

6. The requesting party must have acted dilligently and in good faith to secure the attendance of that witness;⁹ and

7. There is a reasonable likelihood that the testimony would affect the jury's verdict.¹⁰

The Alaskan court found that all these factors were present. On that basis the court held that the defendant's Sixth Amendment right to have compulsory process was denied because he was not allowed to call favorable witnesses, Washington v. Texas, 388 U.S. 14 (1967)

The materiality of the testimony that Ms. Nichols would give was established by Kayle Shaw. He stated the knowledge that Ms. Nichols had would probably affect the determination of the guilt or innocence of the appellant (T. 155). Furthermore, such evidence would be considered for substantive purposes rather than for simply assessing

9. Requirement given in State v. Freshwater, 30 Utah 442, 85 P.447 (1906)

10. This is the general standard for prejudice, State v. Eaton, supra.

Shaw's credibility, as is made clear in the note following Rule 63(1) of the Utah Rules of Evidence.

Shaw also testified that he and Ms. Nichols were the only persons present during the course of the conversation (T.154). Consequently, there were no alternative sources of information.

Ms. Nichols' testimony would not have been cumulative. There had been no showing that Shaw had made other prior inconsistent statements.

By allowing Mr. Rich to claim the attorney-client privilege the court has previously prevented the appellant from showing that Shaw had made such statements.

The witness could have been served in a reasonable time. As noted above the appellant made the request on Thursday, June 16, 1977; the witness would have been available on Monday, June 30, 1977. Since the courts are not open on Saturday and Sunday, Friday, June 17, 1977, would have been the only day that the trial would have to have been continued. What amounts to a one day delay is hardly unreasonable. The reasonableness of this delay is reinforced if this court takes judicial notice,

pursuant to Rules 9¹¹ and 12(3)¹² of the Utah Rules of Evidence, of the fact that it is a common practice in the Third Judicial District to continue a trial from Thursday to Monday if the judge hearing the case is to take the arraignment and sentencing calendar on Friday.

These same considerations apply to the inconvenience that a continuance over a Friday would cause to the court and to others.

11. Rule 9: (1) Judicial notice shall be taken without request by a party, of the common law, constitution and public statutes in force in this state, and of such specific facts and propositions of generalized knowledge as are so universally known that they cannot reasonably be the subject of dispute.

(2) Judicial notice may be taken without request by a party, of (a) the common law, constitution and public statutes of every other state, territory and jurisdiction of the United States, and (b) private acts and resolutions of the Congress of the United States and of the legislature of this state, and duly enacted ordinances and duly published orders, rules and regulations of governmental subdivisions or departments or agencies of this state (and duly published orders, rules and regulations of the departments or agencies of the United States), and (c) the laws of foreign countries, and (d) such facts as are so generally known or of such common notoriety within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute, and (e) specific facts and propositions of generalized knowledge which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy.

(3) Judicial notice shall be taken of each matter specified in paragraph (2) of this rule if a party requests it, and (a) furnishes the judge sufficient information to enable him properly to comply with the request and (b) has given each adverse party such notice as the judge may require to enable the adverse party to prepare to meet the request.

12. Rule 12(3): The reviewing court in its discretion may take judicial notice of any matter specified in Rule 9 whether or not judicially noticed by the judge.

In State v. Salazar, supra, this consideration was weighed against the possible prejudice to the defendant's substantive rights. The rights involved here as were involved in State v. Salazar, supra, are the appellant's Fourteenth Amendment right to Due Process of Law as that clause applies the compulsory process clause of the Sixth Amendment of the United State's Constitution to the states and the rights guaranteed in Article I, Section 12 of the Constitution of Utah. Unquestionably, a one day delay does not so seriously affect the need for efficiency and prompt disposition of criminal cases that these substantive rights must be denied.

Also, there is no question that the appellant acted dilligently and in good faith in trying to secure the attendance of the witness. An attempt to subpoena Ms. Nichols was made on the same afternoon of the date that Kayle Shaw testified and the need for Ms. Nichols to testify was made apparent. (T.401) The continuance was requested the day following the attempt to subpoena Ms. Nichols. It hardly would have been possible for the appellant to act more dilligently in trying to secure the attendance of this witness.

Finally, there is a reasonable likelihood that the testimony would have affected the jury's verdict. As has previously been argued, by preventing the appellant from challenging the credibility of Kayle Shaw the trial court denied the appellant his only defense; that being that Kayle Shaw had lied about buying drugs from the appellant and was repaying the appellant for an old debt. The prior inconsistent statements would allow the jury to see that Shaw must have been lying in making at least one of the inconsistent statements and from this, the jury may infer that Shaw was lying about buying

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narcotics from the appellant. The evidence would also have been considered substantively in determining the guilt or innocence of the appellant. Obviously there is a reasonable likelihood that this testimony may have affected the jury's verdict.

Since all the factors delineated in State v. Salazar, supra have been met in the case at hand, the appellant has been denied his right to call favorable witnesses as required by the compulsory process clause of the Sixth Amendment to the United States Constitution and Article I, Section 12 of the Constitution of Utah. Washington v. Texas, supra. The judgment and verdict must be reversed and the case remanded to the Third District Court for a new trial.

POINT E

THE CUMMULATIVE EFFECT OF THE AFOREMENTIONED ERRORS RESULTED IN A DENIAL OF APPELLANT'S RIGHT TO A FAIR TRIAL.

In State v. St. Clair, supra, this Court found that when a trial court commits a number of errors which if singly considered are insufficient to warrant reversal, the cumulative effect of these errors was prejudicial. The individual errors in that case included an expression of a preconceived notion of the defendant's guilt by the judge; a refusal to allow the defendant's counsel to show the bias of a key prosecution witness; a refusal to admit evidence concerning the relationship between the defendant and the victim of the homicide; a failure to instruct the jury to disregard statements by a witness that the prosecutor had agreed to strike; an intentional

eliciting of an inadmissible statement from a witness by the prosecutor; and an unreasonable time limitation on closing arguments.

The errors in the case at hand are analogous to a number of those errors in State v. St. Clair, supra. There were three distinct groups of errors in this case. The first group of errors involve statements made by Kayle Shaw which constitute prior bad acts by the appellant. Although the court seemed to indicate that error had been committed there was no instruction given to preclude the jury from considering the evidence. At least two of these statements had been intentionally elicited by the prosecutor.

The second group of errors involves the prosecutor's closing arguments where he made adverse comments about the appellant exercising his Fifth Amendment privilege against self incrimination; and where he presented evidence to the jury that had been held inadmissible.

The final group of errors precluded the appellant from impeaching Kayle Shaw on the basis of prior inconsistent statements. Error occurred when the court allowed Kayle Shaw's court-appointed attorney to assert the attorney-client privilege when an exception to that privilege applied. The court also refused to grant a very short continuance to allow Kayle Shaw's other attorney to testify about a conversation she had with Shaw. The prosecutor had elicited statements from Shaw about that conversation.

If as a result of these errors there is a reasonable likelihood that the jury's verdict would have been different, then the error is prejudicial. As has been pointed out in detail, the effect of

the errors was threefold: First of all, the appellant was made out to be a man with a bad reputation who kept large quantities of narcotics at his residence, who would possibly kill the witness and who would interfere with the right to counsel of a witness who was facing three first degree felony charges. Secondly, the prosecutor made it appear that the appellant was willing to keep probative evidence from the jury by not testifying and by not allowing the jurors to read a transcript of the tape recording of the alleged transaction. Finally, the appellant was not allowed to impeach Kayle Shaw on the basis of prior inconsistent statements.

The first set of errors enables the jury to make the inference that the appellant is a bad person therefore he must have sold these narcotics. The second set of errors encourages the jury to believe that the appellant is preventing them from considering probative evidence. The third set of errors prevented the jury from adequately assessing Kayle Shaw's credibility.

The appellant's defense was that Kayle Shaw had lied about narcotics sale, and that Shaw was repaying an old debt. The first part of this defense was severely impaired by the errors that precluded the jury from assessing Kayle Shaw's credibility. The jury being allowed to infer bad acts from the appellant's prior bad acts may prevent the jury from believing the part of the defense explaining why the appellant had the state's money. There is a similar result from those errors which allow the jury to conclude that the appellant is hiding something. Unquestionably, there is a reasonable likelihood that these errors may have affected the jury.

verdict. The judgment in the court below must be reversed and the case remanded to the Third District Court.

CONCLUSION

The use of the tape recording of the transaction between the appellant and Kayle Shaw violated the appellant's rights guaranteed by the Fourth Amendment of the United States Constitution and Article I Section 14 of the Constitution of Utah which resulted in a denial of defendant's right to a fair trial. When the cumulative effect of these errors is considered the reversal of the trial court's judgment is mandated.

DATED this ____ day of March, 1978.

Respectfully submitted,

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