

2005

Brad Lynn Montgomery v. State of Utah : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

BRAD LYNN MONTGOMERY,
Appellant,

)

)

v.

)

Case No. 20050945-CA

STATE OF UTAH
Appellee.

)

Priority: 2

)

APPELLANT'S REPLY BRIEF

APPEAL FROM A JURY VERDICT ENTERED ON JUNE 21, 2005.

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ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

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UTAH APPELLATE COURT
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THE UTAH COURT OF APPEALS

BRAD LYNN MONTGOMERY,)	
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STATE OF UTAH,)	
Appellee.)	Priority: 2

REPLY BRIEF OF BRAD LYNN MONTGOMERY

ARGUMENT I

During opening statements, the prosecutor made comments that called the jurors' attention to matters not proper for their consideration. The question before the court is whether those comments were prejudicial to the defendant.

In a case with less compelling proof, this court will more closely scrutinize the conduct. If the conclusion of the jurors is based on their weighing conflicting evidence or evidence susceptible of differing interpretations, there is a greater likelihood that they will be improperly influenced through remarks of counsel. Indeed, in such cases, the jurors may be searching for guidance in weighing and interpreting the evidence. They may be especially susceptible to influence, and a small degree of influence may be sufficient to affect the verdict. Counsel is obligated in such cases to avoid, as far as possible, any reference to those matters the jury is not justified in considering.

State v. Troy, 688 P.2d 483, 486 (Utah 1984).

During trial the defendant produced the following evidence:

1. That the confidential informant, Mickel Collier, had an economic interest in

producing drug sales for the task force. Further, the confidential informant was hoping to receive a reduction in his sentence in a federal case by doing some drug sales for the task force. R. 436: 6.

2. That although the confidential informant was searched prior to the drug buy, he was not strip searched. R. 436: 88. Further, the back of the confidential informant's truck was not searched by the police prior to the drug buy. R. 436: 108.

3. That the police did not have constant visual contact with the confidential informant. In fact, the police did not visually observe the confidential informant make contact with defendant. R. 435: 186.

4. The recording device that was recording the alleged conversation between the confidential informant and the defendant did not operate properly and the alleged conversation was not recorded. R. 435: 184-187.

5. There was no conversation between the confidential informant and the defendant about buying drugs. The terms that the defendant allegedly used were flat tire and snow. The police interpreted these terms to mean drug buying. R. 435: 191-192; 193-196.

6. The confidential informant claimed that he bought an eightball from the defendant, but the amount of methamphetamine recovered from the confidential informant was only 3.5 grams. R. 435: 225.

7. The confidential informant was given \$350.00 to buy an eightball of methamphetamine from the defendant. The confidential informant claims to have given the defendant the \$350.00. The \$350.00 was marked. When the defendant was arrested the \$350.00 was not found on the defendant. The \$350.00 was never found.

The defendant's theory was that the confidential informant Mickel Collier, was fabricating or pretending to make a buy so that he could make money and have his federal charges reduced. R. 436: 139. As stated above, the evidence that supported this theory is that the defendant was not completely searched nor his vehicle. Therefore, the confidential informant could have hidden drugs on his person or on his vehicle.

When the confidential informant met with the defendant, there was never any mention of drugs. There were ambiguous terms used like flat tire, snow, etc. It is the defendant's theory that when the confidential informant left the meeting with the defendant, he pulled the hidden drugs out and kept the money.

Usually the police record the conversation and have visual contact with the confidential informant to insure that the confidential informant does not attempt this type of scheme on the police, but in this case the police did not have visual contact when the confidential informant and the defendant met. Further, the recording equipment did not work properly so that the police could properly monitor and record the conversation. Finally, when the defendant was arrested the \$350.00 in marked bills were not found

further supporting the defendant's theory.

In this case the evidence was susceptible to differing interpretations, and therefore, the remarks made by the prosecutor had a greater likelihood of improperly influencing the jury and thus the defendant should be granted a new trial.

The defendant further claims that any curative instruction by the judge made the matter worse because the prosecutor gained by having the judge explain his theory of the case to the jury.

It is clear from the record that the defendant's counsel objected to a curative instruction. The following took place between the court and counsel.

Counsel: "And I'm - - and so I'm - - you Honor, I'm moving for a mistrial a at this time based upon that. I don't think it's curable by an instruction."

The Court: "Well, I think it is curable. I'm asking you to suggest a cure, though.

At this point the court required the defendant's counsel to assist in fashioning a curative instruction. It is clear the defendant's counsel objected to the proceedings. Indeed, the defendant's counsel had already suggested a cure, declaring a mistrial. With that request denied, counsel had no choice but to acquiesce to the court's request. The State of Utah suggests that counsel for the defendant is required to tell the judge, no! no! no!, I refuse to help you. Wherefore, the defendant did not invite the error as suggested by the State of Utah.

ARGUMENT II

For the foregoing reasons stated in the Brief of Appellant under Argument II, heretofore filed with the court the Defendant, Brad Montgomery, requests the Court to reverse his conviction.

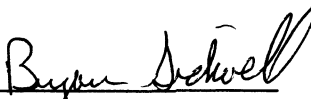
ARGUMENT III

For the foregoing reasons stated in the Brief of Appellant under Argument III, heretofore filed with the court the Defendant, Brad Montgomery, requests the Court to reverse his conviction.

CONCLUSION

For the foregoing reasons, this Court should remand to the trial court for a new trial.

DATED this 16th day of October 2006.



Bryan Sidwell
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Appellant's brief was sent to the following by placing them in the U.S. mail, postage prepaid on October 16th, 2006.

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