

State of Maine v. Ethan Gervais

Appeal from Unified Criminal Docket in
Aroostook County

Supreme Judicial Court sitting as the Law Court
Law Court Docket number ARO-24-127

Reply Brief for Appellant
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Argument

I. The State committed prosecutorial error in its closing remarks to the jury and in its questioning of law enforcement at trial.

Prosecutors have a unique air of authority that can give their comments a special weight with a jury. To that point, this Court has noted that “[a] prosecutor is, however, imbued with a special responsibility in representing the State and ‘has a responsibility to help ensure a fair trial.’” State v. Dolloff, 2012 ME 130, ¶ 41, 58 A.3d 1032, 1045 (Me. 2012). Moreover,

[a]lthough the prosecutor is responsible for the unflinching and assertive efforts to prosecute those who are alleged to have committed crimes, those efforts must be tempered by a level of ethical precision that avoids overreaching and prevents the fact-finder from convicting a person on the basis of something other than evidence presented during trial. See *id.* In the context of arguments to a jury, those ethical obligations require a prosecutor to avoid inviting a jury to make its decision based on bias, prejudice, conjecture, or any other impermissible basis. State v. Dolloff, 2012 ME 130, ¶ 40, 58 A.3d 1032, 1045 (Me. 2012).

In its brief, the State has argued that

The Appellant’s relevant remarks in closing:
‘The officer in this case did his best, *but his best is also lying under oath.*’ (Tr. T. (vol 2) at 220) (emphasis added)
Here, the State’s remarks, referred to as vouching by the Appellant, were invited, and were merely made to balance the scales.
(Red Brief at 10).

However, the closing remarks made to the jury by Mr. Gervais were based on testimony elicited during Officer Querze’s cross examination. During cross-examination the following exchange took place:

Q. . . . Officer Querze, have you ever lied under oath?

A. I have not.

Q. You haven't lied under oath?

A. No.

Q. In a sworn statement?

A. No.

Q. You have not. Okay. Um, do you recall completing a sworn statement in which you indicated there were witness statements and then later in open court said there were actually no witness statements?

A. I do, yes.

Q. So, you completed a probable cause statement.

A. Correct.

Q. And is a probable cause statement a sworn document?

A. Yes.

Q. And it's presented to the Court?

A. Yes.

Q. And when you sign it, you swear everything in it is true?

A. Yes.

Q. The statement was not true.

A. Um, no, it was not.

Q. So, you lied under oath.

A. Um, by assumption, yes.

...

(Tr. T. (vol. 2) at 111-112.

Mr. Gervais was making comments in closing that were based on the above testimony. While the State may try to mediate the effect of the comments in its closing remarks it cannot use the air of its position to vouch for one of its witnesses. Additionally, the State could have raised this issue with the trial court as opposed to trying to “balance the scale” through comments of its own. See Red Brief at 10. And, while a prosecutor’s arguments are not evidence, they can affect how a jury perceives a case, regardless of what is later told to them by the Court.

II. The trial court erred in ruling on Mr. Gervais’ motion in limine, allowing testimony regarding Mr. Gervais’ drug use, was not affected by Mr. Gervais addressing the issue after the court ruled to allow testimony on the subject and the State raised the issue in its initial direct examination.

The State has asserted that “[t]he most damaging comments [pertaining to drug use] in fact happened in response to the Appellant’s cross examination of Ms. M[REDACTED]. . . [t]he Appellant did his worst, to himself.” (Red Brief at 14). However, the record would have been completely void of any mention of drug use or drugs had the court not allowed such testimony in its motion in limine ruling. Moreover, the State raised the issue of drug use in its initial direct examination of Ms. M[REDACTED] (Tr. T. (vol. 1) at 69, 75); See also Blue Brief at 36-37.

Based on the trial court’s motion in limine ruling and the State’s prior questioning on the subject, Mr. Gervais’ cross-examination of Ms. M[REDACTED] was not

the cause of the drug testimony being brought into the trial. To that point, the State introduced the topic of drug use into Mr. Gervais' case and opened the door to further testimony on the subject. And, all statements raised during direct and cross were damaging to Mr. Gervais' case. (Tr. T. (vol. 1) at 69, 75); See also Blue Brief at 36-37. A different ruling by the trial court could have prevented any, and all, of the damaging drug testimony from being heard by the jury.

Mr. Gervais would not have had to deal with the issue on cross if the State had been prevented from raising the topic. The information elicited on cross tried to temper the information brought out on direct. Mr. Gervais clearly wanted to keep drug information from being an issue at trial. If the Court had granted his motion in limine, no testimony about drugs or drug use would have occurred. Counsel for Mr. Gervais had to try and mediate the drug issue that was raised on direct examination. In relation to drugs, the following exchange occurred on cross examination by Mr. Gervais:

Q. But when you went to see Officer Querze, you said to Officer Querze- - if you remember, you said, well, I saw him talking to so and so in the VIP parking lot yesterday.

A. Yes, he was doing- - meeting up with, um, his former drug dealer with my son in the truck and I was upset.

Q. But you don't know what he was doing. You weren't present during the exchange, any of that. You drove by.

A. Yes. I would rather not have my son around his cocaine drug dealer, which is why I was upset.

Q. But you didn't know if he was using at the time. How would you have known?

A. Um, I was actually told that he had failed a piss test on- -

Q. But you were told that. You didn't know yourself.

A. No, I was just going off of the best interest of my child and keeping my eyes open just in case because he deserves to be safe. (Tr. T. (vol. 1) at 258-259).

Additionally, the State states that it only raised the issue of drug use twice with Ms.

M [REDACTED] during its direct examination. (Red Brief at 14). However, an additional discussion occurred during its redirect examination of Ms. M [REDACTED]:

Q. Okay. And were you concerned- - you said the day before, he met with this person who you said had been his, um, his previous drug dealer. We don't know if he was at the time or not. Was that part of your concern?

A. The drug dealer, I guess, was always a concern.

Q. Was it a concern for you when you saw his son with him that day?

A. Yes.¹
(Tr. T. (vol. 1) at 268).

Conclusion

For the above-reasons, the Appellant again requests that this Court to vacate Mr. Gervais' convictions.

Dated: October 10, 2024

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¹ Mr. Gervais' discussion on re-cross examination of drugs and an alleged drug dealer immediately followed this exchange between the State and Ms. M [REDACTED] and was in direct relation to this questioning by the State. On re-cross, Mr. Gervais stated:

Q. You said— you said you saw him with this alleged drug dealer that we have no evidence is a drug dealer, um, where?

A. Um, I remember seeing him at VIP with- - parked right next to him.

Q. Okay. In a store parking lot. Do you know what time of day?

A. Around five, six.

Q. Five or six?

A. Yeah, it was around supper probably.

Q. Okay. Right when people are getting out of work?

A. I guess. VIP is at the other side of town, so it's not, like a busy place, I guess, in Madawaska.

Q. Okay. But did you see other cars in the parking lot?

A. Yeah.

Q. Not the place you typically think of something weird happening?

A. Definitely not, but Ethan was not allowed to leave, so I think that's where he met him at the time.

Q. Not allowed to leave?

A. Um, this was after, when he was on the house arrest when I was upset about him meeting up with the drug dealer.

Q. You don't necessarily have details of that, do you? Where did you get details of that?

A. What do you mean?

...
(Tr. T. (vol. 1) at 269-270).

Certificate of Service

I, Jeremy Pratt, Esquire, hereby certify that on this date I mailed via the U.S. postal service, first class mail, two copies of the foregoing Reply Brief of Appellant to John Inglis, Esq., Aroostook County District Attorney's Office, 144 Sweden Street, Caribou, ME 04936-2353.

Dated: October 10, 2024

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