

1972

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

Utah Supreme Court

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Recommended Citation

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,

vs.

Case No.

127

RODNEY C. ROSE,
Defendant-Appellant.

BRIEF OF RESPONDENT

APPEAL FROM JUDGMENT OF
JUDICIAL DISTRICT COURT IN
COUNTY OF WEBER, STATE OF UTAH

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,
vs.
RODNEY C. ROSE,
Defendant-Appellant.

} Case No.
12974

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant appeals his conviction of Sale of a Stimulant Drug on the ground that the information charging him with the crime specified "methamphetamine" rather than "amphetamine".

DISPOSITION IN THE LOWER COURT

The complaint that charged appellant was amended to read "amphetamine" rather than "methamphetamine". Appellant's main defense was to establish an alibi, questionable identification procedures and possible mistakes in preserving and handling the drugs in question. The court sitting without a jury found appellant guilty.

RELIEF SOUGHT ON APPEAL

Respondent prays that the decision of the lower court be affirmed.

STATEMENT OF FACTS

On May 7, 1971, a complaint was issued against appellant which charged that on April 19, 1971, he "did unlawfully sell a stimulant drug, to wit: Methamphetamine" (Tr. 1). At the preliminary hearing on October 8, 1971, the State moved the court to amend the complaint to read "amphetamine" in lieu of "methamphetamine". Defendant's objection to this motion was overruled and the complaint was amended (Tr. 11-12). The complaint was amended by manually crossing off the first four letters of the word "methamphetamine" (Tr. 1). When the information was prepared, for some reason it did not reflect the amendment authorized at the preliminary hearing. Thus, appellant was arraigned on the charge of "Sale of a Stimulant Drug committed as follows, to wit: That said defendant did unlawfully sell a stimulant drug, to wit: Methamphetamine" (Tr. 14). Appellant waived his right to a jury trial (Tr. 89).

During trial, the information was read and no objections were made by either side (Tr. 90). The State toxicologist testified that the pills in question were amphetamine tablets. Upon cross examination, counsel for appellant never asked the State toxicologist about methamphetamine drugs but only questioned him concerning amphetamine drugs even though the State toxicologist mentioned

that his tests could distinguish methamphetamine from amphetamine (Tr. 136). Counsel for appellant attempted to establish that (1) the appellant was not accurately identified, (2) there were possible mistakes in preserving and handling the drugs, and (3) the appellant had an alibi (Tr. 180-182). No attempt was made by appellant to question the type of drug involved or to argue that it didn't meet the crime as charged.

ARGUMENT

POINT I.

THE APPELLANT WAS PROPERLY CHARGED AND CONVICTED OF SALE OF A STIMULANT DRUG.

A valid and sufficient information may charge a defendant either by stating the name of an offense or by stating enough of the definition of the offense as is sufficient to give the defendant and the court notice of the offense intended to be charged. Utah Code Ann. § 77-21-8 (1953). The information that charged appellant both named the offense and stated a definition of the offense. The name and definition of the offense are found in Utah Code Ann. § 58-33-6(1) (1971 Supp.), which states, "It shall be unlawful for any person to . . . sell . . . any depressant, stimulant, or hallucinogenic, or other drug . . ." The term "depressant, stimulant, or hallucinogenic drug," among other definitions means:

"Any drug which contains any quantity of
(A) amphetamine: dl-methamphetamine; or any

of their optical isomers; (B) any salt of amphetamine: dl-methamphetamine; or any salt of an optical isomer of amphetamine: dl-methamphetamine; or (C) any substance designated by regulations promulgated under the federal act as habit-forming because of its stimulant affect [effect] on the central nervous system." Utah Code Ann. § 58-33-1 (1971 Supp.).

The information which charged appellant states the name of the offense as the Sale of a Stimulant Drug and defines the offense by stating that "said defendant did unlawfully sell a stimulant drug to wit: Methamphetamine" (Tr. 14). Clearly there is enough information to give the court and appellant notice of the offense charged i.e., sale of a stimulant drug.

The basis of the error claimed by appellant is that the information contained the word "methamphetamine" instead of "amphetamine". There are four reasons why this alleged error did not in any manner prejudice appellant's trial. First, the naming of a particular drug is surplusage. In the case of *People v. Gelardi*, 175 P. 2d 855 (Cal. App. 1946), the defendant was convicted under an information charging him with selling "a narcotic, to wit: Opiates," rather than selling a narcotic, to wit, morphine. The court held that the specification of opiates added nothing whatever to the information, and that it may be treated as mere surplusage. The court continued: "However, without any specification of either opiates or morphine, the accusation is sufficient, for it follows the language of the statute . . ." *Id.* at 857. In the present case, the information charging appellant follows the language

of the statute. See Utah Code Ann. § 58-33-6(1) (1971 Supp.) *supra*. Since the language of the statute is followed by charging appellant with the sale of a stimulant drug, the naming of a drug is surplusage and not required to be included in an information. Utah Code Ann. § 77-21-42 (1953).

In the similar case of *State v. Madsen*, 28 Utah 2d 108, 498 P. 2d 670 (1972), this Court found no error in the fact that the drug identified at trial was different than the drug named in the charge since the sale of the drug identified at trial was a prohibited act. In the present case, it is unquestionable that the sale of amphetamine is a prohibited act and that the drug identified at trial was amphetamine.

Second, the appellant could have found out any information about his charge if he were actually in need of additional information by demanding a bill of particulars. Utah Code Ann. § 77-21-9 (1953).

Third, appellant cannot wait until he is convicted to challenge the sufficiency of the information. In the case of *State v. Courtney*, 10 Utah 2d 200, 350 P. 2d 619 (1960), the defendant made no attempt prior to his conviction to challenge the information and then alleged that it did not meet the statutory requirements. This court held that the information did comply with the Constitution and statutes of the State because the charge used the name given the offense by statute. In continuing, this court said:

“Furthermore, his failure to demand a bill of particulars, precludes the defendant on this appeal to question, for the first time the sufficiency of the information.” *Id.* at 621.

In the present case, appellant neither challenged the information nor demanded a bill of particulars so he should be precluded from challenging the information on appeal.

Finally, the use of “methamphetamine” was most likely a clerical mistake which was not caught by either party. During the preliminary hearing, it was recognized that the drug in question was amphetamine. The complaint was allowed to be changed by crossing off the first four letters of “methamphetamine” with a pen (Tr. 1, 11-12). The hand correction is ambiguous and could be the reason for the correction not appearing on the information. Utah law provides that no information that conforms with § 22-21-8 shall be invalid because of any “miswriting”. Further, no appeal based on any such imperfection shall be sustained unless it is affirmatively shown that the defendant was prejudiced in his defense. Utah Code Ann. § 77-21-43 (1953).

Certainly, there was no prejudice to appellant's defense when (1) no objection was made concerning the information as read, (2) counsel for appellant used the word “amphetamine” when cross examining the State toxicologist, and (3) no attempt was made by appellant to question the type of drug involved or to argue that the drug in question did not meet the crime as charged. An

appellant cannot expect a new trial when he has been charged with stealing a cake, to wit: chocolate; and his only claim on appeal is that the cake was angel food.

CONCLUSION

Appellant's trial can best be characterized as a situation wherein both sides were talking about amphetamines, where appellant was convicted of selling an amphetamine but that due to a mistake, the information said "methamphetamine" which resulted in no prejudice to appellant. The conviction of the lower court must be upheld because appellant was properly charged and convicted of the crime of selling a stimulant drug.

Respectfully submitted,

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