

1988

State of Utah v. Ahab Mustapha Aly : Reply Brief

Utah Court of Appeals

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R. Paul Van Dam; attorney general; attorney for respondent.

Joan C. Watt; Salt Lake Legal Defender Assoc.; attorney for appellant.

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UTAH COURT OF APPEALS

BRIEF

UTAH

IN THE COURT OF APPEALS OF THE STATE OF UTAH

DOCLP

^K
THE STATE OF UTAH, :
⁵⁰ :
Plaintiff/Respondent, :
DOCKET NO. 880488 :
v. :
AHAB MUSTAPHA ALY, : Case No. 880488-CA
 : Priority No. 2
Defendant/Appellant. :

REPLY BRIEF OF APPELLANT

Appeal from a judgment and conviction for Exploiting Prostitution, a third degree felony, in violation of Utah Code Ann. §76-10-1305(1)(b) (1953 as amended), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Leonard H. Russon, Judge, presiding.

JOAN C. WATT
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorney for Appellant

R. PAUL VAN DAM
ATTORNEY GENERAL
BARBARA BEARNSON
ASSISTANT ATTORNEY GENERAL
236 State Capitol Building
Salt Lake City, Utah 84114

Attorneys for Respondent

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JOAN C. WATT
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorney for Appellant

R. PAUL VAN DAM
ATTORNEY GENERAL
BARBARA BEARNSON
ASSISTANT ATTORNEY GENERAL
236 State Capitol Building
Salt Lake City, Utah 84114

Attorneys for Respondent

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TEXT OF STATUTES

Rule 609(a), Utah Rules of Evidence (1983) provides:

GENERAL RULE. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

Rule 403, Utah Rules of Evidence (1983) provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

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INTRODUCTION

The Jurisdictional Statement, Statement of the Case, and Statement of the Facts are set forth in Appellant's Opening Brief at V, 1-7. Appellant takes this opportunity to reply to Respondent's argument in Point I of its brief. Points II and III are adequately covered in Appellant's Opening Brief.

SUMMARY OF THE ARGUMENT

The only case cited by the State in support of its argument that some jurisdictions have applied Rule 609 in determining whether the prior conviction of a State's witness should be suppressed (People v. Woodard, 590 P.2d 391 (Cal. 1979)) is inapplicable since the language of the statute involved in Woodard was substantially different from the language of Rule 609.

The prior conviction of Ms. Finken should not have been suppressed under Rule 403. Defense counsel timely raised this issue in the trial court and requested Instruction No. 13 in a timely fashion. The trial court erred in refusing to instruct the jury as

to the use which could be made of the prior conviction and the remaining instructions were not sufficient to adequately inform the jury.

ARGUMENT

POINT. THE TRIAL COURT ERRED IN REFUSING TO GIVE
DEFENDANT'S REQUESTED INSTRUCTION NO. 13.

(Reply to Point I)

In its brief, the State concedes that

[i]t appears that the majority position in the federal courts is that the process of weighing the probative value of evidence of a prior conviction against the prejudicial effect "to the defendant," places no limitation upon cross-examination of government witnesses because of possible prejudicial effect to them [citations omitted].

Respondent's Brief at 8. The State then asserts that "[o]ther jurisdictions have not followed this position" and cites People v. Woodard, 590 P.2d 391, 396 (Cal. 1979), in support of its assertion. Respondent's Brief at 9. However, Woodard fails to support the assertion since the language of California Evidence Code §788, the statute at issue in Woodard, is substantially different than that of Rule 609. California Evidence Code §788 provides in pertinent part:

For the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony . . .

Woodard, 590 P.2d at 393.

The California rule does not contain the language "to the defendant" and is not patterned after federal rule 609. Hence,

whether it is applicable to witnesses for the State is irrelevant in determining whether Utah Rules of Evidence 609 can be used to suppress the prior convictions of a State witness.

The Woodard Court noted that "although Evidence Code Section 788 [footnote omitted] authorizes the admission of prior felony convictions to impeach the credibility of a witness, a trial court must, when requested, exercise its discretion under Section 352 [footnote omitted] and exclude this evidence if the probative value of the prior conviction is outweighed by other factors, such as the risk of undue prejudice." Id. at 393-4. California Evidence Code 352 provides:

The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

Hence, while Rule 788 apparently does not provide for a balancing test similar to that in Utah Rules of Evidence 609, Rule 352 is similar to Utah Rules of Evidence 403 and provides for exclusion where the moving party can establish that the prejudicial effect of the evidence substantially outweighs its probative value.

Furthermore, the prior conviction involved in Woodard was that of a defense witness and not a witness for the State. Woodard did not address the issue raised in the present case and is inapplicable to the State's suggestion that other jurisdictions have used Rule 609 to suppress the convictions of a government witness. The State cites no other cases in support of this proposition.

The State asserts that even if the prior conviction was proper impeachment evidence, it could have been excluded under Utah Rules of Evidence 403. Respondent's Brief at 11. The State then implies that the trial court ruled that the potential for prejudice outweighed the probative value of the conviction requiring exclusion under Rule 403 and that the trial court's determination of the issue "will not be disturbed on appeal unless the court so abused its discretion that there was a substantial likelihood of an unjust result [citations omitted]." Respondent's Brief at 11.

Mr. Aly does not dispute that Rule 403 is applicable; however, Mr. Aly does dispute that the court reached its decision under Rule 403 or applied a balancing test in reaching its ruling which requires deference on appeal.

As pointed out in Appellant's Opening Brief at 7, the trial court seemed to confuse the two subsections of Rule 609 in reaching its decision and relied on subsection (a)(2) and the rationale that a conviction for distribution of controlled substance is not a crime of dishonesty in reaching its decision that the conviction would not have been admissible (T. 44). See Addendum B in Appellant's Opening Brief. In reaching its decision that it would have excluded the prior conviction of the State's witness, the court did not apply a balancing test under either Rule 609 or Rule

403.¹ The court stated:

I will so rule at this time that if the conviction is one for distribution of a controlled substance, that that is not a crime that goes to the question of honesty or dishonesty and cannot be inquired into.

(T. 44). The State's attempts to stretch this ruling to include such a balancing test (Respondent's Brief at 10-11) do not comport with the record. See Addendum B of Appellant's Opening Brief for entire transcript of argument and ruling.

The State suggests that Rule 609 must be made applicable to State witnesses because otherwise the "unsettling result" of allowing a defendant to testify without cross-examination as to his prior convictions but requiring a State's witness to divulge his or her convictions would occur. Respondent's Brief at 9. However, such an "unsettling result" would be easily cured by an appropriate application of Rule 403, and avoiding such a result does not require this Court to misinterpret Rule 609. In the situation outlined by the State on page 9 of its brief, the prejudicial effect of the prior conviction of the State's witness may well outweigh its probative value where numerous convictions of the defendant are

¹ While under 609(a)(1) the party that wishes to admit the prior conviction must establish that the probative value outweighs its prejudicial effect, thereby requiring admission, the burden is reversed under Rule 403. Pursuant to Rule 403, the party seeking to suppress the conviction must establish the prejudicial effect substantially outweighs the probative value. Furthermore, the test under Rule 609(a)(1) explicitly requires that the focus be on the prejudice to the defendant whereas Rule 403 makes no such requirement and allows to focus on the prejudicial impact of the evidence to the party seeking to exclude it.

suppressed, thereby requiring exclusion of the conviction of the government witness under Rule 403.

In the instant case, the prejudicial effect of the prior conviction of Ms. Finken did not outweigh its probative value. Mr. Aly did not testify and he had no prior convictions which were suppressed. The credibility of Ms. Finken was the primary issue in this case, and, as outlined in Appellant's Opening Brief at 19-20, Distribution of a Controlled Substance is a crime which reflects on both the credibility and the reliability of a witness. No prejudice to Ms. Finken was argued and, in fact, the State did not object when defense counsel elicited the response (T. 39). Furthermore, on direct examination, Ms. Finken acknowledged that she stopped working for Mr. Aly because she was arrested on a probation violation (T. 35). Hence, through the direct questioning of the prosecutor, Ms. Finken informed the jury that she had been convicted of a crime. Because the prejudicial effect of the conviction did not substantially outweigh its probative value, Rule 403 did not require exclusion of the conviction.

The State contends that Instructions Nos. 8 and 9 adequately covered the information contained in Defendant's proposed Instruction No. 13. Respondent's Brief at 11-12. However, as pointed out in Appellant's Opening Brief at 26-27, while Instruction No. 9 lists a number of factors that can be taken into account when assessing credibility, it fails to include the prior conviction of a witness. The factors listed are thereby emphasized and the jury is left with almost an implication that the prior conviction is not a

factor to consider.

Nor does Instruction No. 8 inform the jury that it can consider a witness' prior conviction in assessing credibility. That instruction deals with the reconciliation of conflicts in the evidence and how to proceed where the jury believes a witness wilfully testified falsely. It does not guide the jury as to how it should go about assessing the credibility and reliability of a witness.

Finally, the State contends that Defendant did not submit the instruction in a timely fashion and cites State v. Evans, 668 P.2d 566 (Utah 1983) in support of that proposition. Respondent's Brief at 12-13. In Evans, the Court recessed for almost three hours and the trial judge informed the parties that he would be preparing instructions during the recess. The Defendant did not proffer the requested instructions until the Court "was about to read the instructions to the jury . . ." Id. at 567. Defense counsel had not informed the Court earlier that he intended to submit instructions nor asked for a continuance for the purpose of preparing instructions. The trial court refused to consider the instructions.

Rule 19, Utah Rules of Criminal Procedure requires that the parties request their instructions at the close of the evidence or "at such earlier time as the court reasonably direct."

In the instant case, the proposed instruction was initially requested on the first day of trial prior to the close of evidence (T. 43-4). Defense counsel requested that the court use

its "stock felony conviction" instruction but was interrupted by the prosecutor, who questioned the appropriateness of such an instruction (T. 43). A short argument ensued, and the trial court denied the requested instruction (T. 44). See Addendum B, Appellant's Opening Brief.

All of the evidence was presented on the first day of trial. When the court reconvened on the second day of trial, the trial judge held a hearing outside the presence of the jury. The judge stated on the record:

We have met with counsel in chambers and gone over jury instructions. The Court has put together a set of instructions, counsel has had a chance to review those overnight. Counsel for the defendant presented one additional instruction this morning, and we will give that some consideration at this time.

(TF. 1). Defense counsel then argued the appropriateness of giving Instruction No. 13. In reaching his decision not to give the instruction, the trial judge reiterated that he had previously ruled that he would have sustained an objection to the prior conviction evidence and ruled that, under such circumstances, the proposed instruction was not appropriate (TF. 2-3). See Addendum C in Appellant's Opening Brief.

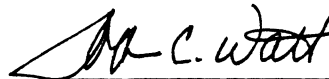
At no time did the trial court indicate that the instruction was not timely, nor did he refuse to review it, as was the case in Evans. The procedure of reviewing and discussing the instructions in chambers then considering the matter on the record indicates that the instruction was requested and considered in a timely fashion and that no party to the proceedings considered the

matter waived. In fact, presenting the instruction on the morning of the second day of trial appears from the record to have been the only appropriate time for doing so within the context of this case.

CONCLUSION

Based on the foregoing, Appellant, Ahab Mustapha Aly, respectfully requests that his conviction be reversed and the case remanded to the trial court for a new trial or dismissal.

Respectfully submitted this 17 day of May, 1989.

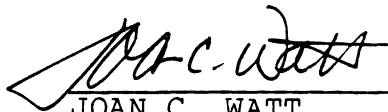


JOAN C. WATT

Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that eight copies of the foregoing will be delivered to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102 and four copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114 this 17 day of May, 1989.



JOAN C. WATT

DELIVERED by _____ this _____ day
of May, 1989.
