

1980

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

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Utah v. Kourbelas*, No. 16875 (Utah Supreme Court, 1980).
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IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

JAMES (JIM) KOURBELAS,

Defendant-Appellant.

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:
:
Case No.
16875
:
:
:

BRIEF OF RESPONDENT

APPEAL FROM THE FIRST JUDICIAL DISTRICT
COURT, IN AND FOR CACHE COUNTY, STATE OF
UTAH, THE HONORABLE VENNOY CHRISTOFFERSEN,
JUDGE, PRESIDING

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FILED

JUL 17 1980

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE
STATE OF UTAH

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

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

STATEMENT OF THE NATURE OF THE CASE

Appellant was convicted of violating § 58-37-8(1)
(a)(ii) Utah Code Annotated 1953, as amended. This statute
prohibits the distribution of a controlled substance for
value. The controlled substance sold by appellant was
marijuana.

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury and was found
guilty on December 19, 1979, in the First District Court,
the Honorable Venoy Christofferson presiding. Appellant
was sentenced on January 31, 1980, to five years in the Utah
State Prison. This sentence was stayed and he was placed

on probation.

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmation of the judgment rendered by the trial court.

STATEMENT OF THE FACTS

On July 3, 1979, Appellant was arrested for selling two pounds of marijuana to Officer Mark Nelson of the Logan City Police Department (T. 159). Prior to the actual sale appellant and Officer Nelson had discussed the sale of marijuana at Lake Powell and in a series of telephone conversations.

When Officer Nelson first approached appellant about buying some marijuana, appellant said, "sure I'll see what I can do." Appellant gave Officer Nelson his name, address, and phone number, asking Officer Nelson to contact him (T. 128).

Officer Nelson conversed with appellant seven times by phone from June 30 to July 2, 1979. Two of the calls were made by appellant and five were made by Officer Nelson.

During the first conversation appellant indicated to Officer Nelson that he would sell the marijuana for \$525.00 a pound (T. 131). In addition, appellant suggested that he could contact his roommate about purchasing some LSD if Officer Nelson were interested (T. 131, 134).

During Officer Nelson's second phone conversation with appellant he discovered that a man named Ladell was appellant's supplier (T. 137). At the end of the second conversation the two decided to consummate the sale at Sherwood Hills in Cache County (T. 138).

Appellant invited Officer Nelson to call back on July 1st (T. 138). When he called, appellant informed Officer Nelson he could only get two pounds of marijuana, and he had failed to contact his roommate about the LSD (T. 140).

Later that day appellant called and informed Officer Nelson he had been unable to contact Ladell, (T. 142) and when Officer Nelson called back appellant indicated he still had not received any word (T. 144). By July 2nd, appellant had contacted Ladell and informed Officer Nelson that he could get two pounds of marijuana (T. 145). He also indicated he would use his boat as collateral to get the marijuana from Ladell (T. 150). After finalizing the deal with Ladell appellant called Officer Nelson to establish the final details of the transaction (T. 151-154).

Officer Nelson repeatedly testified that appellant showed no hesitancy in their conversations (T. 129,134,151, 153,157). When Officer Nelson apologized to appellant for calling him appellant clearly indicated that he was not bothered (T. 137).

ARGUMENT

POINT I

THE EVIDENCE DOES NOT SHOW ANY
IMPROPER POLICE CONDUCT WHICH
ESTABLISHES THE DEFENSE OF
ENTRAPMENT.

Appellant's only contention on appeal is that this Court should find he was entrapped into the commission of the offense as a matter of law.

The issue of entrapment was raised in a recent Utah case, State v. West, No. 15977 (Utah Jan. 14, 1980). The West case involved the sale of \$25.00 worth of marijuana to an undercover security officer who inserted himself into the defendant's social circle, visiting the defendant 12 to 13 times over a nine day period. The security officer admitted he asked the defendant "a few times" for drugs while the defendant claimed he had been constantly hounded for drugs.

This Court in West stated that it would consider the issue of entrapment by "surveying the evidence and the reasonable inferences that may be drawn therefrom in the light favorable to the jury verdict." Id. at 3. The Court went on to say:

Whether entrapment exists is like any other question of fact. Only where the evidence is undisputed, or is so clear and persuasive that reasonable minds acting fairly thereon would necessarily so find, could the Court so rule as a matter of law.

Id. at p. 3-4.

Entrapment is defined in Utah Code Ann. §
76-2-303 (Supp. 1973):

(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.

In State v. Taylor, 599 P.2d 496 (Utah 1979), this Court held that Section 76-2-303 requires the application of an objective standard. This standard being "whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power." Id. at 500. The test used in assessing police conduct is "whether the law enforcement official (used) . . . persuasion or inducement effective to persuade an average person, other than one who is merely given the opportunity to commit the offense." Id. at 503.

In applying the test set forth in Taylor it is appropriate to consider the negotiations between officer Nelson and appellant leading up to the offense. The evidence, viewed in the light most favorable to the jury verdict, does not show any impropriety on the part of the police. Nelson did not coax, badger, or apply pressure by repeatedly

requesting appellant to commit the offense. Nelson did not appeal to appellant's sympathy or exploit a friendship. Nelson merely approached appellant about purchasing some marijuana. Appellant was open to the suggestion and responded that he would attempt to get the requested marijuana (T.128).

Weeks later Officer Nelson found appellant was still interested in making a sale (T.131). Appellant agreed to sell marijuana to Officer Nelson in their first telephone conversation and quoted \$525.00 as a reasonable price for the marijuana he could procure (T.131).

Subsequent calls merely established the details of the transaction. Clearly, the evidence shows that Officer Nelson merely afforded appellant the opportunity to commit the offense which appellant willingly accepted.

The record does not indicate that appellant was coerced or induced to act. Appellant never expressed concern regarding the illegality of Officer Nelson's suggestion. Appellant invited Officer Nelson to call him and voluntarily conducted negotiations preparatory to the actual sale. Further evidence of appellant's disposition to make the sale is demonstrated by his willingness to drive to Cache County to consummate the deal (T.138). In short, appellant was self-motivated not coerced into making the sale.

Appellant asserts that United States v. Twigg, 588 F.2d 373 (3d Cir. 1979), supports his allegations that

the police conduct constituted entrapment. However, Twigg can be distinguished from the instant case. In Twigg the Drug Enforcement Agency through the defendant's friend induced the defendant to set up a laboratory to produce amphetamine. The DEA was intricately involved in the setting up of the laboratory; it purchased most of the equipment and furnished an isolated farmhouse. The defendants did not even know how to produce the drug.

The Court in Twigg did not find the defendants had been entrapped. However, it held that the police involvement in the commission of the offense was so overreaching that prosecution of the defendant would be a violation of due process. The police conduct in the instant case does not approach the level of involvement that is demonstrated in Twigg. Officer Nelson did nothing to facilitate the procurement of the marijuana. He merely offered to buy it.

CONCLUSION

Appellant has failed to show that the evidence is so clear and persuasive that reasonable minds acting upon it would necessarily find entrapment. The evidence shows no dishonorable or unworthy police conduct. Respondent asserts that the rulings of the lower court were proper and

prays the jury verdict be affirmed.

Respectfully submitted,

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