

1994

Utah v. Piccirillo : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Jan Graham; attorney for appellee.

Douglas D. Terry; attorney for appellant.

Recommended Citation

Brief of Appellant, *Utah v. Piccirillo*, No. 940356 (Utah Court of Appeals, 1994).

https://digitalcommons.law.byu.edu/byu_ca1/5999

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH SUPREME COURT

STATE OF UTAH,)
Plaintiff and Appellee,)
vs.)
KELLY JAMES PICCIRILLO,) Case No. 940356
Defendant and Appellant.)

BRIEF OF APPELLANT

APPEAL FROM CONVICTIONS OF DISTRIBUTION OF A CONTROLLED
SUBSTANCE, POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT
TO DISTRIBUTE, BOTH FIRST DEGREE FELONIES, AND POSSESSION OF
DRUG PARAPHERNALIA, A CLASS B MISDEMEANOR; IN THE FIFTH
JUDICIAL DISTRICT COURT IN AND FOR WASHINGTON COUNTY,
STATE OF UTAH, THE HONORABLE JAMES L. SHUMATE PRESIDING

Douglas D. Terry (4158)
Attorney at Law
150 North 200 East, Suite 202
St. George, Utah 84770
Telephone (801) 628-4411

Attorney for Appellant

Jan Graham (1231)
Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Telephone (801) 538-1022

Attorney for Appellee

UTAH COURT

CLERK

UTAH

940356

TABLE OF CONTENTS

APPELLATE JURISDICTION	1
NATURE OF THE CASE	1
STATEMENT OF ISSUES	2
STANDARD OF APPELLATE REVIEW	2
PRESERVATION OF ISSUES ON APPEAL IN THE TRIAL COURT	2
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES	3
STATEMENT OF FACTS	4
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. TRIAL COURT ERRED IN ADMITTING EVIDENCE OF DEFENDANT’S PRIOR DRUG CONVICTION.	6
II. THE TRIAL COURT’S ERROR IN INTRODUCING THE DEFENDANT’S PRIOR CONVICTION WAS SO PREJUDICIAL AS TO DENY DEFENDANT THE RIGHT TO A FAIR TRIAL	10
CONCLUSION	12

TABLE OF AUTHORITIES

<u>State v. Bishop</u> , 753 P.2d 439 (Utah 1988)	7, 9
<u>State v. Ferrone</u> , 96 Conn, 160, 113 A. 457 (1921)	8
<u>State v. James</u> , 767 .2d 549 (Utah 1989)	9
<u>State v. Loudermilk</u> , 221 Kan, 157, 557 P.2d 1229 (1976)	7
<u>State v. Morrell</u> , 803 P.2D 292 (Utah App. 1990)	2
<u>State v. O’Neil</u> , 848 P.2d 649 (Utah App. 1993)	11
<u>State v. Shickles</u> , 760 P.2d 291, (Utah 1988)	11
<u>State v. Stewart</u> , 110 Utah 203, 171 P.2d 383 (1946)	7, 8

CONSTITUTION, STATUTES AND RULES

Fifth Amendment to the Constitution of the United States	3
Fourteenth Amendment to the Constitution of the United States	3
Article I, Section 7, Constitution of Utah	3
Section 58-37-8(1)(a), Utah Code Annotated, 1953 as amended	2
Section 58-37-8(1)(a)(i) & (ii)	4
Section 58-37-8(1)(b)(i), Utah Code Annotated, 1953 as amended	4, 6
Section 78-2-2, Utah Code Annotated, 1953 as amended	1
Rule 403, Utah Rules of Evidence	4, 5, 6, 10
Rule 404, Utah Rules of Evidence	10
Rule 404(b), Utah Rules of Evidence	10
Rule 609, Utah Rules of Evidence	10

OTHER AUTHORITIES

<u>McCormick on Evidence</u> , §190 at 565 (3d Ed. 1984)	11
--	----

LEGEND OF REFERENCES TO RECORD

The following legend will identify the letters used to designate various segments in the record.

R - Pleadings in Trial Court file.

T - Transcript of Trial Proceedings (May 19, 1994)

UTAH SUPREME COURT

STATE OF UTAH,)
Plaintiff and Appellee,)
vs.)
KELLY JAMES PICCIRILLO,) Case No. 940356
Defendant and Appellant.)

BRIEF OF APPELLANT

APPELLATE JURISDICTION

Jurisdiction to hear this appeal is conferred upon the Supreme Court by Section 78-2-2, Utah Code Annotated, 1953 as amended.

NATURE OF THE CASE

Defendant was charged in an Amended Information with three criminal counts, to-wit: COUNT I, Distribution of a Controlled Substance, a First Degree Felony; COUNT II, Possession of a Controlled Substance with Intent to Distribute, a First Degree Felony; and COUNT III, Possession of Drug Paraphernalia, a Class B Misdemeanor. Counts I and II alleged that Defendant distributed and possessed with intent to distribute methamphetamine and further alleged that both offenses were enhanced to first degree felonies due to Defendant's prior conviction of a drug offense.

On May 19, 1994, Defendant was found guilty of all three counts after a jury

trial. Defendant was sentenced to serve two terms of not less than five years or more than life and one term of six months, all to be served concurrently. No fine was imposed. At trial, the Court allowed introduction of evidence of Defendant's prior conviction of Possession of a Controlled Substance with Intent to Distribute, a 2nd Degree Felony, as part of the State's case in chief.

STATEMENT OF ISSUES

1. Did the trial court err in allowing the introduction of evidence of Defendant's prior drug conviction as part of the State's case in chief?

2. Did the Court's error result in the denial of Defendant's right to a fair trial, due process, and equal protection as guaranteed by the United States Constitution and the Constitution of the State of Utah?

STANDARD OF APPELLATE REVIEW

The trial court's ruling on evidentiary issues should be reviewed by the appellate court for a clear abuse of discretion. See State v. Morrell, 803 P.2d 292 (Utah App. 1990).

PRESERVATION OF ISSUES ON APPEAL IN THE TRIAL COURT

Prior to the reading of the Information to the jury at the outset of Defendant's trial, counsel for Defendant asked to approach the bench whereupon counsel for Defendant objected to the reading of the Information, which included language in Counts I and II that the charged offenses were "Defendant's second offense of Section 58-37-8(1)(a)". The Court went back on the record and indicated that counsel for Defendant would be given a chance

to secure a record on Defendant's specific objection at the first recess (T. 54). At the next recess, counsel for Defendant renewed his objection on the record in the form of a Motion in Limine requesting the court to make no reference to Defendant's prior conviction until the jury had returned a verdict on the underlying charges. Counsel for Defendant also moved to bifurcate the presentation of the evidence of the underlying charges and the evidence of Defendant's prior conviction (T. 56-57).

At the conclusion of the State's case, prior to resting and in front of the jury, the prosecutor offered proof of Defendant's prior conviction by offering State's Exhibit No. 12 which was a certified copy of the Judgment, Sentence, Stay of Execution of Sentence, Order of Probation and Commitment in the case of State of Utah v. Kelly James Piccirillo, Case No. 931500375. Counsel for Defendant renewed his objection to the introduction of evidence of Defendant's prior conviction. The court overruled the objection and the exhibit was received (T. 215-16).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Fifth Amendment to the Constitution of the United States

No person shall be . . . deprived of life, liberty, or property, without due process of law.

Fourteenth Amendment to the Constitution of the United States

. . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Article I, Section 7, Constitution of Utah.

No person shall be deprived of life, liberty or property, without due process of law.

Section 58-37-8(1)(a)(i) & (ii).

(1) Prohibited acts A -- Penalties:

(a) Except as authorized by this chapter, it is unlawful for any person to knowingly and intentionally:

(i) produce, manufacture, or dispense, or to possess with intent to produce, manufacture, or dispense, a controlled or counterfeit substance;

(ii) distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or counterfeit substance;

Section 58-37-8(1)(b)(i).

(b) Any person convicted of violating subsection (1)(a) with respect to:

(i) a substance classified in Schedule I or II is guilty of a Second Degree Felony and upon a second or subsequent conviction of subsection (1)(a) is guilty of a First Degree Felony.

Rule 403, Utah Rules of Evidence.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice

STATEMENT OF FACTS

On August 4, 1993, Defendant was convicted of Possession of a Controlled Substance with Intent to Distribute, a Second Degree Felony (See State's Trial Exhibit 12). On February 10, 1994, Defendant was arrested for Distribution of a Controlled Substance, Possession with Intent to Distribute a Controlled Substance and Possession of Drug Paraphernalia (R. 1). In the Amended Information, Counts I and II were enhanced to First Degree Felonies because of Defendant's prior conviction. A jury trial was held May 19, 1994. At trial, the state presented evidence by way of the testimony of the narcotic's officers

involved in the case (T. 66-130, 147-177, 178-186, 189). The testimony of the State Criminalist (T. 132-142), and the confidential informant who allegedly purchased a quantity of methamphetamine from Defendant in a controlled buy (T. 194-214).

At the beginning of the trial, the Amended Information, including the language referring to the Defendant's prior conviction, was read to the jury in its entirety (T. 54). At the conclusion of the State's case, the court received State's Exhibit No. 12 which was a certified copy of the Defendant's prior conviction (T. 215-16). The reading of the Information and the introduction of the Defendant's prior conviction were over Defendant's objection.

The Defendant's case consisted of the testimony of Defendant's mother who testified that the methamphetamine belonged to her and that her son had no knowledge of the methamphetamine (T. 219-228). The Defendant also testified that the tape recording of the transaction was from an earlier drug deal and that he did not sell methamphetamine to the confidential informant on the date alleged (T. 229-235).

The jury returned a verdict of guilty on all counts. Defendant was sentenced to serve two concurrent prison terms of five years to life and one concurrent prison term of six months (R. 99-102). Defendant filed a Notice of Appeal July 15, 1994 (R. 103).

SUMMARY OF ARGUMENT

The trial court committed error in allowing Defendant's prior conviction to be made known to the jury in the reading of the Amended Information and in allowing the introduction of Defendant's prior conviction in the form of State's Exhibit 12. The trial court's error violated Rule 403 of the Utah Rules of Evidence and denied Defendant the

right to a fair trial.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF DEFENDANT'S PRIOR DRUG CONVICTION.

Section 58-37-8(1)(b)(i) states as follows:

(b) Any person convicted of violating subsection (1)(a) with respect to:

(i) a substance classified in Schedule I or II is guilty of a Second Degree Felony and upon a second or subsequent conviction of subsection (1)(a) is guilty of a First Degree Felony. [Emphasis added.]

Clearly, the specific language of the statute indicates the intent of the statute to penalize a person who is convicted of a drug related offense after a prior conviction of a drug offense. A literal interpretation of the statute is that a person is only guilty of a First Degree Felony upon second or subsequent conviction. The introduction of any evidence of the previous conviction prior to the second or subsequent conviction is governed by the Rules of Evidence.

Rule 403, Utah Rules of Evidence, excludes evidence which, although relevant, is excluded because the probative value is substantially outweighed by the danger of unfair prejudice. The trial court must exercise its discretion in determining whether or not such evidence should be excluded.

The Defendant's prior conviction was not an element of the offense of Distribution of a Controlled Substance or Possession of a Controlled Substance with Intent to Distribute. The prior conviction is only relevant for purposes of enhancing the

subsequent conviction. At trial, counsel for Defendant requested that the Court bifurcate the issues and allow the jury to determine the Defendant's guilt or innocence of the underlying charges and, if the Defendant was found guilty of the underlying charges, then either the jury or the judge, as a trier of fact, would determine whether or not the Defendant had been convicted of a previous drug offense for purposes of the enhancement. The Court rejected defense counsel's motion.

The underlying issue presented in this case is what safeguards is the Defendant entitled to an order to ensure that he is given a fair trial? Justice Zimmerman suggested the necessary safeguards in his concurrence in State v. Bishop, 753 P.2d 439 (Utah 1988). The safeguard suggested was that of a two-stage trial. Such a proposal would protect Defendant's right to a fair trial while satisfying the State's objective to punish repeat offenders. However, such a proposal must be supported by law. Defendant submits that it is.

In State v. Loudermilk, 221 Kan. 157, 557 P.2d 1229 (1976), the Kansas Supreme Court dealt with the issue of such procedural safeguards. That court recognized the difference between crimes in which a prior conviction is a necessary element and crimes in which a prior conviction of the same crime is considered in establishing the penalty to be imposed. Id. at 1232. Examples of the former include habitual criminal statutes and possession of a firearm by restricted person. In such cases, the Defendant's prior conviction places him in a class of individuals which makes certain activity itself illegal. The latter class of statutes are designed to enhance the punishment for unrelated misconduct which is not an element of the defined crime.

Because the alleged prior conviction or misconduct is not an element of the underlying offense and is unrelated to the underlying offense, its relevance must be questioned.

Evidence that a person has previously been convicted of the same offense appears to have relevance, however, its obvious prejudicial value must be weighed against its probative value, under Rule 403.

In State v. Stewart, 110 Utah 203, 171 P.2d 383 (1946) the Utah Supreme Court drew the distinction between statutes that have a prior offense as a necessary element of the substantive offense and those that are unrelated and use unrelated crimes solely to impose a greater punishment for the subsequent crime. See Stewart, 110 Utah at 208, 177 P.2d at 385. In Stewart, the Court ruled that the enhanced penalty provision of the DUI statute then in effect fell under the category of enhancement crimes, and ruled that the case should be bifurcated. The Court quoted State v. Ferrone, 96 Conn. 160, 113 A. 457 (1921) setting forth the specific procedural safeguards that should be employed in such a case.

The information should be divided into two parts. In the first the particular offense with which the accused is charged should be set forth, and this should be upon the first page of the information and signed by the prosecuting officer. In the second part former convictions should be alleged, and this should be upon the second page of the information, separable from the first page and signed by the prosecuting officer. The entire information should be read to the accused and his plea taken in the absence of the jurors. When the jury has been impaneled and sworn, the clerk should read to them only that part of the information which sets forth the crime for which the accused is to be tried. The trial should then proceed in every respect as if there were no allegations of former convictions, of which no mention should be made in the evidence, or in the remarks of counsel, or in the charge of the court. When the jury retire to consider their verdict, only the first page of the information, on which the crime charged is set out, should be given to them. If they return a verdict of

guilty, the second part of the information, in which former convictions are alleged, should be read to them without reswearing them, and they should be charged to inquire on that issue. Of course, the accused may plead guilty to this part of the information, and then no further proceedings before or by the jury would be necessary. No reason appears why the accused if he should choose, might not submit this issue to the court without the jury.

In this way the well-recognized rights of an accused person will be protected, and the principles of justice and our long-established laws which have been designed to secure an impartial trial in every criminal cause will be recognized, respected, and obeyed.

110 Utah at 210.

Defendant submits that the above-described procedure was exactly what was suggested by Defendant and rejected by the trial court in the instant case.

In State v. James, 767 P.2d 549 (Utah 1989), the defendant was charged with the first degree murder of his infant son. The charge alleged that the defendant caused the death of his son and alleged as an aggravating circumstance that the defendant had previously been convicted of a felony involving the use or threat of violence to a person. The Supreme Court, in reversing an order denying Defendant's motion for change of venue, directed that the trial proceed upon a bifurcated basis, adopting Justice Zimmerman's approach in Bishop supra. The Court instructed that the jury was not initially to be presented with mention or evidence of the defendant's prior conviction and that only if the defendant was found guilty of the intentional and knowing killing was it to be instructed of the prior conviction. Quoting Justice Zimmerman:

The legitimate interests of the state and the accused can easily be accommodated through a bifurcated procedure. When the underlying crime is charged, and enhancing circumstance involving other crimes or bad acts factually related to the underlying criminal episode are also charged for the purpose of increasing the severity of the punishment

for the underlying crime, the trial court must divide the trial into separate segments. First, evidence regarding the underlying crime should be omitted, and the jury should be asked to determine guilt or innocence based on that evidence alone. Second, if a guilty verdict is returned on the underlying charge, then evidence regarding the enhancing circumstances should be heard by the same jury for the purpose of determining whether those circumstances have been proven beyond a reasonable doubt.

776, P.2d at 557.

POINT II

THE TRIAL COURT'S ERROR IN INTRODUCING THE DEFENDANT'S PRIOR CONVICTION WAS SO PREJUDICIAL AS TO DENY DEFENDANT THE RIGHT TO A FAIR TRIAL.

The record of the trial court proceedings is devoid of any evidence or indication that the state introduced evidence of the Defendant's prior conviction for any purpose other than enhancement of the grade of the offenses charged in Counts I and II from Second Degree Felonies to First Degree Felonies. There is no evidence from the record that either the prosecutor or the judge intended to offer or admit evidence of the Defendant's prior conviction under Rules of Evidence 404 or 609. No evidence of the facts or circumstances surrounding the Defendant's prior conviction were presented, only the fact that he had been convicted. The Defendant's character was never placed in issue nor were any of the other exceptions described in Rule 404(b) met by the presentation of the state's evidence. Nor can the state take the position that evidence of the Defendant's prior conviction was admissible under Rule 609 since the evidence was introduced and admitted before the Defendant even took the witness stand.

Even if it were held that evidence of the Defendant's prior conviction was admissible under Rule 404(b), it must also meet the requirements of Rule 403. See State

v. O'Neil, 848 P.2d 649 (Utah App. 1993). In State v. Shickles, 760 P.2d 291, (Utah 1988), the Utah Supreme Court stated as follows:

The general rule prohibiting evidence that a defendant committed other crimes was established, not because that evidence is logically irrelevant, but because it tends to skew or corrupt the accuracy of the fact-finding process. Indeed, Dean Wigmore has argued, "It is objectionable not because it has no appreciable probative value but because it has too much." 1 AJ. Wigmore, Evidence in Trials at Common Law, §58.2 at 1212 (Tillers Rev. 1983).

Thus, evidence of other crimes is generally inadmissible unless it tends to have a special relevance to a controverted issue and is introduced for a purpose other than to show the defendant's predisposition to criminality.

760 P.2d at 295.

The court goes on to quote E. Cleary, McCormick on Evidence, §190 at 565 (3d Ed. 1984) suggesting the following factors to be evaluated in balancing probativeness vs. prejudice:

The problem is not merely one of pigeonholing, but of classifying and then balancing. In deciding whether the danger of unfair prejudice and the like substantially outweighs the incremental probative value, a variety of matters must be considered, including the strength of the evidence as to the commission of the other crime, the similarities between the crimes, the interval of time that has elapsed between the crimes, the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence probably will rouse the jury to overmastering hostility.

760 P.2d at 295-96.

In the instant case, it is very difficult to apply the factors set forth in Shickles since there is no evidence of the prior crime, other than evidence of the conviction itself, to compare to the charges and factual allegations set forth in Counts I and II. The reason there is no such evidence is because the admission of the evidence of the prior conviction

was not for the purpose of proving the subsequent crime, but only for the purpose of enhancing the subsequent crime. For that very reason, evidence of the prior conviction should not have been introduced in the guilt phase of the trial on the subsequent crime. Its introduction served no purpose other than to "rouse the jury to over mastering hostility," resulting in the denial of the Defendant's right to a fair trial.

CONCLUSION

Clearly, it is within the discretion of the trial court to exclude evidence pursuant to Rule 403, Utah Rules of Evidence when its prejudicial nature outweighs its probative value. It is hard to imagine more prejudicial evidence than evidence of a prior conviction of exactly the same offense as the Defendant is presently being tried for. The prejudicial nature of the introduction of such evidence is further aggravated by the relative simplicity of procedural safeguards to prevent such prejudice. Based on the foregoing, it is respectfully submitted that Defendant's right to a fair trial and due process were violated by the introduction of the evidence of his prior conviction and that the conviction must be reversed and the case remanded to the district court for further proceedings.

DATED this ____ day October, 1994.

Douglas D. Terry
Attorney for Defendant and Appellant

MAILING CERTIFICATE

I do hereby certify that on this ____ day of October, 1994, I did personally mail a true and correct copy of the above and foregoing document to Jan Graham, Utah Attorney General at 236 State Capitol, Salt Lake City, Utah 84114.

Secretary