

1979

# State of Utah v. David Marvin Echols : Brief of Appellant

Utah Supreme Court

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## Recommended Citation

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IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH,  
Plaintiff-Respondent,

-v-

DAVID MARVIN ECHOLS,  
Defendant-Appellant.

Case No. 16225

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BRIEF OF APPELLANT

An appeal from the judgment and conviction of the crime of Unlawful Possession of a Controlled Substance With Intent to Distribute for Value in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Bryant H. Croft, Judge presiding.

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BRAD RICH  
Salt Lake Legal Defender Assn.  
333 South Second East  
Salt Lake City, Utah 84111

Attorney for Appellant

ROBERT HANSEN  
Attorney General  
236 State Capitol Building  
Salt Lake City, Utah 84114

Attorney for Respondent

FILED

JUL 19 1966

Clerk, Supreme Court

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BRAD RICH  
Salt Lake Legal Defender Assoc.  
333 South Second East  
Salt Lake City, Utah 84111

Attorney for Appellant

ROBERT HANSEN  
Attorney General  
236 State Capitol Building  
Salt Lake City, Utah 84114

Attorney for Respondent

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellant, DAVID MARVIN ECHOLS, appeals from the conviction of the crime of Unlawful Possession of a Controlled Substance With Intent to Distribute for Value in the Third Judicial District Court, in and for Salt Lake County, State of Utah.

DISPOSITION IN THE LOWER COURT

The appellant, DAVID MARVIN ECHOLS, was found guilty by a jury before the Honorable Bryant H. Croft, Judge presiding, of the crime of Unlawful Possession of a Controlled Substance With Intent to Distribute for Value on the 21st day of November, 1978, and was thereafter sentenced to be committed to the Utah State Prison for the indeterminate term as provided by law.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of his conviction and a new trial. Counsel on appeal requests permission to withdraw from the

appeal and submits this brief in compliance with Anders v. California  
386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 93 (1967).

#### STATEMENT OF THE FACTS

According to the facts elicited by the prosecution's witnesses in the trial of the above entitled matter, the facts are as follows:

On the 24th day of August, 1978, the police of Salt Lake City had occasion to serve a search warrant upon the residence of one Isaac Paul Wagaman at 140 K Street in Salt Lake City, Utah. The police officers involved searched his residence for some time. During that search Mr. Wagaman had a telephone conversation with a person who he alleged to be the appellant.

Some time later Mr. Echols, the appellant, appeared at the residence of Mr. Wagaman. Shortly after his arrival he was observed to make a movement with his left hand towards the floor and in the area where he had stood a small quantity containing ten balloons of alleged heroin was found. The police officers testified that they had searched the same area earlier and had not found any drugs prior to Mr. Echols arrival.

Deputy Jim Duncan of the Salt Lake County Sheriff's Office testified about the events cited above. Deputy Duncan also testified that he had had some experience in narcotics investigation and that in his "expert" opinion the packaging of the alleged heroin indicated that the heroin was being held for sale rather than for personal use. His opinion was based on the fact that the ten balloons were packaged together as a unit.

The State also introduced evidence in the form of a intoxicology report that the substance contained within the balloons was in fact heroin.

The defense called as a witness Greg Hayner who testified that he had had considerable experience with heroin users and that it was that the quantity of balloons found in the package would have been no more than a multi-day supply and that heroin addicts frequently buy in quantity where they can afford it.

#### ARGUMENT

##### POINT I

IT WAS ERROR FOR THE TRIAL COURT TO ADMIT TESTIMONY BY THE OFFICER IN THE NATURE OF "EXPERT" TESTIMONY REGARDING THE PACKAGING, DISTRIBUTION AND USE OF HEROIN.

Appellant's first contention is that Deputy Duncan lacked sufficient expertise to testify regarding the packaging, distribution and use of heroin. Duncan's testimony was admitted by the trial court to support an inference that the contents of State's Exhibit #1 were held for sale rather than use. The Deputy's qualifications as an expert in the narcotics field consisted of six years with the Salt Lake County Sheriff's Office, four within the Narcotics Division, some thirty seminars, some one thousand investigations of illegal narcotics, and qualification as an expert witness in three criminal trials (T. 103).

In determining the admissibility of expert testimony, the

primary consideration is whether the subject of inquiry is beyond common experience so that expert opinion would assist the trier of fact. (31 Am. Jur. 2d §180). It is generally recognized that the subject matter of heroin use is beyond the knowledge of the average person, and expert opinion is admissible to assist the jury in its deliberation. State v. Fort, 572 Utah 2d 1387, 572 P.2d 1387 (1977); State v. Mason, 530 P.2d 795 (Utah 1975); State v. Bankhead, 30 Utah 135, 514 P.2d 800 (1973).

In order to give the jury assistance and guidance, a witness must have acquired special knowledge of the subject matter about which he will testify, either by study of the recognized authorities, or by practical experience. (31 Am. Jur. 2d §180). Study may be accomplished through professional, scientific, or technical training. Stone v. People, 157 Cal. 178, 401 P.2d 837 (1965). The value of a university degree has been recognized, but it is not essential to the qualification of an expert to testify on subjects within his field. People v. Smith, 298 P.2d 540 (Cal. 1956).

While an expert's qualifications need not be the highest possible, certain requisite ones must be shown, and beyond this any deficiency in training and experience of the expert goes to the weight rather than the admissibility, of his testimony. State v. Macumber, 112 Ariz. 569, 544 P.2d 1084 (1976); State v. Parker, 515 P.2d 1307 (Wash. 1973). The trial court has considerable discretion with regard to this matter, and testimony will not be ruled incompetent unless a clear abuse thereof is shown. State v. Mason, supra. See

State v. Parker, supra, where expert's opinion held not deficient because he couldn't identify three types of cannabis, and State v. Prevost, 574 P.2d 1319 (Ariz. 1977), where a detective was allowed to testify that quantity of heroin was held for sale, even though he had never actually seen anyone snort heroin.

Expert qualifications vary with the purpose of the testimony in narcotics cases. Where testimony is elicited to identify a narcotic substance, a substantial amount of either technical or professional training is generally required. In State v. Twite, No. 15896, (Utah 1979), an officer testified that the substance seized from the defendant was marijuana. Despite the defendant's objection that the officer was not competent to state what the substance was, the Court held that the officer, having been schooled in the identity of marijuana, and having obtained a Bachelor's Degree in botany from the police academy, was qualified to testify.

Other jurisdictions are in accord with this view, although circumstances of a particular case may lend themselves to a higher standard of expertise. In Barnhart v. State, 559 P.2d 451 (Okla. 1977), an expert witness was permitted to testify regarding the identity of cocaine over defendant's objection. The Court noted that the expert's background in chemistry was extensive, including a Ph.D. from Oklahoma State University in chemistry, a major thesis in the field of molecular spectroscopy, and experience as an instructor in quantitative analysis. A degree in chemistry was ruled to be unnecessary for purposes of identification of marijuana in State v.

Garcia, 413 P.2d 210 (N.M. 1966), where the expert had a Bachelor of Science Degree in chemical engineering and six years of lab experience. See also, People v. Chavey, 511 P.2d 883 (Colo. 1973).

Other courts focus on practical experience and technical training as prerequisites for qualification as an expert witness in the identification of drugs. The Court in State v. Schoultz, 564 P.2d 257 (Okla. 1977) admitted expert testimony regarding the identification of marijuana where the investigator had been in law enforcement over sixteen years, and had run field tests for identification of marijuana over one hundred times. Similarly, a detective in State v. Paulsen, 538 P.2d 339 (Mont. 1975), who had only about two years experience with the City-County Narcotics Squad, but had attended law enforcement seminars on identification of marijuana, had tested marijuana through use of field tests, and made some two hundred arrests, was judged by the Court to be qualified as an expert to identify marijuana. In State v. Fretton, 464 P.2d 438 (Wash. 1969), a lieutenant of the Identification Records Division of Tacoma Police Department was permitted to identify marijuana where he performed four to five hundred tests to identify marijuana, and had learned the tests through training by the police department, pathologists and toxicologists.

Where something more than mere identification of marijuana was required, the Court in State v. Hall, 523 P.2d 556 (Ore. 1974) ruled that it was erroneous to admit a state police lab technician's testimony that his visual inspection of a bag of marijuana indicated

only twenty-nine of the thirty-four grams were illegal matter, and the remaining five were stems. The Court stated that in the absence of a showing of any special ability to figure proportionate weights of the various parts of a substance by sight it was erroneous to allow the expert's testimony in, and concluded, " . . . witness . . . must be shown to possess special skill touching upon the matter of inquiry". Id. at 559.

Where an expert testifies as to packaging, distribution or use of drugs, his qualifications can be based on practical experience in some law enforcement capacity. In State v. Bankhead, 30 Utah 2d 135, 514 P.2d 800 (1973), the defendant was convicted of unlawful possession for sale of a narcotic drug, heroin. A supervisor of the narcotics squad testified that in his opinion the quantity and packaging of the heroin found indicated drug trafficking. On appeal, the Utah Supreme Court affirmed the admissibility of the evidence, concluding, "Experienced officers may give their opinions in cases involving possession of heroin that the narcotics are held for purposes of sale based upon such matters as the quantity, packaging, and normal use of an individual. . . ." Id., at 803. In accord is State v. Fort, supra, where a deputy sheriff with eighteen months experience as a narcotics investigator was allowed to testify regarding heroin use, packaging and distribution. The deputy had worked undercover, purchased narcotics numerous times, and was knowledgeable about "shooting galleries" and the packaging and transportation of heroin.

Other jurisdictions apply a similar standard to expert testimony regarding packaging, distribution and use of heroin, requiring some combination of technical training and practical experience. In State v. Keener, 520 P.2d 510 (Ariz. 1974), a detective was allowed to express his opinion that the quantity and purity of drugs possessed by the defendant indicated they were for sale rather than personal use. The qualifications of the expert consisted of fourteen years in law enforcement, six within the Narcotics Division, extensive contact with drug users, special training at the college level, training from the Bureau of Narcotics and Dangerous Drugs of the Federal Government, and experience as teacher of officers in his department. Similarly, a special agent for the Drug Enforcement Administration in State v. Moreno, 547 P.2d 30 (Ariz. 1976), who had been with the United States Department of Justice for four years, had worked as supervisor of six agents, had taken a ten week training course, had worked with three hundred heroin cases, and had testified in court forty or fifty times, was permitted to testify that users generally have one hundred to four hundred milligrams in their possession at one time, while someone holding over one half to one gram would normally possess it for sale.

## POINT II

APPELLANT IS ENTITLED TO A NEW TRIAL BECAUSE THE VERDICT WAS NOT SUPPORTED BY THE EVIDENCE.

This Court has on several occasions stated the rules concerning the granting of a new trial on the basis that the verdict was not supported by the evidence. In State v. Cooper, 114 Utah 531, 201 P.2d 764, 770 (1949), this Court stated:

The question of granting or denying a motion for a new trial is a matter largely within the discretion of the trial court. This court cannot substitute its discretion for that of the trial court. We do not ordinarily interfere with the rulings of the trial court in either granting or denying a new trial, and unless abuse of, or failure to exercise, discretion on the part of the trial judge is quite clearly shown, the ruling of the trial court will be sustained.

While in appellant's case there was no motion for a new trial, the above language would seem to indicate under what circumstances this Court will grant a new trial even in the absence of a motion for a new trial. The Court also stated:

The state's evidence is so inherently improbable as to be unworthy of belief so that upon objective analysis it appears that reasonable minds could not believe beyond a reasonable doubt that the defendant was guilty, the jury's verdict cannot stand. Conversely, if the state's evidence was such that reasonable minds could believe beyond a reasonable doubt the defendant was guilty, the verdict must be sustained. State v. Mills, 122 Utah 306, 249 P.2d 211 (1952).

It is apparent from these various statements of the law that this Court does have the power to order a new trial in appropriate

cases. This Court has said that:

We are not unmindful of the settled rule that it is the province of the jury to weigh the testimony and determine the facts. Nevertheless, we cannot escape the responsibility of judgment upon whether under the evidence, a jury could, and reason, conclude the defendant's guilt was proved beyond a reasonable doubt. State v. Williams, 111 Utah 379, 180 P.2d 551, 555 (1947).

In the case before the Court all of the evidence presented to the jury was circumstantial in nature. The only evidence on the record that the package was held for sale is the testimony of the narcotics officers involved in the case. Their conclusion is based solely on their observation of the way the heroin was packaged (T. 120). Gregory Hayner, a witness for the defense, with established qualifications in the area of drug use, testified that the quantity of drugs involved was not an unusual amount for a drug user, as opposed to a drug seller, to have (T. 173-175).

Clearly each case must turn upon its own facts and circumstances to whether or not a new trial is warranted because the verdict was not supported by the evidence. Appellant contends that in the case before the Court the verdict was not supported by the evidence and therefore he should be granted a new trial.

#### CONCLUSION

Counsel for the appellant respectfully submits the above entitled analysis of the points of law raised by the appellant and requests permission to withdraw, believing the appeal is without

meritorious grounds. Counsel for the appellant further submits that the foregoing brief discusses all the law applicable to the only points that could be arguably raised on appeal.

DATED this \_\_\_\_ day of July, 1979.

Respectfully submitted,

BRAD RICH  
Attorney for Appellant