

1976

Utah v. John Michael Dougherty : Brief of Appellant

Utah Supreme Court

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BRIGHAM YOUNG UNIVERSITY,
J. Reuben Clark Law School

IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,	/	
Plaintiff and	/	
Respondent,	/	
vs.	/	Case No. 14106
JOHN MICHAEL DOUGHERTY,	/	
Defendant and	/	
Appellant.	/	

APPELLANT'S BRIEF

Appeal from the Judgment of the District
Court of Weber County, in and for the Second
Judicial District, State of Utah, the
Honorable Calvin Gould, Judge, presiding

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FILED

JAN 21 1976

Clk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff and
Respondent,

vs.

Case No. 14106

JOHN MICHAEL DOUGHERTY,

Defendant and
Appellant.

APPELLANT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

The Defendant-Appellant appeals from the Judgment of conviction entered upon a jury verdict on the 24th day of April, 1975, in the District Court of Weber County, in and for the Second Judicial District, State of Utah, the Honorable Calvin Gould, Judge, presiding, for the offense of unlawful distribution for value of a controlled substance, to-wit: marijuana, contrary to Utah Code Annotated, Section 58-37-8(1)(a)(ii), (1953).

DISPOSITION IN LOWER COURT

The above entitled matter came on regularly for jury trial the 24th day of April, 1975, before the District Court

of Weber County, in and for the Second Judicial District, State of Utah, the Honorable Calvin Gould, presiding, following which the jury returned its verdict of guilty to the charge of unlawful distribution for value of a controlled substance, to-wit: marijuana. Prior to the commencement of said trial, Defendant by and through his counsel of record timely filed his Request for Jury Instructions, specifically including a request to instruct the Trier of Fact upon the lesser included offense of possession of a controlled substance. Over objection, the Trial Court specifically declined such instruction. From the Judgment of guilt, the Defendant appeals.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the Trial Court's refusal to instruct the Trier of Fact as to the lesser included offense of possession of a controlled substance, together with reversal of his conviction, remanding same to the Trial Court for a new trial upon proper instructions.

STATEMENT OF FACTS

During the latter part of November, 1973, one, Rodney Woolsey, was employed part-time for the Ogden City Police Department as a Narcotics Undercover Agent. (R-68,-69) On the evening of November 23, 1973, Agent Woolsey by prearrangement

with one, Miss Toni Keller, went to the home of said Toni Keller for the purpose of purchasing a quantity of marijuana. (R-69) After being admitted into the home of Toni Keller and entering into the kitchen thereof, said Toni Keller produced for Agent Woolsey a quantity of marijuana from under the sink and handed same to Agent Woolsey for his inspection and examination. (R-74) The marijuana was contained within a plastic bag, which itself had been placed inside a brown paper sack. (R-74) Thereupon, Agent Woolsey opened the brown sack and examined the substance. (R-75) Agent Woolsey thereupon testified that after indicating that said substance was acceptable to himself, briefly took possession of the marijuana, paid over to Miss Toni Keller the sum of \$90.00, and after brief discussion, began to exit the home. Upon leaving the premises, Agent Woolsey then related that Miss Keller requested to and did retake possession of the marijuana. Thereupon, both individuals left the home and outside the residence first greeted the Defendant as he approached the Keller home having exited from his vehicle. At such time, and in front of the Keller home, Miss Keller handed the money and the marijuana to the Defendant, who in turn handed said marijuana to Agent Woolsey without examining same. (R-79)

As to this part of the transaction, Miss Keller offered differing testimony to the affect, that she, and not the Defendant, had arranged and sold the marijuana in question to Agent Woolsey

on November 23, 1973. (R-144) Further, said Toni Keller testified that the Defendant came up to the front of her house as she and Agent Woolsey were completing the transaction in question, but that nothing was passed from her to the Defendant, and that following very brief conversation between herself and the Defendant, said Defendant departed her premises. (R-147,-148)

From the final Judgment of conviction, Defendant duly filed his Notice of Appeal on the 19th day of May, 1975, and on said date, the Honorable Calvin Gould, District Judge, duly executed his certificate of probable cause herein.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY AS TO DEFENDANT'S REQUESTED INSTRUCTION ON A LESSER INCLUDED OFFENSE.

The Honorable Trial Court in Jury Instruction No. 12 instructed the jury in the above matter as follows:

Before you can convict the Defendant of the crime of distribution for value of a controlled substance, you must find from the evidence, beyond reasonable doubt, all of the following elements of that crime:

1. That on November 23, 1973,
2. The Defendant, JOHN MICHAEL DOUGHERTY,
3. Delivered a substance known as "marijuana" to Rod Woolsey;
4. That said delivery was in exchange for compensation or consideration or item of value.

If you believe that the evidence establishes each and all of the essential elements of the offense beyond a reasonable doubt, it is your duty to convict the Defendant. On the other hand, if the evidence has failed to so establish one or more of said elements, then you should find the Defendant not guilty.

Under Section 77-33-6 of Utah Code Annotated, (1953), a jury may find a criminal Defendant guilty of any offense which is necessarily included within the offense charged. Section 77-33-6 provides as follows:

The jury may find the Defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment or information, or of an attempt to commit the offense.

In the case at bar, possession of a controlled substance was a necessary incident of the sale. However, the Defendant's requested instruction of such lesser included offense was rejected by the Court. Such proposed instruction read as follows:

You are instructed that under the laws of the State of Utah, it is a lesser included offense to the charge brought herein for a person to knowingly and intentionally possess or use a controlled substance, or to knowingly and intentionally be present where a controlled substance is used or possessed. Accordingly, even though you should not find the Defendant, John Dougherty, to have distributed a controlled substance for a value, you may consider his guilt for the offense of unlawful possession of a controlled substance, a misdemeanor.

In State v. Durfee, 290 P. 962 (1930), the Utah Supreme Court held:

That as a general rule of law, when a lesser offense is included within the crime charged in an information,

it is the duty of the Trial Court, when so requested, to instruct the jury that they may, if in their opinion, the evidence justifies it, find the Defendant guilty of the lesser included offense.

The Utah Supreme Court in State v. Gillion, 463 P.2d 811 (1970), held it is a fundamental principle, that upon request of the parties, they are entitled to have instructions given upon their theory of the case when there is any substantial evidence to justify such an instruction. The Court furthered in Gillion, that where the question raised relates to the refusal of the Court to give a lesser included offense instruction, the usual rule of reviewing the record in the light most favorable to the jury's verdict does not apply. Where such refusal is the question on appeal, the duty of the Court is to survey the whole evidence and inferences drawable therefrom to see if there is any reasonable basis upon which the Defendant could be convicted of the lesser offense.

The Utah Court further reiterated this position in State v. McCarthy, 483 P.2d 890 (1971), wherein the Court held that a Defendant upon request is entitled to instructions on his theory of the case, including the submission of lesser included offenses where there is some reasonable basis to justify such an instruction.

In State v. Close, 499 P.2d 287, 288 (1972), the Utah Supreme Court reversed the Defendant's conviction for indecent

assault where the Trial Court refused Defendant's proposed instruction as to the lesser included offense of simple assault. The facts of the Close case, while involving a somewhat different offense and one not related to the possession or sale of a controlled substance, do nevertheless have striking similarities to the case at bar. In Close, the jury was instructed that the Defendant must be either guilty of indecent assault or not guilty. The Court held in reversing:

Under the circumstances shown, we believe that the interests of justice requires that the jury should be informed of the lesser and included offense and be given the opportunity to consider it as one of the possible verdicts.

In the case at bar, the Trial Court declined to give the requested instruction of possession of a controlled substance, when in fact, possession was one of the elements to be proven by the State. The jury had to find the Defendant guilty of the sale of a controlled substance or not guilty. The jury was not given the opportunity to find the Defendant guilty of any lesser included offense.

In People v. Burns, 200 P.2d 134 (1948), the California Supreme Court held, that the Court should instruct the jury on every material question upon which any evidence deserving of any consideration whatever exists and the fact that such evidence may not be of such a character to inspire belief does not authorize

the refusal of an instruction thereon. The Court further held:

It is the duty of the Court to instruct the jury in regards to any included offense which the evidence tends to prove.

Further, the character of the evidence in question is within the exclusive province of the jury, and however incredible the testimony may be, the Defendant is entitled to an instruction on his theory of the evidence adduced.

Again, in State v. Gallagher, 103 P.2d 1100 (1940), the Washington Supreme Court held, that when an instruction as to a lesser included offense must be given unless evidence positively excludes any inference that the Defendant committed the lesser crime. Similarly, Utah cases also recognize the fundamental rule, that it is within the exclusive province of the jury to pass upon the evidence and facts in issue. State v. Moore, 183 P.2d 973 (1947).

In State v. Mills, 530 P.2d 1272 (1975), the Utah Supreme Court held it is the prerogative of the Trier of Fact to weigh the evidence, the credibility of the witnesses, and the facts found therefrom. The Court further stated, that where a defendant is challenging the sufficiency of the evidence, all inferences reasonably drawn therefrom must be drawn in a manner most favorable to the jury.

While weighing the facts is inherently a matter within

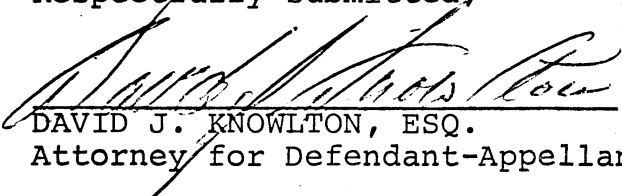
the exclusive province of the jury, the jury is bound in making a determination by the instructions given by the Court. When an instruction as to lesser included offenses is not given them, the jury's discretion in reaching a determination is thereby unduly restricted.

CONCLUSION

The Trial Court's refusal to give the Defendant's requested lesser included offense instruction invaded the exclusive province of the jury. Accordingly, the jury in the instant case was not given the proper opportunity to consider or convict the Defendant on a lesser charge of "possession" and such refusal to instruct was in deprivation of the Defendant's rights. Accordingly, the Defendant's Judgment of conviction should be set aside and same remanded for a new trial with proper instructions.

DATED this 20 day of January, 1976.

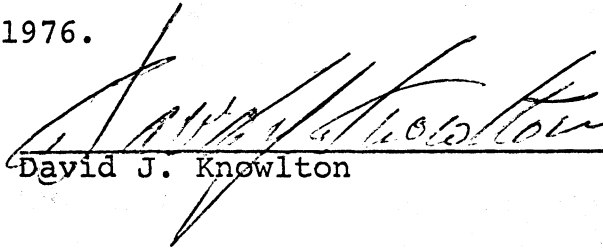
Respectfully submitted,


DAVID J. KNOWLTON, ESQ.

Attorney for Defendant-Appellant

CERTIFICATE OF MAILING

Two copies of the foregoing Appellant's Brief were posted in the U. S. mail, postage prepaid, and addressed to the Attorney for the Respondent, Vernon D. Romney, Utah State Attorney General, State Capitol Building, Salt Lake City, Utah 84111, on this 20 day of January, 1976.


David J. Knowlton

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