1983

State of Utah v. Timmy Hill : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 19275
TIMMY HILL,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

- - - - - - - - - - -

APPEAL FROM A JUDGMENT OF THE SECOND JUDICIAL DISTRICT COURT, IN AND FOR WEBER COUNTY, THE HONORABLE JOHN F. WAHLQUIST, JUDGE, PRESIDING.

DAVID L. WILKINSON
Attorney General
J. STEPHEN MIKITA
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

JOHN T. CAINE
BERNARD L. ALLEN
Richards Caine & Richards
2568 Washington Boulevard
Ogden, Utah 84401

Attorneys for Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 19275
TIMMY HILL,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

- - - - - - - - - - -

APPEAL FROM A JUDGMENT OF THE SECOND JUDICIAL DISTRICT COURT, IN AND FOR WEBER COUNTY, THE HONORABLE JOHN F. WAHLQUIST, JUDGE, PRESIDING.

DAVID L. WILKINSON
Attorney General
J. STEPHEN MIKITA
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

JOHN T. CAINE
BERNARD L. ALLEN
Richards Caine & Richards
2568 Washington Boulevard
Ogden, Utah 84401

Attorneys for Appellant

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 19275
TIMMY HILL,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with and convicted of Theft by Deception, a second-degree felony, in violation of Utah Code Ann. § 76-6-405 (1978).

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury and found guilty of Theft by Deception on 28 April, 1983 in the Second Judicial District Court for Weber County, State of Utah, the Honorable John F. Wahlquist presiding. On 31 May 1983, the trial court sentenced appellant to an indeterminate term of not less than one year nor more than fifteen years. On 19 July 1983, the trial court ordered appellant's release from the Utah State Prison pending disposition of this appeal.

RELIEF SOUGHT ON APPEAL

Respondent seeks a judgment and order of this Court affirming the jury verdict and sentence of the lower court.

STATEMENT OF THE FACTS

On 10 December 1982, Jack Alexander, an Ogden City policeman on special assignment with the State of Utah Narcotic and Liquor Law Enforcement Bureau, and Frank, an informer, met with appellant, Timmy Hill, to arrange for the purchase of an ounce of cocaine (T. 66-71, 101, 116-117, 169). Detective Alexander had been introduced to Timmy Hill by Carolina Jones (T. 5, 19, 35, 115). Appellant and Detective Alexander settled on the price of $2100 for an ounce of cocaine and agreed to meet at Carolina's house later that afternoon (T. 71, 117, 135).

Detective Alexander arrived at Carolina's house before appellant. When appellant arrived, he said he did not have the cocaine with him then, but asked to see Detective Alexander's money (T. 49, 79, 91, 93, 118-121). Appellant said he would return with the cocaine later in the afternoon, and told Detective Alexander to listen for a car's horn and to walk out to the car when he heard it (T. 80, 94, 52).

After the second meeting, appellant drove to a nearby store and obtained a box of baking soda and a "Big Nickel" newspaper with which he fasioned a package of white powder that resembled a package of cocaine (T. 119, 139). Appellant returned to Carolina's house about 5:20 that

afternoon (T. 21, 80). Detective Alexander went out to the car and sat in the back seat (T. 83). Appellant sat in the front passenger seat (T. 22, 140). Detective Alexander asked appellant if he had the cocaine and appellant responded in the affirmative (T. 81). Appellant opened the package he had fashioned, showed it to Detective Alexander and assured him that the purported cocaine was good stuff, but did not let Detective Alexander test it (T. 52, 84, 97, 104, 119-120). Appellant told Detective Alexander that the price was $2100 (T. 84). He took the $2100 Detective Alexander handed to him (T. 84, 86, 99) and gave Detective Alexander the purported cocaine (T. 120). After receiving the money, appellant apparently placed it on the console between the car's bucket seats (T. 23, 24, 89, 120). When the sale was completed, Detective Alexander signaled to other officers waiting nearby, and appellant was arrested (T. 84). Upon being arrested, appellant told the officers, "That's okay, that's okay. You ain't got shit on me, check the stuff out, sucker." (T. 87, 100). The purported cocaine appellant sold to Detective Alexander proved to be the baking soda appellant had purchased earlier in the afternoon (T. 84, 109).

ARGUMENT

POINT I

APPELLANT WAS PROPERLY CHARGED AND CONVICTED OF THEFT BY DECEPTION BECAUSE THE IMITATION CONTROLLED SUBSTANCES ACT PROVISION PROSCRIBING DISTRIBUTION OF IMITATION CONTROLLED SUBSTANCES DOES NOT APPLY TO THE FACTS OF THIS CASE.

Appellant contends that he was improperly convicted of Theft by Deception under Utah Code Ann. § 76-6-405 (1978), because his conduct was more specifically proscribed by Utah Code Ann. § 58-37b-4 (1983 Interim Supp.), Distribution of an Imitation Controlled Substance. Appellant relies on Hulmuth v. Morris, Utah, 598 P.2d 333, 335 (1979) and State v. Shondell, 22 Utah 2d 343, 453 P.2d 146, 148 (1969) for the principle that where a defendant's conduct may be considered to fall within the purview of two separate statutes, the statute which applies more specifically to the defendant's conduct takes precedence, and the rule that "where two statutes interdict the same conduct, but impose different penalties, the violator is entitled to the lesser punishment." Helmuth at 335 (footnote omitted).

"The fallacy in . . . [appellant's] argument is that the statute referred to does not prohibit the same conduct" as does § 76-6-405. Id. Utah Code Ann. § 58-37b-4 (1983 Interim Supp.) states:

> It is unlawful for any person to manufacture, distribute, or possess with intent to distribute, an imitation controlled substance. Any person who violates this section shall be guilty of a class B misdemeanor and upon conviction may be imprisoned for a term not exceeding six months, fined not more than $299, or both.

The Utah statute is nearly identical to Section 2.a. of the Model Imitation Controlled Substances Act (1981).

As defined by Utah Code Ann. § 58-37b-2(4), an "imitation controlled substance" is

> . . . 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 representations made, would cause a reasonable person to believe that the substance is a controlled substance.

Baking soda, the substance appellant sold to the undercover agent, is not an "imitation controlled substance" according to the Imitation Controlled Substances Act, and therefore, the Act does not proscribe appellant's conduct. The reasons for this become apparent upon examination of the Model Imitation Controlled Substances Act (1981). That act is designed to control the manufacture, distribution and use of "look-alike" drugs.

> Look-alikes are tablets and capsules which are manufactured and imprinted to closely resemble or even duplicate the appearnce of well-known, brand name controlled substances, but which contain only non-controlled over-the-counter durgs such as caffeine, ephedrine,

> phenylpropanolamine, actaminophen, or some combination of these substances. Look-alikes are advertised as being body stimulants, alternative energy sources, or nighttime analgesics. . . .

Prefatory Note, Model Imitation Controlled Substances Act (1981). In addition to tablets and capsules, powders and liquids may sometimes be "look-alike" drugs and thus "imitation controlled substances."

> The portion of the DEA Model Act which deals with "representations made: by the seller [, § 58-37b-3 of the Utah Act,] is not really intended to reach look-alikes in tablet or capsule form, but rather, is intended to reach those cases where powder or liquid is represented to be controlled substances.

Comment, Model Imitation Controlled Substances Act (1981). However, not all powders or liquids sold as substitutes for controlled substances are "imitation controlled substances."

> DEA believes that many of the existing and draft State Acts which have sought to reach the look-alike problem have placed too much emphasis on the representations made by the seller of the substances. Hence, the DEA Model Act seeks to place emphasis on the "look-alike" nature of most of the substances involved to sustain the burden of proving a violation. (Emphasis added.)

Comment, Model Imitation Controlled Substances Act (1981). The gravamen of the "look-alike nature" of "imitation controlled substances," including powders and liquids, according to the Prefatory Note of the Model Act, is that the

substance "resemble or . . . duplicate the appearance of well-known controlled substances," but most contain, instead of the controlled substance, any one or a combination of non-controlled over-the-counter drugs, usually stimulants or appetite supressants.

> . . .[T]he look-alike ingredients have a legitimate medical use, they are found in many of the more common over-the-counter products and when used as directed, they are generally not harmful.

Prefatory Note, Model Imitation Controlled Substances Act (1981). The baking soda sold in this case was not a substance which, when ingested, would cause the consumer to experience and effect similar to but less severe than the effect of the controlled substance it was "manufactured" (§ 58-37B-2(3)) to imitate. Thus, it was not within the intent nor scope of the statute. A contrasting example is that of a tablet or capsule containing caffeine which is manufactured to resemble a controlled substance such as an amphetamine. Similarly, if the substitute substance appellant sold to the undercover agent had been composed of a white powder containing, in part, caffeine or ephedrine, then the baking soda would have been an "imitation controlled substance."

The problems at which the Imitation Controlled Substance Act is aimed are described in the Prefatory Note to the Model Act as follows:

> Look-alikes are touted as being completely safe and legal and consumers are advised to take several in order to get the full effect. Of course, the danger to a child who has been ingesting five or six caffeine pills and attempts the same thing with real amphetamines one day is obvious. More insidious is the grwoing climate of acceptance of these substances among students as their sale and use become widespead. Of immediate concern, however, are recent reports of hospital emergencies and even overdose deaths caused solely by ingestion of look-alikes.

Prefatory Note, Model Imitation Controlled Substances Act (1981). Appellant's contention that the Imitation Controlled Substances Act, by statutory language, universally governs all conduct involving imitation controlled substances is unfounded. When read in conjunction with the Prefatory Note and Comment, the Act clearly specifies what kinds of substances it governs, and simple baking soda, under the facts of this case, falls outside the scope of the act.

The Imitation Controlled Substances Act also clearly specifies what conduct it proscribes. Contrary to appellant's conclusion, there is no express or implied reference in § 58-37b-4 to the act of selling substances to unknowing buyers with the intent to deceptively steal their money. This specific intent requirement is, however, found in the Theft by Deception statute which states in pertinent part:

> (1) A person commits theft if he obtains money or exercises control over property of another by deception and with a purpose to deprive him thereof.

Utah Code Ann. § 76-6-405 (1978).

Thus, because the baking soda is not an "imitation controlled substance" as contemplated by the Imitation Controlled Substances Act, and because appellant's conduct does not fall within the scope of the Act, § 58-37b-4 does not provide a more specific interdiction of appellant's conduct. Section 58-37b-4 simply does not apply to appellant's conduct, and therefore, no conflict exist between § 58-37b-4 and § 76-6-405 under the facts of this case.

Absent any conflict between the statutes appellant discusses, this Court need not address the question of whether Utah Code Ann. § 58-37-19 (1953) would be applicable to the Imitation Controlled Substances Act, the later enacted subchapter of the Controlled Substances Act (Utah Code Ann. § 58-37-1 et seq. (1953)). Utah Code Ann. § 58-37-19 (1953) provides as follows:

> It is the purpose of this act to regulate and control the substances designated within section 58-37-4, and 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. (Emphasis added.)

Section 58-37-19 does not prohibit the use of provisions found elsewhere in the Utah Code in all cases. Only when the use of external provisions creates a conflict with the Controlled Substances Act are the external provisions superseded. In the

instant case, the statute under which appellant seeks a lesser sentence does not apply to his conduct, and therefore, it is not in conflict with the statute under which appellant was appropriately charged, convicted, and sentenced.

The gravamen of appellant's appeal is that because his conduct is more specifically defined and proscribed by § 58-37b-4, that statute is controlling, and therefore, he was improperly charged under § 76-6-405. Appellant's argument fails because the statute he refers to does not apply to his conduct. Therefore, appellant's the conviction and sentence must be affirmed.

CONCLUSION

For the reasons stated above, respond requests that this Court affirm the conviction and sentence for Theft by Deception.

RESPECTFULLY submitted this 25 day of November, 1983.

DAVID L. WILKINSON
Attorney General

J. STEPHEN MIKITA
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and exact copy of the foregoing Brief of Respondent, postage prepaid, to JOhn T. Caine and Bernald L. Allen, Attorneys for Appellant, 2568 Washington Boulevard, Ogden, Utah 84401, this 25th day of November, 1983.

Kathleen D. Kellersberger