1978

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

Utah Supreme Court

Robert B. Hansen; Craig L. Barlow; Attorneys for Respondent;
Robert Vansciver; Edward K. Brass; Attorneys for Appellant;

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

EARL B. HANSEN,

Defendant-Appellant.

CASE NO. 15695

BRIEF OF RESPONDENT

APPEAL FROM A JURY VERDICT AND [illegible]
THIRD JUDICIAL DISTRICT COURT IN AND [illegible]
LAKE COUNTY FINDING THE DEFENDANT-APP[illegible]
GUILTY OF ATTEMPTED THEFT BY RECEIVING,
HONORABLE JAY B. BANKS, PRESIDING

ROBERT B. HANSEN
Attorney General

MICHAEL L. DEAMER
Deputy Attorney General

WILLIAM W. BARRETT
Assistant Attorney General

236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

ROBERT VANSCIVER
EDWARD K. BRASS

321 South 6th East
Salt Lake City, Utah 84102

Attorneys for Appellant

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with attempted theft by receiving, a violation of Utah Code Ann. § 76-6-408 (1953 as amended).

DISPOSITION IN LOWER COURT

Appellant was tried before a jury and found guilty of attempted theft by receiving on November 21, 1977, in the Third District Court, the Honorable Jay E. Banks, presiding.

RELIEF SOUGHT ON APPEAL

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

STATEMENT OF FACTS

In January, 1976, Officer Floyd Ledford of the Salt Lake City Police Department was placed at the Concrete Products plant in Salt Lake City as an undercover agent investigating traffic in stolen property. Appellant was an employee at the plant. While posing as a city inspector for the next five months, Officer Ledford became acquainted with appellant and had numerous conversations with him. On at least three separate occasions, appellant approached Ledford and initiated conversations about stolen CB base stations (T.8-10), guns (T.11) and televisions (T.12), asking if Ledford would be interested in any of these goods.

Subsequent to these conversations, Ledford approached appellant with an offer to sell appellant some guns which were represented to have been stolen (T.13). Appellant purchased the guns after being informed that they were "extremely hot." (T.15). On the day of the sale, a search warrant was issued and the guns were recovered from appellant's possession.

At pre-trial, appellant indicated that he would rely on the defense of entrapment. Evidence going to that defense was introduced through the testimony of appellant after the state had rested. Appellant testified that he purchased the guns from Officer Ledford only as a friend helping out someone in economic trouble (T.43). On cross-examination the state

elicited testimony from appellant concerning his offers to Ledford of the sale of stolen CB's and televisions (T.48-49). This testimony was allowed in a rebuttal to the defense of entrapment over the objection of defense counsel (T.50). Officer Ledford then again took the stand and testified concerning the actual sale of a CB unit by appellant (T.53).

The case was submitted to the jury with an entrapment instruction (R.59), the jury found that appellant had not been entrapped and found him guilty of attempted theft by receiving.

ARGUMENT

POINT I

THE SUBJECTIVE THEORY OF ENTRAPMENT WAS CORRECTLY FOLLOWED IN FINDING APPELLANT GUILTY OF THEFT BY RECEIVING.

The subjective theory of entrapment focuses on the predisposition of the defendant to commit the crime with which he is charged; the determination of entrapment is a question of fact for the jury. While the trial judge may rule as a matter of law on entrapment where the evidence is not in conflict, the subjective theory emphasizes the role of the jury in determining guilt. The objective theory, on the other hand, looks to the actions of the police and allows the judge to rule on entrapment as a matter of law. The objective theory ignores the predisposition of the defendant and eliminates

the role of the jury as a finder of fact on entrapment.

Despite an effort by appellant to piece together dissents from various cases advocating the objective theory, the majority opinions from those same cases and others make it clear that the current position of both the United States Supreme Court and the Utah Supreme Court is the adoption of the subjective theory of entrapment. If this Court finds that the subjective theory of entrapment should still be followed in Utah, respondent contends that the procedure followed and the rulings made by the trial judge were proper. Judge Banks ruled initially that entrapment had not occurred as a matter of law; he then submitted the issue of entrapment to the jury with a proper instruction. This procedure comports with the evidence in the instant case and the authority on the subject theory set forth below.

The United States Supreme Court announced the subjective test in Sorrells v. United States, 287 U.S. 435 (1932); this stance was repeatedly reaffirmed in Sherman v. United States, 356 U.S. 369 (1958); United States v. Russell, 411 U.S. 423 (1973), and Hampton v. United States, 425 U.S. 484 (1976).

The Utah Supreme Court, adopting the reasoning of Sorrells, supra, and Sherman, supra, initiated the subjective analysis in State v. Pacheco, 13 Utah 2d 148, 369 P.2d 494 (1962). Except for two notable dissents by Justice Maughan

in State v. Curtis, 542 P.2d 744 (Utah 1975) and State v. Bridwell, 566 P.2d 1232 (Utah 1977), this court has consistently approved of the subjective method of analysis for entrapment. See: State v. Perkins, 19 Utah 2d 421, 432 P.2d 50 (1967); State v. Kasai, 27 Utah 2d 326, 495 P.2d 1265 (1972); State v. Casias, 567 P.2d 1097 (Utah 1977); State v. Sommers, 569 P.2d 1110 (Utah 1977); State v. Soroushirn, 571 P.2d 1370 (Utah 1977).

The subjective theory affords police enough latitude to conduct effective undercover operations without jeopardizing the rights of an innocent individual. One who is predisposed to commit a crime and actually commits it should not escape punishment. As indicated by State v. Soroushirn, supra, the trial judge can still scrutinize police behavior and protect the innocent person. In Soroushirn, this court ruled that entrapment as a matter of law had occurred because there was no evidence to suggest that the defendant was predisposed to commit the crime.

In the instant case there was evidence to suggest that appellant was predisposed to receive stolen goods. Officer Ledford testified that appellant approached him on January 27, 1977, and February 4, 1977 and initiated conversations concerning stolen CB base stations (T.8-10). Ledford also testified that appellant mentioned that appellant possessed stolen guns

(T.11) and televisions (T.12) that were for sale. These conversations preceded the sale by Officer Ledford to appellant; the trial judge could have viewed this as evidence suggesting appellant was predisposed to commit the crime and accordingly submitted the issue of entrapment to the jury. Because there was sufficient evidence to suggest that appellant was predisposed to receive the stolen goods, the trial judge properly declined to find entrapment as a matter of law and left the determination to the jury. State v. Sommers, supra.

Appellant makes a bold assertion that the entrapment instruction was improper. Respondent contends that Instruction #18 (R.59) was a correct statement of the law; the instruction allowed the jury to find that appellant as a matter of fact was not entrapped. The finding of the jury should not be disturbed on appeal absent a clear showing of predjudice, and the evidence should be viewed in a light most favorable to the verdict below. State v. Fort, 572 P.2d 1387 (Utah 1977). The jury determination of no entrapment should not be disturbed.

POINT II

EVIDENCE OF OTHER TRANSACTIONS IN STOLEN GOODS BY APPELLANT WAS ADMISSIBLE.

A. THE EVIDENCE WAS PROPER REBUTTAL TO THE DEFENSE OF ENTRAPMENT.

In State v. Perkins, supra, the Utah Supreme Court

dealt dispositively with the issue of evidence of other criminal acts in entrapment cases. In Perkins, defense counsel elicited testimony on cross-examination of the state's witness that went to the defense of entrapment. In finding that evidence of other sales of narcotics was properly admitted in a trial for possession and sale of narcotics, this court stated:

> "We think and hold that in any case where the issue of entrapment is introduced by the defendant the prior contacts between the defendant and agent can properly be given in evidence to show the state of mind of the defendant even when such contacts show unlawful acts, unless the defendant makes known to the court that he is not relying upon entrapment as a defense. In determining whether entrapment is a defense, we must draw a line between trapping unwary, innocent people who are not inclined to commit the crime, and trapping an unwary criminal who gets caught in his own schemes because of his misplaced confidence. To determine on which side of the line the defendant is to be placed in any given case, the jury must know the predisposition of the defendant to commit or not to commit similar crimes. The amount of persuasion should not be of importance when it is used upon one who is in readiness to commit a crime in question. That persuasion which induces the criminally inclined to lose his wariness is not entrapment at all, but that persuasion which overcomes the natural reluctance on the part of an innocent person to commit a crime which he otherwise is not predisposed to do is entrapment." Id. at 52.

The Perkins reasoning was followed in State v. Kasai, supra, where the court stated:

> "Evidence of other crimes is not admissible if the purpose is to disgrace the defendant as a person of evil character with a propensity to commit crime and thus likely to have committed the crime charged. However, relevant evidence is admissible for the purpose of explaining the circumstances surrounding the crime of which the defendant stands accused; and the fact that it may tend to connect the defendant with another crime will not render the evidence incompetent. In a case where the issue of entrapment has been introduced by the defendant, the prior contacts between the defendant and the agent can properly be introduced into evidence to show the state of mind of the defendant, even though the contacts may indicate unlawful acts. Evidence of this type is competent to rebut the claim of entrapment, for it is 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 1267

The evidence of prior transactions in the instant case was not introduced to degrade appellant; the evidence was relevant to show the predisposition of appellant. In short, Utah follows the subjective approach on entrapment, as shown in Point I, above, evidence that aids the jury in assessing an individual's frame of mind is of critical importance. The evidence of other sales of goods was no more inflammatory than

the drug sales allowed in as evidence in Perkins and Kasai, supra; therefore, no error should be found in the ruling on admissibility by the trial court.

B. THE EVIDENCE SHOWS THE GUILTY KNOWLEDGE OF APPELLANT.

In receiving stolen property cases, the Utah Supreme Court has held that evidence of other acts and possession of other stolen property is admissible to show the guilty knowledge of the individual. State v. Zeman, 63 Utah 422, 226 P. 465 (1924); State v. Georgopoulos, 27 Utah 2d 53, 492 P.2d 1353 (1972). See also 105 A.L.R. 1288. Respondent contends that the evidence of other conversations and transactions concerning stolen goods was admissible as showing that appellant was not innocently receiving the guns sold to him by Officer Ledford. Because the evidence was properly admitted as rebuttal to the defense of entrapment and as proof of the guilty knowledge of appellant, no error was committed.

CONCLUSION

Appellant asks this court to overrule the subjective entrapment cases which are the law in many of Utah case law; respondent contends that these cases are good law and support valuable law enforcement and judicial efforts; therefore, in view of the foregoing reasoning and authority, respondent urges this court to reaffirm the subjective line of entrapment

cases, affirm the ruling of the court below and find appella
guilty of theft by receiving.

Respectfully submitted,

ROBERT B. HANSEN
Attorney General

MICHAEL L. DUANER
Deputy Attorney General

WILLIAM W. BARRETT
Assistant Attorney General