

1980

The State of Utah v. James (Jim) Kourbelas : Brief of Appellant James (Jim) Kourbelas

Utah Supreme Court

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

THE STATE OF UTAH, Plaintiff and Appellant, vs. JAMES (JIM) KOURBELAS, Defendant and Appellant.	
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Case No. 16875

BRIEF OF APPELLANT
JAMES (JIM) KOURBELAS

Appeal from the First Judicial District Court,
in and for the County of Cache, State of Utah,
the Honorable VeNoy Christoffersen, District Judge,
presiding.

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff and Respondent,	:	
vs.	:	Case No. 16875
JAMES (JIM) KOURBELAS,	:	
Defendant and Appellant.	:	

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This appeal is from a conviction of the crime of distribution of a controlled substance, to-wit: marijuana, for value, a third degree felony, and the subsequent sentence thereon of a term in the Utah State Prison, stayed while Defendant/Appellant was placed on probation.

The case was tried before the Honorable VeNoy Christofferson, District Court Judge, presiding and before a jury. From the conviction and sentence Defendant/Appellant files this appeal.

DISPOSITION IN LOWER COURT

Appellant was charged in the lower Court with the offense of distribution of a controlled substance to-wit: marijuana, for value, a third degree felony (see page 16, Transcript on Appeal) in violation of Section 58-37-8 (1)(a)(ii) Utah Code Annotated 1953 as amended. Prior to trial on the charge, Defendant/Appellant filed his Motion To Dismiss on the basis of entrapment, pursuant to 76-2-303 Utah Code Annotated, 1953 as amended

wait for his friends. While on the boat dock he was engaged in conversation by one Mark Nelson, who testified that he was working as an undercover narcotics agent for the San Juan County Sherrif's office. Nelson testified that he worked in this capacity from the middle of May [1979] until the latter part of July [1979] (See Reporter's Transcript of Proceedings, p.15). As his cover, he testified, he worked on the boat dock as assistant manager. (R. Tr. 18).

In his capacity as assistant manager of the gas dock, he entered the picture to resolve a problem that had arisen when the crew filled the houseboat of Appellant's friends, with a wrong fuel mixture.

Nelson, prior to working in San Juan County, was a resident of Cache County, and a student at Utah State University. He also was a reserve officer for the Logan City Police Department since January, 1979. Nelson testified that while at Lake Powell he was still under the supervision of his Logan police officer superior, Rich Hendricks, and he was the only person to whom he reported with regularity. (R. Tr. 24, 25) That he felt he was still acting for Logan City. (R. Tr. 162)

During the conversation on June 13, the subject of "drugs" was raised by Nelson, (R. Tr. 36, 127, 173, 175) and Nelson made the comment that "There could be a lot of money made down here if I had some ways of getting some drugs down here." (R. Tr. 36) Nelson testified further that in that conversation

The Motion to Dismiss was presented to the Court, along with evidence in support thereof. The Court after hearing all the witnesses denied Defendant/Appellant's motion.

The case was then tried to a jury and after the State rested its case, Defendant/Appellant again made his Motion to Dismiss to the Court. This was again denied by the Court. After presentation of Defendant/Appellant's case and rebuttal, and while the case was being deliberated upon by the jury, Defendant/Appellant again moved to dismiss based on entrapment and made a motion for a directed verdict, both of which motions were denied by the Court.

Defendant/Appellant was found guilty by the jury and was sentenced to serve a period of up to five years in the Utah State Prison, which sentence was stayed and Defendant/Appellant was placed on probation. It is from this conviction that Defendant/Appellant now appeals.

STATEMENT OF FACTS

Defendant/Appellant was at Lake Powell, Utah, on June 13, 1979, having been there with some of his friends boating. The houseboat which they were using was in need of gas, so Kourbelas' friends took the houseboat to a place known as Hall's Crossing for refueling.

Defendant/Appellant went into Hall's Crossing in his own boat and was at the boat dock to

he asked Appellant if he could get him some marijuana, or words to that effect. (R. Tr. 37) The Appellant then gave Nelson his name and phone number and Nelson indicated he would contact Appellant. According to Appellant, he gave Nelson his name and phone number and told him if he was up his way, to stop in. (R. Tr. 98).

According to Nelson's testimony, he thereafter contacted Hendricks, who suggested to Nelson that he follow up and see whether or not he could get Appellant to sell marijuana to Nelson (R. Tr. 43, 179, 180) Nelson then telephoned Appellant from a location in Logan City, Cache County, Utah, placing the call to Appellant's home in North Salt Lake, Davis County, Utah, placing five or six such telephone calls.

On June 30, 1979, according to Nelson, he made three telephone calls (R. Tr. 44, 130, 135, 136, 184, 185, 186) He telephoned on the 1st day of July, and the 2nd of July. In a second or third telephone conversation Nelson commented to Appellant that he "hated to keep bothering you like this" (R. Tr. 51, 137, 187).

In the first telephone conversation with Nelson, Appellant testified that he told Nelson that he didn't know whether or not he could get Nelson any marijuana (R. Tr. 100) At any rate, after approximately six telephone conversations between Nelson and Kourbelas (Appellant), Nelson enticed Appellant to come into Cache County in order to consummate a sale

of marijuana, after rejecting three other proposed locations closer to Ogden, Weber County, Utah, where Appellant was working. (R. Tr. 147, 153, 190).

On July 3rd Nelson met with Appellant at the entrance of a resort in Cache County called Sherwood Hills. This was the fourth location suggested, Nelson having rejected three other locations which were located in Box Elder County. (R. Tr. 87) According to Nelson, "we wanted it [the buy] in Cache County." He testified that he didn't have jurisdiction in Box Elder County, or Weber County, but did have jurisdiction in San Juan County some 550 miles away. (R. Tr. 191).

Nelson testified that the profit margin for marijuana would have been \$340.00 a pound profit, and that four or five pounds would have brought some \$1,200.00 to \$1,500.00 in profit. (R. Tr. 195, 196).

Rich Hendricks, Logan City Police Officer, testified that Nelson wanted to join the Logan Police force and that Hendricks told him that becoming a reserve officer was the best way to "get a foot in the door." (R. Tr. 239).

Hendricks also testified that the Sheriff of San Juan County was concerned with drug dealers that lived in San Juan County, because of it being a recreational area. (R. Tr. 246). He further testified that up until June 13, 1979, or shortly after that, Appellant had no contact with Logan City or with Cache County, that he was aware of. (R. Tr. 247) He also

testified that it was his suggestion that the sale be conducted in Cache County rather than Box Elder County, Weber County, or Salt Lake County, and that he instructed the undercover agent to ask Appellant to come up to Cache County to consummate the sale. (R. Tr. 268, 269).

The Appellant testified that he did not formulate an intent to sell Nelson any marijuana until after a number of telephone conversations he had with Nelson. (R. Tr. 311, 315) And considering the amount of money he would make from such a sale.

ARGUMENT

IF DEFENDANT IS INDUCED BY POLICE INTO THE COMMISSION OF AN OFFENSE, SUCH CONDUCT BY POLICE IS UNLAWFUL ENTRAPMENT AND OUTRAGEOUS POLICE CONDUCT WHICH REQUIRES THE DISMISSAL OF THE CASE WITH PREJUDICE.

The facts in the case at bar are not very complex, as the statement of facts indicates. Essentially Appellant, after having met an undercover narcotics officer who solicited him for marijuana, and after some six or seven telephonic contacts by this undercover officer, seeking to have Appellant sell him a substantial quantity of marijuana, and the idea of the money to be made in such a sale, was induced into the act of selling a controlled substance to the agent.

The law in Utah is clear that the misconduct of a law enforcement officer, or a person directed by or acting in cooperation with the officer, will not be tolerated. As such, our

legislature has enacted 76-2-303, Utah Code Annotated in 1973, which flatly states that entrapment of the actor into the commission of an offense is an absolute defense. It sets forth what constitutes entrapment as follows:

(1) 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 cooperation 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. (Emphasis added) 76-2-303 Utah Code Annotated, 1973.

The conduct of the undercover narcotics agent here is certainly more than the giving of an opportunity to commit an offense. Although the State at trial made issue of the fact that "it doesn't hurt to ask," that is not the point. It does hurt to ask, and ask, and ask; in this case some six or seven times.

In the case at bar the evidence clearly shows that the undercover narc met Appellant at Lake Powell in San Juan County, Utah. He had no indication that Appellant was a dealer or even that he smoked marijuana. Not until after the narc struck up a conversation with Appellant and he broached the subject of marijuana was there even an indication that Appellant might even use marijuana. The narc's comments were geared to the fact that he would be willing to buy marijuana from Appellant. There was no indication by Appellant that he was willing or able to procure

any amount of marijuana for the narc.

It is important to note that the narc was in San Juan County at the time that this event occurred. He was there on loan from Logan City, Cache County, Utah, a city in the northernmost part of the State and some 550 miles away. He was a reserve police officer in Logan City, hoping to be hired as a regular officer.

After Appellant returned to his home in North Salt Lake, Davis County, Utah and about two or three weeks after the meeting at Lake Powell, Appellant started to receive telephonic communications from the narc and after some six telephone contacts, all but the last one (or the fourth and sixth call according to the narc) were initiated and made by the narc in Logan City to Appellant's home in North Salt Lake, some three counties away.

Again, it should be noted that there is absolutely no indication that Appellant had ever had any contact with Logan City or Cache County. There was no reason to believe that Appellant was a dealer or had ever dealt in Cache County whatsoever. Yet, according to the Narc's own testimony, he enticed Appellant into coming into Cache County in order to consummate a buy from him, by using the pretext of lack of adequate transportation. It was in Cache County, of course, that the sale was made by Appellant to the narc and where the Appellant was arrested.

The question that remains unanswered is why, if the

initial contact was made in San Juan County, and the Appellant lived in Davis County, worked in Weber County, he was enticed into coming into Cache County in order to be arrested? Why further did the narc contact Appellant by telephone some six times?

This Court has recently held that entrapment must be viewed in the objective view, and specifically stated that:

The focus is not on the propensities and predisposition of the specific Defendant, but on whether police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental powers. State v. Taylor, 599 P.2d 496, at 500 (1979).

Clearly the conduct of the police in the case at bar is not such as to comport with a fair and honorable administration of justice. The enticement into the commission of a crime and the enticing into a county for the commission of a crime is simply not fair and honorable. The police cannot and ought not to be allowed to lure a person into the commission of an offense.

It is clear that the intention that the crime here be committed originated with the police. It is equally clear that without the inducement of the undercover narc here the crime would not have occurred.

This case clearly falls within that conduct proscribed by 76-2-303, Utah Code Annotated, 1973, and as so eloquently discussed in State v. Taylor, supra.

In addition to the entrapment here, we should also be

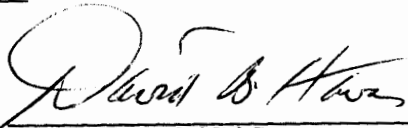
concerned with the outrageous conduct of the police. The numerous contacts and the subsequent enticement into a county which has no relationship to Appellant, merely to have him commit a crime there is outrageous. This is not proper law enforcement. There is no showing of predisposition to criminality in Cache County whatsoever. The conduct of the police clearly falls within that proscribed in U.S. v. Twigg, et al., 588 F.2d 373 (3rd Circ. 1979).

The police conduct in enticing a person into coming within a county in which he has no intent to go, merely to set up a criminal act in such county, is outrageous conduct and fundamental fairness should not permit a Defendant to be convicted of a crime in which police conduct was "outrageous."

CONCLUSION

The conduct of the police as set forth above clearly shows that Appellant received no justice and was found guilty despite the fact that he was entrapped into the commission of the offense and that the police acted outrageously toward Appellant. The conviction must be set aside and the sentence reversed.

DATED this 27th day of May, 1980.



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CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the above and foregoing Brief of Appellant to Robert B Hanson, Utah State Attorney General, 236 State Capitol, Salt Lake City, Utah 84114, Attention: Robert R. Wallace, Assistant Attorney General, postage prepaid this 27th day of May, 1980.


MICHELLE ELM, Secretary