1982

The State of Utah v. Robert Hicken : Brief of Appellant

Utah Supreme Court

David L. Wilkinson; Robert N. Parrish; Attorneys for Appellant;
Shelden R. Carter; Young, Backlund, Harris & Carter; Attorney for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

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THE STATE OF UTAH, :

Plaintiff-Appellant, :

vs. : Case No. 18321

ROBERT HICKEN, :

Defendant-Respondent. :

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RESPONDENT'S BRIEF

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On appeal from the final order granting the defendant's Motion to Dismiss the Information filed by the State charging distribution of a controlled substance for value.

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STATEMENT OF THE NATURE OF THE CASE

Respondent was charged with distribution of a controlled substance for value, in violation of Utah Code Annotated §58-37-8(1)(a)(ii) (1953), as amended.

DISPOSITION IN THE LOWER COURT

Respondent was tried before a jury on February 17, 1982 in the Fourth Judicial District Court for Utah County, State of Utah, the Honorable Allen B. Sorensen, presiding. The trial court issued a final order granting defendant-respondent's Motion to Dismiss the Information.

RELIEF SOUGHT ON APPEAL

Respondent seeks a judgment and order of this Court affirming the trial court's final order granting defendant-respondent's Motion to Dismiss the Information.

STATEMENT OF FACTS

On October 19, 1981, defendant-respondent Robert Hicken was at the home of Jerry Middleton in Provo, Utah, at the request of Jerry Middleton. Judy Smith was to arrive later.

Mr. Middleton had previously been arrested for the offense of possession of marijuana. Officer Markling of the Provo City Police had agreed with Mr. Middleton that the police would work with him on his "possession of marijuana" charge if Mr. Middleton would introduce the police into other instances or identify other individuals (T. 32).

Judy Smith had been a secretary in the Provo Police Department's Detective Division for a period of approximately two years. She had no aquaintance with defendant Robert Hicken and had never seen or observed Mr. Hicken prior to the date charged of October 19, 1981. Officer Markling had previously informed Miss Smith that Mr. Middleton would be able to introduce Miss Smith to someone who would make a buy of narcotics or assist her in making a buy. Pursuant to Officer Markling's directions, Miss Smith was given $120.00 and told to be at the residence of Jerry Middleton. Miss Smith did not know either Jerry Middleton or the defendant nor had she any knowledge of the friendship or relationship between Mr. Middleton and the defendant.

The defendant Robert Hicken had arrived at the home previous to Miss Smith's arrival. When Miss Smith arrived, Mr. Hicken was on the phone talking to someone whose identity was unknown (T. 13). Prior to any introduction of Mr. Hicken to Miss Smith, Mr. Hicken and Mr. Middleton started talking about whether a Mr. Larsen would be home or not (T. 14).

Miss Smith testified under questioning by State's counsel:

A: No. When Mr. Hicken got off the phone Mr. Hicken and Jerry started talking about whether, I would assume, Mr. Larsen would be home or not. Things to that nature.

Q: So they were talking about whether or not Mr. Hicken's source was at home?

A: Right.

Q: Did he attempt to call?

A: Yes.

Q: Okay. What did he say to you as he was calling?

A: He asked me how much I wanted, and I told him that I had $120, and then he told me that a quarter of a pound would be -- well, I asked him how much he had first of all.

After some attempts, Mr. Hicken finally contacted the source, Mr. Larsen. Miss Smith overheard conversations from the defendant and Mr. Larsen regarding inquiries on behalf of Miss Smith made by the defendant. The conversation was as follows (again under questioning by State's counsel):

Q: Did he indicate anything to you about that $150?

A: I told him I only had $120. When he told me I could get a quarter of a pound for $150 -- Mr. Hicken told me that -- he said I could pay the $120 and he would pay $30 to make up the difference and that I could pay him back later.

Q: So then did he finally reach who he was trying to get on the phone, this Mr. Larsen?

A: Yes.

Q: Okay. What happened then?

A: He started talking to him and I heard him say -- ask him how much a quarter of a pound would be, and then he asked how much two lids would be, and he turned to me. Mr. Hicken asked me if I wanted two lids for $95.

Q: What did you say?

A: I told him yes I did.

Q: What happened then?

A: He told the person -- Mr. Hicken told the person on the phone that we would be right over (T. 15 l. 15 - T. 16 l. 3).

The parties arrived at the Larsen residence and Miss Smith testified of the conversation therein:

Q: Okay. What happened when you got to Mr. Larsen's home?

A: Mr. Larsen let us in and led us into the front room where he asked Mr. Hicken if he would drive him to the 7-Eleven before he sold him the stuff.

Q: Then what happened?

A: Mr. Hicken said that I was the one buying it, and so Mr. Larsen said, "Oh." And he went into the back room.

Q: Who was there? Who was there in the front room there at the Larsens?

A: When they led me into the front room there was -- they introduced me to another man sitting in the front room already. They introduced me to him as Rex (T. 17).

Miss Smith then testified that Mr. Larsen and Mr. Hicken went into a back room and returned wherein the defendant sat down by her and gave to her one of the bags of marijuana.

Miss Smith then gave $100.00 to Mr. Larsen, the source, and Mr. Larsen returned $5.00 (T. 19 l. 15-20).

Upon cross-examination of Miss Smith, she indicated that the source, Larsen, had returned from the back room with two baggies filled with marijuana, and not Mr. Hicken (T. 23 l. 13).

Miss Smith had never known a Bob Hicken prior to that night nor had any suspicions or knowledge of any dealings in narcotics or selling or anything of that nature relating to Mr. Hicken (T. 24 l. 20-29). Mr. Hicken never received possession of the money and the defendant alleges that he never received possession of any narcotics.

After the testimony of Miss Smith and Officer Markling, counsel for the defendant motioned the Court to dismiss the Information filed against defendant in that the Information charged the defendant with one count of distribution for value of a controlled substance, to-wit: Marijuana. Counsel contended that it appeared from the evidence, uncontradicted, that Mr. Hicken did not sell the marijuana to the undercover agent but that at most the defendant had arranged for Miss Smith to purchase the marijuana. Counsel for the State had argued that the Accomplice Statute, U.C.A. §76-2-202, allowed the Information to stand, in that, the Accomplice Statute is applicable to the Controlled Substance Act.

The trial court found that Title 76 of the Utah Criminal Code applied generally to the acts of the legislature but the Utah Controlled Substance Act was a specific statute and where the Controlled Substance Act dealt with the conduct specifically, the Controlled Substance Act took precedence and controlled. The Court found that the defendant was charged with one crime but the evidence supported another and consequently dismissed the information filed against the defendant.

ARGUMENT

IT WAS ERROR TO CHARGE THE DEFENDANT-RESPONDENT UNDER §58-37-8(1)(a)(ii).

The general provisions of the Utah Criminal Code provide in §76-1-103 as follows:

> The provisions of this code shall govern the construction of, the punishment for and defenses against any offense defined in this code or, except where otherwise specifically provided or the context otherwise requires, any offense defined outside this code; provided such offense was committed after the effective date of this code appeared (emphasis added).

Section 58-37-19 (1953) as amended provides as follows:

> It is the purpose of this act to regulate and control the substances designated within §58-37-4, and whenever the requirements proscribe, the offenses defined or the penalties imposed relating to substances controlled by this act shall be or appear to be in conflict with Title 51, Chapter 17, or any other laws of this state, the provisions of this act shall be controlling (emphasis added).

In the present case, the defendant is charged with the offense of distribution for value of a controlled substance in violation of §58-37-8(1)(a)(ii) (1953), as amended. The defendant contends and the District Court agreed that the "arranging statute", §58-37-8(1)(a)(iv) of the Utah Controlled Substance Act is applicable under the facts, as presented at trial. Said section provides:

> . . . it shall be unlawful for any person knowingly and intentionally: (iv) To agree, consent, offer or arrange to distribute or dispense a controlled substance for value . . . (emphasis added).

It is clear from the testimony of Judy Smith that the defendant was acting only on behalf of the police officer in contacting the source and that the police officer, Miss Smith, was the person to purchase the marijuana and not the defendant. The defendant was merely acting in the capacity of arranging for a sale of the marijuana at the instance and request of the undercover agent, Judy Smith, and the agent, Jerry Middleton, who was acting under the direction of the police. Further, counsel for the State stipulated in his opening argument to the jury that the defendant was not "some high-powered drug dealer or some drug pusher." The State's counsel argued:

> In fact, I am just going to show you this defendant was more of a middleman. He encouraged and aided and furthered the drug transaction in violation of law which wouldn't have occurred if he hadn't been around to make sure the sale went through . . . he got on the phone and made some arrangements to buy some marijuana, to get her some marijuana (T. 6).

This Court, in Helmuth v. Morris, 598 P.2d 333 (Utah 1979), found that the Controlled Substance Act applied more specifically to the defendant's offense and took precedence over the Criminal Code's general forgery statute.

In Helmuth, the petitioner argued that his conviction of uttering a forged prescription should be dictated and controlled by the Utah Criminal Code and not by the Utah Controlled Substance Act.

The defendant's argument in Helmuth was based upon equal protection. Specifically, the defendant-petitioner argued the Utah Criminal Code §76-6-501(1)(b) controlled the sentencing and that defendant's conduct was proscribed therein as a misdemeanor and should be treated as such. The Utah Controlled Substance Act also applied to the acts of the defendant, but, however made said conduct a felony.

This Court held as follows:

> We recognize the soundness of his (defendant's) contention that where two interdict the same conduct, but impose different penalties, the violator is entitled to the lesser punishment . . . inasmuch as the former act applies more specifically to the plaintiff's offense, it takes precedence over the latter act.
>
> Correlated to the foregoing, it is to be noted that the legislature has expressly provided in §58-37-19 of the Controlled Substance Act that 'whenever . . . the penalties impose relating to substances controlled by this act shall be or appear to be in conflict with . . . any other laws of this state, the provisions of this act shall be controlling.' Thus, even if petitioner were correct in his postulate that the statute referred to prohibited the same conduct, the legislature has declared that the provisions of Title 58, Chapter 17, rather than those contained in the Criminal Code, are to be applied in offenses relating to narcotic drugs.
>
> In the instant case, the facts are more applicable and specifically controlled by the Utah Controlled Substance Act

§58-37-8(1)(a)(iv)--Arranging.

Defendant refers the Court to State v. Harrision, 601 P.2d 922 (Utah 1979). The appellant therein argued that §58-37-8(1)(a)(iv) was unconstitutionally vague. This Court, finding otherwise, defining the arranging statute, stated:

> Thus any witting or intentional lending of aid in the distribution of drugs, whatever form it takes, is proscribed by the act. The citizen of average intelligence is left with no confusion as to what type of conduct is forbidden.

In Harrison, the defendant was convicted under §58-37-8(1)(a)(iv) of arranging distribution for value of a controlled substance. In that case the Vernal Police Department sent a police informant to the defendant's residence for the purpose of purchasing cocaine. When the informant arrived at the defendant's home, he was told that the defendant could not supply cocaine but was told an acquaintance of the defendant's might be able to furnish a substitute substance. The defendant took the police informant to meet the acquaintance by the name of "Suzy" and a drug transaction ensued between "Suzy" and the police informant.

The facts in that case are strikingly similar to the case of Harrision where the respondent was approached by a police undercover agent to secure the purchase of marijuana. The defendant herein, unable or unwilling to accomodate the police undercover agent, takes the undercover agent to the residence of Mr. Larsen and a drug transaction occurs between Mr. Larsen (the source) and the undercover agent.

Section 58-37-8(1)(a)(iv) specifically covers the area charged herein and preempts the application of the general provisions of the Utah Criminal Code §76-1-103(1). The "arranging"

statute supplants the "accomplice" statute of the Criminal Code as applied to the facts herein, State v. Harrison.

Section 58-37-8(1)(a)(ii), under which the defendant was charged, specifically covers and clearly proscribes the sale of a controlled substance or possession with intent to sell a proscribed substance. See, State v. Mills, 641 P.2d 119 (Utah 1982); State v. Hubbard, 601 P.2d 929 (Utah 1979); and State v. Crabtree, 618 P.2d 484 (Utah 1980).

It is accepted in this and other jurisdictions that a specific statute (arranging) takes precedence over a general statute (accomplice). See, Helmuth v. Morris, 598 P.2d 333 (Utah 1979); In Re Smart, 505 P.2d 1979 (Hawaii 1973); and 73 Am.Jur.2d Statutes §257 (1974) Under the definition of Harrison, the Arranging Statute supplements and pre-empts the application of the Accomplice Statute.

CONCLUSION

The respondent was improperly charged under U.C.A. §58-37-8(1)(a)(ii). Section 58-37-8(1)(a)(iv) is applicable in the instant case and specifically applies to any conduct for which the defendant is criminally liable. When the Utah Controlled Substance Act specifically applies to a specific fact or situation the Controlled Substance Act takes precedence over and pre-empts any and all general statutes, including the Accomplice Statute of the Utah Criminal Code. The dismissal of the State's Information against the defendant was properly granted and should not be disturbed by this Court.

(continued)

RESPECTFULLY SUBMITTED this 28 day of July, 1982.

SHELDEN R CARTER
Attorney for Respondent

MAILING CERTIFICATE

I HEREBY CERTIFY that I mailed a true and accurate copy of the foregoing to David L. Wilkinson, Attorney General, and Robert N. Parrish, Assistant Attorney General, Attorneys for Appellant, 236 State Capitol, Salt Lake City, Utah 84114, postage prepaid, this _____ day of July, 1982.