

1970

State of Utah v. John Cunningham and Dennis Parker : Brief of Respondent

Utah Supreme Court

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Recommended Citation

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IN THE
SUPREME COURT

STATE OF UTAH

STATE OF UTAH

JOHN CUNNINGHAM
NIS PARKER

DEFENDANTS

Appeal from the
District Court of
County, Honorable

DAVID M. RUSSELL
CLARENCE M. RUSSELL
ATTORNEYS
226 West 200 South
Salt Lake City, Utah

JOHN D. RUSSELL
252 Canyon Road
Salt Lake City, Utah
Attorney for Appellants

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

STATE OF UTAH,	}	Case No. 12253
<i>Plaintiff-Respondent,</i>		
vs.		
JOHN CUNNINGHAM and DEN- NIS PARKER,		
<i>Defendants-Appellants.</i>		

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a conviction and sentence of an unlawful sale of an hallucinogenic drug in the Third Judicial District Court, Salt Lake County, State of Utah.

DISPOSITION IN THE LOWER COURT

Appellants were tried on a charge of the unlawful sale of LSD, contrary to Utah Code Ann. § 58-33-6(a) (1953), before the Honorable Joseph G. Jeppson, sitting without a jury. Upon a verdict of guilty appellants were sentenced on July 20, 1970, to a term of imprisonment at the Utah State Prison; and are appealing from the judgment and sentence.

RELIEF SOUGHT ON APPEAL

Respondent prays that the findings of the lower court be affirmed.

STATEMENT OF FACTS

In late November of 1969, agent Loni DeLand, doing undercover work for the Utah Liquor Law Enforcement Division, and Kathy Olson, his assistant, made the acquaintance of one Mike Fellows. They bought some LSD tablets from Fellows and had requested more, hoping that Fellows could lead them to the source of his supply. Fellows, on November 30, 1969, took DeLand and Olson to the appellants' apartment located at 329 East Seventh South, Salt Lake City. There DeLand and Olson met appellant Parker (R. 29-31).

While DeLand and another police officer stayed downstairs, Olson, Fellows and Parker went upstairs. Kathy Olson was introduced to Cunningham by Fellows. Olson then inquired as to whether or not she could get a quantity of LSD tablets from appellants. Cunningham told her that the price for the tablets would be \$2.50 per tablet or "hit." Cunningham stated that he had some LSD tablets but that if Olson would wait until the 3rd of December he could then tell her how much he could supply. She gave Cunningham her telephone number and he said that he would call on December 3rd (R. 61-62).

DeLand and Olson went to the appellants' apartment on the 3rd of December, 1969. They were invited in by

Parker, went upstairs, and were seated in the living room. A few minutes later Cunningham entered the room. Cunningham then asked Olson and DeLand if they still planned to buy a large quantity of LSD on the 5th of December. They replied that they did but stated that they only wanted eight tablets or "hits" at that time. Miss Olson asked Cunningham the price and he replied "\$2.50 per hit." Appellant Parker then removed eight orange tablets from a small glass vial containing 20 to 25 orange tablets and gave them to DeLand. DeLand then gave the two a \$20 bill (R. 31-35).

Cunningham and Parker were subsequently arrested on December 5, 1969, and charged with an unlawful sale of hallucinogenic drugs (R. 95-96).

ARGUMENT

POINT I.

APPELLANTS' DEFENSE OF ENTRAPMENT IS NOT SUFFICIENT LEGALLY OR FACTUALLY TO REVERSE THEIR CONVICTIONS.

The first Supreme Court decision to deal with the defense of entrapment was *Sorrells v. United States*, 287 U. S. 435, 53 S. Ct. 210, 77 L. Ed. 413 (1932). The case concerned a federal agent who asked the defendant to procure some liquor for him. After several requests by the agent and after the agent told the defendant that he was in the same army unit as the defendant the agent

received the liquor. As the court stated at 287 U. S. at 441:

“It is clear that the evidence was sufficient to warrant a finding that the act for which defendant was prosecuted was instigated by the prohibition agent, that it was the creature of his purpose, that defendant had no previous disposition to commit it but was an industrious law-abiding citizen, and that the agent lured defendant, otherwise innocent, to its commission by repeated and persistent solicitation in which he succeeded by taking advantage of the sentiment aroused by reminiscences of their experiences as companions in arms in the World War.”

The court went on to hold that the defense of entrapment should have been available to defendant at trial. In so holding the court also provided a rule by which to gauge evidence of entrapment. At page 451, 216, the court said:

“The predisposition and criminal design of the defendant are relevant. But the issues raised must be pertinent to the controlling question whether the defendant is a person otherwise innocent whom the government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials.”

In Utah the standard for entrapment is set out in the opinion of *State v. Pacheco*, 13 Utah 2d 148, 369 P. 2d 494 (1962). As stated by Justice Crockett:

“For a peace officer to procure a person to commit a crime, which he otherwise would not have committed, for the purpose of apprehending

and prosecuting him is entrapment. This is so discordant to the true function of law enforcement which is the prevention, not the accusation, of crime; and so repugnant to fundamental concepts of justice that the conviction of an accused under such circumstances will not be approved. When that issue is present the question is whether the crime is the product of defendant's own intention and desire, or is the product of some incitement or inducement by the peace officer. If the crime was in fact so instigated or induced by what the officer did that the latter's conduct was the generating cause which produced the crime, and without which it would not have been committed, the defendant should not be convicted. On the other hand if defendant's attitude of mind was such that he desired and intended to commit the crime, the mere fact that an officer or someone else afforded him the opportunity to commit it would not constitute entrapment which would be a defense to its commission; and this would not be less true even though an undercover man went along with the defendant in the criminal plan and aided or encouraged him in it."

Respondent contends that neither under the holding of *Sorrells* or *Pacheco* can appellants show that they were entrapped. Their arrest and subsequent conviction was because they desired and intended to commit the crime. The state agents involved in the case only afforded defendants an opportunity to commit the crime.

The defense of entrapment has been held to be a defense as a matter of law in some instances. In the case of *Sherman v. United States*, 356 U. S. 369, 78 S. Ct. 819, 2 L. Ed. 2d 848 (1958), the court held that the evidence

showed entrapment as a matter of law. The defendant there was a narcotics addict who was being medically treated for his addiction. The defendant happened to make the acquaintance of another addict also being treated by the same doctor. The other addict was also a government informer. They requested Sherman to supply him with drugs, a request which Sherman declined. Sherman finally relented after several requests and several appeals to his sympathies by the government informer. Thereafter he supplied the informer with drugs on several occasions. The informer's solicitation not only enticed Sherman into selling drugs but also got him to return to his old drug habit. The Court felt that the informer's actions were so blatantly contrary to public policy and so obviously evil that the Court found entrapment as a matter of law.

The facts in the case at hand do not point to entrapment per se. At the first meeting on November 29, 1969, Kathy Olson inquired as to how much LSD they could get. She was told by Cunningham that he would know on the 3rd of December, 1969, how much he could supply to her and that he had some LSD tablets then but they were promised to someone else (R. 61-62). At the second meeting of the appellants and DeLand and Olson, Cunningham asked if they still wanted a large quantity of LSD. Olson and DeLand replied that they did but at that time they only wanted eight tablets of LSD, with which they were supplied (R. 31-35). The evidence does not show entrapment as a matter of law

as in *Sherman*. The evidence does show a request made by Olson and DeLand that was readily complied with by appellants.

The appellants raised the defense of entrapment at the trial court. Once the defendants bring into issue the defense of entrapment the state's evidence must be sufficient to rebut it. In the Utah case of *State v. Perkins*, 19 Utah 2d 421, 432 P. 2d 50 (1967), the defense attorney brought into issue entrapment. In order to overcome that defense the state showed evidence of prior contacts between the state's agent and the defendant. The evidence showed prior solicitations and drug sales by the defendant. This evidence was used in order to show an intent or a predisposition to commit the criminal act. Such evidence shows that a defendant is not an innocent, law-abiding citizen who was coaxed by government agents to do a criminal act, but was in reality a person who was ready and willing to commit a criminal act. In the case of *State v. Kasai*, 27 Utah 2d 236, 495 P. 2d 1265 (1972), the prosecution again used evidence of prior drug sales to show that the defendant had a prior inclination to commit the crime of selling marijuana.

In the instant case there is no evidence of prior drug sales, prior convictions for drug sales, or prior contacts with state agents. The exact issue that is present here has not been raised in the courts of Utah. The issue is simply one of showing intent or predisposition to commit a criminal act absent any prior evidence of criminal activity. That issue was also presented in *United States v.*

Rodrigues, 433 F. 2d 760 (1st Cir. 1970). There the defendant was convicted of selling heroin to a government agent. The defendant pled entrapment as a defense to the charge. The court's approach to the problem of entrapment was not the traditional bifurcation of the defense into the sub-issues of inducement and predisposition. They used an analysis developed in an earlier case, *Kadis v. United States*, 373 F. 2d 370 (1st Cir. 1967). With that approach the court examines "ultimate questions of entrapment." The defendant first goes forward with the defense by showing some evidence that it was not his intent or predisposition to commit the crime charged. The government must then prove defendant was not induced to commit the criminal act by its agents. In *Rodrigues*, there was no evidence of prior connection with the narcotics trade to rebut the entrapment defense. The court, however, held that there were other means to rebut this defense. The court states at page 762 of the opinion:

"A jury can find predisposition beyond a reasonable doubt by looking to the totality of circumstances involved in the particular transactions in question. Otherwise, a first offender, disposed to commit the crime for which he is charged, would find sanctuary in the entrapment defense merely because the government would be unable to prove prior nonexistent activities. The entrapment defense does not require such a result."

By examining the totality of conduct of the appellants it is clear that their entrapment defense breaks down. The appellants had other quantities of LSD tab-

lets promised to other buyers. The state agents involved made only two contacts with the appellants. From the testimony given, the appellants were unwary and readily sold the illicit drugs to the agents after only two short encounters. Cunningham and Parker claim they were afraid of the agents and that is why they sold them the LSD (R. 84 and 98). A girl who was at the apartment on December 3, 1969, Sally Neilson, testified that although the agents were strangers they did not make threats or use any threatening language while there (R. 94). If appellants were truly fearful they could have asked the agents to leave or put their requests off until a later date. However, they did not do this, they readily sold the agents the LSD tablets and readily accepted the \$20 as payment (R. 34-35, 84).

Appellants' testimony that they were afraid of the agents is unworthy of belief. There is absolutely no affirmative evidence that the state agents did anything to make appellants fearful.

In conclusion it is respondent's contention that the entrapment defense was rebutted by the state's evidence. Appellants readily sold the LSD tablets to the two state agents. Thus, the test of *Pacheco*, to show an intention or predisposition to commit criminal acts is satisfied. Respondents urge the court to adopt the position of the court in the *Rodrigues* case. By looking at the totality of conduct and the ready compliance with the requests for the illicit drug, it is clear that the appellants were not innocent citizens entrapped by the state, but were crim-

inals engaging in the proscribed act of selling drugs, not only to the two state agents, but others. Appellants cannot hid behind the entrapment defense merely because there is no evidence of prior drug sales. The conviction should be affirmed.

POINT II.

APPELLANTS WERE PROPERLY CONVICTED AND SENTENCED FOR THE CRIME OF SALE OF AN HALLUCINOGENIC DRUG.

Appellants claim that they were convicted and sentenced under one statute, Utah Code Ann. § 58-33-6(1), that made the crime of sale of LSD a felony, while there was a similar statute, Utah Code Ann. §58-17-14.11, that makes the same conduct a misdemeanor. It is true that both of these statutes do exist, or did at the time appellants were convicted; however, the two statutes have totally different applications. Utah Code Ann. § 58-17-14.11 is a statute that applies to the regulations of pharmacists and the pharmacy profession. Utah Code Ann. § 58-33-6(1) is a statute designed to curb the abuse and distribution of dangerous drugs and narcotics. The real question that is raised by appellants' argument is showing the application and construction of the two statutes involved. It is respondent's contention that by a logical reading of the statutes involved it is readily apparent that appellants were properly convicted and sentenced for violation of Utah Code Ann. § 58-33-6(1).

Appellants were charged with a violation of Utah Code Ann. § 58-33-6(1). That statute states:

“It shall be unlawful for any person to manufacture, compound, process, possess, have under his control, sell, prescribe, administer, dispense, use or compound any depressant, stimulant, or hallucinogenic, or other drug, as defined herein, except this prohibition shall not apply to the following persons whose activities in connection with any such drug are as specified in this subsection. . . .”

The act then exempts manufacturers operating in conformance with state laws, pharmacies, physicians, laboratories, wholesale druggists, hospitals, and generally all those people who are licensed by the state and who are engaged in the legitimate sale, manufacture, prescribing and use of drugs. The penalty for violation of the above-quoted statute is found in Utah Code Ann. § 58-33-4(3), which states:

“Every person who transports, imports into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport any ‘depressant, stimulant or hallucinogenic drug,’ shall be punished by imprisonment in the state prison from five years to life and shall not be eligible for release upon completion of sentence or on parole or on any other basis until he has served not less than three years.”

The statute regulating the profession of pharmacy and of pharmacists, Utah Code Ann. § 58-17-14.11 reads as follows:

“Any proprietor of a pharmacy or other person who shall sell, dispose of, or permit the sale or other disposition of any drug intended for use by man which under the laws of this state or the laws of the United States, or lawful regulations thereunder, has been designated habit forming, unsafe for use except under the supervision of a practitioner licensed to administer such drugs, or otherwise limited to use under professional supervision of a practitioner licensed by law to prescribe, unless it is dispensed upon a prescription of a practitioner licensed by law to administer the same, shall be guilty of an offense.”

Utah Code Ann. § 58-17-26 provides that for violation of the above-quoted statute a person shall be guilty of a misdemeanor.

Appellants cite two cases attempting to uphold their argument that the lesser penalty should apply. The first case cited is *State v. Shondel*, 22 Utah 2d 343, 453 P. 2d 146 (1969). There the defendant was charged and convicted of possession of LSD, a misdemeanor under Utah Code Ann. § 58-33-4(1), but a felony under Utah Code Ann. § 58-13a-44. The court held that since the prohibited conduct under both statutes was the same the lesser penalty provided in Section 58-33-4(1) would apply. *Shondel* can be distinguished from the instant case in that in *Shondel*, two different laws violating illicit drug sales did apply. Here one statute deals with illicit drug sales and another deals with unlawful sales over the counter at pharmacies or by pharmacists.

Appellant cites *State v. Fair*, 23 Utah 2d 34, 456 P. 2d 168 (1969), for the proposition that when two different statutes apply the one providing the lesser penalty should govern. In *Fair*, the defendant was charged with uttering a forged prescription, a felony under Utah Code Ann. § 58-13a-39 but only a misdemeanor under Utah Code Ann. § 58-17-14.13. The court rightly held that the misdemeanor penalty should apply. Uttering a forged prescription should properly be considered under a statute relating to regulation of pharmacies and pharmacists. *Fair* can be distinguished from the instant case in that in *Fair* there was a true conflict between statutes prescribing differing penalties for the same conduct. In the instant case the two statutes relate to differing conduct. Utah Code Ann. § 58-17-14.11 deals with dispensing of drugs or medicines by pharmacists or those in the pharmacy business. Utah Code Ann. § 58-33-6(1) deals with the illegal dispensing of dangerous drugs by those other than licensed pharmacists or qualified medical people.

The real problem here, as stated previously, is interpreting and applying the two statutes in question in a consistent logical manner. A guide to statutory interpretation is provided for us in the case of *Johnson v. State Tax Commission*, 17 Utah 2d 337, 411 P. 2d 831 (1966). In that case the issue was the interpretation and implication of state tax laws. The court states:

“The fundamental consideration which transcends all others in regard to the interpretation and application of a statute is: What was the intent of the legislature? All other rules of statu-

tory construction are subordinate to it and are helpful only insofar as they assist in attaining that objective. In determining that intent the statute should be considered in the light of the purpose it was designed to serve and so applied as to carry out that purpose if that can be done consistent with its language."

The same proposition, that is carrying out the intent of the legislature, is cited in *Young v. Barney*, 20 Utah 2d 108, 433 P. 2d 846 (1967), and in *State v. Salt Lake City Public Board of Education*, 13 Utah 2d 56, 368 P. 2d 468 (1962).

Appellants' application of Utah Code Ann. § 58-17-14.11 is without merit. The statute applies only to "any proprietor of a pharmacy or other person." The well established rule of statutory construction, *ejusdem generis*, requires that where general words or terms follow specific ones, the general must be understood as applying to things of the same kind as specified. *W. S. Hatch Co. v. Public Service Commission*, 3 Utah 2d 7, 277 P. 2d 809 (1954). Therefore, an "other person" must be interpreted as someone associated with a pharmacy as an agent, employee, owner, etc. acting in connection with the pharmacy. Furthermore, the general common-sense rule of statutory construction stated in *Johnson v. State Tax Commission, supra*, supports this rule. In applying that rule it is clear that § 58-17-14.11 was designed to deal only with pharmacies and pharmacists. Section 58-33-6 exempts pharmacists and others licensed to prescribe drugs from its provisions. Section 58-17-14.11 applies only to

pharmacies and the pharmacy profession because of their explicit exemption in Section 58-17-14.11. The intent of the legislature was to regulate two areas. One, they wished to regulate the pharmacy profession. Two, they wished to regulate illegal drug traffic. The two statutes were designed to regulate two types of conduct by two different classes of people. This is consistent with the holding in *Fair* where a forged prescription was a crime under the pharmacy statute, a statute logically designed to deal with such things.

Appellants made much of the language of § 58-17-14.11 that the statute is intended to cover drugs “intended for use by man.” The point of the statute is not that it regulates drugs intended for man’s use but that it regulates drugs that are dispensed by pharmacists. Heroin too is a drug that is used by man. However, it has no real medical use nor is it dispensed by pharmacists. Likewise LSD has very limited, if any, medical use and is not dispensed by pharmacies. Therefore, the proper statute for regulating traffic in illicit drugs such as LSD is Section 58-33-6(1).

Under Utah Code Ann. § 58-33-4(3) the proper sentence for selling LSD is five years to life in the state prison. Appellants contend that Utah Code Ann. § 58-33-4(6), which makes violation of all other provisions of Chapter 33, except those in Utah Code Ann. § 58-33-1(1) — 58-33-1(4) a felony punishable by a maximum five year sentence, applies in this case. Their argument is that since they were charged with a violation of Section

58-33-6(1) and this is an “other” provision of Chapter 33 then the sentence should be no more than five years. This argument lacks substance. Utah Code Ann. § 58-33-6(1) proscribes the selling or furnishing of a hallucinogen. Therefore, since Section 58-33-1(3) is one of the four paragraphs mentioned by Section 58-33-4(6), Section 58-33-4(6) does not apply.

CONCLUSION

Appellants were convicted under a valid Utah statute. The sentence imposed was a proper one in the case, a sentence of from five years to life for the sale of LSD. Appellants readily sold the illegal drug to two state agents when it was requested by them. The conviction and sentence is proper and should be upheld.

Respectfully submitted,

VERNON B. ROMNEY
Attorney General

DAVID S. YOUNG
Chief Assistant Attorney General

WILLIAM T. EVANS
Assistant Attorney General

Attorneys for Respondent