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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

ALBERT ROSS,

Defendant-Appellant.

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT [illegible]
JUDICIAL DISTRICT COURT, [illegible]
WEBER COUNTY, STATE OF [illegible]
HONORABLE RONALD O. [illegible]

[illegible]

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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-vs-	:	Case No. 14624
ALBERT ROSS,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

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

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury and was found guilty on April 9, 1976, in the Second Judicial District Court, the Honorable Ronald O. Hyde, presiding. On April 9, 1976, the trial court sentenced appellant to a term not to exceed fifteen years in the Utah State Prison.

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RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming the judgment of the jury and the sentence imposed by the trial court.

STATEMENT OF FACTS

On December 9, 1975, an undercover narcotics' agent for the Ogden City Police, Ken Goode, made a "controlled buy" of heroin at the residence located at 823 West Ellis Street, Ogden, Utah (Tr.10,12-14,56,63). Bob Searle, a member of the Ogden City Police Department, testified that at approximately 1:00 p.m. on December 9, 1975, Ken Goode contacted him and that he and Ken Goode actually met at approximately 3:00 p.m. later that same day (Tr.13,14). Officer Searle testified that they met at the Kopper Kottage to set up a heroin buy from Albert Ross. At this meeting, Searle stated, he gave Goode $200 to make the proposed buy and conducted a body search of Ken Goode to determine "that he had no money of his own on him or any narcotic drugs or any drugs of any kind." (Tr.15). Searle testified that Goode's wife, Charlene, was present with him at the Kopper Kottage and that she was searched. Searle also testified that Goode's car

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was searched by a Detective Burnett (Tr.15,16). Officer Searle indicated that from the time Ken Goode left the Kopper Kottage to the time he returned to the Kopper Kottage after the sale was made, Goode was under police surveillance with the exception of the actual time Goode spent at 823 West Ellis Street (Tr.17,18). Officer Searle estimated that the total time Goode spent inside the residence was five or six minutes (Tr.18). When Goode returned to the Kopper Kottage after making the buy, Searle testified that Goode turned over the balloons of suspected heroin to him (Tr.19).

Gerald Burnett, an Ogden City Police Officer, testified that he searched Ken Goode's automobile (Tr.30), and that he observed Goode go to the residence at 823 West Ellis Street and enter it at approximately 3:46 p.m. and exit it at approximately 3:50 p.m. (Tr.31).

Both Searle and Burnett testified that they knew Ken Goode was a heroin addict (Tr.10,31), but that at the time of this incident they knew he was on a methadone program (Tr.12,31,32). Officer Searle testified that it was necessary to use a heroin addict in this case because it might have been necessary for the "buyer" to shoot some of the heroin himself:

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> "SEARLE: Generally when you go to buy heroin, when you buy inside it's the consensus that you have to shoot the drug before you leave the house.
>
> Q. I see. And so there is some danger in using a police officer, you say?
>
> SEARLE: Yes, he would probably have to shoot the drugs, so we couldn't use an undercover police officer for that.
>
> A. Is there any problems [sic] in using other individuals other than using police officers or heroin addicts?
>
> SEARLE: Unless they're a heroin addict or the people know them very well they would never get in the front door." (T.11)

Officer Burnett testified that although he was aware of felony charges Ken Goode had pending against him at the time he became an undercover agent, neither he nor anyone else to his knowledge made any deals with Goode to reduce his charges for cooperation with the police (Tr.32,33,41).

Robert Wallace, the Chief Criminal Deputy County Attorney for Weber County, was called as a rebuttal witness; and he testified that Ken Goode was originally charged with possession of a controlled substance with intent to distribute heroin (Tr.118), but that the

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charge was lessened to mere possession of drugs. When asked why the charges were lessened, he responded:

> "WALLACE: Well, a lot of reasons. In a case, of course you always have difficulties with proof in any type of a case. It is much easier to prove possession of controlled substances, possession of these drugs, then to show that he necessarily intended to distribute them. When we try to prove intent to distribute we ususally look at several factors. Now the one would be the quantity that one possesses. If we have a small amount, obviously we have a hard time proving intent to distribute; we look at quantities. If there is a large quantity or something that would indicate he intends to distribute, we look at that packaging or the way the material is broken down. Sometimes cocaine, heroin or amphetamines or barbituates are broken down into the ususal street quantitites, and that would seem to indicate the intent to distribute the quantities, because they are broken down into a quantity that is readily sold on the street. Now there are a lot of factors such as this that come into play.
>
> "In this case there was definitely a lot of drugs there, sufficient quantities of drugs, quite a few in fact. There was quite a substantial quantity of drugs, but there was nothing broken down into street type selling quantities. It hadn't been broken down into lots of 100 or lots of 10, or they weren't put into jars of 1,000. It wasn't broken down into street quantities, so that would make it difficult.

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> "Also, Ken Goode, at that time we found out, had been aiding the police in some difficult cases and in a serious problem in Weber County. That is, heroin dealing, and that was taken into consideration also, and we amended it to a zero to five felony." (Tr.119-120).

The State's main witness was Ken Goode, an undercover narcotics' agent with the Ogden City Police Department. He testified that he had been a heroin addict and that on December 9, 1975, he was on a methadone program (Tr.56). He admitted that he had been convicted of drug related felonies previously and that he had one pending as of the date of the trial (Tr.57). When asked why he became a narcotics' agent, he replied:

> "GOODE: Well, I was just sick and tired of the drugs and the drug scene. I was involved in it. I wanted to get out and make a new life for myself, and I felt that this was the best way to do it, and I was in hopes that I could help somebody else.
>
> Q. What happens to people who are on heroin.
>
> GOODE. Well, you become addicted, and it's a very expensive habit. Your mental attitude completely changes. It is just a very horrible thing to be on." (Tr.57).

Goode also testified that although he had pending charges, no promises were ever made to him to reduce those charges (Tr.58,82).

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Ken Goode testified that on December 9, 1975, he went to 823 West Ellis Street at approximately 1:00 p.m. to see if he could make a buy of heroin. He stated that the appellant and a woman were at the house when he arrived (Tr.59,50). He testified that he talked with the appellant about buying $200.00 worth of heroin, and that the appellant indicated he could "do something for you at 3:00 o'clock." (Tr.61). Goode stated that after he left the house he met with Officer Searle at approximately 3:00 p.m. at the Kopper Kottage at which time Searle furnished him with $200 for the purchase of heroin (Tr.62). He stated that he was searched and that he thought his car was searched also (Tr.62).

Goode testified that from the Kopper Kottage he drove to 823 West Ellis Street, arriving at approximately 3:45 p.m. He stated he saw the appellant there and a man named Fred Eaton. Goode testified that the appellant asked him if he was there for the eight (balloons of heroin), and that the appellant pointed to Fred Eaton, who pulled the heroin from his pocket. Goode claimed that he took the $200.00 out and tried to give it to Albert who told him to give it to Fred Eaton. Goode stated he did so and picked

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up the heroin. Goodetestified that as he started to leave, the appellant told him that "if this turned into a more regular thing he could give me a better deal and the deals would improve if I could be steady as far as my purchasing from him. . . ." (Tr.64,65).

Then Goode testified he left the house and drove back to the Kopper Kottage and turned over the heroin (Tr.65,66).

The appellant's witness, Jeffery Jackson, testified that he thought Ken Goode was lying to try to get out of his own drug charges, although he admitted he was not present at the West Ellis Street on December 9, 1975, when this incident occurred (Tr.102,103).

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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

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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

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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 witness admittedly was a former heroin addict who had "dealt" in controlled substances in the Ogden area. He had charges pending against him although evidence presented at trial indicated no promise had been made to him to reduce those charges in return for his cooperation. On the other hand, the evidence indicated that Ken Goode made a "controlled buy" of heroin: that is, that he walked into the residence without any drugs on him and carrying $200, and that he came out of the residence with eight balloons of heroin and no money.

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

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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 agent 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 Goode was not (Tr.58). He merely had charges against him regarding which no promises were made to him in turn for his aid.

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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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