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State v. Dent Appellant's Brief Dckt. 42383

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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 42383
Plaintiff-Respondent,)	
)	CANYON COUNTY NO.
v.)	CR 2013-24882
)	
CYNTHIA EVON DENT,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

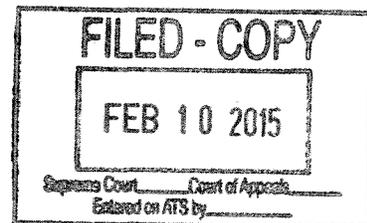
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STATEMENT OF THE CASE

Nature of the Case

Cynthia Dent appeals contending that her Fifth Amendment rights were violated when, while on trial for possession of methamphetamine, a police officer commented on her exercise of her right to remain silent. That violation of her constitutional rights constitutes fundamental error. Therefore, this Court should vacate her conviction and remand the case for a new trial.

Statement of the Facts and Course of Proceedings

Ms. Dent was already having a bad day before and during her encounter with the police officers. She was concerned that people were out to hurt her and texted her mother about those concerns. (Tr., Vol.2, p.156, L.23 - p.157, L.3.)¹ Her mother, worried that her daughter was suffering from schizophrenia or bipolar disorder, called the police and told them her concerns. (Tr., Vol.2, p.185, Ls.19-25.) As a result, officers were sent to perform a welfare check on Ms. Dent. (Tr., Vol.2, p.156, Ls.8-13.) Officer Joel Woodward was one of the officers who responded to that call. Upon contacting Ms. Dent at her home, Ms. Dent told Officer Woodward that she was concerned that people were hiding drugs in her house and using her car to move drugs. (Tr., Vol.2, p.162, Ls.11-12; Tr., Vol.2, p.164, Ls.14-15.) She said she also thought that people were hiding cameras in her house. (Tr., Vo.2, p.162, Ls.7-11.)

However, Ms. Dent was not destined to get help from the officers. Rather, Officer Woodward concluded that she was suffering from paranoia caused by drug use.

¹ The transcripts in this case are provided in two independently bound and paginated volumes. To avoid confusion, "Vol.1" will refer to the volume containing the transcripts of the hearing on Ms. Dent's motion to dismiss and the sentencing hearing. "Vol.2" will refer to the volume containing the transcript of the jury trial.

(Tr., Vol.2, p.159, Ls.17-22.) He later admitted that his observations did not necessarily indicate drug use, as Ms. Dent's symptoms could also have been caused by a mental illness. (Tr., Vol.2, p.162, L.19.) He also admitted that the house did not smell of methamphetamine, nor did he look for other signs of drug use on Ms. Dent's body. (Tr., Vol.2, p.183, L.12 - p.184, L.19.) Nevertheless, he decided he wanted to search Ms. Dent's home, and he wanted to look around in the basement as part of his search. (See Tr., Vol.2, p.164, L.6 - p.165, L.3.) Officer Woodward and Ms. Dent went downstairs, and Officer Woodward noticed some baggies in one of the rooms. (Tr., Vol.2, p.165, Ls.6-10.) Officer Woodward believed they contained a small amount of methamphetamine. (Tr., Vol.2, p.165, Ls.6-10.)

At trial, Officer Woodward testified about the events following his discovery of the baggies:

[Question by prosecutor.] Did you ask the defendant about those baggies?

A. I did.

Q. What did she say about those baggies?

A. Initially stated that she didn't have -- she didn't know what they were. Thereafter, I had read her her *Miranda* rights² and she didn't want to talk about them.

(Tr., Vol.2, p.165, L.21 - p.166, L.3.) When Ms. Dent invoked her right to remain silent, Officer Woodward placed her under arrest for possession of methamphetamine. (Tr., Vol.2, p.166, Ls.6-12.)

Despite being taken into custody, Ms. Dent's day would get worse still. The State initially charged her with trafficking methamphetamine because the officers alleged she was in possession of more than twenty-eight grams of methamphetamine, specifically, 44.7 grams of methamphetamine. (R., pp.6-9.) They reached that total by

² See *Miranda v. Arizona*, 384 U.S. 436 (1966).

weighing not just the contents of the baggies, but the pipe(s) as well. (R., pp.23-24.) As a result of that charge, Ms. Dent's family and friends stopped talking to her and she lost her job because everyone believed she was a drug trafficker rather than just a user. (R., p.24; Tr., Vol.1, p.7, Ls.5-10.) And while the State eventually amended the charge to simple possession of methamphetamine (R., pp.31-32), the public record still indicates, without explanation, that Ms. Dent was originally charged with trafficking. (See Tr., Vol.1, p.7, Ls.5-13; see also Online Repository.)

A jury ultimately found Ms. Dent guilty of the amended charge of possession of methamphetamine. (R., pp.106-07.) The district court sentenced Ms. Dent to a unified term of four years, with two years fixed, but suspended that sentence for a three-year period of probation. (R., pp.113-15.) Ms. Dent filed a timely notice of appeal. (R., pp.116-18.)

ISSUE

Whether Officer Woodward's testimony commenting on Ms. Dent's decision to remain silent constitutes fundamental error.

ARGUMENT

Officer Woodward's Testimony Commenting On Ms. Dent's Decision To Remain Silent Constitutes Fundamental Error

Officer Woodward's testimony – "I had read [Ms. Dent] her *Miranda* rights and she didn't want to talk about them" – impermissibly commented on her exercise of her constitutional right to remain silent. As the Idaho Supreme Court has recently reiterated, "[i]f a prosecutor is allowed to introduce evidence of silence for any purpose, then the right to remain silent guaranteed in [*Miranda*] becomes so diluted as to be rendered worthless."³ *State v. Parker*, 157 Idaho 132, 147 (2014).

In *Parker*, the Supreme Court determined that an officer made an impermissible comment on the defendant's decision to remain silent when he testified, "As I was talking to him about [the acts being investigated], he said, 'I'm done.' . . . I took that as a sign that he did not want to talk to us any more [sic]." *Id.* The Supreme Court held that this constituted prosecutorial misconduct because, even if the comment about the defendant's decision to remain silent was unsolicited by the prosecutor, the improper testimony of the officer was imputed to the prosecution. *Id.*

The Supreme Court indicated that this error satisfied the first two prongs of Idaho's fundamental error test,⁴ since the violation of the defendant's rights under the Fifth and Fourteenth Amendment of the federal Constitution and Article I, section 13 of the Idaho constitution was clear from the record. *See Parker*, 157 Idaho at 147. The

³ There is an exception to this rule – that statements made before a defendant is given the *Miranda* warnings may be used to impeach her testimony at trial. *See, e.g., Parker*, 157 Idaho at 147. However, that exception is not applicable in this case because Ms. Dent did not testify at the trial.

⁴ The fundamental error test requires the defendant to prove: (1) that one or more of her unwaived constitutional rights were violated; (2) the error was clear from the record; and (3) the error affected the outcome of the proceedings. *See State v. Perry*, 150 Idaho 209, 226 (2010).

problem with such comments is that the jury may infer the defendant's guilt from her decision to invoke her right to remain silent, and thus, her silence is impermissibly used against her.

Similarly, in *State v. Ellington*, the Idaho Supreme Court determined that the officer made an impermissible comment on the defendant's invocation of his right to remain silent by answering the question, "And so you did not interview [the defendant]?" with the statement, "I attempted to." *State v. Ellington*, 151 Idaho 53, 59-60 (2011). The Supreme Court pointed out that there was no legitimate reason for the prosecutor to be asking that sort of question, especially since such questions create a high risk that an improper comment on the defendant's silence would be made by the officer. *Id.* at 61. Therefore, this also constituted prosecutorial misconduct.⁵ *Id.*

As in *Parker* and *Ellington*, Officer Woodward's testimony in this case contained an improper comment on Ms. Dent's decision to remain silent. Whether that comment was elicited by the prosecutor's question – "What did she say about those baggies?" – or whether it was an unsolicited comment by the officer, the record clearly shows that Ms. Dent's state and federal constitutional rights were violated by Officer Woodward's comment on her decision to remain silent.

The question, then, is whether that violation of Ms. Dent's constitutional rights affected the outcome of the trial proceedings. See *Perry*, 150 Idaho at 226. When there is no contemporaneous objection, the defendant bears the burden of proof under the harmless error test articulated in *Chapman v. California*, 386 U.S. 18 (1967). *Perry*, 150 Idaho at 225. Therefore, the proper inquiry is whether Ms. Dent can show that

⁵ The Supreme Court ultimately reversed Mr. Ellington's conviction on other grounds, and so, did not reach the question of whether this prosecutorial misconduct rose to the level of reversible error. *Ellington*, 151 Idaho at 76.

there is a reasonable possibility that the officer's improper comment on her invocation of silence contributed to the jury's decision to convict her. *Id.*; *Chapman*, 386 U.S. at 23-24.

The record in this case demonstrates that such a reasonable possibility exists. The jury heard testimony that Ms. Dent said she did not know anything about the baggies. (Tr., Vol.2, p.165, L.24 - p.166, L.1.) The jury also heard testimony that Ms. Dent was concerned that people were hiding drugs in her house and using her car to move drugs. (Tr., Vol.2, p.162, Ls.11-12; Tr., Vol.2, p.164, Ls.14-15.) And while Officer Woodward did not believe that Ms. Dent's concerns were anything other than paranoia, one of the jurors could have concluded that Ms. Dent was correct and that the baggies had been left in her house by another person without her knowledge.⁶

Such a conclusion is not unreasonable. As Richard Bentall, a professor of clinical psychology at Bangor University in the United Kingdom, has pointed out, "delusional ideas rarely lack a nugget of truth. No matter how bizarre the ideas expressed by patients, it is usually possible to identify events in their lives that have contributed to their content. Of course, this observation does not imply that delusions are rational. (Very few people really are victims of government plots.) The nugget of truth is usually distorted in some way" Richard P. Bentall, *Madness Explained: Psychosis and Human Nature* 308 (Penguin UK 2003); see also Richard P. Bentall, *Doctoring the Mind* 253 (NYU Press 2009) ("Not surprisingly . . . during treatment it often becomes obvious that there is a nugget of truth in even the most paranoid belief system."). Therefore, there is a reasonable possibility that the jurors harbored a

⁶ One of the elements of possession of a controlled substance is that the defendant has knowledge of the presence of a drug. See, e.g., *State v. Anderson*, 142 Idaho 62, 64 (Ct. App. 2005).

reasonable doubt as to whether Ms. Dent was telling the truth about not knowing what was in the baggies.

In fact, the jurors may have been particularly skeptical of Officer Woodward's conclusion that she was merely suffering drug-induced paranoia based on his testimony that, despite being a certified drug recognition expert, he did not smell methamphetamine in the house, nor did he notice any indications of drug use on Ms. Dent's person. (Tr., Vol.2, p.183, L.12 - p.184, L.19.)

There is also a reasonable possibility that this skeptical juror, the one fulfilling his duty to hold the State to its burden to prove Ms. Dent guilty *beyond* a reasonable doubt, would have abandoned his reasonable doubts about Ms. Dent's knowledge when Officer Woodward impermissibly commented on Ms. Dent's decision to remain silent.

This possibility is particularly likely in this case since Officer Woodward testified that Ms. Dent decided to stay silent immediately after being given the *Miranda* warnings. As the Supreme Court pointed out in *Parker*, drawing the connection between giving a person the *Miranda* warnings and the immediate decision to keep quiet constitutes an improper implication of guilt from the defendant's silence. *Parker*, 157 Idaho at 147. In fact, the possibility that the jurors drew that connection in this case is even more reasonable given Officer Woodward's testimony that he decided to place her under arrest once she decided to invoke her right to remain silent. As such, there is a reasonable possibility that Officer Woodward's improper testimony contributed to the verdict.

Ms. Dent recognizes that the *Parker* Court found no prejudice under similar circumstances. However, the reason for that determination in *Parker* was the Court's focus on the other evidence presented in the case, which it described as

“overwhelming.” See *id.* at 148. However, the Idaho Supreme Court has recently explained that focusing just on the “overwhelming” evidence is not exactly appropriate. See *State v. Thomas*, ___ P.3d ___, 2015 WL 300944, *4 (January 23, 2015), *not yet final*.

In *Thomas*, the Supreme Court pointed out that the State had argued the claimed error was harmless based on the other, purportedly-overwhelming evidence of the defendant’s guilt that had been presented at trial. *Id.* While pointing out that overwhelming evidence of guilt might be a factor in the harmless error analysis, the Supreme Court also decided that it was not the determinative factor. *Id.* Rather, it held that, “[i]n determining whether the constitutional error was harmless beyond a reasonable doubt, the issue ‘is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict *in the case at hand*.’” *Id.* (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (emphasis added)).

In applying this more appropriate analysis, the *Thomas* Court looked not only at the other evidence indicating the defendant may have been guilty, but also at the potential improper concerns the jurors may have had and the potential inappropriate conclusions they may have reached based on that evidence. For example, the Supreme Court pointed out that “[t]he jury could have assumed that none of [the alleged victim’s] friends that were interviewed would support [the defense’s theory of the case],” when, in fact, their testimony, which had been improperly excluded, would have supported the defense theory. *Id.* Thus, the Supreme Court concluded that, despite the purportedly-overwhelming evidence of guilt, the State, which bore the burden of

persuasion in that case, failed to show that there was not a reasonable possibility that the error had not contributed to the jury's verdict. *Id.*

As in *Thomas*, the evidence in this case reveals the reasonable possibility that the jurors were skeptical of the State's case but they abandoned that reasonable doubt because they inferred Ms. Dent's guilt from the inappropriate comment on her decision to remain silent. As such, the record shows a reasonable possibility that Officer Woodward's improper comment on Ms. Dent's invocation of silence contributed to the jury's decision to convict her, and thus, prejudice under the third prong of the *Perry* fundamental error test.

Therefore, Officer Woodward's comment on Ms. Dent's decision to remain silent constitutes fundamental error. As a result, this Court should vacate Ms. Dent's conviction based on that violation of her constitutional rights and remand this case for a new trial.

CONCLUSION

Ms. Dent respectfully requests that this Court vacate her conviction and remand this case for a new trial.

DATED this 10th day of February, 2015.



BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 10th day of February, 2015, 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:

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E-MAILED BRIEF

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