1983

State of Utah v. Lane Wade Barney : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff and Respondent,	:	
vs.	:	
LANE WADE BARNEY,	:	Case No. 18974
Defendant and Appellant.	:	

BRIEF OF APPELLANT

Appeal from a conviction of the offense of sale of a controlled substance, contrary to section 58-37-8 (i) (a) (ii), Utah Code Annotated (1953, as amended), before a jury in the Sixth District Court in and for Sevier County, the Honorable Don V. Tibbs presiding.

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a conviction of the offense of sale of a controlled substance, a second degree felony.

DISPOSITION IN THE LOWER COURT

A jury trial was held on November 23, 1982 in the Sixth District Court in and for Sevier County, Utah, and the appellant was convicted of the charged offense. On January 12, 1983, the appellant was sentenced to fifteen years in prison. The Court suspended the sentence and placed the appellant on probation on the condition he complete one year in jail in addition to other ordinary conditions of probation.

RELIEF SOUGHT ON APPEAL

The appellant seeks a reversal of the lower court's denial of his motion for a mistrial and a new trial.

STATEMENT OF FACTS

One Michael Reed Allred was visiting a bar known as Li'l Bits on November 7, 1981 when he was asked by some individual he did not know if he would buy some drugs for them (T-69-70). Allred responded he would check around for them and made inquiry of a Dave Jolley, a member of a band playing in the bar, if any drugs were available (T-70). Jolley responded affirmatively and told Allred he could have a gram of cocaine for $120.00 (T-72). Allred then got $120.00 from the unknown individuals. When the band took a break, Allred walked outside, walked up to the appellant, and asked him if he had drugs (T-73, 74). The appellant said yes and gave him a quantity of cocaine in return for the money, according to Allred (T-74). At least 16 people and perhaps as many as thirty were in the parking lot at the same time (T-84, 133). Allred took the substance into the bar and gave it to the strangers (T-75).

No doubt much to his chagrin, the men Allred gave the substance to turned out to be police officers (T-75). Eight months later he was permitted to plead guilty to a class A misdemeanor, two degrees less than a sales charge, (T-90), was fined (T-90), and in return for the first time gave the officers the name of the person from whom he allegedly purchased the drug (T-88). As Allred himself put it, he "got a break" (T-91). The only evidence against the appellant was the word of Allred (T-103).

The appellant's attorney in cross-examining Allred, asked him why he had not received a cue from Dave Jolley as to who was going to sell the drugs (T-84). Dave Jolley was the person

with whom all of the negotiations had occurred (T-70, 72). Allred responded, "Because I have got high with Mr. Barney before," (T-84). Soon as the jury was excused the appellant moved for a mistrial, contending that the response was a volunteered reference to prejudicial, unrelated misconduct (T-113). The motion was denied (T-115).

The appellant called three witnesses who had been with him in the parking lot at the time in question. One gave the opinion that Allred was drunk (T-127, 128). Each said that no transaction took place between the appellant and Allred (T-125, 142, 154). The appellant testified that at best he and Allred were acquaintances and he had not sold him anything (T-159, 161).

ARGUMENT

ALLRED'S STATEMENT VIOLATED RULE 55 OF THE UTAH RULES OF EVIDENCE

The State's own witnesses conceded that the only evidence against the appellant was Allred's uncorroborated claim that the cocaine he gave the undercover officers came from the appellant. The claim can only be viewed with great suspicion when it is considered in light of the circumstances in which it was first made. Given the meager, questionable evidence against the appellant, Allred's volunteered statement that he had gotten high with the appellant on other occasions was such a prejudicial violation of Rule 55, U. R. E., that a new trial is warranted.

Before 1980, a conviction could not have been had on the uncorroborated word of Allred as a matter of law, (see then-section 77-31-18, U. C. A. 1953). Present law would still require

Allred's claim that he acquired cocaine from the appellant to be viewed with caution and close scrutiny, section 77-17-7. He was given money by total strangers and produced cocaine for them at their request. He was arrested and charged with a felony. Eight months later he was offered a class A misdemeanor and a fine, in contrast to the 15 years in prison and $10,000.00 fine he could have received, and all he had to do was produce a name and testify. It merely states the obvious to observe that the opportunity to avoid prison is a powerful motive to falsify. Coupled with the incentive to make a statement, any statement, even a false one, is the complete absence of any evidence to substantiate it. Not a single witness, including the undercover police officers, was called to testify that Allred and the appellant as much as spoke to one another inside the bar. Not a single witness from the sixteen to thirty people in the parking lot was called to testify that Allred and the appellant were even seen together. Those witnesses who did testify said that Allred was drunk, no transaction occurred, and Allred and the appellant hardly knew each other. It is against this backdrop of insubstantial evidence that the prejudicial impact of Allred's statement that he and the appellant had gotten high together must be gauged.

Rule 55, U. R. E. provides in pertinent part that, "... evidence that a person committed a crime ... on a specified occasion, is inadmissable to prove his disposition to commit crime as the basis for an inference that he committed another crime ..." State v. Forsyth, 641 P2d 1172 (Utah 1982) construed Rule 55 as a ru

relevance, providing that "other crime" evidence is admissable if relevant to the proof of some material fact. The volunteered statement from Allred that he had gotten high with the appellant was not relevant to any material fact.

Allred was asked why he did not contact Dave Jolley as to who had the drugs since all of his negotiations were with Jolley. He then made the getting high statement. The fact that one may or may not have "gotten high" in the past is no more relevant to the proof he sold drugs than it is logical to conclude that if one consumes groceries then one must be a grocer. However, the prejudicial impact of such a statement, particularly where the evidence is so weak, is readily apparent. A juror who has heard that an accused "gets high" on unspecified substances would be more inclined to convict on the sales charge despite the fact use may amount at worst to a minor misdemeanor while the sale is a serious felony.

State v. Hansen, 588 P2d 164 (Utah 1978), demonstrates what must occur when other crime evidence is improperly placed before the jury. Hansen was a theft by receiving case in which the State presented evidence that stolen property had been received at times other than the one charged. The case was reversed and a new trial was granted. The appellant here should be granted the same relief, a new trial free from the prejudice engendered by Allred's statement.

CONCLUSION

A new trial should be granted for the reasons stated.

DATED this 20 day of October, 1983.

Respectfully submitted,

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DELIVERY CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was delivered via TRS to the Utah Attorney General, 236 State Capitol, Salt Lake City, Utah 84114, this 20 day of October, 1983.

Edward K. Brass