1971

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

Utah Supreme Court

IN THE SUPREME COURT OF THE

TATE OF UTAH,

Plaintiff-

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OHN CUNNINGHAM and
ENNIS PARKER,

Defendant

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Appeal
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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,
vs.
JOHN CUNNINGHAM and DENNIS PARKER,
Defendants-Appellants.

Case No. 12253

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BRIEF OF APPELLANTS

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Appeal from the Judgment of the Third Judicial District Court of the State of Utah, in and for Salt Lake County, Honorable Joseph G. Jeppson, Judge.

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MISCELLANEOUS

IN THE SUPREME COURT OF THE STATE OF UTAH

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TATE OF UTAH,)

Plaintiff-Respondent,)

s.) Case No. 12253

)HN CUNNINGHAM and
ENNIS PARKER,)

Defendants-Appellants.)

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BRIEF OF APPELLANTS

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STATEMENT OF THE NATURE OF THE CASE

The appellants, John Cunningham and Dennis arker, appeal from a conviction of the unlawful ale of an hallucinogenic drug and the sentence mposed thereon in the Third Judicial District ourt, Salt Lake County, State of Utah.

DISPOSITION IN THE LOWER COURT

Appellants were tried on a charge of the unawful sale of LSD, contrary to Utah Code Ann. 58-33-6 (1) (1953) (Supp. 1969), before the onorable Joseph G. Jeppson, sitting without a ury. Upon a verdict of guilty appellants were entenced on July 20, 1970, to a term of imprison-

nt at the Utah State Prison; and appeal from the dgment and sentence.

RELIEF SOUGHT ON APPEAL

The appellants seek reversal of the judgment the lower court and dismissal of the action, in the alternative, reversal and remand for rther proceedings, with directions and instrucons for modification and correction of the ntence.

STATEMENT OF FACTS

During late November, 1969, a well co-ordined team of undercover agents under the direct-n and control of Loni DeLand, an employee of e Utah Liquor Law Enforcement Division, chanced make the acquaintence of appellant Cunningham the apartment of one Mike Fellows. The team agents subsequently approached the appellants their apartment at 329 East Seventh South, lt Lake City, and asked if appellants could)ply them with a quantity of LSD. On several :asions the response was negative. (R. 77-80)

On the evening of December 3, 1969, the ·ee agents again arrived at appellant's apart-ıt sometime after 10:00 p.m.; and after gaining

entry into the apartment, presented the appel-
lants with a variety of pretenses as to why the
agents had to have the illegal drug. After
about thirty minutes of sporadic conversation
and repeated frequent and insistent demands
from the agents that appellants supply them with
SD, the appellants finally capitulated to the
emands, and allegedly delivered over eight tab-
ets of the drug. The agents threw a $20 bill
n the floor for payment. (R. 82-84)

The appellants, 19-year old boys from a
mall town in Idaho, had been in Salt Lake City
nly a short time and testified that they were
iving in a rough neighborhood and that they
cquiesced in the transaction only because they
ere becoming fearful of the agents and hoped
hat if they gave the agents what they were ask-
ng for that they would go away and leave them
lone. (R. 83, 92) The appellants further testi-
ied that they had been experimenting with LSD,
hat they were not selling or dealing in drugs,
ut that they were merely casual users and that
he tablets in question were in their possession
olely for their own personal use. (R. 90)

On December 5, 1969, appellants were arres-
ed and charged with the unlawful sale of an
llucinogenic drug to agent DeLand. They were
rested at gunpoint and their apartment was
oroughly searched but no other drugs were
und. (R. 95-96)

On the trial of the case the appellants
ised the defense of entrapment based upon the
nner and means used by the agents to finally
fect a purchase including the repeated and
rsistent demands that appellants supply these
ents with the drug. In spite of the entrap-
nt issue the trial Court found both defendants
ilty as charged. (R. 105)

Before sentencing, counsel for the appellants
gued in favor of the Court's consideration of
obation, but the trial judge, the Honorable
seph G. Jeppson, automatically sentenced the
pellants to imprisonment at the State Prison
r the "indeterminate term provided by law."

ARGUMENT I

APPELLANTS WERE DEPRIVED OF A FAIR TRIAL AND UE PROCESS OF LAW FOR THE REASON THAT THE TRIAL OURT ERRONEOUSLY CONSTRUED THE DEFENSE OF ENTRAP-ENT. THE EVIDENCE ADDUCED BY THE STATE WAS IN-UFFICIENT AS A MATTER OF FACT AND AS A MATTER F LAW TO REBUT THE ENTRAPMENT DEFENSE.

Entrapment has been defined as the inducement f one to commit a crime not contemplated by him or the mere purpose of instituting a criminal rosecution against him. It has also been efined as the conception and planning of an ffense by an officer and the procurement of its ommission by one who would not have perpetrated except for the trickery, persuasion or fraud f the officer. See Vol. 21 Am. Jur. 2d, § 143 rim. Law. and cases cited therein.

The defense of entrapment most generally ccepted in the United States has its roots in ie majority opinion in Sorrells v. United tates, 287 U.S. 435 (1932), which held that en-rapment is established:

> "When the criminal design originates with the officials of the government and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."

he controlling question is:

> "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."

ıring the days of Prohibition Sorrells sold some iquor to a government agent who posed as a mem- ɜr of Sorrells' World War I Army division. The ıiskey was forthcoming only after several re- ıests had been mad

The Court in Sorrells adopted the so-called ›rigin of intent" test, a subjective test that ɜquires determining whether the defendant or the ›vernment agent conceived, planned, or caused ›mmission of the crime. By allowing an inquiry to the defendant's past criminal record or ·ior suspicious conduct the requisite elements predisposition and criminal design may be termined; and the defense is valid if the de- ndant lacked the prior intent to commit the ime charged.

The rule and rationale of Sorrells was re- firmed in the case of Sherman v. United States, 6 U.S. 369 (1958). In Sherman the factual sue was whether the informer had convinced an

otherwise unwilling person to commit a criminal act or whether petitioner was already predisposed to commit the act and exhibited only the natural hesitancy of one acquainted with the narcotics trade. The Court found that a number of repetitions of a request to supply narcotics predicated on the informer's presumed suffering had preceded the defendant's final acquiescence to supply some drugs. The Court found that a single request was not enough and that the informant made numerous requests in order to overcome first the defendant's refusal and his evasiveness and finally his hesitancy in order to achieve capitulation. The Court found that the series of sales were not independent acts subsequent to the inducement but part of a course of conduct which was the product of the inducement.

It appears that the defense of entrapment as it exists in the state of Utah, is quite similar to the rules set forth in Sorrells and Sherman, supra. In the case of State v. Pacheco, 15 Utah 2d 148, 369 P. 2d 494, it was stated:

> "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 prosecution, not the causation 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 the defendant's own intention and desire or is the product of some enticement 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 the 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 an opportunity to commit it would not constitute an 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."

n the Pacheco case the defendant was convicted n the basis of a burglary and grand larceny harge in which one of several individuals who erpetrated the crime was, unbeknownst to the efendant, a police officer who tipped off the olice that the crime was about to occur, with

ın undercover officer. Acting on a tip from this .nformant, the defendant and the others were ıpprehended shortly after the burglary with an .mount of money in his possession. Although hat persuasion which overcomes natural reluc- ance on the part of innocent persons to commit crime which he is not otherwise disposed to o is "entrapment," it is noted that the Court ust draw a line between entrapping innocent, nwary people who are not inclined to commit rime and entrapping the unwary criminal who till gets caught in his own schemes because of is misplaced confidence.

This Court affirmed the Pacheco reasoning ı the case of State v. Perkins, 19 Utah 2d 421, 32 P. 2d 50 (1967). In Perkins the defendant irst approached the agent inquiring whether he :sired to make further purchases of drugs. ıere was some evidence that the undercover agent ıd made prior purchases of marijuana from the :fendant. The agent asked whether Perkins ›uld get him a cap of heroin and Perkins quoted .m a price; he left the bar shortly thereafter d attempted to purchase some drugs. The

defendant although unable to obtain heroin, returned after a short time and sold the officer five joints of marijuana. On the trial of that case the entrapment issue was raised indirectly on cross-examination and the defendant did not take the stand. The fact that there was substantial evidence in the case of prior contacts between the defendant and the same agent involving other transactions was allowed to show a predisposition.

This Court has had occasion to interpret and further construe the theory of the entrapment defense in the recent decision of State v. Kasai, 7 Utah 2d 326, 495 P. 2d 1265, wherein it was stated that:

> "Entrapment is not established as a matter of law where there is any substantial evidence in the record from which it may be inferred that the criminal intent to commit the particular offense originated in the mind of the accused. The fact that a government agent offers to buy narcotics from a suspect, thus giving him the opportunity to commit the offense, does not constitute entrapment."

The "origin-of-intent" test, being subjective, has been recently the subject of some criticism.

;ee ULR Vol. 1971, Summer, No. 2, @ p. 266, and
:ases cited therein. It would appear that the
rend is toward the position set out in the con-
urring opinions of Sorrells and Sherman, that
he determination of entrapment as a matter of
aw requires the objective examination of the
olice conduct. In Sherman the concurring jud-
es were of the opinion that the Court reversed
he conviction because of the conduct of the
nformer, and not because the government failed
o draw a convincing picture of the past crimi-
al conduct, even though the majority found no
intent."

It could be contended in the instant case,
s it was in Sherman and Kasai, that the entrap-
ent is no defense on the theory that the offi-
ers "merely afforded an opportunity" to one
predisposed" to sell. A careful comparison of
he facts in the case reveals that Kasai may be
eadily distinguished.

In Kasai, an old acquaintance and former drug
ddict, acting as a police informant, approached
he defendant, who was changing a tire on his
ar, and requested marijuana. The informer
elped the defendant change the tire and then

)oth went into the house where the defendant pro-
luced a "lid." A few minutes later the informant
.eft the house and turned the evidence over to
'aiting police. There was other evidence admit-
ed at the trial of that case tending to estab-
ish that there had been at least one prior
ale to the same informant, and that no unusual
ersuasion was apparently involved.

There is no evidence in the case at bar
hich proves beyond a reasonable doubt the state
f mind or predisposition which "readily res-
onds" to the "opportunity" created by the offi-
ers. On the contrary, it is clear that the
olice conduct was the generating cause which
roduced the crime, and without which it would
ot have been committed.

Appellants respectfully submit that the test
ecently adopted by the Kansas Supreme Court in
ıe case of State v. Reichenberger, 209 Kan.
10, 495 P. 2d 919, should be applied here. The
ınsas Court, after carefully discussing the
istorical developments in this area of the law,
)ted that where the events culminating in a
'iminal offense commence with a police solici-

ation, the defense of entrapment will almost lways present a question of fact. When there s no proof of conduct on the part of the efendants prior to the police solicitation, only n "uncensurable solicitation" met by "ready ompliance" may be some evidence of predisposi- ion.

The further test of predisposition then formu- ated is whether the type of police persuasion sed creates a "substantial risk" that such ffenses will be committed by persons other than ıose who are ready to commit them. This formu- ation was also suggested in the Model Penal Code roposed Official Draft, § 2.13 (1962).

The instant case clearly is one of police licitation involving a substantial risk of ıducing innocent persons to commit a crime ıich they otherwise would not have attempted. ıere can be little doubt but that the trans- tion was brought about through a persistent, rceful, and insistent series of demands by e officers that appellants produce drugs for em. The fact that appellants had only a few blets in their possession is entirely consis-

ent with their explanation that they were, at ost, mere users, and that the only motivation o "sell" was due to the fear induced by the gents. The Reichenberger case indicates that nusual or persistent inducements by police may e sufficient to raise an entrapment defense equiring acquittal.

In conclusion, appellants submit that in his case a public law enforcement official along ith persons acting in co-operation with that fficial perpetrated an entrapment solely for he purpose of obtaining evidence of a commission f an offense by soliciting and encouraging ano- her person to engage in conduct constituting hat offense by employing methods of persuasion r inducement of the type which create a substan- ial risk that such an offense will be committed y persons other than those who are ready to ommit it. The case should be reversed.

ARGUMENT II

IN THE CIRCUMSTANCES OF THE PRESENT CASE, THE SENTENCE IMPOSED CONSTITUTES A DENIAL OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW, AND VIOLATES THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT, DUE TO THE EXISTENCE OF SEPARATE STATUTES WHICH PROVIDE DIFFERENT PUNISHMENTS FOR IDENTICAL CONDUCT; AND SINCE THERE IS DOUBT OR UNCERTAINTY AS TO WHICH OF SEVERAL PUNISHMENTS IS APPLICABLE, APPELLANTS ARE ENTITLED TO THE BENEFIT OF THE LESSER.

Appellants were found guilty of the unlawful sale of LSD and were sentenced to imprisonment at the Utah State Prison. The orders of commitment (R. 12, 14) issued pursuant to the sentence read as follows:

> "The judgment and sentence of this Court is that you, [John Cunningham and Dennis Parker] be confined and imprisoned in the Utah State Prison for an indeterminate term as provided by law for the crime of unlawfully selling an hallucinogenic drug as charged."

Appellants were charged with violation of Utah Code Ann., § 58-37-6 (1) (1953, 1969 supp.) which provides:

> "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 such drug are as specified in this subsection:"

..... This statute then proceeds to exempt manufacturers, compounders, processors, pharmacies, hospitals, research and educational institutions, wholesale druggists, public health agencies and licensed physicians and non-drug uses of peyote by Indian members of the Native American Church from the provisions of the drug abuse control law.

Utah Code Ann., § 58-33-6 (e) (1953, 1969 supp.) provides:

"Whenever the possession, sale, transfer or dispensing of any drug or substance would constitute an offense under this act and also constitutes an offense under the laws of this state relating to the possession, sale, transfer or dispensing of drugs or marijuana, such offense shall not be punishable under this act but shall be punishable under the other provisions of law."

This Court has recently made it perfectly clear that the well-established rule is:

"That a statute creating a crime should be sufficiently certain that persons of ordinary intelligence who desire to obey the law may

know how to conduct themselves in conformity with it. The fair and logical concomitant of that rule is that such a penal statute should be similarly clear, specific and understandable as to the penalty imposed for its violation."

State v. Shondel, 22 Utah 2d 343, 453 P. 2d 146 (1969).

The Shondel case involved the determination of the proper penalty for possession of LSD. One statute, Utah Code Ann., § 58-33, made the offense a misdemeanor while § 58-13a made the identical conduct a felony. The language of this Court in construing a provision of § 58-13a-44 (4), containing language identical to that of § 58-33-6 (e), is as follows:

"This reference to 'such other provisions of the law' leaves one concerned with compliance with the law to search elsewhere to discover whether 'some other provision of the law' dealing with narcotic drugs or marijuana prescribe some other penalty for the possession of LSD."

The equal protection of the law requires that the laws affect alike all persons similarly situated. The conflicting statutes were resolved so that Shondel was entitled to the lesser penalty.

In a similar case, State v. Fair, 23 Utah 2d 34, 456 P. 2d 168 (1969), this Court again ruled that an accused is entitled to the benefit of the lesser penalty where the laws provide two different penalties for the same conduct. The case involved a conviction for uttering a forged prescription, a felony under 58-13a-44, but a misdemeanor under 58-17-14.13. Applying the Shondel rule, the case was remanded for resentencing as a misdemeanor under 58-17-14.13.

Appellants herein submit that the rules laid down by this Court in Shondel and Fair are controlling in the instant case. Utah Code Ann., 58-17-14.11 provides, in pertinent part:

> "Any proprietor of a pharmacy or other person who shall sell, dispose of, or permit the sale or disposition of any drug intended for use by man ..... unless it is dispensed upon a prescription of a doctor ..... is guilty of an offense." (emphasis added)

The conduct which constitutes a violation of 58-33-6 (1) and 58-17-14.11 is identical. The penalty for a violation of 58-17-14.11 is found in § 58-17-26, and provides that a violation of that section is a misdemeanor. Appellants submit that the case at bar should therefore be remanded for proper sentencing.

While it is true that the drug LSD is not as commonly used as stimulant drugs which are extensively prescribed primarily for relief of depression and for weight control or the numerous depressant drugs which are prescribed in great numbers as tranquilizers, the use of LSD in treating chronic alcoholism as well as for the treatment of some cancer patients is quite well documented. The positive uses of this drug by licensed medical practitioners is growing. The trial judge seemed to be of the opinion that LSD was simply not the type of drug which is included within the meaning of 58-17-14.11, but neither statute distinguishes the depressant or stimulant from the hallucinogenic with respect to penalty.

The statute under which appellants were convicted and apparently sentenced has since been repealed by the Utah Legislature effective January 1, 1972, Utah Code Ann., § 58-37. The penalty provided in the new statute for the unlawful sale of controlled substances, including LSD, is a maximum of ten years, § 58-37-8 (b) (ii). There is no minimum mandatory provision and the statute clearly indicates a policy of preferring

ehabilitation by probation and treatment for oung first offenders. Where the legislature hanges the law favorable to an accused,under ertain circumstances the accused is entitled to he favorable change in the law. See State v. app, 26 Utah 2d 392, 490 P. 2d 334, and cases ited therein.

Appellants submit that the Court in the case t bar should also apply the principles set forth n Belt v. Turner, 25 Utah 2d 230, 479 P. 2d 791 1970), on reh. 25 Utah 2d 380, 483 P. 2d 425. ne Legislature has expressed an intent to lessen ne penalty, and modern and advanced principles f jurisprudence should try and give effect to he lesser sentence.

A careful reading of the orders of commitment nd sheriff's receipts (R. 12, 13, 14, 15) re- eals that the Court provided the sentence "as rovided by law" for the offense "as charged." lowhere does the Court specifically set forth hich of several possible penalties within 58-33 were being applied. The record shows hat defense counsel, the Court, and the prose- uting attorney believed,throughout the trial,

that the maximum penalty was five years (R. 26). The actual determination of the term of imprisonment was made, not by the Court, but by the State Prison I.D. Officer, one James W. Johnson (R. 12, 13, 14, 15). The term of five years to life is not set forth specifically in any other part of the record.

The only apparent source of this penalty is found in § 58-33-4-(3) which states in part:

> "Every person who transports, imports into this state, sells, furnishes, administers, or gives away or offers to [do the same] .... 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."

But it is provided in Utah Code Ann., § 58-33-4 (6), that:

> "Any person violating any other provisions of this Chapter, except those mentioned in the preceding four paragraphs, ... shall be punished for the first offense ..... for not more than five years ..... "

And since appellants were charged with violating "other provisions" of the Chapter, it seems clear that the penalty of no more than five years

must also be applied if any part of § 58-33 even applies. Appellants were charged only with a violation of 58-33-6 (1), which nowhere indicates a five year to life penalty. Clearly, then, there exists doubt and uncertainty as between several different statutes and penalties.

The Court automatically imposed a sentence of imprisonment. There is nothing to indicate why two young first offenders who were entrapped into delivering eight tablets of LSD to a team of narcotics agents were denied probation. The report prepared by the Adult Probation and Parole Department recommended probation. There is nothing in their backgrounds to indicate that they are not good probation material. A five to life term, if upheld by this Court, would violate the Constitutional guarantees of equal protection of the law and the prohibition of cruel and unusual punishments. There is no rational justification for the illegal five to life sentence and no distinction can be made between these appellants and the thousands of other young people with similar character and backgrounds, who are routinely placed on probation in this jurisdiction for similar offenses.

This Court, in State v. Barlow, 25 Utah 2d 375, 483 P. 2d 236, held that a minimum mandatory provision of law does not preclude the Court from placing a person on probation pursuant to Utah Code Ann., § 77-35-17 (1953) where it appears compatible with the public interest.

In the case of Trop v. Dulles, 356 U.S. 86 (1958), the Supreme Court of the United States in a majority opinion by Chief Justice Warren stated:

> "The basic purpose underlying the Eighth Amendment is nothing less than the dignity of man. While the state has the power to punish the Amendment stands to insure that this power be exercised within the limits of civilized standards. Fine, imprisonment and even execution may be imposed depending upon the enormity of the crime ..... the Amendment must draw its meaning from the evolving standards of decency that make the progress of a maturing society."

On the basis of the Eighth Amendment, and applying the rules of Shondel and Fair, appellants respectfully submit that in the event that the conviction itself be upheld that the case be remanded for imposition of the proper sentence, a misdemeanor, with recommendation for probation.

CONCLUSION

It is respectfully contended from the foregoing arguments that appellants' convictions should be reversed and the sentence set aside. Alternatively, the case should be remanded for resentencing as a misdemeanor, with recommendation for probation.

Respectfully submitted,

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