Supreme Court of Ohio Clerk of Court - Filed November 19, 2014 - Case No. 2014-1844

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	CASE NO. 2014-1844
PLAINTIFF-APPELLANT,	:	
	:	ON DISCRETIONARY APPEAL FROM THE
v.	:	JEFFERSON COUNTY COURT OF APPEALS,
	:	SEVENTH APPELLATE DISTRICT,
STEDMUND CREECH,	:	CASE NO. 13-JE-41
	:	
DEFENDANT-APPELLEE.	:	

MEMORANDUM IN RESPONSE OF APPELLEE STEDMUND CREECH

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THIS CASE DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS NOT OF PUBLIC OR GREAT GENERAL INTEREST

This case is about whether the Seventh District properly applied Ohio Evidence Rule 403, which mandates that "evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." In this case, the State has not explained how the specifics of Stedmund Creech's criminal history retain any probative value once he offered to stipulate to having a disability that prohibited him from possessing a firearm. Accordingly, the State has not offered *any* probative value that could be weighed against the danger of unfair prejudice from telling the jury the name and identity Mr. Creech's prior convictions.

Because the State fails to explain how a stipulation to an element of an offense prejudices its ability to prove its case, the State creates the appearance that its goal is to encourage the jury to disregard an instruction not to consider the prior bad acts as evidenced of a propensity to commit crime. This Court should not hear this case.

STATEMENT OF THE CASE AND THE FACTS

The State's factual statement is generally correct, but it makes two significant omissions. First, the State does not mention that one of Mr. Creech's co-defendants, Rolland Owens, testified that Mr. Creech did not have a gun. Also, the State's key witness could not specify what kind of gun she claimed Mr. Creech was carrying. Of course, the jury was entitled to disbelieve Mr. Owens or to believe the State's key witness, but there was conflicting testimony about whether Mr. Creech had a gun and, therefore, whether he was guilty of possessing a firearm while under disability.

Second, the State is correct that, "the other charges in the indictment [carrying a concealed weapon and improper handling of a firearm in a vehicle] are not at issue in this appeal." State's Jurisdictional Memorandum at 6. But the State does not explain that the trial court acquitted Mr. Creech of the charges pursuant to Crim.R. 29.

In its procedural statement, the State correctly explains that Mr. Creech argued in the trial court that the State should have been required to accept his stipulation to one of the three disabilities alleged by the State. The State is also correct that the prosecutor objected both to stipulating to anything and to stipulating to only one count. But on appeal, the State has made no argument concerning the sufficiency of the proposed stipulation. Instead, both in the court of appeals and this Court, the State has rested its argument entirely on the premise that the State does not have to accept any stipulation to any prior conviction or indictment for any reason.

ARGUMENT

Proposition of Law:

The court of appeals did not err when it held that the State must accept a defendant's offer to stipulate to a prior conviction in the absence of any explanation from the State of how the stipulation might prejudice any legitimate State interest.

Under Evid.R. 403, "evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Here, Mr. Creech offered to stipulate that he suffered a disability that prevented him from possessing a firearm under R.C. 2923.13. Because of the proffered stipulation, evidence concerning the name and nature of the offenses underlying the disability has no probative value to weigh against the risk of unfair prejudice.

In this case, the Seventh District followed the persuasive reasoning of *Old Chief v. United States*, 519 U.S. 172, 136 L.Ed.2d 574, 117 S.Ct. 644 (1997), which interpreted Fed.Evid.R. 403. *Old Chief's* reasoning is simple, and its interpretation of the rules of evidence applies even more strongly to Ohio. The State must accept a stipulation that relieves the State of its burden to prove a prior conviction unless the State explain a legitimate reason why it still needs to present evidence about the name or nature of the prior conviction. Once the defense offers an adequate stipulation, evidence concerning the name and nature of the underlying disability serves only to risk the unfair prejudice of showing a propensity to commit crime:

> For purposes of the Rule 403 weighing of the probative against the prejudicial, the functions of the competing evidence are distinguishable only by the risk inherent in the one and wholly absent from the other. In this case, as in any other in which the prior conviction is for an offense likely to support conviction on some improper ground, the only reasonable conclusion was that the risk of unfair prejudice did substantially outweigh the discounted probative value of the record of conviction, and it was an abuse of discretion to admit the record when an admission was available.

Old Chief, 519 U.S. at 191, 136 L.Ed.2d 574, 117 S.Ct. 644.

In its memorandum, the State repeatedly and correctly points out that *Old Chief* concerns Federal Rule of Evidence 403 while this case concerns Ohio Rule of Evidence 403. But the State misses that the federal rule gives the government more leeway to introduce unfairly prejudicial evidence than does Ohio's rule. Specifically, when the probative value of relevant evidence is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or of misleading the jury," the federal rule makes exclusion *discretionary* whereas the Ohio rule makes the exclusion *mandatory*:

Federal Rule of Evidence 403 (1997) [1]	**Ohio Rule of Evidence 403(A)**
Although relevant, evidence *may be excluded* if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or misleading the jury[.] (Emphasis added.)	**Exclusion mandatory.** Although relevant, *evidence is not admissible* if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury. (Bold in original, italics added.)

[1] This quotation is from the federal rule that was in effect in 1997. In 2011, "stylistic" changes were made to the federal rule, but there was "no intent to change any result in any ruling on evidence admissibility." Comment Notes, Fed.R.Evid 403.

So, under the federal rule, a trial court *may* exclude unfairly prejudicial evidence. But under Ohio's rule, a trial court *must* exclude unfairly prejudicial evidence. Accordingly, the case for requiring an Ohio prosecutor to accept a stipulation to a prior conviction is even stronger than under the federal rule at issue in *Old Chief*.

The State also argues that the federal statute at issue in *Old Chief* covers a large range of offenses while Ohio's weapon-under-disability statute is more specific in that it applies "only" to felony offenses of violence. State's Jurisdictional Memorandum at 6-7. But the federal statute is more narrow and Ohio's statute more broad than the State suggests. As the United States Supreme Court explained, under the federal statute at issue in *Old Chief*, "'a crime' is not an abstract or metaphysical concept. Rather, the Government must prove that the defendant committed a *particular crime*." (Emphasis sic.) *Old Chief*, 519 U.S. at 194, 136 L.Ed.2d 574, 117 S.Ct. 644. Further, Ohio's definition of felony "crime of violence" covers a broad range of offenses, from aggravated murder to attempting to causing "serious public inconvenience or alarm, by" making a false report of an "impending fire, explosion, crime, or other catastrophe" at a college or university. R.C. 2901.01(A)(9), 2903.01, and 2917.31(A)(1) and (C)(5).

The State also repeatedly claims without explanation that it has the right to tell its narrative anyway it wants. But the United States Supreme Court correctly explained that a defense stipulation to a prior conviction does not deprive the State of any legitimate litigation advantage:

> This recognition that the prosecution with its burden of persuasion needs evidentiary depth to tell a continuous story has, however, virtually no application when the point at issue is a defendant's legal status, dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior charged against him.

Old Chief at 190.

In fact, the United States Supreme Court expressly held that the Government could introduce evidence of prior convictions where doing so had a legitimate purpose, such as showing "motive, identity, or absence of mistake, or accident" under Fed.R.Evid. 404(b). *Id.* But in *Old Chief*, as in this case, proving "status without telling exactly why that status was imposed leaves no gap in the story of a defendant's subsequent criminality, and its demonstration by stipulation or admission neither displaces a chapter from a continuous sequence of conventional evidence nor comes across as an officious substitution, to confuse or offend or provoke reproach." *Id.*

After Mr. Creech's proposed stipulation, evidence of his criminal history had no probative value, but potential unfair prejudice remained. As a result, the trial court should have required the State to accept his stipulation. The trial court's failure to exclude the evidence violated Mr. Creech's right to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution. *Anderson v. Commonwealth*, 281 S.W.3d 761, 768 (Ky. 2009) (Schroeder, J., concurring in judgment only).

CONCLUSION

The judgment of the court of appeals was correct. This Court should not hear this procedurally flawed case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was forwarded by electronic mail to Prosecuting Attorney Jane M. Hanlin, jmkeenan@bruzzeselaw.com, on this 19th day of November, 2014.

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