

2015

**Tim G. Wager, Defendant and Appellant v. State of Utah, Plaintiff
and Appellee**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

TIM G. WAGER,

Defendant and Appellant

v.

STATE OF UTAH,

Plaintiff and Appellee

APPEAL NO. 20140812-CA

BREIF OF APPELLANT

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Salt Lake City, UT 84114

FILED
UTAH APPELLATE COURTS

JUN 08 2015

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STATE OF UTAH

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Statutes and Rules Cited:

Rule 901. Authenticating or Identifying Evidence

- (a) In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

Rule 1002. Requirement of Original

An original writing, recording, or photograph is required in order to prove its content, except as otherwise provided in these rules or by other rules adopted by the Supreme Court of this State or by statute.

Rule 1004. Admissibility of Other Evidence of Content

An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:

- (a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;
- (b) an original cannot be obtained by any available judicial process;
- (c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or
- (d) the writing, recording, or photograph is not closely related to a controlling issue.

Rule 1007. Testimony or Statement of a Party to Prove Content

The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.

Rule 608. A Witness's Character for Truthfulness or Untruthfulness

- (a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

(1) the witness; or

(2) another witness whose character the witness being cross-examined has testified about. By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

(c) Evidence of Bias. Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by other evidence.

The Courts Ruling and Order Below

TABLE OF AUTHORITIES CITED CASE AUTHORITY

State v. Horton, 848 P.2d 708, cert. denied, 857 P.2d 948 (Utah 1993);

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

U.S. Constitution, Fifth Amendment, Due Process clause.

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 offence 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.

Utah State Constitution

Article I, Section 7. [Due process of law.] No person shall be deprived of life, liberty or property, without due process of law.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

TIM G. WAGER,

Defendant and Appellant

v.

STATE OF UTAH,

Plaintiff and Appellee

APPEAL NO. 20140812-CA

STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. §78A-4-103(2)(e) (effective February 7, 2008), whereby the defendant in a district court criminal action may take an appeal to the Court of Appeals from a final order for anything other than a first degree or capital felony. Appellant was convicted of Possession or Use of a Controlled Substance, a second degree felony, in violation of Utah Code §58-37-8 (2)(a)(i), and Possession of Other Controlled Substances or Less than One Ounce of Marijuana, a class A misdemeanor, in violation of Utah Code § 58-37-8 (2)(d)

ISSUES PRESENTED FOR REVIEW

Did the Trial Court violate the Defendant's right to fair trial by admitting, without authentication, a prejudicial photograph purported to be the Defendant using drugs?

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES AT ISSUE

The United States Constitution, Fifth Amendment Due Process Clause, The Utah Constitution, Due Process Clause and Utah Rules of Evidence Rule 901.

STATEMENT OF THE NATURE OF THE CASE

STATEMENT OF FACTS

On July 16, 2012, police executed a search warrant at Appellant Mr. Wager's residence. Police found a wooden jewelry box inside a locked storage cabinet in the garage. A Key to the cabinet was on Wager's key ring. Inside the wooden box, the officer found several plastic bags containing a powder residue that tested positive for methamphetamine. Officer also found a prescription pill bottle in Wager's bedroom that contained a small amount of charred plant material that tested positive for marijuana. At the trial, Mr. Wager's roommate, Alicia Singleton, testified that Mr. Wager's ex-girlfriend, Jenny Stewart, who is the mother of his children, had been staying with them until shortly before the police raid. Ms. Singleton said that the wooden jewelry box belonged to Ms. Stewart, and that Ms. Stewart also had a key to the storage cabinet. Ms. Singleton added that when Ms. Stewart had left the house, Ms. Singleton found drug paraphernalia and items with drug residue in Ms. Stewart's belongings, which Ms. Singleton promptly put out in the garbage. Ms. Singleton also testified that she had not seen Mr. Wager use or possessed drugs.

Mr. Wager also testified at the trial and indicated that he shared his bedroom with his ex-girlfriend when she was there. He denied possession of the drugs, and denied knowledge of the contents of the containers that contained drugs. Notably, Mr. Wager is blind.

After Mr. Wager denied possession or use of drugs during his testimony, the prosecutor offered a photograph purporting to depict Mr. Wager smoking something from a bong-like device. Counsel for Mr. Wager objected for lack of any authentication for the photograph, and that the photograph was extremely prejudicial. The State offered the photograph through the arresting officer, who testified that he had received the photograph from a confidential informant. The judge allowed the photograph into evidence stating that Mr. Wager had opened the door to such evidence by denying use or possession of drugs. No corroborating testimony was offered and in fact no witness at trial had personal knowledge as to when the photograph was taken, and what Mr. Wager was doing in the photograph. The judge added that although the photograph was otherwise inadmissible, she thought it was harmless error to admit it under the circumstances.

ISSUES PRESENTED ON APPEAL

Did the Trial Court violate the Defendant's right to fair trial by admitting, without authentication, a prejudicial photograph purported to be the Defendant using drugs?

SUMMARY OF ARGUMENT

The Defendant was deprived a fair trial when the trial court allowed photographic evidence without proper and/or legal authentication, while misinterpreting the appropriate Evidentiary Rule to apply for the photographic evidence.

ARGUMENT

At the Trial in this matter, the State rested their case in chief and the Defense then proceeded to present witnesses and evidence. The Defendant testified during the presentation of the Defendant's case, and testified that he had not used drugs in the house. The State then

interjected during the Defendants case in an effort to present a photograph of the Defendant allegedly doing drugs in the house. Counsel for the Defense objected and the Court allowed the photograph to come in as evidence, however, this was presented through the officer, who obtained the photograph from a "confidential informant". The officer did not take the photograph nor did not have the photograph the day of the service of the search warrant. Additionally, the officer was unable to testify as to what the defendant was allegedly doing as depicted by the photograph since he is not the one to have taken the photograph. The photograph presented was not the original photograph in violation of the Utah Rules of Evidence.

Under Utah Rules of Evidence Rule 901 it states: "In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." In the case currently before this Court, the proponent (the State of Utah) offered the photograph as evidence that the Defendant was and had been doing drugs in the house. However, there was no evidence to corroborate or authenticate the photograph. The officer neither took, nor was present when the photograph was taken, and did not and was not able to testify that this was taken on the date alleged in the information. Additionally, the officer was unable to testify that the Defendant was in actuality doing "drugs" in the photograph. The extent of the officer's testimony was: "That same bathroom that's in the other photo." The State then posed the question: "Who - - who appears to be in the picture?" answer: "The defendant, Mr. Wager," end inquiry. Thus the only thing that was testified to was that it depicted a bathroom and that the Defendant was in the bathroom that appeared to be the same one that was photographed the day of the search warrant. This is insufficient grounds to admit a prejudicial photograph and is not sufficient to overcome

the lack of authentication and the prejudicial nature of the photograph. The officer also failed to provide any evidence or testimony that this was the date alleged in the information making this photograph completely irrelevant to the case at hand.

In *State v. Horton*, the Utah Supreme Court has held: "In determining whether the trial court properly excluded the photograph of the trunk, we again apply a correction of error standard to the trial court's legal determinations, i.e., whether the trial court was correct in its selection, interpretation, and application of the rule of evidence. *State v. Thurman*, 846 P.2d 1256, 1268-72 (Utah 1993)." *State v. Horton*, 848 P.2d 708, 714 (Utah 1993). While the Trial Court relied upon Rule 901 there are other rules that specifically apply to photographic evidence.

Utah Rules of Evidence, Rule 1002. Requirement of Original states: "An original writing, recording, or photograph is required in order to prove its content, except as otherwise provided in these rules or by other rules adopted by the Supreme Court of this State or by statute." In the Case currently before this Court no testimony was given or offered about the original photograph other than to say that the photograph was provided by a "confidential informant".

Utah Rules of Evidence Rule 1004 allows for admissibility exceptions related to an original photograph stating: "Admissibility of Other Evidence of Content. An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:

- (a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;
- (b) an original cannot be obtained by any available judicial process;
- (c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or
- (d) the writing, recording, or photograph is not closely related to a controlling issue." None of these issues were addressed by the Court nor mentioned with regards to admissibility exceptions and original photograph exception.

Utah Rules of Evidence, Rule 1007. Testimony or Statement of a Party to Prove Content states: "The proponent may prove the content of a writing, recording, or photograph by the testimony,

deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.” The proponent being the State of Utah, in this matter, and there again is not testimony by the Defendant that this was him in the photograph or that he was doing anything illegal in the photograph. Therefore, this Rule again was not followed, mentioned or dealt with by the Trial Court.

The State of Utah, did however, argue that the photograph was being provided for rebuttal or truthfulness under Rule 608 of the Utah Rules of Evidence which states: “A Witness's Character for Truthfulness or Untruthfulness

(a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.” Again, in actuality, while they were alleging that truthfulness was part of the reason for the photograph, the State had not attacked the truthfulness in Court or in the direct examination or cross examination...therefore, again the rule was not followed or applied in this matter. Rule 608 continues by stating: “(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

(1) the witness; or

(2) another witness whose character the witness being cross-examined has testified about. By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

(c) Evidence of Bias. Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by other evidence.”

None of these issues were addressed by the Trial Court. The Court did give some credence to the prejudicial nature as saying that the photograph was innocuous, however, there was no indication as to why or if it indeed was non-prejudicial to the Defendant's case. In fact this photograph, if indeed offered as a specific incident of criminal conduct, should have been

handled by a Motion in Limine allowing the Defense notice and an opportunity to subpoena the person who actually took the photograph or who provided the photograph to the officer.

The Supreme Court in *State v. Horton* continued: "We also apply an abuse of discretion standard in determining whether the trial court reasonably determined the witness failed to properly authenticate the photograph pursuant to Rule 901 of the Utah Rules of Evidence. *United States v. Dombrowski*, 877 F.2d 520, 524 (7th Cir.1989), cert. denied, 496 U.S. 907, 110 S.Ct. 2592, 110 L.Ed.2d 272 (1990); *United States v. Reyes*, 798 F.2d 380, 383 (10th Cir.1986). *State v. Horton*, 848 P.2d 708, 741 (Utah 1993).

Pursuant to Rule 901 of the Utah Rules of Evidence, evidence must be properly authenticated or identified before it is admitted into evidence at trial. In order to properly authenticate a photograph, the proponent must show that the photograph "is what its proponent claims." Utah R.Evid. 901(a). Thus, in order for the photograph to be admitted, Horton must have established that the photograph accurately depicts the trunk of the vehicle. See *State v. Purcell*, 711 P.2d 243, 245 (Utah 1985)." The State of Utah, in this case claims that the photograph depicts prior bad acts, specifically drug use, by the Defendant but fails to provide evidence that supports or accurately depicts that this is the behavior. Defense would suggest that this is impossible given that the officer neither took the photograph, nor was present when the photograph was taken.

While the Trial court in the *Horton* case excluded the evidence because it did not believe the testimony of the defendant's wife, even after her testimony that she was the one who had taken the photograph. Here the Trial court allowed evidence in that was not properly authenticated

since the testimony was from an officer who had not taken the photograph and did not have any personal knowledge whatsoever, about what was depicted in the photograph. This begs the Courts intervention and reversal as a clear abuse of discretion.

The Utah Supreme Court in *Horton* upheld the exclusion due to lack of proper authentication, this case is exactly opposite, the trial court allowed evidence that was not properly authenticated and therefore is subject to reversal.

CONCLUSION

This Case is before the Court on a review of a guilty verdict based on evidence admitted in violation of the Utah Rules of Evidence, and previously decided case law. The Photograph in question was admitted over the Rules of Evidence and created a prejudicial environment for the guilty verdict. The Verdict should be vacated and returned to the Trial Court.

DATED this 8th day of June, 2015.

REMY LAW OFFICES P.C.

A handwritten signature in black ink, appearing to be 'P. Remy', is written over a horizontal line.

PAUL E. REMY
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I hereby certify that on the 8th day of June, 2015, I mailed an accurate and complete copy of the foregoing Appellant Brief to the following:

Utah Attorney General
P.O. Box 140811
Salt Lake City, UT 84114

/s/ Suzie Perucca
Paralegal

IN THE DISTRICT COURT OF SALT LAKE COUNTY
SALT LAKE DEPARTMENT, STATE OF UTAH

STATE OF UTAH,

:

VERDICT

Plaintiff(s),

:

vs.

Case No. 121908651

TIM G WAGER,

JUDGE LINDBERG

Defendant(s),

:

On the count of possession of a controlled substance we, the jurors, unanimously find the defendant,

**Count I: POSSESSION OF A CONTROLLED SUBSTANCE-
METHAMPHETAMINE**



GUILTY



NOT GUILTY

On the count of possession of other controlled substance or <1 OZ Marijuana we, the jurors, unanimously find the defendant,

**Count II: POSSESSION OF A CONTROLLED SUBSTANCE OR <1 OZ
MARIJUANA**

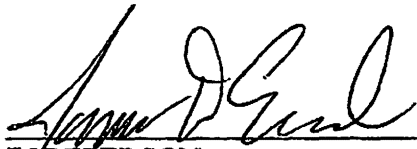


GUILTY



NOT GUILTY

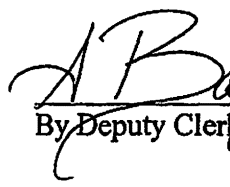
Dated this 22nd day of April, 2014.



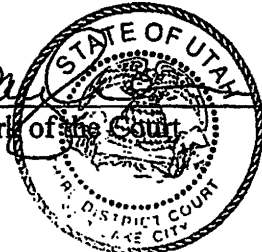
FOREPERSON

Filed April 22, 2013

Clerk of the Court



By Deputy Clerk of the Court



3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 121908651 FS
TIM G WAGER,	:	Judge: DENISE P LINDBERG
Defendant.	:	Date: June 30, 2014

PRESENT

Clerk: amyb
Prosecutor: WATABE, JAMES M
Defendant
Defendant's Attorney(s): DELLAPIANA, RALPH

DEFENDANT INFORMATION

Date of birth: August 3, 1970
Sheriff Office#: 207759
Audio
Tape Number: CR N45 Tape Count: 3:07

CHARGES

1. POSSESSION OR USE OF A CONTROLLED SUBSTANCE - 2nd Degree Felony
Plea: Not Guilty - Disposition: 04/22/2014 Guilty
2. POSSESS OTHER CONTROLLED SUBSTANCES OR < 1 OZ MARIJUANA - Class A Misdemeanor
Plea: Not Guilty - Disposition: 04/22/2014 Guilty
3. USE OR POSSESSION OF DRUG PARAPHERNALIA - Class B Misdemeanor
Plea: Not Guilty - Disposition: 04/22/2014 Dismissed

SENTENCE PRISON

Based on the defendant's conviction of POSSESSION OR USE OF A CONTROLLED SUBSTANCE a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.
The prison term is suspended.

SENTENCE JAIL

Based on the defendant's conviction of POSSESS OTHER CONTROLLED SUBSTANCES OR < 1 OZ MARIJUANA a Class A Misdemeanor, the defendant is sentenced to a term of 365 day(s). The total time suspended for this charge is 355 day(s).
Credit is granted for 0 day(s) previously served.

Charge # 1

Charge # 2 Fine: \$600.00
 Suspended: \$0.00
 Surcharge: \$301.58
 Due: \$600.00

 Total Fine: \$600.00

 Total Suspended: \$0

 Total Surcharge: \$301.58

 Total Principal Due: \$600.00

 Plus Interest

 Attorney Fees Amount: \$350.00 Plus Interest
Pay in behalf of: SALT LAKE COUNTY TREASURER

ORDER OF PROBATION

The defendant is placed on probation for 36 month(s).
Probation is to be supervised by Adult Probation & Parole.
Defendant to serve 10 day(s) jail.

Defendant is to pay a fine of 600.00 which includes the surcharge.
Interest may increase the final amount due.

PROBATION CONDITIONS

Usual and ordinary conditions required by Adult Probation and Parole.

If supervised by Adult Probation and Parole: all fines, fees and/or restitution are to be paid directly to Adult Probation and Parole.
Pay monthly supervision fee as determined by probation agency.
Violate no laws.

Undergo assessment to determine appropriate counseling. Enter and successfully complete any recommended treatment.

Enter, participate in, and complete any program, counseling or treatment as directed by probation agency.

Comply with all standard drug and alcohol conditions imposed by probation agency.

Do not use, consume, or possess alcohol or illegal drugs; nor associate with any persons using, possessing or consuming alcohol or illegal drugs.

Do not frequent any place where drugs are used, sold or otherwise distributed illegally.

Submit to breath and/or urine testing for drugs or alcohol upon the request of any law enforcement officer and/or probation agent.

Submit to random UA's and/or ETG testing.

Submit to search of person and/or property upon the request of any law enforcement officer.


Refrain from the use of alcoholic beverages.

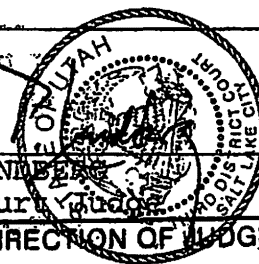
Do not use, consume or possess alcohol or frequent any place alcohol is the chief item of sale.

Case No: 121908651 Date: Jun 30, 2014

Date:

6/30/2014


DENISE P. LINDE
By District Court Judge
STAMP USED AT DIRECTION OF JUDGE



120

FILED DISTRICT COURT
Third Judicial District

Third District Court, State of Utah
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

JUN 30 2014
SALT LAKE COUNTY

State of Utah)
Plaintiff)
vs)
Tim G. Wager)
Address)
8/3/1970)
DOB) Defendant)

By _____
Deputy Clerk

COMMITMENT

After Judgment

Case No. 121908651
50# 207759

THE STATE OF UTAH TO ANY PEACE OFFICER IN THE STATE OF UTAH:

On the 30 day of June, 20 14, the above
named defendant was brought before a judge of the District Court, Salt Lake County, State of Utah,
charged with having committed the crime of (F2) Poss or use of CS, (MA) Poss
CS (Marijuana)

The defendant was found guilty and was sentenced to pay a fine of \$ _____ and to serve
10 days in the County Jail with _____ days in jail to be suspended upon payment of
the fine on or before _____;

The fine has not been paid, nor secured, nor has an appeal been taken;

You are hereby commanded to take said defendant into custody and safely keep until he/she shall
serve out the above-named term of imprisonment or shall pay \$ _____ not to exceed one
day for each _____ of the fine.

Dated June 30, 20 14.

