

1980

# the State of Utah v. Danny Brent Criscola : Brief of Appellant

Utah Supreme Court

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BRAD P. RICH; Attorney for Appellant; ROBERT HANSEN; Attorney for Respondant;

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IN THE SUPREME COURT OF THE STATE OF UTAH

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THE STATE OF UTAH,	:	
Plaintiff-Respondent	:	
v.	:	
DANNY BRENT CRISCOLA,	:	Case No. 16786
Defendant-Appellant	:	

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BRIEF OF APPELLANT

Appellant appeals from a jury verdict of guilty of Unlawful Distribution of a Controlled Substance for Value in the Third Judicial District Court in and for Salt Lake County, State of Utah. The Honorable Dean E. Conder, Judge presiding.

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THE STATE OF UTAH,	:	
Plaintiff-Respondent	:	
v.	:	
DANNY BRENT CRISCOLA,	:	Case No. 16786
Defendant-Appellant	:	

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellant, Danny Brent Criscola, appeals from a conviction and judgment of Unlawful Distribution of a Controlled Substance for Value in the Third Judicial District Court, in and for Salt Lake County, State of Utah.

DISPOSITION IN THE LOWER COURT

The appellant, Danny Brent Criscola, was charged with Unlawful Distribution of a Controlled Substance, a felony in violation of Title 58, Chapter 37, Section 8(1)A, Utah Code Annotated, 1975 as amended. A jury found appellant guilty and he was sentenced to incarceration at the Utah State Prison for the indeterminate term as provided by law.

## RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the conviction and judgment rendered below and a remand to the Third Judicial District Court for a new trial.

## STATEMENT OF FACTS

At trial, the State alleged that appellant, Danny Brent Criscola, offered and sold for value one quarter ounce of cocaine to narcotics agents, Robert Powers and Steven Douglas Brown. Appellant took the stand and testified in his defense. Appellant testified that agents Powers and Brown were driving alongside the car which his brother, Robert Criscola, was driving. There were "a few other people in the car" and appellant was in the back seat. (T. 86,87) Agent Powers motioned for Robert Criscola to roll down his window and a conversation took place. The agents said they were from Phoenix and were looking for a place to buy drinks over the bar. The agents were invited to go to a private club with appellant, his brother and their friends. The agents went to the private bar, and when the bar closed, Robert Criscola invited the agents to his home. Appellant rode in the agents' car to direct them to Robert's home. (T.88) Drinks were served and a poker game was started at Robert's home. (T.89)

During the course of the evening, Robert Criscola, sold a half a gram of cocaine to Agent Powers (T.71,91). Appellant further testified that he was concerned about his brother's

dealings, especially in reference to the two agents (T.92). The agents asked Robert if he could get more cocaine for them. (T.92) Appellant testified that he was fearful that his brother was getting involved with questionable characters. (T.97) The agents had indicated to appellant that they were with an organization that was distributing drugs in Phoenix. (T.97). The agents also continued to lead the conversation to the subject of drugs (T.93). Appellant testified that he was fearful for his brother because of the demanding, insisting attitude of the agents (T.98). Appellant told the agents to deal with him directly and explicitly told them not to deal with his brother (T.97,74,52,42). Prior to that directive Agent Powers testified that his dealings had been with Robert Criscola (T.41). Appellant explained that the reason for telling the agents to deal with him was to "pull them off" his brother. His explanation for taking the risk of stepping between his brother and the two agents was that his younger brother, Robert, had never been in "trouble" before while appellant had been in prison before, was having marital and health problems and therefore felt he had less to lose (T.105,106). Appellant maintained throughout his testimony that his concern of the questionable character of the agents and his fear for his brother led him to intervene and accomodate the agent's requests for narcotics.

## ARGUMENT

### POINT I

#### REFUSAL TO SUBMIT JURY INSTRUCTION ON THE SUBJECTIVE THEORY OF ENTRAPMENT, THE APPLICABLE LAW AT THE TIME OF THE OFFENSE, VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW.

The Constitution of the United States and the State of Utah both expressly prohibit any ex post facto law Article I, Section 10 of the United States Constitution provides:

No state shall . . . pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts.

Article I, Section 18 of the Constitution of Utah provides:

No bill of attainder, ex post facto law, or any law impairing the obligation of contracts shall be passed.

The above provisions are commonly referred to as the ex post facto clause and was first given judicial interpretation in Calder v. Bull, 3 Dall. 386 (1798). In that case the United States Supreme Court was faced with a question of the retroactive application of a change in probate law by a state legislature. The Court noted two important factors in the application of the ex post facto clause. First, the clause applies primarily to criminal actions. Secondly, the nature of retroactive application applies to the time that the offense was alleged to have been committed. The Court in an often-quoted passage described four situations that it considered to be exemplary of ex post facto laws;



I will state what laws I consider ex post facto within the words and intention of the prohibition. First, every law that makes an action done before the passing of the law; and which was innocent when done, criminal; and punishes such action. Second, every law that advocates a crime, or makes it greater than it was when committed. Third, every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed. Fourth, 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. 3 Dall. 386, 390-391.

In Bouie v. City of Columbia, 84 S.Ct. 1697 378 U.S. 347 (1964), the Supreme Court determined that since state legislatures are barred by the ex post facto clause from passing such a law, state courts are barred by the due process clause from achieving precisely the same result by judicial construction. Thus the states cannot do by judicial interpretation what they cannot do legislatively. The trial court's failure to give an instruction on entrapment that was proper under this Court's decisions at the time that the offense was committed was in effect an ex post facto fact application of judicial decision which ". . . makes an action done before the passing of the law; and which was innocent when done, criminal; and punishes such action."

The instruction offered by appellant at his trial was proper under prior decisions of this Court,<sup>1</sup> where the issue of entrapment 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 defendant". State v. Taylor, 599 P.2d 496, 500 (Utah 1979), State v. Bridwell, 566 P. 2d 1232 (1977), Somells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932). This inquiry is a subjective theory of entrapment and one which this Court followed until the decision in State v. Taylor, supra, where the entrapment statute was interpreted as requiring an objective test.

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1. Defendant's Instruction:

For a peace officer to procure a person to commit a crime, which he otherwise would not have committed, for the purpose of apprehending and prosecuting him is entrapment. This is so discordant to the true function of law enforcement which is the prevention, not the causation, of crime; and so repugnant to fundamental concepts of justice that the conviction of an accused under such circumstances will not be approved. When that issue is present, the question is whether the crime is the product of defendant's own intention and desire, or is the product of some incitement or inducement by the peace officer. If the crime was in fact so instigated or induced by what the officer did that the latter's conduct was the generating cause which produced the crime, and without which it would not have been committed, the defendant should not be convicted. On the other hand, if the defendant's attitude of mind was such that he desired and intended to commit the crime, the mere fact that an officer or someone else afforded him the opportunity to commit it would not constitute entrapment which would be a defense to its commission; and this would not be less true even though an undercover man went along with the defendant in the criminal plan and aided or encouraged him in it.

If, after a consideration of all the evidence you have a reasonable doubt that the defendant, Darny Brent Criscola, may have been subject to entrapment as defined above, you must find him not guilty.

See also State v. Curtis, 542 P.2d 744 (Utah 1975), where the court said that the inquiry included one into defendant's "voluntary will and desire." Accord, State v. Pacheco, 369 P.2d 494, 496 (Ut. 1962), State v. Perkins, 432 P.2d 50 (Ut. 1967). The court denied the use of appellant's instruction and instead used the state's instruction which is based on an objective theory.<sup>2</sup>

State v. Taylor, supra, was handed down August 7, 1979 and the alleged offense in this case occurred in April of 1977. At that time the defense of entrapment involved a subjective test. Appellant Criscola would have been allowed to instruct the jury on the question of his subjective intent with respect to entrapment. After the Taylor decision, the focus changed and hence such an inquiry would not have been proper. A change, by court decision in an interpretation of a criminal statute which after the change, requires something "different" than the earlier law, is a violation of the Calder and Bouie principles, the appellant was entitled to a subjective theory of entrapment

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## 2. State's Instruction (no. 17):

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.

This instruction quoted is the language of entrapment statute, Utah Code Ann. §76-2-303 (1953 as amended). This statute itself is now interpreted as requiring by legislative intent an objective inquiry. State v. Taylor, 599 P.2d at 501.

instruction as such a focus was the law at the time the offense was committed. Application of an objective standard, which is what the law required after the commission of the offense in this case was an ex post facto judicial interpretation with respect to the appellant and hence the failure to instruct on the entrapment law in effect at the time of the commission of the offense violated appellant's constitutional right to Due Process of Law.

#### CONCLUSION

The appellant contends that the trial court's refusal to submit his requested jury instruction on the subjective theory of entrapment, the applicable law at the time of the offense, was a violation of the constitutional prohibition against ex post facto laws and in violation of due process and therefore his conviction cannot stand.

Respectfully submitted this \_\_\_\_\_ day of March, 1980.

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Attorney for Appellant