

1979

State of Utah v. Thomas Wyman Berg : 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.

:

THOMAS WYMAN BERG,

:

Defendant and Appellant

:

BRIEF OF APPELLANT

Case No. 16548

BRIEF OF APPELLANT

Appeal from a conviction of the offense of distribution of a controlled substance, marijuana, where noting for value was exchanged, the Honorable George E. Ballif, District Judge of the Fourth Judicial District presiding.

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FILED

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff and Respondent,	:	
vs.	:	TYPOGRAPHICAL CORRECTIONS
THOMAS WYMAN BERG,	:	Case No. 16548
Defendant and Appellant,	:	

Appellant submits the following typographical corrections to appellants brief:

Cover page:	"noting" should read: nothing
Page 2, line 3:	"decisions reversed" should read: decision is reversed
Page 2, line 9:	"noting" should read: nothing
Page 3, line 17:	"no" should read: not
Page 3, line 19:	"tolk" should read: told
Page 4, line 13:	"v.2d" should read: U.2d
Page 5, line 18:	"prohibitations" should read: prohibitions
Page 5, line 23:	"(1978)" should read: (1798)

Dated this 5th day of December, 1979.


EDWARD K. BRASS
Attorney for the Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

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Plaintiff and Respondent,	:	
vs.	:	BRIEF OF APPELLANT
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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent,

vs.

THOMAS WYMAN BERG,

Defendant and Appellant.

:

:

:

:

:

BRIEF OF APPELLANT

Case No. 16548

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Defendant-appellant appeals from his conviction by the Honorable George E. Ballif, Fourth District Judge, sitting without jury, of the offense of distribution of a controlled substance where nothing for value was exchanged. He further appeals from the Court's failure to find that the State's principal witness against him was his accomplice and from the Court's failure to require corroboration of the accomplices testimony.

DISPOSITION IN THE LOWER COURT

Appellant was found guilty on May 25, 1979 by the Honorable George E. Ballif of a violation of Section 58-37-8 (1) A (c), Utah Code Annotated (1953), distributing a controlled substance, marijuana, where nothing for value was exchanged.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the lower Court's decision that the State's principal witness against him was not his accomplice and that

in any event her testimony need not have been corroborated because of the changes made in Section 77-31-18, U.C.A. (1953) by the 1978 Legislature. In the event that the lower Court's decisions reversed, appellant requests that the charges against him be dismissed because the evidence against him was insufficient to sustain a conviction.

STATEMENT OF FACTS

On January 16, 1979, appellant was charged by complaint with having committed the offense of distribution of a controlled substance, marijuana, where noting of value was exchanged. The offense was alleged to have taken place on November 21, 1978 (Record-11). On information charging that offense was subsequently filed in the Fourth Judicial District Court (R-11). On May 8, 1979, former Section 77-31-18 (all statutory citations are to Utah Code Annotated unless otherwise noted) was repealed and a new section 77-31-18 took effect. The new section provides that, "(a) conviction may be had on the uncorroborated testimony of an accomplice." On May 24, 1979, appellant's trial was held before the Honorable George E. Ballif. The appellant waived his right to a jury trial, stipulated to the admission of certain evidence, and the State proceeded to call three witnesses.

The first witness was one Jill Hales. Ms. Hales testified that she knew the defendant and that she had met with him in his home on the morning of November 21, 1978 to acquire some "stuff" for a friend (T-14). Ms. Hales was accompanied by a Teri Barney. Ms. Hales testified that she and the appellant had a conversation out of the presence of Ms. Barney that morning, (T-15). The appellant said, "I have got this for you," (T-16), indicating a pound of marijuana "sitting in the living room." Ms. Hales said she put the marijuana in her purse and said she would bring money back later, but no

definite arrangements for payment were made (T-17). No payment was in fact ever made. Ms. Hales then stated that pursuant to a pre-arranged plan with a Craig Wiseman, she drove to a local restaurant and put the marijuana in Wiseman's car (T-18). Teri Barney accompanied her. Wiseman then paid Hales for the marijuana (T-19). Upon leaving the restaurant parking lot, Hales was arrested (T-20). Hales was told by the officers at the police station that she had the choice to either become a paid undercover narcotics informant or else she would go to prison and lose custody of her little girl (T-22, 33-35, 39). She opted to become an informant and charges were in fact dropped against her pursuant to a grant of immunity she received in exchange for her testimony in this case, (T-30). She was wired with an electronic listening device and returned to the appellant's home, where she thought that the appellant may have asked her if the police had got "it" (T-23). No tape or transcript of their conversation was ever introduced into evidence.

The State's second witness was Teri Barney, the woman who had accompanied Hales to the appellant's home and then to the Wiseman car. She testified that she had no heard any conversation between the appellant and Hales on November 21, 1978 (T-45). She said that she and Hales left the Berg home in her car and Hales asked her to drive by the restaurant (T-46). When they arrived there, Hales took a plastic package out of her purse which Barney believed to be marijuana. No one ever told her if it was or not (T-47). Ms. Barney did not know if Hales had taken the purse into the appellant's home, she did not know how long the marijuana had been in the purse, Hales never opened the purse and showed her the contents before or after they went to the appellant's home, and they in fact never even discussed what she had in the purse (T-50), or why they were going to the restaurant (T-51). Hales then took the plastic package, wrapped it in a windbreaker, and put the wrapped

package in Wiseman's car (T-48).

The State's final witness was Craig Wiseman. Wiseman testified that he had asked Hales to get him "a pound," (T-54). He also said that he had seen Hales arrive at the restaurant and had paid her a sum of money (T-56). Wiseman later found the marijuana in the back seat of the car (T-57).

The appellant chose to rest without presenting any testimony. He argued that Hales was an accomplice and as such her testimony required corroboration. Appellant contended that corroboration was absent or insufficient and thus he should have been found not guilty. The Court took the matter under advisement (T-63-79)

On May 25, 1979 the Court issued a memorandum decision finding the appellant guilty, (R-21-23). The Court based its decision on State v. Kasai, 27 v.2d 326, 495 P.2d 1265 (1972) and State v. Comish, 560 P.2d 1134 (Utah 1977). It also based its decision on the enactment of House Bill 143, now Section 77-31-18, providing that a conviction may be had on the uncorroborated testimony of an accomplice, (R-23) .

ARGUMENT

POINT I

THE APPLICATION OF THE NEW SECTION 77-31-18 TO THIS CASE WAS CONTRARY TO THE EX POST FACTO PROVISIONS OF THE STATE AND FEDERAL CONSTITUTIONS AND CONTRARY TO UTAH LAW.

If this Court concludes that the lower Court was correct in applying to this case the version of Section 77-31-18 which took effect on May 8, 1979, it need not reach the issues of whether or not the witness Hales was an accomplice of the appellant or whether her testimony was corroborated because such issues would be superfluous. The new Section now permits the conviction of a defendant on the uncorroborated testimony of an accomplice. However, the lower court erred when it applied the new accomplice statute to this

action. The application of the new statute was prohibited by the State and Federal Constitutions as well as State law.

The events which gave rise to the proceedings against the appellant were alleged to have occurred on November 21, 1978. On that day, and when the information was filed in January, 1979, the accomplice statute provided,

" A conviction shall not be had on the testimony of an accomplice, unless he is corroborated by other evidence which in itself and without the aid of the testimony of the accomplice tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient, if it merely shows the commission of the offense or the circumstances thereof."

On May 24, 1979, the case went to trial. The lower court, in finding the appellant guilty, applied the accomplice statute which had taken effect 16 days earlier, providing that, " a conviction may be had on the uncorroborated testimony of an accomplice," Section 77-31-18. The application of the new Section violated constitutional restraints on ex post facto laws.

The constitutional prohibitions of ex post facto laws are contained in Article I, Section 10 of the United States Constitution and Article I, Section 18 of the Utah Constitution. The former states, "no state shall ... pass any ... ex post facto law," while the latter commands that, " no ... ex post facto law ... shall be passed." The United States Supreme Court, in Calder v. Bull, 3 Dall. 386 (1778), gave the term "ex post facto law" a definition which has endured nearly 200 years,

" 1st, every law that makes an action done before the passing of the law; and which was innocent when done, criminal; and punishes such action. 2nd, every law that advocates a crime, or makes it greater than it was when committed. 3d, every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed. 4th, every law that alters the legal rules of evidence and receives less or different testimony, than the law required at the time of the commission of the offense in order to convict the offender. All these and similar laws, are manifestly unjust and oppressive,"

The Court's explanation in Calder v. Bull was refined in Hopt v. Utah, 110 U.S. 574 (1883). Hopt was a homicide case. At the time of the homicide, the Utah Territory had a law which forbade testimony by convicted felons. After the indictment, but prior to the trial, the legislature repealed the law. Subsequently, the appellant was convicted. His conviction in part rested upon the testimony of a convicted felon who would not have been permitted to testify under the law in effect at the time the offense was committed. The appellant argued that permitting the convicted felon to testify against him amounted to an ex post facto application of law. The Court rejected his contention, stating, " Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not ex post facto in their application to prosecutions for crimes committed prior to their passage; for they do not ... alter the degree, or lessen the amount or measure of the proof which was made necessary to conviction when the crime was committed." Id., 110 U.S. 574, 589. In contrast, the Court warned, "Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offence was committed, might, in respect of that offence, be obnoxious to the constitutional inhibition upon ex post facto laws, " Id., 110 U.S. 574, 590.

In the present case, the change in the accomplice statute on May 8, did not merely, "enlarge the class of persons who may be competent to testify," Hopt v. Utah, supra. Accomplices have always been competent witnesses under the old statute. Instead, the change in the statute authorized "conviction upon less proof, in amount or degree, than was required when the offence was committed," Id. Under the law in effect at the time of the offense, the

Court observed,

" ... the law should not be changed simply because of the will or desire of judges as to what the law is or ought to be. Much less so, should it be so changed during the course of a particular proceeding to have a retroactive effect thereon ... If there is to be such a change in the law ... it seems that it should have only prospective effect and that fairness and good conscience require that it should not be applied retroactively to adversely affect rights as they existed at the time a particular controversy arose," 569 P.2d 1100, 1102 .

It is apparent that the Court below erred when it failed to apply the old accomplice statute and require corroboration of the Hales testimony. However, even under the old statute, corroboration would not be required if Hales was not an accomplice.

POINT II

THE STATE'S PRINCIPAL WITNESS, HALES, WAS AN ACCOMPLICE.

The principal witness against the appellant was Jill Hales. She merits that designation because hers was the only testimony to connect him with the commission of an offense. If she were not an accomplice her testimony alone might be sufficient to sustain a conviction. However, because she was an accomplice her testimony should have been corroborated.

An "accomplice" has been variously defined as "one who is or could be charged as a principal with the defendant on trial, i.e. one who is liable to prosecution for the identical offense charged against the defendant on trial," State v. Kasai, 27 U.2d. 326, 327, 495 P.2d. 1265, 1266 (1972); or "one who participates in a crime in such a way that he could be tried and charged for the same offense," State v. Comish, 560 P.2d. 1134 (Utah 1977). Under Utah law, one can be "charged as a principal" when he or she, "acting with the mental state required for the commission of an offense ... solicits,

requests, commands, encourages, or intentionally aid another person to engage in conduct which constitutes an offense ..., " Section 76-2-202.

A superficial examination of State v. Kasai, supra, might lead the Court to conclude that Hales was not an accomplice of the appellant. The Court should not make that mistake. Kasai said, "The purchaser of narcotics is not an accomplice of the seller, as the offense of the purchaser is "possession" and not "selling" and, therefore the conviction of a defendant may be founded on the purchaser's uncorroborated testimony," 495 P.2d 1265, 1266. This phrase has no great significance for the present appeal because it is obsolete and may have only been erroneous or unnecessary dictum.

Unlike Kasai, the present case does not involve a "sale" or a "purchase" but rather a distribution without value. The mental state for that offense required the appellant to act "knowingly and intentionally." Hales, acting with the same mental state, "solicited, requested, and encouraged" the appellant to commit the offense by calling him and asking him to procure marijuana for her friend and then going to his home to obtain it. She even "intentionally aided" him to commit the offense by actually accomplishing the distribution element of the offense herself when she walked over to where the marijuana lay and picked it up. Her actions would permit her to be charged as a principal under Section 76-2-202. She would also be an accomplice, because an "accomplice" is "a person who could be charged as a principal with the defendant on trial," State v. Davie, 121 U. 184, 240 P.2d 263 (1952). Section 76-2-202, which broadened the definition of those who could be charged as principals, took effect the year after the Kasai decision and made such narrow concepts as "buyer" and "seller" obsolete.

Kasai may also have been wrongly decided. Appellant suggests that the reason the buyer was held not to be an accomplice of the seller was not merely because he was the "buyer" but rather because he was an undercover policeman. As such, he could hardly be said to be acting with the mental state required for the commission of the offense or any offense for that matter so as a matter of law he could not be an accomplice. He was merely offering Mr. Kasai the opportunity to commit a crime and considerations of who was the buyer and who the seller were irrelevant.

Appellant's position is supported by State v. Comish , 560 P.2d 1134 (Utah 1977). There the court was again presented with an undercover police officer who had purchased narcotics. The defendant again contended that the officer was an accomplice whose testimony required corroboration. The Court rejected this argument, not because the officer was a buyer, but because the definition of accomplice " ... does not include a person who, without using inducement or persuasion which would amount to entrapment, merely provides an opportunity for one who is disposed to commit a crime. More specifically applicable here, a person so acting under the direction of a peace officer in attempting to discover violations of law, is not an accomplice," 560 P.2d 1134, 1136. Comish dispensed with the distinction between buyer and seller drawn in Kasai and recognized the true reason a police buyer is not an accomplice, he does not have the requisite criminal intent.

In the present case, the witness Hales was not a police officer, agent, or even a buyer. Acting with the same mental state as alleged to be present in the plaintiff, she aided, solicited, and encouraged the appellant to commit the offense of distribution of a controlled substance where nothing

of value was exchanged. Her actions made her liable as a principal under Section 76-2-202 and as such, she was an accomplice whose testimony required corroboration.

POINT III

HALES TESTIMONY WAS NOT SUFFICIENTLY CORROBORATED

It has long been the rule that the, " ... corroborating evidence must implicate the defendant in the offense and be consistent with his guilt and inconsistent with his innocence, and must do more than cast a grave suspicion upon him, and all of this must be without the aid of the testimony of the accomplice," State v. Erwin, 101 U. 365, 120 P.2d 285 (1941). In this case there was no sufficient corroboration.

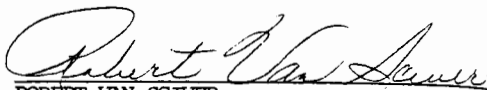
The only two witnesses besides Hales were Barney and Wiseman. Barney testified that she had been with Hales in the Berg home, that she had not seen the transfer of any marijuana, and that she had no idea where the marijuana she later saw Hales remove from her purse came from or how long it had been in there. Wiseman never entered or came near the Berg home and presented no testimony on the source of the marijuana. The State presented no corroborative evidence "consistent with Berg's guilt."

CONCLUSION


The lower Court erred in failing to find that Jill Hales was an accomplice of the appellant whose testimony required corroboration. This Court should reverse that decision and dismiss the charges against the defen-

dant for the reason that the State presented insufficient evidence to convict him and a second trial could well violate the double jeopardy clause.

Dated this 3RD day of December, 1979.

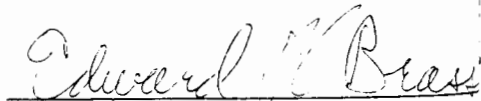

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MAILING CERTIFICATE

I certify that I mailed a true and correct copy of the foregoing Brief of Appellant to Robert B. Hansen, Attorney General, Attorney for Respondent, 236 State Capitol, Salt Lake City, Utah 84114 on this the 4th day of December, 1979.


EDWARD K. BRASS