1982

Bruce E. Lind and Kent Jolley v. Eugene B. Lynch : Brief of Respondent

Utah Supreme Court

Lawrence R. Peteson Jr.; King & Peterson; Attorney for Plaintiffs;
Grant C. Aadnesen; Attorney for Defendant;

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff-Appellant,	:	
-v-	:	Case No. 18321
ROBERT HICKEN,	:	
Defendant-Respondent.	:	

BRIEF OF APPELLANT

Appeal from a final order granting the defendant's Motion to Dismiss the Information filed by the State charging distribution of a controlled substance for value; to wit, marijuana, a third-degree felony, in the Fourth Judicial District Court, in and for Utah County, State of Utah, the Honorable Allen B. Sorenson, Judge, presiding.

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TABLE OF CONTENTS

Cases Cited

Statutes Cited

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STATEMENT OF THE NATURE OF THE CASE

Respondent was charged with distribution of a controlled substance for value; to wit, marijuana, in violation of Utah Code Ann., § 58-37-8(1) (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

Appellant seeks a judgment and order of this Court vacating the dismissal by the lower court and remanding the matter to the trial court for trial.

STATEMENT OF THE FACTS

On October 19, 1981, respondent Robert Hicken was at the home of Jerry Middleton in Provo, Utah, hoping to meet a new customer to whom he could sell drugs (T. 13). Mr. Middleton was working in cooperation with Sergeant Paul Markling of the Provo City Police Department (T. 13, 28, 32). At some point in the day, Judy Smith, a Provo City Police Department employee working for the detective's division, went to Mr. Middleton's home and was met at the door by Mr. Middleton (T. 13). Miss Smith was acting under the instructions of Sergeant Markling and was to attempt to buy some marijuana or cocaine from a third party (T. 13, 28). Miss Smith did not know Mr. Middleton, nor was she aware he was acting in cooperation with the police (T. 24). Mr. Middleton introduced Miss Smith to respondent Hicken (T. 14). Respondent asked Miss Smith how much she wanted to purchase, and after confirming the price and quantity with his "source" over the telephone, respondent agreed to sell her two bags of marijuana for $95 (T. 13-15).

Respondent instructed Miss Smith, Mr. Middleton and Mr. Middleton's little sister to get into Miss Smith's car and follow respondent in his car (T. 16). At approximately 1100 South and 50 East in Orem, respondent pulled over to the side of the road and asked Miss Smith to go with him to complete the previously negotiated sale while Mr. Middleton and his

little sister waited in Miss Smith's car (T. 16). Respondent drove Miss Smith in his car to the home of his "source," Mr. Larsen (T. 17).

Once inside, respondent explained to Mr. Larsen that Miss Smith, not respondent, was to purchase the marijuana (T. 17). Mr. Larsen, followed by respondent, went into a back room for a few minutes (T. 17). When they returned, respondent was carrying the marijuana. He examined it, commented that it was "really good stuff" and delivered it to Miss Smith (T. 18-19, 26). Miss Smith then paid Mr. Larsen $95, the previously agreed upon price (T. 19).

Respondent drove Miss Smith back to her car (T. 20). She drove Mr. Middleton and his little sister back to their home, and then drove to the police station where she reported to Sergeant Markling and gave him the marijuana (T. 20).

At trial, after the State rested its case, defendant-respondent moved to dismiss the Information claiming that in light of the evidence produced by the State, respondent had been improperly charged under § 58-37-8(1)(a)(ii), the distribution for value subsection, and should have been charged under § 58-37-8(1)(a)(iv) which defense counsel characterized as the "arranging statute" (T. 33-36). The State reasoned that because Utah's aiding and abetting statute, § 76-2-202, provides that an aider and abettor may be charged as a principal, respondent was, in

fact, correctly charged because the evidence clearly showed that he had aided in the distribution of a controlled substance for value (T. 33-37). Despite the State's argument, the court ruled that the aiding and abetting provision, § 76-2-202 of the Criminal Code, did not apply to the Controlled Substances Act and therefore respondent could not be found guilty of the crime charged in the Information (T. 37).

Appellant takes this appeal from the final judgment of dismissal pursuant to Rule 26(c)(1) of the Utah Rules of Criminal Procedure.

ARGUMENT

RESPONDENT WAS CORRECTLY CHARGED UNDER § 58-37-8(1)(a)(ii) ACCORDING TO THE FACTS OF THIS CASE.

A. THE AIDING AND ABETTING PROVISIONS OF § 76-2-202 OF THE CRIMINAL CODE APPLY TO THE CONTROLLED SUBSTANCES ACT.

The aiding and abetting statute, Utah Code Ann., § 76-2-202 (1953), as amended, provides:

> Every person acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.

Under Utah law an aider and abettor may be charged and found guilty as a principal. The accepted procedure is to charge

the individual as a principal under the appropriate provision and then at trial, when the facts of the case warrant it, include a jury instruction incorporating the language of Utah Code Ann., § 76-2-202 (1953), as amended, thus enabling the jury to find a defendant who aided and abetted the crime guilty as a principal. This was the strategy employed by the State in this case.

Section 76-2-202 is applicable to the Controlled Substances Act and specifically to Section 58-37-8(1)(a)(ii) of that Act by way of Utah Code Ann., § 76-1-103 (1953), as amended, and because of the holding of this Court in State v. Jeppson, Utah, 546 P.2d 894 (1976). Utah Code Ann., § 76-1-103(1) (1953), as amended, provides:

> The provisions of this code shall govern the consturction 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.

In Jeppson, a conviction for distribution of a controlled substance for value, the defendant claimed that the Controlled Substances Act defined completely all culpable conduct and therefore a jury instruction incorporating the language of Section 76-2-202 of the Criminal Code was improper. This Court disagreed and stated in reference to the jury

instruction in that case:

> The first paragraph of Instruction 6B incorporates, in haec verba, provisions of 76-2-202. It is applicable here, because the Controlled Substance Act does not specifically provide otherwise, nor does its context otherwise require.

State v. Jeppson, Utah, 546 P.2d 894, 896 (1976). See also: Greaves v. State, Utah, 528 P.2d 805, 807 (1974); Howe v. Jackson, 18 Utah 2d 269, 421 P.2d 159, 161 (1966).

Respondent was charged under Utah Code Ann., § 58-37-8(1)(a)(ii) (1953), as amended, which reads:

> (a) Except as authorized by this act, it shall be unlawful for any person knowingly and intentionally: . . .
> (ii) To distribute for value or possess with intent to distribute for value a controlled or counterfeit substance;

Because of the overwhelming evidence produced at trial proving respondent's active participation in setting up the sale of the marijuana, the charge, when considered in conjunction with the aiding and abetting jury instruction which would have been forthcoming (T. 33-34) was appropriate and correct in this case.

B. CHARGING RESPONDENT UNDER § 58-37-8(1)(a)(iv) AS SUGGESTED BY THE TRIAL COURT WOULD HAVE BEEN CLEARLY INAPPROPRIATE IN THIS CASE.

Utah Code Ann., § 58-37-8(1)(a)(iv) (1953), as amended, addresses situations different from that presented in this case. This subsection, incorrectly characterized as the "arranging statute" by defense counsel and the trial court, must be read in its entirety for its purpose to become apparent. It states:

> (a) Except as authorized by this act, 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 or to negotiate to have a controlled substance distributed or dispensed for value and distribute, dispense, or negotiate the distribution or dispensing of any other liquid, substance, or material in lieu of the specific controlled substance so offered, agreed, consented, arranged, or negotiated.

The purpose of this subsection is to provide for criminal liability in a situation known as a "turkey buy" where a controlled substance is offered for sale, but at the time of the sale a substitute or "material in lieu of the specific controlled substance so offered" is delivered. In this case, respondent offered marijuana for sale and did in fact deliver marijuana to Miss Smith when the sale took place. Thus, contrary to the opinion of the judge in the lower court,

Utah Code Ann., § 58-37-8(1)(a)(iv) (1953), as amended, would not have been an appropriate charge under the facts of this case.

CONCLUSION

On the facts of this case, respondent was properly charged with Distribution of a Controlled Substance for Value, in violation of Utah Code Ann., § 58-37-8(1)(a)(ii). This is because the aiding and abetting statute, § 76-2-202, is applicable to the Controlled Substances Act by way of § 76-1-103 and prior decisions of this Court. The dismissal of the information by the trial court was erroneous since it was based on the theory that § 58-37-8(1)(a)(iv) applies to conduct such as that of the respondent in this case. The plain meaning of § 58-37-8(1)(a)(iv) shows it does not apply to what respondent did.

The order dismissing the information should be vacated and this case should be remanded to the district court for trial.

Respectfully submitted this 20th day of May, 1982.

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CERTIFICATE OF MAILING

I hereby certify that I mailed two true and exact copies of the foregoing Brief, postage prepaid, to Shelden R. Carter, Attorney for Respondent, Young, Backlund, Harris & Carter, 350 East Center Street, Provo, Utah, 84601, this 20th day of May, 1982.

Robert N. Parrish