1982

State of Utah v. Wayne Neil Harris : Brief of Respondent

Utah Supreme Court

H. Don Sharp; Attorney for Appellant;
David L. WIlkinson; Attorney for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 18294
WAYNE NEIL HARRIS,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

Appeal from the judgment and conviction of Production of a Controlled Substance, a third-degree felony, in the Second Judicial District Court in and for Weber County, the Honorable Douglas L. Cornaby, Judge, presiding.

DAVID L. WILKINSON
Attorney General
EARL F. DORIUS
Assistant Attorney General
236 State Capitol
Salt Lake City, UT 84114

Attorneys for Respondent

H. DON SHARP
Legal Forum Building
2447 Kiesel Avenue
Ogden, UT 84401

Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 18294
WAYNE NEIL HARRIS,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

Appeal from the judgment and conviction of Production of a Controlled Substance, a third-degree felony, in the Second Judicial District Court in and for Weber County, the Honorable Douglas L. Cornaby, Judge, presiding.

DAVID L. WILKINSON
Attorney General
EARL F. DORIUS
Assistant Attorney General
236 State Capitol
Salt Lake City, UT 84114

Attorneys for Respondent

H. DON SHARP
Legal Forum Building
2447 Kiesel Avenue
Ogden, UT 84401

Attorney for Appellant

TABLE OF CONTENTS

Cases Cited

Table of Contents

Table of Contents

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 18294
WAYNE NEIL HARRIS,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The appellant, Wayne Neil Harris, was charged with Production of a Controlled Substance (to wit: cultivation of marijuana), a third-degree felony, under Utah Code Ann., § 58-37-8(1)(a)(i) (1953), as amended.

DISPOSITION IN THE LOWER COURT

The appellant was found guilty after a bench trial on February 4 and 10, 1982 in the Second Judicial District Court in and for the County of Weber, State of Utah, the Honorable Douglas L. Cornaby, Judge, presiding. On March 3, 1982, the appellant was sentenced to the Utah State Prison for an indeterminate period not to exceed five years and fined $5,000. He appeals from the judgment and sentence entered against him.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming the judgment and sentence of the trial court.

STATEMENT OF FACTS

On June 27, 1981, Dee Knight, who lived on land adjoining that of appellant's, contacted the mayor of Farr West City in Weber County to inform him that he had observed what he believed were marijuana plants growing on appellant's property (T. 24, 25).[1] That same day, at one o'clock in the afternoon, Deputy Anderson of the Weber County Sheriff's Office (WCSO), accompanied by Trooper Jackson of the Utah Highway Patrol, arrived at Mr. Knight's residence and spoke with him about the matter (SH 22, T. 26). From a vantage point on his property, Mr. Knight pointed out to Deputy Anderson the suspected marijuana plants growing in a garden area some distance from appellant's house (T. 56, 57).

Upon seeing the plants and believing them to be marijuana (T. 106), Deputy Anderson (who had previous experience in the identification and seizure of live marijuana plants (T. 64, 101)), along with Trooper Jackson, pulled his patrol car into the open entrance of appellant's driveway

---

[1]Reference to "T. 24," e.g., is to page 24 of the trial transcript; reference to "SH 24," e.g., is to page 24 of the suppression hearing transcript.

(T. 55, 65) and walked down it in order to talk with appellant, who was out working in his yard (T. 29, 62). During the conversation with appellant (the exact location of which is in dispute, but which took place on the driveway or a very short distance from it (SH 50, 51; T. 62; see Appellant's Brief, Appendix A), Deputy Anderson saw a number of marijuana plants in appellant's garden (T. 64). He then returned to his patrol car, radioed the WCSO and requested that Detective Shupe come to appellant's property (T. 64). Shortly thereafter, Detective Shupe (who also had experience in the identification of live marijuana plants (T. 138)) arrived, joining Deputy Anderson and Trooper Jackson at a point close to where the latter two officers had initially engaged appellant. Appellant was then arrested and the marijuana plants were siezed (T. 65, 66). Two days later on June 29, 1981, Detective Shupe returned to appellant's residence with a search warrant and seized additional evidence (T. 108).

At a suppression hearing prior to trial, Judge Cornaby denied appellant's motion to suppress the evidence seized on June 27 and 29 (SH 61). At trial, he again denied appellant's moion to suppress the evidence (T. 184, 185). Having waived a jury trial (T. 134), appellant was convicted by Judge Cornaby of cultivating marijuana (a violation of Utah Code Ann., § 58-37-8(1)(a)(i) (1953), as amended), and

sentenced to the Utah State Prison (T. 198; Sentencing Hearing Transcript, p. 15). On March 3, 1982, the day of the sentencing hearing, appellant filed a petition for certificate of probable cause. The trial court set a hearing on this petition for March 9, 1982; however, at the appointed time neither the state nor the appellant showed up for the hearing (R. 53).

ARGUMENT

POINT I

THE EVIDENCE SEIZED WITHOUT A WARRANT ON JUNE 27, 1981 AND THAT SEIZED PURSUANT TO A WARRANT ON JUNE 29, 1981 WAS NOT INADMISSIBLE AS FRUIT OF AN UNLAWFUL SEARCH AND SEIZURE.

Appellant's argument concerning the admissibility of the evidence admitted at trial is twofold. First, he asserts that the evidence seized without a warrant on June 27, 1981 should not have been admitted because it was the fruit of an unlawful search and seizure. Second, citing Mapp v. Ohio, 367 U.S. 643 (1961), he argues that because the search for and seizure of evidence on June 29, 1981 was made pursuant to a warrant obtained on the basis of evidence and information garnered from the allegedly illegal search and seizure two days earlier, the evidence seized on the 29th was also inadmissible because it constituted "fruit of the poisonous tree."

Given the facts of this case, this Court is initially confronted with the questions of whether the observations made by the police officers on the 27th were lawful and if they were, whether the lawful observation of the contraband was itself sufficient to justify the warrantless seizure. The answers to these questions will determine the legality of the officers' conduct on the 27th and thereby resolve the larger question as to the admissibility of the evidence seized both on the 27th and 29th (given that appellant's objection to the search and seizure on the 29th is based solely on the alleged illegality of the officers' conduct two days earlier[2]).

In Katz v. United States, 389 U.S. 347 (1967), the United States Supreme Court said:

> [T]he 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.

Id. at 351. Katz introduced the justified expectation of privacy approach for determining whether a place is to be especially protected against unreasonable police intrusion.

---

[2]Appellant suggests that there may have been a violation of Utah Code Ann., § 77-23-6 (1953), as amended, which concerns a receipt for property seized pursuant to a search warrant; however, he then admits that a violation under that section would not render the evidence seized inadmissible.

Lower courts interpreting and applying Katz have often relied on Justice Harlan's concurring opinion therein,[3] which elaborated on the majority opinion as follows:

> As the Court's opinion states, "the Fourth Amendment protects people, not places." Generally, as here, the answer to that question requires reference to a "place." My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.

Id. at 361.

In short, in the present case:

> [t]he concern . . . is with what police investigative practices, when directed at residential premises, do not intrude upon a protected privacy expectation as to those premises.

LaFave, Search and Seizure: A Treatise on the Fourth Amendment (1978), § 2.3, Residential Premises.

---

[3]See, e.g., United States v. Freie, 545 F.2d 1217 (9th Cir. 1976); Government of Virgin Islands v. Berne, 412 F.2d 1055 (3d Cir. 1969); People v. Berutko, 77 Cal. Rptr. 217, 453 P.2d 721 (1969).

Appellant had no justified expectation of privacy where the marijuana plants he had growing in his garden were readily visible to persons on neighboring lands. See State v. Lee, Utah, 633 P.2d 48 (1981); State v. Echevarrieta, Utah, 621 P.2d 709 (1980); State v. Wettstein, 28 Utah 2d 295, 501 P.2d 1084 (1972), citing People v. Bradley, 81 Cal. Rptr. 457, 460 P.2d 129 (1969); and Dillon v. Superior Court, 102 Cal. Rptr. 161, 497 P.2d 505 (1972). As noted in State v. Pontier, 95 Idaho 707, 518 P.2d 969 (1974),

> Planting marijuana plants in a back yard enclosed only by a picket fence and intermittent vegetation is not an action reasonably calculated to keep the plants from observation since it is certainly foreseeable that a reasonably curious neighbor, while working in his yard, might look over the picket fence into appellant's yard and see the plants, whether or not he knew what they were.

518 P.2d at 973. Thus, based on this Court's reasoning in State v. Lee, supra, wherein it said:

> For an officer to look at what is in open view from a position lawfully accessible to the public cannot constitute an invasion of a reasonable expectancy of privacy. State v. Echevarrieta, Utah, 621 P.2d 709 (1980); United States v. Polk, 433 F.2d 644 (5th Cir. 1970).

Id. at 51, fn. 3. Deputy Anderson's observation of marijuana plants growing in appellant's garden from a point on neighboring land (upon which he had been invited) did not

constitute a search and was clearly legal. See also: State v. Folkes, Utah, 562 P.2d 1125 (1977); Turner v. State, Tex. Crim., 499 S.W.2d 182 (1973); Lorenzana v. Superior Court, 108 Cal. Rptr. 585, 511 P.2d 33 (1973).

Appellant's main argument is that the officers' uninvited entry on appellant's property without a search warrant and their confiscation of the marijuana plants after appellant's arrest (all on June 27) constituted an unlawful search and seizure. Having been told by a neighbor that he had observed what he believed to be marijuana plants in appellant's garden and having themselves viewed what they believed to be marijuana plants,[4] Officers Anderson and

---

[4]Respondent recognizes that the record indicates that only Deputy Anderson actually knew what live marijuana plants looked like, but it was not unreasonable for Trooper Jackson to rely on Anderson's knowledge. Thus, all of Jackson's actions were also based on a reasonable belief that appellant was cultivating marijuana plants.

Also, appellant suggests that Dee Knight's reliability as an informer was suspect because he had never seen a live marijuana plant prior to observing those in appellant's garden, and that this in some way further illegitimatized the officers' conduct. First, Mr. Knight testified that he had seen pictures of marijuana plants prior to his observations of appellant's plants (T. 25). Therefore, he had some idea of how marijuana plants looked. Second, as People v. Hubbard, Colo., 519 P.2d 951, 953 noted:

> When the source of the information is a citizen-informant who was an eyewitness to the crime and is identified, the information is presumed to be reliable, and the prosecution is not required to establish either the credibility of the informant or the reliability of his

Jackson had probable cause to believe that a crime was being committed and therefore had a legitimate purpose in walking down appellant's driveway, to which the gate was open, in order to further investigate the matter by talking to appellant who was out in the yard working.[5]

> Absent express orders from the person in possession against any possible trespass, there is no rule of private or public conduct which makes it illegal per se, or a condemned invasion of the person's right of privacy, for anyone openly and peaceably, at high noon, to walk up the steps and knock on the door of any man's

---

> information. Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959) (additional cites omitted).

This appears to be the view adhered to in Echevarrieta, supra.

[5]Appellant makes light of Deputy Anderson's testimony at the Suppression Hearing indicating that he could not say with certainty that what he saw from Dee Knight's property were in fact marijuana plants. However, Anderson consistently maintained that he reasonably believed the plants he saw were marijuana (SH 26; T. 106). State v. Folkes, Utah, 565 P.2d 1125, 1127 (1977), made clear that:

> When a police officer sees or hears conduct which gives rise to suspicion of crime, he has not only the right but the duty to make observations and investigations to determine whether the law is being violated; and if so, to take such measures as are necessary in the enforcement of the law.

Deputy Anderson clearly had a reasonable suspicion of crime which justified his further investigation.

> "castle" with the honest intent of asking questions of the occupant thereof--whether the questioner be a pollster, a salesman, or an officer of the law.

United States v. Hersh, 464 F.2d 228, 230 (9th Cir. 1972), quoting from Davis v. United States, 327 F.2d 301 (9th Cir. 1964). As noted by Professor LaFave in Search and Seizure, supra:

> Thus, courts have held "that police with legitimate business may enter the areas of the curtilage which are impliedly open to use by the public" and that in so doing they "are free to keep their eyes open and use their other senses." [State v. Crea, 305 Minn. 342, 233 N.W.2d 736 (1975)]. This means, therefore, that if police utilize "normal means of access to and egress from the house" [Lorenzana v. Superior Court, 9 Cal. 3d 626, 108 Cal. Rptr. 585, 511 P.2d 33 (1973)] for some legitimate purpose, such as to make inquiries of the occupant [United States v. Hersh, 464 F.2d 228 (9th Cir. 1972); State v. Crea, 305 Minn. 342, 233 N.W.2d 736 (1975)] . . ., it is not a Fourth Amendment search for the police to see or hear from that vantage point what is happening inside the dwelling (additional cites and footnotes omitted).

Id. at Vol. I, p. 305.

It follows, therefore, that officers do not engage in a search if, for instance, they, from the street, observe plants in someone's yard or house and then enter on the property by a driveway or other normal access route to the house in order to determine if the plants are marijuana.

See, e.g., People v. Bradley, 81 Cal. Rptr. 457, 460 P.2d 129 (1969); People v. Superior Court, 264 Cal. App. 2d 165, 70 Cal. Rptr. 362 (1968); People v. King, 5 Cal. App. 3d 724, 85 Cal. Rptr. 461 (1970).

Citing Lorenzana, supra, this Court in Echevarrieta, supra, adopted these principles, holding that where an officer "was afforded an implicit invitation to enter upon the premises via the driveway and from his vantage point thereon, he observed the growing marijuana plants," his observation did not amount to a search in the constitutional sense. Echevarrieta, supra, at 711. See also: State v. Lee, supra. Hence, in the present case, the officers' act of walking down appellant's driveway to further investigate a possible crime by talking to appellant who was at the time out in the yard in an area toward the end of the driveway, and Deputy Anderson's subsequent observation of marijuana plants plainly visible from a vantage point on appellant's driveway (or a point very close to it)--a place the officer had a legal right to occupy--did not constitute a search and were clearly legal. Even if the officers' only purpose for entering appellant's property was to confirm their reasonable belief that what they had seen from the neighbor's land were marijuana plants, their conduct was clearly legal. See People v. Superior Court, supra.

The only question that remains concerns the legitimacy of the warrantless seizure of the plants visible

to the officers from vantage points on and off appellant's land. Appellant argues that because there were no exigent circumstances the officers acted illegally by seizing the marijuana plants, even though they were in plain view in appellant's garden, without first obtaining a warrant. However, under Utah law the warrantless seizure of the plants was legal as a justified confiscation of evidence in plain view incident to appellant's arrest, notwithstanding the absence of exigent circumstances.

Appellant was arrested without a warrant, which under the circumstances of this case was lawful and is not challenged in this appeal. See Utah Code Ann., § 77-7-2(1) (1953), as amended. State v. Folkes, supra, held that where officers could lawfully arrest an individual without a warrant:

> they could take anything in the immediate area which was so involved in the criminal conduct that it would serve as evidence in proof of the crime (footnote omitted).

Id. at 1127-1128. A further illustration of the proper operation of this rule in a situation where the police do not have a search warrant can be found in State v. Austin, Utah, 584 P.2d 853 (1978), where the Court held that police officers who were authorized to be in a hotel room, although without a search warrant, properly seized evidence in "plain view" in the suspects' wastebasket. Finally, relying on Folkes, this

Court in Echevarrieta, supra, held that where an officer, incident to the defendant's arrest and without a warrant, had seized several marijuana plants in the defendant's yard (plants which were in the immediate area and plain view of the arresting officer), the seizure was lawful. The factual situation in this last case is very similar to that in the present case, and the differences are not such as to call for a result here different from the one the Echevarrieta Court reached.

In short, under the doctrine of plain view as it is applied in Utah (which is consistent with the holding of Coolidge v. New Hampshire, 403 U.S. 443 (1971)), the officers' warrantless seizure of evidence incident to appellant's arrest was valid. It must be noted that the officers' seizure was particularly justified and reasonable since the contraband was in full view in an area where appellant had little, if any, reasonable expectation of privacy. As noted in People v. Arroyo, Super., 174 Cal. Rptr. 678 (1981), citing Lorenzana v. Superior Court, supra, there are certain situations:

> where a defendant ha[s] conducted his felonious activity in an area so open to public view that he could be deemed to have "implicitly invited" the police to observe and seize the contraband.

Id. at 682, fn. 2.

In conclusion, the officers' conduct on June 27 was both reasonable and entirely lawful. Hence, the evidence

seized on that day and the evidence seized pursuant to a warrant two days later was properly admitted at appellant's trial.

POINT II

THE TRIAL COURT DID NOT ERR IN ADMITTING INTO EVIDENCE THE RESULTS OF THE CHEMICAL TESTS WHICH INDICATED THAT SOME OF THE EVIDENCE SEIZED WAS MARIJUANA.

Appellant initially argues that the best evidence rule required that the color results of the Duquenois Levine test, performed by the state's criminalist technician to determine whether appellant's plants were marijuana, be introduced in court instead of the criminalist's testimony as to the test results. The best evidence rule, however, is not applicable in this situation. The rule is applicable only where the thing to be proved is the contents of a writing. State v. Reay, Utah, 368 P.2d 595, 597 (1962); State v. Baker, Wash., 413 P.2d 962 (1966). Hayes v. State, Okl. Cr., 397 P.2d 524 (1964) provides a clear, general statement of the rule:

> For the purpose of proving the content of a writing, the original writing itself is regarded as the primary evidence, and secondary evidence is inadmissible unless failure to offer the original is satisfactorily explained.

Id. at 527 (Emphasis in original).

The Hayes court went on to hold that in a prosecution for operating a motor vehicle under the influence of intoxicating liquor, the best evidence rule was therefore not applicable to the defendant's objection to admission of testimony concerning a blood-alcohol test on the ground that the sample of blood would be the best evidence. Accordingly, failure to introduce the color samples from the chemical test in appellant's case was not a violation of the best evidence rule.

Appellant's second argument goes to the interpretation of Utah Code Ann., § 58-37-2(24) (1953), as amended, which states the definition of "marihuana" as it was rewritten by the Utah Legislature in 1981. The deletions and additions made by the Legislature within the pertinent sentence of that section are as follows:

> The ~~words "cannabis" or~~ word "marihuana" means all parts of the ~~plants~~ plant cannabis sativa L. and ~~cannabis indicia~~ . . .

Laws of Utah 1981, Chapter 75, Section 1.

This amendment simply was an attempt to define marijuana in a scientifically and legally accurate manner by eliminating unnecessary references to "cannabis" and "cannabis indicia."[6] In State v. Navaro, 83 Utah 6, 26 P.2d 955 (1933), this Court fully discussed the history of marijuana

---

[6]The Utah Code used the word "indicia"; however, the more popular spelling appears to be "indica." Respondent uses the latter spelling hereinafter.

and the meaning of that term for legal purposes. Its conclusion is reflected in the following language from that opinion:

> The plant or drug known as Cannabis Indica, or Marihuana, has as its parent the plant known as Cannabis Sativa. It is popularly known in India as Cannabis Indica; in America, as Cannabis Americana; in Mexico, as Cannabis Mexicana, or Marihuana. It is all the same drug, and is known in different countries by different names. It is scientifically known as Cannabis Sativa, and is popularly called Cannabis Americana, Cannabis Indica, or Cannabis Mexicana, in accordance with the geographical origin of the particular plant.

Id. at 958-959. Citing Navaro, Black's Law Dictionary, 5th Edition, 1979, defines marijuana as:

> An annual herb, cannabis sativa, having angular rough stem and deeply lobed leaves. . . . A drug prepared from "cannabis sativa," designated in technical dictionaries as "cannabis" and commonly known as marijuana, marihuana, marajuana, maraguana, or marihuana [sic].

In State v. Romero, 74 N.M. 642, 397 P.2d 26, 29 (1964), the New Mexico Supreme court concluded that:

> marijuana is identical with cannabis, cannabis sativa L., and cannabis indica [in that] [m]arijuana and cannabis indica are merely geographically oriented names of cannabis, whereas cannabis sativa L. is the botanical name of cannabis.

Other state courts have reached similar conclusions. See, e.g., Martinez v. People, 160 Colo. 333, 417 P.2d 485 (1966);

State v. Curry, 97 Ariz. 191, 398 P.2d 899 (1965); People v. Savage, 64 Cal. App. 2d 314, 148 P.2d 654 (1944).

Appellant cites only one case, United States v. Lewallen, 385 F.Supp. 1140 (W.D. Wisc. 1974), in support of his assertion that under Utah Code Ann., § 58-37-8(1)(a)(i) (1953), as amended, the State had to prove that the evidence was in fact cannabis sativa L. and not cannabis indica. The holding of that case--which said that because 21 U.S.C.A. § 802 (15) referred only to cannabis sativa L. in defining marijuana, the government must show that the evidence is cannabis sativa L. and not cannabis indica or some other species in order to prove a violation of the law--has been rejected by every federal circuit court of appeals that has considered the issue. See United States v. Walton, 514 F.2d 201 (D.C. Cir. 1975) (see also fn. 12 therein citing other federal circuit decisions and several state court decisions); United States v. Dinapoli, 519 F.2d 104 (6th Cir. 1975); United States v. Lupo, 652 F.2d 723 (7th Cir. 1981); United States v. Kelly, 527 F.2d 961 (9th Cir. 1976). The Tenth Circuit's opinion in United States v. Spann, 515 F.2d 579 (10th Cir. 1975) is representative of the position taken by those courts:

> The Walton opinion is most persuasive to us, reasoning that Congress intended to outlaw all species of marihuana since all types possess the toxic agent tetrahydro-cannabinol.

Id. at 582, fn. 4.

The Utah Legislature's "cleaning up" of the statutory language defining marijuana does not reasonably indicate that it contemplated immunity from prosecution for those producing or possessing what is popularly called cannabis indica. The Legislature, like Congress, by using the term "cannabis sativa" to define marijuana intended to outlaw all species of marijuana, since all types possess tetrahydrocannabinol (THC). This is evident by the listing of THC in the schedules of controlled substances in Utah Code Ann., § 58-37-4 (1953), as amended. See § 58-37-4(2)(a)(iii)(T).

In the construction of a statute, the Court must be controlled by the evident purpose of the Legislature to attain a certain end. State v. Navaro, supra. In short, the fundamental question which transcends all others is what was the intent of the Legislature. Johnson v. Tax Commission, 17 Utah 2d 337, 411 P.2d 831 (1966). Insuring proper effect to legislative intent and purpose is a primary consideration. Parson Asphalt Production, Inc. v. Utah State Tax Commission, Utah, 617 P.2d 397 (1980); Millett v. Clark Clinic Corp., Utah, 609 P.2d 934 (1980). A statute should not be construed or applied so as to result in incongruous results which were never intended. Snyder v. Clune, 15 Utah 2d 254, 390 P.2d 915 (1964). Accordingly, the Legislature's recent amendment of the definition of marijuana is most reasonably construed as an

effort to clarify the definition of that term (i.e., by making the definition scientifically and legally correct), and as intending to include all species of marijuana within the scope of § 58-37-8(1)(a)(i). In short, given the widely accepted legal standard that cannabis sativa L. refers to all species of cannabis and that cannabis sativa L. and cannabis indica are indistinguishable, the Legislature did not intend to immunize the production of cannabis indica from prosecution. Therefore, in appellant's case, the State was not required to show that the evidence was not cannabis indica; it was required only to show that it was marijuana, the specific species being irrelevant.

POINT III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SENTENCING APPELLANT TO THE STATE PRISON OR IN NOT GRANTING APPELLANT A CERTIFICATE OF PROBABLE CAUSE.

> Upon conviction of a crime, whether by verdict or by plea, the matter of the sentence to be imposed rests entirely within the discretion of the court, within the limits prescribed by law.

State v. Harris, Utah, 585 P.2d 450, 453 (1978). See also: State v. Carson, Utah, 597 P.2d 862 (1979). Appellant does not show nor does the record indicate anything which amounts to or even suggests an abuse of discretion in this respect. The trial judge fully considered all the factors relevant to

appellant's sentencing before he pronounced the sentence (see Sentencing Hearing Transcript, pp. 14-15).

With respect to the denial of appellant's petition for a certificate of probable cause, as noted in the Statement of Facts, appellant failed to appear at a hearing set by the trial court for consideration of the petition. Having offered no explanation for not taking the opportunity to present to the trial court reasons why a certificate of probable cause should be granted, appellant has no room to complain of its denial on appeal to this Court.

POINT IV

UTAH'S MARIJUANA LAWS ARE NOT UNCONSTITUTIONAL ON THE GROUND THAT THEY DENY APPELLANT HIS RELIGIOUS FREEDOM AS PROTECTED BY THE FIRST AMENDMENT.

Appellant argues that his First Amendment right to "freedom of religion" is violated by this state's laws prohibiting the production and use of marijuana. He claims that based on the "Bible," the "Book of Mormon," and the "Doctrine and Covenants," his production and use of marijuana is justified as a religious practice and is constitutionally protected. This position has been soundly rejected in numerous jurisdictions. See, e.g., State v. Brashear, 92 N.M. 622, 593 P.2d 63 (1979); Town v. State ex rel. Reno, Fla., 377 So.2d 648 (1979); State v. Soto, Or. Ct. App., 537 P.2d 142

(1975); United States v. Spears, 443 F.2d 895 (5th Cir. 1971). Cf. Whitehorn v. State, Okl. Cr., 561 P.2d 539 (1977); State v. Whittingham, 19 Ariz. App. 27, 504 P.2d 950 (1973); People v. Woody, 40 Cal. Rptr. 69, 394 P.2d 813 (1964).

The following from Lewellyn v. State, Okl. Cr., 592 P.2d 538 (1979), wherein the court rejected the claim that Oklahoma's marijuana laws were unconstitutional because they do not provide for the use of the drug as a religious sacrament, is dispositive of appellant's argument:

> Religious liberty is not an unlimited freedom, and while laws cannot interfere with mere religious belief and opinions, they may inhibit certain acts or practices. Perfect toleration of religious sentiment does not include the right to introduce and carry out every scheme or purpose which persons see fit. The religious liberty intended by the framers of the Constitution is not a license unrestrained by law. One cannot stretch his liberty so as to interfere with that of his neighbor or violate police regulations or the penal laws of the land, enacted for the good order and general welfare of all the people (footnote omitted).

Id. at 540.

POINT V

APPELLANT WAS REPRESENTED BY EFFECTIVE COUNSEL AT TRIAL.

Throughout his pro se brief, appellant makes general allegations that his counsel ineffectively represented

him at trial. However, he points to no specific incident which adequately supports that claim. The mere assertion of the charge does not prove the fact. State v. Forsyth, Utah, 560 P.2d 337, 339 (1977). The appellant bears the burden of establishing ineffectiveness, and the proof must be demonstrable, not speculative. State v. Gray, Utah, 601 P.2d 918 (1979).

An accused is entitled to:

> [T]he assistance of a competent member of the Bar, who shows a willingness to identify himself with the interests of the defendant and present such defenses as are available to him under the law and consistent with the ethics of the profession.

Alires v. Turner, 22 Utah 2d 18, 499 P.2d 241, 243 (1969). This standard has recently been affirmed in State v. Malmrose, Utah, 649 P.2d 56 (1982). Appellant makes no demonstrable showing that the above standard was not satisfied.

CONCLUSION

Respondent has addressed those issues raised in appellant's pro se brief and the brief submitted in his behalf by H. Don Sharp, Esq., which it believes merit a response. For the reasons discussed above, respondent respectfully

submits that the trial court's judgment and sentence should be affirmed.

Respectfully submitted this 8th day of November, 1982.

DAVID L. WILKINSON
Attorney General

Robert M. Parish for

EARL F. DORIUS
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and exact copy of the foregoing Brief, postage prepaid, to Wayne N. Harris, P.O. Box 250, Draper, Utah, 84020, and to H. Don Sharp, Attorney for Appellant, Legal Forum Building, 2447 Kiesel Avenue, Ogden, Utah, 84401, this 8th day of November, 1982.

Susan Patton