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

Utah Court of Appeals

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A. Utah case law requires bifurcation.

In State v. Stewart, the Utah Supreme Court found that bifurcation was necessary in DUI cases which called for a harsher punishment if convicted because of prior DUI offenses. The Court adopted this procedure “in view of the prejudicial nature of the evidence of prior conviction as such evidence bears on proof of commission of substantive offense. Stewart, 171 P.2d at 386. The Court held that since “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.” Id. Furthermore, Utah courts, including the most recent decision, State v. Doporto, 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).

1. State v. Doporto holds that prior conviction evidence is highly prejudicial.

In State v. Doporto, the Utah Supreme Court reversed the defendant's conviction and remanded for a new trial because the trial court had admitted prior crime evidence which did not have any "probative value beyond the prohibited inference that he had some propensity to commit such crimes and acted in accordance with that propensity." Id. at 20.

In rendering its decision, the Court determined that due to the "acute concerns of fundamental fairness arising from the real possibility that the defendant will be convicted for his presumed bad character rather than his acts" when prior crime evidence is admitted, appellate courts in Utah should "review closely the trial court's justifications when it chooses to admit evidence under 404(b)". Id. at 14.

Moreover, the Court set forth a three-prong test relating to the admissibility or prior crime evidence:

To assure the integrity of the trial process, we hold that evidence of prior crimes is presumed to be inadmissible and that, prior to admitting it, the trial court must find that (1) there is a necessity for the prior crime evidence, (2) it is highly probative of a material issue of the crime charged, and (3) its special probativeness and the necessity for it outweigh its prejudicial effect. As stated above, we will review the trial court's rulings on these issues more closely than ordinary rulings on relevance and with a limited deference."

Id. at 16.

Although Rule 402 provides that any evidence that is relevant may be admissible, Rule 404(b) clearly prohibits the use of prior crime evidence to "prove the character of a person in order to show action in conformity therewith." Id. at 18. The evidence may be used for other purposes outlined in Rule 404(b). However, "even if relevant to prove such issues, the prior crime evidence must meet certain standards. First, it must be necessary; it cannot be used to prove a point not really contested. Second, it must be strongly probative of a material issue, a probativeness that cannot serve as a ruse for showing that the defendant's propensity is such that he is likely to have committed the kind of crime charged." Id. at 19 (emphasis added).

2. Bifurcation is necessary when prior convictions “bear on the sentence to be imposed.”

The Doporto court describes two situations in which prior crime evidence may be admissible. "First, the commission of prior crimes may, itself, constitute an element of the crime charged or bear on the sentence to be imposed Second, evidence of prior crimes may be adduced as circumstantial evidence of a material element of the crime charged. The highly prejudicial effect of prior crime evidence has been recognized in both instances and dealt with in different way." Id. at 8.

In referring to the type of prior crime evidence at issue in this case, the Court explained:

The first category of prior crime evidence is admissible because the commission of a prior crime or crimes is an aggravating factor constituting an element of the crime charged and must be proved beyond a reasonable doubt for the prosecution to prove all the elements of that enhanced charge. We have held that prior crime evidence must not be allowed to prejudice the finder of fact in deciding the issue of guilt on the underlying charge. To that end, we have required that the prior crime evidence be presented in a separate bifurcated proceeding, after the proceeding where guilt is decided on the underlying charge."

Id. at 8, 9.

In the present case, Smith and the State stipulated to the three prior convictions, rendering it unnecessary for the prosecution to prove this element beyond a reasonable doubt. Unfortunately, the judge refused to accept the motion. He explained: "I tried that once in another county and found that it was quite burdensome and confusing to the jury" (R. 148) Further, he stated to the defense attorney that "I think you can take away any prejudicial effect if you just instruct the jury that that's one [element] they don't even

need to worry about but attack on the ones that you do intend to attack in court today” (R. 149).

However, even if Smith had not stipulated to the three convictions, the Utah Supreme Court in Doperto has made it clear that the prior conviction element of felony DUI must be proved in a separate proceeding after the jury had made a determination on the present charge. The trial court committed error by allowing the prosecution to discuss the previous convictions in the guilt phase. In his opening statement, the prosecuting attorney referred to the prior convictions: “In addition, as you’ve heard previously, the defendant is charged with a felony. A felony occurs in Utah when a person has three prior convictions for DUI after April 23rd of 1990. Counsel agrees with me that that has occurred. So you can take that as a given.” (R. 168-69) At the close of the prosecution’s case-in-chief, the attorney again referred to the prior convictions. (Id. 258) Finally, in his closing argument, he stated again “that he (Smith) has the three prior convictions. Well, we’ve stipulated to that” (R. 327).

By requiring the inclusion of the prejudicial prior conviction evidence during the guilt phase, the trial court erroneously allowed the jury's verdict to be tainted by evidence which the jury should not have heard until Smith's guilt or innocence on the present charge had been determined.

C. The trial court committed reversible error because the nature of the crime to be proved was the same as the prior convictions.

In Doport, the Utah Supreme Court also reviewed whether the erroneous admission of prior crime evidence constituted reversible error. Doport, 308 Utah Adv. Rep. at 27, 28. The Court reiterated the “harmless error” standard: “A conviction will not be reversed even if there is error unless the error is 'prejudicial in the sense that there is a reasonable likelihood that in its absence there would have been a more favorable result for the defendant.’” Id. at 28 (citing State v. Johnson, 771 P.2d 1071, 1073).

However, the Court concluded that the trial court committed reversible error because the Court was "wholly unable to conclude that the jury was uninfluenced by that [prior crime] evidence in assessing defendant's and the victim's credibility. We cannot say with any assurance that absent the erroneous admission of the evidence of the prior crime evidence, the result would have been the same [in convicting the defendant]." Id. at 29.

Because of the presumed highly prejudicial nature of admitting Smith's three previous convictions in the guilt phase, it seems unlikely that the jury was "uninfluenced" by the prior DUI convictions in its assessment of Smith and his credibility.. Smith's explanation of the facts never had a chance because of the jury’s likely belief relating to Smith’s predisposition of guilt which was spawned by the evidence of the three previous DUI charges. In accordance with Doport, it is clear that the trial court committed

reversible error in allowing the jury to learn of Smith's prior convictions during the trial's guilt phase.

D. In a similar case to the one at bar, the North Dakota Supreme Court found that reversible error when the jury heard prior conviction evidence during the guilt phase.

In State v. Saul, 434 N.W.2d 572 (N.D. 1989), the North Dakota Supreme Court found that since "the defendant stipulated to prior convictions when charged under the enhancement provisions of [North Dakota's DUI statute], the submission of evidence of the defendant's prior convictions to a jury constitutes prejudicial and reversible error." Id. at 573 n. 1, 575. The court explained its holding by recognizing that "the risk is considerable that the jury may have improperly used [the defendant's] prior convictions to find him guilty of driving while under the influence in this case." Id. at 575. The court concluded:

When a defendant stipulates to the prior convictions, as in this case, he effectively removes that element of the crime from the charge, and we do not see any reason why evidence of the prior convictions should be submitted to the jury unless they are relevant to some disputed issue under Rule 404(b).

Id. at 575.

The court also addressed the role of the cautionary instruction provided by the trial court, finding that it may be appropriate to counterbalance the prejudicial effects of the prior conviction evidence when the prior convictions were contested. However, the court found "no purpose in risking reliance on the cautionary instruction to alleviate the prejudicial effect of the prior convictions when the defendant has stipulated to them." Id.

at 573 n. 2, 575. This court's decision reflects the Utah Supreme Court's sensitivity to the highly prejudicial nature of prior conviction evidence.

1. The trial judge did not give the jury any cautionary instructions to counterbalance the prejudicial effect of the prior crime evidence.

In the present case, the trial court not only refused the parties' stipulation but he also failed to give a cautionary instruction to the jury. Instead the court indicated to counsel before closing arguments that "I think we did soft pedal (sic) it enough so that I don't think it's a big issue with the jury. They realize what their duty is is to tell us whether or not on this occasion Mr. Smith was driving under the influence" (R. 348-49).

Although the trial judge did not want the prosecuting attorney to make "a big deal" of Smith's prior convictions, this safeguard made no sense in light of Smith's stipulation to the prior convictions (R. 150). Also, this instruction to the attorneys could not take the place of a cautionary jury instruction.

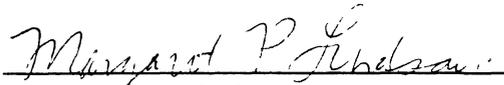
In contrast, in the Wisconsin case, State v. Alexander, 559 N.W.2d 925 (Wis. App. 1996), relied on by the State in its brief, the trial court used a cautionary instruction to counteract the prejudicial effect of admitting the defendant's prior convictions. Id. at 926. Such an instruction was not given here. Moreover, even had such a cautionary instruction been given by the trial court, in Utah bifurcation would still be required under State v. Stewart and State v. Doport.

CONCLUSION AND PRECISE RELIEF SOUGHT

Contrary to the State's assertion, the trial court's failure to provide for a bifurcated proceeding is reversible error. The evidence against Smith is not so overwhelming that this Court, under the heightened standard of review set forth in Doporto, can "wholly" conclude that the "jury was uninfluenced" by the prior crime evidence. Smith and his witnesses provided a reasonable explanation of the facts, indicating that Smith was not driving under the influence of alcohol (R. 264-306, 327-44). Unfortunately, because of the trial court's error in refusing to conduct bifurcated proceedings, the jury never had the opportunity to properly and fairly assess the credibility of Smith's position because of the prejudicial nature of the prior conviction evidence.

Accordingly, Smith asks this Court to reverse his conviction.

DATED this 3 day of June, 1997.


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CERTIFICATE OF MAILING

I hereby certify that I mailed, postage prepaid, two (2) true and correct copies of the foregoing Brief to James H. Beadles, Assistant Attorney General, Appeals Division, Heber Wells Building, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 3 day of June, 1997.

