

2016

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

Utah Court of Appeals

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IN THE
COURT OF APPEALS OF THE STATE OF UTAH

State of Utah,
Plaintiff and Appellee,

v.

Michael John Edgar,
Defendant and Appellant.

BRIEF OF THE APPELLANT

On appeal from the Fourth Judicial District Court, Utah County,
Honorable Lynn W. Davis, District Court No. 131403330

Appellant Michael Edgar is currently incarcerated.

Sean Reyes
UTAH ATTORNEY GENERAL
160 East 300 South
6th Floor
P.O. Box 140854
Salt Lake City, UT 84114

*Attorney for Plaintiff/ Appellee
State of Utah*

Emily Adams (14937)
ADAMS LEGAL LLC
PO Box 1564
Bountiful, UT 84011
eadams@adamslegalllc.com
(801) 309-9625

*Attorney for Defendant/Appellant
Michael John Edgar*

ORAL ARGUMENT REQUESTED

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P.O. Box 140854
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*Attorney for Plaintiff/ Appellee
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Emily Adams (14937)
ADAMS LEGAL LLC
PO Box 1564
Bountiful, UT 84011
eadams@adamslegalllc.com
(801) 309-9625

*Attorney for Defendant/Appellant
Michael John Edgar*

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- A Sentence, Judgment, Commitment in *State v. Edgar*, District Court Case No. 131403330, on June 24, 2015 (R. 236–39)
- B Excerpt from DEA agent's testimony (R. 408–32)
- C District court order supplementing the record (R. 808–13)

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Jurisdictional Statement

This court has jurisdiction over this appeal pursuant to Utah Code § 78A-4-103(2)(j).

The district court issued its Sentence, Judgment, Commitment in *State v. Edgar*, District Court Case No. 131403330, on June 24, 2015 (R. 236–39; attached at Addendum A). Appellant Michael Edgar filed a timely notice of appeal on July 23, 2015. (R. 240–41.) This case initially came under the jurisdiction of the Utah Supreme Court, but the Utah Supreme Court transferred the case to this Court.

Statement of the Issues

Issue 1: In regards to the testimony of a Drug Enforcement Administration agent, (1) did the district court abuse its discretion when it allowed the testimony or (2) was Mr. Edgar’s attorney ineffective when he failed to properly object?

Standard of Review: “A trial court’s ruling under rule 403 is reviewed for abuse of discretion.” *State v. Bluff*, 2002 UT 66, ¶ 47, 52 P.3d 1210. “A claim of ineffective assistance of counsel raised for the first time on appeal presents a question of law that the court reviews for correctness.” *State v. Lucero*, 2014 UT 15, ¶ 11, 328 P.3d 841 (quotation omitted).

Preservation: Mr. Edgar’s attorney objected to the prejudicial nature of the agent’s testimony during trial. (R. 429.) But, if the attorney’s objection was not

specific enough, then Mr. Edgar's argument on appeal is not preserved; but an "exception to the preservation requirement is where trial counsel's failure to preserve the issue in the trial court is the result of ineffective assistance of counsel." *State v. Kozlov*, 2012 UT App 114, ¶ 35, 276 P.3d 1207.

Issue 2: Was Mr. Edgar's attorney ineffective when he failed to object to the State's request for permission to file the Second Amended Information the morning of trial?

Standard of Review: "A claim of ineffective assistance of counsel raised for the first time on appeal presents a question of law that the court reviews for correctness." *Lucero*, 2014 UT 15, ¶ 11 (quotation omitted).

Preservation: This issue is not preserved, but an "exception to the preservation requirement is where trial counsel's failure to preserve the issue in the trial court is the result of ineffective assistance of counsel." *Kozlov*, 2012 UT App 114, ¶ 35.

Determinative Provisions

Utah R. Crim. P. 4(d)

(d) The court may permit an information to be amended at any time before trial has commenced so long as the substantial rights of the defendant are not

prejudiced. If an additional or different offense is charged, the defendant has the right to a preliminary hearing on that offense as provided under these rules and any continuance as necessary to meet the amendment. The court may permit an indictment or information to be amended after the trial has commenced but before verdict if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced. After verdict, an indictment or information may be amended so as to state the offense with such particularity as to bar a subsequent prosecution for the same offense upon the same set of facts.

Utah R. Evid. 403:

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Statement of the Case

1. Nature of the Case and Course of Proceedings

The State originally charged Appellant Michael Edgar with one count of theft by receiving stolen property, nine counts of possession with intent to distribute, and one count of use or possession of drug paraphernalia. (R. 1–3.) The State later amended the possession charges to include an allegation that Mr. Edgar possessed drugs and paraphernalia within a drug-free zone. (R. 170–71.)

A jury convicted Mr. Edgar on all counts and determined that Mr. Edgar possessed drugs and paraphernalia within a drug-free zone. (R. 178–88.)

2. Statement of Facts

2.1 Mr. Edgar is arrested.

In November 2013, a man found out about a fairly new trailer that was being sold for a very low price. (R. 359.) The man suspected the trailer was stolen. (R. 359–60.) The police¹ became involved, and when the man went to meet the seller of the trailer – Mr. Edgar – the police intervened and arrested Mr. Edgar. (R. 362, 364, 367.)

When he was arrested, Mr. Edgar had been driving a car. (R. 379.) The car was not his; it was registered to others. (R. 459–60.) Mr. Edgar told the police that

¹ Officer Boren was the primary officer on that investigated and arrested Mr. Edgar. (R. 376.) Before Mr. Edgar's trial, Officer Boren killed his two young children, his wife, and his mother-in-law, and then he committed suicide. (R. 347.)

he was borrowing the car from a friend. (R. 460-61.) After his arrest, the police did an inventory impound search of the car and found a briefcase in the trunk. (R. 382-84.) An officer popped open the locked briefcase with a screwdriver and found various drugs and a scale. (R. 385-86.)

2.2 The State charges Mr. Edgar and amends the Information the morning of trial.

The State initially charged Mr. Edgar by Information with, among other things, possession of a controlled substance with intent to distribute. (R. 1-3.) The State later amended the Information and charged Mr. Edgar with possession with intent to distribute and possession of drug paraphernalia within a drug-free zone. (R. 27-29.) The State alleged in the Amended Information that Mr. Edgar committed the crime within 1,000 feet of a ballet school. (R. 29.) The ballet school, however, was over 1,000 feet from where Mr. Edgar was arrested. (Add. C, R. 809.)

The morning that trial began, at around 8:30am, the district court, the prosecutor, and the defense attorney held an in-chambers conference. (*Id.*)

The prosecutor brought to that conference a Second Amended Information, where, for the first time, Mr. Edgar was charged with committing a crime within 1,000 feet of the "Ultimate Sports USA Baseball and Softball Training Facility to the NW, making it a drug-free zone." (Add. C, R. 809-10.)

The prosecutor asked for permission to file the Second Amended Information. (Add. C, R. 811.) The district court stated that it would allow the State to file the Second Amended Information if the State called an owner or operator of the Ultimate Sports training facility to establish proper foundation for the new drug-free zone. (Add. C, R. 810.) The State found one of the owners of the facility, and she testified later that day. (*Id.*) Mr. Edgar's attorney did some quick Google research on the facility, and he interviewed the owner for the first and only time during a break in the trial proceedings that morning. (Add. C, R. 810-11.)

The owner did testify about the sports facility, and the prosecutor argued in his closing statement that based on the information elicited from the owner during her testimony, Mr. Edgar was within a drug-free zone when he was arrested. (R. 390, 585-86.)

2.3 A witness testifies about a connection between Mr. Edgar and high-level drug dealers.

During trial, a Drug Enforcement Administration (DEA) agent testified that about seven months after the charged conduct in this case, Mr. Edgar called him and said "he was seeking to cooperate with law enforcement in regard to heroin trafficking or heroin trafficker that was operating out of the Salt Lake City area and that he would do so in exchange for consideration with his pending charges in Utah County." (Add. B, R. 411, 418, 419.) The agent testified that Mr. Edgar

specified that the trafficker dealt in "pounds of heroin," which was valued at around \$20,000. (Add. B, R. 423.) Then the agent stated that Mr. Edgar discussed working with other law enforcement officers, and Mr. Edgar objected. (Add. B, R. 424-25.) Outside of the hearing of the jury, Mr. Edgar elaborated on his objection, noting "[t]he prejudicial nature of the testimony, there's other cases, he's working with other officers here in [the] state of Utah, that don't pertain necessarily to this case and we're looking at the facts for November 7, 2013 and what he was doing at that time." (Add. B, R. 429.)

The district court granted the objection in part. Specifically, the district court did not allow information about Mr. Edgar's prior contact with law enforcement officers. (Add. B, R. 430.) But the court did conclude that the evidence of Mr. Edgar contacting the agent and informing the agent of his access to heroin traffickers was probative. (*Id.*) After the ruling, the prosecutor asked the agent another question, mentioning Mr. Edgar's "ability to access pounds of heroin and a potential Mexican drug trafficker." (Add. B, R. 431-32.)

The prosecutor again referenced the DEA agent's testimony in closing, when he stated that Mr. Edgar's conversation with the agent was "very telling." (R. 593.) The prosecutor told the jury, "[W]ould we be using our common sense, our life experience be able to reach out and track down the DEA and say, Hey, I've got these state charges, these drug charges, need some help with them, can you

contact the prosecutor? What are you willing to do for me? I've got connections to a Mexican cartel and I can help you bust someone with pounds of heroin. Well, what a coincidence, we actually have some heroin in this case and tons of other drugs." (R. 593.) The evidence at trial showed that the officers found 546 milligrams—1/56 of an ounce—of heroin in the briefcase in the car Mr. Edgar was driving. (R. 506–07.)² The jury convicted Mr. Edgar on all counts.

Summary of the Argument

Mr. Edgar raises two issues on appeal:

First, the DEA agent's testimony about Mr. Edgar's connection to a heroin trafficker should not have been admitted into evidence. The evidence associated Mr. Edgar with a highly disliked and dangerous group—Mexican heroin traffickers—when there was no evidence that connected the trafficker with any of the charged crimes. Such an association was unduly prejudicial and insufficiently probative.³

² The detective that discovered the drugs initially testified that the amount of heroin found was 14 grams. (R. 454.) But then he testified that he found "less than a gram" of heroin. (R. 466.) Finally, the forensic scientist who tested the heroin testified that the amount of heroin found was actually 546 milligrams, which is less than half a gram or 1/56 of an ounce. (R. 486–88, 496, 506–07.)

³ The DEA agent also testified against Mr. Edgar in another case. That case is currently pending on appeal. *See State v. Edgar*, No. 20150594-CA. Mr. Edgar makes similar arguments about the DEA agent's testimony in this case and in No. 20150594.

Second, Mr. Edgar's attorney was ineffective when he did not object to the State's request for permission to file the Second Amended Information the morning trial began. The Second Amended Information changed the location of the drug-free zone, and Mr. Edgar was substantially prejudiced by the admission of the Second Amended Information because he had little time to prepare a defense.

Argument

- 1. The DEA agent's prejudicial testimony should not have been allowed into evidence.**

During trial, a DEA agent offered testimony about Mr. Edgar's association with a drug trafficker working out of the Salt Lake area who dealt with pounds of heroin. That testimony was more prejudicial than probative and should have been excluded under Utah R. Evid. 403. Mr. Edgar's attorney objected to the testimony, arguing that it was prejudicial, and the district court overruled that objection.

The argument here is two-fold: (1) the district court abused its discretion when it allowed into evidence the DEA agent's prejudicial testimony, and (2) in the alternative, if Mr. Edgar's attorney's prejudice objection was not timely or sufficiently specific, then Mr. Edgar's attorney was ineffective for failing to timely and specifically object to the prejudicial nature of the testimony.

1.1 The district court abused its discretion when it allowed the DEA agent's testimony into evidence.

Utah R. Evid. 403 allows a court to "exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice." Here, the minimal evidentiary value of the DEA agent's testimony was significantly outweighed by the prejudicial nature of that testimony, and the district court should have excluded the testimony.

The DEA agent's evidence was insufficiently probative. The probative value of the DEA agent's testimony was low. When weighing evidence under Rule 403, "courts may consider many factors" and are "bound by the text of rule 403." *State v. Cuttler*, 2015 UT 95, ¶ 18.⁴

The evidence here was ultimately unhelpful in aiding the jury in determining what actually happened in November 2013, when Mr. Edgar was arrested. For instance, the agent's testimony was nonspecific and general: the agent testified Mr. Edgar had "access to a heroin trafficker who was capable of moving large quantities of heroin." (Add. B, R. 422.) No evidence existed that the drug trafficker was involved in the charged crimes. *See United States v. Espinoza*,

⁴ The Utah Supreme Court has noted that "it strikes us as inappropriate for a court to discuss the need for the evidence or the efficacy of alternative proof when the court is analyzing only whether the evidence is unfairly prejudicial." *Cuttler*, 2015 UT 95, ¶ 19.

244 F.3d 1234, 1240 (10th Cir. 2001) (excluding evidence of defendant's sons' drug convictions because there was no evidence that sons were involved in charged crime); *United States v. Romo*, 669 F.2d 285, 288–89 (5th Cir. 1982) (reasoning that defendant's contact with individuals who had convictions for drug-related offenses was irrelevant to whether defendant was engaged in a drug conspiracy).

And although the prosecutor made much of the fact that heroin was also found in the car Mr. Edgar was driving, what was found was 1/56 of an ounce — a far cry from the “pounds of heroin” distributed by the trafficker. (*Compare* Add. B, R. 423 *with* R. 506–07.)

Furthermore, the evidence did not relay any information about what occurred in November 2013; it did not shed any light on whether Mr. Edgar knew the briefcase was in the back of the car he was driving or whether Mr. Edgar knew that the briefcase contained drugs.

Rather than relay information about what happened the day Mr. Edgar was arrested, the evidence merely associated Mr. Edgar with high-level drug traffickers without making any connection between the traffickers and the charged crimes. The evidence did not aid the jury in its determination of whether Mr. Edgar possessed drugs or drug paraphernalia.

The DEA agent's testimony was unfairly prejudicial. “The critical question in a rule 403 analysis for unfair prejudice is whether certain[] testimony is so

prejudicial that the jury will be unable to fairly weigh the evidence.” *State v. Jones*, 2015 UT 19, ¶ 30, 345 P.3d 1195 (quotations omitted). “Additionally, evidence is not unfairly prejudicial because it tends to prove guilt, but because it tends to encourage the jury to find guilt from improper reasoning.” *Id.* (quotations omitted). Improper reasoning includes finding a defendant guilty merely because of an association with others (“guilt by association”), *State v. Gonzalez*, 2015 UT 10, ¶ 37, 345 P.3d 1168, or finding a defendant guilty because of irrelevant emotional considerations, *Robinson v. Taylor*, 2015 UT 69, ¶ 34, 356 P.3d 1230; *State v. White*, 880 P.2d 18, 22 (Utah Ct. App. 1994).

The evidence of Mr. Edgar’s association with a heroin trafficker encouraged the jury to engage in improper reasoning because the evidence both influenced the jury to find guilt by association and stirred up irrelevant emotional considerations.

Here, the DEA agent linked Mr. Edgar with a “heroin trafficker that was operating out of the Salt Lake City area” who “was capable of moving large quantities of heroin,” “pounds of heroin” with a street value of \$20,000. (Add. B, R. 419, 422–23.) The prosecutor then summarized the agent’s testimony, noting that Mr. Edgar had an “ability to access pounds of heroin and a potential Mexican drug trafficker.” (Add. B, R. 431–32.) Then in closing the prosecutor mentioned that Mr. Edgar “had connections to a Mexican cartel.” (R. 593.)

The agent's testimony, linking Mr. Edgar to the Mexican drug cartel operating locally, "appeal[ed] to the jury's passions or prejudices" and attempted "to associate the defendant with a feared . . . group" — a foreign drug cartel. *See United States v. Reynolds*, 534 F. App'x 347, 367–68 (6th Cir. 2013) (reasoning that prosecutor's argument that a defendant brought Mexican drug cartels into the local community appealed to the jury's passions and constituted prosecutorial misconduct) (quotation omitted).

Not only did the evidence appeal to the jury's passions, the evidence "implicitly associated" Mr. Edgar with a Mexican drug trafficker, even though there was no evidence of any connection between Mr. Edgar and the trafficker in the charged crime. *See United States v. Echavarria-Olarte*, 904 F.2d 1391, 1398 (9th Cir. 1990) (holding testimony that implicitly associated the defendant with a drug cartel was prejudicial, especially when an association with the cartel did not bear on any element of the charged crime); *see generally United States v. Vallejo*, 237 F.3d 1008, 1017 (9th Cir.), *opinion amended on denial of reh'g*, 246 F.3d 1150 (9th Cir. 2001) (reasoning that the testimony that portrayed the defendant "as a member of an enormous international drug trafficking organization and implied that he knew of the drugs in his car because of his role in that organization" was prejudicial because the defendant "was not alleged to be associated with a drug trafficking organization in even the most minor way").

Here, all the evidence proved was that Mr. Edgar knew drug dealers. That's it. No evidence—not even a hint of an allegation—existed that the drug dealers were connected with the charged crimes. The jury realizing that Mr. Edgar knew some drug dealers was utterly unhelpful in determining whether Mr. Edgar possessed drugs on the night he was arrested.

But what the evidence did do was raise an impermissible inference that because Mr. Edgar knew drug dealers, he, too, was a drug dealer. *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”); *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 an 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”). The agent’s testimony inferred guilt by association and was highly prejudicial because it may have led the jury to conclude

that Mr. Edgar should be punished, “regardless of his liability in this particular case.” *Robinson*, 2015 UT 69, ¶ 37.

The error was not harmless. Mr. Edgar was harmed by the evidence. An appellate court “will not disturb the jury’s verdict unless the likelihood of a different outcome is sufficiently high to undermine confidence in the verdict.” *State v. High*, 2012 UT App 180, ¶ 41, 282 P.3d 1046 (quotation omitted). “Harmless errors are those that are sufficiently inconsequential so no reasonable likelihood exists that the error affected the outcome of the proceedings.” *Id.* (quotations omitted).

Here, the State’s evidence against Mr. Edgar was not overwhelming. The drugs were found in a briefcase that was locked inside the trunk of the car that Mr. Edgar was borrowing from a friend. (R. 379, 382–86, 460–61.) Furthermore, when the police arrested Mr. Edgar, it was in connection with a stolen trailer — Mr. Edgar was not suspected of dealing drugs nor did the police suggest that any of Mr. Edgar’s conduct was indicative of drug dealing. (R. 362, 364, 367, 382–84.) The police never mentioned that they saw Mr. Edgar distribute or purchase drugs.

Because the evidence against Mr. Edgar was not overwhelming, the agent’s testimony that Mr. Edgar had connections with a high-level drug dealer could have influenced the jury to find Mr. Edgar guilty based on a person he knew rather than on the facts presented at trial.

1.2 Alternatively, Mr. Edgar's trial counsel was ineffective for not appropriately objecting to the DEA agent's testimony.

Mr. Edgar's attorney objected to the "prejudicial nature" of the agent's testimony. (Add. B, R. 429.) Although this should be sufficient to preserve the prejudice argument for appeal, if this Court determines that the argument was not adequately preserved, then Mr. Edgar's attorney was ineffective for failing to timely raise an objection to the testimony on the basis of prejudice.

For an ineffective assistance of counsel claim, a defendant must satisfy the *Strickland*⁵ standard, which requires a defendant to prove "(1) that counsel's performance was so deficient as to fall below an objective standard of reasonableness and (2) that but for counsel's deficient performance there is a reasonable probability that the outcome of the trial would have been different." *State v. Larrabee*, 2013 UT 70, ¶ 18, 321 P.3d 1136 (quotation omitted). "Proving that his counsel's performance fell below an objective standard of reasonableness requires [the defendant] to rebut the strong presumption that under the circumstances, the challenged action might be considered sound trial strategy." *State v. Ott*, 2010 UT 1, ¶ 34, 247 P.3d 344 (quotations omitted). Sound trial strategy does not require trial counsel to submit a motion or lodge an objection that would be futile. *State v. King*, 2010 UT App 396, ¶ 33, 248 P.3d 984.

⁵ See *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Here, the failure of Mr. Edgar's trial counsel to timely object to the testimony on the basis of prejudice constituted deficient performance. Throughout the agent's testimony, trial counsel objected on the basis of relevance. (Add. B, R. 411, 413–14, 415, 417, 420.)

In conjunction with the relevance objection, trial counsel should have also objected on the basis of prejudice under Utah R. Evid. 403. An attorney in trial counsel's position should have realized that testimony that links a defendant charged with a drug crime to a high-level drug trafficker—when there is no evidence that the drug trafficker was involved in the charged crime—is unfairly prejudicial. *See Echavarria-Olarte*, 904 F.2d at 1398 (holding testimony that implicitly associated the defendant with a drug cartel was prejudicial, especially when an association with the cartel did not bear on any element of the charged crime). Furthermore, trial counsel should have known that an objection to relevance does not encompass an objection on the basis of prejudice. *See State v. Davis*, 2013 UT App 228, ¶ 72, 311 P.3d 538. And trial counsel should have known that objections must be timely and specific. *State v. Winfield*, 2006 UT 4, ¶ 14, 128 P.3d 1171.

Moreover, Mr. Edgar was prejudiced by his trial counsel's failure to object. As argued more thoroughly in section 1.1, *supra*, the agent's testimony linking Mr. Edgar to the Mexican drug cartel operating locally "appeal[ed] to the jury's

passions or prejudices” and attempted “to associate the defendant with a feared . . . group.” *Reynolds*, 534 F. App’x 347, 367–68.

And the testimony—which only proved that Mr. Edgar knew drug dealers—raised an impermissible inference that because Mr. Edgar knew drug dealers, he, too, was a drug dealer. See *Lopez-Medina*, 461 F.3d at 741–42; *Marshall*, 173 F.3d at 1317; *Pritchett*, 699 F.2d at 319. The agent’s testimony inferred guilt by association and was highly prejudicial because it may have led the jury to conclude that Mr. Edgar should be punished, “regardless of his liability in this particular case.” *Robinson*, 2015 UT 69, ¶ 37. For these reasons, the district court should have excluded the testimony had Mr. Edgar’s attorney timely and specifically objected to the testimony on the basis of prejudice.

Because the jury rendered its verdict based on evidence that should have been excluded, Mr. Edgar asks this Court to reverse the verdict and remand to the district court for further proceedings.

2. Mr. Edgar’s attorney was ineffective when he did not object to the State’s request for permission to file the Second Amended Information

Mr. Edgar’s attorney was ineffective when he failed to object to the State’s request for permission to file the Second Amended Information the morning trial began that changed the location of the drug-free zone; the timing of the filing of

the Second Amended Information prevented Mr. Edgar from fully developing his defense.

An ineffective assistance of counsel claim requires the defendant to prove deficient performance and prejudice. *Larrabee*, 2013 UT 70, ¶ 18.

Mr. Edgar's attorney performed deficiently when he did not object to the State's request for permission to file the Second Amended Information or ask for a continuance. "The court may permit an information to be amended at any time before trial has commenced so long as the substantial rights of the defendant are not prejudiced." Utah R. Crim. P. 4(d). For a defendant to be subject to the drug-free zone sentencing enhancement, the finder of fact must determine that certain actions occurred within a certain distance from a particular location. Utah Code § 58-37-8(4)(a).

When the State initially charged Mr. Edgar, it did not allege that the charged crimes occurred within a drug-free zone. (*See* R. 1-3.) Rather, the State amended the information shortly thereafter to allege that certain charged crimes occurred in a drug-free zone, namely, within 1,000 feet of a ballet school. (R. 29.) However, that ballet school was over 1,000 feet from where Mr. Edgar was arrested. (Add. C, R. 809.)

It was not until 11 months later, on the morning trial began, that the State presented a Second Amended Information that alleged for the first time that Mr.

Edgar was in drug-free zone because he was within 1,000 feet of a sports facility. (R. 30, 809–10.) Because of the timing of the filing of the Second Amended Information, Mr. Edgar’s attorney only had enough time to do some brief Google research and talk to the State’s witness during a break in trial proceedings. (Add. C, R. 810–11.)

Mr. Edgar’s attorney should have objected to the State’s request for permission to file the Second Amended Information because it substantially prejudiced the rights of Mr. Edgar. Mr. Edgar prepared for trial for several months knowing that the State’s allegation that Mr. Edgar committed a crime within a drug-free zone — i.e., within 1,000 feet of a ballet school — was unsupported by the evidence. And when the State sought to amend the Information to change the location of the drug-free zone, Mr. Edgar’s attorney had little time to investigate the new location. The timing of the Second Amended Information hindered Mr. Edgar’s ability to prepare his own defense. Mr. Edgar’s attorney should have objected to the State’s request to file the Second Amended Information or at least requested a continuance of the trial so that he could prepare a defense.

The failure of Mr. Edgar’s attorney to object or ask for a continuance prejudiced Mr. Edgar. Mr. Edgar’s attorney could not thoroughly investigate the new location of the drug-free zone; specifically, Mr. Edgar’s attorney could not measure the distance between the new location and the place where Mr. Edgar

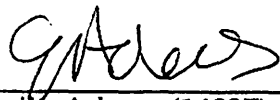
was arrested, nor could Mr. Edgar's attorney investigate the type of business done at the new location.

Mr. Edgar's attorney was ineffective for failing to object to the State's request for permission to file a Second Amended Information and for failing to ask for a continuance to prepare a defense. Because Mr. Edgar was substantially prejudiced, Mr. Edgar requests that this Court reverse the jury's finding that Mr. Edgar committed the charged crimes within a drug-free zone.

Conclusion

Mr. Edgar respectfully requests that this Court reverse the jury's verdict. Not only was the jury exposed to evidence that should have been excluded – the DEA agent's testimony that associated Mr. Edgar with a Mexican heroin trafficker—but Mr. Edgar was also prejudiced when the State amended the Information the morning of trial to include a new location for the drug-free zone. For these reasons, Mr. Edgar requests that this Court reverse.

DATED this 12 day of March, 2016.



Emily Adams (14937)
ADAMS LEGAL LLC
P.O. Box 1564
Bountiful, UT 84011
eadams@adamslegalllc.com

(801) 309-9625

Attorney for Defendant/Appellant
Michael Edgar

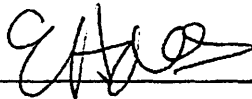
Certificate of Compliance With Rule 24(f)(1)

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 4,785 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 2010 in 13 point Book Antiqua.

DATED this 12th day of March, 2016.

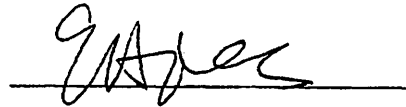


Certificate of Service

This is to certify that on the 14th day of March, 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
160 East 300 South
6th Floor
P.O. Box 140854
Salt Lake City, UT 84114

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.

A handwritten signature in black ink, appearing to read "J. A. Jones", is written over a horizontal line.

Tab A

Addendum A

Sentence, Judgment, Commitment in *State v. Edgar*, District Court Case No.
131403330, on June 24, 2015

4TH DISTRICT COURT - PROVO
UTAH COUNTY, STATE OF UTAH

FILED
JUN 24 2015
4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

STATE OF UTAH, : MINUTES
Plaintiff, : SENTENCE, JUDGMENT, COMMITMENT
vs. :
MICHAEL JOHN EDGAR, : Case No: 131403330 FS
Defendant. : Judge: LYNN W DAVIS
Custody: Utah County Jail : Date: June 24, 2015

PRESENT

Clerk: treenah
Prosecutor: JOHNSON, CRAIG R
Defendant
Defendant's Attorney(s): STEWART, GREGORY V

DEFENDANT INFORMATION

Date of birth: September 16, 1980
Audio
Tape Number: 301-15 Tape Count: 11:36

CHARGES

1. THEFT BY RECEIVING STOLEN PROPERTY - 3rd Degree Felony
Plea: Guilty - Disposition: 04/10/2015 Guilty
2. POSS W/ INTENT TO DIST C/SUBSTANCE - 1st Degree Felony
Plea: Guilty - Disposition: 04/10/2015 Guilty
3. POSS W/ INTENT TO DIST C/SUBSTANCE - 1st Degree Felony
Plea: Guilty - Disposition: 04/10/2015 Guilty
4. POSS W/ INTENT TO DIST C/SUBSTANCE - 1st Degree Felony
Plea: Guilty - Disposition: 04/10/2015 Guilty
5. POSS W/ INTENT TO DIST C/SUBSTANCE - 1st Degree Felony
Plea: Guilty - Disposition: 04/10/2015 Guilty
6. POSS W/ INTENT TO DIST C/SUBSTANCE - 1st Degree Felony
Plea: Guilty - Disposition: 04/10/2015 Guilty
7. POSS W/ INTENT TO DIST C/SUBSTANCE - 1st Degree Felony
Plea: Guilty - Disposition: 04/10/2015 Guilty
8. POSS W/ INTENT TO DIST C/SUBSTANCE - 2nd Degree Felony
Plea: Guilty - Disposition: 04/10/2015 Guilty
9. POSS W/ INTENT TO DIST C/SUBSTANCE - 2nd Degree Felony
Plea: Guilty - Disposition: 04/10/2015 Guilty
10. POSS W/ INTENT TO DIST C/SUBSTANCE - 2nd Degree Felony
Plea: Guilty - Disposition: 04/10/2015 Guilty

11. USE OR POSSESSION OF DRUG PARAPHERNALIA - Class A Misdemeanor

Plea: Guilty - Disposition: 04/10/2015 Guilty

SENTENCE PRISON

Based on the defendant's conviction of THEFT BY RECEIVING STOLEN PROPERTY a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of POSS W/ INTENT TO DIST C/SUBSTANCE a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than five years and which may be life in the Utah State Prison.

Based on the defendant's conviction of POSS W/ INTENT TO DIST C/SUBSTANCE a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than five years and which may be life in the Utah State Prison.

Based on the defendant's conviction of POSS W/ INTENT TO DIST C/SUBSTANCE a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than five years and which may be life in the Utah State Prison.

Based on the defendant's conviction of POSS W/ INTENT TO DIST C/SUBSTANCE a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than five years and which may be life in the Utah State Prison.

Based on the defendant's conviction of POSS W/ INTENT TO DIST C/SUBSTANCE a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than five years and which may be life in the Utah State Prison.

Based on the defendant's conviction of POSS W/ INTENT TO DIST C/SUBSTANCE a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than five years and which may be life in the Utah State Prison.

Based on the defendant's conviction of POSS W/ INTENT TO DIST C/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.

Based on the defendant's conviction of POSS W/ INTENT TO DIST C/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.

Based on the defendant's conviction of POSS W/ INTENT TO DIST C/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.

COMMITMENT is to begin immediately.

To the UTAH County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

Court sentences defendant to 257 days on the Class A Misdemeanor with credit for time served. Sentence to run concurrent.

SENTENCE RECOMMENDATION NOTE

Court recommends Defendant not serve a lengthy sentence. Court recommends defendant be given credit for time served of 257 days, the court also recommends defendant participate in the Conquest Program.

SENTENCE JAIL

Based on the defendant's conviction of USE OR POSSESSION OF DRUG PARAPHERNALIA a Class A Misdemeanor, the defendant is sentenced to a term of 365 day(s) The total time suspended for this charge is 108 day(s).

Credit is granted for 257 day(s) previously served.

SENTENCE FINE

Charge # 1 Fine: \$5000.00
 Suspended: \$5000.00

Charge # 2 Fine: \$10000.00
 Suspended: \$10000.00

Charge # 3 Fine: \$10000.00
 Suspended: \$10000.00

Charge # 4 Fine: \$10000.00
 Suspended: \$10000.00

Charge # 5 Fine: \$10000.00
Suspended: \$10000.00

Charge # 6 Fine: \$10000.00
Suspended: \$10000.00

Charge # 7 Fine: \$10000.00
Suspended: \$10000.00

Charge # 8 Fine: \$10000.00
Suspended: \$10000.00

Charge # 9 Fine: \$10000.00
Suspended: \$10000.00

Charge # 10 Fine: \$10000.00
Suspended: \$10000.00

Charge # 11 Fine: \$2500.00
Suspended: \$2500.00

Total Fine: \$97500.00
Total Suspended: \$97500.00
Total Surcharge: \$0
Total Principal Due: \$0
Plus Interest

CUSTODY

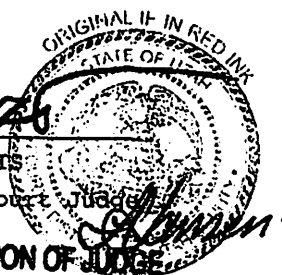
The defendant is present in the custody of the Utah County jail.

Date

June 24-2015

LYNN W DAVIS
District Court Judge

STAMP USED AT DIRECTION OF JUDGE



Tab B

Addendum B

Excerpt from DEA agent's testimony (R. 408-32)

1 THE COURT: Argument outside the presence of the
2 jury. Thank you.

3 (Whereupon a lunch recess was taken)

4 THE COURT: We're back on the record in the case of
5 State of Utah vs. Michael Edgar, Case No. 131403330. The
6 record will reflect that counsel and clients are present,
7 that the jury is seated.

8 And Mr. Johnson, you may call your next witness.

9 MR. JOHNSON: Thank you, Judge. We will be getting
10 to Detective Purvis's testimony a little later on. The State
11 would call Agent Brandon Holmer.

12 THE COURT: Okay. Let's have you raise your right
13 hand and be sworn by the Clerk of the Court then.

14 BRANDON LEE HOLMER

15 having been first duly sworn, testified
16 upon his oath as follows:

17 THE COURT: You may be seated. Invite you to speak
18 up clearly for the benefit of the record and also clearly for
19 the benefit of the jury seated to your left. I advise every
20 witness if a question is confusing to you, please advise me
21 and I'll have counsel restate it for your benefit. Thank you
22 for being here.

23 DIRECT EXAMINATION

24 BY MR. JOHNSON:

25 Q Good afternoon.

1 A Good afternoon.

2 Q Will you state your full name and spell your last
3 name for the jury please?

4 A My name is Brandon Lee Holmer, last name is spelled
5 H-O-L-M-E-R.

6 Q And what do you do for a living, sir?

7 A I'm a special agent with the Drug Enforcement
8 Administration.

9 Q Okay, short that is DEA, right?

10 A Yes, sir.

11 Q Okay. How long have you been with them?

12 A Since July of 2004.

13 Q Okay, and before that what did you do for a living?

14 A I served with the U.S. military and I performed
15 duties during part of that time in the Utah National Guard
16 Counter Drug Program where I served as an analyst for
17 approximately six years.

18 Q Okay, and before that?

19 A U.S. Army Special Forces in the Utah National Guard
20 and LDS Mission to Argentina.

21 Q All right. We can stop there. Won't go into your
22 high school English grades or anything.

23 A Thank you.

24 Q What sort of occupational experience do you have
25 with drug interdiction?

1 A Aside from the time that I spent with the FBI,
2 District Attorney's Office in Salt Lake on a task force and
3 working for the State Bureau of Investigation as an analyst,
4 I was trained in the DEA Academy in Quantico, Virginia. It
5 was approximately 17 weeks at the time and they cover a
6 myriad of instruction in how to perform your duties a special
7 agent.

8 Q And what is drug interdiction? I guess I should
9 start with that.

10 A Drug interdiction is basically trying to staunch
11 the supply of drugs to the streets to getting out and
12 becoming available for users.

13 Q Okay. And so what exactly does, in your current
14 capacity as a DEA, what does the DEA do? Is it state level,
15 federal or what?

16 A So, the DEA was formed in, I believe 1973
17 specifically with the aim of reducing the supply of narcotics
18 and also controlling legal controlled substances. We focus
19 on federal level cases and if appropriate we'll prosecute at
20 other levels.

21 Q And when you say federal level, is that, what's
22 that determined by?

23 A What level a case is prosecuted at, there's some
24 discretion at the investigative level but primarily it's
25 based on what legislators determine to be appropriate for

1 certain offenses. So specifically, they have laid out, the
2 U.S. Congress has laid out certain levels of drugs should be
3 punished at a certain level. So generally we don't prosecute
4 anything below a five year - or below a 10-year minimum
5 mandatory in the federal system.

6 Q When we're talking - without going into the
7 mandatory - how does that relate to quantity or across state
8 lines, things like that?

9 A So, for federal level prosecution it needs to be
10 fairly serious drug offenses in terms of the -

11 MR. STEWART: I'm going to object to this. I don't
12 see how it's relevant to the case at hand.

13 MR. JOHNSON: Giving some background to give
14 context to a conversation this agent had with the defendant,
15 Judge.

16 THE COURT: Okay. Well, let's move through it
17 quickly as it relates to this -

18 MR. JOHNSON: Yes, certainly.

19 THE COURT: - I'll reserve as it relates to
20 sustaining or overruling the objection. Let's give it -

21 Q (BY MR. JOHNSON) Can you summarize that then?

22 A We're looking for traffickers, not users, people
23 that are moving major quantities of drugs.

24 Q Okay, and in your - so on a day-to-day daily
25 responsibilities in your job, not talking about the DEA in

1 general, what do you do?

2 A That's the beauty of the job I guess is it depends.
3 It can be anything from training, anything from tactical to,
4 to investigative type things, search warrant surveillance, a
5 lot of time spent writing, documenting what's going on and
6 then working with confidential sources.

7 Q And what role do confidential sources play in your
8 job?

9 A Specifically they give us access to drug
10 trafficking organizations. They give us information and
11 they'll actually deal with drug traffickers. It's pretty
12 hard for to walk in off the street and convince a guy that
13 I'm a bad guy and he should sell me drugs.

14 Q Okay. We'll get some more information in a minute.
15 We'll jump ahead. So drawing your attention to July 29th of
16 last year, did you give me a call?

17 A Yes, I did.

18 Q Why was that?

19 A I'd been contacted by an individual who was later
20 identified as Michael Edgar. He called me on the duty phone.
21 I was serving as the duty agent at that time.

22 Q Explain the duty phone to the jury.

23 A So the duty phone goes along with the
24 responsibility of taking any incoming cases to the office and
25 it's a publically available number. If you call our office,

1 our office phone after hours, it refers you to the duty phone
2 and we're responsible to answer it in case someone has an
3 emergency or they want to report drug trafficking activities.

4 Q In this case it just happened to be -

5 MR. STEWART: Judge, could we approach?

6 THE COURT: Yes, sir.

7 (Whereupon a side bar was held as follows:

8 MR. STEWART: (Inaudible) to this case (inaudible).

9 THE COURT: How would it be - I mean, you can
10 present it as it relates to rebuttal but what is it?

11 MR. JOHNSON: (Inaudible).

12 THE COURT: Ahhh, I think it is. We can make a
13 record outside the presence of the jury but if it's contacted
14 independently as it relates to the resolution of the case,
15 you can have some discussions. Okay?

16 (End of sidebar)

17 Q (BY MR. JOHNSON) So you were talking about the
18 duty phone. So were you, just happened to be - was it your
19 turn or do you do it every night or what?

20 A No, it goes a week at a time. We rotate through
21 the 17 or 18 agents that are in the office.

22 Q Okay, and how soon before you called me did he call
23 you to the best of your recollection?

24 A To the best of my recollection it was the previous
25 day and during our discussion he told me that the prosecutor,

1 Craig Johnson, was the guy handling his case and so that's
2 when I called you.

3 Q Okay. I didn't seek you out independently?

4 A No.

5 Q Your contact came from Mr. Edgar?

6 A That's correct.

7 Q And what did he say to you when he got ahold of you
8 on the phone?

9 MR. STEWART: Judge, just for the record, we would
10 object to this on the grounds of relevance to this case.

11 THE COURT: I don't know the relevance. We can
12 address it outside the presence of the jury if you wish to.

13 MR. JOHNSON: I think my proffer at the bench
14 should be sufficient for us to continue with the line of
15 questioning at this point.

16 THE COURT: But let's make a record outside the
17 presence of the jury then.

18 Ladies and gentlemen of the jury, in light of that
19 we will take up a legal discussion outside the presence of
20 the jury, excuse you at this point in time and caution you
21 not to discuss the case with anyone. If you've taken notes,
22 don't show those to anyone and don't attempt to learn
23 anything about this case outside this courtroom setting. Of
24 course avoid any radio, TV, newspaper, comments about the
25 trial. With that we'll excuse the jury, then we'll take up

1 these matters outside your presence and once I've ruled then
2 we will invite you back in. Thank you.

3 (Whereupon the jury left the courtroom)

4 THE COURT: The jury has been excused. There is an
5 objection. The basis hasn't been stated on the record and,
6 counsel, you may state that basis. You may then respond.

7 MR. STEWART: Judge, again, just to make this
8 perfectly clear for the record, I object on the basis of
9 relevance to this case. This case happened in November of
10 2013.

11 THE COURT: This contact was July 29, 2015.

12 MR. STEWART: '14.

13 THE COURT: '14, excuse me, all right. Okay.

14 MR. STEWART: Seven or eight months after this.

15 THE COURT: Now I don't know the facts involved
16 here and you can respond briefly to that and we may need to
17 take some testimony so that in fact I can -

18 MR. JOHNSON: Let's just do that. I'll just ask a
19 couple of questions and we'll see where that takes us.

20 THE COURT: Okay, very well.

21 Q (BY MR. JOHNSON) Agent Holmer, why did Mr. Edgar
22 indicate that he was contacting you?

23 A He was seeking consideration with pending charges
24 by cooperating with law enforcement on other cases.

25 Q State level or federal level?

1 A To my knowledge his charges were at state level.

2 MR. JOHNSON: And Judge, the Court can take
3 judicial notice that this case, among several others were
4 pending at the time of this conversation with Agent Holmer
5 and the defendant. I was the prosecutor on all of those
6 cases.

7 THE COURT: So he would cooperate with a federal
8 agent as it relates to -

9 Q (BY MR. JOHNSON) What did he want you to do if he
10 cooperated?

11 A He seemed to believe that I could supercede the
12 authority of the state and compel them to help him out with
13 his charges.

14 Q How did my name get brought up with respect to
15 that?

16 A He told me that you were the prosecutor.

17 Q Okay. And that by contacting me, what might
18 happen?

19 A That he might be given a stay on the current status
20 of these charges or a reduction in his charges because of my
21 involvement and his cooperation with us.

22 THE COURT: And did he promise anything in
23 connection with that as it relates to cooperation?

24 THE WITNESS: Obviously -

25 THE COURT: Your tie is running into the mike.

1 THE WITNESS: Sorry.

2 THE COURT: It's all right.

3 THE WITNESS: So, so whenever someone contacts me
4 I'm going to try and determine what their usefulness is to
5 the government. So I questioned him about what he would be
6 willing to provide, what level of trafficker he could give me
7 access to and what actions he could take specifically with
8 regard to that activity.

9 Q (BY MR. JOHNSON) How did he respond to that?

10 A He indicated that he had access to a high level
11 Mexican heroin trafficker that operated out of the Salt Lake
12 City area.

13 Q Okay, how much, how much quantity-wise of drugs
14 could he get access to?

15 A Pound level quantities. So significant
16 distribution quantities. Anytime there's going to be pound
17 loads of heroin, we're obviously interested. That's a fairly
18 good sized trafficker.

19 MR. JOHNSON: Judge, based on that I think the
20 relevance has been established.

21 THE COURT: Anything further, counsel?

22 MR. STEWART: Ummm - no, Judge, we'll stand on
23 what's been presented (inaudible) the objection.

24 THE COURT: Okay. Well, I'll overrule the
25 objection to outside the presence of the jury I make a

1 determination as it relates to the nature of the
2 conversations, the basis of the conversation and the
3 projection as it relates to the usefulness of the information
4 that could be provided and that it related specifically to
5 this pending, these pending charges because there's a
6 reference directly to Mr. Craig Johnson as Deputy Utah County
7 Attorney and I will find by virtue of that and the admissions
8 involved that it is relevant.

9 So we'll invite the jury back in.

10 And it's sort of an admission against interest. I
11 would make the further observation that there's been
12 testimony already that some of the drugs involved were
13 heroin; and secondarily, the independent contact by the
14 defendant with a federal agent was initiated by him and that
15 secondarily that it would be admissions against interest.

16 (Whereupon the jury entered the courtroom)

17 THE COURT: We are back on the record in the case
18 of state of Utah vs. Michael Edgar, Case No. 131403330.
19 Counsel and clients are present, the jury is now seated and
20 that we had some testimony elicited outside the presence of
21 the jury. The Court has made a ruling and you may proceed
22 counsel.

23 MR. JOHNSON: Thank you.

24 Q (BY MR. JOHNSON) You said Mr. Edgar contacted you
25 on the duty phone around July 28, 2014?

1 A Yes, sir.

2 Q And describe that conversation from the beginning.
3 I guess had you ever talked to him before this?

4 A No, never.

5 Q Okay, so describe the conversation please.

6 A So Mr. Edgar identified himself, told me that he
7 was seeking to cooperate with law enforcement in regard to
8 heroin trafficking or heroin trafficker that was operating
9 out of the Salt Lake City area and that he would do so in
10 exchange for consideration with his pending charges in Utah
11 County. He identified Mr. Johnson as the prosecutor over his
12 cases and we had a discussion about what his ability, what he
13 could provide, what services he could provide to me
14 specifically in the course of investigation.

15 THE COURT: Let me have counsel approach just
16 quickly and then -

17 (Whereupon a sidebar was held as follows:

18 THE COURT: He made a generic reference to his
19 cases. I don't want any plurality as it relates to this jury
20 knowing that there are other pending cases. Now the cases
21 could refer to multiple charges in this case certainly but if
22 you will instruct him that I've got to narrow that. It's
23 potentially approaching prejudicial if he goes into each of
24 the cases and the number of charges and the nature of the
25 charges and everything else.

1 (Inaudible conversation)

2 THE COURT: Okay, what are we doing to do? It's a
3 fine balance as it relates to that because I don't want all
4 four cases to be before this jury -

5 MR. JOHNSON: It would be those two, but
6 (inaudible).

7 THE COURT: I know. What do you do? How do you
8 protect your client?

9 MR. JOHNSON: (Inaudible).

10 THE COURT: I know. I know.

11 MR. JOHNSON: (Inaudible).

12 THE COURT: Okay, yeah, he probably did. Ummm, if
13 you will just advise this witness that beyond what he has
14 testified to or he heard from him that he can't open the door
15 to all the other cases that are pending and everything else
16 that way.

17 MR. JOHNSON: (Inaudible).

18 THE COURT: I know. If there's a specificity but -

19 MR. JOHNSON: (Inaudible).

20 THE COURT: Okay.

21 MR. STEWART: (Inaudible) irrelevant to this case.

22 (End of sidebar)

23 THE COURT: Approach again if you will, counsel.

24 (Whereupon a sidebar was held as follows:

25 THE COURT: Again, even though the discussion may

1 be, may involve other cases or other pending charges and it's
2 an admission on his part - I think opening that door before
3 this jury as it relates to exclusively here is a real
4 problem. So I don't know how to resolve that, you know, I
5 wasn't aware of it until two minutes ago.

6 MR. JOHNSON: (Inaudible) he created it.

7 THE COURT: I know he created it. What do you do?
8 Is it relevant? It is relevant. It's relevant as it relates
9 to the fact that he knows contacts and heroin traffickers and
10 everybody else and all that -

11 MR. JOHNSON: (Inaudible).

12 THE COURT: I know.

13 MR. JOHNSON: (Inaudible).

14 THE COURT: I don't know. Be cautious.

15 (End of sidebar)

16 Q (BY MR. JOHNSON) Okay, Agent Holmer, so to just
17 reorient ourselves where we were, Mr. Edgar talked to you,
18 called you to talk about working out some considerations,
19 some sort of deal on his Utah County charges, drug charges?

20 A Correct.

21 Q Okay. And as part of that, he was talking about
22 what he could offer in exchange for you trying to pull some
23 strings perhaps?

24 A Yes, sir, that's correct.

25 Q Specifically, I guess what - do you use

1 confidential sources as part of your job?

2 A Yes, it's a huge part of what we do.

3 Q Okay. And so in speaking with Mr. Edgar, I mean,
4 what factors play into whether you're going to actually use a
5 confidential source?

6 A First thing would be what they can actually
7 provide, their access and placement to drug traffickers.
8 Then there are a number of other factors that we take into
9 that which include their ability to be controlled and then
10 possibly most important, how truthful and whether or not we
11 can trust them which is a delicate matter because anytime
12 you're dealing with confidential source, obviously they've
13 probably doing something they shouldn't have been doing
14 previously.

15 Q Okay. And so in talking with Mr. Edgar,
16 specifically when you're talking about what he could do for
17 you, what was that conversation about?

18 A Had to do with specifically access to a heroin
19 trafficker who was capable of moving large quantities of
20 heroin.

21 Q Did you discuss that any further with him about
22 what large quantities mean?

23 A Well, we had to, as I recall we had to kind of
24 break it down because what one person considers a large
25 quantity may not necessarily be what I consider a large

1 quantity or something that's worth my time and efforts, just
2 quite simply because I get paid by the taxpayers to target
3 large trafficking organizations. So, as I recall, we had to
4 quantify what large quantities was and I believe it was
5 pounds specifically that we discussed, that he was capable of
6 dealing in pounds of heroin which, for the record, was worth
7 my time.

8 Q Okay. Do you happen to know the street value of
9 pounds of heroin?

10 A I believe it's over \$10,000. I think we're paying
11 20 for a kilo, something like that, \$20,000. I'd have to
12 confirm that.

13 Q So what else did Mr. Edgar - well, I guess at that
14 point were there some baseline rules that you talked to Mr.
15 Edgar about working with him?

16 A Well, I always try and kind of lay down
17 expectations. That's a big part of confidential source
18 management is them understanding exactly what we are willing
19 to do and not do, what they're allowed to do and not do and
20 one thing that I think has some bearing is that we
21 established that we do not make promises other than the fact
22 that we are going to make recommendations. So I do not
23 dictate the terms of their cooperation when they're working
24 as a defendant, confidential source, meaning they're giving
25 us cooperation in exchange for consideration with charges.

1 We make recommendations to prosecutors and we make
2 recommendations to judges but we have no bearing on what they
3 decide to do. So generally speaking, those are taken pretty
4 seriously.

5 Q And you explained that to Mr. Edgar?

6 A I explained that almost every time I speak to a
7 confidential source whose looking to work with us.

8 Q Okay. And was he willing to go along with that
9 or...

10 A I believe he understood that. I think I made
11 myself very clear.

12 Q Did he discuss with you working with any other
13 officers on a state level?

14 A Yes, he did. And that's another aspect of source
15 management, what's important is we, we always try and find
16 out if they are currently or have previously worked with
17 anyone else in law enforcement.

18 MR. STEWART: Judge, can we approach?

19 THE COURT: You may.

20 (Whereupon a sidebar was held as follows:

21 MR. STEWART: (Inaudible).

22 THE COURT: Can't go into any previous or anything
23 else that way. There's no - that's improper.

24 (Inaudible conversation)

25 MR. JOHNSON: Agent Holmer (inaudible).

1 THE COURT: Okay -
2 MR. JOHNSON: (Inaudible) his conversation
3 (inaudible) in connection with his client (inaudible).
4 THE COURT: Pardon me?
5 MR. STEWART: I (inaudible).
6 THE COURT: What we've got here is that you've got
7 the - he can't talk about his past at all. He can talk about
8 this case but he can't talk about the fact that he's served
9 as a confidential informant in the past in any form or
10 fashion. That's out totally, in my estimation. Okay? So
11 that's totally out.
12 MR. JOHNSON: (Inaudible) and because of this case
13 and the case (inaudible) he's trying to (inaudible).
14 MR. STEWART: (Inaudible).
15 THE COURT: Well, you can call Agent Palmer as it
16 relates to that if he independently goes to him and you can
17 call him as it relates to -
18 MR. JOHNSON: I've declared him as a witness and
19 that's okay with Mr. Stewart (inaudible).
20 THE COURT: Okay. Well, I don't -
21 MR. STEWART: (Inaudible).
22 THE COURT: - I don't want, yeah, no you can't do
23 that. I don't want a mistrial in this case.
24 MR. JOHNSON: It's not a mistrial (inaudible).
25 THE COURT: And it's delicate as it relates to that

1 in my estimation. So...

2 MR. STEWART: Well, when he's done I'd like to break
3 (inaudible).

4 THE COURT: Pardon me?

5 MR. STEWART: When he's done I'd like to break for
6 a (inaudible).

7 THE COURT: Well, we can do it, we can do it right
8 now because we've got to make a determination as it relates
9 to the breadth of the direct examination from this point
10 forward.

11 MR. STEWART: (Inaudible).

12 THE COURT: We'll take another break.

13 (End of sidebar)

14 THE COURT: We'll take another break so that we can
15 discuss some legal matters outside the presence of the jury,
16 and I will caution you not to discuss the case with anyone.
17 If you've taken notes don't show those to anyone. Don't
18 attempt to learn anything about the case outside this
19 courtroom setting and avoid, of course, any radio, TV,
20 newspaper comments about the trial. We'll take matters up
21 outside the presence of the jury. Thank you.

22 (Whereupon the jury left the courtroom)

23 THE COURT: Mr. Holmer, you may be seated.

24 The record will reflect that the jury has been
25 excused and counsel wish to discuss some further legal

1 matters outside the presence of the jury and first of all in
2 connection with that, Mr. Stewart, you may be heard.

3 MR. STEWART: Judge, I think we're bordering on
4 testimony here that could easily lead to a mistrial. Agent
5 Holmer has mentioned other cases, he's mentioned in working
6 with other state agents that won't be involved in this case,
7 he's talked about matters that happened well after November
8 7, 2013 and I think the jurors have almost heard enough that,
9 to further implicate Mr. Edgar in other matters.

10 THE COURT: Okay.

11 MR. STEWART: Besides what we -

12 THE COURT: Mr. Johnson, you may be heard.

13 MR. JOHNSON: Thank you, Your Honor. Just a
14 second.

15 This testimony is 100 percent bourne out of a
16 contact that was initiated by the defendant. The defendant
17 took a great risk in doing this, doing it under the nose of
18 his attorney at the time who as far as I know had no
19 knowledge of this conversation. Anything he says to Agent
20 Holmer is an admission by a party opponent and is admissible.
21 It's relevant and frankly, under 403, it's not substantially
22 more prejudicial than probative. While it is prejudicial to
23 the defendant, it's certainly extremely probative of the
24 defendant's knowledge, intent in possessing the controlled
25 substances in the briefcase. Where the argument is going to

1 be that, oh, it just was in the car, that he was borrowing
2 from someone or whatever and he doesn't own what's in there.
3 Certainly conversations to a DEA agent about trying to
4 negotiate this case and another case that happened on
5 November 21st also in Lindon, the case officer in that case
6 was Detective Palmer, deputy with - actually he was an
7 officer with Provo Police Department who was with the Major
8 Crimes Task Force at the time and during that interaction,
9 two weeks after this case, the defendant tried to negotiate
10 this case and that case with Detective Palmer. When that
11 didn't work out, he then tried to negotiate this case with
12 Agent Holmer and gave Agent Holmer information about his
13 interactions with Detective Palmer.

14 At sidebar, when we spoke about this a couple of
15 sidebars ago, the Court said that we could go into what
16 Detective Palmer's interaction and involvement was with this
17 as long as I cautioned Agent Holmer to refer to his other
18 cases as pending state drugs charges or pending Utah County
19 drug charges or pending Lindon drug charges as opposed to
20 saying there were multiple cases and I did instruct Agent
21 Holmer about that and I've been trying to keep to that in
22 directing my questions and so far I think we've done that.
23 So then when we go and talk about Detective Palmer and then
24 the objection is raised again, after we just said that was
25 allowed, permissible, that's problematic for the State based

1 on the Court's prior ruling.

2 Again, this is information that came to my
3 attention because the defendant called Agent Holmer, gave
4 Agent Holmer my name, gave Agent Holmer Detective Palmer's
5 information and said this is what I can offer you, see what
6 you can do with them, contact them and try to work out my
7 case. This is nothing me seeking this out from the agent.
8 He said as much. Agent never talked to Mr. Edgar before this
9 happened, he wasn't seeking to set him up or something. This
10 is a mess that was created by the defendant and while it's
11 prejudicial and problematic and whatever you want to call it,
12 it's still lawful under the rules of evidence and ummm, and
13 so for that reason I think we should be allowed to continue
14 in this vein of questioning.

15 THE COURT: Mr. Stewart, anything further, sir?

16 MR. STEWART: The prejudicial nature of the
17 testimony, there's other cases, he's working with other
18 officers here in state of Utah, that don't pertain
19 necessarily to this case and we're looking at the facts for
20 November 7, 2013 and what he was doing at that time. I
21 think-

22 THE COURT: Okay. I will allow it as it relates to
23 the breadth - now, my understanding would, was when I made
24 the initial ruling that Officer Palmer would be a witness.
25 Now I'm advised at the next sidebar that he would not be a

1 witness.

2 MR. JOHNSON: His case is -

3 THE COURT: (inaudible).

4 MR. JOHNSON: - sorry. His case is Monday's case.

5 THE COURT: Yeah.

6 MR. JOHNSON: I noticed Agent Holmer up as a
7 witness for this hearing not Detective Palmer.

8 THE COURT: Okay. Well, then let's draw a line as
9 it relates to representations relative to the other case that
10 is going to be coming up on Monday and Tuesday in jury trial,
11 13th and 14th of April and draw the line there. I would have
12 drawn that line had I known that officer or Deputy Palmer was
13 not going to be called as a witness in this particular case.

14 Now, when he independently calls a federal officer
15 as it relates to potential for that officer to be involved in
16 this case and admitting that he may be useful in terms of
17 drug traffickers, then that is admissible, that's admissible.
18 He admits it. He made the contact. He independently did that
19 and he was - so I think it's probative and - but we have to
20 be very cautionary in my estimation as it relates to the next
21 case and you probably have enough before the jury already
22 relative to that independent contact by this defendant
23 relative to the resolution of this case with a designation
24 that he is able to supply them with high level traffickers.
25 So let's - so -

1 MR. JOHNSON: Okay, based on that ruling I'll wrap
2 it up and we'll -

3 THE COURT: Yeah, wrap it up because I -

4 MR. JOHNSON: - I'll just have to accept that.

5 THE COURT: - think we need to use a great deal of
6 caution in my estimation, even though that's independently
7 done on the part of the defendant probably which would have
8 been against any recommendation or approval of his attorney
9 at that point in time. Okay.

10 Let's get the jury back in here and wrap it up. So
11 I've sustained the objection, Mr. Stewart -

12 MR. JOHNSON: With respect to Detective Palmer's
13 involvement.

14 THE COURT: Yeah, I sustained the objection in part
15 as it relates to the breadth and as it relates to Deputy
16 Palmer. Okay.

17 (Whereupon the jury entered the courtroom)

18 THE COURT: You may be seated. We're back on the
19 record in the case of state of Utah vs. Michael Edgar, Case
20 No. 131403330. Counsel and clients are present, the jury is
21 seated and Mr. Johnson, you may continue with your
22 examination of Mr. Brandon Holmer.

23 MR. JOHNSON: Thank you, Your Honor.

24 Q (BY MR. JOHNSON) Agent Holmer, so after the
25 defendant talked to you about his ability to access pounds of

1 heroin and a potential Mexican drug trafficker, did you
2 indicate that you would contact me at his direction?

3 A Yes.

4 Q How were you suppose to get ahold of him after you
5 spoke to me?

6 A I was provided with a cell phone number.

7 Q By?

8 A By Mr. Edgar.

9 Q And after some time in talking with me did you call
10 that number back?

11 A Yes.

12 Q And who did you speak with?

13 A Spoke with who I identified as Mr. Edgars.

14 Q Okay, and during that conversation did you indicate
15 that you would not be working with him?

16 A That is correct, I told him I would not be willing
17 to work with him.

18 Q And is that the last you heard from him?

19 A Yes.

20 MR. JOHNSON: Okay, that's all I have. Thank you.

21 THE COURT: Cross examination?

22 CROSS EXAMINATION

23 BY MR. STEWART:

24 Q So, when you get calls like this do you make
25 records of those calls?

Tab C

Addendum C

District court order supplementing the record (R. 808-13)

The Order of the Court is stated below:

Dated: January 28, 2016
03:22:46 PM

/s/ Lynn W. Davis
District Court Judge



EMILY ADAMS (14937)
ADAMS LEGAL LLC
PO Box 1564
Bountiful, UT 84011
Telephone: (801) 309-9625
Email : eadams@adamslegalllc.com

Attorney for Defendant/Appellant

**IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH**

STATE OF UTAH,

Plaintiff / Appellee,

vs.

MICHAEL JOHN EDGAR,

Defendant / Appellant.

**ORDER SUPPLEMENTING THE
RECORD**

Dist. Ct. No. 131403330
App. No. 20150605-CA

Judge Lynn Davis

This matter came before the Court for a hearing on January 12, 2016, on request of the Court of Appeals to determine what happened at an unrecorded pre-trial bench conference. Craig Johnson appeared on behalf of the State, and Emily Adams appeared on behalf of Defendant Michael Edgar.

Based on the testimony received at the hearing, the Court makes the

following findings of fact:

1. Mr. Edgar was charged by Information with, among other things, possession of a controlled substance with intent to distribute.
2. The State amended the Information and charged Mr. Edgar with possession with intent to distribute within a drug-free zone. The State alleged in the Amended Information that Mr. Edgar committed the crime within 1,000 feet of a ballet school.
3. The ballet school, however, was over 1,000 feet from where Mr. Edgar was arrested.
4. The trial in this case occurred on April 9–10, 2015.
5. Around 8:30am on April 9, 2015, this Court, the prosecutor, and the defense attorney held an in-chambers conference. That conference was not recorded, although it was not the intent of the parties for the conference to be an on-the-record type of hearing; it was more of a conference where the attorneys touched base with the Court about the upcoming trial.
6. The prosecutor brought to that conference a Second Amended

Information, where, for the first time, Mr. Edgar was charged with committing a crime within 1,000 feet of the "Ultimate Sports USA Baseball and Softball Training Facility to the NW, making it a drug-free zone."

7. The prosecutor wanted the police case officer to testify about the Ultimate Sports training facility, since he had measured its distance from the defendant's arrest, but the defense attorney objected, arguing that the officer's testimony lacked foundation. The Court indicated that it would likely not allow the case officer's testimony about the Ultimate Sports training facility, but that the State could file the Second Amended Information if that State called the owner or operator of the Ultimate Sports training facility to establish the foundation for the new drug-free zone.
8. The prosecutor and case officer then located one of the owners of one of the businesses located at the Ultimate Sports training facility on the morning of April 9, 2015, and she agreed to appear at trial later that day. The defense attorney did some Google research on the

training facility briefly that morning.

9. As aforementioned, the prosecutor did ask permission from this Court to file the Second Amended Information. The prosecutor based the Second Amended Information on the information from the police officer, and had he not had the testimony from the police officer, he would not have asked for permission to file the Second Amended Information. The Court granted permission to file the Second Amended Information as long as the prosecutor could get one of the owners to testify and as long as the defense attorney could interview the owner during a break at trial.
10. The prosecutor and the defense attorney interviewed the owner for the first and only time during a break in the trial proceedings on the morning of April 8, 2015.
11. The owner did testify at trial and was cross-examined at trial.
12. As a result, the Court granted the State permission to file the Second Amended Information, which the defendant was convicted of, including the drug-free zone beyond a reasonable doubt.

Approved as to form:

/s/ Craig Johnson

Deputy Utah County Attorney

****ENTERED BY THE COURT ON THE DATE AS INDICATED BY THE COURT'S SEAL AT THE TOP OF THE**

FIRST PAGE**

CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2016, I efiled and therefore served a true and correct copy of the foregoing on the following:

Jeffrey Buhman
Utah County Attorney

Gregory Stewart

/s/ Emily Adams