

1995

The State of Utah v. Max L. Smith : Brief of Appellant

Utah Court of Appeals

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Jan Graham; Utah Attorney General; Counsel for Appellee.

Margaret P. Lindsay; Aldrich, Nelson, Weight and Esplin; Counsel for Appellant.

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CONTROLLING STATUTORY PROVISIONS

Utah Code Annotated Section 41-6-44(7) (a) (1994 Supp.)

A fourth or subsequent conviction for a violation committed within six years of the prior violations under this section is a third degree felony if at least three prior convictions are for violations committed after April 23, 1990.

STATEMENT OF THE CASE

A. Nature of the Case

Max L. Smith appeals from the judgment, sentence and commitment imposed by the Honorable Guy R. Burningham on September 27, 1995, after a jury trial at which Smith was convicted of Driving under the Influence, a third degree felony, in violation of Utah Code Annotated Section 41-6-44.

B. Trial Court Proceedings and Disposition

Smith was charged by information filed on or about January 18, 1995, with Driving Under the Influence, a third degree felony, in violation of Utah Code Annotated Section 41-6-44 (1995 Supp.) (R. 9)¹. A preliminary hearing was conducted on January 26, 1995 (R. 7-8), after which Smith was bound-over to the Fourth District Court where they entered a plea of "not guilty" at arraignment (R. 11, 16).

¹Smith was also charged with Driving on Revocation, a class B misdemeanor, in violation of Utah Code Annotated Section 41-2-136. Smith, however, does not challenge that conviction on appeal.

On May 22, 1995, a jury trial was held in Fourth District Court, the Honorable Guy R. Burningham presiding, wherein Smith convicted (R. 145-355). Smith moved the trial court for an Arrest of Judgment on May 31, 1995 (R. 101-106); and that motion was denied by Order signed on July 17, 1995 (R. 124) On September 27, 1995, Judge Burningham sentenced Smith to three-years probation (R. 132-134, 356-368) and this appeal followed (R. 139).

STATEMENT OF RELEVANT FACTS

On May 22, 1995, a jury trial was conducted in Fourth District Court, the Honorable Guy R. Burningham presiding, at which Smith was convicted of Driving Under the Influence, a third degree felony (R. 145-355).

Prior to the beginning of trial, the parties gave notice to the trial court of their intent to enter a stipulation on the record which would bifurcate the proceedings and preclude the introduction of evidence of Smith's three/four prior DUI convictions until after the jury's deliberation on the charged offense in order to avoid the introduction of evidence which is more prejudicial than probative (R. 147). Then, if Smith was convicted by the jury of the charged offense minus the element of three prior convictions, Smith would waive the jury relative to the "prior convictions" element of the offense and the State

would present evidence of the prior convictions to the trial court (R. 147-48).²

The trial court refused to accept the stipulation stating that "I tried that once in another county and found that it was quite burdensome and confusing to the jury" (R. 148). The trial court added that, because the prior convictions constitute a necessary element of the charged offense, "I'm going to require that it be done according to the statute, rather than try to bifurcate it" (R. 148-49).

During trial, the jury was informed of Smith's prior convictions (R. 168-69, 258, 327) and was instructed prior to deliberation that the prior convictions were an essential element of the charged offense (R.84, 85 (Instruction Nos. 2 and 3)). In addition, the verdict form given to the jury required a finding of either "Guilty" or "Not Guilty" (R. 88). Smith was subsequently convicted by the jury (R. 88, 352-54).

SUMMARY OF ARGUMENT

Smith asserts that the trial court abused its discretion in refusing to accept the parties' stipulation to bifurcated

²In fact, the State advocated for a bifurcated procedure in its proposed jury instructions and verdict form (R. 25-56). For example, in the instruction setting forth the charge as contained in the criminal information and in the instruction breaking-down the essential elements of the offense, all references to prior convictions were removed (R. 53, 54). Likewise, in the State's proposed verdict form, the jury would be instructed to find either "The facts alleged have been proven" or "The facts alleged have **not** been proven" (R. 25) (emphasis in original).

proceedings. Utah courts have repeatedly found that in cases where prior convictions are an element of the charged offense, proceedings should be bifurcated, absent contrary legislative guidance, unless such convictions are competent to establish defendant's culpability for the offense for which he is then on trial. Moreover, a trial court's failure to bifurcate in such a case is reversible error for which prejudice is generally presumed. In this case, evidence of Smith's prior-DUI convictions could not establish that Smith was driving under the influence of alcohol at the time of the alleged offense. Therefore, it was prejudicial error constituting an abuse of discretion for the trial court to refuse to bifurcate the proceedings.

ARGUMENT

POINT I

THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO BIFURCATE THE PROCEEDINGS AS REQUESTED BY BOTH COUNSEL FOR THE STATE AND COUNSEL FOR SMITH

Immediately prior to the commencement of Smith's trial, the trial court was presented with a proposed stipulation by the parties which would bifurcate the proceedings and prohibit the introduction of evidence of Smith's prior DUI convictions until the jury had convicted Smith of the other elements of the current DUI charge (R. 147-48). The purpose of the stipulation was to

avoid the introduction of unduly prejudicial evidence to the jury prior to their examination of the elements relating solely to the incident which formed the basis of the current charge (R. 147).

The trial court refused the request to bifurcate the proceedings because it would be "quite burdensome and confusing to the jury" (R. 148); and because the prior convictions constituted a necessary element of the charged felony-DUI offense.

During trial, the jury was informed of Smith's prior convictions (R. 168-69, 258, 327) and Smith was subsequently found "guilty" of the charged offense (R. 88, 352-54).

Smith asserts that the trial court abused its discretion, and committed reversible error, in its refusal to bifurcate the evidence of Smith's prior-DUI convictions from evidence related exclusively to the commission of the charged DUI.

In State v. Stewart, 171 P.2d 383 (Utah 1946), the Utah Supreme Court outlined a bifurcated procedure to be followed by trial courts in DUI cases which involve prior-DUI convictions and purport to impose a greater punishment for a subsequent DUI offense. The purpose of this procedure, in the absence of legislative direction, was to "properly expedite the adjudication of such cases, while at the same time safeguard[ing] the substantial rights of accused persons and to prevent an accused person from being advertised to the jury as one who previously

perpetrated a similar type of offense.” Stewart, 171 P.2d at 386. This procedure was instigated by the Court “in view of the prejudicial nature of the evidence of prior conviction as such evidence bears on proof of commission of the substantive offense.” Id.

The Utah Supreme Court then adopted the bifurcated procedure utilized by the Connecticut Supreme Court in State v. Ferrone, 113 A. 452, a habitual criminal case: In the absence of statutory regulation, the information should be divided into two parts. The first detailing the elements of the current offense; and the second, alleging the existence of prior convictions. Stewart, 171 P.2d at 387 (quoting Ferrone, 113 A. at 457). The jury should initially receive and deliberate only on the first part of the information. Id. Then if the jury returns a verdict of “guilty” on the substantive offense, then they should be given the second part of the information and “should be charged to inquire on that issue.” Id.

In addition, the Utah Court quoted and adopted language from Ferrone which allows the defendant to plead guilty to the second part of the information so that further proceedings with the jury are not necessary, or the defendant could choose to submit the second issue of prior convictions to the court and not the jury. Id.

Accordingly, the Stewart Court held that because "the prior convictions could not properly be considered by the jury in determining the guilt or innocence of the defendant of the substantive offense," it was "reversible error to permit evidence thereof to be presented to the jury in the trial of that issue." Stewart, 171 P.2d at 386. Furthermore, Utah courts have repeatedly affirmed that "evidence of prior crimes is generally presumed prejudicial and that 'absent a reason for the admission of the evidence other than to show criminal disposition, the evidence is excluded.'" State v. James, 767 P.2d 549, 557 (Utah 1989).

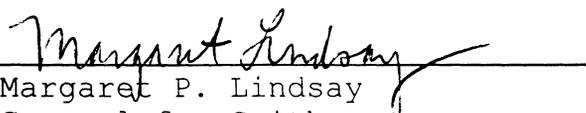
In James, the Utah Supreme Court exercised its "inherent supervisory power over trial courts" and adopted a bifurcated procedure in the context of first degree murder under Utah Code Annotated Section 76-5-202(1)(h) which would preclude presentation of defendant's prior conviction until a finding of guilt on the current killing. James, 767 at 557. Accord, State v. Florez, 777 P.2d 452 (Utah 1989); State v. Bishop, 753 P.2d 439, 494-99 (Utah 1988) (separate opinion of Zimmerman, J.). See also, State v. Saunders, 699 P.2d 738 (Utah 1985) (Trial court abused its discretion in refusing to sever burglary and theft charges from possession of firearm charge for which evidence of a prior conviction was admissible).

Likewise, in this case the statute is devoid of any guidance from the legislature as to the procedures to be used in felony-DUI proceedings. Utah Code Annotated Section 41-6-44(7) (1993) simply states that a "fourth or subsequent conviction for a violation committed within six years of the prior violations. . . is a third degree felony" that is subject to a greater penalty. Moreover, like the scenarios in Stewart and Ferrone, "until a verdict has been rendered on the principal offense, there is no occasion to mention the prior convictions since previous offenses would not be competent to prove that defendant committed the offense for which he is then on trial." Stewart, 171 P.2d at 387. In other words, evidence of Smith's prior-DUI convictions is incompetent to prove that, on the occasion resulting in the current offense, Smith was driving under the influence of alcohol. Accordingly, prejudice to Smith which resulted from the jury's knowledge of the prior convictions should be presumed; and this Court should conclude that the trial court, in refusing to bifurcate the proceedings as requested by the parties, abused its discretion.

CONCLUSION AND PRECISE RELIEF SOUGHT

Based upon the trial court's failure to bifurcate the proceedings as required by established precedent, Smith asks this Court to reverse his conviction on grounds that he was prejudiced by the jury's knowledge of his previous DUI convictions prior to deliberation on the current, substantive offense.

RESPECTFULLY SUBMITTED this 17 day of January, 1997.


Margaret P. Lindsay
Counsel for Smith

ADDENDUM

No addendum is necessary in this brief pursuant to Rule 24(a)(11) of the Utah Rules of Appellate Procedure.

CERTIFICATE OF MAILING

I hereby certify that I delivered two (2) true and correct copies of the foregoing Brief Of Appellant to the Appeals Division, Utah Attorney General, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 17 day of January, 1997.

