2006

State of Utah v. Donald Wayne Brown : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee vs. GARY WELCH BROWN, Defendant/Appellant	:	Case No. 20066(0969-CA

BRIEF OF APPELLEE

RESPONSE TO APPEAL FROM THE FIFTH DISTRICT COURT, WASHINGTON COUNTY STATE OF UTAH, FROM MISDEMEANOR CONVICTIONS OF SEXUAL BATTERY AND INTOXICATION, BEFORE THE HONORABLE G. RAND BEACHAM

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STATEMENT OF FACTS

The State has no disagreement with the facts of this case as the Appellant has presented them. The State therefore refers the Court to the Appellant's discussion of the relevant facts on pages 3 - 7 of the Appellant's brief.

ISSUE PRESENTED AND STANDARD OF REVIEW

The issue the Court must determine in this case is whether the trial court erred in allowing the testimony of Officer Shawn Carter regarding previous encounters he had with intoxicated persons. The admissibility of evidence is reviewed for "abuse of discretion or reasonability." *State v. Norton*, 2003 UT App 88, 4¶ 11, 67 P.3d 1050 (quoting *Mule-Hide Prods. Co. v. White*, 2002 UT App 1, ¶ 12, 40 P.3d 1155). This Court has previously stated that "'[w]hile relevant evidence is generally admissible . . . a

trial court has broad discretion to determine whether proffered evidence is relevant, and we will find error in a relevancy ruling only if the trial court has abused its discretion.'" *Id.* at ¶ 22 (quoting *State v. Kohl*, 2000 UT 35, ¶ 17, 999 P.2d 7). This "abuse of discretion" standard also applies to a trial court's determination of the prejudicial effect of evidence. *See State v. Dominguez*, 2003 UT App 158, ¶ 23, 72 P.3d 127 (trial court's pre-trial ruling on the prejudicial effect of proffered evidence was not an abuse of discretion).

ARGUMENT

I. The testimony of Officer Carter regarding his training and experience was relevant to the issue of whether or not Officer Carter had probable cause to arrest, and therefore was admissible.

The elements of the crime of public intoxication, as they apply to this case, are that a person must be (1) under the influence of alcohol, (2) to a degree that they pose a danger to themselves or others, (3) in a public place.[1] The burden is on the State to prove each of these elements beyond a reasonable doubt. Officer Carter's testimony was relevant to each of these elements, and was therefore admissible at Mr. Brown's trial.

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[1]The crime of intoxication is codified in § 76-9-701 of the Utah Code:

> A person is guilty of intoxication if the person is under the influence of alcohol, a controlled substance, or any substance having the property of releasing toxic vapors, to a degree that the person may endanger the person or another, in a public place or in a private place where the person unreasonably disturbs other persons....

Utah Code Ann. § 76-9-701 (Lexis 2007)

According to the Utah Rules of Evidence, evidence is relevant if it has any tendency to make "the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Utah R. Evid. 401. All relevant evidence is admissible except as provided for by statute, constitution, other rules of evidence, or other local rules. *Id.* at 402. Some such provisions are enumerated at Rule 403, which 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[.]" *Id.* at 403.[2] The consequential fact addressed by Officer Carter's testimony, which goes to the first element of the offense, was whether he had any objectively identifiable information to indicate that the defendant was probably intoxicated.

Probable cause determinations are reviewed under an "'objective standard: whether from the facts known to the officer, and the inferences [that can] fairly . . . be drawn therefrom, a reasonable and prudent person in [the officer's] position would be justified in believing that the suspect had committed the offense'" for which he was arrested. *State v. Trane*, 2002 UT 97, ¶ 27 (quoting *State v. Cole*, 674 P.2d 119, 125 (Utah 1983) (alterations in original). "The validity of the probable cause determination is made from the objective standpoint of a 'prudent, reasonable, cautious police officer . . . guided by his experience and training.'" *State v. Dorsey*, 731 P.2d 1085, 1088 (Utah

[2]Rules 401 to 403 match the corresponding Federal Rules of Evidence verbatim.

1986) (emphasis added, quoting *United States v. Davis,* 458 F.2d 819, 821 (D.C. Cir.1972)).

Officer Carter testified that he perceived several indicia of intoxication when he encountered Mr. Brown, including slurred speech, glassy eyes, unsteadiness on his feet, and a strong scent of alcohol emanating from him. Mr. Brown also admitted that he had been consuming alcohol in the last hour. Taking these factors into account, Officer Carter reasonably compared these symptoms to those of others he had encountered in order to determine whether it was probable that Mr. Brown was intoxicated. In other words, the testimony regarding the intoxilizer test results of others was not offered to show that Mr. Brown was intoxicated, but rather to show that Officer Carter's impressions were formed on objectively reasonable and prudent bases. Officer Carter's probable cause determination was at issue in this case, and therefore, any testimony serving to show that this determination was prudent and reasonable was admissible at trial. Officer Carter's impressions, and the training and experience he used to evaluate those impressions, were absolutely relevant to the State's case.

The present case is readily distinguishable from *State v. Colwell*, 2000 UT 8, 994 P.2d 177, as discussed in the appellant's brief. In that case, the Utah Supreme Court upheld a trial court's exclusion of testimony of an officer's knowledge of officer-assisted suicide, stating that it was irrelevant "to the defendant's state of mind at the time of the offense . . . [and] [did] not shed light on the defendant's intent or state of mind at the time of the offense." *Id.* at ¶ 28 (first two alterations in original). That case dealt with a very

different factual scenario than is present in this case. *Colwell* dealt with an exchange of gunfire between an officer and a driver during a traffic stop. Fortunately for the citizens of Washington County, incidents of gun violence are rare, and the necessity of officers being trained in identifying possible officer-assisted suicide attempts has comparatively little relevance to Mr. Brown's case. Conversely, officers frequently encounter intoxicated persons, and are commensurately familiar with the tell-tale signs of substance-induced impairment. It is quite reasonable for a court to conclude, as this Court has many times before, that an officer's observations of intoxication provide probable cause for arrest for public intoxication. See *State v. Henderson*, 2007 UT App 125, 159 P.3d 397; *State v. Trane*, 2002 UT 97, 57 P.3d 1052. Also, the elements at issue in *Colwell,* particularly the intent of the defendant to kill the officer or to die as a result of his return fire, are not present in a simple public intoxication charge; intent is not an element of public intoxication.

II: The probative value of Officer Carter's testimony outweighed its prejudicial potential.

While Rule 403 protects parties against prejudicial evidence, all evidence establishing guilt is somewhat prejudicial to the defendant. Rule 403 only "excludes evidence which poses a danger of unfair prejudice that substantially outweighs the probative value of that evidence." *State v. Decorso,* 1999 UT 57, ¶ 80, 993 P.2d 837. Therefore, in determining whether testimony is unfairly prejudicial, the reviewing court must balance the testimony's probative value against its prejudicial value. *Deters v. Equifax Credit Information Services, Inc.*, 202 F.3d 1262, 1274 (10th Cir. 2000). In

performing this balancing test, "'the court should give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value.'" Id. (quoting *Securities and Exchange Commission v. Peters*, 978 F.2d 1162, 1171 (10th Cir.1992)).

The State readily concedes that the questioned testimony possessed some minor prejudicial value. However, the probative force of the testimony far outweighed this prejudicial value. As Mr. Brown claims, there is the possibility that testimony led the jury to inaccurately and unconsciously link Mr. Brown to other intoxicated persons. However, this possibility was remote, and eliminated by the limitations on the testimony erected by the trial court. Judge Beacham specifically admitted the testimony "to suggest the officer's background and experience," and voiced that it would be inappropriate for the testimony to "suggest . . . anything directly measurement-wise toward Mr. Brown." (R. 66:143). These limitations effectively eliminated any prejudicial effect the testimony may have had, leaving only the probative value for the jury to consider.

The probative value of this testimony was substantial. Officer Carter had previously encountered persons who both exhibited the same characteristics as Mr. Brown, such as slurred speech, glassy eyes, unsteadiness, and a predominant odor of alcohol on their persons. He had also administered blood-alcohol tests to these people, and all of them had tested as intoxicated. Therefore, in his training and experience, any other person displaying these characteristics would also probably test as intoxicated. Therefore, he felt he had probable cause to arrest Mr. Brown for intoxication when viewing his perceived condition in concert with his conduct towards Ms. Reynolds. The

questioned testimony had substantially more probative value than prejudicial value, and as such was admissible at trial.

CONCLUSION

The trial court did not abuse its discretion in allowing the testimony of Officer Carter regarding the intoxilyzer results of other persons. These results provided a reasonable basis for Officer Carter to conclude that Mr. Brown was probably guilty of the crime of intoxication, and was therefore relevant to the jury's factual calculus. The prejudicial potential of this testimony was outweighed by its probative value; therefore the trial court was correct to allow it, and defendant's conviction should be upheld.

RESPECTFULLY SUBMITTED this 23 day of January, 2008.

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CERTIFICATE OF MAILING

I hereby certify that I caused two (2) true and correct copies of the foregoing Brief of Appellee to be deposited in the U. S. Mail, addressed to Margaret P. Lindsay, Counsel for Appellant, at P. O. Box 1895, Orem, Utah 84059-1895, first-class postage fully prepaid, on the 24 day of January, 2008.

MATHEW C. MILLER