1971

The State of Utah v. Robert Richard Scott : Brief of Respondent

Utah Supreme Court

Vernon B. Romney; Attorney for RespondentPhil L. Hansen; Attorney for Defendant-Appellant

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

vs.

ROBERT RICHARD SCOTT,

Defendant-Appellant.

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE SEVENTH JUDICIAL DISTRICT COURT FOR GRAND COUNTY, STATE OF UTAH, HONORABLE EDWARD SHEYA PRESIDING.

VERNON B. ROMNEY
Attorney General
LAUREN N. BEE
Chief Assistant Attorney General
236 State Capitol
Salt Lake City, Utah
Attorneys for Respondent

PHIL L. HANSEN
410 Empire Building
231 East Fourth South
Salt Lake City, Utah 84111
Attorney for Appellant

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STATE OF UTAH

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF CASE

This is an appeal from a conviction and sentence imposed upon appellant after his plea of guilty to the sale of drugs in violation of Utah Code Ann. § 58-33-4(3) (1953), as amended.

RELIEF SOUGHT ON APPEAL

The State seeks affirmation of the lower court's judgment and conviction.

DISPOSITION IN LOWER COURT

On December 29, 1970, defendant, Robert Richard Scott, after entering a plea of guilty to the sale of a hallucinogenic drug, LSD, was sentenced to the Utah

State Prison for five years to life pursuant to Utah Code Ann. § 58-33-4(3) (1953), as amended.

STATEMENT OF FACTS

On May 26, 1970, appellant was charged, by complaint filed in the City Court of Moab, Grand County, State of Utah, with selling Lysergic acid diethylamide (LSD) and Phencyclidine to one R. Drew Moren on April 24, 1970, in violation of Utah Code Ann § 58-33-6(1) (1953), as amended. On December 29, 1970, the day set for the trial in the Seventh Judicial District Court, counsel for appellant asked permission of the court to withdraw the plea of not guilty and enter a plea of guilty, with sentencing being stayed until the Adult Probation and Parole Board could review the defendant's personal data and report. After receiving the Board's recommendation to deny appellant probation (R. 11), the trial court, on February 5, 1971, sentenced appellant to imprisonment in the state prison from five years to life with no consideration for parole until he had served at least three years, pursuant to Utah Code Ann. § 58-33-4(3) (1953), as amended.

ARGUMENT

POINT I.

IN RENDERING ITS JUDGMENT AND SENTENCE UPON APPELLANT, THE LOWER COURT DID NOT FAIL TO CONSIDER PROBATION.

The crux of the appeal is whether or not the trial court failed to consider probation in its sentencing of appellant. As Utah Code Ann. § 77-35-17 (1953) grants to the trial court the discretion to suspend the imposition of the execution of a sentence in a criminal matter when it appears compatible with the public interest, this Court, in *State* v. *Barlow*, ... Utah 2d ....., 483 P. 2d 236 (1971), held that the Legislature did not intend to abrogate this discretionary power by the wording in Utah Code Ann. § 58-13a-44 (4) (1953), as amended, which states: ". . . shall not be eligible for release upon completion of sentence or on parole or on any other basis until he has served not less than three years." As the lower court in *Barlow* had erroneously believed that the wording of the statute required a mandatory sentence, and did not, therefore, consider probation, this Court remanded the case for the trial court to make such consideration. *Id.* at 237.

However, in the instant case, the record fully illustrates that Judge Sheya fully exercised his discretionary powers by considering probation for the appellant, but concluded that the public interest would be best served by committing appellant to the prison.

Appellant was not a neophyte convicted for selling a few pills to his friends; rather, he had a previous conviction of negligent homicide (R. 10) and had been arrested in the present case for a sale that included seventy LSD pills, twenty pills of another synthetic marijuana, and an offer to sell even more pills (R. 10, 11).

Before sentencing appellant, Judge Sheya had deliberated for several days upon the matter (R. 10). He had closely studied the Probation and Parole Department's recommendation that appellant be denied probation (R. 11), and had reread several times the presentence report which had been prepared to determine if there were any mitigating circumstances that would warrant probation (R. 10, 11).

As appellant had demonstrated his inability to voluntarily seek for and adhere to medical treatment, evidenced by his two charges of possession in Seattle (R. 16), Judge Sheya personally made inquiry into the types of facilities available to the court in cases like this and into what kinds of treatments the court could arrange for (R. 17). Based upon the presentence report and recommendation, and based upon the court's determination to provide appellant with effective treatment, Judge Sheya sentenced appellant to five years imprisonment and took written precautions to insure that appellant would receive proper treatment at the prison:

> ". . . and I feel, I have thought this matter over carefully and I don't want to deny you any medical treatment that you may need. That is why I went to the length of calling the Warden to see if there was something that he could do in this regard. He assured me if I wrote a letter that he would see to it that whatever treatment was available or could be furnished would be furnished to you. I feel that this is about the best this court can do in this regard" (R. 19-20).

While recognizing that the court had the discretionary power to grant probation in cases involving the sale of drugs, the trial court also realized that the apparent intent of the legislature in enacting Utah Code Ann. § 58-33-6(1) (1953), as amended, was to require incarceration for at least three years if the trial court decided that the public interest required commitment rather than probation. *Barlow, supra,* at 237. As Judge Sheya had concluded that the public interest required appellant's imprisonment rather than probation, he had no alternative but to sentence appellant to five years to life (R. 20).

Perhaps the most salient evidence as to the consideration given by the trial court to the propriety of granting appellant probation is the admission by appellant's counsel that the trial court had the power to grant probation in the instant case and that the trial court had previously explicitly stated that it would exercise that power. As stated by appellant's counsel in the record:

> ". . . (B)ut I also recognize the Court's inherent power to suspend sentences and place people on probation or have different conditions short of sending him to prison . . . that the court has that power, and I recall that the court indicated the last time that we were here on this matter that the court had such power, although the court made no indication as to what the sentence would be, . . . yet the court acknowledged the fact that if the court after seeing, receiving all the information that it desired prior to imposing sentence decided that there should be a suspension of that sentence that the court does have this inherent power" (R. 11-12).

CONCLUSION

An analysis of the record demonstrates that the trial judge fully considered the propriety of granting probation to appellant before he passed judgment and sentence upon him.

The State therefore respectfully submits that the *Barlow* decision does not apply and this Court should affirm the decision of the trial court.

Respectfully submitted,

VERNON B. ROMNEY
Attorney General

LAUREN N. BEASLEY
Chief Assistant Attorney General

Attorneys for Respondent