

2007

State of Utah v. Dawn Marie Downs : Brief of Appellee

Utah Court of Appeals

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Joanne C. Slotnik; Assiatant Attorney General; Mark L. Shurtleff; Attorney General; Roger S. Blaylock; Deputy Salt Lake District Attorney; Attorneys for Appellee.

Linda M. Jones; Salt Lake Legal Defender Assoc.; Attorney for Appellant.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
 :
 Plaintiff/Appellee, :
 :
 v. : Case No. 20070526-CA
 :
 DAWN MARIE DOWNS, :
 :
 Defendant/Appellant. :

BRIEF OF APPELLEE

- - - - -
APPEAL FROM A CONVICTION ON ONE COUNT OF
UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE
IN A CORRECTIONAL FACILITY, A SECOND DEGREE
FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-
37-8(2)(e) (SUPP. 2005), IN THE THIRD
JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE
COUNTY, THE HONORABLE ANN BOYDEN, PRESIDING

JOANNE C. SLOTNIK (4414)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
Attorney General
160 East 300 South, 6th Floor
Salt Lake City, Utah 84114
Telephone: (801) 366-0180

ROGER S. BLAYLOCK
Deputy Salt Lake District Attorney

Attorneys for Appellee

LINDA M. JONES
Salt Lake Legal Defender Association
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorney for Appellant

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Assistant Attorney General
MARK L. SHURTLEFF (4666)
Attorney General
160 East 300 South, 6th Floor
Salt Lake City, Utah 84114
Telephone: (801) 366-0180

ROGER S. BLAYLOCK
Deputy Salt Lake District Attorney

Attorneys for Appellee

LINDA M. JONES
Salt Lake Legal Defender Association
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorney for Appellant

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ARGUMENT

IN THIS PROSECUTION FOR DRUG POSSESSION IN A CORRECTIONAL FACILITY, THE TRIAL COURT REASONABLY ADMITTED, OVER RULE 401 AND 403 OBJECTIONS, EVIDENCE OF HOW POLICE CAME TO FIND DRUGS IN DEFENDANT’S PANTS POCKET BECAUSE THAT EVIDENCE WAS RELEVANT TO DEFENDANT’S INTENT AND KNOWLEDGE THAT SHE POSSESSED METHAMPHETAMINE AND WAS UNLIKELY TO HAVE CAUSED THE JURY TO CONVICT HER ON AN IMPROPER BASIS . 8

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff/Appellee, :
v. : Case No. 20070526-CA
DAWN MARIE DOWNS, :
Defendant/Appellant. :

BRIEF OF APPELLEE
- - - - -
JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction on one count of unlawful possession of a controlled substance in a correctional facility, a second degree felony (R. 170-72). This Court has jurisdiction over the appeal pursuant to Utah Code Ann. § 78-2a-3(2)(e) (West 2004).

STATEMENT OF THE ISSUE ON APPEAL AND
STANDARD OF APPELLATE REVIEW

In this prosecution for drug possession, did the trial court reasonably admit, over defendant's rule 401 and 403 objections, evidence of how police came to find drugs in her pants pocket?

An appellate court reviews the decision of a trial court "to admit or exclude evidence under [r]ule 403 [using] an abuse of discretion standard." State v. Castillo, 2007 UT App 324, ¶ 6, 170 P.3d 1147 (citation omitted). A lower court's decision to

admit evidence will not be reversed "unless it is 'beyond the limits of reasonability.'" Id. (quoting State v. Hamilton, 827 P.2d 232, 240 (Utah 1992)).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Rule 401, Utah Rules of Evidence, defines "relevant evidence:"

"Relevant evidence" means 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.

Rule 403, Utah Rules of Evidence, governs the exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time:

Although 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, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

Defendant was charged with one count of possession of a controlled substance (methamphetamine), a third degree felony (R. 2-3). The information was subsequently amended to one count of possession of a controlled substance in a correctional facility, a second degree felony (R. 103-04). A jury convicted defendant of the amended charge (R. 156). The court sentenced her to a suspended term of one-to-fifteen years in the Utah State Prison, 180 days in the county jail, 36 months of supervised probation, a

fine, and conditions of probation (R. 170-72). Defendant filed a timely notice of appeal (R. 173).

STATEMENT OF THE FACTS

Around 11 o'clock on a November night in 2005, police officers executed a search warrant targeting a drug distribution operation at 2965 South 700 East in Salt Lake City (R. 184: 115-16). The warrant specifically named Brian Stevens, who had twice sold drugs to a confidential informant and who had been under police surveillance for several weeks, and also generally referenced "all persons present at the home" (Id. at 141, 148). Stevens' girlfriend, the defendant in this case, had been living with Stevens for two to three years and was at home when the police arrived with the warrant (Id. at 121, 130, 145, 207, 223; R. 185: 256). In searching the home, officers found methamphetamine, packaging materials commonly used in drug distribution, other materials used to store and secret drugs, and more than \$4000 in cash in a safe in the closet of the couple's bedroom (R. 184: 121-28). Defendant told the officer in charge that "she didn't know anything that was going on in the home and didn't want to talk to [him]." Id. at 132; accord R. 185: 303.

In executing the warrant, officers utilized standard police procedure, including identifying and running warrants checks on all persons present (R. 184: 129-30). When the officers ran a warrants check on defendant, they discovered two outstanding misdemeanor justice court warrants, wholly unrelated to the

search warrant they were executing (Id. at 131, 167, 175). Defendant was transported to jail on the outstanding warrants (Id. at 167).

Prior to turning defendant over to jail personnel for admittance, the transportation officer asked her if she had "[a]ny kind of weapons or contraband, [or] controlled substances" with her "because if they take anything into the jail[,] it's an additional charge" (Id. at 168-69). A jail worker later asked defendant the same question (Id. at 156, 160). She maintained that she did not (Id. at 157, 169). When the jail worker subsequently searched defendant, however, the worker found a small plastic baggie of methamphetamine in the right front coin pocket of her pants (Id. at 157-58, 171-72). A Utah Crime Laboratory technician testified that both the unusual pink color of the plastic baggie found in the pants and the appearance of the methamphetamine itself was consistent with the baggies and drugs found in the home (Id. at 193, 197, 198). Nonetheless, defendant told the worker "that she didn't know where that [baggie of methamphetamine] came from and that it was not hers" (Id. at 162).

Defendant did not contest that she physically possessed the methamphetamine. Instead, she maintained that her possession was not intentional or knowing (R. 185: 319-23). Her defense rested on activities that occurred earlier on November 30, just a few hours before police executed the warrant (Id. at 329-30).

Defendant's girlfriends, Karen and Misty, testified that they, along with one additional friend, had planned a joint birthday lunch at Chuck-A-Rama on November 30 (R. 184: 204, 213). When Karen arrived at defendant's home to pick her up, defendant was not ready to go, so the women decided to drive to Thrift Town, a nearby used clothing store, to find some "good deals" while waiting for defendant (Id. at 205, 208-09).

Karen, who had worked at Thrift Town, testified that much of the clothing sold at Thrift Town was not washed before being sold, and that employees did not routinely check the pockets of the clothing (Id. at 218, 230). Consequently, she occasionally found things—such as Kleenex, a rubber, and a \$10 bill—in pockets of Thrift Town clothing (Id. at 219, 231).

Karen testified that she bought two shirts and two or three pairs of pants that afternoon. She put them in her car, along with several other pairs of pants she had previously purchased for her grown daughter (Id. at 210-11, 226-27). The women then returned to defendant's home to pick her up, and they all drove to the restaurant together (Id. at 212-13, R. 185: 252, 267).

Karen and Misty testified that, as they reached the restaurant parking lot, defendant had a "cough attack" that resulted in her urinating in her pants (R. 184: 215, R. 185: 252, 268). Karen remembered the pants she had purchased for her daughter and pressed defendant to try on one of those pairs instead of taking the time to return home to change (R. 184:

215, 229; R. 185: 252-53, 269-70). Defendant found a pair of pants that fit, wore them for lunch, and eventually returned home (R. 184: 217, 220; R. 185: 253, 273). Later that night, when the police officers found the methamphetamine in her pocket, defendant was still wearing the Thrift Town pants. Defendant thus argued that the pants in which the methamphetamine was found were not hers and that she did not knowingly or intentionally possess the drug.

After considering the evidence, the jury convicted defendant of possession of a controlled substance in a correctional facility, a second degree felony (R. 156).

SUMMARY OF ARGUMENT

Defendant sought exclusion of all evidence relating to the execution of the search warrant for drug distribution that targeted the man with whom she lived. She argued that the evidence was both irrelevant and unduly prejudicial, and thus violated rules 401 and 403 of the Utah Rules of Evidence. The trial court admitted the evidence.

The trial court's ruling was not "beyond the limits of reasonability." State v. Hamilton, 827 P.2d 232, 240 (Utah 1992). Pursuant to rule 401, the evidence was plainly relevant. First, evidence that defendant had outstanding justice court warrants was relevant to explain why she was at the jail and subject to the search that revealed the drugs. It provided the necessary factual predicate for the jury to understand how and

why the methamphetamine was found. Second, evidence that methamphetamine and unusual, small pink baggies were found in defendant's home makes defendant's knowledge and intent to possess the same drug packaged in the same colored baggie more probable than if the jury did not have the evidence about the drugs in the home.

Pursuant to rule 403, the probative value of this relevant evidence was not substantially outweighed by the danger of unfair prejudice or confusion of the issues. The evidence was highly probative, both of her knowledge and intent and of the circumstances leading up to the discovery of methamphetamine on her person. And as the trial court determined, any prejudice was "minimal," well below "undu[ly] prejudic[ial]." Defendant has wholly failed to articulate how mere knowledge of two misdemeanor warrants could have so inflamed the jury as to convict her on the basis of those warrants rather than on the basis of the methamphetamine found in her pocket. Similarly, she offers no cogent explanation of how the items found in the house likely so confused the jury as to cause the jury to convict her improperly. Because the trial court's decision was not "beyond the limits of reasonability," this Court should affirm it. Castillo, 2007 UT App 324, ¶ 6.

Defendant also argues that the evidence should have been excluded pursuant to rule 404(b). This argument fails on multiple grounds. First, defendant failed to preserve it below.

Second, even if the Court considers the argument, it should be rejected because the evidence does not fall within the ambit of rule 404(b). Finally, even if this Court were to reach the issue and determine that rule 404(b) applies, the evidence was introduced for clear, non-character purposes. For these reasons, defendant's rule 404(b) claim fails.

ARGUMENT

IN THIS PROSECUTION FOR DRUG
POSSESSION IN A CORRECTIONAL
FACILITY, THE TRIAL COURT
REASONABLY ADMITTED, OVER RULE 401
AND 403 OBJECTIONS, EVIDENCE OF HOW
POLICE CAME TO FIND DRUGS IN
DEFENDANT'S PANTS POCKET BECAUSE
THAT EVIDENCE WAS RELEVANT TO
DEFENDANT'S INTENT AND KNOWLEDGE
THAT SHE POSSESSED METHAMPHETAMINE
AND WAS UNLIKELY TO HAVE CAUSED THE
JURY TO CONVICT HER ON AN IMPROPER
BASIS

Prior to trial, defense counsel objected to the admission of evidence detailing the execution of the search warrant at the home defendant shared with Brian Stevens, the named target of a drug distribution investigation. Counsel argued that this evidence was both irrelevant and unduly prejudicial and thus violated rules 401 and 403 of the Utah Rules of Evidence. See Br. of Aplt. at 14. Specifically, counsel asserted that because defendant was not charged with anything found in her home, evidence about what was found there would be irrelevant and confusing and would prejudice the jury against her. Id. at 15-17.

In rejecting defendant's argument, the trial court first determined that the evidence was relevant. The court reasoned: "[T]he burden on the State is to prove beyond a reasonable doubt [defendant's] knowledge and intent into [sic] possessing the methamphetamine. . . . [T]his evidence goes directly to [defendant's] knowledge and intent; therefore, it is absolutely relevant" (R. 184: 18 or addendum A). Thus, because the evidence directly addressed the mens rea of the charged crime, it was clearly relevant. Second, the court weighed whether or not the evidence was prejudicial or confusing. Determining that it was not, the court stated:

It is not confusing to [the jury], . . . it actually gives them context. . . . [I]n order to prove . . . possession of a controlled substance the State has got to prove that [defendant] possessed the methamphetamine. Whether or not that is shown at the jail or at another place is not more prejudicial to [defendant]. . . . [T]he fact that it comes in in the context that it was at a search warrant at a residence where she was . . . goes directly to her knowledge and lack of mistake. So that goes specifically to . . . the State's ability to enter this in its case in chief.

[A]nything that makes the possession more knowing, more intentional, more likely than not is by definition relevant, and the prejudice is simply not extensive at all. The only prejudice that goes to [defendant] is that she possessed an . . . unlawful controlled substance.

Id. at 18-19 or addendum A. The court thus determined that the evidence was not confusing and that any minimal prejudice was not

unfair. Because the court concluded that the evidence presented no danger of unfair prejudice or confusion of the issues, that evidence could not substantially outweigh its highly probative value. The court, therefore, admitted the evidence. Id. at 18. The trial court did not abuse its discretion in so ruling.

A. Rules 401 and 403 govern this case.

Evidence is relevant if it possesses "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. This means that "even evidence that is only slightly probative in value is relevant." State v. Martin, 2002 UT 34, ¶ 31, 44 P.3d 805 (citing State v. Colwell, 2000 UT 8, ¶ 27, 994 P.2d 177). Because even evidence with minimal probative value is relevant, the standard for determining the relevancy of evidence is "very low." State v. Jaeger, 1999 UT 1, ¶¶ 12, 16, 973 P.2d 404 (quoting Edward L. Kimball & Ronald N. Boyce, Utah Evidence Law 4-2 (1996)).

Applying this low threshold, the evidence in this case is relevant.¹ Evidence that defendant had outstanding justice court warrants was relevant to explain why she was admitted to jail and thus subject to the search that revealed the drugs. It provided

¹ Defendant on appeal objects generally to all "evidence at trial relating to the search warrant and drug activity at the house" (Br. of Aplt. at 18). For analytical purposes, the State draws a distinction between the evidence of the outstanding warrants and the physical evidence found in the home.

the necessary factual predicate for the jury to understand how and why the methamphetamine was found. Evidence that particular drugs and distinctive pink baggies were found in defendant's home was relevant because it made defendant's knowledge and intent to possess the same drugs packaged in the same way more probable than if the jury did not have the evidence about the drugs in the home. That is, the methamphetamine and packaging found in defendant's home was consistent with the methamphetamine and packaging found in her pocket, and so undermines the credibility of her claims that she knew nothing about what was going on in the home and had no knowledge of, nor any intent to, possess the methamphetamine found in her pocket.

Once a court determines that evidence is relevant, it must then decide whether the "probative value (of the evidence) is substantially outweighed by the danger of unfair prejudice [or] confusion of the issues." Utah R. Evid. 403. Rule 403 is an "inclusionary rule," and "presumes the admission of all relevant evidence except where the evidence has 'an unusual propensity to unfairly prejudice, inflame, or mislead' the jury." State v. Ramirez, 924 P.2d 366, 369 (Utah App. 1996) (citations omitted). On appeal, review of a 403 ruling, as with rule 401, is "limited," with the trial court accorded "wide latitude." State v. Boyd, 2001 UT 30, ¶ 23, 25 P.3d 985 (citation omitted).

The 403 inquiry involves balancing the probative value of the evidence against its unfairly prejudicial or confusing effect

to determine whether the unfairly prejudicial or confusing effect "substantially outweighs" the probative value. The Utah Supreme Court has elaborated upon what constitutes "unfair prejudice":

Since all effective evidence is prejudicial in the sense of being damaging to the party against whom it is offered, prejudice which calls for exclusion is given a more specialized meaning: an undue tendency to suggest decision on an improper basis, commonly but not necessarily an emotional one, such as bias, sympathy, hatred, contempt, retribution or horror.

State v. Maurer, 770 P.2d 981, 984 (Utah 1989). The fact that evidence is prejudicial does not alone render it incompetent. Indeed, "[t]he exclusion of relevant evidence under rule 403 is an extraordinary remedy to be used sparingly." Woods v. Zeluff, 2007 UT App 84, ¶8, 158 P.3d 552 (citing K-B Trucking Co. v. Riss Int'l Corp., 763 F.2d 1148, 1155 (10th Cir. 1985)).

Here, the evidence detailing the execution of the warrant at defendant's home, including the drugs, money, and paraphernalia found there, and the two unrelated outstanding misdemeanor warrants against her were highly probative of her knowledge and intent and of the circumstances leading up to the discovery of the methamphetamine on her person. And, as the trial court determined, that evidence was not "unduly" prejudicial within the meaning of rule 403 because it did not have "an undue tendency to suggest decision on an improper basis." Maurer, 770 P.2d at 984.

Evidence about defendant's outstanding misdemeanor warrants had no tendency to inflame the jury or motivate them to convict her on any improper basis. Two police officers testified about the standard procedures used during search warrant execution, including running warrants checks on all persons present in the home (R. 184: 130-31, 166-67). The fact that officers discovered that defendant had two outstanding misdemeanor warrants explained only why she was transported to jail. It explained the circumstances and set the scene for the subsequent search of her person and discovery of methamphetamine. It did not, however, suggest that the jury should convict her on the basis of the misdemeanor warrants. Indeed, it is difficult to surmise how the jury could have been improperly influenced by the unspecified misdemeanor warrants in light of the evidence that she had committed a far more serious second degree felony. Where defendant has wholly failed to explain how mere knowledge of these outstanding misdemeanor warrants could have so inflamed the jury as to convict her of a second degree felony on the basis of those warrants rather than the evidence presented at trial, her claim fails.

Similarly, evidence about what was found in the home did not have an undue tendency to suggest that the jury should convict defendant on an improper basis. Renewing her trial court argument, defendant contends that the drugs, paraphernalia, and cash found in the home created the potential for so much

confusion that the evidence should be excluded (Br. of Aplt. at 17-18). Had defendant been charged only with possession of a controlled substance, the jury might well have been confused about whether that charge was directed at the drugs found in her home or on her person. The state, however, amended the original information to one count of unlawful possession of a controlled substance *in a correctional facility*. Compare R. 2-3 with R. 103-04. In addition, the jury was specifically instructed that, to convict defendant, it must find beyond a reasonable doubt that defendant "was within a correctional facility" when she possessed the drugs (R. 136). Thus, the trial court ensured that evidence related to the search warrant would not cause confusion for the jury.

Moreover, evidence about defendant's living environment was no more prejudicial than it was probative. That is, while the drugs in the home damaged her credibility, they did not do so unfairly. The evidence in her home simply undermined her credibility when she maintained she knew nothing about the drugs in her pocket. Defendant has wholly failed to articulate why she thinks this evidence would cause the jury to convict her on an improper basis.

The ruling in this case to admit the evidence pursuant to rule 403 thus falls well within the ambit of evidence that tells the story of the charged crime or explains the circumstances surrounding the crime. See, e.g., Boyd, 2001 UT 30 at ¶ 24

(admitting evidence of "nicknames, chants, and dances" because it provided background for the rape that followed); State v. Daniels, 584 P.2d 880, 882 (Utah 1978) (allowing evidence that defendant had siphoned gas to fuel a stolen car because it "explain[ed] the circumstances surrounding the . . . crime [of car theft]"); State v. Pierce, 722 P.2d 780, 782 (Utah 1986) (admitting evidence that defendant paid for stolen property with marijuana because it was relevant to show "general circumstances surrounding defendant's purchase, receipt, and retention of the stolen property").

The trial court admitted the evidence in this case because it was "absolutely relevant" and, therefore, highly probative and because the prejudice was "not extensive at all" (R. 184: 19). In the court's judgment, the balancing required by rule 403 tipped heavily for admission. This decision was not "'beyond the limits of reasonability'" and should, therefore, be affirmed. Castillo, 2007 UT App 324, ¶ 6 (quoting State v. Hamilton, 827 P.2d 232, 240 (Utah 1992)).

B. Rule 404(b)

On appeal, counsel also argues that the trial court's decision to admit the evidence violated rule 404(b).²

² To demonstrate the court's abuse of discretion, counsel engages in a lengthy rule 404(b) argument, applying the analysis articulated in State v. Shickles, 760 P.2d 291 (Utah 1988), See Br. of Aplt. at 10-11, 14-18. Rule 404(b) provides for the admissibility of prior bad acts evidence if that evidence has a non-character purpose, is relevant, and possesses probative value that is not substantially outweighed by a non-character purpose.

Defendant's claim based on rule 404(b) is not properly before this Court. At trial, counsel did not assert a rule 404(b) argument. See R. 184: 13-17. Because she did not, her rule 404(b) argument is not preserved and should not be considered on appeal. See, e.g., State v. Larsen, 865 P.2d 1355, 1363 n.12 (Utah 1993) ("[t]rial counsel must state clearly and specifically all grounds for objection" in order to preserve issue for appeal). Neither has defendant asserted plain error or exceptional circumstances, the two main exceptions to the preservation rule. The law is well-settled that appellate courts generally will not consider issues raised for the first time on appeal. See, e.g., Espinal v. Salt Lake City Bd. of Educ., 797 P.2d 412, 413 (Utah 1990). Where defendant has failed to argue an exception to the preservation rule, this Court should not consider her claim. State v. Pledger, 896 P.2d 1226, 1229 n.5 (Utah 1995).

Even assuming *arguendo* that defendant had preserved such an argument, evidence that a search warrant was executed at defendant's home does not implicate evidence within the scope of

Shickles outlines factors to be used in the balancing of probativeness against prejudice. In essence, Shickles articulates a rule 403 analysis within the context of rule 404(b). The State has been unable to locate any cases in which the Shickles factors have been applied outside the context of a rule 404(b) analysis. That is, when cases present rule 403 issues, but do not involve rule 404(b), courts do not engage in a Shickles analysis. See, e.g., State v. Castillo, 2007 UT App 324, 170 P.3d 1147; Woods v. Zeluff, 2007 UT App 84, 158 P.3d 552; State v. Maurer, 770 P.2d. 981 (Utah 1989). This Court should continue this practice.

rule 404(b). The evidence found at the home and the outstanding misdemeanor warrants were introduced as an integral part of the essential story of this crime, providing background necessary for the jury to have a complete picture of the crime. See Pierce, 722 P.2d at 782 (holding that evidence showing "the general circumstances surrounding" the crime should not be excluded as "prior crimes" evidence); United States v. Kimball, 73 F.3d 269, 272 (10th Cir. 1995) (evidence is admissible when it provides context for the crime, "is necessary to a full presentation of the case, or is appropriate in order to complete the story of the crime. . .by proving its immediate context or the res gestae" (quoting U.S. v. Masters, 622 F.2d 83, 86 (4th Cir. 1980)) (internal quotation marks omitted).

In this case, absent the evidence of the outstanding misdemeanor warrants, the jury would have been left to wonder why defendant was taken to jail and on what basis the officer searched her. Absent evidence of the drugs found in the home, the jury also would have been left without evidence critical to establishing defendant's intent and knowledge to possess the drugs. In essence, the evidence defendant sought to exclude was relevant background for the crime with which she was charged. As such, the trial court properly determined that it was governed not by rule 404(b), but by rules 401 and 403. See, e.g., Boyd, 2001 UT 30 at ¶¶ 23-24 (and cases cited therein).

Finally, even assuming arguendo that the evidence about the search warrant execution did fall within the ambit of rule 404(b), the evidence would nonetheless be admissible because it served a clear non-character purpose. Evidence of the drugs found in the home related directly to defendant's knowledge and intent to possess the drugs that were found in her pocket at the jail directly after police executed the warrant. And evidence that she had outstanding justice court warrants explained why she was taken to the jail where the search revealing the drugs in her pocket occurred. See State v. Morgan, 813 P.2d 1207, 1210 n.4 (Utah App. 1991) (holding that although rule 404 contains no express exception for "background information" showing how the charges came forward, "the prosecutor is entitled to paint a factual picture of the context in which the events in question transpired").

Defendant's rule 404(b) argument thus fails on multiple grounds. At the outset, defendant failed to preserve it below. Moreover, even if the Court considers the argument, it should be rejected because the evidence does not fall within the ambit of rule 404(b). And finally, even if this Court determines that rule 404(b) applies, the evidence was introduced for clear, non-character purposes. For these reasons, defendant's rule 404(b) claim fails.

CONCLUSION

For the reasons stated, this Court should affirm defendant's conviction on one count of possession of a controlled substance in a correctional facility, a second degree felony.

RESPECTFULLY submitted this 15th day of February, 2008.

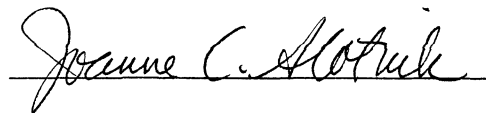
MARK L. SHURTLEFF
Attorney General



JOANNE C. SLOTNIK
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing brief of appellee were mailed first-class, postage prepaid, to Linda M. Jones, Salt Lake Legal Defender Association, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, this 15th day of February, 2008.



Addendum A

1 relevant to the case. Once again, Ms. Fulkerson would like to
2 address the Court on that. She's done some research on the law
3 and also the facts of this case, and she wanted to just address
4 the Court on that issue.

5 THE COURT: All right. Thank you. What are your
6 concerns, Ms. Fulkerson?

7 MS. FULKERSON: Thank you again, your Honor. This is
8 just a basic 401 (inaudible) 3 argument, your Honor. I think
9 that this is clearly irrelevant to her arrest. I think that it
10 would also unduly prejudice and confuse the jury in this case.

11 Where we have a drug case, a possession of controlled
12 substance and we have the search warrant relating to what it
13 related to, but where she was not actually arrested in connection
14 with that warrant I think clearly would be prejudicial in this
15 case and I would ask that it be excluded on those grounds.

16 THE COURT: All right. Was Ms. Downs listed on the
17 search warrant as a party that would be present at the place
18 being searched. Do--

19 MR. BLAYLOCK: She was not specifically listed; however,
20 the search warrant says, "and search all persons present."

21 THE COURT: Persons there. All right. Thank you.
22 Response, Mr. Blaylock?

23 MR. BLAYLOCK: Your Honor, there are a number of facts
24 that were determined at the scene that relate to her knowledge,
25 lack of mistake and things of that nature. One of those

1 particular is that the controlled substances that were found were
2 found packaged in a manner similar to the one in her pocket, the
3 same color as the one found in her pocket.

4 So I would suggest that it's important that we be
5 allowed to show. because intent is a critical issue here that
6 there was no mistake and there was knowledge on her part. In
7 fact, also that she lived at this location, that she was
8 familiar with the other defendant who was charged with the
9 other controlled substances that were found at the scene.

10 There's a bill that comes to that address showing that
11 in fact she does live there. As a matter of fact, she told one,
12 of the officers she had no idea what was going on. Well, I think
13 it would be important to show what was observed at the scene so
14 the jury can make a decision of whether or not she should have
15 known or could -- did know what was going on as opposed to merely
16 claiming, "I knew nothing."

17 THE COURT: Thank you. Further response?.

18 MR. TAN: And your Honor, if I may respond.

19 THE COURT: You may.

20 MR. TAN: Having done the prelim, I can address the
21 issue. First of all, as the Information states, she is charged
22 with just one count, and the count is very specific. The State
23 has amended it in regards to the location. It's not the
24 residence, but it is the jail.

25 The original Information yes, she was charged with being

1 in possession at the location of 2965 South 700 East, which
2 was the address on the search warrant. However, the State has
3 amended this, and they're specifically pointing out to the Court,
4 and subsequently to the jury, that she was found trying to
5 smuggle drugs into the jail. It has nothing to do with what took
6 place at the 7th East 29th South location.

7 Furthermore, it is just one count. There is nothing
8 else. She is not charged with possession of drug paraphernalia.
9 She is not charged with any of the controlled substances that
10 were found at the location. If in fact the search warrant is
11 relevant to her as well, if in fact there are relevant issues of
12 her being at the location, why did the detectives and the SWAT
13 team and whoever else that entered the home and did the raid,
14 they cited a lot of other people.

15 There were obviously one co-defendant we know of; I
16 believe there might be more. However, Ms. Downs was not cited
17 or even mentioned to have any type of connection with any of
18 the controlled substances within the residential area. She is
19 charged with possession of a controlled substance at the jail.

20 I believe that if the State was to allow or to be
21 allowed to admit into evidence a search warrant and also any
22 background information, then, that the State's witnesses will
23 testify to, I think that's going to just confuse the jury.
24 They're going to try to then link Ms. Downs, who was charged with
25 possession of a controlled substance at the jail, with the fact

1 that there were other people charged at the residential area
2 instead.

3 So I think, once again, it is highly prejudicial. I
4 don't see any probative value involved. I think it also will
5 confuse the jury because they're going to think that she is
6 charged with possession, and it is irrelevant if it's at the jail
7 or at the residential area. If that's the case, once again we
8 would ask the Court not to allow the State to amend it to a
9 second degree of possession at a correctional facility, because
10 the jury is going to think, "Well, she's in possession. Maybe
11 she had the drugs back at the residential place instead of the
12 jail," then the Information is not correct. So we would make an
13 argument on that, your Honor.

14 THE COURT: All right. Thank you. If you wish to
15 respond.

16 MR. BLAYLOCK: Just one other comment. My understanding
17 from the individuals that the defense has called as witnesses is
18 she has a very specific defense, and that is, "Those weren't my
19 pants." So I think it's critical that the State be allowed to
20 tie in the drugs that were found in the pants with the drugs that
21 were found at the residence and with what was there to see at the
22 residence and to know.

23 THE COURT: All right. Thank you. Any further response
24 to that?

25 MR. TAN: Nothing else, your Honor.

1 THE COURT: All right. Thank you. The -- again, the
2 issues are very appropriately addressed at this point, but I
3 do find that the evidence of how the defendant possessed the
4 methamphetamine, that the burden on the State is to prove beyond
5 a reasonable doubt her knowledge and intent into possessing the
6 methamphetamine, and that is the first part of the charge. It is
7 an element that the State must prove, and that this evidence goes
8 directly to Ms. Downs' knowledge and intent; therefore, it is
9 absolutely relevant.

10 Whether or not it is so prejudicial that that
11 outweighs the relevance and would be unfair and unjust to allow
12 that evidence in, I do not find that that is the case. I think
13 that this gives context to the jury. It is not confusing to
14 them, that it actually gives them context, but that in order to
15 prove any possession of a controlled substance the State has got
16 to prove that Ms. Downs possessed the methamphetamine.

17 *Whether or not that is shown at the jail or at another*
18 *place is not more prejudicial to Ms. Downs. It is not more*
19 *prejudicial to Ms. Downs that she possessed it somewhere else.*
20 *The same evidence of her possession is going to be coming in,*
21 *and so the fact that it comes in in the context that it was at*
22 *a search warrant at a residence where she was, and apparently*
23 *there's some evidence that she resides there, goes directly to*
24 *her knowledge and lack of mistake. So that goes specifically to*
25 *the case -- the State's ability to enter this in its case in*

1 chief.

2 Clearly if it is also the defense, and Ms. Downs has
3 no responsibility to even provide any defense, but clearly if
4 it does go to the defense, then -- then that information is
5 appropriate there. But the first part of the ruling has got to
6 be whether or not the State can even use it in their case in
7 chief. I find that this is absolutely relevant to the State's
8 element that they must prove this knowing possession, and that
9 it -- the fact that the possession may have occurred somewhere
10 besides the address and the correctional facility does not make
11 it irrelevant to the case.

12 The know -- anything that makes the possession more
13 knowing, more intentional, more likely than not is by definition
14 relevant, and the prejudice just simply is not extensive at all.
15 The only prejudice that goes to Ms. Downs is that she possessed
16 an unlawfully -- an unlawful controlled substance.

17 That is something that is going to have to be shown by
18 the State or they're going to fail in the first element that they
19 must prove. The fact that it was somewhere besides the second
20 element that they must prove is not prejudicial to Ms. Downs.
21 That's information that the jury and the fact finders are going
22 to have to receive anyway.

23 I am, however, going to make it be specific so that if
24 there -- the cross examination may also allow that this was --
25 whether or not the search warrant was specifically to Ms. Downs.

1 That type of cross examination is appropriate as well. It
2 doesn't look like there's any objection to this being why she was
3 taken to the jail. They're not getting in the subject matter of
4 the bench warrants for the justice courts. That doesn't seem to
5 be necessary, and I don't get -- sense from either argument that
6 there is any anticipation of the underlying warrants -- the
7 nature of the underlying warrants being admitted for any 404(b)
8 purposes. It's simply that Ms. Downs was arrested and taken to
9 the jail. Is that what evidence the State is anticipating as far
10 as any prior war -- bench warrants or convictions?

11 MR. BLAYLOCK: Yes, your Honor. We weren't going to
12 delve into the nature of the warrants. We were merely going to
13 indicate that because that's the way that they normally do these
14 kinds of search warrants, execute these search warrants. They
15 put people in restraints. They then check on warrants and they
16 found warrants outstanding for Ms. Downs, and she was taken into
17 custody, arrested for that.

18 THE COURT: And --

19 MR. TAN: And your Honor, I believe just so that there
20 are no unexpected surprises when actually we have the jury before
21 us, I think that I may very well on cross examination dive into
22 that issue, because I think if in fact the Court will allow the
23 search warrant and some of the facts that transpired at the
24 residence to come in to testimony, I think it will be important
25 for the jury to know that even though she was picked up on