

APPEAL NO. ED87599

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

STATE OF MISSOURI,
Respondent

v.

WILLIAM T. WARD
Appellant

Appeal to the Missouri Court of Appeals
from the Circuit Court of St. Louis County

Cause No.: 03CR-5143A

Division 9

Honorable David Vincent

APPELLANT'S BRIEF

BERNARD EDELMAN - #20904
EDELMAN & EDELMAN, LLC
8008 Carondelet, Suite 303
Clayton, Missouri 63105
314-726-5588 Fax: 314-726-5847
Attorney for Appellant

TABLE OF CONTENTS

Table of Authorities	3
Jurisdictional Statement	5
Statement of Facts.....	6
Points Relied Upon.....	19
Argument.....	21
Conclusion.....	37
Certificate of Compliance.....	38
Certificate of Service.....	39
Appendix.....	A1

TABLE OF AUTHORITIES

CASES

<u>Bisby v. Texas</u> , 907 SW2d 949 (TexApp 1995).....	30
<u>California v. Trombetta</u> , 467 US 479, 104 S.Ct. 2528 (1984).....	37
<u>Crane v. Ky</u> , 476 US 683, 106 S.Ct. 2142 (1986).....	37
<u>Gordon v. Idaho</u> , 778 F2d 1397 (9th Cir. 1985).....	27
<u>People of Calif. v. Johnson</u> , 62 CalApp 4th 608 (4th Dist. Ct of App 1998).....	31
<u>Rock v. Arkansas</u> , 483 US 44, 107 S.Ct. 2704 (1987).....	27
<u>State v. Barnard</u> , 849 SW2d 10 (Mo 1993).....	34
<u>State v. Bowlin</u> , 850 SW2d 116 (MoApp 1993).....	25
<u>State v. Davis</u> , consolidated with <u>State v. Bainter</u> , #SC87748 and SC87749 (Mo banc 12/5/06).....	36
<u>State v. Edwards</u> , 173 SW3d 384 (MoApp 2005).....	26
<u>State v. Kitson</u> , 817 SW2d 594 (MoApp 1991).....	35
<u>State v. Mahoney</u> , 70 SW3d 601 (MoApp 2002).....	34
<u>State v. Reese</u> , 274 SW2d 304 (Mo 1954).....	35
<u>State v. Sladek</u> , 835 SW2d 308 (Mo 1992).....	35
<u>State v. Spulak</u> , 720 SW2d 396 (MoApp 1986).....	23
<u>US v. Looper</u> , 419 F2d 1405 (4th Cir. 1969).....	25, 26, 30
<u>US v. Ward</u> , 989 F2d 1015 (9th Cir. 1992).....	29

STATUTES

491.380 RSMo..... 22

492.030 RSMo..... 22

492.040 RSMo.....23, 24, 25, 32

492.060 RSMo.....23, 24, 25, 26, 32

OTHER AUTHORITIES

Sect 18(a), Mo Constitution..... 22, 23

Amendments to US Constitution

Fifth Amendment..... 29

Sixth Amendment.....22, 24, 28, 29, 33, 27

Fourteenth Amendment.....24, 28, 37

JURISDICTIONAL STATEMENT

On November 15, 2005, Appellant, William T. Ward, was convicted of Possession of a Controlled Substance with Intent to Distribute (LF 45, 47), and in a separate proceeding, the jury recommended a term of imprisonment of 6 years (LF 46-47). Appellant was formally sentenced to a 6-year term in the Missouri Department of Corrections on January 9, 2006 (LF 52-54), from which sentence Appellant timely filed a notice of appeal (LF 55).

The issues on appeal do not involve matters exclusively within the jurisdiction of the Missouri Supreme Court and therefore jurisdiction is proper in the Missouri Court of Appeals for the Eastern District. This appeal falls within the general appellate jurisdiction of this Court as it does not involve the validity of a treaty or statute of the United States, or a statute or provision of the Constitution of this state, or the title to any state office, and is not a case in which the punishment of death has been imposed. St. Louis County is within the territorial jurisdiction of this Court. Missouri Constitution, Article V, Section 3.

STATEMENT OF FACTS

On August 6, 2003, Officer James Hildebrand of the St. Louis County Police Department, pulled over a Toyota Sequoia SUV on Highway 44 at or near Lewis Road in St. Louis County, Missouri (TR 74-76). Appellant was the driver of the vehicle, Pritchett was in the front seat, and the owner of the vehicle, Anthony McMullen, was in the right rear seat (TR 76-77, 81-82). Patrolman Hildebrand smelled the odor of marijuana and called a canine handler, Detective Berra, to bring her drug dog to the location of the traffic stop (TR 77, 84-85). It took 25 minutes for Detective Berra and the drug dog to arrive and when they did, Detective Berra ran her drug dog across the vehicle and around the vehicle, and the dog alerted to the presence of narcotics (TR 85). Officer Hildebrand then opened the luggage carrier on top of the vehicle, where he found a duffle bag which contained bricks of what appeared to be marijuana (TR 87-88). Lab tests of the seized items, by the St. Louis County Police Lab, confirmed the substance was marijuana and the bricks weighed 73.8 pounds (TR 127-130).

Appellant was ultimately charged in the St. Louis County Circuit Court with the Class B felony of Possession of Controlled Substance with Intent to Deliver (LF 8-10).

Because of concerns the trial judge had as to the competence of appellant, a competency exam was ordered (LF 19-28) and a hearing on appellant's competence was held on July 8, 2005 before the Honorable David Vincent, the trial judge in this case (TR 5, LF 29). At the competency hearing, the State offered the report of Dr. Rabun, and the appellant offered the report of Dr. Duncan, as well as a report prepared in 1992 in a federal case, which report was a determination of the competence of appellant in 1992. Appellant's standby

counsel then called for appellant to testify as to issues involving his competence when the following colloquy occurred between the court and the appellant:

“MR. EDELMAN: Okay. Would you be sworn by the judge and --

‘THE COURT: Right, if you read the notes he doesn’t swear, Counsel.

“THE DEFENDANT: I’ll tell the truth.

‘THE COURT: Because swearing is something that he has a problem with.

“MR. EDELMAN: Listen to what the Judge is going to read to you, William, and see if you agree to do that.

“THE COURT: Please step forward, raise your right hand. You do solemnly affirm, under the pains and penalties of perjury, that the testimony you’re about to give will be the truth, the whole truth and nothing but the truth, so help you?

‘THE DEFENDANT: I’ll tell the truth.

“THE COURT: Is that a yes? I didn’t say swear, I said to affirm.

“THE DEFENDANT: Affirm and swear would be the same.

“THE COURT: You’ll tell the truth.

“THE DEFENDANT: I’ll tell the truth, your Honor.

“THE COURT: That’s fine. Have a seat.” (TR 12-13).

After appellant’s testimony and argument by both lawyers, the trial court found the appellant competent to stand trial (TR 73, LF 29).

Appellant’s trial began on November 14, 2005 in Division 9 of the St. Louis County Circuit Court, and the first witness for the State was Patrolman Hildebrand, who testified as

to the circumstances of appellant's traffic stop and arrest (TR 74-88). Appellant acted as his own counsel and cross-examined all witnesses who appeared for the State.

During Patrolman Hildebrand's testimony, in an answer not responsive to the assistant prosecuting attorney's question, he stated that, "I asked him if he had ever been arrested for narcotics violations and he said yes, he had been arrested. So, therefore, I had done what was called an EPIC check. It's a special check geared more towards people involved in transporting large sums of currency or narcotics. And that proved to be positive. Mr. Ward did come back positive through EPIC [f]or being arrested for possession of cocaine through an airport in North Carolina." (TR 79).

Appellant objected to this testimony about his arrest in North Carolina, which was sustained by the trial court. No admonishment was given to the jury to disregard this improper evidence. However, appellant's request for a mistrial was denied (TR 79-80). On cross-examination, Hildebrand again, not responsive to a question by appellant, volunteered that, "And asked if you had ever been arrested for narcotics, you said yes. I did an EPIC check on you. It came back positive. You had been arrested for possession of cocaine through an airport in North Carolina." (TR 99). Again, appellant objected to the testimony of Hildebrand about a prior arrest, which objection was sustained, and the court instructed the jury to disregard the evidence of the arrest (TR 99). The trial judge, out of the jury's hearing, admonished the prosecutor to instruct the witness, Hildebrand, to not again refer to appellant's arrest in North Carolina (TR 100). Appellant's second request for a mistrial was denied (TR 100).

The next witness was Detective Berra, a St. Louis County police officer, who testified that she was called to the scene of a traffic stop by Detective Hildebrand in St. Louis County on August 6, 2003 (TR 122). She had a dog with her, Allen, who was allowed to search around the vehicle and in the vehicle, and he alerted to Detective Berra, indicating to Berra that Allen had detected some type of narcotic (TR 121-124). After the dog alerted, Patrolman Hildebrand opened up the luggage carrier on top of the vehicle and removed a large duffle bag which contained marijuana (TR 124, 125).

The next witness was the appellant's co-defendant, Anthony McMullen, the owner of the vehicle that appellant was driving, who had made an agreement to testify for the State of Missouri (TR 130-132). McMullen told the jury that he and appellant had gone to Arizona to buy marijuana, using one of appellant's sources in Arizona as a supplier of the drug (TR 132, 133). McMullen stated he and appellant had pooled their money to buy the marijuana in Arizona with McMullen supplying the bulk of the money (TR 133).

The last witness for the State was Ryan Campbell, a forensic scientist with the St. Louis County Police Department (TR 127). He testified he tested the drugs that were brought to him from a traffic stop on Highway 44 on August 6, 2003 and that the sample brought to him was marijuana, a controlled substance, and that the total weight was 73.8 pounds (TR 127-130).

After appellant's opening statement, he called Detective Bradley as his first witness (TR 244). Detective Bradley indicated that the quantity of drugs did not meet the criteria of the U.S. Attorney's Office for prosecution and that no federal prosecution was initiated (TR

246). Appellant then stepped forward to testify on his own behalf, when the following occurred:

“THE DEFENDANT: I guess that leaves me.

“THE COURT: Please face the clerk of the Court. Raise your right hand.

“THE DEFENDANT: We already went through that with the -- we already went through that. I stated that I haven’t taken an oath to affirm to or swear to, but I’ll tell the truth.

“THE COURT: Okay. Ladies and gentlemen of the jury, we’re going to take about a five-minute break. I’ll give you this instruction before you leave.

“(The jury was duly admonished.)

“THE COURT: Court will be in recess for five minutes.

“May the record reflect that we’re outside the hearing and presence of the jury with the defendant present and Counsel, and with Mr. Smallwood for the State.

“Mr. Ward and the defendant (sic), I don’t know of any law that says your client can promise to tell the truth without being sworn in by the clerk of the Court. Do you know of any law about that, Mr. Edelman?

“MR. EDELMAN: Judge, I don’t know of any law about that. Again, we went through this at the competency hearing, just as a reminder, that Mr. Ward -- and again, I’m not sure he, like any other witness, has to be subject to the penalty of perjury upon his testimony. And in order to be subject to his testimony of penalty of perjury, he has to swear to take an oath, and I’m not a hundred percent sure what his basis is of why he won’t take

an oath. I know he doesn't want to take it under God, so help me God, but I think there is a way to do it without using the word God.

“THE DEFENDANT: It's unacceptable to me for any reason.

“MR. EDELMAN: You may not be allowed to testify. Be careful.

‘THE DEFENDANT: As long as it's told to the jury why I can't testify.

“MR. EDELMAN: That's up to you. This is your case and you wanted them to hear from you so you better put yourself in a position where you let that happen.

“THE COURT: Off the record right now.

“(An off-the-record discussion was held.)

“THE COURT: Let's go back on the record.

“Mr. Smallwood, do you have any objection to the defendant not being sworn before he's testifying before this jury?

“MR. SMALLWOOD: Yes, your Honor. The State objects. I know of no situation where a witness can testify without taking the oath or some type of oath.

“THE COURT: Okay. Mr. Ward, what you're saying is that you do not want to take the oath so help you God or affirm under the pains and penalty of perjury before testifying; is that what you're saying?

“THE DEFENDANT: I'm saying I'm a nonbeliever. I don't believe in oath, affirming to oath or anything else.

“THE COURT: Do you have scruples? I think you have a conscience, a scruple against taking an oath or swearing in any form; is that correct?

‘THE DEFENDANT: That's correct.

“THE COURT: Can you at least affirm to this statement under Section 492.030: You do solemnly declare and affirm, under the pains and penalty of perjury, that you will promise to tell the truth in this case?

“THE DEFENDANT: No, that means the same thing to me.

“THE COURT: Is there any form that you can at least affirm or make some kind of indication --

“THE DEFENDANT: No, your Honor.

“THE COURT: So there is no oath or no swearing of any form that you will permit before you testify; is that correct?

“THE DEFENDANT: That’s correct.

“THE COURT: You’re not permitted to testify in this case, Mr. Ward, unless you do take some kind of oath or affirmance; do you understand that?

“THE DEFENDANT: Am I entitled to a closing statement?

“THE COURT: Yes, sir. Let’s go off the record a second.

“(An off-the-record discussion was held.)

“THE COURT: Back on the record. Did you consult with your attorney about your right to testify and right not to testify? You knew that you would have a right not to testify, right, Mr. Ward?

“THE DEFENDANT: No, I didn’t know I had a right not to testify.

“THE COURT: That’s okay.

“THE DEFENDANT: I thought I had a right to testify.

“THE COURT: You have a right to testify if you choose to do so.

“THE DEFENDANT: I don’t remember it’s written anywhere in the bill of rights, in the first ten bill of rights.

“THE COURT: That’s all right, Mr. Ward. It’s already on the record that you understand your right to not testify. You do have a right to testify, but in this court of law you’re going to give some kind of statement prior to going on the witness stand which you refuse to do so. And that’s okay with me, but you understand I’m not going to permit you to testify in this case if you do not take some kind of oath or affirmance?

“THE DEFENDANT: Am I allowed to mention that you allowed this in an earlier proceeding, when we had the competency hearing, that you allowed for me to take the stand without taking an oath or affirming?

“THE COURT: Your statements weren’t used for your credibility or to determine whether or not you were guilty or not guilty. They were used, in fact, to see what you were saying, in other words, whether or not you had clear thinking, knew exactly what was going on and had some competence about representing yourself, that’s why we proceeded in that form. But in front of this jury, you will not be permitted to tell them you testified in an earlier proceeding.

“THE DEFENDANT: That’s what I wanted to ask you, your Honor. I didn’t want to get in the middle of it and you jump all over me.

“THE COURT: Anything else? Are you ready to argue the case? Do you have any other evidence other than the detective?

“THE DEFENDANT: No. No, you said that I can’t testify.

“THE COURT: Are you resting at this time?

“THE DEFENDANT: I would like to tell the jury why I’m resting at this time. That I didn’t want to rest at this time but my hand is being forced by the courts for the --

“THE COURT: Do you have any other evidence?

“THE DEFENDANT: No, sir.” (TR 249-255.)

When the court asked the appellant if appellant wanted to submit an instruction on his right not to testify, he indicated he did not want to submit such an instruction and indicated to the court that he believed he was being denied his right to testify, stating:

THE COURT: “Let’s go back on the record. I’ve had a conversation with all counsel, the defendant is present, as well, concerning submission of the instruction, the right not to testify. Mr. Ward, do you want to submit that instruction?

“THE DEFENDANT: I’m saying I’m not being allowed to testify.

“THE COURT: Right, but are you going to submit that instruction, right not to testify?

“THE DEFENDANT: No. I’m saying that I’ve been denied the right to testify.

“THE COURT: Right. Mr. Edelman, I think you’re in charge of the instructions for the defendant.

“MR. EDELMAN: Judge, he tells me he doesn’t want me to submit that because he feels he’s been denied of his right to testify as to voluntarily choosing to testify (sic), so I’m not going to submit that instruction.

“THE COURT: You agree with that, Mr. Ward?

“THE DEFENDANT: Yes.” (TR 256).

In closing argument, appellant told the jury:

THE DEFENDANT: “You’re probably asking why I’m not taking the stand, you know. But I’ve been denied the right to testify in my own defense.

“MR. SMALLWOOD: Your Honor, I’m going to object.

“THE COURT: Sustained.

“THE DEFENDANT: I’ve been instructed by the Court that I cannot take the witness stand and testify in my own defense in the United States of America. Yeah, you all got people fighting right now in Iraq for the freedom that you say you guarantee everybody because I refuse to accept being a nonbeliever, which I stated all the time, that I’m a nonbeliever, and for me to agree with an oath, affirming to an oath, would make me not who I say I am. And there is nowhere in the constitution that it states that you can’t be a nonbeliever if that’s your religious view. It states you can have any religious view that you want, and you have the right to take the stand and give your own testimony. But the Judge tell[s] me I cannot testify because I refuse to take an oath, you know.

“And I told you all that if you all seen that I got my rights, that I would prove that the government is framing me. And the courts already knew that I wouldn’t do this because it came up in earlier parts of the trial, other conferences here and stuff, it came up where I refused to all these things and we went on with it and they didn’t stop that.” (TR 262-263.)

After jury deliberation, appellant was found guilty of Possession with Intent to Distribute a Controlled Substance (TR 277, LF 45). Prior to the sentencing phase of

appellant's trial, appellant's standby counsel indicated to the court that he was going to make the argument at the sentencing phase of appellant's trial, when the following took place:

THE COURT: "However, Mr. Edelman, do you want to make a record regarding your client?"

"MR. EDELMAN: Judge, I do. I think I had requested that I be allowed to be the attorney for the sentencing stage.

"THE COURT: That's what you want, Mr. Ward?"

"THE DEFENDANT: Yes.

"THE COURT: That will be granted.

"MR. EDELMAN: Assuming we get there, which would then allow me to call my client as a witness and to argue the case on his behalf. And if he's not -- if it turns out he doesn't testify, then just to make the closing argument, there wouldn't be an opening statement because there would be no evidence. So, anticipating that he'd like to testify, I anticipate there is going to be another problem with the oath or affirmation, and I would like for you to determine now whether he would be allowed to testify at the sentencing phase of this proceeding if we get there.

"THE COURT: And you could not do any oaths or any affirmations or anything that we already talked about like promises to speak the truth, you could not do that at all?"

"THE DEFENDANT: No.

“THE COURT: Would there be an objection, Mr. Smallwood, to any testimony to go before the jury without any oaths or affirmations or any swearing to tell the truth subject to the pains and penalties of perjury?

“MR. SMALLWOOD: Yeah, your Honor. The State objects.

“THE COURT: It will be sustained. If your client does not wish to take any oaths or affirmations, like I said, in accordance with the statute requiring oaths, then he will not be allowed to testify.

“MR. EDELMAN: Then I anticipate we will have no evidence. I don’t know if the State does or doesn’t. If there is no evidence by either side, then, as I understand it, there would only be argument.” (TR 274-275.)

No evidence was presented to the jury at the sentencing phase by either side and the assistant prosecuting attorney and standby trial counsel both made closing arguments to the jury regarding the appropriate punishment (TR 278-288). After deliberations as to punishment, the jury assessed appellant’s punishment at six years in the Missouri Department of Corrections (TR 291, LF 46). Appellant timely filed a motion for new trial (LF 48), which was overruled on January 19, 2006 (LF 51). On January 19, 2006, the court sentenced appellant, pursuant to the jury’s verdict, to a term of six years in the Missouri Department of Corrections (LF 52-54). From that verdict, the appellant timely filed his appeal to the Missouri Court of Appeals (LF 55.)

POINTS RELIED ON

I.

THE COURT ERRED IN DENYING DEFENDANT THE RIGHT TO TESTIFY AS A WITNESS IN HIS OWN DEFENSE DURING THE GUILT AND PENALTY PHASES OF THE TRIAL, IN VIOLATION OF THE 5TH, 6TH AND 14TH AMENDMENTS OF THE US CONSTITUTION AND ARTICLE I, SECTIONS 10 AND 18(a) OF THE MISSOURI CONSTITUTION.

State v. Bowlin, 850 SW2d 116 (MoApp 1993)

§492.060 RSMo

Rock v. Arkansas, 483 US 44, 107 S.Ct 2704 (1987)

II.

THE COURT ERRED IN FAILING TO DECLARE A MISTRIAL WHEN OFFICER HILDEBRAND WAS ALLOWED TO TESTIFY THAT DEFENDANT HAD BEEN ARRESTED FOR DRUG VIOLATIONS IN NORTH CAROLINA.

State v. Barnard, 849 SW2d 10 (Mo 1993)

State v. Davis, consolidated with State v. Bainter, #SC87748 and SC87749 (Mo banc 12/5/06)

State v. Mahoney, 70 SW3d 601 (MoApp 2002)

ARGUMENT

I.

THE COURT ERRED IN DENYING DEFENDANT THE RIGHT TO TESTIFY AS A WITNESS IN HIS OWN DEFENSE DURING THE GUILT AND PENALTY PHASES OF THE TRIAL, IN VIOLATION OF THE 5TH, 6TH AND 14TH AMENDMENTS OF THE US CONSTITUTION AND ARTICLE I, SECTIONS 10 AND 18(a) OF THE MISSOURI CONSTITUTION.

At the conclusion of presenting his witness to the jury, appellant, stating, “I guess that leaves me,” rose to take the witness stand to testify in his defense and to present his version of the events to the jury (TR 249). Instead of taking the oath, appellant told the judge that he had already gone through this with the court in an earlier proceeding, the competency hearing, and he would not take an oath to affirm or swear, but would “tell the truth” (TR 249). Even though the trial judge had allowed appellant to testify at the competency hearing without taking an oath, the court began an inquiry, outside the presence of the jury, as to whether appellant had to be sworn (TR 249-255). The trial judge asked the prosecutor if he had any objection to appellant’s testifying without being sworn and he stated that he did (TR 251). Appellant then told the judge he was a nonbeliever and did not believe in oaths or affirmations to oaths (TR 251). The judge asked appellant whether there was any oath or swearing that would permit him to testify and he said there wasn’t (TR 252). The trial court then told appellant he wouldn’t be allowed to testify in his defense (TR 252).

Constitutional Provisions

§18(a) of the Missouri Constitution states that, “In criminal prosecutions, the accused shall have the right to appear and defend, in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face-to-face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county.”

The Sixth Amendment to the United States Constitution states, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”

Missouri Statutes

The following Missouri statutes are relevant and necessary for an appropriate disposition of appellant’s appeal:

§491.380(2) RSMo states that, “Every person offered as a witness, before any testimony shall be given by him, shall be duly sworn, or affirmed, that the evidence he shall give relating to the matter in issue between.....plaintiff and....defendant shall be the truth, the whole truth and nothing but the truth.” (A6).

§492.030 RSMo states that, “Every person who shall declare that he has conscientious scruples against taking an oath or swearing in any form shall be permitted to make his solemn

declaration or affirmation in the following form: ‘You do solemnly declare and affirm,’ etc., concluding with the words ‘under the pains and penalties of perjury.’” (A7).

§492.040 RSMO states, “Whenever the court or officer by whom any person is about to be sworn shall be satisfied that such person has any peculiar mode of swearing connected with or in addition to the usual form of administering oaths, which is to him of more solemn and binding obligation, the court or officer shall adopt that mode which shall appear to be most binding on the conscience of the person to be sworn.” (A8).

§492.060 RSMO states, “In all cases in which an oath or affirmation is required or authorized by law, every person swearing, affirming or **declaring, in whatever form**, shall be deemed to have been lawfully sworn, and to be guilty of perjury for corruptly and falsely swearing, affirming or declaring, in the same manner as if he had sworn by laying his hand on the gospels and kissing them.” (Emphasis added.) (A9).

Missouri Law

Appellant’s counsel could not find any precedent in Missouri case law where a Missouri trial judge refused, under any circumstances, to allow a defendant to testify in his own defense in a criminal case, which the Missouri appellate courts then affirmed. However, several cases analyzed a trial judge’s decision not to allow a witness to testify for a defendant, when they would not take an oath or affirmation for religious reasons.

In State v. Spulak, 720 SW2d 396 (MoApp 1986), appellant complained that the trial court would not let five of his witnesses testify because they would not swear or affirm. Even though the witnesses were willing to declare that they would testify subject to the penalties of perjury, they were not allowed to testify unless they took an oath. The appellate

court, in reversing Spulak's conviction, stated, "There is no special litany required in administering an oath. Whenever the court...by whom any person is about to be sworn shall be satisfied that such person has any peculiar mode of swearing connected with or in addition to the usual form of administering oaths, which is to him of more solemn and binding obligation, the court...shall adopt that mode which shall appear to be most binding on the conscience of the person to be sworn." See §492.040 RSMo. (Spulak at 397). The court went on to say: "Also, in all cases in which an oath or affirmation is required or authorized by law, every person swearing, affirming or declaring in whatever form, shall be deemed to have been lawfully sworn..." See §492.060 RSMo. "The sanction of an oath, regarded as a feature of judicial procedure, is its quickening of the conscience of the affiant, and the liability it creates to the penalty of perjury, if the testimony is willfully false. This penalty attaches, whatever be the form in which the oath is administered." (Spulak at 398).

The Spulak opinion further stated that, "The Sixth Amendment to the Constitution guarantees to a criminal defendant the right of compulsory process to call witnesses in his favor. This right is applicable to the states under the Fourteenth Amendment and is implicated when a defendant is barred from calling witnesses to testify on his behalf....While a defendant's right to call witnesses on his behalf is not absolute, a state's interest in restricting who may be called will be scrutinized closely." (Spulak at 398).

The appellate court, in reversing Spulak's conviction, further stated: "There is no special litany required in administering an oath. Whenever the court...by whom any person is about to be sworn shall be satisfied that such person has any peculiar mode of swearing connected with or in addition to the usual form of administering oaths, which is to him of

more solemn and binding obligation, the court...shall adopt that mode which shall appear to be most binding on the conscience of the person to be sworn.” See §492.040 RSMo. “Also, in all cases in which an oath or affirmation is required or authorized by law, every person swearing, affirming or declaring, in whatever form, shall be deemed to have been lawfully sworn.” See §492.060 RSMo. (Spulak at 397). “Exclusion of testimony as a sanction is to be tested by whether such trial court action results in fundamental unfairness to the defendant. In attempting to come to grips with the somewhat nebulous term, ‘fundamental unfairness,’ we keep in mind that in criminal cases involving erroneous exclusion of defense evidence, such error is presumptively prejudicial, and that presumption can only be overcome by a showing that such erroneous exclusion was harmless error beyond any reasonable doubt.” (Spulak at 399).

Interestingly, US v. Looper, supra, was cited by the Spulak court as authority to reverse Spulak’s conviction. (Spulak at 398).

The appellate court, in Spulak, also stated that an offer of proof as to what the witness would have testified to was not required. (Spulak at 399).

In State v. Bolin, 850 SW2d 116 (MoApp 1993), a situation similar to Spulak, supra, occurred. Bolin asked if he and his witness could testify without affirming and the trial court judge said they could not unless they affirmed. (Bolin at 117). The appellate court, in reversing Bolin’s conviction, cited Spulak as authority. In addition, the court also noted that §492.060 RSMo provided that, “declaring in whatever form shall be deemed to have been lawfully sworn.” (Bolin at 117). The court also found that an offer of proof as to the witness’s testimony was not necessary because the basis for the exclusion of the testimony

dealt solely with the matter of the oath to be administered, and had nothing to do with the content of the witness's testimony. (Bolin at 118).

In State v. Edwards, 173 SW3d 384 (MoApp 2005), the defendant was found guilty of murder second degree and armed criminal action. The jury was sent home for the night and the next morning, the penalty phase of the trial was to begin. Believing there was no penalty evidence to be presented, the trial judge read the balance of the instructions to the jury, but before closing argument in the penalty phase could begin, Edwards' attorney told the trial court that Edwards wanted to testify and present evidence in the penalty phase. The trial court refused to let Edwards testify, stating it was too late as the jury had already been instructed. Edwards raised this refusal to allow him to testify on appeal.

The appellate court, in reversing Edwards' conviction, stated, "There is evidence defendant wished to assert his right. We believe it is error for a trial court to be informed of a criminal defendant's desire to testify and not allow the criminal defendant to take the stand, even at this stage of the proceeding." (Edwards at 386.)

Other Jurisdictions

In US v. Looper, 419 F2d 1405 (4th Cir. 1969), the US Court of Appeals reversed Looper's conviction because the trial court would not let Looper's witness testify because he would not take an oath or affirm. In reversing the conviction, the court stated, "If defendant's religious beliefs made repugnant or impossible to him an appeal to God or the raising of a hand as part of an oath or affirmation (and in this regard, his statement was to be believed), all the district judge need do is to make inquiry as to what form of oath or affirmation would not offend defendant's religious beliefs, but would give rise to a duty to

speak the truth. The district judge could qualify defendant to testify in any form which stated or symbolized that defendant would tell the truth and which, under defendant's religious beliefs, purported to impress on him the necessity for so doing." (Looper at 1407).

Gordon v. Idaho, 778 F2d 1397 (9th Cir. 1985), was a civil rights case brought by Gordon alleging he was incarcerated for 12 days for civil contempt during the course of the State's civil proceeding because he refused to take an oath or affirmation in a deposition. In the federal civil rights case, Gordon again refused to swear or affirm before giving a deposition and the trial judge dismissed Gordon's civil rights action as a sanction.

On appeal, the US Court of Appeals stated that requiring Gordon to swear or affirm was error. Any statement indicating deponent (Gordon) is impressed with the duty to tell the truth and understands that he or she can be prosecuted for perjury for failure to do so satisfies the requirement of an oath or affirmation. (Gordon at 1400).

In Rock v. Arkansas, 483 US 44, 107 S.Ct. 2704 (1987), Rock was charged with shooting her husband and because she could not remember the precise details of the shooting, her attorney had her hypnotized to attempt to refresh her memory. When the prosecutor learned of Rock's hypnosis, he moved to exclude her testimony and the trial judge restricted what Rock could testify about. The restriction was that Rock could not testify as to any enhancement of her memory by the hypnosis. After Rock was convicted, she appealed, contending it was error to restrict her testimony. The Arkansas Supreme Court affirmed her conviction and an appeal was taken to the US Supreme Court. The US Supreme Court, in reversing Rock's conviction and remand back to the Arkansas state court for a new trial stated, "The right to testify on one's own behalf at a criminal trial has sources in several

provisions of the constitution. It is one of the rights that are essential to due process of law in a fair adversary process....The necessary ingredients of the Fourteenth Amendment guarantee that no one shall be deprived of liberty without due process of law include a right to be heard and to offer testimony: a person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense - a right to his day in court - are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." (Rock at 51.).

"The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call witnesses in his favor, a right that is guaranteed in the criminal courts of the states by the Fourteenth Amendment....Logically included in the accused's right to call witnesses whose testimony is material and favorable to his defense...is a right to testify himself should he decide it is in his favor to do so. In fact, the most important witness for the defense in any criminal case is the defendant himself. There is no justification today for a rule that denies an accused the opportunity to offer his own testimony. Like the truthfulness of other witnesses, the defendant's veracity, which was the concern behind the original common law rule, can be tested adequately by cross-examination....the Sixth Amendment grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be informed of the nature and cause of the accusation, who must be confronted with the witnesses against him, and who must be accorded compulsory process for obtaining witnesses in his favor...Even more fundamental to a personal defense than the right of self-representation, which was found to be necessarily implied by the structure of the Sixth Amendment, is an accused's right to present his own

version of events in his own words. A defendant's opportunity to conduct his own defense by calling witnesses is incomplete if he may not present himself as a witness. The opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony....every criminal defendant is privileged to testify in his own defense or to refuse to do so." (Rock at 52-53).

In US v. Ward, 989 F2d 1015 (9th Cr. 1992), Ward was convicted of income tax violations and after conviction, appealed, contending he was not allowed to testify because he wanted to swear to an oath of his own creation. Ward was even willing to take the standard oath, but wanted to also take his own oath, which replaced the word "truth" with the phrase "fully integrated honesty." Ward's oath would have read, "Do you affirm to speak with fully integrated honesty, only with fully integrated honesty, and nothing but fully integrated honesty," as Ward believed that honesty was superior to the truth. (Ward at 1017). In reversing Ward's conviction, the US Court of Appeals stated: "All that the common law requires is a form or statement which impresses upon the mind and conscience of a witness the necessity for telling the truth. Thus, defendant's privilege to testify may not be denied him solely because he would not accede to a form of oath or affirmation not required by the common law...all the district judge need do is make inquiry as to what form of oath or affirmation would not offend defendant's religious beliefs, but would give rise to a duty to speak the truth." (Ward at 1019), citing US v. Looper, supra.

Bisby v. Texas, 907 SW2d 949 (TexApp 1995) looked at this issue from a different perspective. One of the State's witnesses was allowed to testify against Bisby without taking the standard oath based on the witness's religious beliefs. After a lengthy exchange, the

witness answered that he would accurately and truthfully answer under penalty of perjury the questions he was asked and was allowed to testify. (Bisby at 953). After Bisby's conviction for murder and his sentence of 99 years, he appealed, contending it was error to allow the witness to testify without taking the appropriate oath. In affirming Bisby's conviction, the Texas appellate court stated, "Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so...When a trial judge is confronted by a witness who refuses on religious grounds to take an oath or an affirmation, the trial judge should take reasonable steps to accommodate the witness's beliefs....Faced with such a situation, the trial judge should strive to devise, in consultation with the witness if necessary, some alternative form of serious public commitment to answer truthfully that does not transgress the prospect's sincerely-held beliefs." (Bisby 954-955).

In footnote 4 of Bisby, the Texas appellate court stated, "If the court wishes to preserve the threat of perjury, the court may compel the witness to acknowledge that he is subject to penalties for perjury." (Bisby at 955).

In People of California v. Johnson, 62 CalApp 4th 608 (4th Dist. Ct. of App.1998), Johnson was convicted of various crimes and sentenced to five consecutive life terms plus 440 years. In an in-camera hearing, Johnson's lawyer told the court he was not going to call his client as a witness, even though Johnson wanted to testify, because of ethical concerns. The lawyer felt that Johnson was going to testify falsely and was attempting to distance himself from suborning perjury by not calling Johnson as a witness. The trial judge apparently misunderstood the lawyer's dilemma and thought the lawyer was telling the court

that it wasn't in Johnson's best interests to testify. The court noted that Johnson wanted to testify in his own defense. (Johnson at 613-614). After conviction and on appeal, the California Court of Appeals delivered a scholarly overview of the development of a defendant's right to testify. The appellate court felt that even though Johnson might be committing perjury if he testified, he was still entitled to be heard as a witness. The court concluded it was error to deny Johnson his constitutional right to testify and reversed and remanded the case back to the trial court.

Appellant's Case

In this case, appellant was representing himself, with the limited assistance of standby counsel. He found himself in a predicament that he could not solve, not having the experience or intellect to do so. He was allowed by the trial judge to testify at the competency hearing without taking an oath (TR 12-13). At trial when he was about to be sworn as a witness, he indicated he would not swear or affirm, but reminded the trial judge that he previously was allowed to testify without taking the oath (TR 249). The court attempted to differentiate the different proceedings and why he let the appellant testify without taking an oath at the earlier competency proceeding but not before the jury (TR 254-255). The court, rather than fashioning a remedy that would allow the appellant to testify, put the burden on the appellant to develop a form of an oath or affirmation that would satisfy the trial court. The judge asked appellant if there was any oath or swearing of any form that he would present before testifying and the appellant said there was not. The trial judge then told appellant he could not testify without an oath or affirmation (TR 249-255).

Clearly, the trial court mishandled this issue and misapplied the law. §492.060 RSMo states that every person, declaring in whatever form, shall be deemed to have been lawfully sworn. §492.040 RSMo authorizes the judge to adopt that mode which shall appear to be most binding on the conscience of the witness. Appellant stated a number of times he would tell the truth. It was incumbent upon the court, especially in a case where the defendant is representing himself, to fashion a declaration that would allow the appellant to testify, not to require the appellant to devise such a declaration that will satisfy the court.

Under the facts of this case, Patrolman Hildebrand stopped a vehicle being driven by appellant, which contained a large amount of marijuana in the luggage carrier . Witness McMullen, who made a deal to testify for the State, tied appellant to the drugs. When appellant wanted to testify, to give his version of the events and to protest his innocence to the jury, he was not allowed to do so. Thus, the most important witness for the appellant, the appellant himself, was not allowed to give any testimony for the jury to consider. Further, as indicated, the appellant was not allowed to testify in the penalty phase in order to give the jury any information that might have affected a sentence lower than the one given to him by the jury.

The Sixth Amendment of the United States Constitution, Article 18, Section (a) of the Missouri Constitution, and the existing case law, give appellant the constitutionally-guaranteed right to defend himself against the State's allegations and to present a defense. The trial judge's unwillingness or inability to fashion a declaration that satisfied the judge prevented appellant from exercising this constitutionally-protected right and was error

requiring reversal of his conviction, and a remand back to the St. Louis County Circuit Court for a new trial.

II.

THE COURT ERRED IN FAILING TO DECLARE A MISTRIAL WHEN OFFICER HILDEBRAND WAS ALLOWED TO TESTIFY THAT DEFENDANT HAD BEEN ARRESTED FOR DRUG VIOLATIONS IN NORTH CAROLINA.

Not on one, but on two occasions, Patrolman Hildebrand, in his testimony before the jury, unresponsive to any question, told the jury that appellant had been arrested in North Carolina for transporting large quantities of marijuana through an airport (TR 79, 99).

Appellant's objection to the first reference was sustained by the trial court, but no admonition was given to the jury to disregard this testimony. Appellant's request for a mistrial was denied (TR 79-80). Appellant's objection to Hildebrand's second reference to his arrest in North Carolina was also sustained and his request, again, for a mistrial was denied. The jury was told to disregard that evidence given by Hildebrand and the judge admonished the prosecutor to instruct Patrolman Hildebrand not to again refer to the arrest of appellant in North Carolina (TR 99-100).

The issue before this Court is whether this testimony as to a prior drug arrest of appellant was sufficiently prejudicial to warrant a reversal of appellant's conviction. A criminal defendant has a right to be tried only for the crime with which he is charged. State v. Mahoney, 70 SW3d 601, 605 (MoApp 2002). As a general rule, evidence of prior misconduct is inadmissible for the purpose of showing the propensity of the defendant to commit such crimes. State v. Barnard, 849 SW2d 10, 13 (Mo 1993).

As an exception, evidence of prior misconduct may be admitted if it is logically and legally relevant to the pending charge (Barnard at 13). Such evidence is logically relevant if it has some legitimate tendency to establish directly the accused's guilt of the charge for which he is on trial (Barnard at 13). Specifically, evidence of uncharged misconduct can be used to establish motive, intent, the absence of mistake or accident, a common scheme or plan, or to identify the alleged perpetrator, and such evidence is legally relevant if its probative value outweighs its prejudicial effect (Barnard at 13). There is a possibility of prejudice when the evidence is used to support an inference that he committed the crime with which he is charged. State v. Kitson, 817 SW2d 594, 597-98 (MoApp 1991).

The Court should require that the admission of evidence of other crimes be subjected to rigid scrutiny because such evidence could raise a legally-spurious presumption of guilt in the minds of the jury. State v. Sladek, 835 SW2d 308, 311 (Mo 1992) and State v. Reese, 274 SW2d 304 (Mo 1954).

At appellant's trial, the State made no attempt to use the North Carolina arrest of appellant on a drug charge as evidence of motive, intent, absence of mistake or accident, common theme or plan, or for purposes of identity. The State was apparently willing to let the evidence of appellant's prior arrest (misconduct) to be used by the jury to convict the appellant of this charge because he had previously been arrested in North Carolina in 1994 for a similar incident. The court's admonishment to the jury to disregard the evidence did not sufficiently protect appellant from this inadmissible evidence as it would be difficult for the jury to "unring the bell."

In a decision handed down by the Missouri Supreme Court on December 5, 2006, State v. Davis, consolidated with State v. Bainter, Case Numbers SC87748 and SC87749, (subject to modification, until the parties' motions for rehearing, if any, and will become final after the court issues its mandate), the Supreme Court reversed the convictions and remanded the case back to the St. Charles County Circuit Court for a new trial because of the presentation of evidence as to the uncharged crimes, finding the evidence to be prejudicial and the admission of that evidence to be erroneous and an abuse of discretion by the trial judge.

Because of the similarity of the testimony Patrolman Hildebrand gave to the jury regarding appellant's arrest in North Carolina for transporting marijuana in relation to this charge, where he was arrested for allegedly transporting marijuana by automobile from Arizona through Missouri, the admission of uncharged conduct and the arrest is prejudicial, and even though the trial court, on the second occasion, ordered the jury to disregard it, the jury still heard the evidence and, because of the prejudicial effect of that testimony during appellant's trial, a reversal of appellant's conviction and remand to the Circuit Court of St. Louis County should be ordered.

CONCLUSION

In Crane v. Ky., 476 US 683, 690, 106 S.Ct 2142 (1986), the US Supreme Court stated, “Whether rooted directly in the Due Process clause of the Fourteenth Amendment...or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. In California v. Trombetta, 467 US 479, 485, 104 S.Ct. 2528 (1984), the US Supreme Court stated that under the Due Process clause of the Fourteenth Amendment, criminal prosecutions must comport with the prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense.”

Because the appellant was improperly denied his right to testify at the guilt phase of these proceedings, and was also denied his right to testify at the penalty phase of these proceedings, he was denied his right to present a complete defense; and because evidence of his prior arrest in North Carolina was introduced into evidence before the jury, the prejudicial effect of that testimony further tainted appellant’s trial, and his conviction for possession with intent to distribute a controlled substance should be set aside and his case should be remanded by this Honorable Court back to the St. Louis County Circuit Court for a new trial.

BERNARD EDELMAN - #20904
EDELMAN & EDELMAN, LLC
8008 Carondelet, Suite 303
Clayton, Missouri 63105
(314) 726-5588 FAX: (314) 726-5847
Attorney for Appellant

COMPUTER DISK AND WORD COUNT CERTIFICATION

The undersigned counsel certifies that a copy of appellant's brief appears in complete form on the attached computer disk; that said brief consists of 8,669 words, including this certification; and that the computer disk is virus-free to the best of counsel's knowledge.

Bernard Edelman

CERTIFICATE OF SERVICE

The undersigned certifies that two copies of appellant's brief was mailed, postage prepaid, this 13th day of December, 2006, to:

Office of the Missouri Attorney General
207 West High Street
Jefferson City, Missouri 65102
Attn.: Criminal Division

Bernard Edelman

APPEAL NO. ED87599

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

STATE OF MISSOURI,
Respondent

v.

WILLIAM T. WARD
Appellant

Appeal to the Missouri Court of Appeals
from the Circuit Court of St. Louis County

Cause No.: 03CR-5143A

Division 9

Honorable David Vincent

APPENDIX

BERNARD EDELMAN - #20904
EDELMAN & EDELMAN, LLC
8008 Carondelet, Suite 303
Clayton, Missouri 63105
314-726-5588 Fax: 314-726-5847
Attorney for Appellant

TABLE OF CONTENTS

Sentence and Judgment..... A3

Missouri Statutes:

 §491.380 RSMo..... A6

 §492.030 RSMo..... A7

 §492.040 RSMo..... A8

 §492.060 RSMo..... A9