2001

# The State of Utah v. Vera Mason : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

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| THE STATE OF UTAH, | : | |
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| PLAINTIFF AND RESPONDENT | : | |
| | : | |
| vs. | : | CASE NO. |
| | : | 13642 |
| VERA MASON, | : | |
| | : | |
| DEFENDANT AND APPELLANT | : | |

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BRIEF OF ~~DEFENDANT~~ Appellant

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Appeal from Judgment of the Third Judicial Court for Salt Lake County, Utah

Honorable Joseph G. Jeppson, Judge



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BRIEF OF DEFENDANT

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## STATEMENT OF THE KIND OF CASE

This is a criminal prosecution of the Defendant, here Appellant, for theft during the course of which the jury heard certain admissions from the defendant on the stand relating to recent use of narcotics and testimony from a police officer relative to the effect of narcotics use.

## DISPOSITION IN THE LOWER COURT

Objections of Defense counsel at the trial to testimony about narcotics use and alleged expert testimony as to effect of narcotics were overruled by the trial court. The jury found defendant quilty and she was duly sentenced and is now serving her term.

## RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the judgment, vacation of sentence and dismissal of the case as having been tried under conditions so prejudicial as to have resulted in denial of a fair trial.

## STATEMENT OF THE FACTS

The matter came on to be heard in Third District Court in and for Salt Lake County; the Honorable Joseph G. Jeppson presiding. The State of Utah

was represented by John R. Anderson, Esq., and the Defendant by Jack W. Kunkler, Esq., Salt Lake Legal Defenders Association. Various witnesses testified as to the circumstances surrounding a theft, and made various identifications. At the close of the State's case the Defendant, Vera Mason, was called in her own behalf and testified. After direct testimony the State's attorney began his cross-examination with the question, "Mrs. Mason, are you now under the influence of any narcotic?" Over objection of Defense counsel the Defendant was directed to answer and replied "Somewhat, yes." (R.110, T. 66) State's next question was, "By 'somewhat', would you tell us when you last took a drug and what it was?" Defendant replied, "About, let's see, about 8:30 this morning." (This testimony was given sometime after 3:00 p.m. as may be seen from

the colloquy between court and bailiff at page 58 of the Transcript (R 102) about the time then being twenty to three. A brief recess (R. 105 line 4) was had; and testimony filling eight pages of transcript was taken between "twenty to three" and the Defendant's testimony about narcotics use.

Defendant subsequently testified under cross examination as to the narcotic she had used, heroin (R. 111, line 2); the quantity, two ten-dollar caps or baloons (R. 111, lines 13, 15); her state of sensation, "Do you consider yourself as now being under full control of your faculties?" "Yes."; "Are you high?" Answer "No, I'm not." (R. 111, lines 18-22).

An objection was sustained as to when Defendant planned to take narcotics again, after which the following testimony occurred:

Q. (By Mr. Anderson, the prosecutor) "Your testimony, then, is that you are now under the influence of the heroin that you took at 8:30 this morning?"

Mr. Kunkler: "I believe she just testified that she wasn't."

Mr. Anderson: "She can answer it."

A. (Defendant)"I beg your pardon?"

Q."You are then under the influence of the two caps of heroin that you took at 8:30 this morning?"

THE COURT:"You are now under some influence from it?"

A. "Well somewhat. It's mostly worn off. It's not - It's mostly gone out. I'm not high or anything from the effect of it."(R. 111, 112 lines 27-30, 1-9). Thereafter followed cross-examination relating to defendant's whereabouts on the date of the alleged theft.

David W. King, a police officer

was subsequently recalled by the state (R. 113), gave an account of his experience in narcotics related work (R. 114); gave his opinion as to what the effect of two balloons of heroin would have on a "normal" person taken at 8:30 in the morning "... the time now being a quarter to four?" (Hospitalization) (R. 115); gave his opinion as to the state of an addict under the same time interval (wanting some more; but neither extremely high nor in pain from withdrawal) (R. 116). Under cross-examination by defense counsel officer King testified about cutting of heroin and strengths (R. 117); kinds of heroin, Mexico brown and French white (R. 118), the kind and typical strength of heroin available in Salt Lake City (Mexico brown, "...typically 3 to 7 percent"),(R. 118), and gave an opinion that an addict having taken

such a dose at 8:30 would not by that time of day be "off in another world." (R. 119).

Defendant's admissions were objected to and overruled by the court three times. (R. 110, R. 111) and the testimony of the officer as expert was objected to for lack of relevance, and overruled (R. 114); for lack of foundation (R. 114) (R. 115) and overruled in each case. The State did not offer and the record does not disclose any proffer of testimony which would tend to show the truth of defendant's admissions by independent evidence.

The court instructed the jury as to the credibility and prejudicial effect of the narcotics-use testimony (R. 119-121) but the jury instruction on this point was oral and not submitted to the jury in writing since the court had not anticipated such testimony. (R. 119).

Defendant was found guilty as charged.

ARGUMENT

POINT 1

IT WAS ERROR TO PERMIT PROSECUTION TO ELICIT ADMISSION OF NARCOTICS USE ON MORNING OF TRIAL FROM DEFENDANT WITHOUT REQUIRING PROPER FOUNDATION AND WITHOUT REQUIRING STATE TO PROVE OR OFFER TO PROVE THAT MATTERS INSINUATED OR SUGGESTED ON CROSS EXAMINATION WERE TRUE BY INDEPENDENT EVIDENCE.

No Utah cases directly in point have been found.

Cases from other jurisdictions are fairly numerous in holding that narcotics addicts are not thereby rendered incompetent as witnesses even though addiction be proved.

There are a number of cases holding that evidence showing past ude of

narcotics or effect of such may not usually be shown for purposes of impeaching the credibility of witnesses. People v Dixon, 22 Ill 2d 513, 177 NE2d 224, cert den 368 US 1003, 7 L ed 2d 542, 82 S Ct 637. People v Williams, 6 NY2d 18, 187 NYS2d 750, 159 NE2d 549, cert den 361 US 920, 4 L ed 188, 80 S Ct 266. People v Sorrentini, 26 App Div 2d 827, 273 NYS2d 981. Commonwealth v Davis (Pa Super) 132 A2d 408; Commonwealth v Reginelli, 208 Pa Super 344, 222 A2d 605. Tobar v State, 32 Wis 2d 398, 145 NW2d 782.

There appears to be a well-recognized exception, however, where cross-examination is directed to determination of whether a given witness is under the influence of narcotics while testifying. Campbell v U.S. (CA1 Mass) 269 F2d 688. State v Reyes, 99

Ariz 257, 408 P2d 400. People v Perez, 239 Cal App 2d 1, 48 Cal Rptr 596. People v Lewis, 25 Ill 2d 396, 185 NE2d 168. State v Cox (Mo) 352 SW2d 665. State v Collins (Mo) 383 SW2d 747.

The inquiry is permitted for purposes of showing lack of credibility. People v. Perez, supra.

The Missouri courts have held that the extent of cross-examination to impeach credibility of a drug user is a matter for the trial court's discretion. State v. Cox, supra.; State v. Collins, supra.

Many older cases are summarized at 52 ALR2d 848-860 in an annotation "Use of drugs as affecting competency or credibility of witness."

The earliest cases are reviewed and analyzed in an article "The Testimony of Drug Addicts," George Rossman,

3 Ore. L.Rev 81 (1924).

Utah Code Annotated 77-44-5 provides that a defendant may be cross-examined the same as any other witness and his or her credibility may be impeached by the same methods.

A defendant or any other witness may be temporarily incompetent to testifv by reason of recent administration of narcotics. But it is a matter for the trial court's determination from personal observation whether the witness is able to understand questions and respond lucidly or whether he is temporarily so impaired as to lack the qualifications of a witness. State v. Ballestros, 100 Ariz 262, 413 P2d 739. People v Dixon, 22 Ill 2d 513, 177 NE2d 224, cert den 368 US 1003, 7 L ed 2d 542, 82 S Ct 637. State v Cox (Mo) 352 SW2d 665.

The better reasoned cases impose

two requirements for the admissibility of testimony about recent narcotics use for purposes of impeachment of credibility. They are 1) a foundation must be laid and 2) the state must be prepared to at least proffer proof of either a history of addiction, some physical evidence of use, e.g. needle tracks, or independent proof of witnesses use of drugs.

The Appellate Court of Illinois has said:

> "[2] It is an elementary rule of trial procedure that for the purpose of impeachment, a witness may be cross-examined concerning his drug addiction in order to disclose a matter affecting his cridibility. (citing Illinois cases). However, a foundation must be laid; and, once this is done, it is incumbent on the party who lays the foundation to offer proof of what is insinuated or suggested in the impeaching cross-examination. (Citations) Failure to do so can, in a proper case, result in infringement of the right to a fair trial. (Citations). Therefore,

it was improper for the assistant state's attorney to ask Urbina whether he used narcotics without being able to prove that he was an addict or a user of drugs. The trial judge erred in allowing the question and its answer to be read to the jury. (Citations)." People v. Telio, 1 Ill. App 3d 526, 275 NE2d 222 at 225.

The Court of Appeal for the Second District, Division 2, in California has quoted 52 ALR2d 848-849 and added comment as follows:

"As stated in 52 A.L.R2d at pages 848-849: 'The view adhered to by what may be called the weight of authority is that testimony as to narcotic addiction, or expert testimony as to the effects of the use of such drugs, is not considered admissible to impeach the credibility of a witness unless followed by testimony tending to show that he was under the influence while testifying, or when the events to which he testified occurred, or that his mental faculties were actually impaired by the habit. A minority of the decisions take the broad view

> that evidence of the use of narcotics (may be introduced subject to) the qualifying factors mentioned above.' (See said A.L.R. reference for a summary of cases supporting majority and minority views; see also So.Calif.Law Review, Vol. 16, page 333 et seq. for a discussion of this issue with appropriate citations of cases.) Reason and California case law compels the adoption of the majority view. The prosecution produced no witnesses nor made any offer of proof to indicate that Aiken was under the influence at any critical time or that his mental faculties were actually impaired by reason of addiction. The whole line of questioning on this subject was not only improper but highly prejudicial to appellant Ortega and could only have the effect of degrading the witness Aiken." (Emphasis added) People v Ortega, 2 col App3d 888 at 903, 83 Cal.Reptr 260 at 271.

In the case at bar it does not appear that anywhere in the record did the State attempt to adduce or even make a proffer of independent proof of defendant's use of narcotics.

The entire matter of the defendant-witness's use of narcotics

depends on her own admission. An admission elicited from her before any foundation of any type had been laid by the state's attorney. An admission made over counsel's objection and never subsequently corroborated by any independent evidence whatever. In accordance with the principles enunciated in the better reasoned opinions, defendant respectfully submits that in this case, if anywhere, have failure to lay a foundation and to thereafter "offer proof of the matters insinuated or suggested in the impeaching cross-examination" resulted in infringement of the right to a fair trial.

POINT II

IT WAS ERROR TO PERMIT A POLICE OFFICER WITH NARCOTICS SQUAD EXPERIENCE TO TESTIFY AS TO THE EFFECTS OF

NARCOTICS IN GENERAL TERMS AND WITHOUT ANY PROBATIVE RELATIONSHIP TO THE DEFENDANT-WITNESS' PRESENT CONDITION AND WITHOUT ANY EVIDENCE WHATEVER BEFORE THE COURT OR JURY AS TO THE TYPE OR STRENGTH OF NARCOTICS DEFENDANT MIGHT HAVE USED.

In general terms the Utah rule on expert witnesses is that the qualifications necessary for a witness to testify as an expert depend on the nature of the case and the complexity of the particular matters on which he will testify. Startin v. Madsen, 120 U 631,237 P.2d 834. It is a matter for the trial court to pass upon whether the matter requires expert testimony and if so what the necessary qualifications of the witness shall be. Webb v. Olin Mathieson Chemical Corp., (9 U2d 275, 342 P2d 1094, 80 ALR2d 476). It is also the responsibility of the

court to closely scrutinize the qualifications of the expert witness, in view of the weight and significance to be given his testimony, in order to guard against giving undue credence to the pseudo-expert of charlatan. Id.

In the present case the officer testified to two and a half years of police work in narcotics. He testified to having been to narcotics seminars, the Utah Police Academy narcotics investigation course, working a year undercover and stated that "experience" had been his greatest teacher. (R 114, T. 70). Immediately following that testimony he testified that he could not state with any degree of precision how much heroin was in a cap, "not in milligrams or anything" (R. 115, T. 71); that it would amount to something like half a cold capsule full, that it would be cut "with lactose or something

like that" and that two balloons worth would hospitalize a "normal" (i.e. non-addicted) person. (R. 115; T. 71) He further testified on direct examination that an addict would be neither extremely high nor in pain of withdrawal on two caps taken at 8:30 that same morning by the time he was testifying, 3:45 p.m. (R 116, T. 72, line 10,11-19) He had previously testified that the mental state in which a heroin user would be, in his opinion, would depend on "....what habit the heroin user had, how much heroin he shows (sic), how much resistance he has, how long he or she had been on heroin." (R. 116, T. 72, lines 3-5).

On cross-examination the officer testified as to the probable condition of an addict who might be accustomed to taking two caps at 8:30 in the morning of "current street heroin";

(R. 117, T. 73); admitted that heroin may be "cut" many times by dealer, pusher (Id.); that strengths of cuts vary; that at least two kinds of heroin are available varying greatly in quality (R 118, T. 74, lines 17-26).

The foregoing is all the testimony that was offered on the subject of heroin and its effects. As to the defendant-witness who had previously assumed the stand in her own behalf, something she was not bound to do, this testimony without more served only to inflame the jury and to offer them nebulous criteria for impermissible speculation as to what the effects of a heroin use by the defendant early in the day of the trial might have been.

There is no scintilla of evidence anywhere that the defendant in fact used any narcotic apart from her own admission extracted over her counsel's



objection. The state

made no showing that the balloons in this case contained heroin at all, that if they did it was of any particular type or grade, or that it was cut to a heavy or mild or non-narcotic dose by percentage. The jury could only conjecture from the paucity of proof and wealth of innuendo presented in officer King's testimony.

Officer King's testimony is highly suspect as expert opinion evidence. He claims no medical background, describes no physical symptoms. He is only able to state that experience has taught him a good deal and that he has seen people in drugs. Nowhere in the record does it appear that he can characterize the defendant as appearing as though under the influence of narcotics. Rather the officer's testimony is a series of conjectures as to

how much or how little an addict might be "hurting" after an elapsed time of 7 1/4 hours since a fix consisting of two caps of un unknown grade of an unknown variety of a substance identified only by the defendant over objection as heroin.

Here as in Ortega (supra) "the whole line of questioning on this subject was not only improper but highly prejudicial to appellant ... and could only have the effect of degrading the witness", here the defendant.

The degradation of the witness in the jury's eyes can readily be seen, when such evidence come in, is hashed and rehashed immediately before their deliberations, yet never tried by any shred of independent corroborative evidence to defendant's condition

at the time of trial, or to her past history of addiction, tolerance, quality of use or any other of the factors which the state's own pseudo-expert witness himself testified would have to be factors to be considered in forming an opinion as to the defendant's present state of mind.

## CONCLUSION

Defendant, as a matter of law, is entitled to dismissal of the verdict against her and the vacation of sentences pursuant thereto because of prejudicial error in permitting the State's attorney to elicit damaging admissions relative to recent use of narcotics without first laying a foundation and/or subsequently adducing or at least proffering independent corroborative evidence of defendant's

alleged use; and because the state's expert witness 1) lacked the necessary expertise to testify meaningfully as to the effects of narcotics on the defendant and 2) what testimony he gave was never related to defendant, consisted of hypothetical narcotics effects based on generalities not meeting the standard of proof and had only the effect of prejudicing the jury against defendant since it was without probative value as to the effects of admitted drug use by her.