2000

State of Utah v. Farhad Soroushirn : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

FARHAD SOROUSHIRN,

Defendant-Appellant.

Case No. 14485

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE SECOND JUDICIAL DISTRICT COURT, IN AND FOR WEBER COUNTY, STATE OF UTAH, THE HONORABLE JOHN F. WAHLQUIST, JUDGE

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NOTE ON INDEXING TO REPORTER TRANSCRIPTS

Citations in this brief to the record in the court below are as follows:

R.---------Record on Appeal

Tr.--------Transcript of Testimony of hearing held on January 27, 1976, before the Honorable John F. Wahlquist

Tp.--------Transcript of Proceedings of hearing held on October 1, 1975, before the Honorable Calvin Gould

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH, Plaintiff-Respondent, -vs- FARHAD SOROUSHIRN, Defendant-Appellant.	Case No. 14485

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged in the Second Judicial District Court of Weber County upon an information alleging a violation of Utah Code Ann. § 58-37-8(1)(a)(iii) (1953), as amended, in that he "distributed a controlled substance for value, to-wit: Marijuana."

DISPOSITION IN THE LOWER COURT

The matter was tried in the Second Judicial District Court, in and for Weber County, before the Honorable John F. Wahlquist, sitting without a jury. Appellant was found not guilty of distributing a controlled substance for value as

charged, but was found guilty of a lesser included offense, distributing a controlled substance not for value. Appellant was sentenced upon the above stated conviction. It is from that verdict and judgment that appellant appeals.

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmance of appellant's conviction.

STATEMENT OF FACTS

On October 29, 1974, Officer L. J. Call, an Ogden Police Department undercover agent, purchased marijuana from one Farhad Soroushirn, identified as the defendant by Officer Call (Tr.35,37). Officer Call was accompanied by and led to defendant's apartment by a black college student, Terrell Eady (Tr.41). On this occasion, Officer Call, Terrell Eady and the defendant went to an Ogden residence where marijuana was obtained through the defendant Soroushirn's contact (Tr.42). On this occasion, Terrell Eady rather than Officer Call requested that the defendant make the purchase of marijuana (Tr.42).

On two other occasions between October 30 and November 4, 1974, Officer Call again contacted defendant, this time without Terrell Eady, and asked him whether he or his contact had additional marijuana for sale. His reply

on both occasions was simply, "no, my contact does not have any." Defendant made no expression of an unwillingness to sell (Tr.5).

Officer Call returned to defendant's apartment, again alone, on November 5, 1974. This time in response to a like inquiry, defendant, without being entreated to do so, joined Officer Call in his car and led him to an Ogden residence. At this residence, defendant did sell Officer Call marijuana (Tr.37,38).

On the following day, November 6, 1974, a complaint alleging distribution of marijuana for value and referring to the October 29, 1974, incident was signed by the Weber County Attorney and filed with the City Clerk. Shortly thereafter, County Attorney Prosecutor Robert Wallace, and attorney for defense William Marsh, entered into plea negotiations regarding the purchases occurring on October 29, 1974, and November 5, 1974 (Tr.79). Pursuant to those negotiations, defendant plead guilty to a reduced charge of possession of marijuana, a Class "B" Misdemeanor (Tr.79). However, on February 19, 1975, the date set for sentencing, defendant made an oral request to withdraw his plea of guilty (Tp.20). On April 2, 1975, defendant was allowed to withdraw his plea of guilty, entered pursuant to the above mentioned negotiations (Tp.20).

Following defendant's withdrawal of his guilty plea, he made motion to dismiss the State's action on grounds of entrapment. One day later, on May 22, 1975, after reevaluation of the two purchases, the State decided to dismiss the complaint alleging distribution for value on October 29, 1974, and filed a new complaint alleging the facts arising out of the November 5, 1974, purchase (Tp.20). The prosecutor responsible for the dismissal of the October 29th charge and filing of the November 5th complaint testified at defendant's trial that this was done because the county attorney's office believed the second purchase on November 5, 1974, was a stronger case for the State (Tr.87).

On May 29, 1975, the date set for trial, the first complaint was dismissed and the second complaint was filed. Summons on the second complaint was not served on defendant at that time because of representations made by the defense that defendant would be out of the country for the summer (Tp.21).

The State became aware of defendant's presence in this country on July 3, 1975, when defendant was picked up and arrested on charges of possession of a controlled substance (Tp.21). At the time of defendant's arraignment on the charge of possession the Weber County Attorney's Office had him arraigned on the complaint charging distribution for value, occurring on November 5, 1974.

At arraignment in district court on the second prosecution, appellant moved to dismiss, raising the defenses of (1) entrapment, (2) double jeopardy, and (3) denial of speedy trial (R.9-10). Defendant's motion to dismiss the information was denied (R.30).

Defendant's case was then set for a jury trial on January 27, 1976. Defendant then waived his right to a jury trial (Minute Entry, R.36).

On the day of the trial defendant appeared and moved the court for an order compelling the State to produce Terrell Eady as a witness for defendant. The court denied the motion and ordered the case to trial.

After hearing the evidence, the trial court judge found defendant guilty of distribution not for value. The trial judge stated that he was not satisfied that defendant was guilty of distributing a controlled substance for value but was satisfied that defendant stood ready and willing to distribute not for value. The trial judge therefore found appellant guilty of the lesser included offense (Tr.102).

ARGUMENT

POINT I

THE TRIAL JUDGE DID NOT ERR IN FINDING APPELLANT GUILTY OF DISTRIBUTION NOT FOR VALUE.

Appellant was charged with distributing a controlled substance for value. In a non-jury trial, Judge Wahlquist

after hearing evidence from both defense and prosecution, found appellant guilty of distributing a controlled substance, not for value. Distributing not for value is a lesser included offense of the crime of distributing for value. In so finding, Judge Wahlquist stated the following:

> "Insofar as the facts of the crime are concerned, the court believes that what has occurred is this: The court believes that the defendant stood ready, willing, and able to share with others possession and use and division of marijuana.
>
> The court is not convinced that he was necessarily in a position or made a habit of selling marijuana." (Tr.102).

Stated simply, the trial judge in this case did not find the State's evidence sufficient to sustain a verdict of guity as to the major offense, distributing for value. The trial judge did, however, find the evidence sufficient to support a verdict of guilty as to the lesser included offense.

Appellant contends that the trial judge found appellant not guilty of the major offense because of entrapment and guilty of the lesser offense because it found entrapment to be only a "partial defense."

Appellant bases this argument on the following observation made by Judge Wahlquist:

> "The court believes that entrapment may operate through instrumentalities or other persons that the conduct of Eddie is such that under the objective standard, it might take one who is willing to distribute marijuana not for sale and cause them to

> be involved in a valued distribution.
> In other words, I believe in this case entrapment is a partial defense. It may have a tendency of increasing the nature of the crime, for this reason the court finds him guilty, not guilty of entrapment insofar as the major offense is concerned because of entrapment, but finds that the conduct of entrapment, but finds that the conduct of entrapment in no way entrapped him into sharing possession and making division of marijuana. For that reason I find him guilty of the lesser offense of distributing not for value." (Tr.102,103).

Respondent's understanding of Judge Wahlquist's statement concerning entrapment is this. Judge Wahlquist found appellant guilty of distributing marijuana not for value but found that appellant would not have distributed for value had it not been for Officer Call's providing the money and making the request. The trial court therefore felt that appellant was entrapped into distributing for value but not entrapped into distributing not for value.

Appellant argues, however, that any finding of entrapment compels the trial court to dismiss the case with prejudice. This position is not supported by statute.

In the chapter on entrapment, Utah Code Ann. § 76-2-303 (1977), subsections (4) and (5) read as follows:

> "(4) Upon written motion of the defendant, the court shall hear evidence on the issue and shall determine as a matter of fact and law whether the defendant was entrapped to commit the offense. Defendant's motion shall be made at least ten days before trial except the court for good cause shown may permit a later filing.
>
> (5) Should the court determine that the defendant was entrapped, it shall dismiss the case with prejudice, but if the court determines the defendant was not entrapped, such issue may be presented by the defendant to the jury at trial. Any order by the court dismissing a case based on entrapment shall be appealable by the state."

Subsections (4) and (5) provide that the trial court, upon defendant's motion, shall hear evidence on the issue of entrapment. Should the trial court at that time determine that defendant was entrapped, the case should be dismissed with prejudice. Should the court find that defendant was not entrapped the case should go to trial, at which time evidence of entrapment may still be admitted for consideration by the trier of fact. Should the trier of fact find entrapment at trial, the statute does not require a dismissal of the case.

In the present case, defendant, prior to trial, was granted an evidentiary hearing to consider his motion to dismiss. Defendant's motion properly raised the defense of entrapment. Judge Gould, presiding over the evidentiary hearing, found as a matter of law and fact that defendant

had not been entrapped into distributing for value. Had Judge Gould found entrapment at that time, the case would have been dismissed with prejudice.

Defendant's case was then tried in a non-jury trial before Judge Wahlquist. Judge Wahlquist, the trier of fact, listened to evidence concerning the defense of entrapment, as provided for in Utah Code Ann. § 76-2-303(5) (1977). After hearing all the evidence Judge Wahlquist found appellant not guilty of distribution for value, because of entrapment, and guilty of distribution not for value, finding no entrapment to have been involved.

Judge Wahlquist's determination that appellant would not have distributed for value had he not been entrapped did not, according to the statute, mandate that the case be dismissed.

Judge Wahlquist was authorized in finding appellant guilty of the lesser included offense of distributing not for value, provided there was no entrapment involved in appellant's non-valued distribution.

This was Judge Wahlquist's conclusion as is evidenced by the statement:

> ". . . [The court] finds that the conduct of entrapment in no way entrapped him into sharing possession and making division of marijuana. For that reason I find him guilty of the lesser offense of distributing not for value." (Tr.103).

POINT II

THE TRIAL COURT PROPERLY DENIED APPELLANT'S PLEA OF FORMER JEOPARDY.

Appellant entered a plea of "once in jeopardy" at his arraignment, on the charge of distribution for value occurring on November 5, 1974, and moved for the court to dismiss the action (R.9-10,23-29). The motion was denied.

Appellant distributed a controlled substance to Officer Call on two separate occasions. The first distribution occurred on October 29, 1974, in the presence of Terrell Eady. The second distribution occurred on November 5, 1974, a full week later, Officer Call being alone.

The Weber County Prosecutor after initially charging appellant with the October 29th offense, dismissed that case and filed the November 5th case against appellant, the second case being the stronger of the two.

The October 29th case was dismissed before appellant was brought to trial, before a jury had been empaneled, and before a decision had been reached concerning appellant's motion to dismiss the October 29th charge because of entrapment.

Appellant contends that the dismissal by the prosecution of the October 29th distribution for value case

and subsequent prosecution of the November 5th distribution for value case constituted double jeopardy.

Collateral estoppel or double jeopardy as it is referred to in criminal cases, State v. Pruitt, 531 P.2d 860, 862 (Kan. 1975), is a federal and state constitutional protection against putting a person in jeopardy twice for the same offense. People v. Smith, 512 P.2d 269, 272 (Colo. 1973). Appellant's claim of double jeopardy applies not to one single offense but to two separate and distinct offenses, and therefore the protection against double jeopardy does not apply.

That appellant's distribution of a controlled substance on two different occasions constituted two separate offenses is supported by the decision of this Court in State v. Dolan, 502 P.2d 549 (Utah 1972). In that case, defendant plead guilty to a misdemeanor charge of writing a bad check on August 16, 1971. Defendant was also later convicted of two felony charges for writing bad checks on July 22, 1971, and August 3, 14 and 15, 1971. All of these bad check writings were known to the prosecution at the time defendant plead guilty to the misdemeanor charge of writing a bad check. Defendant appealed from the felony conviction, claiming double jeopardy. The Utah Supreme Court concluded that there was no double jeopardy in that case.

In Disherson v. State, 518 P.2d 892 (1974 Oklahoma Court of Criminal Appeals), the defendant claimed that his alleged act of distributing marijuana to undercover agents on four different occasions constituted one offense and therefore the act of trying him on more than one charge constituted double jeopardy. In finding no double jeopardy, the Oklahoma Court stated:

> "After carefully reviewing the record in the three cases in which he was convicted, we are of the opinion that each sale was a separate and distinct offense and find this proposition to be without merit." Id. at 895.

Respondent argues that appellant's distribution of marijuana on October 29, 1974, and November 5, 1974, constituted two separate offenses and therefore the protection of not being placed in jeopardy twice for a single offense does not apply.

Even if this Court concluded that appellant's two separate distributions of a controlled substance constituted a single offense, double jeopardy would not attach until a jury is empaneled or if it is a non-jury trial, the actual trial of the case has begun. This was the ruling of this Court in the case of Boyer v. Larson, 433 P.2d 1015, 1016 (1967). In the case of Serfass v. United States, 95 S.Ct. 1055 (1975), which stands for the same principle as enunciated in Boyer v. Larson, supra, the United States Supreme Court stated:

> "As an aid to the decision of cases in which the prohibition of the Double Jeopardy Clause has been invoked, the courts have found it useful to define a point in criminal proceedings at which the constitutional purposes and policies are implicated by resort to the concept of 'attachment of jeopardy.' . . . In the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn. . . In a nonjury trial, jeopardy attaches when the court begins to hear evidence. . . The Court has consistently adhered to the view that jeopardy does not attach, and the constitutional prohibition can have no application, until a defendant is 'put to trial before the trier of facts, whether the trier be a jury or a judge.'" Id. at 1062.

In the present case, the record shows that the case was dismissed by the prosecution prior to either an empaneling of a jury or an actual trial before a trial court judge. Double jeopardy therefore could not have attached in the present case.

Appellant relies on Ashe v. Swenson, 90 S.Ct. 1189 (1970), to support his contentions that double jeopardy occurred in this case. Ashe v. Swenson, supra, states that collateral estoppel is applied when an issue of ultimate fact has been determined by a valid and final judgment. Appellant does not contend that a valid and final judgment was reached in the first case brought against appellant. It is clear from the record that no judgment whatsoever was

made. Respondent urges this Court to affirm the trial court's denial of appellant's double jeopardy claim on the basis that the two distributions constituted separate offenses and that double jeopardy had not attached at the time the first case brought against appellant was dismissed.

POINT III

THE TRIAL COURT WAS CORRECT IN DENYING APPELLANT'S MOTION TO ORDER THE STATE TO PRODUCE TERRELL EADY AS A WITNESS.

Appellant claims that the trial court in refusing his motion for compulsory process denied him a fair trial.

The witness appellant sought to have testify at his trial was one Terrell Eady. As has been stated, Mr. Eady, formerly a black student at Weber State College, assisted Officer Call in contacting appellant and was present on October 29, 1974, when appellant distributed marijuana to Officer Call (Tr.42). Mr. Eady was not present, however, on November 5, 1974, when the crime for which appellant has been convicted occurred (Tr.37,38).

Prior to trial on the October 29, 1974, distribution charge a hearing on the issue of entrapment was held. Mr. Eady testified as a witness for appellant in that hearing (Tp.24). Following the hearing, Weber County Prosecutor Robert Wallace chose to dismiss the October 29th charge against appellant.

Mr. Wallace took the stand at appellant's trial and in response to counsel for appellant's question, concerning his reasons for dismissing the first case and prosecuting the second, stated:

> "So tactically I felt the second case to be stronger and plus the fact that you have the evidence of the first case to show some previous position or some earlier contact with the defendant, and so I decided that it would be better tactically to proceed on one trial." (Tr.87).

The State dismissed the October 29th charge of distribution and prosecuted the November 5th distribution for the simple tactical reason that their November 5th case was stronger.

On the day of appellant's trial on the November 5th charge, appellant's counsel moved the court for an order compelling the State to produce Mr. Eady as a witness (Tr.3). After hearing argument on both sides concerning the relevance of Mr. Eady's testimony, the court denied appellant's motion for compulsory process but reserved the right to continue the trial or dismiss the case if it appeared appellant was prejudiced by this ruling (Tr.11). Neither a continuance nor a dismissal was issued by the trial court and the denial of appellant's motion was left standing.

At the trial, appellant's counsel claimed that he had made extensive efforts to locate Mr. Eady, but was unable

to do so. Weber County prosecutor Mr. Wallace testified at trial that the fact that Mr. Eady was on probation would make it relatively simple to find him (Tr.89). That Mr. Eady was on probation was a fact which the defense counsel easily could have ascertained.

Respondent contends that appellant in this case is requesting that the court subpoena a witness whom defendant himself could have subpoened.

With reference to this matter, the Washington Supreme Court in the case of State v. Smith, 540 P.2d 424 (1975), stated:

> "Under court rules, appellant could himself have subpoenaed the broadcaster. CrR 4.8, CR 45(a)(1). This he chose not to do. Under these circumstances a request to the trial court to issue a subpoena is addressed to the discretion of the trial court, and an adverse decision thereupon will be overturned only on a showing of prejudice." Id. at 433-434.

In the present case the trial court exercised its discretion in refusing appellant compulsory process. Respondent argues that the trial court's position should only be disturbed by a showing of prejudice. This position is supported by the Tenth Circuit Court of Appeals in the case of United States v. Lepiscopo, 458 F.2d 977 (10th Cir. 1972). The Court in upholding the trial court's decision to refuse appellant compulsory process stated:

> "In his appeal pro se the appellant claims that he was denied his right to compulsory process. He requested several witnesses, five of these were denied by the trial judge. Two of those denied were expert witnesses from Atlanta, Georgia, where the appellant had been imprisoned prior to transfer to Leavenworth; the remainder were inmates at other federal prisons. Rule 17(b) Fed.R.Crim.P. provides that witnesses will be subpoenaed at government expense 'upon a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense.' A motion to have a witness produced at government expense is addressed to the sound discretion of the court and is not an absolute right. . . . These witnesses were to tesitfy on the insanity issue. None of them had seen or talked to the defendant for over a year prior to the offense. The court justifiably ruled that their testimony was not necessary to an adequate defense. There was no abuse of discretion by the trial judge." Id. at 978.

In the present case, appellant failed at the time of trial to show the materiality of Mr. Eady as a witness. Appellant also fails now on appeal to show prejudice resulting from Mr. Eady's failing to testify.

Mr. Eady was not in appellant's or Officer Call's presence on November 5, 1974, when appellant voluntarily distributed a controlled substance to Officer Call. What

testimony Mr. Eady had to give pertained to the October 29th offense. Mr. Eady's testimony was immaterial as to the November 5th offense, his having had nothing to do with the dealings between appellant and Officer Call on that day. This was the sound decision of the trial court.

Even if this Court should find that Mr. Eady's testimony was material, respondent contends that the court's refusal to invoke compulsory process constituted harmless error in that the substance of Mr. Eady's testimony given at pretrial hearing on the October 29th charge was allowed in as hearsay evidence without objection through the testimony of County Prosecutor Robert Wallace (Tp.25).

Respondent argues that because Mr. Eady's testimony that appellant was unwilling to distribute and was basically entrapped into committing the offense was allowed in as evidence appellant was neither harmed nor prejudiced by Mr. Eady's not testifying.

POINT IV

APPELLANT WAS NOT DENIED A FAIR AND SPEEDY TRIAL.

Appellant claims that the prosecution intentionally delayed his trial for the purpose of preventing appellant from calling Terrell Eady as a witness. Appellant's claim

is not supported by the record.

Shortly after the commission of the offense for which appellant has been convicted, the State entered into a plea negotiation with appellant. The State agreed not to prosecute the November 5, 1974, distribution offense and to reduce the October 29, 1974, offense to a misdemeanor charge of possession if appellant would agree to plead guilty to the misdemeanor charge (Tp.20). Appellant plead guilty, but later was allowed to withdraw his guilty plea. The court approved appellant's guilty plea withdrawal on April 2, 1975, approximately six months after the commission of the offense. (Tp.20). The record establishes that appellant's tactics with reference to the plea bargaining agreement caused a six months' delay in the State's prosecution of this case. The record further establishes that appellant and his counsel knew that the State intended to prosecute appellant on one if not both of the distribution offenses occurring in October and November.

Following the breakdown in the plea bargaining agreement, the State began the prosecution anew and chose to prosecute appellant on the October 29, 1974, distribution offense. Trial on that case was set for May 29, 1975. As they neared that date, County Prosecutor Robert Wallace decided that the State should prosecute appellant on just one offense rather than on both the October 29th and November 5th offenses

Mr. Wallace also testified that because the November 5th case was the stronger of the two, the State decided to drop the October 29th case and prosecute appellant on the November 5, 1974, offense (Tr.86,87).

Mr. Wallace further testified that the State's plan was made known to appellant's counsel (Tp.23). A new complaint against appellant alleging the November 5th offense was then filed prior to the May 29, 1976, trial date.

A warrant was not issued for appellant's arrest at that time, however, as the State did not feel it was necessary, and was under the impression from appellant's counsel that appellant would be out of the Country during the summer (Tp.21). Appellant's presence in Weber County became known when he was picked up on a possession of marijuana charge in Ogden. The State then had appellant arraigned, on the November 5, 1974, distribution offense. Appellant's case then proceeded through its normal course to trial. The record establishes that the Weber County Prosecutor's Office dealt with appellant in an open and honest manner. This was also the finding of the trial judge.

At the conclusion of appellant's trial, Judge Wahlquist made the following findings of fact:

> "THE COURT: The court finds the facts to be as follows: First of all the court believes that the dismissal of the one and the filing of a new one is done in good faith and for reasons of strategy. What Mr. Wallace has said about his intent and reasons are true statements and he has not falsefied to the court in this regard. What he has said is true." (Tr.102).

The State's trial tactics were exercised in good faith and for reasons of strategy. Appellant's claim that the prosecution's tactics denied him a fair and speedy trial is unfounded.

POINT V

APPELLANT WAIVED HIS RIGHT TO TRIAL BY JURY.

Under Utah law, a defendant may waive his right to trial by jury. Utah Code Ann. § 77-27-2 (1953), as amended, provides that ". . . waiver shall be made in open court and entered in the minutes."

The minutes of the court in this case state on page 36 of the record: "Defendant waived his right to trial by jury." This minute entry was recorded on January 27, 1976, the day of appellant's trial. (R.36).

Appellant contends now on appeal that he did not waive his right to trial by jury and that the record is insufficient to support the fact that he did waive a jury trial.

Respondent argues that the Court's minute entry is sufficient to support the fact that appellant did waive his right to trial by jury.

In Bush v. Bush, 150 P.2d 168 (1944), the Supreme Court of Kansas said the following concerning the validity of the court's minutes:

> "The minutes of the trial court may be presumed to be a trustworthy chronicle of events as they transpired at trial, and that they are competent and ordinarily controlling on the question of what order was in fact made." Id. at 170.

The validity of the court's minutes was also enunciated in an Oklahoma case under facts similar to those in the present case. In Smith v. State, 429 P.2d 533 (Court of Criminal Appeals, Oklahoma 1967), petitioner Smith in petitioning for a writ of habeas corpus contended that he had been denied the representation of counsel at every stage of his proceedings. The minute entry of the court showed that appellant had waived his right to an attorney and knowingly and voluntarily entered a plea of guilty. The Oklahoma Court of Criminal Appeals found the minute entry to be sufficient to establish the fact that appellant had waived his right to counsel. In so finding, the Court held:

> "It has been repeatedly held where a dispute arises as to the trial procedure, the minutes of the court are the best evidence of what transpired." Id. at 534.

In the case before this Court, the best evidence of what transpired at appellant's trial is the minutes of the court, and the minutes state that appellant waived his right to trial by jury.

Arguing in the alternative, respondent contends that even without the court record stating that appellant waived his right to a jury trial, appellant should be estopped from raising the issue now on appeal.

In reviewing the application of Jay Banshbach, for a writ of habeas corpus or writ of review, 323 P.2d 1112 (Mont. 1958), the Montana Supreme Court stated:

> "Of course, if accused proceeds to trial without making his desires for a jury known, then he waives a jury trial under the rule stated in Ex parte Lewis, 85 Okl.Cr. 322, 188 P.2d 367, and Ex parte Guisti, 51 Nev. 105, 269 P. 600. In other words, he is not permitted to gamble on the outcome before the judge without a jury and then if dissatisfied make a belated demand for a jury." Id. at 1114-1115.

Appellant's counsel in this case allowed the non-jury trial to proceed without objection or claim that appellant desired a trial by jury. Counsel for appellant after gambling that they would win their case in a non-jury trial, now attempts

to raise the issue of a non-jury trial on appeal.

To allow appellant to induce error on the part of the trial court for the purpose of having that issue to raise on appeal, is to allow appellant to abuse the trial court for his benefit. Appellant should be estopped from abusing the trial court in this manner.

CONCLUSION

The Weber County Attorney's Office dealt with appellant in an open and honest manner as determined by the trial court. The record establishes that appellant was given a fair trial and afforded the constitutional protections guaranteed him. For the reasons stated in this brief, respondent urges this Court to sustain appellant's conviction.

Respectfully submitted,

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