1983

State of Utah v. Lane Wade Barney : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 18974
LANE WADE BARNEY,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

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APPEAL FROM A CONVICTION OF THE OFFENSE OF SALE OF A CONTROLLED SUBSTANCE, COCAINE, IN VIOLATION OF UTAH CODE ANN. § 58-37-8(1)(a)(ii), BEFORE A JURY IN THE SIXTH DISTRICT COURT IN AND FOR SEVIER COUNTY, THE HONORABLE DON V. TIBBS, PRESIDING.

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RULES CITED

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STATEMENT OF THE NATURE OF THE CASE

Appellant, Lane Wade Barney, was charged by information with the sale of a controlled substance in violation of Utah Code Ann. (1953, as amended) § 58-3-8 (1)(a)(ii).

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury and convicted in the Sixth District Court in and for Sevier COunty, the Honorable Don V. Tibbs, presiding. Appellant was sentenced to serve not less than one nor more than fifteen years in the Utah State Prison and fined $10,000. Sentence and $5,000 of the fine were suspended and appellant was placed on probation provided he serve a one year term in the county jail, reviewable at the end of three months.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order affirming the judgment of the lower court.

STATEMENT OF THE FACTS

On November 6, 1981, Officers Russell Spann and Mike Kagie of the State Narcotic and Liquor Law Enforcement Bureau were conducting an undercover drug investigation. That evening at the Lil's Bits Bar in Richfield, Utah, the officers were introduced to Michael Allred as interested drug buyers (T. 70, 94-95). During the ensuing conversation, Allred agreed to check around concerning the availability of drugs (T. 70). Pursuant to that agreement, Allred contacted Dave Jolley, a member of the band playing at the bar. Based on his conversation with Jolley, Allred reported to the undercover officers that cocaine would be available later in the evening for $120.00 a gram. The undercover officers then gave Allred $120.00 to make the purchase (T. 70-73).

During the band's next break, Allred followed the band members to the parking lot where he approached appellant and purchased a gram of cocaine from him with the money received from the officers (T. 73-74). Allred then delivered the cocaine to Officer Spann (T. 74-75, 98).[1]

During cross-examination at appellant's trial, defense counsel asked Allred why he had approached appellant to make the drug purchase when Allred's earlier negotiations had all been with another band member, Dave Jolley. Allred stated that he sought out appellant "because I have got high

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[1] Allred was later prosecuted for the sale. He was allowed to plead guilty to a class A misdemeanor in exchange for naming the person from whom he purchased the cocaine and testifying at his trial (T. 88-90)

with Mr. Barney before" (T. 83-84). Defense counsel objected to Allred's statement as prejudicial and moved for a mistrial. This motion was denied (T. 113-115).

ARGUMENT

POINT I

ALLRED'S STATEMENT WAS NOT A VIOLATION OF RULE 55, UTAH RULES OF EVIDENCE.

Appellant contends a mistrial should have been granted based on Allred's response during cross-examination that he and appellant had previously "gotten high" together. Appellant argues this statement constitutes a violation of Rule 55, Utah Rules of Evidence. Rule 55 states:

> Subject to Rule 47 evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his disposition to commit crime or civil wrong as the basis for an inference that he committed another crime or civil wrong on another specified occasion but, subject to Rule 45 and 48, such evidence is admissible when relevant to prove some other material fact including absence of mistake or accident, motive, opportunity intent, preparation, plan, knowledge or identity.

The policy behind Rule 55 is to assure that a defendant is convicted for the charged crime and to prevent any conviction based on the defendant's character. State v. Tanner, Mo. 17742 (Utah, November 15, 1983). Respondent asserts that appellant's testimony with respect to "getting high" with appellant is not prohibited by Rule 55. It was

not offered to prove the matter's truth, the appellant's character, nor the appellant's disposition to break the law. Moreover, this particular statement was not part of the prosecution's case-in-chief.

Allred's response was a specific reply to defense counsel's question during cross-examination. Allred's testimony was used by the State to show: (1) that there was a cocaine sale, and (2) that the cocaine was purchased from appellant. There is no evidence of an attempt by the prosecution to use Allred's reply during cross-examination to show that appellant either possessed a bad character or was an habitual drug dealer. Furthermore, Allred's "getting high" reference is not synonymous with a prior conviction of another crime. Therefore, Allred's testimony was a direct response to defense counsel's questioning during cross-examination.

Allred's statement was not only completely responsive to defense counsel's question but also was useful to explain the circumstances surrounding the cocaine purchase. This Court has previously held that evidence relevant to explain the circumstances of a crime is admissible even though it might tend to connect the defendant with a prior wrong. State v. Daniels, Utah, 584 P.2d 880 (1978). See also: State v. Lopez, 22 Utah 2d 257, 451 P.2d 772 (1969).

Alger v. State, Okla. Cr., 603 P.2d 1154 (1980) addressed the effect to be given a voluntary, tangential

remark by a witness. The defendant in Alger was on trial for taking indecent liberties with a minor. The victim's mother was called as a witness. During her testimony, in response to a question, the witness made a general reference to "it having happened before" with the defendant. Defense counsel argued that the statement was prejudicial. The court said:

> There is only an implication of another crime which is obvious only to defense counsel. To extend the protection of the rule to every possible implication which might be conceived by defense counsel is to extend the rule too far. Id. at 1156, quoting Burks v. State, Okla. Cr., 568 P.2d 322 (1977).

Allred's statement parallels the type of statement at issue in Alger; a somewhat tangential remark made in response to a question. Appellant was given adequate opportunity to rebut Allred's testimony and impeach Allred's credibility. The jury weighed the conflicting testimony and rendered its verdict. There is absolutely nothing to indicate that the jury based its verdict on Allred's "getting high" statement.

Appellant complains that he was prejudiced by Allred's testimony. Appellant fails to show, however, that Allred's statement was "unduly prejudicial". Even if it were determined that Allred's statement was technically a violation of Rule 55, it was not sufficiently prejudicial under the standards of Rules 4 and 45, Utah Rules of Evidence to warrant a mistrial.

Rule 4, provides in pertinent part:

> "A verdict shall not be set aside, nor shall the judgment or decision based thereon, by reason of the erroneous admission of evidence unless . . . the court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the grounds stated and probably had a substantial influence in bringing about the verdict or finding. (emphasis added.)

Therefore, the defendant must make some showing that the verdict was directly and substantially influenced by the challenged testimony "Under Rule 4, . . . an erroneous admission of evidence is treated as harmless error absent a showing that it had a substantial influence in bringing about the verdict." State v. Malmrose, Utah, 649 P.2d 56, 59 (1982).

In State v. Creviston, Utah, 646 P.2d 750 (1982), the defendant was on trial for the sale of a controlled substance. In response to the prosecutor's question concerning the price of the cocaine, a police officer testified that the price was lower than usual because the defendant owed money to the State Narcotic and Provo Police Departments. The defendant objected to the remark as prejudicial and stated it would cause the jury to perceive him as a regular drug dealer and hardened criminal. This Court held, however, that the police officer's remark was not the type of statement which would be unduly prejudical to the defendant. See also: State v. Dodge, 12 Utah 2d 293, 365 P.2d 798 (1961).

A jury verdict should not be overturned in spite of error if it can be fairly concluded that the error had no prejudicial effect on the complaining party. The verdict should only be overturned when the error is so substantial or prejudicial that in its absence there would likely have been a different result. State v. Urias, Utah, 609 P.2d 1326 (1980).

Rule 45 makes clear that the admission of evidence is discretionary with the trial court. The judge may choose to exclude evidence if he finds the risk that its admission will ". . . create substantial danger of undue prejudice." (emphasis added). Although a judge may exclude evidence, he should do so only after concluding that an injustice will result by its admission. This Court

> . . . court respects his prerogative in that regard and will not interfere with his ruling unless it clearly appears that he so abused his discretion that there is a likelihood that an injustice resulted. State v. Dankers, Utah, 599 P.2d 518, 520 (1979).

This position was reiterated by the Court in State v. McCardell, Utah, 652 P.2d 942 (1982) in which the Court stated that the issue was not whether the evidence created prejudice, but whether it created undue prejudice. Furthermore, it is the function of the trial court to determine the prejudical effect of the admission.

At the conclusion of the state's case, defense counsel moved for a mistrial and was given the opportunity to

argue the prejudical effect of Allred's testimony to Judge Tibbs. The motion was denied leading to the inference that the trial court weighed Allred's alleged prejudicial statement the testimony and found it insufficiently prejudical to warrant a mistrial.

CONCLUSION

Allred's alleged prejudicial remark is not prohibited by Rule 55 since it was not part of the state's case against appellant and was not offered by the State as evidence of appellant's bad character nor was it offered by the State to establish the truth of the matter. It was merely a response to defense counsel's question, and not a part of the prosecution's case-in-chief.

Even if the statement were admitted in violation of Rule 55, its effect must be determined in accordance with the standards of Rule 4 and 45. These standards require a showing of substantial or undue prejudice. The trial judge determines the possible prejudical effect and his decision should be overturned only if there has been a clear abuse of discretion.

There has been no showing that the jury's verdict was substantially influenced by Allred's remark, nor has it been reasonably established that there was a likelihood of a different result in its absence. Therefore, appellant's conviction should be sustained.

RESPECTFULLY submitted this 20 day of January, 1984.

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CERTIFICATE OF MAILING

I hereby certify that I mailed and true and exact copy of the foregoing Brief, postage prepaid to, Robert Van Sciver and Edward K. Brass, attorneys for appellant, 321 South Sixth East, Salt Lake City, Utah 84102, this 20th day of January, 1984.

Kathleen D. Kellersberger