1972

State of Utah v. Rodney C . Rose : Brief of Appellant

Utah Supreme Court

IN THE SUPR

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BRIEF

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Honorable John

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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH
Plaintiff and Respondant,

Vs.

Case No.

RODNEY C. ROSE
Defendant and Appellant.

12974

BRIEF OF APPELLANT

APPEAL FROM JUDGMENT OF THE
SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE COUNTY OF WEBER,
STATE OF UTAH

Honorable John F. Wahlquist presiding

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IN THE SUPREME COURT OF THE

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RODNEY C. ROSE 12974
Defendant and Appellant.

BRIEF OF APPELLANT

NATURE OF THE CASE

The Appellant, Rodney C. Rose, appeals from his conviction of SALE OF A STIMULANT DRUG, to-wit: Methamphetamine, in violation of § 58-33-6 (1), Utah Code Annotated, 1953, upon a trial to the court sitting without a jury, in the Second Judicial District Court of Weber County, State of Utah. The Honorable John F. Wahlquist presiding.

DISPOSITION IN LOWER COURT

The appellant was charged by Complaint

on the 7th day of May, 1971, with the crime of Sale of a Stimulant Drug, to-wit: Methamphetamines. Preliminay hearing was held on the 8th day of October, 1971, and the court after amending the complaint to conform to the evidence, bound the defendant over to stand trial in the District Court. The appellant was charged by information in the District Court with the crime of sale of a stimulant drug, and trial was held before the court without a jury on the 13th day of April, 1972. The court found the appellant guilty as charged and sentenced to serve a term in the Utah State Prison for not less than one nor more than ten years.

RELIEF SOUGHT ON APPEAL

The appellant respectfully requests this Honorable Court to reverse the judgment of the Lower Court and remand the matter to the District Court for a new trial.

STATEMENT OF FACTS

The appellant was charged by Complaint on the 7th of May, 1971, with the offense of sell of a stimulant drug, to-wit: Methamphetamine. (Tr-1) Preliminary hearing was held on October 8, 1971, and following the testimony of the State's witnesses the attorney for the State made a Motion To Amend the Complaint to read "amphetamine" instead of "methamphetamine." (Tr-11) Counsel for the defendant objected to the amendment but the Court overruled the objection and ordered the Complaint amended and the defendant bound over to District Court to stand trial. (Tr-2)

For some reason unknown to this writer the District Attorney filed his information alleging the sell of methamphetamine as opposed to amphetamine. (Tr-14) The defendant entered a plea of "NOT GUILTY" to the information charging him with sell of

a stimulant drug, to-wit: methampheta-mine. Trial was held before the Honorable John F. Wahlquist without a jury on the 13th day of April, 1972. At the conclusion of the case the Judge pronounced his ver-dict as follows: "The Court finds the defendant guilty as charged." (Tr-182)

POINT I

THE STATE FAILED TO CHARGE OR PROVE THAT THE ACTS ALLEGED TO HAVE BEEN COMMITED BY THE APPELLANT WERE IN VIOLATION OF UTAH LAWS.

The appellant was charged under the "Drug Abuse Control Law" Title 58-33-6 (1), Utah Code Annotated 1953, with the sell of a stimulant drug, to-wit: methamphetamine. After reviewing the "Drug Abuse Control Law" this writer was unable to find any section of that law that defined metham-phetamine as being a depressant, stimulant or hallucinogenic drug, nor was I able to locate any portion of that law that prohibited the sell of methamphetamine.

Under §58-33-1 (d) (2), Utah Code Annotated 1953, (Definitions) the Code does define dl-methamphetamine as being a depressant, stimulant or hallucinogenic drug, however, there was no evidence before the Court that "dl-methamphetamine" and "methamphetamine" are the same substance.

In a criminal prosecution the State has the burden of proving all elements of the alleged offense beyond a reasonable doubt. §77-31-4 Utah Code Annotated 1953. In this case the State accused the appellant of an act which it contends is illegal. The only way the State could meet its burden of proof would be to show by competent evidence that methamphetamine and dl-methamphetamine are the same substance.

One of the witnesses called by the State was Stanley Morrett, a Utah State Toxologist (Tr-133). If anyone could have clarified this question, Mr. Morrett could,

but the State in no way attempted to meet its burden of proof on one of the more critical elements of a violation of law.

By analogy, if a person were to be charged with the offense of sell of a stimulant drug, to-wit: methodism; it might be assumed that methodism is some form of a drug that generally goes by a different name, and at trial the State might be able to prove the two to be the same. However, at trial if the State merely proves that methodism may be stimulating, but cannot prove it is a drug, then the State has failed to meet its burden.

The net result is that the appellant now stands convicted of an offense which the Legislature has not defined as a crime, and this Court has a duty to rectify the situation.

POINT II

THE COURT ERRED BY CONVICTING THE APPELLANT WHEN THE EVIDENCE DID NOT SUPPORT THE STATE'S

ALLEGATIONS.

The appellant was charged by information with the crime of Sell of a Stimulant Drug, to-wit: Methamphetamine. The only evidence presented at trial as to the nature of the substance in question was that testimony given by Stanley Morrett, a Toxologist. (Tr-133 to 139) Through Mr. Morrett's testimony it is very clear that the substance in question was NOT methamphetamine. Mr. Morrett ran two tests on the substance (1) ultra violet spectrophotometry and (2) gas chromotography. (Tr-135) He testified that the gas chromotography test which he ran distinguishes amphetamine from methamphetamine, and that the substance he tested was amphetamine and not methamphetamine. (Tr-136)

We contend that the subject matter or object of the act is crux the of the charge and must be proven. If it is not,

prior decisions of that Court they did acknowledge the rule of law we are concerned with, as follows:

> "This Court has held that if a person is found guilty of an offense that is not charged in the indictment, the verdict is contrary to law. McGuire v. State (1875) 50 Ind. 284; Thelge v. State (1882) 83 Ind. 126.", at page 650.

In State v. Jordan, 37 S.E. 2d 111, (N.E. 1946), the appellant had been charged with the offense of Burglary in the 1st Degree, but he was actually tried on Burglary in the 2nd Degree, and found guilty of Burglary in the 1st Degree. In reversing the held as follows; at page 112:

> "...but it would seem to be without precedent to try a defendant for one offense and to convict him of another and greater offense, even though the conviction be of a higher degree of the same offense for which he is being tried."

Inasmuch as I was appointed on Appeal, after trial, I do not have benefit of trial counsel's thinking on this point. But it

appears that there may have been a mistake in charging the offense. If that is the case, it would seem that §77-31-19, Utah Code Annotated, 1953, should require that the case be remanded for re-charging, and a new trial. I acknowledge that §77-31-19 deals with those cases where the mistake is discovered before verdict or judgment, but the same logic should follow after verdict and judgment.

In any event this appellant stands convicted of the crime of Sell of Methamphetamine and the State's evidence conclusively proves there was never any methamphetamines involved in this incident.

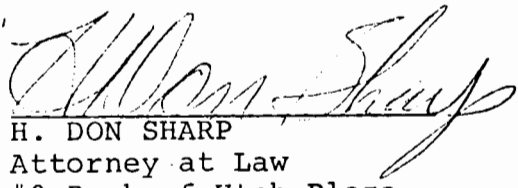
CONCLUSION

If the problems presented on this appeal seem to have been the result of mistake, confusion, or misunderstandings, they may be partially explained by the fact that the appellant had one attorney

at preliminary hearing, another at trial, and a third attorney appointed for the purpose of appeal. The State was represented by the County Attorney's office through preliminary hearing, and the District Attorney's office handled the trial. Whatever the cause may be, the judicial process broke down in this case and the appellant was improperly convicted.

We respectfully request this Court to remand this case back to the District Court for a new trial.

Respectfully Submitted.



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