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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
)
 Plaintiff-Respondent,) NO. 41355
)
 v.) BONNEVILLE COUNTY NO. CR 2012-
) 16081
)
 JOSHUA THOMAS BENNETT,) APPELLANT'S BRIEF
)
 Defendant-Appellant.)
 _____)

COPY

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BONNEVILLE

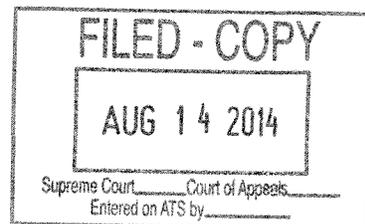
HONORABLE JOEL E. TINGEY
District Judge

SARA B. THOMAS
State Appellate Public Defender
State of Idaho
I.S.B. #5867

ERIK R. LEHTINEN
Chief, Appellate Unit
I.S.B. #6247

SPENCER J. HAHN
Deputy State Appellate Public Defender
I.S.B. #8576
3050 N. Lake Harbor Lane, Suite 100
Boise, ID 83703
(208) 334-2712

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534



ATTORNEYS FOR
DEFENDANT-APPELLANT

ATTORNEY FOR
PLAINTIFF-RESPONDENT

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STATEMENT OF THE CASE

Nature of the Case

Joshua Thomas Bennett appeals from the judgment of conviction for delivery of a controlled substance (marijuana) following a jury trial. On appeal, he asserts that the district court erred, and violated his Sixth Amendment right to confront his accuser, when it sustained the State's relevance objection during his attempt to cross-examine the State's key witness regarding a matter testified to on direct examination and that concerned the witness' bias, interest, or motive.

Statement of the Facts and Course of Proceedings

Following a jury trial at which the chief witness against him was Levi Sermon, a confidential informant, Mr. Bennett was found guilty of delivery of a controlled substance (marijuana). (*See generally* Trs.) During defense counsel's cross-examination of Mr. Sermon, he attempted to ask Mr. Sermon about his prior activities as a cocaine dealer, but the district court sustained the State's relevancy objection. (Tr. (Vol. II), p.13, L.17 – p.15, L.17.) This was despite the fact that, on direct examination, Mr. Sermon had testified regarding his past as a cocaine dealer, and claimed that making amends for his past work as a drug dealer was the main reason why he began working as an informant. (Tr. (Vol. I), p.222, Ls.10-16.)

Mr. Bennett received a unified sentence of five years, with two-and-one-half years fixed (R., pp.131-32), and filed a timely notice of appeal. (R., p.140.)

ISSUE

Did the district court err, and violate Mr. Bennett's Sixth Amendment right to confront his accuser, when it sustained the State's relevance objection during his attempt to cross-examine the confidential informant regarding matters testified to on direct examination and that concerned his bias, interest, or motive?

ARGUMENT

The District Court Erred, And Violated Mr. Bennett's Sixth Amendment Right To Confront His Accuser, When It Sustained The State's Relevance Objection During His Attempt To Cross-Examine The Confidential Informant Regarding Matters Testified To On Direct Examination And That Concerned His Bias, Interest, Or Motive

A. Introduction

At trial, after establishing that confidential informant Levi Sermon was being paid \$200 to \$300 for each controlled buy he completed for police (Tr. (Vol. II), p.13, Ls.4-16),¹ defense counsel attempted to cross-examine him regarding his past as a drug dealer, as follows:

Q. How many times did you sell cocaine?

[Prosecutor:] Your Honor, I'm going to object. That's not relevant to this particular inquiry.

[Defense counsel:] I believe it is, Your Honor. *They raised it yesterday – his past, his drug dealing. I think we're entitled to go into it because it affects his credibility.*

[Prosecutor:] His prior conduct years ago does not affect his credibility on the issues of this date. The number of times he may have engaged in a felony itself does not affect his credibility on this date.

[Defense counsel:] We've talked about it already. She brought it up yesterday, and I'm following up today. And he – without any objection, he started – he talked about selling cocaine. That was what his prior felony was. So I'm asking him how many times he did it.

THE COURT: I don't know how long ago we're talking about. Because it may not be relevant at this point.

[Defense counsel:] All right. I guess I could . . .

THE COURT: I mean, was it more recent than – I think you need to lay some kind of foundation.

[Defense counsel:] Okay. Thank you.

¹ He had previously worked as an informant to avoid a conviction for selling cocaine. (Tr. (Vol. II), p.11, L.11 – p.12, L.2.)

Q. After your bust for cocaine delivery, did you sell cocaine after that point?

A. No.

Q. But you did before that point?

A. Yes.

Q. Okay. How long before that point?

THE COURT: Okay. I don't know when he was busted for –

Q. When were you busted for cocaine sales?

A. I believe it was 2009.

Q. Okay.

[Prosecutor:] Your Honor, I'm going to object to any further inquiry. He hasn't been convicted of that. I allowed some of it because I felt it was relevant to the cooperation agreement and why he was working in the first place. But going into specific instances is completely inappropriate, and it's not a conviction. So I'm going to object to any further inquiry into this.

[Defense counsel:] Your Honor –

THE COURT: It was four years ago.

[Defense counsel:] Yes. But we're establishing what this gentleman's knowledge of his drug trade is. *He's the one that mentioned it yesterday.*

THE COURT: I'll sustain the objection. I think it's been argued sufficiently.

[Defense counsel:] Okay.

(Tr. (Vol. II), p.13, L.17 – p.15, L.17 (emphases added).)

During the State's direct examination of Mr. Sermon, it had inquired as to why he "start[ed] working [as an informant] for the sheriff's office in the first place," to which he responded,

I used to be a drug dealer. All I could think about every night was how many kids' lives I'd ruined, how many mamas' babies is out doing drugs

because of me. I feel like I'm giving back and doing something that's right.
No mom or parent should have to see that.

(Tr. (Vol. I), p.222, Ls.10-16.)

Because I.R.E. 611(b) provides that “[c]ross-examination should be limited to the subject matter of direct examination and matters affecting the credibility of the witness,” and because the answer sought was relevant to the confidential informant’s motivation to testify, the district court abused its discretion when it sustained the State’s relevance objection to his attempt to cross-examine the confidential informant regarding matters he testified to on direct examination, namely his motivation for acting as an informant.² Additionally, the district court’s decision to sustain the State’s objection deprived Mr. Bennett of his Sixth Amendment right to confront his accuser.

B. The District Court Erred, And Violated Mr. Bennett’s Sixth Amendment Right To Confront His Accuser, When It Sustained The State’s Relevance Objection During Mr. Bennett’s Attempt To Cross-Examine The Confidential Informant Regarding Matters Testified To On Direct Examination And That Concerned His Bias, Interest, Or Motive

1. The District Court Abused Its Discretion When It Sustained The State’s Relevance Objection

Idaho Rule of Evidence 401 defines relevant evidence as “evidence having 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.” I.R.E. 401. The Idaho Court of Appeals has explained, “The credibility of a witness is always material.” *State v. Guinn*, 114 Idaho 30, 38 (Ct. App. 1988). Quoting the United

² Because this issue is non-constitutional, Mr. Bennett will discuss it first. See *State v. Pierce*, 150 Idaho 1, 6 (2010) (W. Jones, J., concurring) (“It is a fundamental principle of our jurisprudence that courts pass on deciding constitutional issues if the case can be decided without addressing the constitutional question.”) (citations omitted).

States Supreme Court's interpretation of the similar federal rule of evidence, the Court of Appeals has explained that evidence that bears on credibility is relevant, and that "[b]ias may be induced by a witness' . . . self-interest.' Generally, 'Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony.'" *State v. Thumm*, 153 Idaho 533, 540 (Ct. App. 2012) (quoting *United States v. Abel*, 469 U.S. 45, 52 (1984)) (citations omitted).

Idaho Rule of Evidence 611(b), in relevant part, provides, "Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness." I.R.E. 611(b). The Idaho Court of Appeals has explained, "The appropriate scope of cross-examination includes not only the facts testified to on direct examination, but other facts connected with those facts, directly or indirectly, tending to explain, modify, or qualify the inferences resulting from the direct examination." *State v. Brummett*, 150 Idaho 339, 344 (Ct. App. 2010) (citing *State v. Starry*, 96 Idaho 148, 150 (1974)).

Defense counsel was attempting to cross-examine Mr. Sermon about a matter he testified to on direct examination – his motivation for acting as an informant – and about a matter that went directly to his bias, interest, and motive in acting as a confidential informant and testifying for the State. Both bases for the subject on which defense counsel sought to cross-examine Mr. Sermon were appropriate areas of inquiry under I.R.E. 401 and 611(b). As such, the district court abused its discretion when it failed to recognize both the relevance of the questioning and the fact that it was an area to which cross-examination "should be limited" under I.R.E. 611(b). In light of the crucial nature

of Mr. Sermon's testimony, the district court's abuse of discretion cannot be said to have been harmless beyond a reasonable doubt.

2. Mr. Bennett's Sixth Amendment Right To Confront His Accuser Was Violated When The District Court Sustained The State's Relevance Objection

The Sixth Amendment to the United States Constitution, in relevant part, provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

The United States Supreme Court has explained the significance of the Sixth Amendment right to cross-examine the government's witnesses as follows:

Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. . . . A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight of his testimony." *We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.*

Davis v. Alaska, 415 U.S. 308, 316-17 (1974) (internal citations omitted) (emphasis added). The Idaho Supreme Court has explained, "This court has consistently held that where a defendant is seeking on cross-examination to show bias or test the credibility of the complaining witness, the trial court should allow considerable latitude." *State v. White*, 97 Idaho 708, 713 (1976) (citing *State v. Storms*, 84 Idaho 372, 375-76 (1962)).

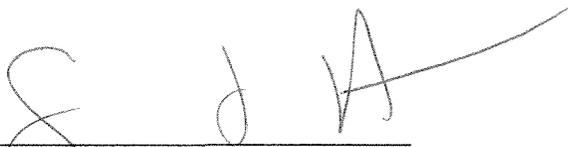
Mr. Bennett's thwarted attempt to cross-examine Mr. Sermon regarding his testimony on direct examination, which also concerned his bias, interest, or motive in

acting as a confidential informant and testifying against Mr. Bennett violated his Sixth Amendment right to confront his accuser. In preventing Mr. Bennett from cross-examining on the issue, the district court failed to recognize what the United States Supreme Court and the Idaho Supreme Court have recognized: that the trial court should give “considerable latitude” to defense counsel and that “exposure of a witness’ motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.” In light of the crucial nature of Mr. Sermon’s testimony, the violation of Mr. Bennett’s Sixth Amendment right to confrontation cannot be said to have been harmless beyond a reasonable doubt.

CONCLUSION

For the reasons set forth herein, Mr. Bennett respectfully requests that this Court vacate the judgment of conviction, and remand this matter to the district court for a new trial at which he is allowed to conduct adequate cross-examination of the State’s chief witness against him.

DATED this 14th day of August, 2014.



SPENCER J. HAHN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 14th day of August, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

JOSHUA THOMAS BENNETT
INMATE #87291
ISCC
PO BOX 70010
BOISE ID 83707

JOEL E TINGEY
DISTRICT COURT JUDGE
E-MAILED BRIEF

R MACKAY HANKS
ATTORNEY AT LAW
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720-0010

Hand delivered to Attorney General's mailbox at Supreme Court.



EVAN A. SMITH
Administrative Assistant

SJH/eas