

1997

State of Utah v. Christina Dimauro : Brief of Appellant

Utah Court of Appeals

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Chrstine Soltis; Assistant Attorney General; Craig Halls; San Juan County Attorney; Attorneys for Appellee.

William L. Shultz; Attorney for Appellant.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff / Appellee,	:	Case No. 970604-CA
vs.	:	Priority No. 2
CHRISTINA DIMAURO,	:	
Defendant / Appellant.	:	

OPENING BRIEF OF APPELLANT

APPEAL FROM A CONVICTION OF UNLAWFUL USE OF A CREDIT CARD
 IN VIOLATION OF UTAH CODE SEC. 76-6-506.2
 IN THE SEVENTH JUDICIAL DISTRICT COURT
 IN AND FOR THE COUNTY OF SAN JUAN, STATE OF UTAH
 THE HONORABLE LYLE R. ANDERSON, PRESIDING

WILLIAM L. SCHULTZ, #3626
 69 East Center
 P.O. Box 937
 Moab, Utah 84532
 Telephone: (435) 259-5914

Attorney for Appellant

CHRISTINE SOLTIS, #
 Assistant Attorney General
 Appellate Division
 160 E. 300 S., Heber Wells Bldg.
 Salt Lake City, Utah 84114
 Telephone: (801) 366-0180

CRAIG HALLS, #1317
 San Juan County Attorney
 P.O. Box 850
 Monticello, Utah 84535
 Telephone: (435) 587-2128

Attorneys for Appellee

UTAH COURT OF APPEALS
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**WILLIAM L. SCHULTZ, #3626
69 East Center
P.O. Box 937
Moab, Utah 84532
Telephone: (435) 259-5914**

Attorney for Appellant

**CHRISTINE SOLTIS, #
Assistant Attorney General
Appellate Division
160 E. 300 S., Heber Wells Bldg.
Salt Lake City, Utah 84114
Telephone: (801) 366-0180**

**CRAIG HALLS, #1317
San Juan County Attorney
P.O. Box 850
Monticello, Utah 84535
Telephone: (435) 587-2128**

Attorneys for Appellee

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** There is no addendum because the determinative statutory and constitutional provisions are set out in the body of the brief.

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to Rule 3 of the Utah Rules of Appellate Procedure because the sentencing of Ms. Dimauro, on September 18, 1997, is considered the final decision of the District Court. *See also* Utah Code Sec. 78-2a-3 (2)(f).

The Notice of Appeal was filed on October 15, 1997, within 30 days of the entry of judgment. Thus, pursuant to Rule 4(a) of the Utah Rules of Appellate Procedure, this appeal is timely.

STATEMENT OF ISSUES PRESENTED AND STANDARD OF REVIEW

The issues presented for appeal are as follows:

1. Is the State barred from filing a new action after dismissal of the first Information after Preliminary Hearing?

Standard of Review: Reviewed on due process considerations.

Reviewed for correctness. *State v. Brickey*, 714 P.2d 644 (Utah 1986).

2. Did the trial court err in failing to exclude the tape recording which was not disclosed to Defendant by the prosecution?

Standard of Review: The Court reviews the trial court's admission of evidence for correctness. *State v. Kallin*, 877 P.2d 138 (Utah 1994).

TEXT OF CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution, Fourteenth Amendment, Section 1, provides that:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Utah Constitution, Article I, Section 7, provides that:

No person shall be deprived of life, liberty or property, without due process of law.

Rule 16(a) of the Utah Rule of Criminal Procedure provides that:

- (a) Except as otherwise provided, the prosecutor shall disclose to the defense upon request the following material or information of which he has knowledge:
- (1) relevant written or recorded statements of the defendant or codefendants;
 - (2) the criminal record of the defendant;
 - (3) physical evidence seized from the defendant or codefendant;
 - (4) evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced punishment; and
 - (5) any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare his defense.

Rule 16(b) of the Utah Rules of Criminal Procedure provides that:

- (b) The prosecutor shall make all disclosures as soon as practicable following the filing of charges and before the defendant is required to plead. The prosecutor has a continuing duty to make disclosure.

STATEMENT OF THE CASE

A. NATURE OF THE CASE.

Ms. Dimauro appeals from her conviction following a Jury Trial of Unlawful Use of a Credit card, in violation of Utah Code Sec. 76-6-506.2.

B. COURSE OF PROCEEDINGS.

1. *On January 31, 1997, Ms. Dimauro was charged in a two-count Information with Unlawful Use of a Credit Card, a third-degree Felony and a Class B Misdemeanor , in violation of a Utah Code Sec. 76-6-506.2.*

2. *On May 13, 1997, a Preliminary Hearing was held and the case was dismissed on the basis that the language contained in the original Information claimed Ms. Dimauro had “signed the name of another” on credit card receipts when she had in fact signed her own name.*

3. *On May 13, 1997, the San Juan County Attorney filed an amended Information under a new case number with the same charges but deleted the language that Ms. Dimauro had “signed the name of another.” The language in the Information was changed to read “did knowingly purchase or attempt to purchase goods or services by use of a financial transaction credit number not authorized by the issuer or cardholder*

4. *On May 29, 1997, a Preliminary Hearing on the refiled case was held and Ms. Dimauro was bound over for trial on the counts charged in the amended Information of May 13, 1997.*

5. *On July 15, 1997, a jury was impaneled and on that same day, the jury returned a guilty verdict.*

C. DISPOSITION IN THE COURT BELOW.

The sentencing hearing was held on September 18, 1997. At that time, the trial court ordered Ms. Dimauro committed to the Utah State Prison for a term not to exceed five (5) years. The Findings, Judgment and Commitment was entered on September 19, 1997.

A Notice of Appeal was filed on October 15, 1997.

D. STATEMENT OF FACTS.

On January 31, 1997, Ms. Dimauro was charged in a two-count Information with Unlawful Use of a Credit Card, a third-degree felony and a class B misdemeanor, the value of the use distinguishing the degrees. (R 12-13) Both counts charged that “Defendant did with intent to defraud sign the name of another to a financial transaction card...” Preliminary Hearing was held on May 13, 1997. The Magistrate dismissed based on the above language. Ms. Dimauro had, in fact, signed her own name. The above occurred in the Seventh District Court, in and for San Juan County, Utah, Case No. 9717-71.

Before Defendant could even be released, the State refiled in the same Court, Case No. 9717-90. The charges remained the same, but the language was changed to “did knowingly purchase or attempt to purchase goods or services by use of a financial transaction credit number not authorized by the issuer or cardholder.” (R 1-2).

Defendant filed a Motion to dismiss or Quash Bindover on June 23, 1997. (R 9) Defendant’s Motion was denied.

At trial the State introduced a tape recording of a phone conversation between Ms. Dimauro and her father, over Defendant’s objection. (R 258) Defendant objected both because the recording had not been disclosed by the prosecution and the matter was not properly rebutted, Defendant having admitted previously that her relationship with her father “had deteriorated” (R 220), and having already admitted she had called her dad a “scum bag” and an “a-hole”. (R 239)

SUMMARY OF ARGUMENT

I. The State is barred from filing a second case after its failure to obtain a bindover on its first case.

II. Allowing the tape recording to be presented to the jury after its nondisclosure was improper. The tape was not proper rebuttal. The tape is highly inflammatory and its sole purpose was to unfairly prejudice the jury.

ARGUMENT

Point I: The State is barred from filing a second case after its failure to obtain a bindover on its first case.

The Utah Supreme Court has placed a limit on the State's ability to refile criminal charges when those charges have been previously dismissed. State v. Brickey, 714 P.2d 644 (Utah 1986). In Brickey, the charges were originally dismissed for insufficient evidence, similar to Dimauro I, in which the charges were dismissed because the evidence was insufficient evidence to establish that she "signed the name of another." The Brickey rationale, as well as Brickey's progeny, clearly support Defendant's position.

In Brickey, the Supreme Court first considered the purpose of a preliminary hearing, the standard of proof and the fact that jeopardy does not attach at the hearing. While the Court found that double jeopardy was therefore no bar to subsequent prosecution, it expressly held that the State is not therefore free to refile charges. In cases such as the present the Court adopted the Jones standard from Oklahoma, requiring the prosecutor to show new or previously unavailable evidence that has surfaced or other good cause before refile. The court also set forth procedures for refile which were not followed in Dimauro II. See also State v. Johnson, 782 P.2d 533 (Utah App 1989), State v. Jaeger, 886 P.2d 53 (Utah 1994), discussing the strict requirements" of Brickey, at 55.

Public policy consideration, as expressed in Brickey support defendant's position. The purpose of a preliminary hearing, as well as defendant's right to speedy trial, clearly guarantee defendants from unwarranted prosecution and protect his or her right to have

serious allegations disposed of efficiently and expeditiously. If the State has erred, the defendant should not be called upon to suffer. Nor should he or she be exposed to additional incarceration due to the State's error. The Court should note that dismissal does not leave the alleged victim remediless, since they have the opportunity of civil remedy.

Point II: The introduction of the tape recording was prejudicial to defendant.

In criminal prosecutions the state has two independent obligations to provide evidence to the defense. First, the state has a duty under the Due Process Clause of the United States Constitution to provide, without request by the Defendant all exculpatory evidence. State v. Worthen, 765 P.2d 839, 850 (Utah 1988); State v. Carter, 707 P.2d 656, 662 (Utah 1985). Second, the state must disclose evidence pursuant to Rule 16 of the Utah Rules of Criminal Procedure.

These duties have been determined to comply fully and forthrightly and to identify those portions not disclosed. State v. Knight, 734 P.2d 913, 916-7 (Utah 1987). This obligation is ongoing and continuing. Brady v. Maryland, 373 U.S. 83 (1963).

The Knight case provides a thoughtful analysis of the need for criminal discovery to be a fair and full process to make sure that a trial is a real quest for truth and not simply a contest between the parties to win. Knight at 917, citing Carter, further sets forth the standard of prejudice necessary for reversible error as reasonable likelihood of a different result Id. at 919.

Defendant contends that the tape should not have been admitted on two bases. First, it was not proper rebuttal. Defendant had already admitted that the relationship with her father was bad. Second, the tapes were admitted, over objection, for their prejudicial rather than probative value. (R 258) The State acknowledged that the tapes were admitted to give the jury the "flavor" of the conversations and relationship with

defendant's father.

The tape itself is inflammatory, including abusive and vulgar language. Since none of the probative points the State alleges it proved were at issue, its probative value was nil. It's sole function was to portray the defendant as unbelievable and to prejudice the jury against her.

CONCLUSION

Defendant is entitled to a reversal of her conviction.

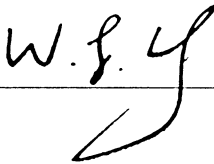
DATED this 12 day of February, 1998.



WILLIAM L. SCHULTZ
Attorney for Appellant.

CERTIFICATE OF SERVICE

I hereby certify that I mailed true and correct copies of the foregoing Opening Brief of Appellant to Christine Soltis, Assistant Attorney General, Appellate Division, 160 E. 300 S., Heber Wells Building, Salt Lake City, UT 84114, postage prepaid, this 12 day of February, 1998.



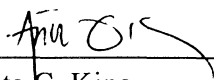
AMENDED CERTIFICATE OF SERVICE

I, Anita C. King, certify that on February 21, 1998, I served a copy of the attached Amended Opening Brief of Appellant (cover page replaced with correct color) upon Christine Soltis, counsel for the appellee in this matter, by mailing it to her by first class mail with sufficient postage prepaid to the following address:

Appellate Division, 160 E. 300 S., Heber Wells Building, Salt Lake City, Utah 84114

Amended copy also mailed on February 21, 1998, postage prepaid, to Craig C. Halls, San Juan County Attorney at the following address:

P.O. Box 850, Monticello, Utah 84535



Anita C. King,
Secretary to William L. Schultz,
Attorney for Appellant.