

1977

# State of Utah v. Dennis Boyd Gardner : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff  
Respondent

vs

DENNIS BOYD GARDNER

Defendant  
Appellant

BRIEF OF APPELLANT

Appeal from the Judgment of the District  
Judicial District Court

EDWARD SHEPHERD, COUNSEL

RECEIVED  
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UTAH STATE CAPITOL BUILDING  
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THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A MISTRIAL BASED ON IMPROPER CLOSING REMARKS OF ATTORNEY FOR THE STATE WHICH IN EFFECT, DENIED TO DEFENDANT HIS RIGHT TO EXERCISE HIS PRIVILEGE TO REFUSE TO GIVE EVIDENCE AGAINST HIMSELF.

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PHENTERMINE IS NOT A CONTROLLED SUBSTANCE AS DEFINED BY LEGISLATIVE LAW. THE SALE OF PHENTERMINE IS NOT VIOLATIVE OF ANY PROVISION OF THE UTAH CODE AND DOES NOT SUPPORT A VERDICT OF GUILTY OF SALE OF A CONTROLLED SUBSTANCE.

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#### CONSTITUTION OF THE UNITED STATES OF AMERICA,

IN THE SUPREME COURT

of the

STATE OF UTAH

THE STATE OF UTAH,

Plaintiff and Respondent,

vs

Case No. 15536

DENNIS BOYD GARDNER,

Defendant and Appellant.

BRIEF OF APPELLANT

NATURE OF CASE

Defendant was charged, by information, with three counts of violation of Title 58, Chapter 37, Section 8 (1) A (a) (ii) Utah Code Annotated, 1953, as amended.

DISPOSITION IN THE LOWER COURT

Defendant was found guilty, by a jury, of three counts of distribution of a controlled substance for value (two counts, phentermine, one count, marijuana) in violation of Title 58, Chapter 37, Section 8 (1) A (a) (ii) Utah Code Annotated, 1953, as amended. Defendant Appellant was sentenced to serve ninety (90) consecutive days or six (6) months, weekends, in the Carbon County Jail, to make restitution to the State for attorney fees, plus a three (3) year probation.

RELIEF SAUGHT ON APPEAL

Reversal of the verdict and judgment of the Court below.

## STATEMENT OF FACTS

1. On or about the 21st day of January, 1977, Defendant Appellant was charged with violation of Title 58, Chapter 37, Section 8 (1) A (a) (ii), Utah Code Annotated, 1953. Said charge was amended to include two additional counts; i.e., distribution of a controlled substance for value, two counts phentermine, one count marijuana. Defendant entered pleas of not guilty to all counts.

2. Preliminary hearing was had in Price City Court on the 4th day of May, 1977. Defendant's Motion to Dismiss as to counts one and two (phentermine) on the grounds that phentermine is not a controlled substance as defined in Title 58, Chapter 37, Section 2 (5), Utah Code Annotated, 1953, as amended. Defendant's Motion was denied and Defendant was bound over to District Court for trial.

3. Defendant was arraigned in the Seventh District Court of Carbon County on the 16th day of May, 1977 and entered pleas of not guilty to all three counts. Trial was set for June 20, 1977 and continued at the request of the State. On the 10th day of June, 1977 Defendant filed a Motion in Limine asking the Court to define the allowable scope of cross-examination of the State's chief witness, Barry Decker.

4. On the 8th day of September, 1977, the day of trial, the Court considered defendant's Motion in Limine and prohibited defendant's cross-examination of State's witness with regard to his criminal and/or employment record. Defendant

was found guilty of the charges.

5. On the 20th day of October, 1977, prior to the sentencing Defendant moved the Court for an Order for a new trial, the State objected on the grounds that the Motion was untimely whereupon defendant asked the court to consider the Motion as a petition for a Writ of Coram Nobis, citing as precedent, State v. Mitchell, Utah, No. 15118, (1977). Defendant's Motion was denied.

6. Defendant was sentenced on October 31, 1977 and has served the jail portion of said sentence.

#### ARGUMENT

##### POINT I

THE TRIAL COURT ERRED IN REFUSING TO ALLOW DEFENDANT'S CROSS-EXAMINATION OF THE STATE'S WITNESS WITH REGARD TO HIS CREDIBILITY, I.E., HIS CONVICTION AND DISMISSAL AS A POLICE OFFICER FOR A CRIME INVOLVING DISHONESTY AND MORAL TURPITUDE.

The chief witness for the State at defendant-appellant's trial was one Barry Becker, paid informant for Region VIII Task Force. Mr. Becker has testified under oath at defendant-appellant's preliminary hearing in Price City Court that he, Mr. Becker, had been dismissed as a law officer in the State of California. He testified further that his dismissal followed charges of fraud which were brought against him involving giving false statements to an insurance company and police officers regarding theft of an automobile--crimes involving dishonesty and false statement. He testified that

as a result of plea bargaining he had entered a plea of guilty to a misdemeanor. It was urged at trial that Mr. Becker's record had been expunged. [See transcript.]

In the case of State v. Hougensen, 64 P2d 229 (1936) the Supreme Court of Utah surveyed the law with respect to the issue as to whether on cross-examination, prior conduct, act or actions, specific in nature, may be elicited in order to affect credibility. The Court set forth principles to aid the jury in determining the reliability of a witness. Among these principles the Court listed as follows:

(3) Questions whose only object could be to call for answers to affect the credibility of the witness and which answers would tend to degrade his or her character, but not tend to subject such witness to punishment for a felony, are permissible over a general objection as to their relevancy or competency, in the sound discretion of the court.

(4) Questions whose only object could be to call for answers to affect the credibility of the witness and which would tend to subject such witness to punishment for a felony, are permissible over a general objection as to their relevancy or competency, in the sound discretion of the court.

(5) The discretion referred to in rules 3 and 4 is to be exercised in view of the varying circumstances of each particular case and not limited by the intrinsic and immediate consideration arising out of the cross-examination.

(6) Answers called for by questions specified under (3) and (4), are not excluded by the court in its discretion on a general objection, and always subject to exclusion by the witness exercising his or her personal privilege, and this may be suggested to the court by the attorney. The court should before the witness answers, inform the witness of his or her rights in that regard.



(7) Guiding the discretion of the court, are the following: If the cross-examiner claims that he desires to show the witness as one of low morality or a dissolute person by a series of questions showing such facts, conduct or associations with disreputable characters as would tend to so stamp the witness as not worthy of credit, the court should in the absence of the jury take the offer of such questions and determine if it would so tend to show such character that the jury should have it as part of the case in order to judge of the credibility of the witness and, if so, permit in the presence of the jury such questions to be asked, subject to Rule (6). People v. Morano, 192 App., Div. 342, 183 N.Y.S. 435 ... at 236.

(10) All of the above rules relate only to questions on cross-examination designed not to show motive, or to explain, clarify, amplify, contradict, or directly destroy the force of any evidence brought out on direct examination, but only for the purpose of impairing the reliability of a witness as an honest, accurate and fair transmitter of testimony. at 236

The trial court, citing Hougensen, relied on paragraph 5 to support its decision. Paragraph 8 reads as follows:

(8) Where the questions of the cross-examiner call for isolated or sporadic acts or conduct directly tending to degrade the witness, or show moral turpitude, whether they would tend to subject the witness to punishment for a felony or not, but which could not be said to mark the witness as one of low or dissolute character and which do not present any reasonable basis for an assumption that the witness was not telling the truth in the case, objection on the ground of irrelevancy and incompetency should be sustained. at 238.  
[emphasis added]

It is here argued that conviction of a crime of dishonesty and dismissal of a police officer for conduct unbecoming an officer do represent a reasonable basis for an assumption that the witness was not telling the truth.

Hougensen, though old law is still good law as seen by

its adaptation into the Utah Code and Utah Rules of Evidence. Title 78, Chapter 24, Section 9 provides as follows:

Although, in every case the credibility of the witness may be drawn in question, or by evidence affecting his character for truth, honesty, or integrity, and the jury are the exclusive judges of his credibility. (emphasis added).

The counter part of this code provision is found in the Utah Rules of Evidence,

Rule: 21 Limitations on Evidence of Conviction of Crime as Affecting Credibility

Evidence of the conviction of a witness for a crime (not involving dishonesty or false statement) shall be inadmissible.

In the case at bar, the crime of the witness involved dishonesty and false statement. In his article, Impeachment of Witness for Prior Criminal Activity, 3 Utah Bar Jur. 1-6, p. 13 (1975), Professor Ronald N. Boyce says as follows:

It would appear that the Utah court has clearly stated that, both under statute and rule, a witness may be examined as to a felony conviction, the number and type. Although the Utah court has not passed on the question of impeachment by misdemeanors, it would appear that a reasonable construction of Rule 21 would be to conclude that the language of the rule limiting use of convictions to crimes involving dishonesty or false statement would be applicable to misdemeanors . . . . . at 21.

It is submitted that the status of the law of impeachment in Utah by prior criminal activity has been clarified by the adoption of the Utah Rules of Evidence and Interpretive case law. A witness may be impeached by showing a conviction of a felony or by showing conviction of a misdemeanor involving dishonesty or false statement, at 21.

The Code provides in addition for a privilege which the witness may claim if he is asked questions, the answers to which could degrade his character.

78-24-9: Duty to answer questions - Privilege  
A witness must answer questions legal and pertinent to the matter in issue, although his answer may establish a claim against himself; but he need not give an answer which will have a tendency to subject him to punishment for a felony; nor need he give an answer which will have a direct tendency to degrade his character, unless it is to the very fact in issue or to a fact from which the fact in issue would be presumed. But a witness must answer as to the fact of his previous conviction of felony.

The Rule of Evidence which supports the above code section reads as follows:

Rule 63 (20) Judgement of Previous Conviction.  
Evidence of a final judgment adjudging a person  
guilty of a felony, to prove any fact essential  
to sustain the judgment.

The Utah Code of State v. Bennett, 517 P2d 1029, cited by the Court below, is inapposite to the issue at bar since in Bennett, the issue was whether Defendant was required to answer regarding conviction of a felony. As indicated above the law in Utah is that a witness must answer to a felony but that he may raise the privilege provided by law not to answer to other convictions. The law nor the rule does not prohibit the asking of the question. Whether an answer is admissible is a matter of judicial discretion as the issue of credibility is one for the jury.

The case of Gordon v. U.S., 383 F2d 936 (1966) sets forth the purpose of impeachment as follows:

In considering how the District Court is to exercise

the discretionary power we granted, we must look to the legitimate purpose of impeachment which is, of course, not to show that the accused who takes the stand is a "bad" person but rather to show background facts which bear directly on whether jurors ought to believe him rather than other and conflicting witnesses. In common human experience acts to deceive, fraud, cheating, or stealing, for example, are universally regarded as conduct which reflects adversely on a man's honesty and integrity. Acts of violence on the other hand, which may result from a short temper, a combative nature, extreme provocation, or other cause, generally have little or no direct bearing on honesty and veracity. A "rule of thumb" thus should be that convictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes generally do not; traffic violations, however serious, are in the same category. The nearness or remoteness of the prior conviction is also a factor of no small importance. Even one involving fraud or stealing, for example, if it occurred long before and has been followed by a legally blameless life, should generally be excluded on the ground of remoteness . . . at 940.

The state has the burden of proving the guilt of a presumably innocent defendant. If a witness, has committed crimes of dishonesty, the trier of fact should have that information upon which to base a decision as to credibility of that witness - whether his crime be called a felony or misdemeanor.

## POINT II

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A MISTRIAL BASED ON IMPROPER CLOSING REMARKS OF ATTORNEY FOR THE STATE WHICH IN EFFECT, DENIED TO DEFENDANT HIS RIGHT TO EXERCISE HIS PRIVILEGE TO REFUSE TO GIVE EVIDENCE AGAINST HIMSELF.

Amendment V of the Constitution of the United States provides as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Constitution of the State of Utah, Article I, Section 12, Rights of Accused Persons provides:

" . . . . The accused shall not be compelled to give evidence against himself . . . ."

State of Utah v. Fred L. Eaton, No. 14543 was filed by the Utah Supreme Court on September 22, 1977.

Defendant in Eaton alleged improper remarks by the prosecutor who said,

I listened to the entire defense in this case and never heard one shred of evidence from Defendant to prove any motive, any reason that showed Ken Goode was out to get blacks in this community. [at p. 2]

In this case at bar, Plaintiff made repeated remarks to the jury that no defense had been presented. This allegation was repeated six or seven times by Plaintiff during his summation and rebuttal. Plaintiff said, the evidence presented by the state was "not rebutted in any way." Clearly, Plaintiff's remarks were directed to Defendant's failure to testify since

there were only two witnesses to the alleged crime, a paid informer who testified for the State and Defendant.

Referring to the States' right and duty to analyze evidence and point out the strength and weakness of Plaintiff and Defendant's respective positions the Utah Supreme Court, citing State v. Kazda, Utah 540 P2d 949 (1975) says as follows:

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.

It is to be noted that in the Kazda case, referred to above, the distinction we have just discussed was pointed out: and that although the prosecution did analyze the evidence, it made no such reference to the fact that the defendant did not testify as was done here. 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, at p. 1, 2.

Eaton was remanded for a new trial.

The remarks of Plaintiff during summation and rebuttal were improper and repeatedly implied to the jury that defendant had not testified. That implication, in effect, denied to defendant his right to exercise his constitutional privilege not to to be witness against himself.

### POINT III

PHENTERMINE IS NOT A CONTROLLED SUBSTANCE AS DEFINED BY LEGISLATIVE LAW. THE SALE OF PHENTERMINE IS NOT VIOLATIVE OF

AN PROVISION OF THE UTAH CODE AND DOES NOT SUPPORT A VERDICT OF GUILTY OF SALE OF A CONTROLLED SUBSTANCE.

Phentermine is not listed as a controlled substance in the Utah Code. At trial, in the case at bar counsel for the State introduced (Exhibit 7) a certified document signed by the Secretary of State, Utah, declaring phentermine a controlled substance.

This issue, whether an executive Department of the State, may amend a legislative act, was decided by the Utah Supreme Court in November 1977, State v. Gallion, no. 14966. The Court in Gallion said as follows:

There are sound reasons for ruling the definition of a crime and the precise punishment therefor to be essential legislative functions, which cannot be transferred. Criminal trials would be unduly complicated, for the defendant would have the right to challenge the administrative procedure and the findings where a substance has been scheduled or re-scheduled. A similar determination by the legislature could not be challenged. The administrative rulings are not statutes and are not incorporated into the code, a person who wishes to abide by the law would have to resort to the permanent register kept by the secretary of state to determine the status of a substance.

. . . A determination of the elements of a crime and the appropriate punishment therefor are, under our Constitutional system, judgments which must be made exclusively by the legislature, at 6. Footnotes omitted

Under the rationale of Gallion, phentermine, is not a controlled substance, the sale of which is punishable by law. An attempt by the Attorney General and/or the Secretary of State to declare phentermine a controlled substance is

violative of the Constitution of the State of Utah, Article V, Section I. Therefore, defendant-appellant could not be built up of two counts of sale of a controlled substance for value in violation of Title 58, Chapter 37, Section 8 (1) A (a) (ii), to-wit: phentermine.

#### CONCLUSIONS

1. The trial court erred in prohibiting defense counsel's cross-examination of the chief witness for the State with regard to his conviction of a crime involving dishonesty and his dismissal as a police officer for conduct unbecoming an officer.

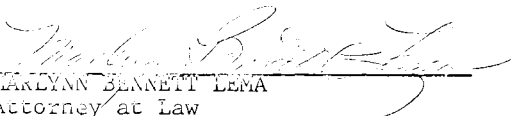
2. The remarks of counsel for the State during summation and rebuttal were improper and repeatedly implied to the jury that Defendant had not testified. That implication, in effect, denied to Defendant his right to exercise his Constitutional privilege not to be witness against himself.

3. Phentermine is not a controlled substance as defined or scheduled in the Utah Code. An administrative attempt to "declare" phentermine a controlled substance is violative of Article V, Section I of the Constitution of the State of Utah. Therefore, defendant-appellant could not be found guilty of two counts of distribution of a controlled substance for value.



CERTIFICATE OF MAILING

I hereby certify that I mailed two true and correct copies of the above and foregoing BRIEF to ROBERT B. HANSEN, ATTORNEY GENERAL, at the Utah State Capitol Building, Salt Lake City, Utah this 22<sup>nd</sup> day of January, 1970, postage prepaid.

  
MARLYNN BENNETT LEMA  
Attorney at Law