

1992

Utah v. Lorenzo Miranda-Ramirez : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *Utah v. Miranda-Ramirez*, No. 920454 (Utah Court of Appeals, 1992).

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
LORENZO MIRANDA-RAMIREZ,	:	Case No. 920454-CA
Defendant/Appellant.	:	Priority No. 2

BRIEF OF APPELLANT

Appeal from a judgment and conviction for attempted unlawful agreeing, consenting, offering, or arranging to distribute a controlled or counterfeit substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(ii) (1992), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Richard H. Moffat, presiding.

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APPEALS

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JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this Court pursuant to Utah Code Ann. section 78-2a-3(2)(f) (1992), and Utah R. Crim. P. 26(2)(a), whereby a defendant in a district court criminal action may take an appeal to the Court of Appeals from a final judgment and conviction for any crime other than a first degree or capital felony.

STATUTES AND CONSTITUTIONAL PROVISIONS

The pertinent parts of the following statutes and constitutional provisions are contained in the text of this brief or in Addendum A:

Utah Code Ann. § 58-37-8(1)(a)(ii)

STATEMENT OF THE ISSUE AND STANDARD OF REVIEW

Whether the State's evidence sufficiently supported a probable cause bindover determination. "[T]he district court need show no deference to the magistrate's legal conclusion, . . . but may conduct its own review of the order." State v. Humphrey, 818 P.2d

1027 (Utah 1991); State v. Cooper, 809 P.2d 515, 517 (Idaho App. 1991) ("our standard of review of a district court decision where the district court is sitting in an appellate capacity is one of free review"); accord Tolman v. Salt Lake County Attorney, 818 P.2d 23, 26 (Utah App. 1991).

STATEMENT OF THE CASE AND NATURE OF THE PROCEEDINGS

This is an appeal from a judgment and conviction for attempted unlawful distribution, offering, agreeing, consenting or arranging to distribute a controlled or counterfeit substance, a third degree felony, in violation of Utah Code Ann. section 58-37-8(1)(a)(ii), and pursuant to a plea bargain agreement. (R 55-61, 65; 128).

On May 1, 1992, the State filed an Information which was then amended and refiled on June 12, 1992. (R 07-08, 21-22). On June 17, 1992, Mr. Miranda-Ramirez moved "to Quash the Bindover of the Circuit Court and to Dismiss the Information[.]" (R 20; 79-105). The trial court denied his motions. (R 50-52).

Mr. Miranda-Ramirez then entered a conditional plea of guilty contingent upon his right to appeal the court's ruling. (R 55-61; 111; 120-21; 127-28). Following its acceptance of the plea, the court sentenced Mr. Miranda-Ramirez to an indeterminate term of zero-to-five years in the Utah State Prison and also ordered him to make various payments. The court immediately suspended imposition of sentence and placed him on probation for three years. (R 65). Due to his status as an illegal alien, Mr. Miranda-Ramirez

was deported¹ by the I.N.S. Other facts relevant to this section are stated elsewhere in the brief.

STATEMENT OF THE FACTS

The State initially filed an Information, dated May 8, 1992, which alleged in relevant part that Mr. Miranda Ramirez "did knowingly and intentionally distribute, offer, agree, consent or arrange to distribute a controlled or counterfeit substance, to-wit: Cocaine, a Schedule II Controlled Substance. (R 07) (emphasis added). On June 12, 1992, the State filed an Amended Information which alleged that Mr. Miranda Ramirez "did knowingly and intentionally offer, agree, consent or arrange to distribute a controlled or counterfeit substance, to-wit: Cocaine, a Schedule II Controlled Substance. (R 21). With the exception of the word, "distribute," the Amended Information was essentially the same as the initially filed Information.

The amendment resulted from a preliminary hearing discussion, held on May 21, 1992, in which the State was unable to produce a toxicologist (report) or establish a chain of custody that could identify the evidence obtained as cocaine or a counterfeit substance. (R 23-49). The State deleted the "distribute" language and instead focused on whether Mr. Miranda-Ramirez had "offered" to distribute a controlled or counterfeit substance. (R 81-82).

¹ Cf. United States v. Campos-Serrano, 404 U.S. 293, 294 n.2 (1971); State v. Ortiz, 774 P.2d 1229 (Wash. 1989) (deportation does not moot the appeal).

According to the State, Detective Tony Garcia and another undercover narcotics officer entered the Shamrock bar on April 23, 1991. (R 30-31). The charge was based on detective Garcia's belief that the substance in a "baggy" was cocaine notwithstanding the State's failure of produce the substance, itself.

[Witness, Detective Garcia]: On that evening Detective Lucas and myself walked in the Shamrock bar. We were approached by several individuals as to ahw, if we wanted to buy some some [sic] narcotics, cocaine. Ahw, we by passed those individuals and one sat down at a booth. While we were sitting at the booth the defendant came up to me and asked me if I needed anything.

[Prosecutor]: By the defendant you're talking about the [man] that just sat down?

A: Yes, I am.

Q: Alright. And when he came up and sat down next to you what did he say?

A: Ahw, I asked him, he asked me if I needed anything I told him ahw, ahw, I wanted a 1/16th -- cocaine.

Q: How did he respond to that?

A: Ahw . . .

. . .

Pros: . . . And ahw, how did he respond to that when you say you wanted 1/16th ounce of cocaine?

Wit [Garcia]: Ahw, he showed me ahw, small baggy of cocaine which he produced and held it in front of me.

Q: Alright. What did you say?

A: I asked him how much he wanted for it.

Q: What did he say?

A: He said \$60 dollars.

Q: And then what?

A: I handed him a \$100 dollar bill he handed me the baggy of cocaine and \$40 dollars change.

Q: And any further dealings with him that night?

A: No I did not.

(R 32-33).

The State's contention was that it did not have to produce the substance, regardless of whether it was real or counterfeit, because the prosecution's focus was on the "offer" to distribute the substance.

It is the State's position [now] . . . and at the preliminary hearing [on this charge] . . . that when the offer is made and something that the defendant holds out to be a controlled substance is agreed upon, whether or not a real narcotic exists, [then] that crime is complete. We did not bring the controlled substance itself to the hearing nor the toxicology report. We brought in an officer [detective Garcia] who stated he dealt with Mr. [Miranda-]Ramirez. He handed over money and Mr. [Miranda-]Ramirez handed over something Mr. [Miranda-]Ramirez [sic] held out to be cocaine.

(R 81-82). The differences between the prosecutor's recollection and the actual testimony of detective Garcia will be elaborated upon below.

SUMMARY OF THE ARGUMENT

The testimony of the State's key witness, Detective Garcia, did not provide evidence of the existence of a crime. Even though Garcia may have subjectively perceived his encounter with Mr. Miranda-Ramirez as one involving a drug "buy," since no evidence of cocaine was produced and because Miranda-Ramirez never represented that he would sell Garcia a controlled substance,

Mr. Miranda-Ramirez's conduct did not fall under the plain language of the statute.

ARGUMENT

THE PROBABLE CAUSE BINDOVER DETERMINATION WAS NOT SUFFICIENTLY SUPPORTED BY THE EVIDENCE

Utah Code Ann. section 58-37-8(1)(a)(ii), reads "it is unlawful for any person to knowingly and intentionally . . . distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or counterfeit substance[.]" Id. (emphasis added). Following the preliminary hearing, the word "distribute" was deleted from the Information and the State instead emphasized that Mr. Miranda-Ramirez had already completed the crime when he "offered" to distribute a controlled or counterfeit substance. (R 51) (Minute entry) ("It is the State's position that the essence of the crime charged is the offering to sell a controlled or counterfeit substance"); (R 81).

Since the State failed to provide proof that the involved substance was in fact cocaine, the alleged crime must be shown through evidence of a "counterfeit substance." Cf. (R 115) ("at the preliminary hearing, the State elected, affirmatively elected not to bring on the chain, toxicology and the actual drugs because we [the State] think that we have met probable cause of a crime [offering to distribute]"). However, as reflected by the involved officer's testimony, Mr. Ramirez-Miranda never represented that the substance in the baggy was cocaine or a counterfeit substance. Ramirez-

Miranda stated only that he wanted \$60 dollars for the contents in the baggy. Detective Garcia was the person responsible for expressing his interest in cocaine. Mr. Miranda-Ramirez's conduct did not amount to a crime under the plain language of the statute:

Q [the prosecutor]: Alright. And when he [Miranda-Ramirez] came up and sat down next to you [detective Garcia] what did he say?

A [Garcia]: Ahw, I asked him, he asked me if I needed anything I told him ahw, ahw, I wanted a 1/16th -- cocaine.

Q: How did he respond to that?

A: Ahw . . .

. . .

Pros: . . . And ahw, how did he respond to that when you say you wanted 1/16th ounce of cocaine?

Wit [Garcia]: Ahw, he showed me ahw, small baggy of cocaine which he produced and held it in front of me.

Q: Alright. What did you say?

A: I asked him how much he wanted for it.

Q: What did he say?

A: He said \$60 dollars.

Q: And then what?

A: I handed him a \$100 dollar bill he handed me the baggy of cocaine and \$40 dollars change.

(R 32-33).

Asking a person if he "needs anything" does not amount to agreeing, consenting, offering, or arranging to distribute a controlled or counterfeit substance. Utah Code Ann.

§ 58-37-8(1)(a)(ii). Nor would the involved statute criminalize a

"baggy" sale notwithstanding the detective's perceptions, as opposed to an individual's representations of the contents at issue. The statute focuses only on the accused's representations and places no relevance on the detective's preconceived notions or his perceptions of ambiguous conduct. See Utah Code Ann. § 58-37-2(5)(b) ("'Counterfeit substance' means . . . any substance that is represented to be a controlled substance").

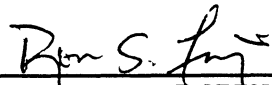
Nothing in the record reflects whether the substance in the baggy weighed "1/16th" of an ounce or even if the amount would have appeared consistent with the detective's request. Particularly since detective Garcia had never previously bought or attempted to buy narcotics (or counterfeit substances) from Mr. Miranda-Ramirez, (R 42), Garcia lacked the benefit of prior dealings or a course of performance as a means of interpretation. The State failed to clarify whether Miranda-Ramirez's production of a baggie was not simply a follow up to his willingness to sell "anything" to Garcia, as opposed to a misplaced perception of a targeted individual suspected of drug dealing. The burden of proof and the burden of resolving ambiguous conduct fell on the State.²

² Unlike other cases where neither the validity of the drug nor the representations of the defendant were at issue, see, e.g., State v. Pelton, 801 P.2d 184 (Utah App. 1990) (citing cases), here the defendant's conduct or lack of conduct could not be viewed as an "offer." Detective Garcia was the individual referring to cocaine.

CONCLUSION

Appellant respectfully requests that this Court reverse his conviction.

SUBMITTED this 29th day of October, 1992.



RONALD S. FUJINO
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JAMES A. VALDEZ
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CERTIFICATE OF DELIVERY

I, RONALD S. FUJINO, hereby certify that I have caused eight copies of the foregoing to be delivered to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102, and four copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 29th day of October, 1992.



RONALD S. FUJINO

DELIVERED/MAILED this _____ day of October, 1992.

ADDENDUM A

58-37-8. Prohibited acts — Penalties.

58-37-8(1) Prohibited acts A — Penalties:

58-37-8(1)(a) Except as authorized by this chapter, it is unlawful for any person to knowingly and intentionally:

(ii) distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or counterfeit substance;