

1983

State of Utah v. Timmy Hill : Brief of Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :

Plaintiff/Respondent, :

vs. :

Case No. 19275

TIMMY HILL, :

Defendant/Appellant, :

BRIEF OF APPELLANT

Appeal from a judgment of the Second Judicial District
Court, County of Weber, State of Utah, the Honorable
John F. Wahlquist presiding.

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Salt Lake City, Utah 84114

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:	BRIEF OF APPELLANT
:	Case No. 19275
:	
TIMMY HILL,	:
:	
:	
:	
:	
Defendant/Appellant.	:

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with theft by deception, a second degree felony, in violation of UCA §76-6-405, in connection with the sale of an imitation controlled substance.

DISPOSITION IN THE LOWER COURT

Appellant was convicted as charged in a jury trial on April 28, 1983, in the Second Judicial District Court, County of Weber, State of Utah, the Honorable John F. Wahlquist presiding.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of his conviction on the grounds as set forth in the following argument.

STATEMENT OF THE FACTS

On Friday, December 10, 1982, pursuant to negotiations with several individuals, undercover Detective Jack Alexander of the Ogden City Police Department met with Timmy Hill with the intent of purchasing one ounce of cocaine for a price of \$2,100. Timmy met with Detective Alexander in a parked car, told him that he had one ounce of "good" cocaine and then completed the deal. Detective Alexander immediately placed Timmy under arrest. Timmy had one ounce of cocaine which he shared with distribution for value of an

imitation controlled substance in that it is prohibited by UCA §58-37b-4. At a later time, the state attorney, using the information, charged Timmy with theft by deception under UCA §76-6-405 instead of pursuing the charge under §58-37b-4. Counsel for defendant resisted this amendment, and on March 4, 1983, moved the District Court of Weber County to dismiss on the basis that Timmy was improperly charged. The court denied defendant's motion and Timmy was tried and convicted for violation of UCA §76-6-405.

ARGUMENT

POINT I

APPELLANT WAS IMPROPERLY CHARGED UNDER A GENERAL THEFT STATUTE OF THEFT BY DECEPTION (UCA §76-6-405), WHEN A SPECIFIC DRUG STATUTE (UCA §58-37b-4) WOULD BE MORE APPLICABLE AND DIRECTLY CONTROLLING.

The Legislature has specifically provided that provisions of the Controlled Substances Act be controlling over conflicting provision of other state laws. UCA §58-37-19 provides in relevant part:

"Whenever the requirements prescribed, the offenses defined or the penalties imposed relating to substances controlled by this act shall be or appear to be in conflict with Title 58, Chapter 17 or any other laws of this state, the provisions of this act shall be controlling."

Any offense that is clearly included within the Controlled Substances Act, would therefore be governed by that Act, notwithstanding the fact that the offense could conceivably be construed to be a violation of a more general statute in the Criminal Code.

The recent Utah Supreme Court decision of State v. Hicken 100 P.2d 1638 (Utah 1983), discusses this issue and should govern the Court's ruling in this case. In that case, the defendant arranged a sale of marijuana. He was charged, however, with distribution for value in conjunction with UCA 1953 §76-2-202, by intentionally aiding another person to engage in that criminal conduct. The defendant's argument was that UCA §58-37-8(1) (a) (iv), arranging the sale of a controlled substance, spoke directly and specifically to the defendant's conduct and would be the proper statute under which the defendant should be charged. In holding that §76-2-202 did not apply, this Court asserted persuasively that the Controlled Substances Act exclusively governed conduct included within its parameters.

The question to be decided by this Court is whether UCA §58-37-19 would be applicable to a later enacted chapter of the Controlled Substances Act that of Title 58, Chapter 37(b), entitled the "Imitation Controlled Substances Act."

The logical application of §58-37-19 to Chapter 37(b), is indicated by several factors. First, §58-37b was enacted for the purpose of clarifying and specifying in some detail what would be considered an imitation controlled substance and to set a penalty for selling, distributing or manufacturing such substances for the purpose of substituting them for real controlled substances. The important fact in determining whether the "Imitation Controlled Substances Act" should be included as a controlling statute over conflicting or simultaneous statutes as specified in

§58-37-19 is that §58-37b replaces the language a "substantive material in lieu of the specific controlled substance..." previously stated in §58-37-8 (1) (a) (iv). This language replaced by §58-37b was clearly included as controlling over a general criminal statute. It is logical to assume that §58-37 then is also controlling.

Second, the "Imitation Controlled Substances Act" is extremely brief and refers to the Controlled Substances Act for its major definition. It contains none of the procedural sections that are contained in the parent statute which further implies that one should refer to §58-37 provisions.

Finally, the legislature inserted the "Imitation Controlled Substances Act" as §58-37b making it a sub-chapter to chapter 37 of the Controlled Substances Act.

Other considerations should likewise be examined in determining whether an offense should be prosecuted under Chapter 37(b) or the more general Criminal Code. In Helmuth v. Morris, 598 P.2d 333 (Utah 1979), this Court expressed its adherence to the common principle that when an individuals' conduct can be construed to be a violation of two conflicting statutes, the more specific statute will control over the more general. Additionally, the Court declared "that where two statutes interdict the same conduct, but impose different penalties, the violator is entitled to the lessor punishment." Id at 335. See also State v. Shondel, 453 P.2d 146 (UT 1969); People v. Gilbert, 462 P.2d 586 (Cal 1969.)

A final factor which this Court should consider is the general principle that a more recently enacted statute generally takes precedence over an earlier enacted statute.

The scope of the Imitation Controlled Substances Act by statutory language universally governs all conduct involving imitation controlled substances. UCA §58-37b-4 in relevant part states: "It is unlawful for any person to manufacture, distribute, or possess with intent to distribute, an imitation controlled substance." The Act does not directly speak to the issue of whether or not the transacting individuals have knowledge of the fact that it is imitation substance or not. In defining imitation controlled substance, the statute states,

"Imitation controlled substance means a substance that is not a controlled substance, which by overall dosage unit substantially resembles a specific controlled substance in appearance (such as color, shape, size, and markings), or by representation made, would cause a reasonable person to believe that the substance is a controlled substance." (UCA §58-37b-2(4), emphasis added.)

By enacting this statute, the Legislature doubtless was aware that it would be used not only in charging individuals who sold an imitation controlled substance to a buyer who knew or was told of its false nature, but also in charging individuals who sold imitation substances to unknowing buyers with the intent to deceptively steal their money.

The facts of the case on appeal present the Court with circumstances that would clearly fall within the intended scope of UCA §58-37b-4. The defendant sold to an undercover agent a substance which in appearance substantially resembled cocaine.

The defendant represented to the agent that the substance was cocaine. The defendant clearly distributed an imitation controlled substance as defined by statute. The appellant's conduct may well be a violation of the more general theft by deception statute §76-6-405 in that the defendant obtained control over the agent's money by deception. The gravamen of the defendant's appeal, however, is that his conduct is more specifically defined and proscribed by UCA §58-37b-4, that this statute is controlling, and therefore the defendant was improperly charged under the more general and non-controlling Criminal Code. The strength of appellant's contention that his conduct should be governed by the controlled substances act is further substantiated by the fact that the prosecution, initially charged the defendant with distribution of an imitation controlled substance under UCA §58-37b-4, only to amend the charge at a later point in time.

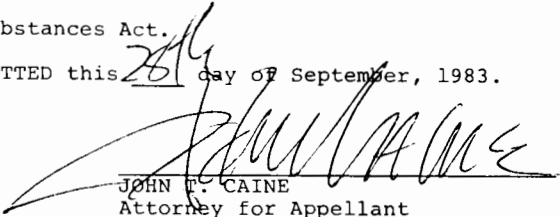
CONCLUSION


The trial court erred in allowing the State to amend the charge against defendant from a violation of the Imitation Controlled Substances Act to a second degree felony, theft by deception. That the trial court further violated defendant's rights to due process and equal protection by allowing the State to proceed to trial and gain a conviction over the proper and timely objection of defense counsel. That the Imitation Controlled Substances Act is to be considered under UCA §58-37b-4 making it controlling over the general criminal law statutes.

In addition, prior decisions by this court requires that the defendant is entitled to be charged with that statute which most specifically proscribes the defendant's conduct or when the states are equally specific the defendant is entitled to the benefit of the statute carrying the less sever penalty.

Therefore, the appellant respectfully prays that this court reverse his conviction and remand the matter for trial under the Imitation Controlled Substances Act.

RESPECTFULLY SUBMITTED this 26th day of September, 1983.



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Attorneys for Appellant gratefully acknowledge the assistance of Randall Richards, third year law student at the University of Utah, in the preparation of this brief.

CERTIFICATE OF MAILING

I hereby certify that I mailed two true and correct copies of the above and foregoing brief to the Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114, postage prepaid, this 28th day of September, 1983.


WENDY BOOTH, Secretary