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Recommended Citation
Reply Brief, *Utah v. Reddish*, No. 20050403 (Utah Court of Appeals, 2005).
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IN UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff / Appellee, v. SHARON KAYE REDDISH, Defendant / Appellant.	)))))))))	Case No. 20050403-CA

REPLY BRIEF OF APPELLANT

Appeal from the Sentence, Judgment, Commitment, which was signed by the district court on April 4, 2005, and entered that same day in the Second District Court, Davis County, the Honorable Darwin C. Hansen, presiding.

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FILED
UTAH APPELLATE COURTS
AUG 25 2006

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IN UTAH COURT OF APPEALS

STATE OF UTAH,	)	
	)	
Plaintiff / Appellee,	)	Case No. 20050403-CA
	)	
v.	)	
	)	
SHARON KAYE REDDISH,	)	
	)	
Defendant / Appellant.	)	

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See cases, etc., cited above . . . .*in passim*

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ARGUMENTS

I. CONTRARY TO THE STATE'S ASSERTIONS, THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING THE STATE TO ELICIT AND INTRODUCE EVIDENCE OF MS. REDDISH'S SIX OR SEVEN-YEAR-OLD DRUG CONVICTION.

A. Prior Evidence

The State argues that Ms. Reddish was not harmed by the admission of evidence of her conviction for drug possession because the facts of the conviction had already been admitted and because there was overwhelming evidence of her guilt. *See* Brief of Appellee, pp. 11-14. The record on appeal and applicable case law demonstrate otherwise.

Contrary to the State's assertion, the record demonstrates that the previously admitted evidence, to which the State refers, dealt only with drug use and arrest and not with the drug conviction wrongfully elicited by the State on cross-examination (*Cf.* R. 209:104-06 and R. 210:210:12-17). The State elicited Ms. Reddish's prior drug conviction on cross-examination as follows:

Defendant:	He never even told me what I was being arrested for, actually.
Prosecutor:	Okay.
Defendant:	I found out in jail.
Prosecutor:	But you did tell the officer that you had a prior conviction for meth? Seven years -
Defendant:	No, I did not. I never did. No. It's nothing I brag about.

(R. 210:210:12-17).

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The aforementioned exchange, during which the State elicited the drug conviction, demonstrates that the proffered evidence was probative of no other issue other than the criminal propensity or character of Ms. Reddish. *See State v. Saunders*, 1999 UT 59, ¶15, 992 P.2d 951. Moreover, the trial court's ruling was woefully short of the analysis required under Utah Rule of Evidence 404(b).

Prior to deciding whether evidence of other crimes, wrongs, and bad acts is admissible under Rule 404(b), "the trial court must determine (1) whether such evidence is being offered for a proper, noncharacter purpose under 404(b), (2) whether such evidence meets the requirements of rule 402, and (3) whether this evidence meets the requirements of rule 403." *State v. Nelson-Waggoner*, 2000 UT 59, ¶16, 6 P.3d 1120 (citing *State v. Decorso*, 1999 UT 57, ¶21-22, 29, 993 P.2d 837); *see also Decorso*, 1999 UT 57 at ¶18 (stating that the "admission of prior crimes evidence itself must be scrupulously examined by trial judges in the proper exercise of that discretion.") (citation omitted).

In the instant case, the trial court circuitously ruled that the State's reference to the prior drug conviction of Ms. Reddish was admissible because it goes to the intent of Ms. Reddish to possess the controlled substances found in her car (R. 210:215-16). Additionally, the trial court concluded that "the probative

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value on the intent issue rises above the level of the prejudicial issue." (R. 210:215-16).

The trial court failed to discuss or take any evidence concerning the surrounding circumstances or similarities between the prior drug conviction and the drug charges at issue in the instant case. As a result, there was no demonstration of a nexus between the prior drug conviction and the alleged charges of possession of controlled substances and drug paraphernalia. In addition, the prior drug conviction that occurred some six or seven years ago did not satisfy the requirements of Utah Rule of Evidence 402.

The trial court erred by concluding that the evidence of Ms. Reddish's prior drug conviction met the requirements of Utah Rule of Evidence 403. In the course of so ruling, the trial court failed to consider the various matters set forth by the Utah Supreme Court in *State v. Shickles*, 760 P.2d 291, 295-96 (Utah 1995) (quoting E. Cleary, *McCormick on Evidence* § 190, at 565 (3d ed. 1984)). The trial court failed to consider the similarities, if any, between the crimes. Moreover, the trial court failed to consider the lack of proximity between the crimes or how the interval-of-time factor might affect the Rule 403 analysis.

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B. Harmful Error

The State's assertion concerning harmless error is also ineffectual in the instant case. According to Utah case law, harmless errors are "errors which, although properly preserved below and presented on appeal, are sufficiently inconsequential that [the appellate court] conclude[s] there is no reasonable likelihood that the error affected the outcome of the proceedings." *See State v. Verde*, 770 P.2d 116, 120 (Utah 1989). In other words, "[f]or an error to require reversal, the likelihood of a different outcome must be sufficiently high to undermine confidence in the verdict." *State v. Knight*, 734 P.2d 913, 920 (Utah 1987); *see also State v. Hamilton*, 827 P.2d 232, 240 (Utah 1992). In light of the foregoing, the likelihood in the instant case of a different result is sufficiently high to undermine confidence in the verdict.

II. THE TRIAL COURT, AS CONCEDED BY THE STATE, ERRED BY FAILING TO DETERMINE ON THE RECORD THE ACCURACY OF CONTESTED INFORMATION CONTAINED IN THE PRESENTENCE INVESTIGATION REPORT.

The State concedes that the trial court erred in failing to resolve the alleged inaccuracy in the Presentence Investigation Report. *See* Brief of Appellee, pp. 15-16. However, the State's argument that the sentence previously imposed by the trial court

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should not be disturbed is contrary to both the underlying policy of Utah Code Ann. § 77-18-1 and principles of due process. At the very least, the trial court should be allowed to exercise its discretion to resentence Ms. Reddish after resolving the inaccuracy in the Presentence Investigation Report. Moreover, the State's argument is directly contradicted by the nature of the sentence ultimately imposed by the trial court.[1]

CONCLUSION

Based on the foregoing, as well as that set forth in the previously filed Brief of Appellant, Ms. Reddish respectfully requests that this Court reverse her convictions and remand the

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[1]Based upon the conviction of Possession or Use of a Controlled Substance, a second-degree felony, the trial court sentenced Ms. Reddish "to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison", which the trial court suspended (R. 162). *See* Sentence, Judgment, Commitment, R. 161-65, a true and correct copy of which is attached to the Brief of Appellant as Addendum C. The trial court then sentenced Defendant to a term of 180 days in the Davis County Jail (*Id.*). The trial court also imposed the following sentences: (1) for the conviction of Possession or Use of a Controlled Substance, a class A misdemeanor, the trial court sentenced Ms. Reddish to a term of 365 days in the Davis County Jail, which the trial court suspended; (2) for the conviction of Possession of Drug Paraphernalia, a class B Misdemeanor, the trial court sentenced Ms. Reddish to a term of 180 days in the Davis County Jail, which the trial court suspended; and (3) for the conviction of Driving Under the Influence of Alcohol / Drugs, a class B Misdemeanor, the trial court sentenced Ms. Reddish to a term of 180 days in the Davis County Jail, which the trial court also suspended (*Id.*).

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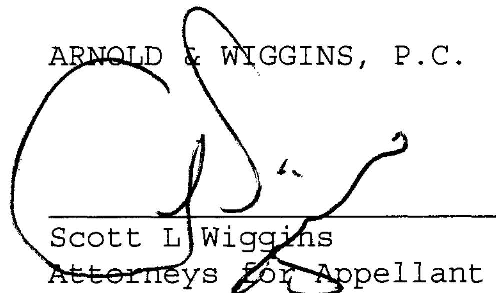
case to the district court for further proceedings consistent with this Court's instructions as set forth in its opinion.

RESPECTFULLY SUBMITTED this 24th day of August, 2006.

ARNOLD & WIGGINS, P.C.



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CERTIFICATE OF SERVICE

I, SCOTT L WIGGINS, hereby certify that I personally caused to be hand-delivered two (2) true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT** to the following on this 25th day of August, 2006:

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ADDENDA

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