

2015

**State of Utah, Plaintiff/ Appellee v. Tilvi G. Wager Defendant/  
Appellant**

Utah Court of Appeals

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Case No. 20140812-CA

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IN THE  
UTAH COURT OF APPEALS

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STATE OF UTAH,  
Plaintiff/Appellee

v.

TIM G. WAGER  
Defendant/Appellant

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Reply Brief of Appellant

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Appeal from convictions for possession of methamphetamine, enhanced to a second degree felony, and possession of marijuana, a Class A misdemeanor, in the Third Judicial District, Salt Lake County, the Honorable Denise P. Lindberg presiding

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Oral Argument Not Requested

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UTAH APPELLATE COURTS

OCT 29 2015

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IN THE  
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STATE OF UTAH,  
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**STATEMENT OF JURISDICTION**

Defendant appeals from convictions for possession of methamphetamine, enhanced to a second degree felony; and possession of marijuana, a Class A misdemeanor. This Court has jurisdiction under Utah Code. Ann. § 78-4-103(2)(e) (West Supp. 2014

**INTRODUCTION**

While executing a search warrant on Wager's house, officers found a wooden box in a locked storage cabinet in the garage. A key to the cabinet was on Wager's key ring. Officers found several plastic bags containing a powder residue that tested positive for methamphetamine inside the box. Officers also found marijuana on a bedroom dresser in a pill bottle that had his name on the label. The marijuana was found in the room where Wager lived with a roommate at the time of the execution of the search warrant. At trial, the prosecutor presented a photograph (attached hereto as Exhibit A) depicting Mr.

Wager sitting in a bathroom smoking a pipe. The prosecution could not authenticate the photograph or provide any information to its origin.

### **STATEMENT OF THE ISSUES**

**Did the Trial Court violate the Defendant's right to fair trial by admitting, without authentication, a prejudicial photograph purported to be the Defendant using drugs?**

After Mr. Wager denied possession or use of drugs during his testimony, the prosecutor offered a photograph purporting to depict Mr. Wager smoking something from a bong-like device. Counsel for Mr. Wager objected for lack of any authentication for the photograph, and that the photograph was extremely prejudicial. The State offered the photograph through the arresting officer, who testified that he had received the photograph from a confidential informant. The judge allowed the photograph into evidence stating that Mr. Wager had opened the door to such evidence by denying use or possession of drugs. No corroborating testimony was offered and, in fact, no witness at trial had personal knowledge as to when the photograph was taken, and what Mr. Wager was doing in the photograph. The judge added that although the photograph was otherwise inadmissible, she thought it was harmless error to admit it under the circumstances.

1. Did the Trial Court violate the Defendant's right to fair trial by admitting, without authentication, a prejudicial photograph purported to be the Defendant using drugs?

## **CONSTITUTIONAL PROVISIONS, STATUTES AND RULES**

The United States Constitution, Fifth Amendment Due Process Clause, The Utah Constitution, Due Process Clause and Utah Rules of Evidence Rule 901.

### **STATEMENT OF THE FACTS**

On July 16, 2012, police executed a search warrant at Mr. Wager's residence. Police found a wooden jewelry box inside a locked storage cabinet in the garage. A key to the cabinet was on Wager's key ring. Inside the wooden box, the officer found several plastic bags containing a powder residue that tested positive for methamphetamine. Officer also found a prescription pill bottle in Wager's bedroom that contained a small amount of charred plant material that tested positive for marijuana. At the trial, Mr. Wager's roommate, Alicia Singleton, testified that Mr. Wager's ex-girlfriend, Jenny Stewart, who is the mother of his children, had been staying with them until shortly before the police raid. Ms. Singleton said that the wooden jewelry box belonged to Ms. Stewart, and that Ms. Stewart also had a key to the storage cabinet. Ms. Singleton added that when Ms. Stewart had left the house, Ms. Singleton found drug paraphernalia and items with drug residue in Ms. Stewart's belongings, which Ms. Singleton promptly put out in the garbage. Ms. Singleton also testified that she had not seen Mr. Wager use or possessed drugs.

Mr. Wager also testified at the trial and indicated that he shared his bedroom with his ex-girlfriend when she was there. He denied possession of the drugs, and denied



knowledge of the contents of the containers that contained drugs. Notably, Mr. Wager is blind.

After Mr. Wager denied possession or use of drugs during his testimony, the prosecutor offered a photograph purporting to depict Mr. Wager smoking something from a bong-like device. Counsel for Mr. Wager objected for lack of any authentication for the photograph, and that the photograph was extremely prejudicial. The State offered the photograph through the arresting officer, who testified that he had received the photograph from a confidential informant. The judge allowed the photograph into evidence stating that Mr. Wager had opened the door to such evidence by denying use or possession of drugs. No corroborating testimony was offered and in fact no witness at trial had personal knowledge as to when the photograph was taken, and what Mr. Wager was doing in the photograph. The judge added that although the photograph was otherwise inadmissible, she thought it was harmless error to admit it under the circumstances.

### **SUMMARY OF ARGUMENT**

The Defendant was deprived a fair trial when the trial court allowed photographic evidence without proper and/or legal authentication, while misinterpreting the appropriate evidentiary rule to apply for the photographic evidence.

### **ARGUMENT**

- 1. The trial court improperly admitted an impeaching photograph of Wager.**

**A. The trial court improperly admitted the photograph of Wager for the sole purpose of impeaching his testimony that no one used drugs in the house.**

At the trial, the State rested their case-in-chief and then Counsel for the Defendant proceeded to present witnesses and evidence. The Defendant testified during the presentation of the Defendant's case, and testified that he had not used drugs in the house. The State then interjected during the Defendant's case a photograph of the Defendant allegedly doing drugs in the house. Counsel for the Defense objected and the Court allowed the photograph to come in as evidence. However, this was presented through the officer, who obtained the photograph from a "confidential informant". The officer did not take the photograph the day of the service of the search warrant. Additionally, the officer was unable to testify as to what the Defendant was allegedly doing as depicted by the photograph since he is not the one to have taken the photograph. The photograph presented was not the original photograph in violation of the Utah Rules of Evidence.

Under Utah Rules of Evidence Rule 901 it states:

"In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is."

**B. The State improperly authenticated the impeaching photograph.**

In the case, the State of Utah offered the photograph as evidence that the Defendant was and had been doing drugs in the house. However, there was no evidence

to corroborate or authenticate the photograph. The officer neither took, nor was present when the photograph was taken, and did not and was not able to testify that this was taken on the date alleged in the Information. Additionally, the officer was unable to testify that the Defendant was actually doing “drugs” in the photograph. The extent of the officer’s testimony was:

Officer: “That same bathroom that’s in the other photo.”

State: “Who - - who appears to be in the picture?”

Officer: “The defendant, Mr. Wager,”

Thus the only thing that was testified to was that it depicted a bathroom and that the Defendant was in the bathroom that appeared to be the same one that was photographed the day of the search warrant. This is insufficient grounds to admit a prejudicial photograph and is not sufficient to overcome the lack of authentication and the prejudicial nature of the photograph. The officer also failed to provide any evidence or testimony that this was the date alleged in the information, making this photograph completely irrelevant to the case at hand.

In *State v. Horton*, the Utah Supreme Court has held:

“In determining whether the trial court properly excluded the photograph of the trunk, we again apply a correction of error standard to the trial court’s legal determinations, i.e., whether the trial court was correct in its selection, interpretation, and application of the rule of evidence.”

*State v. Thurman*, 846 P.2d 1256, 1268-72 (Utah 1993). *State v. Horton*, 848 P.2d 708, 714 (Utah 1993).

While the Trial Court relied upon Rule 901, there are other rules that specifically apply to photographic evidence.

Utah Rules of Evidence, Rule 1002. Requirement of Original states:

“An original writing, recording, or photograph is required in order to prove its content, except as otherwise provided in these rules or by other rules adopted by the Supreme Court of this State or by statute.” In the Case currently before this Court no testimony was given or offered about the original photograph other than to say that the photograph was provided by a “confidential informant”.

Utah Rules of Evidence Rule 1004 allows for admissibility exceptions related to an original photograph stating: “Admissibility of Other Evidence of Content. An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:

(a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;

(b) an original cannot be obtained by any available judicial process;

(c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or

(d) the writing, recording, or photograph is not closely related to a controlling issue.” None of these issues were addressed by the Court nor mentioned with regards to admissibility exceptions and original photograph exception.

Utah Rules of Evidence, Rule 1007. Testimony or Statement of a Party to Prove Content states:

“The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.”

The proponent being the State of Utah, in this matter, and there again is not testimony by the Defendant that this was him in the photograph or that he was doing

anything illegal in the photograph. Therefore, this Rule again was not followed, mentioned or dealt with by the trial court.

The State of Utah, did however, argue that the photograph was being provided for rebuttal or truthfulness under Rule 608 of the Utah Rules of Evidence which states:

“A Witness's Character for Truthfulness or Untruthfulness

(a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.” Again, in actuality, while they were alleging that truthfulness was part of the reason for the photograph, the State had not attacked the truthfulness in Court or in the direct examination or cross examination... therefore, again the rule was not followed or applied in this matter. Rule 608 continues by stating: “(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

(1) the witness; or

(2) another witness whose character the witness being cross-examined has testified about. By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

(c) Evidence of Bias. Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by other evidence.”

None of these issues were addressed by the Trial Court. The Court did give some credence to the prejudicial nature as saying that the photograph was innocuous. However, there was no indication as to why, or if it indeed, it was non-prejudicial to the Defendant's case. In fact, this photograph, if offered as a specific incident of criminal conduct, should have been handled by a Motion in Limine. Thus, allowing the Defense notice and an opportunity to subpoena the person who actually took the photograph or who provided the photograph to the officer.

The Supreme Court in *State v. Horton* continued:

“We also apply an abuse of discretion standard in determining whether the trial court reasonably determined the witness failed to properly authenticate the photograph pursuant to Rule 901 of the Utah Rules of Evidence.

*United States v. Dombrowski*, 877 F.2d 520, 524 (7th Cir.1989), *cert. denied*, 496 U.S. 907, 110 S.Ct. 2592, 110 L.Ed.2d 272 (1990); *United States v. Reyes*, 798 F.2d 380, 383 (10th Cir.1986). *State v. Horton*, 848 P.2d 708, 741 (Utah 1993).

Pursuant to Rule 901 of the Utah Rules of Evidence, evidence must be properly authenticated or identified before it is admitted into evidence at trial. In order to properly authenticate a photograph, the proponent must show that the photograph "is what its proponent claims. Utah R.Evid. 901(a). Thus, in order for the photograph to be admitted, the State must have established that the photograph accurately depicts the bathroom of the residence. *See State v. Purcell*, 711 P.2d 243, 245 (Utah 1985).” The State of Utah, in this case claims that the photograph depicts prior bad acts, specifically drug use, by the Defendant, but fails to provide evidence that supports or accurately depicts that this is the

behavior. Defense would suggest that this is impossible given that the officer neither took the photograph, nor was present when the photograph was taken.

While the Trial court in the *Horton* case excluded the evidence because it did not believe the testimony of the defendant's wife, even after her testimony that she was the one who had taken the photograph. Here the trial court allowed evidence in that was not properly authenticated since the testimony was from an officer who had not taken the photograph and did not have any personal knowledge, whatsoever, about what was depicted in the photograph. This begs the Court's intervention and reversal as a clear abuse of discretion.

The Utah Supreme Court in *Horton* upheld the exclusion due to lack of proper authentication, this case is exactly opposite, the trial court allowed evidence that was not properly authenticated and therefore is subject to reversal.

**C. Was the admission of the photograph over the defense counsel's objection harmless error?**

The Supreme Court of Utah has stated in *State v. Lovell*, "Harmless error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." *State v. Lovell*, 071211 UTSC, 20061025, 2011 UT 36 (2011). In the present case to say admission of an incriminating photograph over the objection of defense counsel and without foundation and under the wrong rules simply cannot be looked at as an "irregularity". This must and absolutely affects the substantial rights of the Defendant, since without the said incriminating photo,

standards”” *State v. Duran*, 262 P.3d 468 (Utah App. 2011). (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309, 111 S.Ct. 1246, 113 L.Ed.2d 3012 (1991). The Court continued by stating: “Although other constitutional errors may be disregarded if they are harmless beyond a reasonable doubt, these fundamental errors are structural, meaning that they are so “intrinsically harmful as to require automatic reversal.” *Id.* At 7, 119 S.Ct. 1827” *Duran supra*. In this case before the Court, there is no way to avoid a tainted jury pool given the prejudicial nature of the photo that was unlawfully admitted as evidence. This is indeed a fundamental error causing a prejudicial jury pool. The Court of Appeals in *Duran* stated: “Only where the errors “infect the entire trial process, “thereby” depriv[ing] defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, “is harm presumed.” *Duran supra*. While the Court in the *Duran* case was dealing with a jury instruction and did not find that to be a fundamental error, the admission of evidence in violation of the procedural requirements and prejudicing the jury is absolutely a fundamental error requiring reversal of the verdict in this matter and remanding for a new trial. This cannot be held to be harmless beyond a reasonable doubt and therefore requires reversal in this matter.

The United States Court of Appeals District of Columbia Circuit has held:

“The government did not, however, present sufficient evidence to establish with any degree of certainty when the photographs were



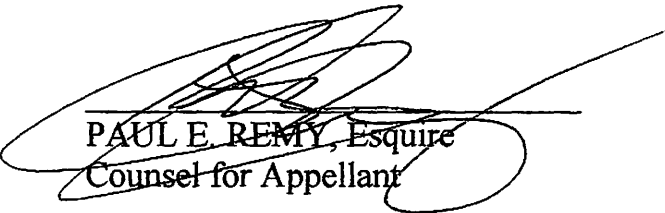
taken. Proper authentication requires not only that the government identify the scene depicted in the photographs, but also their coordinates in time and place.

*See United States v. Stearns*, 550 F.2d 1167, 1171 (9th Cir.1977).” *United State v. Blackwell*, 694 F.2d 1325, 1331 (DC Cir. 1982). This is the exact same problem that exists in this case and reversal should be required, the State introduced a photograph with absolutely zero evidence as to its authenticity and orientation as to time and place. Thus given the prejudicial nature of the photograph, its admission against the governing rules and failure to authenticate all are grounds in and of themselves for reversal, however, in the present case all exist and therefore, reversal is appropriate.

### CONCLUSION

This Case is before the Court on a review of a guilty verdict based on evidence admitted in violation of the Utah Rules of Evidence, and previously decided case law. The Photograph in question was admitted over the Rules of Evidence and created a prejudicial environment for the guilty verdict. The Verdict should be vacated and returned to the Trial Court.

Respectfully submitted this 23<sup>rd</sup> day of October, 2015.

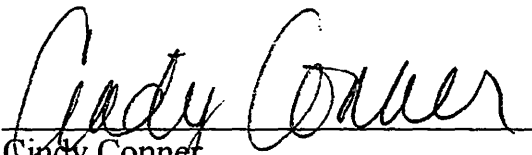


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### CERTIFICATE OF SERVICE

I certify that on October 23, 2015, two copies of the Brief of Appellant was mailed to:

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EXHIBIT A

