

1978

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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STATE OF UTAH,

Plaintiff-Respondent,

-vs-

DENNIS BOYD GARDNER,

Defendant-Appellant.  
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Case No.  
15536  
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BRIEF OF RESPONDENT  
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APPEAL FROM THE JUDGMENT OF THE SEVENTH  
JUDICIAL DISTRICT COURT, IN AND FOR CARBON  
COUNTY, STATE OF UTAH, THE HONORABLE  
EDWARD SHEYA, JUDGE, PRESIDING  
-----

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**FILED**

APR 10 1978

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent, :

Case No. 15536

-vs-

DENNIS BOYD GARDNER,

Defendant-Appellant. :

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with three counts of distribution of controlled substance for value in violation of Utah Code Ann. §58-37-8(1)(a)(ii) (1953).

DISPOSITION IN LOWER COURT

Appellant was tried before a jury and found guilty of three counts of distribution of controlled substances for value (two counts for phentermine, one count for marijuana), on September 8, and 9, 1977, in the District Court in and for Carbon County, Utah, the Honorable Edward Sheya presiding. On November 9, 1977, appellant was sentenced for each of the

three counts; to 1) three years probation, 2) 90 days in jail and 3) ordered to repay the county for attorney fees that had been incurred in his defense. The three sentences were to be served concurrently with only one restitution of attorney fees being required (R.73).

#### RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation of the verdict and judgment of the lower court.

#### STATEMENT OF THE FACTS

Mr. Barry Becker was working as a Region 8 Narcotics Task Force undercover agent during December of 1976 (T.14). In that capacity, he met appellant in the Point After Bar in Helper, Utah, on December 1, 1976 (T.16). Appellant offered to sell Mr. Becker some "cartwheels," the street name for amphetamines (T.16). After some negotiations, Mr. Becker gave appellant twenty-five dollars in exchange for a bag of twenty amphetamines (T.17). A similar incident occurred the following night. Becker met appellant elsewhere and then they drove to the Point After Bar where Mr. Becker again exchanged twenty dollars for a bag of pills represented to be twenty amphetamines (T.21-22).

On December 7, 1976, Mr. Becker was in the No Name Bar when appellant offered to sell him a "lid" of marijuana (T.24-25). In exchange for ten dollars, Mr. Becker received a baggie from appellant, purportedly containing marijuana

Bruce Beck, toxicologist for the Utah State Department of Health (T.52) testified that his findings indicated that the first two exhibits presented by the State were Phentermine, a substance similar in effect to amphetamines (T.53-54). Mr. Beck also verified that the State's third exhibit was marijuana (T.55).

#### ARGUMENT

#### POINT I

THE LOWER COURT PROPERLY RESTRICTED CROSS EXAMINATION OF A STATE'S WITNESS CONCERNING A PRIOR CHARGE OF FALSE STATEMENT AND ITS ATTENDANT JUDICIAL PROCEEDINGS.

Prior to the presentation of any evidence ~~the trial~~ court held a hearing regarding a motion in limini. The Court ascertained that Mr. Barry Becker, the State's chief witness, had previously been charged with a misdemeanor crime involving moral turpitude in California (T.9). Evidence presented by the State showed that Mr. Barry Becker had fulfilled his probation and the court, pursuant to statute, allowed him to withdraw his guilty plea, enter a plea of not guilty, dismissed the Information involved and released him from "all penalty and disability therefrom" (T.6).

After full discussion of this matter the court determined that it would be improper to allow appellant to cross-examine Mr. Becker concerning these previous judicial proceedings and directed her not to do so (T.13).

Appellant argues that questioning about additional details of this charge should have been allowed to impeach Mr. Becker's testimony by demonstrating he was a dishonest person. Respondent submits that this argument is not supported by the facts of the case nor the current state of the law.

Appellant focuses on Rule 21 of the Utah Rules of Evidence in support of his argument. Rule 21 reads:

"Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his credibility, except as otherwise provided by statute."

Even assuming, arguendo, that appellant is correct in his assertion that this rule would allow evidence of a misdemeanor conviction involving dishonesty or false statement to be presented for impeachment purposes,<sup>1</sup> respondent submits that this rule would not be applicable in the present case. Respondent asserts that the proceedings against Mr. Becker in California did not constitute a conviction for purposes of this Rule.

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<sup>1</sup> Respondent has found no judicial interpretation as to the scope of this rule. Whether the rule applies only to evidence of felony conviction or whether misdemeanor evidence is also included within the rule seems to be an unsettled question.



The statute under which Mr. Becker's charge was dismissed is Ann. California Code, Section 1203.4 (Supp. 1978). It reads in relevant part:

"(a) In any cases in which a defendant has fulfilled the conditions of probation for the entire period of probation, or has been discharged prior to the termination of the period of probation. . . the defendant shall, at any time after the termination of the period of probation, if he is not then serving a sentence for any offense, on probation for any offense, or charged with the commission of any offense, be permitted by the court to withdraw his plea of guilty . . . and enter a plea of not guilty; . . . and, . . . the court shall thereupon dismiss the accusations or information against the defendant and he shall thereafter be released from all penalties and disabilities resulting from the offense of which he has been convicted. . . ."

The California District Appeals Court determined the effect that the forerunner of this statute would have on the admissibility of impeaching evidence in the case of People v. Mackey, 58 Cal.App. 123, 208 Pac. 135 (Calif. 1922). In that case a principal witness against the defendant had been charged with a felony and had pled guilty. Under a procedure identical to that expressed in Section 1203.4, the court had dismissed the charge prior to the time he was testifying as a witness. The defendant sought to introduce the record of this prior conviction for impeachment

purposes, as was provided for by statute. But the trial court sustained an objection to the offer of this evidence. In upholding the trial court, the Appeals Court discussed the purpose and legislative intent of the statute in question:

"Of course, after a dismissal in such a situation, the defendant involved, if not still a convicted felon, remains in a practical sense one who has been convicted of a felony. We cannot avoid the conclusion, however, that the Legislature intended in a legal sense by directing a dismissal under such circumstances, to wipe out absolutely the entire proceeding in question in a given case, and to place the defendant in the position which he would have occupied in all respects as a citizen if no accusation or information had ever been presented against him. Such is the legal effect of the dismissal of a criminal charge before conviction, and we are convinced that the lawmaking body intended, by section 1203, that the same effect should attend a dismissal after conviction. . . . On the whole, we conclude that the Legislature intended by the enactment of section 1203 that no convicted person discharged after probation thenceforth should be regarded as one possessed of the degree of turpitude likely to affect his credibility as a witness." Id. at 138.

This holding in Mackey makes clear that the California courts would not have allowed any further evidence concerning Mr. Becker's dismissed conviction to be admitted had this case been before a court of that

state. The reasoning of the California court in Mackey was valid and logical and therefore should be applied by Utah courts. The similar intent of the Utah legislature to free people of certain disabilities relating to prior convictions is expressed in Utah Code Ann. § 77-35-17.5 (Supp. 1977):

"(1) (a) Any person who has been convicted of any crime within this state may petition the convicting court for a judicial pardon and for the expungement of his record in that court . . .

(b) If the court finds that the petitioner, for a period of five years in the case of a class A misdemeanor or felony, or for a period of one year in the case of other misdemeanors, since his release from incarceration or probation, has not been convicted of a felony or of a misdemeanor involving moral turpitude and that no proceeding involving such a crime is pending or being instituted against the petitioner and, further, finds that the rehabilitation of the petitioner has been attained to the satisfaction of the court, it shall enter an order that all records in the petitioner's case in the custody of that court or in the custody of any other court, agency or official be sealed. . .

(c) Upon the entry of the order in those proceedings, the petitioner shall be deemed judicially pardoned and the petitioner may thereafter respond to any inquiries relating to convictions of crimes as though that conviction never occurred." (Emphasis

The important rehabilitative purpose of the above statute outweighs any need for a technical application of Rule 21. Respondent submits this type of proceeding, which

ends with a plea of not guilty being entered and the charges being dismissed is not within the purview of "conviction" evidence which the legislature intends to be utilized for impeachment purposes. Rule 21 therefore is inapplicable in the present case.

Further, evidence of the prior criminal proceedings involving Mr. Becker would not be admissible under the more general Rules of Evidence relating to impeaching evidence.

Rule 22 establishes specific limitations on the admissibility of evidence affecting credibility. It reads, in relevant part:

"(c) [E]vidence of traits of (a witness') character other than truth, honesty and integrity or their opposites, shall be inadmissible; (d) evidence of specific instances of his conduct relevant only as tending to prove a trait of his character, shall be inadmissible."

Although this rule impliedly permits evidence as to the truth, honesty and integrity (or their opposites) of a witness, such evidence cannot take the form of specific instances of conduct. Rules 46 and 47 reveal that evidence of a bad character trait must take the form of opinion or evidence of reputation. The only evidence of specific conduct allowed under these rules is evidence

in the present case.

Since evidence concerning these prior judicial proceedings against Mr. Becker would have been inadmissible under the Rules of Evidence it was properly excluded by the trial court.

This conclusion is also supported by pre-Rule case law. In State v. Hougensen, 91 Utah 351, 64 P.2d 229 (1936), a case heavily relied on by appellant, this Court established several principles to help guide the "bench and bar." Principle number eight, which was omitted by appellant, is directly applicable in the present case:

"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." Id. at 238.

This principle enunciates the balancing approach that the court found necessary when dealing with evidence of specific conduct. The prior specific conduct which

apparently involved false statement was totally unrelated in time or place to the testimony which the witness presented in the present case. It could not lead to any assumptions about the present testimony and one prior act does not establish that Mr. Becker is of "low and dissolute character." The trial court's sustaining of the State's objection to questioning of this specific act complied with this principle of Hougensen.

Lastly, prior case law establishes that the extent of any cross-examination as to specific acts for purpose of credibility is within the sound discretion of the trial court.

"As to other matters affecting the witness' morality or violations of law, the field of cross-examination is largely within the sound discretion of the trial court and will not be disturbed except in cases of clear abuse of that discretion. State v. Hougensen (cite omitted)." State v. McIntyre, 92 Utah 177, 66 P.2d 879, 888 (1937).

The trial court gave considerable time for the discussion of this point at trial and had previously studied briefs prepared by counsel (T.12-13). His preclusion of questioning of Mr. Becker as to the prior California proceeding was a rational omission of inadmissible evidence and should

## POINT II

APPELLANT'S CLAIM OF ERROR DUE TO IMPROPER CLOSING REMARKS IS NOT REVIEWABLE BY THIS COURT SINCE CLOSING REMARKS WERE NOT MADE PART OF THE PRESENT RECORD.

Appellant moved for a mistrial based on allegations of improper closing remarks by the respondent. The trial court reviewed the question and determined that counsel for the State had not exceeded proper limits in his closing argument. (T.71-72). Except for this indirect reference to closing remarks the transcript is silent as to the content of these remarks. Respondent has been told by the recorder in this case that the verbal arguments were not recorded. Only a note as to when they occurred is present in the transcript (T.70).

This Court can only review matters of record before it. Brandley v. Lewis, 97 Utah 217, 92 P.2d 338 (1939). Therefore, any review of non-recorded closing arguments would be improper.

## POINT III

RESPONDENT ADMITS THAT PHENTERMINE IS NOT A CONTROLLED SUBSTANCE AND APPELLANT'S CONVICTION ON TWO COUNTS INVOLVING PHENTERMINE SHOULD BE VOID.

Phentermine is one of many substances which was added to the legislative list of controlled substances by

the Attorney General under the power granted by Utah Code Ann. §58-37-3(2). However, since this Court has recently determined this power was an unconstitutional delegation, in State v. Gallion, 572 P.2d 683 (Utah, 1977), respondent concedes that the conviction of appellant for the two counts of distribution of phentermine for value was improper and should be reversed.

It is important to note, however, that appellant was also convicted of distribution of marijuana for value. This substance is listed in Utah Code Ann. §58-37-4, under Schedule I(iii)(J), on the original legislative list of controlled substances and is, therefore, unaffected by the ruling in Gallion. Appellant's sentence for this conviction of 1) three year probation, 2) 90 days in jail and 3) restitution for attorney fees should be upheld.

#### CONCLUSION

Detailed information about previous judicial proceedings against a witness was not proper evidence for impeachment purposes since the proceedings had ultimately concluded with a plea of not guilty being entered, the charges being dismissed and the witness being relieved of criminal "disabilities." Such proceedings do not constitute a "conviction" within the purpose or meaning of Rule 21. Neither is such evidence admissible to demonstrate a bad character trait such



it is not reputation evidence. The trial court properly excluded any questioning in this regard. And, since there is no transcript of closing arguments any alleged error of the prosecutor in his closing statement is not reviewable by this court.

Respondent concedes that phentermine is not a controlled substance under the holding in Gallion and, therefore, respondent does not oppose reversal on counts I and II.

However, for the above-mentioned reasons, respondent contends that the conviction involving marijuana was proper and, therefore, respectfully submits that the judgment and sentence of the lower court on Count III of the amended \_\_\_\_\_ complaint be affirmed.

Respectfully submitted,

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