1977

State of Utah v. Elbert Junior Ross : Brief of Respondent

Utah Supreme Court

Tom Jones; Attorney for AppellantROBERT M. HANSON; Attorney for Respondent

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

ELBERT JUNIOR ROSS,

Defendant-Appellant.

BRIEF OF [illegible]

APPEAL FROM THE [illegible]
JUDICIAL [illegible]
WEBER COUNTY, [illegible]
HONORABLE JOHN [illegible]

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IN THE SUPREME COURT OF THE

STATE OF UTAH

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ELBERT JUNIOR ROSS,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with Distribution for Value of Controlled Substance in violation of Utah Code Ann. § 58-37-8(1)(a)(i) (1953).

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury and was found guilty on February 11, 1976, in the Second Judicial District Court, the Honorable John F. Wahlquist, presiding. Appellant was sentenced March 22, 1976, to not less than fifteen years.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming the judgment of the jury.

STATEMENT OF FACTS

On December 8, 1975, two undercover narcotics' agents for the Ogden City Police, Ken and Charlene Goode, made a "controlled buy" of heroin at the residence located at 804 West 27th Street, Ogden, Utah (Tr.19,23,30). Anita Swanson, a secretary of the Ogden Police Department, testified that she conducted a strip search on Charlene Goode at the Kopper Kottage at approximately 10:00 a.m. on December 8, 1975 (Tr.11,12); and that she found no drugs on her at that time (Tr.12,13). Ms. Swanson also testified that she searched Charlene Goode later that same morning at approximately 11:21 a.m. after Ms. Goode allegedly made the heroin buy, and again found no drugs (Tr.13,14).

Mervin Taylor, a detective for the Ogden City Police Department, testified that he searched the automobile driven by the Goodes at approximately 10:00 a.m. on December 8, 1975, finding nothing in the vehicle (Tr.16,17). He too testified that he searched the

vehicle later that same day at approximately 11:25 a.m. and again found nothing (Tr.18).

Bob Searle, a member of the Ogden City Police Department, testified that on the morning of December 8, 1975, at approximately 10:00 a.m., he met with Ken and Charlene Goode to discuss a heroin buy. He stated that he searched Mr. Goode before this buy and that he gave Ken Goode ten empty balloons of different colors with residue of foot powder in each of them: five balloons for Ken and five for Charlene (Tr.22-25). Mr. Searle testified that he did this because it was his information that no one was able to leave the intended site of the buy with the heroin. He stated, "They have to shoot inside and these balloons were prepared so that a switch might be made inside for one of the empty balloons here that were prepared for a real one." (Tr.24).

Mr. Searle and Mr. Taylor then testified that the police kept surveillance on the Goodes from the time the Goodes were searched to the point at which the Goodes entered the residence at 11:10 a.m. on December 8, 1975 (Tr.18-20,26,27). Mr. Searle stated that when he again met with Ken Goode at 11:21 a.m., Goode handed him a balloon with suspected heroin in it. Officer Searle testified he then searched Goode, finding nothing (Tr. 28-30).

Ken Goode testified that on December 8, 1975, he and his wife met with the detectives at the Kopper Kottage and that he was searched (Tr.82). He stated that Officer Searle gave him one hundred dollars to make a buy of heroin at 804 West 27th Street, Ogden, Utah. He said that Searle gave him ten empty balloons to make a switch at the residence (Tr.53). He testified that he and Charlene went to the residence and were met at the door by the appellant (Tr.56,57). He stated that when he asked if there "was anything going on," the appellant said, "Yes, I have got some balloons." (Tr.59).

> "Well, he reached in his pocket and pulled out a plastic baggie. He had three balloons in it and he said that's all he had right then. So I proceeded to hand him four twenties, and he handed me back five dollars change, the price of the balloons being $25.00 apiece." (Tr.59).

Ken Goode testified that the appellant, his wife, and he walked into a bedroom, and that while the appellant went to look for some drug paraphernalia, Charlene made the switch, substituting a yellow balloon with foot powder in it for one that contained heroin

(Tr.61). After injecting the two remaining balloons of heroin into himself and his wife, Ken and Charlene Goode left the house (Tr.61). Shortly thereafter, Ken stated he saw the police following him until they all arrived at the mobile home where they were again thoroughly searched (Tr.64). Ken Goode stated he turned over the bag of suspected heroin, the empty balloons and the $5.00 to Detective Searle (Tr.64).

Charlene Goode's testimony verified what others had previously stated (Tr.83-95). Both Ken and Charlene testified that they were not presently addicted to heroin (Tr.52,90), and that they were on a methadone program at the time of the controlled buy (Tr.53,54,62, 90). Both Ken and Charlene testified that although there were criminal charges pending against them, no promise had been made to them by the prosecuting attorneys (Tr.67,90,94).

When the appellant took the stand on behalf of his own defense, he admitted that he was a heroin user and that at the time of the incident on December 8, 1975, he was on the methadone treatment program (Tr.99). The appellant admitted he was at the residence at 804 West 27th Street, Ogden, Utah, on December 8, 1975, and that

he saw Ken and Charlene Good (Tr.102). He denied selling the Goodes heroin (Tr.104), but testified that he did not have much money, was not working at the time, even though he owed several car payments (Tr.105). The appellant also admitted on cross-examination that he had "dirty" methadone tests, indicating that he was taking methadone and heroin at the same time (Tr.111).

ARGUMENT

POINT I

THE EVIDENCE PRESENTED AT TRIAL WAS LEGALLY SUFFICIENT TO SUPPORT APPELLANT'S CONVICTION.

Appellant's sole issue on appeal is that the evidence presented by the State did not support his conviction. He claims that Ken Goode, the State's chief witness, was himself so unbelievable a character that he could not be believed by "reasonable men" because Goode himself was a former heroin addict and had a possible motive to lie to reduce charges then pending against him. To support this contention, the appellant cites several cases holding that the State must prove its case beyond a reasonable doubt in a criminal prosecution, Holt v. United States, 218 U.S. 245 (1910); State v. Allgood, 28 Utah 2d 119, 499 P.2d 269 (1972); State v. Shonka, 3 Utah 2d 124, 279 P.2d 711 (1955); State v. Sullivan, 6 Utah 2d 110, 307 P.2d 212 (1957); State v. Danks, 10 Utah 2d 162, 350 P.2d 146 (1960). The appellant asserts that a reviewing court may set aside a guilty verdict where the evidence is so inconclusive and unsatisfactory that

reasonable men could and should have entertained reasonable doubt that the defendant committed the crime charged, supporting his assertions with State v. Allgood, supra; State v. Shonka, supra; State v. Sullivan, supra; and State v. Danks, supra. Respondent does not quarrel with the appellant's interpretation of the law; in fact, the Utah Supreme Court succinctly stated the requirements for the sufficiency of evidence to support a guilty verdict in State v. Allgood, supra. The evidence is insufficient if it is "so inconclusive or unsatisfactory that reasonable minds acting fairly upon it must have entertained reasonable doubt that the defendant committed the crime." 28 Utah 2d at 120, 499 P.2d at 270.

Appellant asserts that a guilty verdict may be set aside when "taking the evidence in the light most favorable to the verdict," the "findings are unreasonable State v. Berchtold, 11 Utah 2d 208, 357 P.2d 183 (1960). Again, respondent agrees with appellant that this is an accurate statement of the law.

Respondent asserts, however, that whether evidence is sufficient or not to support a guilty verdict

is a factual question for the trier of fact at the trial level. The jury is entitled to believe or disbelieve witnesses. In the case at bar, the State's chief witnesses admittedly were former heroin addicts who had "dealt" in controlled substances in the Ogden area. They had charges pending against them although evidence presented at trial indicated no promise had been made to them to reduce those charges in return for their cooperation. On the other hand, the evidence indicated Ken and Charlene Goode made a "controlled buy" of heroin: that is, they walked into the residence without any drugs on them and carrying $100 (Tr.53); and that they came out of the residence with one balloon of heroin and $25.00.

The Utah Supreme Court, in the recent decision of State v. Wilson, No. 14731 (May 25, 1977), held that where an undercover agent furnished with two $20.00 bills, walked into a west second south bar, purchased a balloon of heroin and returned to the policeman's car, was sufficient evidence to support the guilty verdict of the seller of that heroin. In State v. Wilson, id., the appellant made the same argument as is the appellant in the instant case: namely, that because the undercover

agent was a former heroin user and had a motive to fabricate the story and that since the agent's testimony was indispensable to the conviction, that therefore there must necessarily have been a reasonable doubt as to guilt. See also State v. Shupe, Utah, 554 P.2d 1322 (1976). This Court in State v. Wilson, supra, held:

> "The judging of the credibility of the witnesses and the weight of the evidence is exclusively the prerogative of the jury. Consequently we are obliged to assume that the jury believed those aspects of the evidence, and drew those inferences that reasonably could be drawn therefrom, in the light favorable to the verdict. In order for the defendant to successfully challenge and overturn a verdict on the ground of insufficiency of the evidence, it must appear that upon so viewing the evidence, reasonable minds must necessarily entertain a reasonable doubt that the defendant committed the crime. In applying the rules above stated to the instant case, we are not persuaded that the verdict should be overturned."

Respondent contends that there is even less reason to disbelieve the undercover agents in the instant case than there was in State v. Wilson, id., because in Wilson the agent was being paid by the police for her work whereas Ken and Charlene Goode were not (Tr.66,89). They merely had charges against them regarding which no promises were made to them in turn for their aid.

CONCLUSION

Respondent respectfully submits that appellant has failed to show that the evidence presented at trial was so inconclusive or unsatisfactory that reasonable minds should have had reasonable doubt as to its validity. Respondent respectfully requests that this Court affirm the verdict and judgment of the lower court.

Respectfully submitted,

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