

1992

State of Utah v. Mark David Lewis : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS

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DOCKET NO.

920472

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
vs.	:	Case No. 920472-CA
MARK DAVID LEWIS,	:	
Defendant/Appellant.	:	Priority No. 2

BRIEF OF APPELLANT

Appeal from a conviction for the offense of "Driving Under the Influence of Alcohol," Title 41, Chapter 6, Section 44, Utah Code Annotated (1953 as amended), a Class B Misdemeanor, in the Fourth Circuit Court of the State of Utah, the Honorable Lynn W. Davis, presiding.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:
Plaintiff/Appellee,	:
vs.	: Case No. 920472-CA
MARK DAVID LEWIS,	:
Defendant/Appellant.	: Priority No. 2

JURISDICTIONAL STATEMENT

The Utah Court of Appeals has jurisdiction over this matter pursuant to Section 78-2a-3(2)(f), Utah Code Annotated, (1953, as amended.

ISSUES PRESENTED

I. Whether comments made by the trial court instructing the prosecution as to how it should proceed and as to the credibility and weight to be given the testimony of a prosecution witness deprives the defendant of a fair trial and thus constitutes reversible error.

II. Whether the failure of the prosecution to identify the defendant in its case in chief constitutes reversible error.

III. Whether the trial court should have recused itself for prejudice upon motion by the defense.

STATEMENT OF THE CASE

NATURE OF THE CASE.

This is an appeal of a criminal case for Driving Under the Influence of Alcohol (DUI). The case comes before the Utah Court of Appeals after defendant Mark David Lewis was convicted at trial

and judgement was entered thereon.

STATEMENT OF THE FACTS.

On 21 October, 1991, Mark David Lewis, in a rural area unfamiliar to him, drove his vehicle onto what he believed (according to signage and poor lighting), was a freeway on-ramp. Mr. Lewis' vehicle went off-road and became immobile on railroad tracks. (T. at 10.) During his efforts to free his vehicle, police personnel arrived at the scene to investigate. (T. at 9.) After Mr. Lewis informed the police that he nearly had the vehicle free, the officers remained at the scene to ensure no assistance was necessary. (T. at 13.) Subsequently, upon noting that a passenger in the vehicle was intoxicated, (T. at 11,) the officer began to administer a field sobriety test (FST) to Mr. Lewis. (T. at 15-22.) Although the facts as to how well Mr. Lewis performed on the FST are controverted, the officer arrested Mr. Lewis for DUI. (T. at 22.)

SUMMARY OF ARGUMENTS

At trial, the court committed a significant error by first instructing the prosecutor as to how to argue his case, and immediately thereafter informing the prosecutor that the testimony of a particular witness for the prosecution should have been given more weight and credibility than the prosecutor had acknowledged. (T. at 57 et. seq.)

Later in the trial, after the prosecution had rested and the defense was beginning its case in chief, the defense moved for dismissal on the ground that the prosecution had failed to produce

evidence identifying Mr. Lewis as the defendant. (T. at 76.) Rather than grant the motion, the court forestalled the defense by allowing the prosecution to re-open its case in chief to recall a witness in order to identify Mr. Lewis as the defendant. (T. at 96-97.) As to the motive for the court's ruling, the defense believes it results from prejudice on the part of the trial court as against Mr. Lewis. Such prejudice is reflected in the comments of the court directed at the prosecution which are mentioned above. A motion was made that the court recuse itself for such prejudice, but again the motion for the defense was denied. (T. at 64-65.)

ARGUMENT I.

IMPROPER JUDICIAL COMMENT.

In Meier v. Christensen, 389 P.2d 734, 735 (Utah, 1964), the Utah Supreme Court said "trial courts should be careful not to comment or express opinions on the evidence." In another case from the Utah Supreme Court, Fox v. Taylor, 350 P.2d 154, 157 (Utah, 1960) , the state high Court said "[w]e recognize the duty of the court under our law to avoid comments on the evidence; or which may tend to indicate an opinion as to what the facts are on disputed issues." (See also; Ortega v. Thomas, 383 P.2d 406 (Utah, 1963); Federated Milk Producers' Assoc., Inc. v. Statewide Plumbing & Heating Co., 358 P.2d 348 (Utah, 1961), both recognizing the impropriety of comments as to evidence by trial court judge.)

During the trial of the case here on appeal, the trial judge, in response to the prosecutor's remarks and what the court apparently thought was a lack of necessary fervor, told the

prosecutor to "be an advocate," and went on to express the court's opinion as to the experience of a police officer witness and the resulting weight that should thus attach to his testimony. The court said

why can't an officer, based upon his seventeen years of experience, make a determination whether somebody passed or failed [a field sobriety test]? He can state in his opinion whether or not he passed or failed, based upon seventeen years of experience and hundreds of cases. Don't defeat his own ability to make those judgements and have that opinion. (T. at 57-58.)

This is obviously an attempt by the court to instruct the prosecution as to its procedure and handling of its case. Such instruction is not only unwarranted, but more importantly works against the adversarial system wherein the court is to remain absolutely neutral as to the parties.

As such, the comments of the court as to how the prosecutor should proceed and the quality of the witness's testimony are sufficient for reversal of the trial court's judgement upon the conviction.

ARGUMENT II.

FAILURE OF PROSECUTION TO IDENTIFY DEFENDANT.

Nowhere in the prosecution's case in chief did it produce evidence showing that Mark David Lewis was in fact the individual at the scene of incident of October 21. That is, the only point at which the prosecution introduced such identification testimony was after a Dismissal Motion made by defense counsel for failing to identify the defendant, which motion was made after the prosecution had rested. (Transcript at 76.) It was at that point in the proceeding when the court allowed the prosecution to re-open its

case and recall a witness to identify Mark David Lewis as the individual at the scene of the arrest. (Transcript at 96, 97, 114.)

In Johns v. Shulsen, 717 P.2d 1336 (Utah, 1986), the Utah Supreme Court stated, "in a criminal prosecution every element of the offense must be established beyond a reasonable doubt." (Citing Utah Code Annotated, 1953, § 76-1-501(1)) (emphasis added). In State v. Sorenson, 758 P.2d 466, 468 (Utah App., 1988), this Court said "[d]ue process requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged." (Citing In Re Winship, 397 U.S. 358, 364, (1970)).

Having failed in its case in chief to identify Mr. Lewis as the defendant, and then being allowed to re-open its case after commencement of the defense, resulted in prejudice to Mr. Lewis. Such prejudice should be considered in light of the prejudice alleged by the defense on the part of the trial court judge considered in Argument III below. The defense believes that but for such prejudice, defense's Motion to Dismiss for failure to so identify Mr. Lewis would have been granted.

ARGUMENT III.

JUDICIAL PREJUDICE, FAILURE TO RECUSE.

At trial, counsel for the defense moved the court to recuse itself for prejudice. (T. at 64-65, et. seq.)

In State v. Gardner, 789 P.2d 273, 278 (Utah, 1989), the Utah Supreme Court said "defendant does not allege any actual bias but argues that a trial judge should recuse himself where there is an

appearance of bias. We agree." The Court went on to say

[i]f the allegations in the affidavit are true and they would give a reasonable person cause to doubt whether the judge could be impartial under the circumstances, he should recuse himself. Nothing is more damaging to the public confidence in the legal system than the appearance of bias or prejudice on the part of the judge." (Id.)

As to whether a case should be reversed for error due to judicial prejudice, the test is "whether 'there was a reasonable likelihood of a more favorable result for the defendant.'" (Id., citing State v. Hutchinson, 655 P.2d 635, 637 (Utah, 1982)).

This Court should recognize that absent such prejudice on the part of the trial court, such prejudice evidenced by comments made at trial favoring the prosecution and its witnesses, it is likely it would not have allowed the state to re-open its case after resting and subsequent to the opening of the defense in order to introduce evidence regarding the identity of the defendant, a fact obviously necessary for conviction. Had the Court not allowed the prosecution such wide latitude, it likely would have had to dismiss the case upon motion made by the defense. (Trial record at 76.) It is clear that there is a reasonable likelihood that a more favorable result for Mr. Lewis would have occurred were it not for the prejudice displayed by the trial court.

In State v. Neeley, 748 P.2d 1091, 1094 (Utah, 1988), the Utah Supreme Court referred to Utah Code Annotated 77-35-29 and the Utah Code of Judicial Conduct 3(c)(1)(b) (1981) when it said

it has been suggested that a trial judge disqualify himself whenever an affidavit of bias and prejudice is filed against him in good faith . . . (citing State v. Byington, 200 P.2d 723 (Utah, 1948)). There the Court went on to say ". . . a judge should recuse himself when

his impartiality might reasonably be questioned . . . this standard set forth by the Code of Judicial Conduct should be given careful consideration by the trial judge. It may require recusal in instances where no actual bias is shown. Failure to observe it may subject the judge to disciplinary measures . . ."

. . . [W]e recommend the practice that a judge recuse himself where there is a colorable claim of bias or prejudice . . ."
Neeley, 748 P.2d at 1094.

Although in this case prejudice by the court was clear, Byington and Neeley clarify the attitude of the Utah Supreme Court on the mere appearance of prejudice. Had the trial court recognized its prejudice against Mr. Lewis and appropriately recused itself, it is probable that Mr. Lewis would have had his Motion to Dismiss for Failure to Identify granted.

CONCLUSION

The trial court erred in making improper comments as to how the prosecution should conduct its case and as to the weight to be given to the statements of its witness. Such err was recognized by the defense. The court further erred in failing to recuse itself for prejudice when so moved by the defense. The result of that prejudice was the court's allowance of the prosecution to re-open its case to identify Mr. Lewis after the defense had commenced its case in chief. Such error resulted in a failure of the judicial system to deal fairly with Mr. Lewis at his trial. Accordingly, defense counsel respectfully requests that this court reverse the judgement of the trial court and dismiss the case with prejudice.

Respectfully submitted this 3 day of February, 1993.


Cleve J. Hatch

Mailing Certificate

I hereby certify that I mailed ~~four~~^{one} copies of the foregoing Brief of Appellant to Ben Davis, County Attorney's Office, 100 East Center Street, Suite 2100, Provo, Utah 84606, this 3 day of February, 1993.


Alicia L. Head

FILED

FEB 16 1993

ALS

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
	:	ADDENDUM TO BREIF
Plaintiff,	:	
	:	
vs.	:	
	:	Case No. 920472-CA
MARK DAVID LEWIS,	:	
	:	
Defendant.	:	


Comes now the Defendant, Mark David Lewis, by and through his attorney of record, Cleve J. Hatch, and does hereby susbmit the following Addendum to Brief.

Dated this 12 day of February, 1993.


Cleve J. Hatch

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Addendum to Brief, postage prepaid, to Ben Davis, 100 East Center, Suite 2100, Provo, Utah 84606, and to Utah Court of Appeals, 230 South 500 East, Suite 400 Salt Lake City, Utah 84111, this 12 day of February, 1993.



DOCKET INFORMATION:

Chrg: DUI

Plea: Not Guilty Find: Guilty - Ju

Fine Amount:	1000.00	Suspended:	400.00
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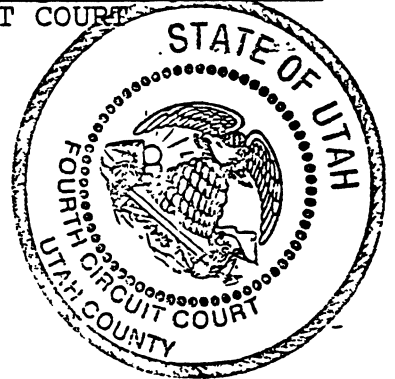
Jail: 180 DAYS Suspended: 178 DAYS

LWD/THE JURY HAVING FOUND DEFENDANT GUILTY AND DEFENDANT HAVING
WAIVED SENTENCING DEFENDANT IS FINED \$1000/\$600 SUSP TO BE TAKEN
FROM BAIL POSTED. DEFENDANT IS TO SERVE 2 DAYS (LESS 5 HRS
CREDITED FOR TIME ALREADY SERVED) TO BE SERVED IN THE UTAH CO.
JAIL ON WEEKENDS OR DAYS OFF BY 8/23/92. DEFENDANT IS ORDERED
TO HAVE AN ALCOHOL EVALUATION (IF DONE IN UTAH COUNTY IT MAY BE
PAID FOR FROM THE TRUST FUND. DEFENSE COUNSEL MOVED TO STAY
EXECUTION ON FINE/JAIL. HE IS ORDERED TO FILE SUCH MOTIONS
WITH THE COURT ALONG WITH APPROPRIATE AFFIDAVITS. CC: UTAH
COUNTY JAIL AND UTAH COUNTY DEPARTMENT OF SUBSTANCE ABUSE.

BY THE COURT

JUDGE, CIRCUIT COURT

NOTE: APPEAL MUST BE FILED WITHIN 30 DAYS
OF ENTRY OF THIS JUDGMENT.



PART 5

BURDEN OF PROOF

76-1-501. Presumption of innocence — "Element of the offense" defined.

(1) A defendant in a criminal proceeding is presumed to be innocent until each element of the offense charged against him is proved beyond a reasonable doubt. In absence of such proof, the defendant shall be acquitted.

(2) As used in this part the words "element of the offense" mean:

(a) The conduct, attendant circumstances, or results of conduct proscribed, prohibited, or forbidden in the definition of the offense;

(b) The culpable mental state required.

(3) The existence of jurisdiction and venue are not elements of the offense but shall be established by a preponderance of the evidence.

1973

76-1-502. Negating defense by allegation or proof — When not required.

Section 76-1-501 does not require negating a defense:

(1) By allegation in an information, indictment, or other charge; or

(2) By proof, unless:

(a) The defense is in issue in the case as a result of evidence presented at trial, either by the prosecution or the defense; or

(b) The defense is an affirmative defense, and the defendant has presented evidence of such affirmative defense.

1973

76-1-503. Presumption of fact.

An evidentiary presumption established by this code or other penal statute has the following consequences:

(1) When evidence of facts which support the

A Judge Should Perform the Duties of the Office Impartially and Diligently.

The judicial duties of a full-time judge take precedence over all other activities. These judicial duties include all the duties of the office prescribed by law. In the performance of these duties, the following standards apply:

(A) Adjudicative Responsibilities.

(1) A judge should be faithful to the law and maintain professional competence in it. A judge should be unswayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should maintain order and decorum in proceedings before the court.

(3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others who come before the court or the judge in the judge's official capacity, and should require similar conduct of lawyers, and of staff, court officials, and others subject to judicial direction and control.

(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding. A judge may communicate with court staff and/or other judges about issues in a case without engaging in inappropriate ex parte communication provided that the judge does not abrogate the responsibility to personally decide the case pending before the court. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before the court if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(5) A judge should dispose promptly of the business of the court.

(6) A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to judicial direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

(7) A judge should prohibit broadcasting, televising, or recording in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:

(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration; or

(b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings.

(8) A judge should prohibit taking photographs (including motion picture and videotape) in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that still photographs of the judge and other court personnel,

urt shall specifically forbid the taking of any photographs where it
ids a substantial likelihood that such activity would jeopardize a
ir hearing or trial in the matter at issue.

Administrative Responsibilities.

- (1) A judge should diligently discharge administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.
- (2) A judge should require staff and court officials subject to judicial direction and control to observe the relevant ethical standards of legality and diligence.
- (3) A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware. However, this provision shall not apply to information which is generated and communicated under the policies of the Judicial Performance Evaluation Program.
- (4) A judge should not make unnecessary appointments and should exercise the power of appointment only on the basis of merit, avoiding nepotism and favoritism. A judge should not approve compensation of appointees beyond the fair value of services rendered.

Disqualification.

(1) Disqualification must be entered in a proceeding by any judge whose impartiality might reasonably be questioned, including but not limited to instances where:

(a) The judge has a personal bias or prejudice concerning a party, a strong personal bias involving an issue in a case, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) The judge had served as lawyer in the matter in controversy, had practiced law with a lawyer who had served in the matter at the time of their association, or the judge or such lawyer has been a material witness concerning it;

(c) The judge knows of a financial interest, including fiduciary interest, of either the judge personally or the judge's spouse and/or minor children residing in the household, in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) The judge or spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

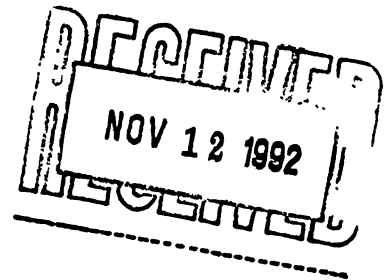
(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(2) A judge should be informed about personal and fiduciary financial interests, and make a reasonable effort to be informed about the



FOURTH CIRCUIT COURT - PROVO
UTAH COUNTY, STATE OF UTAH

STATE OF UTAH
VS

JUDGMENT, SENTENCE
(COMMITMENT)

LEWIS, MARK DAVID
5818 SOUTH 3340 WEST
BENNION UT 84118

CASE NO: 925001121
DOB: 03/13/58
TAPE: 771 COUNT: 960
DATE: 06/23/92

THE ABOVE NAMED DEFENDANT BEING ADJUDGED GUILTY FOR THE
OFFENSE(S) AS FOLLOWS:

Charge: 41-6-44 DRIVING UNDER THE INFLUENCE OF ALC/DRUGS
Plea: Not Guilty Find: Guilty - Jury
Fine: 1000.00 Susp: 400.00
Jail: 180 DA Susp: 178 DA ACS: 0

FEES AND ASSESSMENTS:

Fine Description: Fine- Prosecutor Spl			
Credit: 0.00	Paid: 0.00	Due: 480.00	
Fine Description: Surcharge - 85%			
Credit: 0.00	Paid: 0.00	Due: 120.00	
TOTAL FINES AND ASSESMENTS:			
Credit: 0.00	Paid: 0.00	Due: 600.00	