

1978

## State of Utah v. Albert Taylor : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

ALBERT TAYLOR,

Defendant-Appellant.

BRIEF OF DEFENSE

APPEAL FROM THE  
JUDICIAL DISTRICT  
COUNTY, STATE OF UTAH  
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Ogden, Utah 84401

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

----- : -----  
STATE OF UTAH, :  
Plaintiff-Respondent, :  
-vs- : Case No.  
ALBERT TAYLOR, : 15645  
Defendant-Appellant. :

----- : -----  
BRIEF OF RESPONDENT  
-----

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with a violation of Utah  
Code Ann. § 58-37-8(i)(a)(ii) (1953), as amended,  
distribution of a controlled substance (heroin) for value.

DISPOSITION IN LOWER COURT

Appellant was tried before a jury before the  
Honorable Ronald O. Hyde in the Second District Court of  
Weber County and found guilty of distribution of a  
controlled substance for value.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation of the verdict and  
judgment of the lower court.

Respondent has submitted two separate briefs in response to Case Nos. 15631 and 15645, consolidated on appeal by defense counsel. Differences in facts and legal issues have required a complete separation of the two cases. Respondent respectfully requests the indulgence of the Court in submitting its case in this manner.

#### STATEMENT OF FACTS

The essential differences between this case and Case No. 15631 are:

(1) Sale took place on October 4, 1977 (as opposed to October 10, 1977).

(2) Site was appellant's house (as opposed to Ogden Holiday Inn).

(3) Appellant denies that the transaction ever occurred.

(4) Case was tried before a jury.

At about 2:00 a.m. on October 4, 1977, Annette Stubbs telephoned appellant to arrange for a buy of two balloons of heroin (T.72-73). The substance of that conversation was:

- "A. I called Albert Taylor.  
Q. And where did you call  
Albert Taylor?  
A. At his home.  
Q. What time did you call  
Albert Taylor at his home?

A. About 2:05.  
Q. A.m?  
A. Yes.  
Q. Did anyone to your knowledge answer the phone at Albert Taylor's house?  
A. Yes.  
Q. Who was that?  
A. His grandmother.  
Q. Was Albert home?  
A. Yes, he was.  
Q. Did he come to the phone?  
A. Yes, he did.  
Q. And what if anything did you say to Albert when he came to the phone?  
A. I asked him if he would get me two bags of heroin, and he said he could. And I told him if he would let me shoot one, I'd walk with one.  
Q. Okay. Starting out first of all with the two bags, why did you ask for two bags?  
A. Why did I ask for two bags?  
Q. Uh, huh.  
A. To make a case.  
Q. Okay. Was there any other conversation with Albert Taylor on the night other than, 'Can you get me two bags of heroin?'  
A. No.  
Q. When you called him?  
A. No.  
Q. Did you promise to do anything in return for his getting you these bags of heroin?  
A. I told him I would give him \$5.00.  
Q. Okay. Now who brought up the \$5.00?  
A. He asked me for it on the telephone.  
Q. He asked you for \$5.00?  
A. Yes, he did.  
Q. Were there any other promises other than monetary promises made for the heroin?  
A. No." (T.73-74).

Ms. Stubbs further testified that she recognized appellant's voice on the telephone from having known him before (T.76). This telephone call was witnessed by three police officers (T.72).

Ms. Stubbs was strip searched, given \$60.00 and proceeded by cab to appellant's house at 217-30th, Ogden (T.76-78). One officer was placed in front of the house and another in the alleyway in the rear to observe.

Ms. Stubbs approached the rear door of the house and knocked. Appellant answered the door. Ms. Stubbs testified:

- "A. I walked in, and we went back to his bedroom, and he asked me if I had the money, and I then handed him two 20's and two 10's.  
Q. All right. What is the very first thing that he said to you at the time that he opened the door if you recall?  
A. He asked me for the money.  
Q. Is that the first thing that he said?  
A. Yes.  
Q. Okay. And you handed him the money?  
A. Yes, I did." (T.79).

Ms. Stubbs was given two balloons by appellant. She injected one and "walked" with the other (T.81-82). Ms. Stubbs paid \$65.00 to appellant (T.82), presumably \$60.00 for the heroin and \$5.00 for the "finder's fee" requested by appellant on the telephone (T.74). Ms. Stubbs left through the front door and returned by cab to meet the police officers (T.85-86). She gave the officers one empty and one full balloon (T.86).

Officer Gerald Burnett testified that he observed appellant's house and Ms. Stubbs' entry and exit from the house (T.157-158). Officer Bob Searle observed Ms. Stubbs' entry from the rear of the house (T.182-183).

Appellant testified in his own behalf and denied that the sale occurred as related by Ms. Stubbs (T.225). He testified that he talked to Ms. Stubbs in the house on that occasion, but that no sale took place (T.226).

Appellant's testimony was followed by rebuttal witnesses who testified concerning the arrest of appellant and his possession of heroin on November 9, 1977.

The jury found appellant guilty of distribution of heroin for value.

#### ARGUMENT

##### POINT I

THE POLICE AGENT WAS NOT AN ACCOMPLICE  
BECAUSE SHE DID NOT DISTRIBUTE A  
CONTROLLED SUBSTANCE FOR VALUE.

Respondent incorporates herein by reference the argument of the State under Point I of the companion case hereto, State of Utah v. Albert Taylor, No. 15631.

##### POINT II

APPELLANT WAS NOT ENTRAPPED BECAUSE  
THERE WAS SUFFICIENT EVIDENCE TO SHOW  
THAT HE WAS PREDISPOSED TO COMMIT THE  
CRIME.

Utah Code Ann. § 76-2-303(3) (1973), permits a

defendant to raise the defense of entrapment even though he has denied that he committed any act whatsoever. Thus, while there exists evidence to show that appellant did commit the act, as the jury found at trial, the rebuttal to the defense of entrapment proceeds irrespective of the existence of an actual sale.

Utah Code Ann. § 76-2-303(1) (1973), states:

"(1) It is a defense that the actor was entrapped into committing the offense. Entrapment occurs when a law enforcement officer or a person directed by or acting in co-operation with the officer induces the commission of an offense in order to obtain evidence of the commission for prosecution by methods creating a substantial risk that the offense would be committed by one not otherwise ready to commit it. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment." (Emphasis added.)

This statute has been construed by this Court to embody the "subjective" test of entrapment, also known as the "innocence" or "origin of intent" test. State v. Curtis, 542 P.2d 744 (Utah 1975). The subjective test focuses on the innocence of the individual or the predisposition of the person to commit the crime. Under this theory, if the evidence shows that the defendant had tendencies to commit the crime absent any police activity or had formed the intent within his own mind, then he cannot raise the affirmative defense of entrapment.

With the exception of two dissents by Justice Maughan arguing for the objective test, the subjective theory has received repeated approval in Utah. State v. Curtis, supra; State v. Bridwell, 566 P.2d 1232 (Utah 1977); State v. Casias, 567 P.2d 1097 (Utah 1977). The position of this Court reflects the approval of the subjective test by the United States Supreme Court in United States v. Russell, 411 U.S. 423 (1973), approving several earlier entrapment decisions.

Respondent contends that in the instant case, appellant was predisposed to distribute heroin for value. The facts showed Albert Taylor to be familiar with heroin buys. Appellant admitted he was a heroin user (T.224). He also admitted he had acquired heroin for Ms. Stubbs before (T.257). When appellant was arrested on November 9, 1977, he had narcotics in his possession. The transcript further reveals that appellant needed little or no information from Ms. Stubbs concerning the purchase of two balloons. Her testimony was that the very first thing appellant asked was, "Where's the money?" (T.79). These indications of predisposition preclude a subjective finding that appellant was entrapped.

In State v. Casias, supra, this Court stated that

entrapment was a question of fact for the trier of fact, the jury in the instant case. Determination in finding that the defendant in Casias was predisposed to distribute marijuana for value was the fact that Casias "was acquainted with and engaged in an illegal activity." Id. at 1099. Appellant in the instant case was equally well acquainted with the heroin activity in Ogden. He had purchased heroin for Annette Stubbs previously (T.257). Appellant readily responded to Ms. Stubbs' phone call seeking a "buy." Appellant was subsequently caught with more narcotics and other "dummy balloons" in his possession. The dummy balloons containing coffee and sugar, according to appellant's own admission (T.256), were full. The possession of these dummy balloons raises the inference that appellant was contemplating "burning" (selling them to someone who believed they contained narcotics) someone.

In short, respondent maintains that appellant was not the mere innocent friend induced into doing something foreign to his own prior behavior, as he maintains throughout the course of his testimony. Under the Casias fact determination standard of predisposition, appellant was not entrapped.

The case of State v. Curtis, supra, is remarkably similar to the case at bar. In Curtis, the defendant was accused of selling amphetamines to a female undercover agent. The defendant testified that he provided the drugs only as a favor to the agent, Ms. Stout, and would not have procured the drugs but for the close personal and sexual relationship that had developed. Brief of Appellant at 3, State v. Curtis, supra. This Court, Justice Maughan dissenting, found that the facts indicated a predisposition of the defendant to commit the crime and stated:

"In that regard, we make these brief comments: despite defendant's concession that 'during March and April of 1974 he was continously procuring drugs for Ms. Stout . . .,' he urges that it is not shown that he was habitually selling drugs. Concerning his contention that he was providing the drugs merely to do 'favors' for Ms. Stout: this might test the credulity of even the most trusting, when it is realized that in each transaction the drugs were sold for money; and that the price he exacted for the drugs in the transaction of which he was convicted was \$100." Id. at 747.

Even though appellant denies that the act occurred, the circumstances of the instant case are clearly similar. Respondent contends that Curtis should control this Court's determination of entrapment in this case.

By emphasizing the relationship that had existed between appellant and Ms. Stubbs, the amount of money spent on this operation and by citing several cases focusing

on police behavior, appellant is attempting to inject an objective element into the subjective entrapment analysis approved by this Court. The actions of the agent and the police are irrelevant when it is shown that an individual is predisposed to commit the crime charged. Annette Stubbs did no more than present appellant with an opportunity to commit the crime. The opportunity was, of course, tailored in such a manner as to be credible to the appellant. It would be ridiculous to expect a stranger to confront a heroin seller, pay sixty dollars and walk away with two full balloons of heroin on the first try. Law enforcement officers must be afforded enough flexibility to establish believable, effective drug enforcement operations that do not trap the innocent and naive. See, generally, Annots., 22 ALR Fed. 731; 62 ALR 3d 110. No extraordinary inducement was used in this case. No sexual favors were promised; no possibility of a renewal of the old relationship between appellant and Ms. Stubbs was ever suggested. Ms. Stubbs did not coerce appellant into making the sale.

In State v. Soroushirm, 571 P.2d 1370 (Utah 1977), this Court found such an entrapped defendant. Soroushirm, a Persian college student in Logan, Utah, buying a small amount of marijuana, is not on the same level as appellant, a long-time Ogden resident trafficking in heroin and

possessing other narcotics and dummy balloons (T.265). Respondent submits that appellant's claim of innocence and naivete "test(s) the credulity of even the most trusting," in the words of Justice Crockett in Curtis, supra.

### POINT III

EVIDENCE OF POSSESSION OF HEROIN  
SUBSEQUENT TO THE DATE OF THE  
CRIME CHARGED WAS PROPER REBUTTAL  
TO THE DEFENSE OF ENTRAPMENT.

Rule 55, Utah Rules of Evidence, states:

"Subject to Rule 47 evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his disposition to commit crime or civil wrong as the basis for an inference that he committed another crime or civil wrong on another specific occasion but, subject to Rule 45 and 48, such evidence is admissible when relevant to prove some other material fact including absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge or identity."

Under this rule, this Court has permitted evidence of other crimes to be admitted as rebuttal to the defense of entrapment. State v. Perkins, 19 Utah 2d 421, 432 P.2d 50 (1967); State v. Kasai, 27 Utah 2d 326, 495 P.2d 1265 (1972). In Perkins, prior sales of marijuana by the defendant on January 28, 1965, February 2 and 6, 1965, and March 27, 1965, were allowed in to rebut the defense of

entrapment related to a sale taking place on March 28, 1965. This Court stated:

"The evidence regarding prior contacts between the agent and the defendant was competent to rebut the claim of entrapment. It was offered to enable the jury to determine whether the defendant was an innocent person whose mind was being influenced by suggestions of the agent or whether he had a disposition to deal in narcotics when the proper situation arose." Id. at 52.

In the instant case, the other crime occurred some 35 days after the date of the offense charged. The fact that the other crime occurred after the crime charged should not remove it from the rule of Perkins and Kasai, supra.

In United States v. Rodriguez, 474 F.2d 587 (5th Cir. 1973), a sale of cocaine occurring twenty days after the crime charged was allowed in to rebut entrapment, the court stating:

". . . evidence of a similar offense, committed in close proximity of time, may be corroborative of a prior or subsequent offense. Although evidence introduced in a criminal trial generally should relate only to the specific offense charged, prior or subsequent incidents may be introduced to establish that a defendant possessed a requisite knowledge or that there is consistent pattern, scheme of operations, or similarity of method." (Emphasis added.)

See also 61 ALR 3d 293, 320. The close proximity of the

other crime, whether prior or subsequent to the crime charged, still serves the purpose of aiding in the determination of predisposition.

Appellant suggests that the subsequent act is too remote. In Perkins, supra, this Court permitted evidence of act more than two months apart from the crime charged. Respondent contends that thirty-five days is sufficiently proximate to ensure reliability in determining predisposition. This similar crime of possession of heroin was closely related in nature to distribution of heroin for value. Because of this relation and its close proximity in time, the admission of this act was proper rebuttal to appellant's defense of entrapment.

#### CONCLUSION

The subjective theory of entrapment is the current standard by which this Court and the United States Supreme Court determine whether or not an innocent, otherwise law-abiding citizen has been trapped by over-zealous law enforcement methods. Respondent maintains that the evidence in the instant case shows that appellant was predisposed to commit the crime; furthermore, the police methods used, while technically irrelevant,

would not have endangered an innocent citizen's rights.  
In view of the foregoing reasoning and authority,  
respondent urges that this Court affirm the ruling of  
the lower court and find appellant guilty of distribution  
of a controlled substance for value.

Respectfully submitted,

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