

1980

The State of Utah v. Robert Kirk Echevarrieta : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

THE STATE OF UTAH, :
Plaintiff-Respondent, :

v. : Case No. 16914

ROBERT KIRK ECHEVARRIETA, :
Defendant-Appellant. :

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE FOURTH
JUDICIAL DISTRICT COURT, IN AND FOR UTAH
COUNTY, STATE OF UTAH, THE HONORABLE
J. ROBERT BULLOCK, JUDGE, PRESIDING

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TABLE OF CONTENTS

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 INITIAL SEARCH BY THE POLICE VIOLATED APPELLANT'S RIGHTS UNDER THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION, AND ALL EVIDENCE OBTAINED AS A RESULT OF THAT SEARCH SHOULD HAVE BEEN SUPPRESSED.	5
POINT II. ALL EVIDENCE OF THE PRESENCE OF MARI- JUANA EXCEPT THAT RELATING TO THE PLANTS IN THE PLASTIC BUCKETS SHOULD HAVE BEEN EXCLUDED AS IRRELEVANT AND PREJUDICIAL TO THE DEFENDANT. . .	14
POINT III. FAILURE OF THE COURT TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF POSSESSION OF MARIJUANA WAS ERROR.	21
POINT IV. THE FAILURE OF THE COURT TO INSTRUCT THE JURY THAT THE OFFENSE CHARGED INCLUDED THE ELEMENT OF INTENT TO DISTRIBUTE WAS PREJUDICIAL ERROR.	24
POINT V. APPELLANT IS ENTITLED TO REVERSAL IN THIS MATTER SINCE THE EVIDENCE PRESENTED AT TRIAL WAS NOT SUFFICIENT TO JUSTIFY A CONVICTION.	26
CONCLUSION	29

CASES CITED

Black v. State, 168 S.E.2d 916 (Ct.App.Ga. 1969)	.11
Commonwealth v. Williams, 330 N.E. 2d 502 (App.Ct.Mass. 1975)	.16
Durham v. State, 471 S.W.2d 527 (Ark. 1971)	.12
Jenkins v. State, 248 So.2d 758, (Ct.Crim. App.Alab. 1971)	.10
Katz v. United States, 389 U.S. 374, 88 S.Ct.507, 14 L.Ed.2d 576 (1967)	6,7,8,10
Lorenzana v. Superior Court of Los Angeles County, 9 Cal.3d 626, 108 Cal.Rptr. 585, 511 P.2d 33 (Calif. 1973)	7
Olivera v. State, 315 So.2d 487 (Dist.Ct.App. Fla. 1975)	.10
People v. Bradley, 81 Cal.Rptr. 459, 460 P.2d 129 (1969)	7
People v. Miller, 268 N.E.2d 213 (App.Ct.Ill. 1971)	.16
People v. Miller, 328 P.2d 506 (Dist.Ct.App. Calif. 1958)	.17
State v. Buchanan, 432 S.W.2d 324 (Mo. 1968)	.12
State v. Goodliffe, 578 P.2d 1288 (Utah 1978)	.19
State v. Hall, 523 P.2d 556 (Ore. 1974)	.15
State v. Schieving, 535 P.2d 1232 (Utah 1975)	.20
State v. Whitted, 205 S.E.2d 611	.25
State v. Wiley, 522 P.2d 281 (Mo. 1975)	.18
Wattenburg v. United States, 388 F.2d 853 (9th Cir. 1968)	.10
Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed2d 441 (1963)	.14

OTHER AUTHORITIES CITED

North Carolina G.S. 90-87(15)	.25
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STATUTES CITED:

Utah Code Annotated Section 58-37-8(1)(a)(i)	1, 22,25
Utah Code Annotated Section 58-37-8(2)(a)(i)	22, 25

IN THE SUPREME COURT OF THE
STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
v.	:	
ROBERT KIRK ECHEVARRIETA,	:	Case No. 16914
Defendant-Appellant.	:	

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with having knowingly and intentionally produced marijuana, a Schedule I controlled substance, in violation of Section 58-37-8(1)(a)(i), Utah Code Annotated, 1953 as amended.

DISPOSITION IN THE LOWER COURT

Appellant was convicted in the District Court of the Fourth Judicial District of Utah County, State of Utah, the Honorable J. Robert Bullock presiding, on the 16th day of January, 1980.

RELIEF SOUGHT ON APPEAL

The appellant respectfully requests that, on the basis of the grounds herein set forth, his conviction be

reversed and that he be released from the custody of the State of Utah forthwith.

STATEMENT OF THE FACTS

On October 9, 1979, the appellant and his wife were staying at their parents' home in Goshen, Utah. (Trial Record 61:21). At the same time, they were visiting the house of appellant's older brother in Santaquin in order to check on the house and care for the yard while the brother was out of town. (T.R.62:1). Another, younger brother of the appellant also had access to the Santaquin house and yard at the time.

The house belonging to appellant's older brother is situated on a large lot on the corner of two roads, on the northwest corner of the intersection. The house is separated from the roads on its south and east by large trees and yards and various types of shrubbery. The front door is on the east side of the house, with a walkway leading from the sidewalk to the door. The carport and driveway are also on the east side, toward the north end of the house.

The kitchen door is on the southwest corner of the house, where there is a kind of private driveway leading from the door to the road on the south of the house. Just east of the kitchen door is a living room window on the south side of the house, and west of the south driveway and kitchen door is the back yard.

On the afternoon of the 9th of October, a Mr. Walter Smith of Santaquin went to the house to read the water meter. He did not know the location of the meter beforehand and had to search the yard for it. Coming from the neighboring house on the north of the house in question, he left the public sidewalk on the east side of the house and entered the front yard. Not finding the meter on the east side of the house, he angled across the corner of the house to the south side of the yard and found the meter located on the property line near the road on the south edge of the yard, about 50 feet from the house. (Hearing Record 11:26).

While in the yard, Mr. Smith observed the following: two flower pots in the living room window containing single plants of a height between one, and one and a half inches tall (H.R.12:15, 28:5), a large metal washtub near the kitchen door containing several plants of heights between two and six inches (H.R.13:28), and two white five-gallon plastic buckets in the back yard, west of the private driveway, each containing two to four plants between five and six inches tall (H.R.28:26, 29:28). Mr. Smith recognized the plants from a course that he had taken in law enforcement, and concluded that they were marijuana.

Within half an hour, Mr. Smith had notified Officer Gary McGiven who went directly to the property, without a search warrant, to confirm the report. Officer McGiven

walked directly onto the property and examined the plants close-up. He admitted that the weeds on the property were about a foot higher than the edge of the metal tub, and that the plants extended only a couple inches over the edge of the tub. (H.R.27:12, 16:14). The weeds in the back yard were also higher than the tops of the five-gallon buckets (H.R.27:18). As to the plants in the window, Officer McGiven testified that he had to get right next to them to see what they were (H.R.28:11). In short, none of the plants could be identified from the street or from any other public property (H.R.26:9-16, 16:14). The officer did not in fact attempt to observe them from a public place (H.R.24:26) and although he could have gotten a search warrant that day, he failed to do so but rather went directly onto the property to search for the reported plants (H.R.24:2, 24:30).

Having concluded that the plants were marijuana, the officer established surveillance from behind a fence on the north end of the back yard. The metal tub had been moved to a position about ten feet inside that fence (H.R.37:12) so that from the fence the officer could see the tub ten feet away and the two plastic buckets at the south end of the yard about 90 feet away (H.R.23:11). It was not shown who had moved the tub. At about 6:00 p.m. on the 12th, the fourth day of the surveillance, the officer observed the appellant come out of the house and

water the plants in the two plastic buckets 90 feet away (H.R.35:7, T.R.20:7, 22:16). Appellant was never observed watering or caring in any way for any of the other plants, nor taking care of the plants in the buckets on any other occasion (T.R.22:22, 23:5). He was only seen watering those in the buckets, and was never observed near the other plants. Appellant's brother (not the owner of the house but a younger brother) however, was observed near the metal tub, apparently checking the plants.

Having observed the appellant watering the plants in the buckets, Officer McGiven and others arrested the appellant and his wife. They had no warrant to arrest appellant or to search the property, but nonetheless took him into custody and seized all the plants in the yard which appeared to be marijuana (H.R.31:24-27).

ARGUMENT

- I. THE INITIAL SEARCH BY THE POLICE VIOLATED APPELLANT'S RIGHTS UNDER THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION, AND ALL EVIDENCE OBTAINED AS A RESULT OF THAT SEARCH SHOULD HAVE BEEN SUPPRESSED.

Based upon the facts of the case outlined above, appellant made a motion to suppress all evidence of the marijuana plants found growing at the Santaquin house. That motion was denied after a hearing held immediately before appellant's trial. Appellant submits that the denial of that motion was error and that all such evidence should have been suppressed. Since the evidence was crucial to

the State's case, its erroneous admission is grounds for reversal.

The first issue to resolve is whether there was in fact a search or seizure for the purposes of the Fourth Amendment. The courts make a distinction between those cases in which, before such an observation is possible, the officer intrudes upon the protected privacy of the suspect. In the first instance, no search or seizure occurs for the purposes of the Fourth Amendment; but in the second, the intrusion of the officer upon the constitutionally protected privacy of the suspect invokes the requirements of the Amendment that such intrusion be authorized by a warrant or be in conformance with certain well-defined exceptions to the warrant requirement.

The scope of protection offered by the Fourth Amendment is delineated in the case of Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 14 L.Ed.2d 576 (1967). There, the United States Supreme Court stated:

The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. [Citation] But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. 88 S.Ct. at 511. [Emphasis added].

Thus, if a person exposes the evidence or fruits of a crime to the public, he very likely forfeits the protection of the Fourth Amendment because the officer's observation of

that evidence would not constitute a "search" under the Fourth Amendment. However, if the person has sought to protect his property from public scrutiny, any observation of that property would have to meet the requirements of the Fourth Amendment. The officer would either have to obtain a warrant to search or be able to justify his search under one of the limited exceptions to the warrant requirement.

A number of cases have applied the Katz rule to facts very similar to those of this case. Although Katz itself dealt with electronic surveillance, its rationale applies equally well to searches of the private property of citizens. In such cases, the court seeks to determine whether the accused held a "reasonable expectation of privacy" in his property at the time when the police conducted a search.

For example, in Lorenzana v. Superior Court of Los Angeles County, 9 Cal.3d 626, 108 Cal.Rptr. 585, 511 P.2d 33 (Calif. 1973), in which the California Supreme Court overruled several prior California cases such as People v. Bradley, 81 Cal. Rptr. 459, 460 P.2d 129 (1969), the Court considered a similar case in which the police received information that a suspect was selling drugs at his home. Officers proceeded to the address without first obtaining a warrant either to search the house or to arrest the suspect. The house was a single family home, set back about

70 feet from the sidewalk, with entrances on the west side and the rear. On the east side of the house there were no doors or pathways but there was a strip of grass-and-dirt-covered ground 6 to 10 feet wide separating the side of the house from the edge of the driveway of the house next door. The officers, rather than approach the house using the paths to the front door, walked up the neighbor's driveway and crossed over this strip of ground to a window on the east side of the house. From the driveway, they could see nothing through the window. But from a position about six inches from the window, they could see into the house through a space in the curtains. It was necessary to cross the ground and be within six inches of the window to observe anything inside. From that position, where they had no permission from the defendant to be, they could see the defendant inside involved in a heroin transaction. On the basis of that evidence, the defendant was arrested and convicted.

In deciding whether the Fourth Amendment requirements were applicable to the officers in that case, the court applied the test of Katz. Under the facts, the court framed the issue as whether the police were making their observations from a position on a part of the house's surrounding property which was in some manner expressly or impliedly opened to the public and to public use:

These cases clearly demonstrate the salutary rule of law that observations of things in plain sight made from a place where a police officer has a right to be do not amount to a search in the constitutional sense. On the other hand when observations are made from a position to which the officer has not been expressly or impliedly invited, the intrusion is unlawful unless executed pursuant to a warrant or one of the established exceptions to the warrant requirement. 511 P.2d at 39. [Emphasis added.]

Finding that the officer in the case did not have express invitation to cross the defendant's property to a position six inches from his window, the court considered whether such invitation could be implied from any facts which might indicate that the property was opened to public use generally. Examining the physical characteristics of the house and yard, the court stated:

None of this evidence could support a finding that normal approach to the Lorenzana home would lead the public to within six inches of the window in question. . . . The record reveals no substantial evidence supporting a conclusion that a normal access route to either the Lorenzana home or the house behind it on the same lot would lead to a point within a scant six inches from the window through which the officers made their observations; thus, those observations were made from a position where the officers had no right to be. Id. at 40-41

Thus, the court reasoned that where a party has developed his property in such a way that a normal access route to the house is provided and clearly defined, though other routes may be possible and other areas of the property accessible to the public in the sense that there are no fences or barriers erected to prevent passage,

that party has indicated his intention to allow public access by the normal route but to preserve his privacy in all other areas. Police officers intruding in those other areas, away from the normal access route, must meet the requirements of the Fourth Amendment. The court explained:

. . . the generic Katz rule permits the resident of a house to rely justifiably upon the privacy of the surrounding areas as a protection from the peering of the officers unless such residence is "exposed" to that intrusion by the existence of public pathways or other invitation to the public to enter upon property. This justifiable reliance on the privacy of the non-common portion of the property surrounding one's residence thus leads to the particular rule that searches conducted without a warrant from such parts of the property always are unconstitutional unless an exception to the warrant requirement applies. Id. at 42.

Similar conclusions were reached in the cases of Jenkins v. State, 248 So.2d 758, (Ct.Crim.App.Alab. 1971) and Olivera v. State, 315 So.2d 487 (Dist.Ct.App.Fla. 1975).

The fact that the evidence in this case was found lying in the yard by officers walking around the yard rather than by looking through drawn curtains or standing only inches away from the house itself is not significant. In Wattenburg v. United States, 388 F.2d 853 (9th Cir. 1968), officers investigating the theft of trees from federal lands went to the residence of the defendant and found a stockpile of trees next to his home, among some standing trees and in a pile only 20 to 35 feet from the building and a mere 5 feet from a public parking place. The defendant's home itself was a resort lodge, open to the public,

and the primary issue in the case was whether the area where the trees were piled was property which the defendant sought to protect as private.. The pile was in plain view of the parking lot, but in order to determine if the trees were stolen, the officers had to step onto the property and examine the trees close up. The court held that though the pile of trees was on property which was unenclosed by any kind of fence and was bordered only by the curb of the parking lot, it was still apparently meant to be protected as private by the defendant, since there were no paths onto that part of the property from any public area which could be considered normal approaches to the residence. The court concluded:

A more appropriate test in determining if a search and seizure adjacent to a house is constitutionally forbidden is whether it constitutes an intrusion upon what the resident seeks to preserve as private even in an area which, although adjacent to his house, is accessible to the public. . . . There can be no doubt that Wattenburg, in placing the stockpile this close to his place of residence, sought to protect it from this kind of government intrusion.
388 F.2d at 857.

Similarly, in Black v. State, 168 S.E.2d 916 (Ct. App.Ga. 1969), the court held that entry upon a person's front yard for the purpose of examining possibly stolen property was unlawful. There, the police suspected that the resident of a home had stolen an automobile engine. Arriving at the home without a warrant to search or arrest,

they saw a motor hanging from a tree in the front yard, but were unable to see from the path to the front door whether there were marks on the motor which would identify it as the stolen one. Walking over to the tree, they examined the motor close up and determined that it was stolen. The court on appeal, however, determined that this intrusion violated the Fourth Amendment, since, although the area was unenclosed, it was a part of the property which the suspect meant to preserve as private. As soon as the police stepped off the path to the front door, which was the normal access route to the entrance of the home, they were committing an unlawful intrusion. See also State v. Buchanan, 432 S.W.2d 342 (Mo. 1968) and Durham v. State, 471 S.W.2d 527 (Ark. 1971).

In the present case, there was clearly sufficient evidence brought out at the suppression hearing to establish that the evidence of the presence of marijuana plants on the property in question was obtained as a result of a search that violated the Fourth Amendment. Here, the only normal and apparent public approaches to the entrance of the Santaquin house were the carport driveway on the north-east corner of the house and the path leading from the east road to the front door, also on the east side of the house. Neither of these normal public access routes was anywhere near the window where the potted plants were observed, nor were either of the routes close to the kitchen

door, near which the metal tub was located. Both the window and the kitchen door were in the south side of the house, completely opposite and isolated from the normal approaches to the public entrance of the house. There was certainly no express or implied invitation to the public to enter the back yard, where the plastic buckets were located.

Further, it is clear that the area where the plants were found was an area which the owner of the house sought to preserve as private. As stated, that side of the house was far from the public approaches to the main entrance. That side of the house faced away from any neighboring house, and yet was sufficiently distant from the road that it would be impossible for anyone to observe the plants from any public property as long as they remained small. Even the fact that the water meter was on that side of the house does not tend to negate the fact that the owner sought to protect his privacy there, since the meter was at least 50 feet away from the house, from which distance the plants could not be recognized. The presence of a makeshift driveway was also not an invitation to public access, since it was a private driveway, located in an area which was not intended to be a normal, public approach to the house.

Because of these facts, when the officer left the public street and public sidewalk and entered the property

of the appellant to observe the plants, he intruded upon an area in which the appellant had a reasonable expectation of privacy. Even though the planters themselves may have been in plain view from the street, the facts show that the plants could not be recognized from that distance. Since the officer had no warrant to search, and could not justify his search on the basis of any exception to the warrant requirement, his search was unlawful. All evidence of the presence of marijuana, obtained as a result of that search, should have been suppressed. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed2d 441 (1963).

II. ALL EVIDENCE OF THE PRESENCE OF MARIJUANA EXCEPT THAT RELATING TO THE PLANTS IN THE PLASTIC BUCKETS SHOULD HAVE BEEN EXCLUDED AS IRRELEVANT AND PREJUDICIAL TO THE DEFENDANT.

During the trial, it was established that the only observation which connected the appellant to any of the marijuana was the officer's testimony that the appellant watered the plants in the two white plastic buckets. (T.R.22:22, 23:5). There was no evidence that the appellant was connected in any way with the other plants. After the presentation of evidence concerning those other plants, the appellant therefore moved to exclude such evidence, since it constituted evidence which was irrelevant as to his offense. That motion was denied. (T.R.52:8-53:15, 58:14). The appellant respectfully submits that the denial of his motion was improper and that the admission of the

evidence of the other plants was highly prejudicial and constituted reversible error.

It is well established that generally where a defendant is charged with a specific offense, evidence against him will be admitted only if it is relevant to that offense. If there is no apparent connection between an item of evidence and the offense of the defendant, that evidence must be excluded, especially where it might prejudice the jury against the defendant.

In a very similar case, the Supreme Court of Oregon held such unconnected evidence to be inadmissible and highly prejudicial. In State v. Hall, 523 P.2d 556 (Ore. 1974), a suspect shared a four-bedroom home with a married couple. On the occasion in question, the police raided the home to search for drugs and found, among other things, 95 grams of marijuana in the couple's bedroom. The presence of that marijuana in the home was admitted into evidence in the trial of the suspect for possession of marijuana, although the suspect argued that it was inadmissible against him. The court reversed his conviction, stating:

On oral argument, the State conceded that the 95 grams of marijuana found in the west bedroom was erroneously admitted. This concession was well warranted. The evidence was uncontroverted that the west bedroom was occupied by the Spikes. Nothing produced at trial indicated that petitioner had any right of access to this room, nor that he had actual or constructive possession

of the marijuana in that room. This conclusion alone requires reversal because we cannot be certain that the jury did not rely on this evidence in finding petitioner guilty. 523 P.2d at 558.

Thus, the court held that where there was no evidence tending to connect the defendant with the presence of the marijuana, its admission was highly prejudicial and required reversal.

In Commonwealth v. Williams, 330 N.E.2d 502 (App. Ct. Mass. 1975), a similar conclusion was reached. There, the police had kept a house under surveillance and had observed two defendants entering and leaving the house on numerous occasions. Executing a search warrant, the police met one of the defendants at the door and found another in bed in a bedroom. They further found heroin in the kitchen and arrested both the men for possession of heroin. On appeal, the court held that where there was no evidence that either was owning or renting the home which might establish constructive possession, nor any evidence that either of them had any form of dominion or control over the kitchen area of the house or even of the apartment as a whole, there was simply no connection between the suspects and the contraband, and the presence of the heroin in the kitchen was not competent evidence against them.

In People v. Miller, 268 N.E.2d 213 (App. Ct. Ill. 1971), a court held that evidence of narcotics and paraphernalia which could not be directly connected with the

defendant should have been excluded and its admission was highly prejudicial and constituted reversible error. In another case of the same name, People v. Miller, 328 P.2d 506 (Dist.Ct.App.Calif. 1958), a court similarly ordered reversal where evidence of the presence of marijuana near an individual's apartment was irrelevant and highly prejudicial. There, the court explained:

The court clearly committed error in the admission of the marijuana. it was not only separated from appellant by space but by time as well Nothing was produced in evidence to connect appellant with it in any way. . . . Something more than mere suspicion must be shown and appellant's connection with this marijuana does not rise above the level of pure guess and conjecture. * * * The prejudice to appellant from the introduction of this very large cache of marijuana is clear, and this was aggravated by the court's reiterated statement that the jury "has a right to consider it."

In the present case, there was similarly no evidence tending to connect the appellant with any plants other than those in the white plastic buckets. He was never seen near any of the other plants. It is true that the plants in the tub were moved, but the conclusion that the appellant moved them is pure guesswork and mere conjecture, not sufficient to make those plants relevant to appellant's alleged offense. The fact that appellant's younger brother, one not living at that home, was in fact seen near the tub of plants serves to further add to the uncertain nature of any connection between appellant and those plants, since

it could easily have been the brother who moved the tub.

Furthermore, the fact that the appellant had some access to the yard and to the house is not sufficient to establish the necessary connection between him and the plants, as illustrated in the cases above. Exclusive control of a premises may serve to create a presumption that the person in control has possession of all objects on the premises, but where there is joint possession, there must be further circumstances establishing beyond a reasonable doubt that the suspect exercised some form of dominion or control over the object. State v. Wiley, 522 P.2d 281 (Mo. 1975). Here, if the appellant had possession of the premises at all, it was shared with his wife, his younger brother who was present at the same time, and with his older brother, the owner of the house. In order for his access to the premises to serve as a justification for admitting evidence of the plants, there would have to be other circumstances connecting him with them. In this case, there were simply no facts connecting appellant with these other plants, and the admission of evidence concerning them was erroneous.

That the admission of evidence concerning the plants in the metal tub was prejudicial to the appellant and requires reversal is clear from the fact that the only plants positively identified as marijuana at the trial were plants from the metal tub. (T.R.26:4-9). There was

no direct testimony by any expert witness that the plants which the appellant actually was seen watering were marijuana plants. Thus, if the plants in the tub had been excluded as required by the law, there would have been insufficient evidence to convict the appellant; their admission therefore was highly prejudicial and requires reversal.

Even if the court could have been justified in finding a connection between the appellant and the other plants, their admission would still have been improper under the general rule that evidence of a defendant's other crimes or wrongful acts is inadmissible for the purpose of degrading his character or to establish his propensity to commit the crime in question. If the appellant were shown to be connected to the other plants, his connection with them could only establish that, in regards to them, he was in unlawful possession of them. But evidence of his unlawful possession of other plants, constituting allegations of other crimes, would be excluded under Rules 47 and 55 of the Utah Rules of Evidence.

In State v. Goodliffe, 578 P.2d 1288 (Utah 1978), those rules are summarized as follows:

The rules of evidence require rejection of evidence of specific behavior to prove a character trait except evidence of conviction of crime. The rule, of course, is different where the evidence of other crimes or civil wrongs is relevant to prove some other material

fact such as motive, opportunity, intent, preparation, plan, knowledge, or identity.

In State v. Schieving, 535 P.2d 1232 (Utah 1975), the rule is stated thus:

The general rule is that in a criminal case evidence which shows or tends to show that the defendant had committed another crime in addition to that for which he is on trial is inadmissible. However, an exception to the rule is that evidence of another crime is admissible when it tends to establish motive; intent; absence of mistake or accident; or to show a common scheme or plan embracing commission of similar crimes so related to each other that the proof of one tends to establish the crime for which the defendant is on trial.

In the present case, where the appellant was charged with the cultivation of the plants in the white buckets but evidence was introduced which tended to show his possession of other plants, none of the exceptions to the general rule of inadmissibility are applicable. Here, the presence of the other plants adds nothing to the establishment of the appellant's motive, intent, or knowledge, because there was nothing in the evidence which tended to show that he had any motive, intent, or knowledge or undertook any act of cultivation with respect to those other plants. No inference as to motive, intent, or knowledge arises from his alleged possession of the other plants which does not arise from his watering of the plants in the white buckets. And since the only evidence of his motive, intent, or knowledge as to the plants in the white buckets arose from a statutory

presumption based upon his cultivation, Section 58-37-8(11) U.C.A., the additional evidence of the other plants therefore added nothing.

Nor does the presence of the other plants establish a plan which would tend to verify his cultivation of the plants in the white buckets, since absent a showing that he watered or did any other act constituting "cultivation" of any other plants, there would be no inference from his connection with the other plants which would support the charge of cultivation of the plants in the white buckets. Certainly, proof of some connection between him and the other plants, or of his possession of those plants, does not tend to prove the fact that he watered the plants in the white buckets, for which he is charged.

Therefore, since the evidence of the other plants could be offered only if he was in possession of those plants, and such evidence would be evidence only of other crimes of the appellant, it would be inadmissible under the general rule. As such evidence does not fit any of the adopted exceptions in this case, it should have been excluded.

III. FAILURE OF THE COURT TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF POSSESSION OF MARIJUANA WAS ERROR.

During the trial, appellant requested that the court deliver to the jury two instructions, one detailing the elements of the offense of simple possession of marijuana

as prohibited by Section 58-37-8(2)(a)(i), U.C.A., and the other instructing the jury that it could find the defendant guilty of the lesser included offense of simple possession of marijuana. Both these instructions were refused by the court. Appellant respectfully submits that such refusal was erroneous, since simple possession of marijuana is a lesser included offense of manufacture of marijuana, and since in this case the jury may have found insufficient evidence on the greater charge but sufficient evidence on the lesser charge.

Section 58-37-8(1)(a)(i) provides:

Except as authorized by this act, it shall be unlawful for any person knowingly and intentionally:

- (i) To produce, manufacture, or dispense, or to possess with intent to produce, manufacture, or dispense, a controlled or counterfeit substance.

Section 58-37-8(2)(a)(i) provides:

It shall be unlawful:

- (i) For any person knowingly and intentionally to possess or use a controlled substance . . .

Violation of the former provision, with respect to marijuana, carries a felony sentence. Violation of the latter, with respect to marijuana, a misdemeanor sentence, for first offenses. The latter is clearly a lesser offense than the former. The issue here is whether it is an included offense.

An offense is included in another if there is no element of the former which is not also an element of the latter. On the basis of the statutes and the usual definitions

of the terms therein, it is clear that simple possession of marijuana includes no element which is not also an element of production of marijuana. The mental state required for each is the same. As to the substantive elements of each, Section 58-37-2 defines "possession" as including "joint or individual ownership, control, occupancy, holding, swallowing, injection, or consumption, as distinguished from distribution, of controlled substances." It defines "production" as "manufacturing, planting, cultivation, growing, or harvesting of a controlled substance," and "manufacture" as "production, preparation, propagation, compounding, or processing of a controlled substance."

In the instant case, the conduct of the appellant which satisfies the definition of production or manufacture was his watering of the marijuana plants. However, such conduct also fits the definition of possession, for it constitutes "maintaining" the plants, at least, and arguably requires the exercise of some degree of "control" or "retaining" at the moment that the conduct occurs. Therefore, as applied to the facts of this case, the conduct of the appellant satisfies both the simple possession statute and the production statute, and there is no element of the simple possession statute, as applied to his conduct, which is not also an element of the production statute. Since the evidence could have been found by the jury insufficient for the greater but sufficient for the lesser offense, the appellant was entitled to an instruction on the lesser offense.

IV. THE FAILURE OF THE COURT TO INSTRUCT THE JURY THAT THE OFFENSE CHARGED INCLUDED THE ELEMENT OF INTENT TO DISTRIBUTE WAS PREJUDICIAL ERROR.

During the trial, appellant also requested an instruction defining the offense as including, as an element of the crime, the intent to distribute the controlled substance. However, the court's instruction on the elements of the offense, Instruction No. 6, did not include that element as an element of the offense charged. Appellant submits that that failure by the court constituted reversible error since the statute under which he was charged, Section 58-37-8(1)(a)(i), includes as an element the intent to distribute or "dispense."

Section 58-37-8(1)(a)(i) makes it a felony:

To produce, manufacture, or dispense, or to possess with intent to produce, manufacture, or dispense, a controlled or counterfeit substance.

The language of subsection (a)(i) is ambiguous as to the application of the words "with intent to" to the operative words "produce, manufacture or dispense."

Generally, acts constituting production could hardly be viewed as inherently more culpable than those constituting possession, especially where production is for one's own use and not for sale. Indeed, some states have provided by statute that production which is not for the purpose of distribution shall not be subject to the same penalty as production which is for the purpose of distribution, since production for one's own use is

essentially equivalent, in moral culpability, to simple possession. (See North Carolina G.S. 90-87(15) and State v. Whitted, 205 S.E.2d 611.) In this case, evidence at trial showed approximately a dozen plants, the largest of which was five inches high. Production or cultivation would, in most circumstances, involve possession of the substance.

In light of the fact that simple production for one's own use is inherently no more culpable than simple possession, a misdemeanor offense, the statute prohibiting production should be interpreted, if possible, to apply the same penalty to simple production as is applied to simple possession. Since the Utah statute prohibiting production is ambiguous, it can and should be interpreted in such a way that production is a felony only if it involves an intent to distribute. In other words, Section 58-37-8(1)(a)(i) should be read in such a way that one element of production under that section, which makes production a felony, is an intent to distribute. Simple production, which is inherently a misdemeanor, would be prosecutable under the simple possession section, Section 58-37-8(2)(a)(i).

In the present case, this conclusion mandates the result that the appellant was entitled to an instruction that the offense for which he was charged, production under §58-37-8(1)(a)(i), included the element of intent to distribute or dispense, since under that section he was subject

to a felony penalty. The giving of the court's instruction which omitted that element, and the court's failure to give the appellant's requested instruction, constituted reversible error, particularly in light of the fact that the court also refused to give the appellant's requested instruction on the lesser included offense of simple possession, which would have been appropriate in this case where there was no evidence of the appellant's intent to distribute the marijuana and which would have been the proper offense to charge since the evidence tended to show only simple production, inherently a misdemeanor.

V. APPELLANT IS ENTITLED TO REVERSAL IN THIS MATTER SINCE THE EVIDENCE PRESENTED AT TRIAL WAS NOT SUFFICIENT TO JUSTIFY A CONVICTION.

On appeal, the test of the sufficiency of the evidence at trial is whether the evidence presented was sufficient to establish a prima facie case of every element of the crime charged. If there was not enough evidence on any element to enable the jury to reach a verdict of guilt beyond a reasonable doubt, as a matter of law, then a conviction must be reversed.

In the present case, there were several elements on which there was not sufficient evidence to enable the jury to reach a justifiable verdict. First, in regards to the element of intent to distribute, as discussed above, the State presented no evidence at all concerning the appellant's intent to distribute the marijuana in the future.

Considering the fact that the appellant was only a guest in the house and was only temporarily taking care of the property, the only reasonable inference from the evidence as a whole was that he had no intent at all regarding the future of the marijuana. He could not contemplate having control of it in the future, and therefore could not possibly have had an intent to sell it.

On the element of knowledge and intention as to the conduct of the appellant, it is provided at Section 58-37-8(11) that any evidence of production will raise the presumption that the suspect acted with knowledge of the character of the substance produced. However, such a presumption is rebuttable, and is particularly vulnerable under circumstances where, as here, it is shown that a suspect is not the actual owner of the substance but was, if anything, temporarily performing a service. In this case, evidence that the appellant was merely visiting the home for the purpose of caring for the house and yard was sufficient to rebut the statutory presumption that he knew that any of the plants were marijuana. In the absence of the presumption, there is nothing in the record, nor in the statements of the appellant himself (T.R.44:9-20), that would indicate that the appellant had ever seen marijuana before, had been told that there was marijuana in the yard, or that he knew from any other source that there was marijuana in the plastic buckets that he was seen watering.

Even more crucial to the question of sufficiency of the evidence is the fact that there was no evidence in the case establishing to a sufficient moral certainty that the plants in the plastic buckets were marijuana. As pointed out before, the evidence indicated only that the plants in the metal tub were analyzed by an expert and determined to be marijuana. Such a finding has no rational connection to any other location or object on the premises, unless it can somehow be inferred that every potted plant on the yard in question was a marijuana plant. The failure of the State to present competent evidence that the buckets contained marijuana negates the inference that when he watered the plants in the buckets, he was cultivating marijuana.

Since the evidence was therefore insufficient on the elements of the presence of a controlled substance, the mental state of the appellant, and the specific intent to distribute a controlled substance in the future, the State failed to present a prima facie case under Section 58-37-8(1)(a)(i) and the case should not have been submitted to the jury. To allow the conviction was reversible error.

During the trial, appellant moved to dismiss the case on the grounds of insufficiency of the evidence on the elements of the offense. That motion was denied. The appellant respectfully requests that the conviction be

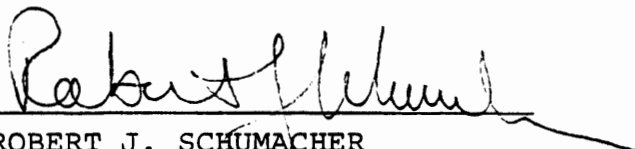
reversed on the grounds that that dismissal should properly have been granted.

CONCLUSION

Defendant-Appellant requests the Court to reverse the conviction and judgment entered against the defendant in the trial court and remand the case for vacating of that judgment.

DATED this 25 day of April, 1980.

Respectfully submitted,


ROBERT J. SCHUMACHER
Attorney for Appellant

MAILING CERTIFICATE

I hereby certify that I mailed 11 copies of the foregoing Brief Of Appellant, to the Utah Supreme Court, State Capitol, Salt Lake City, Utah 84114, and 3 copies of the same to the Office of the Utah Attorney General at 236 State Capitol, Salt Lake City, Utah 84114, this 25th day of April, 1980.

