2016

State of Utah Plaintiff and Appellee v. Michael John Edgar Defendant and Appellant

Utah Court of Appeals

No. 20150594-CA

IN THE
COURT OF APPEALS OF THE STATE OF UTAH

State of Utah,
Plaintiff and Appellee,

v.

Michael John Edgar,
Defendant and Appellant.

REPLY BRIEF OF THE APPELLANT

On appeal from the Fourth Judicial District Court, Utah County,
Honorable Lynn W. Davis, District Court No. 131403487

Appellant Michael Edgar is currently incarcerated.

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ORAL ARGUMENT REQUESTED

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Argument

1. Mr. Edgar's counsel was ineffective for failing to object to testimony about Mr. Edgar knowing drug dealers.

Mr. Edgar's attorney was ineffective when he did not object to testimony that Mr. Edgar knew drug dealers. That testimony did not help the jury determine who possessed the drugs found in the car, because there was absolutely no evidence that the drug dealers were connected at all with the charged crime. Instead, what the challenged testimony did was raise the impermissible inference that because Mr. Edgar knew some drug dealers, he must be a drug dealer, too.

The State's arguments to the contrary do not change the baseline problem: that the testimony did not shed any light on what happened the evening Mr. Edgar was arrested and instead implied guilt by association. The State argues that the testimony that Mr. Edgar knew other drug dealers was probative of who owned the drugs in the vehicle. The State points to *United States v. Haynes*, where a defendant was charged with manufacturing methamphetamine; the district court held that evidence that the defendant knew a person who manufactured methamphetamine using a unique method was admissible because it showed that the defendant was aware that the method could be used to manufacture methamphetamine and explained the various items in the defendant's possession.

372 F.3d 1164, 1167 (10th Cir. 2004). But this argument does not advance the State's case.

Haynes involved charges that the defendant attempted to manufacture drugs through a unique manufacturing process, so the fact that the defendant knew about that drug manufacturing process was probative. Here, however, the drugs found in the vehicle were not unique or different. The drugs were not marked in a unique way, packaged peculiarly, or handled in any way differently than ordinary drugs. There was no evidence that the drug dealers were tied in any way to the charged crime. In fact, one of the drug dealers dealt heroin specifically, and the police found no heroin in the vehicle or in Mr. Edgar's house. (*See* R. 471–86, 593.)

The State also argues that Mr. Edgar's admission that he knew drug dealers was probative because it was a tacit admission of guilt. But the State's reasoning essentially is what Rule 403 prohibits: because Mr. Edgar knows drug dealers, he must be one himself. *See United States v. Lopez-Medina*, 461 F.3d 724, 741–42 (6th Cir. 2006) (reasoning that "guilt by association" evidence is "irrelevant to the question of a defendant's actual guilt" and is not probative; consequently, evidence that a defendant "knew a criminal" should have been excluded); *United States v. Marshall*, 173 F.3d 1312, 1317 (11th Cir. 1999) (excluding evidence that "tended to establish guilt by association—because [the defendants] cavorted with

drug dealers, they must be drug dealers themselves"). Mr. Edgar's attorney should have known the prejudicial nature of the testimony and objected it to.

Contrary to the State's argument, Mr. Edgar was prejudiced by his attorney's failure to object. The admission of the evidence was harmful to Mr. Edgar because the evidence against him was not overwhelming. The police found drugs in Mr. Edgar's wife's vehicle after the vehicle left Mr. Edgar's home. But Mr. Edgar was not in the vehicle when the police found the drugs, and no officer saw Mr. Edgar get in the vehicle, even though the officers were surveilling Mr. Edgar's home. (R. 451–52, 546–57, 526.) The police did find drugs on the passenger in the vehicle, Ms. Marsh. (R. 456–58.) Mr. Edgar never gave the police the combination to the safe in the vehicle that contained drugs. A detective at trial testified that Mr. Edgar said that the drugs were not his wife's; they were his. But Mr. Edgar was merely protecting his wife, who was found in the vehicle with the drugs.

2. Mr. Edgar's counsel was ineffective for failing to object to the prosecutor's misstatement in closing argument.

Mr. Edgar's trial counsel was ineffective when he failed to object to the prosecutor's comment in his closing statement that Mr. Edgar was "moving tons of weight, pounds of heroin." (R. 672–73.) That statement was not supported by evidence in the record, nor was it a reasonable inference from the evidence. What was in the record was Mr. Edgar's statement to the agent that he had *access* to

someone who could supply pounds of heroin, not that Mr. Edgar himself was *moving* pounds of heroin. (*Compare* Add. C., R. 593 *with* Add. D, R. 672.) In fact, the police found no heroin in the vehicle or in Mr. Edgar's house. Just because someone knows a heroin supplier does not mean that the person is a heroin supplier, especially a high-level supplier who is moving pounds of heroin into the area; that is prohibited guilt-by-association reasoning. *United States v. Pritchett*, 699 F.2d 317, 319 (6th Cir. 1983) (reasoning that prosecutor's questioning about defendant's association with a drug dealer created the improper inference that "because [the defendant] maintained a relationship with a convicted cocaine dealer, [the defendant] himself was somehow prone to criminal activity of the same sort").

And Mr. Edgar would not have been prejudiced had his attorney objected and the prosecutor was forced to state the evidence accurately—that Mr. Edgar knew drug dealers, but there was no evidence that Mr. Edgar himself was moving pounds of heroin. The prosecutor's misstatement encouraged the jury to punish Mr. Edgar because he was a high-level heroin dealer, even though the police found no heroin in this case. It was an inflammatory misstatement of the evidence. And Mr. Edgar was prejudiced by his attorney's failure because, as argued above, the evidence against Mr. Edgar was not overwhelming.

3. This Court should grant Mr. Edgar's Rule 23B motion

Concurrent with his opening brief, Mr. Edgar filed a Rule 23B motion arguing that his counsel was ineffective for failing to exclude plea negotiations between Mr. Edgar and a detective under Rule 410, but he needed this Court to remand the case to get all the necessary evidence on the record.

In response, the State argues that Mr. Edgar's argument about his Rule 23B motion is improper because it references extra-record evidence. Yet the State's argument is contrary to the Utah Supreme Court's September 2013 Revised Order Pertaining to Rule 23B. According to that order, if a Rule 23B motion is filed concurrently with the opening brief, "the briefs may reference the arguments in the motion and response, and the motion and response may reference the fact statement and arguments in the briefs. Affidavits submitted in support of Rule 23B motions are not part of the record on appeal and will be considered only to determine whether [to] grant or deny the motion." Under this rule, it is entirely appropriate for Mr. Edgar to reference the arguments he made in his Rule 23B motion in his opening brief. He submitted his affidavit to the Court so that the Court would more fully understand his argument; however, Mr. Edgar is very aware that his affidavit is extra-record evidence that this Court can only use in deciding whether to grant his motion.

Turning to the merits of the motion, at trial, a detective testified about conversations he had with Mr. Edgar, where Mr. Edgar gave him information about cooperating with law enforcement in exchange for leniency on his charges. The information Mr. Edgar gave to the detective should have been excluded under Utah R. Evid. 410 as a statement made in the course of a plea negotiation. Federal courts have realized that Rule 410 applies not only to statements made to prosecuting attorneys but to a government agent (in this case, the detective). *United States v. Greene*, 995 F.2d 793, 799 (8th Cir. 1993); *United States v. O'Neal*, 992 F.2d 1218, at *8 (6th Cir. 1993) (unpublished).

The State argues that Mr. Edgar has not shown that his counsel was ineffective because the law Mr. Edgar relies on is not controlling. However, the advisory committee notes to Rule 410 specifically state that it is the "federal rule, verbatim." Utah R. Evid. 410 advisory comm. notes. And Utah courts have looked to federal courts in determining the contours of Rule 410. *W. Valley City v. Fieeiki*, 2007 Ut App 62, ¶ 20, 157 P.3d 802. Because Utah adopted the federal rule and looks to federal cases interpreting the rule, Mr. Edgar's attorney should have known that Rule 410 applies not only to prosecuting attorneys but also to government agents.

Conclusion

Mr. Edgar respectfully requests that this Court hold that his counsel was ineffective and vacate his convictions.

DATED this 14th day of May, 2016.

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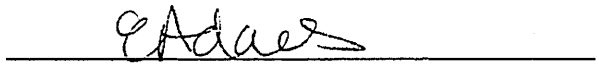
Certificate of Compliance With Rule 24(f)(1)

I hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 1,446 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2015 in 13-point Book Antiqua.

DATED this 14th day of May, 2016.



Certificate of Service

This is to certify that on May 23, 2016, I caused two true and correct copies of the Brief of Appellant to be served on the following via first class mail, postage prepaid:

Utah State Attorney General's Office
Appeals Division
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Also, in accordance with Utah Supreme Court Standing Order No. 8, a courtesy brief on CD in searchable portable document format was also filed with the Court and served on Appellee.