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State of Utah v. Earl B. Hansen : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,)	
)	
Plaintiff and Respondent,)	
)	
vs.)	Case No. 15655
)	
EARL B. HANSEN,)	
)	
Defendant and Respondent.)	

BRIEF OF APPELLANT

Appeal from a jury verdict and judgment in the Third Judicial District Court in and for Salt Lake County finding the defendant-appellant guilty of attempted theft by receiving, the Honorable Jay E. Banks presiding.

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OTHER SOURCES

Section 76-2-303, Utah Code Annotated (1953).	1, 4, 8, 11, 13
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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The defendant-appellant appeals from a jury verdict finding him guilty of the offense of theft by receiving despite his entrapment defense, and from certain evidentiary rulings made by the Court during the course of his trial in the Third Judicial District Court in and for Salt Lake County, State of Utah, presided over by the Honorable Jay E. Banks.

DISPOSITION IN THE LOWER COURT

On June 23, 1976 an information was filed accusing the appellant of attempted theft by receiving in violation of Section 76-6-408. All references are to Utah Code Annotated, 1953, unless otherwise noted. Appellant raised the defense of entrapment. Pursuant to Section 76-2-403(4), a hearing was held on September 10, 1976 on

appellant's motion to dismiss before the Honorable James S. Sawas determine whether as a matter of fact and law appellant was entrapped. On September 28, 1977 the motion was denied. Trial by jury was held on November 21, 1977. Appellant continued to raise the entrapment defense. Over appellant's continuing objection certain evidence of other offenses allegedly committed by the appellant was admitted. Appellant was found guilty of the charged offense.

RELIEF SOUGHT ON APPEAL

The appellant seeks a finding that, as a matter of law, entrapment was present in his case and therefore the verdict and judgment against him should be reversed and the charge against him vacated and dismissed. In the alternative, defendant seeks a new trial on the grounds that the lower Court committed prejudicial error by admitting evidence of alleged past offenses committed by the defendant.

STATEMENT OF FACTS

On January 26, 1976, Sergeant Floyd Ledford of the Salt Lake City Police went undercover at the Concrete Products Plant in Salt Lake City to investigate the buying and selling of stolen properties. (Exhibits - 6). Sgt. Ledford's assumed identity was as a city cement inspector and in this capacity he came to know appellant Hansen, an employee at the plant.

At Hansen's trial, Sgt. Ledford testified that soon after he became acquainted with Hansen, Hansen approached him with an offer to sell him allegedly stolen properties and to assist in the sale of

These conversations were admitted over appellant's pre-trial objection and motion to suppress, the Court having ruled that conversations such as these would be admissible to show intent but that actual transactions would be inadmissible (T-28,29). On February 4, 1976, Sgt. Ledford left his assumed employment (T-34). Apparently the next contact Hansen had with the Sgt. came on May 7, 1976, when the Sgt. telephoned Hansen to offer to sell him some guns he anticipated would be stolen in a burglary from Lehi, Utah (T-15,37). The guns were actually the property of the Salt Lake City Police (T-16). On May 10, 1976, Sgt. Ledford took the initiative to drive out to the plant and sell three guns to Hansen, admitting that Hansen would have been unaware of the guns unless he had initiated and carried out the sale (T-37,38). A week after the transaction, appellant was arrested for attempted theft by receiving. (Record - 6).

Hansen testified that during the time they had worked together he had come to know Ledford as a friend (T-41). He also said he purchased the guns from Ledford only because Ledford had said he was about to lose his job and needed the money to support his family (T-41,44). While Ledford denied mentioning his family to Hansen, he did not deny telling him prior to the sale that he was losing his job as a city inspector.

In rebuttal, the State was permitted by the Court, over appellant's repeated and continuing objection, to submit evidence of offers by Hansen to sell allegedly stolen CB radios to Ledford (T-48,51), access by Hansen to purportedly stolen televisions (T-49), an actual sale by Hansen to an allegedly stolen CB radio to Ledford (T-50,52-53).

and a trade by Ledford of a pistol he told Hansen was stolen for CB radio (T-52). All of these conversations or transactions took place between January 26, 1976 and February 4, 1976, three months prior to the transaction for which appellant was placed on trial. Appellant's motion for a mistrial was denied (I-56).

ARGUMENT

POINT I

THE CONDUCT OF THE POLICE CONSTITUTED ENTRAPMENT UNDER SECTION 76-2-303(1)

Utah law provides that, "Entrapment occurs when a law enforcement 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. Section 76-2-303(1). The Utah Legislature, in enacting this statute in 1973, adopted what has been called the objective test of entrapment. This test focuses primarily upon the conduct of the law enforcement officials, as opposed to the subjective test, which considers the defendant's predisposition to commit crimes. An examination of precedents from other states and from this Court leads to the conclusion that if the lower court or jury had correctly applied the statutory test for entrapment then either of them would have found that the appellant was entrapped.

The development of the two standards, objective and subjective entrapment, was traced in two cases from other states. Opinion 8-8003-2

State, 457 P.2d 226 (Alaska 1969) and People v. Turner, 390 Mich. 336, 210 N. W. 2d 336 (1973). In Grossman, the origins of the subjective test were found in a 1932 U. S. Supreme Court case, Sorrells v. United States, 287 U. S. 435. The Alaska Court considered the main points of the Sorrells opinion to be found at 287 U. S. 435, 442 and 451, and summarized them in its own language:

"... officers of government may afford opportunities to commit crime, may employ artifice and stratagems to catch persons engaged in criminal enterprise, but they cannot implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute, (footnote omitted).

The Court emphasized that entrapment applies only when the criminal conduct is 'the product of the creative activity' of the government agents, (footnote omitted). It held that the determination in each case should focus on whether the particular defendant was predisposed to commit the crime or was an otherwise innocent person who would not have erred except for the persuasion of the government's agents. This permits a searching inquiry into the conduct and motivations of both the officers and the defendant, including the past conduct of the defendant in committing similar crimes, and the general activities and character of the defendant." Grossman, at 227.

The subjective test apparently has derived its label from its focus on the defendant's state of mind, his "predisposition" to commit the crime of which he has been accused. The objective test, on the other hand, considers the conduct of law enforcement officials and rejects inquiries into the accused's predisposition.

The objective test announced by Alaska in Grossman is closely

akin to Section 76-2-303. The Court said:

"... unlawful entrapment occurs when a public law enforcement official, or a person working in cooperation with him, in order to obtain evidence of the commission of an offense, induces another person to commit such an offense by persuasion or inducement which would be effective to persuade an average person, other than one who is ready and willing, to commit such an offense. Conversely, instigations which would induce only a person engaged in an habitual course of unlawful conduct for gain or profit do not constitute entrapment... Examples of what might constitute prohibited activity depending upon an evaluation of the facts in each case, are extreme pleas of desperate illness, appeals based primarily on sympathy, pity, or close personal friendship, and offers of inordinate sums of money." People v. Turner at 119, 120.

This objective standard was also adopted by the Michigan Court in People v. Turner, 390 Mich. 7, 217 N.W. 2d 316 (1974), an opinion which provides a detailed analysis of the standards and the weaknesses inherent in the subjective test.

The objective test also apparently took root in the United U. S. case 167 U. S. 435 (1901), according to the Turner 400 Michigan Court quoted extensively from the dissent of Justice to that case, which was critical of the doctrine of the defendant's predisposition. At 167 U. S. 435, 443-444 quoted at 119, 120, 336, 340 in Turner, he wrote:

"The proof received in rebuttal... of the entrapment defense... is that the defendant was not a person of bad reputation, or that he had not been previously convicted..."

"However, the fact that the defendant was not a person of bad reputation or that he had not been previously convicted..."

or law these will not justify the instigation and creation of a new crime, as a means to reach him and punish him for his past misdemeanors. He has committed the crime in question, but, by supposition, only because of instigation and inducement by a government officer. To say that such conduct and rendered innocuous by the fact that defendant had a bad reputation or had previously transgressed in wholly to disregard the reason for refusing the processes of the Court to consummate an abhorrent transaction. It is to discard the basis of the doctrine... The accepted procedure, in effect, pivots conviction in such cases, not on the commission of the crime charged, but on the prior reputation... of the defendant...

This criticism of the subjective standard has carried into the present in Justice Stewart's dissent to U. S. v. Russell, 411 U. 423 (1973), quoted in Turner at 210 N. W. 2d 236, 342:

"... focusing on the defendant's innocence or predisposition has the direct effect of making what is permissible or impermissible police conduct depend upon the past record and propensities of the particular defendant involved... this subjective test means that the government is permitted to entrap a person with a criminal record or bad reputation, and then to prosecute him for the manufactured crime, confident that his record or reputation itself will be enough to show that he was predisposed to commit the offense anyway.... a person's alleged 'predisposition' to crime should not open him to government participation in the criminal transaction that would otherwise be unlawful."

It is clear that the objective standard rejects inquiry into a defendant's predisposition to commit crime. It is instead a test of the law enforcement official's conduct, an inquiry into whether or not that official's conduct was such that it would induce an

average person to commit an offense. Under the subjective standard, however, where inquiry into predisposition is permitted, an otherwise innocent person who raises the entrapment defense may be convicted simply because the prosecution is permitted to introduce evidence that the defendant may have committed in the past.

Whether the subjective test or the objective test applies in Utah is presently a matter of some confusion. Prior to 1973, Utah followed the subjective test, see State v. Perkins, 19 Utah 2d 432 P.2d 50, and State v. Pacheco, 13 Utah 2d 148, 369 P.2d 494. In 1973, however, the Utah legislature enacted Section 76-2-303, which, as noted, provides that, "Entrapment occurs when a law enforcement officer or a person directed by or acting in cooperation with the officer induces the commission for prosecution by methods creating a substantial risk that the offense would not 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." This is the same objective standard adopted by the judiciaries of Alaska, State v. Grossman, supra; Michigan, People v. Turner, supra; and Iowa, State v. Mullen, 216 N. W. 2d 375 (1974). Earlier in this analysis it was discussed that under the objective test there is no room for inquiry into predisposition, rather the focus is to be on the official's conduct and whether or not the conduct creates a "substantial risk" that an average person might be induced to commit an offense, or whether that conduct merely affords an opportunity for a person to commit an offense.

Yet there is language in some Utah cases to suggest that the subjective test lives on in Utah. In State v. Curtis, 541 P.2d

744 (Utah 1975) the Court stated that the inquiry in an entrapment case should focus upon two questions: "(1) Does it appear beyond a reasonable doubt that the crime was the product of the defendant's voluntary will to commit it; or (2) Was the crime induced or motivated by the actions of the prosecution," Curtis, at 747. In State v. Casias, 567 P.2d 1097 (Utah 1977), the inquiry was said to be into the state of mind of the defendant, "... on whether or not the crime was voluntary on the part of the defendant or was induced solely by the actions of the prosecution, against the will of the defendant," Casias, at 1098. The statute enacted by the Utah legislature in 1973, however, left no room for an inquiry into the defendant's mind. The language of the statute makes reference only to conduct of law enforcement officials and to the degree to which the conduct creates a risk an offense will be created. As Justice Maughn said in dissent to State v. Bridwell, 566 P.2d 1232 (Utah 1977), "There is no provision or phraseology in the statute providing a "predisposition" or "innocense" requirement to constitute an entrapment defense. Concededly, prior to the adoption of this statute, this court had adopted the subjective test, viz, whether the accused had a predisposition to commit the crime. The legislature overruled this court."

"... the very notion that certain police conduct may be improper in relation to the "innocent" but acceptable when addressed to the "guilty" seems incompatible with the idea of equality before the law." (emphasis added), Bridwell, at 1236, and this may well be why the legislature enacted the Model Penal Code's objective test of entrapment. See 19 U.S.A. Model Penal Code, Section 2-13.

The lower court erred in failing to properly apply the objective standard to the facts of Earl Hansen's case and erred in failing to properly instruct the jury on the same standard so that the jury might correctly consider the issue in reaching its decision. If the Court had considered the standard correctly either it or the jury would have ruled as a matter of law or fact, respectively, that entrapment did occur.

Ignoring questions of predisposition, as both the Court and jury should have done, the inquiry should have been into whether or not Sgt. Ledford's conduct created a substantial risk an offense would occur or whether he merely gave Hansen a chance to commit the offense. Sgt. Ledford had not seen the appellant for three months, then called him to tell him about a pending burglary of some guns. Both Ledford and the appellant agree that Ledford made representations that he was going to lose his job and he needed money. Hansen testified he considered Ledford a friend and wanted to help him out. These are exactly the types of appeals to sympathy and friendship condemned by the Grossman court, 436 P.2d 226, at least as indicative of entrapment. Finally, Ledford testified that he not only initiated the transaction but he also brought the guns to where Hansen worked. The only active part Hansen played in the entire scenario was to pay Ledford some money. Ledford not only created a "substantial risk an offense would occur, committed by one not ready to commit it," he carried out virtually the entire transaction himself and insured its completion by playing on defendant's sympathy.

Entrapment as a matter of law occurred. If the jury had been

properly instructed on the law, it may have found entrapment as a matter of fact. If the Court had properly applied the objective, statutory test, it would have found as a matter of law that entrapment occurred. No issue of predisposition should have been considered. For this error alone the verdict and judgment of the jury and Court below should be reversed. However, the Court below committed a second error which entitled the defendant to a reversal.

POINT II

THE LOWER COURT ERRED IN ADMITTING EVIDENCE OF PRIOR ALLEGEDLY CRIMINAL TRANSACTIONS BY THE DEFENDANT

The statement of facts in this brief of the appellant set out that the respondent, over appellant's objection, was permitted by the Court to cross-examine the appellant and introduce through Ledford, evidence on the issue of predisposition on the part of Hansen. This evidence consisted of offers and actual sales by Hansen to Ledford of allegedly stolen CB radios and televisions, and a trade of an allegedly stolen pistol for a CB radio. All of these offers and transactions took place from January 26, 1976 to February 4, 1976. No proof was ever submitted that any of these goods were actually stolen. The offense for which defendant was actually charged didn't occur until May 10, 1976. The Court erred in admitting evidence of these "transactions".

Section 76-2-303(6) provides, "In any hearing before a judge or jury where the defense of entrapment is an issue, past offenses of the defendant shall not be admitted except that in a trial where the defendant testifies he may be asked of his past convictions for

felonies and any testimony given by the defendant at a hearing on entrapment may be used to impeach his testimony at trial." Neither of the two exceptions arose here. As Justice Maughan noted in Bridwell, supra, at 1237, "This provision effectively eliminates the opportunity of the prosecution to present proof of the accused criminal character or predisposition by evidence of his past offenses." In 5 Utah Bar Journal Nos. 4-6, at p. 47, Professor Ronald N. Boyce would seem to concur, writing in reference to the same subsection that, "... there has also been a legislative judgment that evidence of other offenses is too prejudicial to be received."

Other courts have rejected the same type of evidence of prior offenses in entrapment cases. In State v. Nelson, 228 N. W. 2d 146 at 147 (South Dakota 1975), the Court said, "Because of the prejudicial effect of evidence of prior convictions or criminal reputation is devastating, far outweighing its probative value; and because this Court believes that the defendant should be tried for present conduct, and not on the basis of past crimes, evidence of prior convictions should not be introduced on the issue of predisposition." "Past crimes do not forever outlaw the criminal and open him to police practices, aimed at securing his repeated conviction, from which the ordinary citizen is protected," Sherman v. U. S., 356 U. S. 369, at 383 (1958). But perhaps most pertinent to appellant's case is the case of State v. Klauer, 226 N. W. 2d 803 (Iowa 1975). In an earlier case, State v. Mullen, 216 N. W. 2d 375 (Iowa 1974), Iowa had adopted the objective test and ruled that evidence of prior crimes to show predisposition was therefore inadmissible.

Klauer, the Court reaffirmed Mullen and ruled that it was error for the lower court in an entrapment-narcotics sale case to have admitted evidence of prior narcotics sales, methadone use, and marijuana use by the defendant. The Court reversed and granted a new trial.

The same situation presents itself in appellant's case in light of the statute forbidding the admission of past offenses. The error committed by the Court below in admitting past transactions and offers by the appellant in this case is compounded by the fact that what the Court admitted did not even rise to the level of past "offenses", but were merely unsupported allegations by the prosecution and its witnesses that defendant may have dealt in stolen merchandise three months prior to the occurrence of the offense for which he was charged. Indeed, if charges had been filed against defendant based on these earlier allegations the respondent would never have had to concoct the situation which lead to the charge against the defendant.

CONCLUSION

The lower court erred in failing to properly apply the statutory test for entrapment, and in failing to rule as a matter of law that entrapment occurred. It further erred in failing to instruct the jury on the correct application of the entrapment defense. The final error was in the admission into evidence of alleged prior "offenses" of the defendant over the objection of appellant's counsel and in spite of Section 76-2-303(6), which prohibits the admission of such prior offenses. Any one of these

errors justifies the reversal of appellant's conviction and the granting of a new trial or dismissal of the charges against him.

Respectfully Submitted,

*Respectfully Submitted,
on behalf of Robert Van Sciver*

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MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Brief of Appellant was mailed to Robert B. Hansen, Attorney General, attorney for Respondent, at 236 State Capitol Building, Salt Lake City, Utah, 84114, this 3 day of July, 1978.

Edward T. Brass