

1992

Utah v. Ronald A. Harry : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 920633 IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff/Appellee, :
vs. : Case No. 920633-CA
RONALD A. HARRY: : Priority No. 2
Defendant/Appellant. :

REPLY BRIEF OF APPELLANT


An appeal from a Judgment and Conviction entered by the Third
Judicial District Court for Salt Lake County, State of Utah, the
Honorable Richard H. Moffat, presiding.

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FILED
Utah Court of Appeals

SEP 27 1993


Mary T. Noonan
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
vs.	:	
RONALD A. HARRY:	:	
Defendant/Appellant.	:	Case No. 920633-CA

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DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES.

Appellant maintains he was denied his right to due process of law under the Fifth Amendment to the United States Constitution and Article I Section 12 of the Utah Constitution. Please see also Table of Authorities, Statutes and Rules.

ARGUMENT

POINT I

ADDENDUM B TO THE STATE'S PRINCIPAL BRIEF, THE STATE'S BRIEF IN STATE v. LARSEN BEFORE THE UTAH SUPREME COURT, SHOULD BE STRICKEN FROM THE STATE'S PRINCIPAL BRIEF HEREIN.

In reply to the Appellant's argument that the trial court erred by permitting an expert to testify as to what particular facts constitute materiality in a Securities Fraud case, the State has relied upon this Court's ruling in State v. Larsen, 828 P.2d 487 (Utah App. 1992). However, the State has done more than rely on this precedent. The State has also incorporated by reference the State's brief in Larsen before the Utah Supreme Court on Writ of Certiorari (Addendum B, State's principal brief). This is an inappropriate use of an addendum under Rule 24(f).

Inclusion of a respondent's brief in a related case before a different appellate court is beyond the scope of the addenda authorized by Rule (24)(f). Moreover, Rule 24(g) limits principal briefs to 50 pages. The State's principal brief in this matter is 53 pages. Addendum B, the State's brief in State v. Larsen before the Utah Supreme Court on Writ of Certiorari, is 29 pages. Together, these two briefs total 82 pages. This exceeds the 50-page limit imposed by Rule 24(g). The State's efforts to circumvent the page restriction of Rule 24(g) should be rejected and the State's brief in State v. Larsen before the Utah Supreme Court on Writ of Certiorari should be stricken from the State's principal brief in the instant matter.

POINT II

THE TRIAL COURT ERRED BY PERMITTING THE STATE'S EXPERT WITNESS TO STATE AS OPINION AN IMPERMISSIBLE LEGAL CONCLUSION OVER THE DEFENDANT'S OBJECTION.

In State v. Larsen, the Utah Court of Appeals ruled that expert testimony on what constitutes materiality was permissible fact-oriented testimony as distinguished from impermissible legal conclusions: "[W]e are persuaded by Lueben that the use of the term "material" may be admitted as permissible fact-oriented testimony. Upon review of the record, we conclude that the expert in this case used the term "material" in a factual sense." Larsen, 828 P.2d at 493.

One of the two experts permitted to testify at the trial of this matter over the Appellant's objection was not restricted to expressing opinions solely about materiality in a criminal Securities Fraud case. Steve Neilson, the assistant director of the Utah Securities Division, was permitted over defense objection to offer the following impermissible legal conclusion:

Q. Now, looking at true selling away -- we'll leave aside this other question of what happens if you have two brokerage houses. Is true selling away legal?

A. No, it is illegal.

(T. Tr. 895).

This type of opinion testimony is precisely the type of impermissible legal conclusion prohibited by State v. Larsen, supra. The Court of Appeals in Larsen cited with approval

Scop v. United States, 846 F.2d 135 (2d Cir., modified on rehearing 856 F.2d 5 (1988)); Marx & Company, Inc. v Diner's Club, Inc., 550 F.2d 505 (2d Cir. 1977), cert. denied, 434 U.S. 861 (1977); and Adalman v. Barker Watts & Company, 807 F.2d 359 (4th Cir. 1986), for the proposition that legal conclusions are not properly admitted into evidence. Just as in Scop, Marx, and Adalman, the Mr. Neilson's opinion that true selling away was illegal constituted an impermissible legal conclusion.

Expressing an opinion that "true selling away" is illegal is not a fact-oriented opinion. Testimony is not helpful to the factfinder if it is couched as a legal conclusion. Hogan v. American Tel. & Tel. Co., 812 F.2d 409 (8th Cir. 1987); Davidson v. Prince, 813 P.2d 1225, 1231 (Utah App. 1991) ("questions which allow a witness to simply tell a jury what result to reach are not permitted."); Steffensen v. Smith's Management Corp., 820 P.2d 482 (Utah App. 1991) ("A witness may testify as to the defendant's actions, including whether the defendant acted with care; however, the witness may not consider all the facts and render a final legal conclusion.").

Expressing an opinion that selling away is illegal is not the same as expressing an opinion about materiality in a factual sense. This is not merely an ultimate fact. Whether selling away is illegal is indisputably a legal conclusion. Indeed, it was the very legal conclusion that the jury was required to decide in Counts 1-3 (did the Defendant fail to disclose to his customers that he was selling Red River Limited Partnerships without the approval of Private Ledger?) and in Count 4 (did the Defendant fail to disclose to Private Ledger that he was selling away Red River Limited Partnerships to customers?). Under the

State's theory, if the jury found that the Defendant was "selling away" the Red River Limited Partnership, then he was guilty of securities fraud on all counts alleged in the Information. Whether the Defendant's conduct was legal or illegal was precisely the question the jury had been impanelled to decide.

The problem is exacerbated by the vagueness of the question. As the state correctly notes in footnote 12, the Defendant was not charged with a crime entitled "selling away." No statute specifically designates selling away as a crime. The vagueness of the question and its lack of reference to an element of an offense charged invites both the jury's speculation and the jury's misapplication of the law. Mr. Neilson's position as a lawyer compounded the problem of invading the province of the judge to instruct the jury on the law applicable to the charged offenses.

POINT III

THE DEFENDANT WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. The Defendant's trial counsel's failure to make an opening statement constitutes ineffective assistance of counsel.

The first prong of the two-prong test announced in Strickland v. Washington, 446 U.S. 668 (1984), requires a defendant to show that his counsel's representation fell below an objective standard of reasonableness. Id. at 687-88. Under Strickland, however, appellate courts will not normally second guess a lawyer's strategic or tactical decisions. In the instant matter, the State has endeavored to characterize Mr. Barber's failure to deliver an opening statement as a strategic decision. The State's novel theory is that Mr. Barber's

"decision" to forego an opening statement was a strategic decision, albeit a subconscious one. The State's disingenuous argument should be eschewed.

A strategic decision contemplates reflection upon the benefits and disadvantages of various courses of conduct. While a decision can be based upon years of experience and can be made quickly in response to the rapidly unfolding events of trial, a decision certainly requires cognitive thought and a selection of strategy. A strategic decision cannot be made on a subconscious level.

The record is clear that Mr. Barber did not make a strategic decision to forego giving an opening statement. Although he had reserved the right to give an opening statement and had, in fact, planned to do so, Mr. Barber simply forgot to carry out his intention. The following colloquy demonstrates that Mr. Barber did not make a strategic decision to forego giving an opening statement:

Q. (Mr. Bugden): When you began your case and didn't give an opening statement, at the precise moment that you called your first witness, did you go through a thought process where you considered the merits of "Okay, I am not going to give an opening statement?" or "Okay, I am going to give an opening statement?"

A. I do not believe I did.

...

Q. Mr. Barber, in a number of conversations you and I had over the last several days, both yesterday and then today, did you tell me that you forgot to give the opening statement?

A. I may have used the words "I forgot."

...

Q. (Mr. Sonnenreich): You mentioned that you told Mr. Bugden that you "forgot" to make an opening statement perhaps in the last couple of days. Can you elaborate why you used the word "forgot"?

A. Well I think I did tell Wally as a part of a longer statement about the issue, that I forgot to make the statement. But what I intended to imply by that, counsel, was that at the time that I didn't stand up and commence to make an opening statement, I didn't engage in an act of mental process about the issue of making a statement at all . . . I did not engage in any mental process that I can now recall about whether to make an opening statement or not at the beginning of our case . . . I did not engage in the processes to make a conscious decision at that time . . .

State's Addendum C to State's Brief pp. 48-49.

Q. (Mr. Bugden): You didn't go through a thought process, a cognitive process at all with regard to the opening statement.

A. That is correct.

(Addendum C to State's Brief, p. 52).

The second part of the Strickland test requires a Defendant to demonstrate that but for the conduct which falls below an objective standard of reasonableness, there is a reasonable likelihood of a different result. Strickland at 694. Admittedly, it is difficult to predict just how important an opening statement might be in a securities fraud trial. In the instant case, however, the absence of an opening statement coupled with the closing argument delivered by Mr. Barber lead one to the inescapable conclusion that the outcome

of the trial would have been different but for Mr. Barber's objectively inadequate performance.

Central to the State's theory on all four counts was its allegation that the Defendant neglected to disclose the possibility of future payments to the investors. Although the Defendant realized that future payments were possible under the terms of the prospectus of the Red River Limited Partnership, he also believed - based upon Mr. Farnsworth's track record and representations that he would turn the property over in one year - that future payments would never be required. The following jury instruction excerpts are applicable to these facts:

The securities fraud statute under which Counts 1, 2, 3 and 4 of the information are brought is concerned only with such "material" misstatements or such "material" omissions and does not cover minor, or meaningless or unimportant ones. (Instruction No. 22).

A "material fact", is a fact that a reasonable person would deem important in determining whether or not to purchase a security. (Instruction No. 21).

If you find that the defendant acted in good faith, or are not sure that the defendant acted with an intent to defraud, you shall not convict the defendant on the theory that he employed a device, scheme, or artifice to defraud. (Instruction No. 26).

Despite the existence of an argument, based on these facts and law, that the Defendant was not guilty of Counts 1, 2, 3 and 4, Mr. Barber never explained to the jury how to find the Defendant not guilty of those Counts, notwithstanding his failure to disclose the possibility of future payments. Although the instructions to the jury were the legal tools

by which Mr. Barber could have explained to the jury why a verdict of "not guilty" was not only possible, but was also necessary, Mr. Barber never even referred to the jury instructions in his closing argument. Surely a reference to Instruction No. 26, and the Defendant's good faith belief that no future payments would accrue was essential to the Defendant's theory of the case. Yet the closest that Mr. Barber came to explaining to the jury why they should not convict the Defendant for failing to disclose the possibility of future payments is as follows:

I am not sure that it is an excuse that Ron believed, that these people were never going to get to the point of needing those payments, but it isn't a crime that he believed it and omitted to tell it to someone. There is a massive difference. He truly believe what Farnsworth told him . . . that nobody is ever going to have to make any second payments . . . but I can see that Ron knew or should have known there was a potential of future payments even though he didn't think it would happen.

Mr. Barber could have mitigated the consequences of his forgetting to give an opening statement by giving at least an adequate closing argument. However, Mr. Barber's closing argument was less than adequate. By failing to explain to the jury how the law on materiality and the Defendant's good faith belief should be applied to the facts, i.e. possibility of future payments, Mr. Barber effectively insured the Defendant's conviction. In sum, Mr. Barber's failure to give an opening statement together with his deficient closing argument lead one to believe the Defendant was denied his right to the effective assistance of counsel.

B. The Defendant's trial counsel's failure to introduce critical evidence constitutes ineffective assistance of counsel.

Mr. Barber failed to introduce Verl Thornton's subscription booklet relating to the Red River Mountain Limited Partnership which included both the Subscription Agreement (in which Mr. Thornton agreed to purchase the security) and the suitability questionnaire (which was used to determine whether Mr. Thornton was suitable for this particular investment). The State suggests that "this smacks strongly of a tactical decision." State's brief p. 31. However, the State's intuitive characterization is unsupported by the record:

Q. (By Mr. Bugden) Do you, sir, know or did you discuss with Mr. Barber prior to Mr. Thornton testifying, whether or not you and Mr. Barber, as a matter of strategy, would forego the possibility or the opportunity to introduce the subscription agreement through Mr. Thornton?

A. (Mr. Harry) We did not [discuss] to forego it. We were going to do it.

Q. How do you know that you were going to do it?

A. Well, I had spent a considerable amount of time pointing out the subscription agreement to Mr. Barber beforehand.

Q. Why was the subscription agreement important?

A. Well, he - it clearly shows the nature of the investment. I mean, he signed up as to the number of units he was going to buy and what type of an investment it was.

Q. When Mr. Barber omitted or failed to ask Mr. Thornton to identify the subscription agreement, did he do so as the result of a tactical decision?

A. No.

...

Q. And did it come as a surprise to you that Mr. Barber failed to introduce that document.

A. I am very surprised.

Q. Okay. And Mr. Barber neglected to introduce the document for whatever reason, through Mr. Thornton; did he then endeavor to introduce the document through you?

A. He did.

Q. And did the State object?

A. Vehemently.

Q. And did the State succeed in keeping the document out?

A. Yes, sir.

Transcript of Hearing on Motion for a New Trial (March 18, 1992) pp. 20, 26.

Q. (By Mr. Bugden) [D]id you also acknowledge in conversations with me, Mr. Barber, that if you had an opportunity to re-try this case, you would indeed attempt to introduce the Subscription Agreement through Verl Thornton? Did you tell me that yesterday?

A. (Mr. Barber) What I told you was is that when Ron reminded me that I hadn't done it, I attempted to do it. And if I had to do it again, I would probably put it in.

Transcript of Hearing on Motion for New Trial (April 10, 1992) p. 40.

Thus, Mr. Barber's failure to introduce the subscription booklet was not the result of a tactical decision. The subscription booklet was necessary to demonstrate that Mr. Thornton was aware of the possibility of future payments. The suitability questionnaire was critical documentary evidence contradicting Mr. Thornton's testimony that the Red River Limited Partnership was inconsistent with the investment goals he had discussed with the Defendant. The failure to introduce the subscription booklet and the suitability questionnaire fell below an objective standard of reasonableness.

The State's invitation to lay the blame for the failure to introduce this subscription booklet at the feet of the Defendant must be rejected. The State has argued, "Ron Harry, a particularly intelligent Defendant, was also actively engaged in his own defense. Indeed, he regularly passed notes to Mr. Barber throughout the trial, and Mr. Barber almost always checked with Harry before leaving a witness." (State's brief p. 33). None of these assertions are supported by the record and may not be considered. The State has failed to cite those portions of the record that support these allegations as required by Rule 24(e) of the Utah Rules of Appellate Procedure. Accordingly, the State's attempt to argue any facts not properly cited to, or supported by, the record must be eschewed. Uckerman v. Lincoln Nat. Life Ins. Co., 588 P.2d 142 (Utah 1978); Christensen v. Munns, 812 P.2d 69, 73 (Utah App. 1991).

Turning to the second prong of the Strickland test, it is reasonably likely that Mr. Barber's deficient performance affected the outcome of the trial. Defendant had been given discretion to make investments on behalf of Mr. Thornton (T. Tr. p. 52). Thus, establishing

Mr. Thornton's suitability for the Red River Mountain Limited Partnership investment was vital to the defense strategy. The subscription booklet contained the information from which the Defendant concluded that Mr. Thornton was suitable for the investment:

- Q. (By Mr. Barber) In the case of Mr. Thornton, what was your judgment about this deal being suitable to him, including the fact that it featured future payments and was a limited partnership?
- A. (Defendant) Mr. Thornton had a securities portfolio in excess of \$400,000 in this particular account. He had tens of thousands of dollars in securities, cash, and equivalents in other accounts. He owned free and clear both homes in Salt Lake and in Arizona. He had real estate experience in the past, as far as liability as a general partner in the trailer park, as a limited partner in at least one real estate limited partnership. He was clearly suitable.

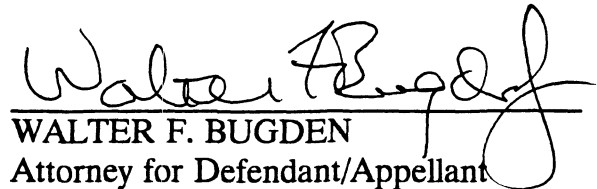
T. Tr. p. 172.

When the evidence is viewed as a whole, a reasonable likelihood exists that but for Mr. Barber's failure to introduce the subscription booklet and the suitability questionnaire, the verdict on Count 1 would have been different.

CONCLUSION

Counts 1, 2, 3 and 4 must be reversed for insufficient evidence. When a reversal is based upon insufficient evidence, double jeopardy precludes a second trial. State v. Musselman, 667 P.2d 1061, 1065 (Utah 1983); State v. Sorenson, 758 P.2d 466, 470 n. 4 (Utah Ct. App. 1988). Alternatively, the case should be remanded for a new trial on all counts.

RESPECTFULLY SUBMITTED this 27 day of September, 1993.


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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing, first class postage prepaid, on this 27 day of Sept., 1993, to:

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