1998

State of Utah v. Patrick L. Stanley : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 980126-CA
vs.	:	
	:	Priority No. 2
PATRICK L. STANLEY,	:	
Defendant/Appellant.	:	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE FOURTH DISTRICT JUDICIAL COURT, UTAH COUNTY, STATE OF UTAH, BEFORE THE HONORABLE LYNN W. DAVIS, FROM A CONVICTION OF TWO FELONY VIOLATIONS OF THE CONTROLLED SUBSTANCES ACT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutory Provisions

Cases Cited

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STATE OF UTAH,	:	
	:	
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ARGUMENT

POINT I

THE TRIAL COURT'S INSTRUCTIONS TO THE JURY RELATING TO THE DEFENSE OF ENTRAPMENT ARE LEGALLY INSUFFICIENT

Stanley asserts that the trial courts instructions on the defense of entrapment because the instructions did not inform the jury that it must employ an "objective" standard and because they failed to instruct the jury on the facts that it must consider in making its determination of entrapment. The State, on the other hand, asserts that the language of Utah Code Annotated § 76-2-303(1)--from which Jury Instruction #11 was

taken--"adequately instructed the jury on the appropriate objective standard" because "the words of the statute reflect the objective standard" (Br. of Appellee at 17).[1]

The State contends that this Court decided in State v. Squire, 888 P.2d 1102, 1104 (Utah App. 1994), that a trial court does not err in refusing to give a defendant's proposed jury instruction on entrapment where the instruction given followed the statutory language (Br. of Appellee at 17). This Court in Squire took its holding relating to the adequacy of a jury instruction tracking the statutory definition of entrapment from State v. Cripps, 692 P.2d 747, 748 (Utah 1984).

At issue in Cripps, however, was the fact that the trial court--over the objection of the defendant--instructed the jury that entrapment could only be established if the police inducement was sufficient to "persuade an average person [to commit the offense], other than one who was merely given the opportunity to commit the offense." Cripps, 692 P.2d at 749. The trial court's "average person" language came from language in State v. Taylor, 599 P.2d 496, 503 (Utah 1979), as part of the Utah Supreme Court's discussion on the objective test. In Cripps, the defendant claimed that the trial court's instruction erroneously "raised the standard for unlawful entrapment above that defined by statute and [the Utah Supreme Court]" and that the "average

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[1]The "objective" standard of entrapment places the focus not on the "record and predisposition" of the defendant but on "the conduct of the police". State v. Cripps, 692 P.2d 747, 750 (Utah 1984).

person" language in Taylor was dictum which should not be elevated into law by being recited as a jury instruction. Cripps, 692 P.2d at 749, 750. The Utah Supreme Court agreed with the defendant and reversed his conviction.

Only incidentally did the Court in Cripps mention that it had previously "approved giving the statutory definition of entrapment to the jury" (citing State v. Salmon, 612 P.2d 366, 369 (1980)). However, the Utah Supreme Court in Salmon did not address the adequacy of the statutory language in instructing the jury on the objective test of entrapment. The Court in Salmon merely addressed whether the evidence was sufficient to establish that the defendants were not entrapped. The only language relating to the jury instruction was the Court's indication that "The statutory definition of entrapment was given to the jury in the form of an instruction." Salmon, 612 P.2d at 369. Noting that an instruction was given does not establish its adequacy. Accordingly, Stanley asserts that the adequacy of a jury instruction which tracks the statutory language but does not include the objective test of entrapment has never directly been addressed by Utah courts.

Moreover, the instruction requested by the defendant in Squire, did not simply track the language of the objective test of entrapment as did the instruction submitted by Stanley. Rather the proposed instruction in Squire instructed the jury "that if there was reasonable doubt whether defendant sold the marijuana based on his own initiative and desire rather than police inducements and persuasion, then defendant must be found not

guilty." Squire, 888 P.2d at 1103. The instruction in Squire is far different than the one requested by Stanley and therefore, Squire should not control this Court's decision here.

Accordingly, for the reasons set forth here and in appellant's brief, Stanley requests that this Court reverse his conviction because the jury instruction on entrapment was inadequate and the trial court erred in refusing to give the instruction requested by Stanley.

POINT II

THE TRIAL COURT COMMITTED PLAIN ERROR BY INSTRUCTING THE JURY THAT STANLEY'S PRIOR CONVICTION WAS A SUBSTANTIVE ELEMENT OF COUNT III

The State asserts that the trial court did not commit plain error in instructing the jury that Stanley's prior conviction was a substantive element of count III because State v. Portillo, 914 P.2d 724 (Utah App. 1996), is not applicable to this case (Br. of Appellee at 22-24). Stanley contends, however, that Portillo is applicable to this case and that it clearly establishes the error made by the trial court in instructing the jury that his prior conviction was a substantive element of count III.

The holding in Portillo was not centered on the notion that there is a difference between the terms "violation" and "conviction". The true holding in Portillo is that the question of whether the current offense should be enhanced based upon a prior offense

is a question for sentencing to be decided apart from the elements of the current offense: "Defendant asserts that whether or not a charge is a 'second or subsequent' violation is not a substantive element of the charged crime, but is rather a sentencing enhancement. We agree." 914 P.2d at 726. If the holding truly was the one asserted by the State then this Court would have reversed because the trial court erroneously instructed the jury with the term "violation" rather than "conviction".

Moreovoer, Portillo was decided under the "plain error" standard of review so the State's argument that any error could not have been obvious to the trial court must fail--particularly when the trial court judge in Portillo was the same judge who presided in this case. Portillo, 914 P.2d at 725.

Finally, Stanley asserts that the obvious error was also harmful. While the jury did have knowledge of Stanley's prior conviction under the terms of the entrapment statute, the purpose of that admission was for purposes of credibility or impeachment. Moreover, the entrapment statute in Utah relies on an objective standard which focuses not on the defendant's conduct or his predisposition to commit a crime, but on the conduct of law enforcement personnel and their agents. Jury Instruction #5 removed the attention of the jury from the issue of entrapment--and the conduct of Mangum and Randall--and focused it squarely on Stanley's history. Accordingly, Stanley was deprived of a more favorable result, and therefore, was prejudiced by the erroneous instruction.

POINT III

STANLEY WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL

Stanley asserts that because the trial court committed "plain error" in instructing the jury that Stanley's prior conviction was an substantive element of count III, trial counsel, likewise, was ineffective in failing to object to said instruction.

In addition, trial counsel was ineffective in failing to object to the hearsay testimony which formed the basis of the drug-free zone enhancement. The entire evidence produced at trial on the drug-free zone enhancement consisted of Officer Terry's testimony. Terry stated that he "had cases in the past years where we've had an overview map done of that area, of the motel itself. And it gives you--when they do that, it's a topographical map, and it just shows you where it sits. And the playland for McDonald's sits in there as well as, you know, the high school ball field" (R. 211 at 294). Based upon the map, Terry concluded that the McDonald's and the high school field were both within a 1,000 feet of the motel (R. 211 at 294).

Stanley asserts that Terry's testimony relating to the map was hearsay which should have been objected to by trial counsel because clearly the map's testimony or statements (what it conveyed) were made out of court and were offered by the State for

the truth of the matter.[2] Moreover, hearsay is not admissible except as provided by law or the Utah Rules of Evidence. Rule 802, Utah Rules of Evidence.

Rules 803 and 804 of the Utah Rules of Evidence define the exceptions to the hearsay rule. However, in this case, Terry's testimony does not fall within any recognized exception. Stanley asserts that insufficient foundation was presented to establish that the map was a "record of regularly conducted activity" under Rule 803(6) nor could the hearsay be admitted under Rule 804(b)(5) because it was not established that the map was unavailable nor was trial counsel given notice in advance of trial that the State would seek admission into evidence of the hearsay. Accordingly, Stanley asserts that his trial counsel was deficient in failing to object to the hearsay in Terry's testimony. Moreover, Stanley was prejudiced by this deficiency because the hearsay testimony was the evidence which established the drug-free zone and led to his convictions of a first degree felonies rather than second degree felonies--which is the difference from "five years to life" in prison and "one to fifteen years" in prison.

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[2]Rule 801(c) of the Utah Rules of Evidence defines "hearsay" as "a statement, other than one made by the declarant while tesifying at the trial or hearing offered in evidence to prove the truth of the matter asserted."

POINT IV

THE EVIDENCE WAS PRODUCED AT TRIAL WAS INSUFFICENT TO SUSTAIN THE JURY'S VERDICT AS TO THE "DRUG-FREE ZONE" ELEMENT

Stanley's convictions were enhanced to first degree felonies because they were committed in a drug-free zone. The drug-free zone enhancement is an element of the underlying offense that must be proved beyond a reasonable doubt. State v. Powasnik, 918 P.2d 146, 148 (Utah App. 1996). The State asserts that the evidence produced at trial on this issue--evidence which consisted solely of Terry's hearsay statements gained from the topographical map--was sufficient to establish the drug-free zone enhancement because the map showed that the motel was within 1,000 feet of a McDonald's playland and a high school ball field. However, while Terry's testimony (and the map) may have established that a portion of the Timpanogos Inn was located within 1,000 feet of the McDonald's and ball field, there was no evidence produced that the actual motel room where the underlying offenses occurred was within the same 1,000 foot radius. The drug-free zone must be proved beyond a reasonable doubt, therefore, Stanley asserts that the evidence was insufficient to establish the enhancement in this case because the evidence was so inconclusive that reasonable minds must have entertained a reasonable doubt. Accordingly, Stanley request that this court strike the drug-free zone enhancements and convert his first degree felony convictions to second degree felonies.

CONCLUSION AND PRECISE RELIEF SOUGHT

Stanley respectfully asks that this Court reverse his convictions because the trial court's instructions to the jury relating to the defense of entrapment were legally insufficient and prejudicial. Alternatively, Stanley asks that this Court find that the trial court committed plain error in instructing the jury that Stanley's prior conviction was a substantive element of Count III; and that Stanley's trial counsel was likewise ineffective. Finally, Stanley requests that this Court find that the evidence produced at trial was insufficient and inconclusive to establish, beyond a reasonable doubt, that Count I and Count III took place in a drug-free zone..

RESPECTFULLY SUBMITTED this 1st day of March, 2000.

/s/

Margaret P. Lindsay
Counsel for Stanley

CERTIFICATE OF MAILING

I hereby certify that I delivered two (2) true and correct copies of the foregoing Brief Of Appellant to the Appeals Division, Utah Attorney General, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 1st day of March, 2000.

/s/