

1980

the State of Utah v. Danny Brent Criscola : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

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

Recommended Citation

Brief of Respondent, *Utah v. Criscola*, No. 16786 (Utah Supreme Court, 1980).
https://digitalcommons.law.byu.edu/uofu_sc2/2004

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE
STATE OF UTAH

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

:

BRIEF OF RESPONDENT

APPEAL FROM A JURY VERDICT OF GUILTY OF
UNLAWFUL DISTRIBUTION OF A CONTROLLED SUB-
STANCE FOR VALUE IN THE THIRD JUDICIAL
DISTRICT COURT IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH, THE HONORABLE DEAN E. CONDER,
JUDGE, PRESIDING

ROBERT B. HANSEN
Attorney General

EARL F. DORIUS
Assistant Attorney General

236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

BRAD P. RICH

44 Exchange Place
Salt Lake City, Utah 84111

Attorney for Appellant

FILED

MAY 5 1980

TABLE OF CONTENTS

	Page
STATEMENT OF THE NATURE OF THE CASE-----	1
DISPOSITION IN THE LOWER COURT-----	1
RELIEF SOUGHT ON APPEAL-----	1
STATEMENT OF THE FACTS-----	2
ARGUMENT	
POINT I: THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE APPLICABLE THEORY OF ENTRAPMENT--	5
POINT II: THE EVIDENCE PRODUCED AT TRIAL SUPPORTS APPELLANT'S CONVICTION UNDER EITHER THE SUBJECTIVE OR OBJECTIVE THEORY OF ENTRAPMENT---	9
CONCLUSION-----	11

CASES CITED

<u>Bouie v. City of Columbia</u> , 378 U.S. 347 (1964)-----	6
<u>State v. Curtis</u> , 542 P.2d 744 (Utah 1975)-----	10
<u>State v. Summers</u> , 569 P.2d 1110 (Utah 1977)-----	10
<u>State v. Taylor</u> , 599 P.2d 496 (Utah 1979)-----	5,7

STATUTES CITED

Utah Code Ann. § 58-37-8(1)A (1953), as amended 1975-	1
---	---

IN THE SUPREME COURT OF THE
STATE OF UTAH

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

----- : -----
BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was convicted of Unlawful Distribution of a Controlled Substance for Value, a violation of Utah Code Annotated, § 58-37-8(1)A (1975), as amended, a felony of the third degree.

DISPOSITION IN LOWER COURT

Appellant was tried and convicted by a jury in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Dean E. Conder, presiding, on October 3 and 4, 1979, and sentenced to an indeterminate term of 0 to 5 years in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of Appellant's conviction.

STATEMENT OF THE FACTS

On April 6, 1978, at approximately 7:00 a.m., Appellant phoned Robert Powers, a special agent for the Arizona Drug Control District, and Steve Brown, an undercover agent for the State Narcotics and Liquor Law Enforcement Division, Utah Department of Public Safety, (T.25) to invite them to meet him at his residence to further negotiate a drug deal that had been discussed the previous evening. (T.26). Powers and Brown had met Appellant and his brother on the evening of April 5th when the agents accompanied them to a private club (T.51). At the club, Appellant introduced Powers and Brown to a couple of pilots who Appellant stated were "flying loads of marijuana." Appellant asked to see Powers identification because he wanted to make sure Powers was from Arizona as he had claimed (T.51). Later that evening, a drug transaction between Agent Powers and Appellants brother, Bobby Criscola, occurred. Agent Brown testified at trial that prior to the transaction taking place, Bobby looked at Appellant, who appeared to accept the terms of the deal by nodding his head (T.79). Appellant disputed this testimony at trial (T.90).

Upon arriving at Appellant's brother's house, Powers and Brown met Appellant, his brother, and a woman identified as Frankie (T.27). A conversation took place

regarding a quarter ounce of cocaine (T.27). Agent Powers asked Appellant if the cocaine were "still available" and how much it would cost. Appellant told Powers that the price would be around \$600. Agents Powers and Brown subsequently accompanied Appellant, his brother, Frankie, and an unidentified man to a cafe where the discussion concerning drugs continued (T.30). Prior to this time, Appellant instructed Powers not to deal with his brother, Bobby Criscola, but to deal directly with Appellant (T.42,52,97).

At the trial, Agent Powers testified that Appellant asked Brown if he were interested in a "girl," a slang term for cocaine (T.30,60). Brown said that he was and asked if it were still available. The group left the cafe and Appellant's brother told the agents to call them around 2:30 or 3:00 that afternoon (T.32). Powers called Appellant at the agreed upon time and Appellant asked him if he were still interested in the cocaine. Powers replied that he was and Appellant told him to come to his brother's house. Powers and Brown drove over to Bobby Criscola's house and Appellant met them between the house and street (T.33). Appellant informed them that they would have to make a "run" to pick up the cocaine (T.33) and the three of them, Agents Powers and Brown and Appellant left in Agent Brown's car (T.34). Appellant repeatedly asked Brown and Powers if they were

police officers (T.35,63) and they stated that they were not. Appellant directed them to stop the car at approximately 1700 South and 1300 East. Appellant asked for the agreed upon \$600 and the agents told him they would give him \$300 up front and the remaining \$300 when they got the cocaine. Brown counted the \$600.00 in front of Appellant and placed the money on the console between the two front seats of the car. (T.36). Appellant then told the agents it would not be necessary to give him any money until they received the cocaine (T.64). Appellant left the vehicle and returned a few minutes later (T.36). Appellant again asked Powers and Brown if they were police officers and again they said they were not. Appellant then handed Agent Brown a plastic bag containing the cocaine (T.37) and Powers gave Appellant the money (T.37).

There was a discussion regarding the possibility of future negotiations between Appellant and the agents (T.38). Appellant stated that he was reluctant to talk about cocaine on the telephone and wanted to set up a code (T.38,67). Appellant told Powers that if he were interested in buying ounces of cocaine, he should mention "ski boots;" if he were interested in buying half-pounds of cocaine, he should mention "ski poles;" and if he were interested in buying pounds of cocaine, he should talk about "skis" (T.38).

Appellant once again expressed concern that Powers and Brown were police officers, but told them that "if [they] played [their] cards right, [they] could flood the Phoenix market with good cocaine from Salt Lake" (T.39,53).

POINT I

THE TRIAL COURT PROPERLY INSTRUCTED
THE JURY ON THE APPLICABLE THEORY OF
ENTRAPMENT.

Appellant argues that the trial court's refusal to submit his jury instruction on the subjective theory of entrapment constituted error and violated his right to due process of law. Appellant further argues that the court retroactively applied the objective test for entrapment adopted by this Court in State v. Taylor, 599 P.2d 496 (Utah 1979) an action prohibited as an ex post facto law. Respondent submits that there was no ex post facto application of a criminal statute, that appellant did not preserve his claim for appeal in that at trial he argued an opposing theory, and finally that the trial court's instructions to the jury presented the appropriate theory of entrapment.

The constitutional prohibition against any ex post facto application of a criminal statute is not at issue in this case. Appellant argues, however, that although the trial court did not retroactively apply a new criminal statute, not in effect at the time the crime was committed,

the court allegedly accomplished the same thing by applying a new statutory construction of a previously enacted statute, Utah Code Ann. § 76-2-303 (1953) as amended. Appellant cites the case of Bouie v. City of Columbia, 378 U.S. 347 (1964), in support of this argument. Respondent contends that Appellant's reliance on Bouie is misplaced. Bouie involved two defendants who were charged with criminal trespass in violation of a local statute which prohibited entry onto premises of another after receiving notice not to enter. Their convictions were affirmed by the State Supreme Court and they petitioned the United States Supreme Court for review by certiorari. The petitioners claimed that the State Supreme Court's new construction of the statute to cover not only the act of entry onto premises of another after receiving notice not to enter, but also the act of remaining after receiving notice to leave, in effect punished them for conduct that was not criminal at the time they committed it, and thus violated the requirement of the due process clause that a criminal statute must give fair warning of the conduct which it prohibits.

The United States Supreme Court held in Bouie that the action of the State Supreme Court, in giving retroactive application to its new construction of the statute, deprived petitioners of their right to fair warning

of a criminal prohibition, and thus violated the due process clause of the Fourteenth Amendment. In Bouie, the Court was dealing with retroactive application of new statutory construction of a substantive criminal statute, the effect of which was to make an act that was not criminal at the time it was committed, a crime. That is not the situation here. In this case, Appellant was convicted for the crime of Unlawful Distribution of a Controlled Substance for Value. The criminal conduct and the requirement that one have fair warning of specifically which conduct is prohibited is not an issue here. What is at issue is the statutory defense of entrapment and the court's use of the applicable law in instructing the jury. Appellant was not deprived of notice of prohibited acts; the due process rights of Appellant, with which the Court in Bouie was concerned, have not been violated. Thus, there is no ex post facto situation in the present case.

Secondly, Appellant's claim that the court's instruction to the jury was improper because it embodied the objective test for entrapment adopted by this court in State v. Taylor, 599 P.2d 496 (Utah 1979), is diametrically opposed to the theory or objection he posed at trial. Counsel for Appellant, at trial, objected to the court's Instruction No. 18 because "it appears to concentrate on a subjective

standard that is concentrating on the victim of potential entrapment rather than the activities of the persons - the agents of the state who are in fact engaging in that conduct." (T.145) In other words, Appellant's counsel at trial objected to the court's instruction because it set forth the subjective test for entrapment; yet on appeal, counsel for Appellant now chooses to argue that the court erred in failing to instruct on the subjective theory of entrapment. It appears that Appellant on appeal now wants what he voiced objection to at trial.

Finally, respondent submits it was totally proper for the trial court to instruct the jury on the objective theory of entrapment and indeed, it would have been error for the court to do otherwise since the trial occurred after this Court issued its ruling in State v. Taylor, supra, which required a jury instruction on the objective theory of entrapment. Since the Taylor ruling focuses on a defense which is raised procedurally at trial, and is not a decision which changed the element of a crime as in Bouie, supra, respondent submits that the critical date for implementation of the new ruling is not when the crime was committed, but rather when the appellant's case went to trial.

POINT II

THE EVIDENCE PRODUCED AT TRIAL SUPPORTS APPELLANT'S CONVICTION UNDER EITHER THE SUBJECTIVE OR OBJECTIVE THEORY OF ENTRAPMENT.

In the case of State v. Taylor, supra, this court stated that the subjective theory of entrapment focused 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. Whereas, the objective theory of entrapment adopted by this Court in Taylor focuses on whether the police conduct revealed in the particular case falls below standards for the "proper use of governmental power." Id. at 500.

The facts of this case cannot support a defense of entrapment under either the subjective theory or the objective theory. Under the subjective theory, the conduct of Appellant, shows that it was he who contacted agents after the initial meeting; it was Appellant who determined the price of the cocaine; it was Appellant who directed the agents to the place where he picked up the cocaine, sold it to the agents, and received the money. Further, it was Appellant who continuously and repeatedly asked the agents if they were police officers - surely not the actions of an "otherwise innocent person" who would not commit the crime

except for the persuasion of the government's agents. Had Appellant had no predisposition to commit the crime, he could have chosen not to contact the agents to resume negotiations for the drug sale. Appellant claims he did all of this, however, because he wanted to protect his little brother. Yet, no threats were made to Appellant or his little brother, and although Appellant claims he was afraid to refuse to sell the agents drugs, he never told them he would not sell them drugs, even to see their reaction.

Under the objective theory of entrapment, the conduct of the agents involved must be carefully scrutinized. The transcript reveals that the conduct of the agents involved cannot be criticized. There were no threats made by the agents to either Appellant or his little brother. Further, no coercive tactics were employed to entice Appellant into committing the crime. The agents merely provided Appellant with an opportunity to carry out his criminal intention. Once again, it was not the agents who made subsequent contact with Appellant, but rather it was Appellant who remained in contact with the agents. See State v. Summers, 569 P.2d 1110 (Utah 1977) and State v. Curtis, 542 P.2d 744 (Utah 1975).

The facts clearly establish that the Appellant was

not entrapped into committing the crime for which he was convicted; rather he was merely apprehended.

CONCLUSION

Based upon the foregoing argument and case law, Respondent urges this Court to affirm Appellant's conviction.

Respectfully submitted,

ROBERT B. HANSEN
Attorney General

EARL F. DORIUS
Assistant Attorney General

Attorneys for Respondent