

2006

State of Utah v. Christopher Simon Castillo : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,)
)
 Plaintiff/Appellee,)
)
vs.) **Case No. 20060811-CA**
)
CHRISTOPHER SIMON CASTILLO,)
)
 Defendant/Appellant.)

BRIEF OF APPELLANT

THIS APPEAL IS FROM A PLEA AND SUBSEQUENT SENTENCING TO AGGRAVATED ASSAULT, A THIRD-DEGREE FELONY, AND POSSESSION OF A DANGEROUS WEAPON BY A RESTRICTED PERSON, A SECOND-DEGREE FELONY; AND DEFENDANT WAS SENTENCED TO SERVE AN INDETERMINATE TERM OF ZERO TO FIVE YEARS AT THE UTAH STATE PRISON AND A CONCURRENT INDETERMINATE TERM OF ONE TO FIFTEEN YEARS AT THE UTAH STATE PRISON, IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR WEBER COUNTY, STATE OF UTAH, THE HONORABLE ROGER S. DUTSON PRESIDING. THE DEFENDANT IS CURRENTLY INCARCERATED AT THE UTAH STATE PRISON

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THE COURTS

IN THE UTAH COURT OF APPEALS

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 Plaintiff/Appellee,)
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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,)
)
 Plaintiff/Appellee,)
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 vs.) **Case No. 20060811-CA**
)
 CHRIS CASTILLO,)
)
 Defendant/Appellant.)

BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a finding of guilty by a jury in the Second District Court for Aggravated Assault, a third-degree felony, and Possession of a Dangerous Weapon by a Restricted Person, a second-degree felony. The Defendant entered a guilty plea on August 7, 2006, and was sentenced that same day to serve an indeterminate term of zero to five years at the Utah State Prison and a concurrent indeterminate term of one to fifteen years at the Utah State Prison. The Defendant entered the plea pursuant to the case of *State v. Sery*, 758 P.2d 935 (Utah Ct. App. 1988). This Court has jurisdiction over this appeal pursuant to Utah Code Ann. 78-2a-3(2)(e)(2004).

ISSUE ON APPEAL AND STANDARD OF REVIEW

POINT I

DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT RULED, PURSUANT TO A MOTION IN LIMINE, THAT IT WOULD ALLOW EVIDENCE TO BE PRESENTED TO THE JURY THAT A FIREARM WAS FOUND 172 DAYS AFTER THE ALLEGED DATE OF THE CRIME.

Standard of Review: This issue should be reviewed under an abuse of discretion standard of review. “The trial court’s ultimate ruling under Rule 403 of the Utah Rules of Evidence is reviewed for an abuse of discretion.” *State v. Gulbransen* 106 P.3d 734, 740 (Utah 2005). This issue was preserved when Defendant’s attorney filed a motion in limine (R. 068-071).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

U. S. CONSTITUTION

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

CONSTITUTION OF THE STATE OF UTAH

Article I Section 12

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

UTAH CODE ANNOTATED

§76-5-103. Aggravated assault

- (1) A person commits aggravated assault if he commits assault as defined in Section 76-5-102 and he:
 - (a) intentionally causes serious bodily injury to another; or
 - (b) under circumstances not amounting to a violation of Subsection (1)(a), uses a dangerous weapon as defined in Section 76-1-601 or other means or force likely to produce death or serious bodily injury.
- (2) A violation of Subsection (1)(a) is a second degree felony.

(3) A violation of Subsection (1)(b) is a third degree felony.

§76-10-503. Possession of a dangerous Weapon by a Restricted Person: Restrictions on possession, purchase, transfer, and ownership of dangerous weapons by certain persons

(1) For purposes of this section:

- (a) A Category I restricted person is a person who:
 - (i) has been convicted of any violent felony as defined in Section 76-3-203.5;
 - (ii) is on probation or parole for any felony;
 - (iii) is on parole from a secure facility as defined in Section 62A-7-101; or
 - (iv) within the last ten years has been adjudicated delinquent for an offense which if committed by an adult would have been a violent felony as defined in Section 76-3-203.5.
- (b) A Category II restricted person is a person who:
 - (i) has been convicted of or is under indictment for any felony;
 - (ii) within the last seven years has been adjudicated delinquent for an offense which if committed by an adult would have been a felony;
 - (iii) is an unlawful user of a controlled substance as defined in Section 58-37-2;
 - (iv) is in possession of a dangerous weapon and is knowingly and intentionally in unlawful possession of a Schedule I or II controlled substance as defined in Section 58-37-2;
 - (v) has been found not guilty by reason of insanity for a felony offense;
 - (vi) has been found mentally incompetent to stand trial for a felony offense;
 - (vii) has been adjudicated as mentally defective as provided in the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993), [FN1] or has been committed to a mental institution;
 - (viii) is an alien who is illegally or unlawfully in the United States;
 - (ix) has been dishonorably discharged from the armed forces; or

- (x) has renounced his citizenship after having been a citizen of the United States.
- (2) A Category I restricted person who intentionally or knowingly agrees, consents, offers, or arranges to purchase, transfer, possess, use, or have under his custody or control, or who intentionally or knowingly purchases, transfers, possesses, uses, or has under his custody or control:
 - (a) any firearm is guilty of a second degree felony; or
 - (b) any dangerous weapon other than a firearm is guilty of a third degree felony.
- (3) A Category II restricted person who purchases, transfers, possesses, uses, or has under his custody or control:
 - (a) any firearm is guilty of a third degree felony; or
 - (b) any dangerous weapon other than a firearm is guilty of a class A misdemeanor.
- (4) A person may be subject to the restrictions of both categories at the same time.
- (5) If a higher penalty than is prescribed in this section is provided in another section for one who purchases, transfers, possesses, uses, or has under this custody or control any dangerous weapon, the penalties of that section control.
- (6) It is an affirmative defense to a charge based on the definition in Subsection (1)(b)(iv) that the person was:
 - (a) in possession of a controlled substance pursuant to a lawful order of a practitioner for use of a member of the person's household or for administration to an animal owned by the person or a member of the person's household; or
 - (b) otherwise authorized by law to possess the substance.

§78-2a-3. Court of Appeals jurisdiction.

- 2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

- (a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;
- (j) cases transferred to the Court of Appeals from the Supreme Court.

UTAH RULES OF EVIDENCE

RULE 403. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

The Defendant was charged by Information with Aggravated Assault, a third-degree felony, a violation of U.C.A. §76-5-103, and Possession of a Dangerous Weapon by a Restricted Person, a second-degree felony, a violation of U.C.A. §76-10-503. The Defendant pled not guilty and filed a motion in limine to exclude evidence found by the police some 172 days after the alleged assault had occurred (R. 068-071). The trial court denied this motion. (Mot. Hearing. Tr. 8).

On August 7, 2006, based on the trial court's ruling on the motion in limine, the Defendant entered an *Alford* plea to the two charges listed above, specifically reserving his right to appeal pursuant to *State v. Sery*, 758 P.2d 935 (Utah Ct. App. 1988). The Defendant was sentenced on August 7, 2006, to serve an indeterminate term of zero to five years at the Utah State Prison and a concurrent indeterminate term of one to fifteen years at the Utah State Prison. The Sentence, Judgment and Commitment was signed on August 7, 2006. A Notice of Appeal was filed on August 14, 2006. (R. 084-085).

STATEMENT OF THE FACTS

The motion in limine in this case was argued on July 31, 2006, with both parties submitting the case on stipulated facts. (R. 100). These facts indicated that on the date alleged, Officer Hammond responded to the area of the Wonder Bread Bakery in Ogden, Utah, on a report to 911 of a man with a firearm. Officer Hammond claimed that he observed a man fitting the description of this individual and began pursuing. The individual ran and kept turning around and pointing at Officer Hammond what he described as silver, semiautomatic pistol. (R. 100/6).

Another witness at the scene was an employee in the Wonder Bread parking lot that encountered this individual and claims that within a distance of

ten to fifteen feet away the individual also pointed a weapon at him which he also described as a silver, very large, shiny semiautomatic handgun. (R. 100/6).

Officer Hammond lost track of the individual for approximately 20 seconds. When he apprehended the individual, who was identified as the Defendant, a search was undertaken in the area of the parking lot where the officer saw him disappear. Despite the efforts of several police officers utilizing rakes and a canine search dog, as well as the efforts of several Wonder Bread employees, the weapon could not be located. (R. 100/2). Approximately 172 days later a weapon that generally fit the description given by Officer Hammond and the other individual was found in the park strip outside the Wonder Bread bakery underneath some trees. (R. 100/2). All parties acknowledge that this area was located in a high crime region and was accessible to the general public. (R. 100/3).

While examining the weapon it was determined that someone had filed off the serial number. Apparently the serial number was raised by CSI, and a search of the national weapons database revealed no information as to it being stolen or any information linking it to the Defendant. (R. 100/3). The Defendant acknowledged running from the officer, but he has consistently maintained that he did not possess the firearm and did not threaten anyone with a weapon.

SUMMARY OF ARGUMENTS

The trial court denied the Defendant's motion in limine to exclude evidence of the weapon discovered 172 days after the alleged crime had occurred. This evidence, although somewhat relevant to the charge, was highly prejudicial and highly suspect. The trial court should have determined that any probative value was substantially outweighed by the risk of unfair prejudice. Based on the highly prejudicial effect of this evidence and the substantial danger that a jury would disregard the obviously tenuous link of the weapon to the Defendant, the Defendant elected to enter into a plea negotiation reserving the right to appeal this decision.

ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT RULED, PURSUANT TO A MOTION IN LIMINE, THAT IT WOULD ALLOW EVIDENCE TO BE PRESENTED TO THE JURY THAT A GUN WAS FOUND AT THE SCENE OF THE CRIME 172 DAYS AFTER THE ALLEGED DATE OF THE CRIME.

Rule 403 of the Utah Rules of Evidence states that relevant, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury..." U.R.E. 403 (2004). When determining admissibility under Rule 403, trial courts must "weigh its probative value against its tendency to unfairly prejudice

the defendant.” *State v. Jamison*, 767 P.2d 134, 137 (Utah Ct. App. 1989). “Unfair prejudice” means “an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.” *State v. Maurer*, 770 P.2d 981, 984 (Utah 1989).

In *State v. Maurer*, 770 P.2d 981 (Utah 1989), the defendant was convicted of second-degree murder. Thirty-eight days after the homicide the defendant wrote the victim’s father a letter from the jail. The letter said among other things that the defendant was glad he killed the victim. He said that it “was a great feeling to watch her die.” The defendant signed the letter, “The killer, John H. Maurer.” *Id.* at 982.

The defendant filed a motion in limine to preclude the State from introducing the letter into evidence. The trial court denied the motion and found that the letter was probative of the defendant’s state of mind at the time of the homicide and would assist the jury in determining whether the defendant was guilty of murder or manslaughter. *Id.*

The defendant argued on appeal that even if the letter had some relevance, the prejudicial effect of the letter far exceeded its potential relevance under Rule 403. *Id.* at 983. Both the defendant and the State agreed that the central issue at the trial was the defendant’s state of mind at the time he killed

the victim. *Id.* The Supreme Court found that “the balance of the letter reflects defendant’s state of mind at the time the letter was written.” *Id.*

The Court recognized that it was “cognizant of the rule that the appraisal of the probative and prejudicial value of evidence under Rule 403 is generally entrusted to the sound discretion of the trial judge and will not be upset on appeal absent manifest error.” *Id.* The Court went on to state that “any relevance which could be found therein was greatly and clearly outweighed by the danger of ‘unfair prejudice, confusion of the issues, [and] misleading the jury.’” *Id.* The Supreme Court concluded that the trial court’s admission of the entire letter was clearly erroneous. *Id.*

The Supreme Court stated that “[s]ince all effective evidence is prejudicial in the sense of being damaging to the party against whom it is offered, prejudice which calls for exclusion is given a more specialized meaning:” *Id.* at 984. The Court then listed “an undue tendency to suggest decision on an improper basis, . . . such as bias, sympathy, hatred, contempt, retribution or horror. Where a danger of unfair prejudice is perceived, the degree of likely prejudice must also be considered.” *Id.*

In *Maurer*, the Supreme Court stated that “[t]he mere fact that evidence possesses a tendency to suggest a decision upon an improper basis does not require exclusion; evidence may be excluded only if the danger of unfair

prejudice substantially outweighs the probative value of the proffered evidence.” *State v. Maurer*, 770 P.2d at 984.

The Sixth Amendment to the Constitution of the United States guarantees a criminal defendant the right to an impartial jury. Likewise, Article I Section 12 of the Constitution of the State of Utah requires an impartial jury for a criminal defendant.

These constitutional protections were addressed in the case of *State v. Kell*, 2002 UT 106 at ¶30, 61 P.3d 1019. The Utah Supreme Court held:

Although rule 403 contains a presumption of admissibility of evidence, evidence that has “an unusually strong propensity to unfairly prejudice, inflame, or mislead a jury” will be deemed inadmissible. *State v. Lafferty*, 749 P.2d 1239, 1256 (Utah 1988). Inadmissible evidence may include gruesome photographs of a homicide victim’s corpse, evidence of a rape victim’s past sexual activities with someone other than the accused, and statistical evidence of matters not susceptible to quantitative analysis, such as witness veracity.

(R. 100)

In *State v. Bluff*, 2002 UT 66, ¶ 59, 52 P.3d 1210 (Utah 2002), the Utah Supreme Court stated that when deciding whether the risk of unfair prejudice under Rule 403 substantially outweighs the probative value, a number of factors need to be considered, including “the strength of the evidence as to the commission of the other crime,” and “the degree to which the evidence will rouse the jury to overmastering hostility.” (*Id.* at ¶ 59) The court went on to

state that “[e]ven though we have applied these factors in the past to ‘causes,’ we think they are equally applicable to determine the effect of a ‘wrong act’ as described in Rule 403.” *Id.*

The Utah Supreme Court has further held that evidence of a defendant’s prior bad acts can violate Rule 403 due to the prejudicial effect such evidence may carry to a jury. In *State v. Saunders*, 699 P.2d 738 (Utah 1985), the Utah Supreme Court stated that “[t]he bases of these limitations on the admissibility of evidence of prior crimes is the tendency of a fact finder to convict the accused because of bad character rather than because he is shown to be guilty of the offenses charged. Because of this tendency, such evidence is presumed prejudicial and, absent a reason for the admission of the evidence other than to show criminal disposition, the evidence is excluded.” *Id.* at 741

In the case at bar, the evidence that a weapon generally fitting the description of a gun the two State’s witnesses claimed to have seen would be highly prejudicial. The problems that arises in this case is that the evidence of the gun found 172 days after the alleged offense would almost certainly be given an inordinate amount of weight by a jury. Just as the evidence of prior convictions may be improperly utilized in obtaining a conviction, the evidence that a gun was found at the scene would be tempting for a jury to utilize to find the Defendant guilty.

The problem is that the probative value is virtually nonexistent. In the case at bar, the fact that a weapon generally matching the description of the weapon claimed to have been used at the scene was found nearly six months after the fact is highly suspect. The fact that it happens to match the general description of the witness's weapon is not unusual since hundreds of models of handguns are silver semiautomatic. The chance that this gun was ever held by the Defendant is speculative at best. The ability of the Defendant to refute the connection is not feasible. This is not because there is a high likelihood that the gun was the Defendant's, but rather because the passage of 172 days made the ability to fingerprint the weapon impossible. This leaves the Defendant in an untenable position. He could either try to brush off the evidence and hope the jury would disregard the prosecutor's efforts to link this gun to the Defendant, or he could attack this evidence during cross-examination of the State's witness. The problem with attempting a vigorous cross-examination is the danger that the jury may apply the old Shakespeare line, "The lady protests too much Methinks." (Hamlet, act 3, sc. 2, l. 219 (1604)). In either scenario the Defendant faces a high probability that he will lose.

The problem in the present case is that the presence of a gun is seminal to the entire case. Without a gun the prosecutors would be unable to convict the Defendant on the charge of possession of weapon by a restricted person. The

absence of a gun would also eliminate the possibility of a finding of guilt to the aggravated assault.

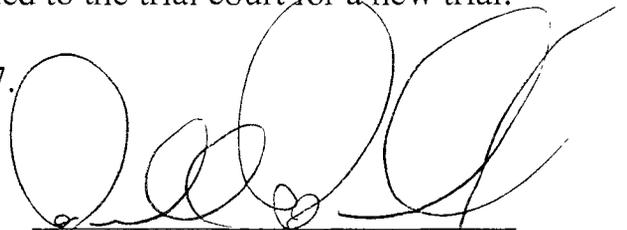
The Defendant believes that the prejudicial effect of this evidence far outweighs the probative value, and therefore this Court should find that the trial court abused its discretion in denying the Defendant's motion to exclude this evidence. The harmfulness of this evidence is obvious, since without the gun the prosecution is left with a case of a couple of eyewitnesses without any supportive evidence. The Defendant could then argue that the absence of a gun, despite rigorous efforts to find the same raises reasonable doubt. The problem is that a jury is not sophisticated enough to separate the prejudicial effect of the later found weapon from the limited probative value it brings. The jury would not be able to recognize the fact that it would not be unusual for a gun to be found in the relatively large area in question during a six-month period in a high crime area.

CONCLUSION

The trial court did not properly consider the high probability that the prejudicial effect of this evidence outweighed any minimal probative value this evidence could have presented to a jury. For these reasons the trial court abused its discretion when it denied the Defendant's motion in limine to

exclude this evidence. Therefore, the Defendant's conviction should be reversed, and this matter should be remanded to the trial court for a new trial.

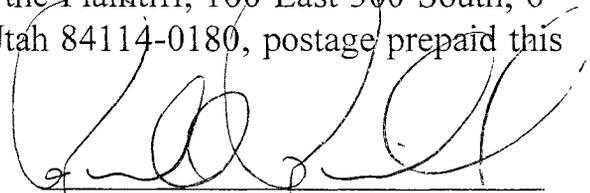
DATED this 9 day of January 2007.



RANDALL W. RICHARDS
Attorney for Appellant

CERTIFICATE OF MAILING

I certify that I mailed two copies of the foregoing Brief of Appellant Assistant Attorney General, Attorney for the Plaintiff, 160 East 300 South, 6th Floor, PO Box 140854, Salt Lake City, Utah 84114-0180, postage prepaid this 9 day of January 2007.



RANDALL W. RICHARDS
Attorney at Law

ADDENDUM A

2006 AUG 15 P 5:00

SECOND DISTRICT COURT - OGDEN COURT
WEBER COUNTY, STATE OF UTAH

AUG 7 2006

STATE OF UTAH, : MINUTES
Plaintiff, : ORAL ARGUMENT
: SENTENCE, JUDGMENT, COMMITMENT
:
:
vs. : Case No: 051905870 FS
:
CHRISTOPHER SIMON CASTILLO, : Judge: ROGER S DUTSON
Defendant. : Date: August 7, 2006

PRESENT

Clerk: carier
Prosecutor: LYON, NATHAN D
Defendant
Defendant's Attorney(s): MARTIN GRAVIS, PDA

DEFENDANT INFORMATION

Date of birth: June 23, 1976
Video
Tape Number: D080706 Tape Count: 330

CHARGES

1. AGGRAVATED ASSAULT (amended) - 3rd Degree Felony
Plea: Guilty - Disposition: 08/07/2006 Guilty
3. POSSESSION OF A DNGR WEAP BY RESTRICTED - 2nd Degree Felony
Plea: Guilty - Disposition: 08/07/2006 Guilty

HEARING

This is time set for oral argument. The defendant is present in custody from the Utah State Prison with counsel. Negotiations have been reached.

The defendant enters an Alford plea to count #1, F3-Aggravated Assault and to count #3, F2-Possession of Dngr Weap by Restricted Person as he intends to appeal this matter.

State moves to dismiss all remaining charges, including the enhancement charge. Court grants.

The Court accepts the Alford plea and enters the conviction. A plea agreement is submitted and signed in open Court. The defendant waives time for sentencing. Court grants and proceeds with

Case No: 051905870
Date: Aug 07, 2006

sentencing.

SENTENCE PRISON

Based on the defendant's conviction of AGGRAVATED ASSAULT a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of POSSESSION OF A DNGR WEAP BY RESTRICTED a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

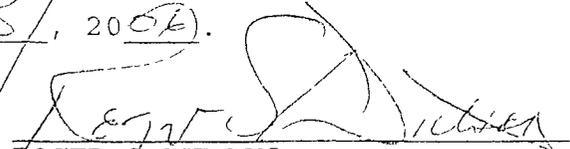
COMMITMENT is to begin immediately.

To the WEBER County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

The sentence imposed in each count shall run concurrently with one another and concurrently with any other sentencing being served.

Dated this _____ day of 8/15/2006.


ROGER S DUTSON
District Court Judge