1982

# The State of Utah v. Robert Hicken : Brief of Respondent

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, | : | |
| -v- | : | Case No. 18321 |
| ROBERT HICKEN, | : | |
| Defendant-Respondent. | : | |

APPELLANT'S BRIEF IN SUPPORT OF
PETITION FOR REHEARING

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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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## INTRODUCTORY NOTE

The standard established by this Court for determining whether a petition for rehearing is proper was expressed in Brown v. Pritchard, 4 Utah 292, 9 P. 573; reh. den., 4 Utah 292, 294, 11 P. 512 (1886):

> . . . [To] justify a rehearing, a strong case must be made. We must be convinced that the court failed to consider some material point in the case, or that it erred in its conclusions, or that some matter has been discovered which was unknown at the time of the hearing.

In Cummings v. Neilsen, 42 Utah 157, 129 P. 619, 624 (1913), the Court stated:

> To make an application for a rehearing is a matter of right, and we have no desire to discourage the practice of filing petitions for rehearings in proper cases. . . . [A] rehearing should not be applied for, unless we have misconstrued or overlooked some material fact or facts, or

> have overlooked some statute or decision which may affect the result, or that we have based the decision on some wrong principle of law, or have either misapplied or overlooked something which materially affects the result. . . . If there are some reasons, however, such as we have indicated above, or other good reasons, a petition for a rehearing should be promptly filed and, if it is meritorious, its form will in no case be scrutinized by this court (Emphasis added).

The argument portion of this brief will show that this petition for rehearing is properly before this Court in that this Court in its decision issued February 4, 1983, overlooked certain elementary rules of English usage and principles of logic which materially affect this appeal and misconstrued § 58-37-8(1)(a)(iv) in rendering its opinion.

## 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)(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. Sorenson presiding. The trial court issued a final order granting defendant-respondent's Motion to Dismiss the Information.

## RELIEF SOUGHT ON APPEAL

Appellant seeks the granting of a rehearing or a summary reversal of this Court's February 14, 1983 decision in this case.

## 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. 240. Mr. Middleton introduced Miss Smith to respondent (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, § 76-2-2-2, 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 appealed the final judgment of dismissal pursuant to Rule 26(c)(1) of the Utah Rules of Criminal Procedure.

## ARGUMENT

The Court's opinion holds that respondent should have been charged with "arranging a sale" under Utah Code Ann., § 58-37-8(1)(a)(iv) (1953), as amended, and that Utah Code Ann., § 76-2-202 (1953), as amended, did not apply. The opinion is supported by the reasoning that the Controlled Substances Act expressly and specifically sanctions the offense of arranging for the distribution of a controlled substance and thereby displaces the general sanction for aiding and abetting provided for in § 76-2-202. In reaching

this conclusion, the Court has overlooked certain elementary principles of English usage and principles of logic which materially affect this appeal and has failed to discern the plain meaning of the statute.

Utah Code Ann., § 58-37-8(1)(a)(iv) (1953), as amended, must be read in its entirety for its meaning to become manifest. 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 (Emphasis added).

For purposes of illustrative argument, subpart (iv) may be divided into three phrases, A, B and C. Phrase A includes:

> To agree, consent, offer, or to arrange to distribute or disperse a controlled substance for value

Phrase A is connected, without punctuation, by the word "or" to Phrase B which reads:

> to negotiate to have a controlled substance distributed or dispensed for value

Phrase B is connected, without punctuation, by the word "and"

to the final phrase of the statute, Phrase C, which reads:

> 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.

Demarcated as explained above, subpart (iv) appears as follows:

> 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 dispense 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 (Emphasis added).

When the subpart is read as it is interpreted in the Court's opinion, the "or" which appears between Phrase A and Phrase B is emphasized. So read, the subpart proscribes the conduct "A" and also proscribes the conduct "B and C."

The "or" emphasized by the Court, however, is not the only connective used in the statute. There are many. One of equal importance is the first "or" found in Phrase C. One of greater importance is the "and" which appears between Phrases B and C. When the subpart is read as interpreted by appellant, this "and" in conjunction with Phrase C properly becomes the crux of the subpart.

Appellant's interpretation of the subpart is that it proscribes the condct "A and C" and also proscribes the conduct "B and C." This is what the subpart says when logically read. The conduct "A" by itself is not proscribed by this subpart. That is, an agreement, offer, arrangement or consent to the distribution or dispensing of a controlled substance is not punishable by this subpart if standing alone, contrary to this Court's opinion.

The reasons supporting appellant's interpretation are several and are based primarily upon rules of English usage and logic as these disciplines are related to the construction of the subsection. The first reason is that there is no punctuation between Phrase "A" and the "or" introducing Phrase "B." If there was a comma before the word "or", the Court's holding that Phrase "A" is a separate criminal sanction independent of Phrases "B" and "C" might be correct. This would be consistent with the rule of English usage that requires that a comma be placed before a conjunction introducing an independent clause. The absence of a comma before "or" indicates that Phrase A must be read in conjunction with Phrase C and is not a separate criminal sanction in and of itself.

The second reason is that Phrase A is stated in the conjunctive in relation to Phrase C. Although the "or" indicates that Phrases A and B are stated in the disjunctive,

they are disjunctive only so far as they relate to each other. Phrase A is nonetheless stated in the conjunctive in relation to Phrase C, and similarly, Phrase B is stated in the conjunctive in relation to Phrase C. This is more easily understood if it is remembered that all three phrases follow from subsection (a) of the statute and are all dependent clauses. Absent punctuation indicating otherwise, the use of the word "or" does not divorce Phrase A from the remainder of the sentence.

The third and perhaps the most compelling reason sustaining appellant's interpretation of the subpart involves the parallel structure of the statute. Phrase C incorporates all the essential language of both Phrase A and Phrase B (with the exception of the "for value" requirement) and also the "or" connecting those phrases. The "distribute or dispense" language of Phrase A is paired, again by a disjunctive "or", with the "to negotiate to have . . . distributed or dispersed" language of Phrase B. This language, identical in meaning, appears in Phrase C as "distribute, dispense, or negotiate distribution or dispensing."

After the above reiteration, Phrase C adds its own operative language, that being: "any other liquid, substance, or material in lieu of." This is followed by the words "the specific controlled substance." This language of Phrase C

refers the reader directly back to its parallel, the "a controlled substance" language found in both Phrase A and Phrase B. Such syntax is not mere coincidence.

That Phrase A of the subpart cannot be read alone is also clear from the Legislature's inclusion of the language "so offered, agreed, consented, arranged, or negotiated" in Phrase C. "Negotiated," as the Court implied in its opinion in this case, clearly corresponds with "negotiate" as used in Phrase B. The words "so offered, agreed, consented, arranged" in Phrase C clearly correspond with the "agree, consent, offer, or arrange" language of Phrase A and are conclusive evidence that Phrase A and Phrase C are to be read together. This is the only reason language from Phrase A would be repeated in parallel form in Phrase C. If the subpart were to be interpreted as the Court has in this case, this expression of coordinate ideas in similar form would be unneeded, irrelevant and confusing. Thus, it is apparent that Phrase C was meant to be read in conjunction with either Phrase A or Phrase B as the circumstances of the particular case might require.

Drafting the subpart in this way, so that it solely applies where any other liquid, substance, or material in lieu of a specific controlled substance is involved, cannot be said to be myopic on the part of the Legislature. The subpart addresses one problem, that known in the vernacular as a

"turkey buy." It addresses the problem in terms of a person performing the distribution or dispensing necessary for the "turkey buy" himself, and in terms of the person negotiating to have another perform the actual distribution or dispensing. The subpart makes reference to both controlled and counterfeit substances only because providing a counterfeit substance in lieu of a controlled substance is the essence of a "turkey buy." "Arranging" for the distribution of a genuine controlled substance, as occurred in the facts of this case, is clearly proscribed by subpart (ii) of § 58-37-8 of the Controlled Substances Act and § 76-2-202 of the Criminal Code. Section 76-2-202 is applicable to the Controlled Substances Act by way of Utah Code Ann., § 76-1-103 (1953), as amended. State v. Jeppson, Utah, 546 P.2d 894 (1976). Subpart (iv) applies only to "in lieu of" distributions and dispensings and is therefore not in conflict with a finding of criminal culpability under the agency theory.

The Court's reliance on State v. Harrison, Utah, 601 P.2d 922 (1979), in conjunction with its distinction of State v. Jeppson, Utah, 546 P.2d 894 (1976), is enlightening. In Harrison, at 293, this Court made the following statement in reference to subpart (iv) at issue here:

> A statute may legitimately proscribe a broad spectrum of conduct with a very few words, so long as the outer perimeters of such conduct are clearly defined. The

> statute in question accomplishes this by specifying that any activity leading to or resulting in the distribution for value of a controlled substance must be engaged in knowingly or with intent that such distribution would, or would be likely to occur. Thus, any witting or intentional lending of aid in the distribution of drugs, whatever form it takes, is proscribed by the act (Emphasis added).

In the earlier case, Jeppson, the defendant was charged with aiding another because he had knowingly and intentionally made his trailer available to persons unlawfully possessing, using or distributing controlled substances therein. Id. at 895. The Court upheld the use of an aiding and abetting instruction incorporating, in haec verba, the provisions of § 76-2-202 on the basis that:

> It is applicable here, because the Controlled Substances Act does not specifically provide otherwise, nor does its context require otherwise.

Id. at 896. In its opinion in this case the Court further elaborated:

> There are no provisions in the Utah Controlled Substances Act dealing with the offense of providing a place for illegally selling drugs, and therefore the provisions of the Criminal Code may be resorted to.

State v. Hicken, Utah, ____ P.2d ____, filed February 14, 1983, at 3 (1983). This distinction appears to be at odds

with the Court's declaration in Harrison. Unless one is to believe that providing a place for illegally selling drugs is not included in "any witting or intentional lending of aid in the distribution of drugs, whatever form it takes," Harrison and Jeppson are in conflict. That conflict, instead of being resolved by the Court's opinion in this case, is perpetuated by it.

Appellant submits that this conflict would be effectively resolved if it were to apply the Jeppson precedent to the facts of this case and hold that respondent was properly charged with Distribution of a Controlled Substance for Value in violation of Utah Code Ann., § 58-37-8(1)(a)(ii) and that subpart (iv) of the statute applies only to sales involving substances distributed or dispersed in lieu of a controlled substance.

## CONCLUSION

Based upon the foregoing, appellant respectfully requests that this Court grant a rehearing in this matter.

Respectfully submitted this 7th day of March, 1983.

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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, 350 East Center Street, Provo, Utah, 84601, this 8th day of March, 1983.

Susan Patten