1983

The State of Utah v. Thomas Lowell Sprague : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

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THE STATE OF UTAH, :

Plaintiff/Respondent, :

vs. : Case No. 18975

THOMAS LOWELL SPRAGUE, :

Defendant/Appellant. :

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APPELLANT'S BRIEF

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Appeal From Criminal Conviction Entered
In The Sixth Judicial District Court In
And For Sanpete County, State of Utah
Honorable Don V. Tibbs, Judge

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STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a criminal conviction entered in the Sixth Judicial District Court in and for Sanpete County, State of Utah, trial by jury, the Honorable Don V. Tibbs, presiding.

DISPOSITION IN THE LOWER COURT

The defendant was found guilty of one count of distribution of marijuana in violation of Section 58-37-8, Utah Code Annotated.

RELIEF SOUGHT ON APPEAL

Defendant seeks the reversal and dismissal of said judgment on the basis of entrapment or, in the alternative, for an order of this Court requiring a new trial.

STATEMENT OF FACTS

The State's case consisted of one witness, James Walker Tauffer. Mr. Tauffer, an undercover agent for Sanpete County,

made the first contact with Sprague on August 19, 1982 at approximately 10:00 p.m. The contact was initated by Officer Tauffer in Manti (T. 78). Sprague was sitting conversing with a friend nothing illegal was observed by the officer (T. 67 L. 3-9).

Tauffer and Spann had decided to make contacts with various people in Sanpete County as undercover agents. They possessed no prior knowledge of Mr. Sprague nor of the friend he was visiting. No reason was given as to why Mr. Sprague was isolated, except that Spann and Tauffer observed Sprague and his friend talking at the park (T. 67). The defendant was not discussing marijuana (T. 80 L. 9), nor did he bring up the subject of marijuana. The officers possessed no knowledge or suspicion that Sprague was involved in the distribution of controlled substances.

After some preliminary and informal discussions, Tauffer brought the subject up asking Sprague if he knew where Tauffer could get a quarter ounce of marijuana. Sprague told Tauffer that his best bet would be to go to Provo (T. 89 L. 19-25). After further discussion, Sprague thereafter told the officer that he, Sprague, would see what he could do. Sprague took no action to obtain any substance as a result of the first contact by the officers.

After realizing no results from his first contact, Mr. Tauffer sought out Sprague once again, this time on August 27, 1982 at 2:46 p.m. (Sprague did not initiate either the first or the second meeting and no communications between the officer and Sprague had occurred between the first and second meeting.)

Tauffer, in company with fellow undercover agent Ed Spann, went to defendant's place of employment, Mr. Chainsaw, in Manti, where the defendant maintained a part-time job. Tauffer and Spann again brought up the subject of marijuana--asking him about trying to buy a quarter ounce, if he knew where they could get some. Sprague then told them he was going to Gunnison and he might be able to get some. A tentative meeting was set in Ephraim that evening (T. 69 L. 1-9).

Sprague had taken no action regarding the first meeting (T. 99) and regarding the second meeting, Sprague stated (T. 99 L. 14 through T. 100. L. 16):

> A. He met me at the Chain Saw Doctor's. I was inside getting down working on a project and he--at first I didn't know who he was because when I last talked to him it was dark and I didn't recognize him because it had been some time since I'd talked with him and I tried to figure out who he was, you know, I thought he was a customer who'd like to buy a chain saw or something and I was trying to figure out who he was and he mentioned something about a quarter, he talked to me about a quarter.
>
> Q. A quarter, meaning what?
>
> A. A quarter of an ounce.
>
> Q. Go ahead and tell what happened.
>
> A. Well, we really didn't talk too much about it. I just told him that I possibly might look around and see if I could find any for him.
>
> Q. What is this thing about Gunnison?
>
> A. I told him I heard there was some going around down there and just, you know, talk around town and I told him probably I could go down there and find some if there was.
>
> Q. Did you ever go to Gunnison?
>
> A. No, I didn't.

Q. Did you ever have any marijuana on that first time that you could have given him?

A. No.

Q. How about the second time?

A. No.

When the second meeting brought no results, Tauffer approached Sprague a third time. Sprague stated (T. 102 L. 4 through T. 103 L. 21):

A. I told him there's no way I could find any right there at the spot, that I'd have to ask somebody when I get home, off work, or out of--

Q. Did you have any money that you could have bought, say, a quarter ounce of marijuana, or a half ounce of marijuana or more?

A. No. The money I do get is usually spent by the time I get it.

Q. Tell us about the third time. What happened at that meeting, you met at the Bright Spot?

A. Yes.

Q. What happened there?

A. I told--the part I do remember about it is I told him it could be possible that some, but what I know about, it would only be a small amount, that it would be a gram, if any, if the person had any still. I just said--

Q. You mean you were going to have to go and get it from somebody else for him?

A. Yes.

Q. Alright, go ahead. What happened then?

A. I left and I come back and handed it to him and, at first, when I first met him, he asked me how good it was and I told him I didn't know for sure and I didn't even know anything about it other than I knew who had it and then I left and come back and I showed it to him and he bought it.

Q. How much money did you give--how much money did he give for it?

A. $10.00.

Q. Did you keep any of that money for yourself?

A. No, I didn't.

Q. Did you take any of that marijuana?

A. No.

Q. Did you get any benefit at all from the transaction?

A. No.

As a result of that occurrence, the information was filed against the defendant. Defendant further contends that inadmissible evidence was improperly admitted. During the trial, the trial court admitted into evidence a subsequent transaction between Tauffer and Sprague (T. 111 L. 21 through T. 122 L. 9):

Q. Have you ever been charged with any kind of drug offense in Utah County? . . .

Q. My question, my last question was, I believe, Mr. Sprague, if in Utah County, you have not been charged with some drug related offenses?

MR. CARTER: Your Honor, I would like to express at this time my objection to that question.

THE COURT: State your objection, please.

MR. CARTER: My objection is the line of questioning Mr. Frischknecht is pursuing is irrelevant to this proceeding. We're trying to determine if there was entrapment at this point, if there was a subsequent sale, between this officer and this gentleman in Utah County but we think that's irrelevant to this proceeding because we're trying to determine the mental attitude of the defendant at that time.

THE COURT: Your objection's overruled. This is cross-examination. He has taken the witness stand and the Court feels that it is relevant . . .

Q. And what was the situation in Utah County involving your selling?

A. It wasn't me that was selling it.

Q. You didn't sell anything?

A. No, I did not.

Q. You didn't receive any money?

A. No, I didn't.

Q. Were you there?

A. Can we back up on a phrase?

Q. Sure.

A. Can you ask that again, the question?

Q. The question was: Weren't you--I believe--weren't you involved in the sale of drugs in Utah County? Didn't you sell up there?

A. I didn't sell. It wasn't me selling it.

Q. Were you with somebody who was selling it?

A. What do you mean by this?

Q. What do you mean, Mr. Sprague, when you say you weren't selling it? What were you doing?

A. Well, I just knew some people up there who had it, that they occasionally get it, and I know where it is in Utah County.

Q. So, you went there and you got it from some people that you knew there and you sold it to someone; isn't that right?

A. I don't understand the question that well.

Q. You went to Provo where you knew you could get it from some people and you got--

A. I wasn't sure about it.

Q. But you did get some drugs from some people in Provo?

A. Yes, I did.

Q. And what did you do with those drugs? They were mushrooms; weren't they?

A. Yes.

Q. What did you do with them?

A. Well, I personally didn't have anything to do with them but we went back and asked James' partner if he was interested.

Q. Now, that's James Tauffer's partner and that was Ed Spann; wasn't it?

A. Yes.

Q. That counsel has referred to as being another good looking, well-personalitied gentleman. You went back and you asked him if he wanted mushrooms?

A. Yes.

Q. What did he say?

A. He said, "Yes, if you could get an ounce."

Q. Did you get some for him?

A. Well, after while, we went back and forth, yes, we did.

Q. So you eventually got some and you sold them to Ed Spann?

A. Yes, but there was only three grams.

Q. Only three grams? How much money did you receive for that?

A. Well, at first I told him to keep his money and he said, "Here take this," and I says, "No," and then he would say, "Take it." I says, "Well, if anything, give me a couple of dollars to pay for the gas coming up here," but he just kep on insisting on giving me more.

Q. How much did you get from him?

A. $6.00.

Q. You only wanted two but he gave you six?

A. Yes.

Q. Now, that incident, Mr. Sprague, resulted in a charge against you for violation of the drug statutes in Utah County; isn't that correct?

A. Yes.

MR. FRISCHKNECHT: That's all the questions.

REDIRECT EXAMINATION

BY MR. CARTER:

Q. Let's just tell the truth about that, O.K.? Mr. Frischknecht has gone into it so why don't you tell the jury how that episode came about?

A. Well, when I first met James, he waved me down on the highway between Manti and Ephraim.

Q. Now, the first time you met him--are you meaning after the 29th, after the transaction with the marijuana?

A. Yes.

Q. You saw him on the freeway or the--

A. I was just coming home from the game in Ephraim. I just made a trip over there for my Mom, and he waved me down on the highway, and I turned around and went back and he was asking me if there was any way we could go to Provo that day and see if we couldn't get him some marijuana.

Q. So, he brought up the subject again?

A. Because he wanted--because his brother-in-law was up there and he was going up north or somewhere and he wanted to know if he could get it down there because he knew me and he said he didn't know anybody else.

Q. Why did you do all of this, Tom?

A. I don't know, just trying to help him out, and being a friend.

Q. Did you want a friend?

A. In a way, yes.

Q. Why?

A. Because the friends I did have were immature.

Q. Your friends had been getting married and you were somewhat alone or what?

A. Yes. This town, when they grow up, they grow up slower than the age that you grow up with than they do in the city.

Q. Now, did you have a difficult time adjusting to the City of Manti High School?

A. Yes. It took me about a couple of years to adjust, just to where they were.

Q. So, when this guy came to you and he suggested again that you take him to Provo, why did you drive all the way to Provo and go out of your way for him?

A. I don't know.

Q. Tell us what happened. Did you take him to Provo?

A. Yes, I did.

Q. What kind of a car did you drive up there?

A. A Baja Bug, Volkswagen.

Q. It took more than a couple of dollars worth of gas; didn't it, to get up there and back?

A. It took $6.00 to go up there and then I put $2.00 in it to drive around from Provo to Orem.

Q. So, you went in the hole on that transaction; did you not?

A. Yes, other than--

Q. And the first time you didn't receive any profit, you didn't receive anything at all for it; did you?

A. No.

Q. You did it completely for the benefit of Mr. Tauffer?

A. Yes.

Q. And the second time you even had to shell out a couple of bucks to do it for Mr. Tauffer?

A. Yes.

Q. Tell us what happened when you once got to the Provo or Orem area?

A. Well, we met Spann and we talked to him about what he wanted and he said he wanted--I can't remember the quantity he wanted, but he wanted a large amount so he could sell it up north.

Q. Did you have any means to do that, to get a large amount of anything?

A. Not really because I know my friends don't carry that much.

Q. Tell us what happened.

A. And we went looking for the address and I didn't know where my friends were living at the time because they'd just moved out from their old apartment and we found the house and they were outside talking and stuff, and then they were pretty well stoned on these mushrooms.

Q. What happened?

A. Well, we went in and started talking and then my friends, you know, and we were in the kitchen and standing there.

Q. Who was in the kitchen? Were Mr. Spann and Mr. Tauffer there?

A. Spann, we'd told Spann to meet us at Z.C.M.I. in his car and I took James with me to my friend's house and introduced him to my friends and, first they blurped out that they had some mushrooms right then and there and, after a minute, they pulled me away from James and asked me how well I knew him and I said, "He's pretty cool," and they accepted it at that and we started discussing about how much mushrooms were and they were--I can't remember all of it.

Q. Okeh.

A. But we left there.

Q. Did Mr. Tauffer buy mushrooms there?

A. No, he didn't. He went back to his partner Spann and talked to him and he said he wanted to buy an ounce or something like that.

Q. Did Mr. Spann and Mr. Tauffer go back over?

A. No, just me and Tauffer.

Q. Okeh.

A. Went back.

Q. So, you went in and bought some stuff again?

A. Well, we didn't buy it at the time because they said, no, not to sell it to them because they didn't know him too well and they didn't want any trouble.

Q. Did you actually get some mushrooms?

A. We went back and they told me that. Tauffer was in the car when I come back and we left again and went back to Spann's and I told him that, you know, that my friends didn't want to sell it and they didn't really have an ounce with them so--

Q. But you're trying to get your friends to sell to Tauffer and you weren't going to be involved in it at all; is that right?

A. At first, yes.

Q. And they wouldn't sell it to Mr. Tauffer alone?

A. No.

Q. So you went back and then to do a buddy or a friendship a favor, you went back and bought them some?

A. I went back by myself and they followed me into Orem and stayed in a K-Mart store and I went back to the house and lied to my friends and told them it was for me and then went back and gave it to--they gave me $50.00 ahead of time to go get it.

Q. Tom, why did you do it for those guys if they didn't know you that well? And I mean you didn't know them that well and you'd met him three or four times before, why did you do it for Tauffer?

A. To try to help out and be a friend to him. I thought he was going to be a friend to me if, you know, I tried to help him.

Q. You let these guys use you because of that?

A. Well, I do a lot for my friends because it means a lot to me.

Q. Have you ever sold any other drugs at any other time?

A. No, I haven't.

ARGUMENT

POINT I

THE DEFENDANT WAS ENTRAPPED AND THE JUDGMENT SHOULD BE REVERSED.

The facts of the present case are strikingly similar to the facts of State v. Kourbelas, 621 P.2d 1238 (Utah 1980) where the undercover officer brought up the subject, inquired whether defendant could get some, the defendant responded, "I'll see what I can do," and defendant in Kourbelas gave the undercover agent his address and telephone number.

In the present case, the defendant was initially contacted by the undercover officer on the 19th day of August, 1982. The undercover agent brought up the subject of selling marijuana. The agent then asked the defendant if he could get him some and the defendant gave the agent basically the same answer as given in Kourbelas.

Approximately one week transpired wherein the defendant made no attempt to secure any marijuana for the undercover agent. The agent then sought out the defendant again to locate the agent some marijuana. Mr. Sprague then responded that he would see what he could do and set up a tentative meeting in Ephraim. The defendant made no effort to acquire any marijuana and thereby

produced no results for the undercover agent.

In the present case, the undercover agent, for the third time, sought out the defendant to obtain some marijuana although defendant did not produce the marijuana on the previous two occasions. The undercover agent wanted substantially more marijuana but the defendant was only able to produce a small amount, one gram. The marijuana was obtained from another individual. The defendant received no benefit but did it only at the insistence of the officer.

Section 76-2-303, Utah Code Annotated, provides that it is a "defense if the actor was entrapped in committing the offense." The section provides:

> Entrapment occurs when a law enforcement officer or a person directed by or acting in cooperation with the officer induced the commission of an offense in order to obtain evidence of the commission for prosecution by methods creating a substantial risk that the offense would be committed by one not otherwise ready to commit it. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment. (Emphasis added).

In two recent cases before the Court on the issue of entrapment, the Court has held that the defense of entrapment was met. In State v. Taylor, 599 P.2d 496 (Utah 1979), the Court specified that an objective test was to be applied to determine if entrapment had occurred--the focus of attention being on the police officer's conduct rather than the defendant's predisposition or the lack thereof.

In evaluating the course of conduct between the government representative and the defendant, the transactions leading up to the offense, the interaction between the agent and the defendant

and the response to the inducements of the agent, are all to be considered in judging what the effect of the governmental agent's conduct would be on the defendant. State v. Taylor, supra.

The Court found that under the facts of Taylor that entrapment occurred. The female police agent, Stubbs, and the defendant had cohabitated until the first week of July. During the time they engaged in this illicit, intimate relationship, they were both heroin addicts who procured and injected the drugs in a spirit of togetherness. Although they subsequently occupied separate dwellings, they remained close friends. Stubbs submitted she shared defendant's bed some time in September, the same month she contacted the defendant for the purpose of making a controlled buy to obtain evidence to convict him. The defendant was an addict who had recently undergone detoxification, had personally experienced the agonies of withdrawal and could empathize with this girl he loved who pleaded for his assistance in locating heroin.

In State v. Soroushairn, 571 P.2d 1370 (Utah 1977), the evidence showed that a police officer had enrolled at the same college as attended by the defendant for the sole purpose of finding those students who distributed drugs and marijuana.

The narcotics officer lived at home but maintained a room in the college dormatory where the students believed he resided. He secured marijuana and threw "pot parties" in his room and in his car. He fraternized with the students. He made friends with a student and urged him to obtain marijuana or, failing that, to

put him (the officer) in contact with someone who could secure the substance.

The student introduced the officer to the defendant and they also became friends. When asked at trial if he had any indication that the defendant was an individual who would get involved in selling marijuana, the officer replied, "I had no indication."

The officer took the student and the defendant in his own automobile to a place in town where he had been directed by the student. He gave the appellant $20.00 and asked him to get two bags of marijuana. The appellant went into the house and returned with the two bags and delivered them to the officer. For almost a week thereafter, the officer visited the appellant and importuned him to get more marijuana.

On all occasions, the defendant told the officer that the "contact" did not have any. Finally, on the eighth day after the first buy, the appellant, again at the importuning of the officer, rode with him to the home of the "contact" where the officer gave the defendant $40.00 and requested that he buy four packages of marijuana.

The defendant brought two bags and $20.00 back to the car saying that the wife of the contact told him that was all they could sell him. The officer claimed that the two bags were for someone else and asked the defendant to try to get the other two bags. On this second try, the defendant managed to get them. They drove to the defendant's room where the marijuana was handed over to the officer. Thereafter, the officer gave to the defen-

dant two or three joints as a courtesy.

The Court held that the defendant had been entrapped. The Court stated:

> He manifested no indication of being in the marijuana business; but at the importuning of the undercover officer, did act as his agent to buy from the real seller. There is nothing to suggest that the appellant would ever have dealt in marijuana except at the instance of and for the benefit of the officer. (Emphasis added).
>
> We think that the entrapment so permeated the entire matter that it also would include the two joints given to the appellant by the narcotics officer.

Most recently in State v. Kourbelas, supra, the Court found that the defendant had been entrapped. On June 13, 1979, the defendant and some friends were boating on Lake Powell. At that time, Mark Nelson was working as an undercover narcotics agent for the San Juan County Sheriff's Office and had been hired as an assistant manager of the gas dock at the marina. When the defendant and his friends brought their houseboat into the marina for refueling, there was some problem about the gas mixture and Mr. Nelson intervened to help resolve it. In his conversations with the defendant, Nelson brought up the subject of selling marijuana. He told the defendant that there could be "a lot of money made down here if I had some way of getting some." Nelson then asked: "Can you help me get some or do you know where I can get some?" When the defendant replied: "I'll see what I can do," Nelson asked for his name, address and telephone number. The defendant gave that information to him and told Nelson to get in touch.

About two weeks later, Nelson telephoned the defendant,

reminded him of their conversation at Lake Powell and asked him if he could get some marijuana. According to Nelson, the defendant said he could and asked how much he wanted. Nelson stated: "Four or five pounds." The defendant said he would call back later that afternoon; however, he did not do so.

Nelson called the defendant two more times on June 30. Nelson said, "Hey, I hate to keep bothering you like this," and the defendant responded that it was "no problem at all." Nelson called the next morning and asked once more if the defendant could sell some marijuana. Defendant promised to call back. Later that same day, the defendant reported that he had not been able to contact one "LaDell" who might have some marijuana, but that he would keep trying. Nelson called back three days later. The defendant stated that he had spoken with LaDell and there were two pounds of marijuana available. They discussed the price and how the defendant could pay LaDell. When they met, the defendant and Nelson used some marijuana and consumed some beer. After the money was exchanged, the defendant was placed under arrest.

The Court held:

> These facts are significant: That it was Mr. Nelson who first suggested the purchase of marijuana from the defendant; that after two weeks had passed, it was he who renewed the contact and the request which he followed up by calling the defendant at least five times and attempting to purchase the marijuana. This is to be considered together with the fact that there is no evidence that the defendant had previously possessed or dealt in the drug. Based on those facts, we think that the above quoted statement of the trial judge relating to whether it was a police conduct which induced this crime is a "crucial question, not easy to answer . . ." was a well advised observation.

> It is our opinion that, if the rule as to the presumption of innocence is fairly and properly applied, there necessarily exists a reasonable doubt as to whether the offense committed was the product of the defendant's initiative and desire, or was induced by the persistent request of Mr. Nelson. Accordingly, it is our conclusion that the defendant's conviction should be reversed.

It is important to note the citation of the Kourbelas court to State v. Curtis, 542 P.2d 744 (Utah 1975), where the Supreme Court indicated:

> When it is known or suspected that a person is engaged in criminal activities, or is desiring to do so, it is not entrapment to provide an opportunity for such person to carry out his criminal intention.

However:

> . . . it is not the proper function of law enforcement officers, either themselves or by use of decoys or undercover agents, to induce persons who otherwise would be law-abiding into the commission of a crime.

Defendant submits that it was the officer who made the first contact and brought up the subject of marijuana, and it was the officer who made the second and third contacts when the first contact proved fruitless. There is no evidence that the defendant was in the business of selling marijuana and the defendant manifested no indications of such. The defendant performed the acts suggested by the officer, not for the defendant's benefit, but only as a favor and to the sole benefit of the officer and only upon the insistence and perseverance of the officer was the defendant able to obtain an extremely small amount from another person.

If the presumption of innocence is to be given its fair and practical application, a presumption of innocence exists.

POINT II

OVER THE OBJECTION OF DEFENSE COUNSEL, THE COURT ALLOWED INTO EVIDENCE THE FACT THAT DEFENDANT HAD BEEN ARRESTED AND CHARGED WITH A SUBSEQUENT OFFENSE OF SELLING A NARCOTIC SUBSTANCE.

Courts in the United States have applied two different tests to the defense of entrapment. The U. S. Supreme Court applies what is called the subjective test. This test focuses on a defendant's intent, or predisposition, to commit a crime. Hampton v. U. S., 96 S.Ct. 1646 (1976). A defendant who was predisposed to commit a crime will not be acquitted in spite of the police officer's inducive conduct.

The second and more recent standard is the objective test. Several states have adopted this test, including California, Michigan and Utah. The Utah Legislature adopted it in 1973 (see Utah Code Annotated, Section 76-2-303). The Utah Supreme Court approved the objective test in State v. Taylor, supra.

The defendant's state of mind is not the issue; the focus of attention should be the officer's conduct, and when the police conduct falls below a set level of propriety, the defendant is to be acquitted. State v. Taylor, supra; People v. Wisneski, 292 NW2d 196 (Mich. Ct. App. 1980); and People v. Barraga, 591 P.2d 947 (Cal. 1979).

Since the subjective test emphasizes a defendant's predisposition, courts have allowed the prosecution to submit evidence of other crimes committed by the defendant. This is an exception to the general rule against allowing such evidence. The law allows

it in this case because when defendant pleads entrapment, the vital issue is whether the accused was predisposed to commit the crime; evidence of other crimes being proof of predisposition. See State v. Taylor, supra, p. 500, and State v. Perkins, 432 P.2d 50 (Utah 1967).

The entrapment exception (permitting evidence of other crimes) is not justified when the court is applying the objective test of entrapment. Predisposition is not an issue. As was stated in State v. Taylor, supra, evidence of other crimes is not permissible in a trial where the objective test governs.

The Utah Legislature anticipated the problem and resolved it in Utah Code Annotated, Section 76-2-303(6), which states:

> . . . [i]n any hearing before a judge or jury where the defense of entrapment is an issue, past offenses of the defendant shall not be admitted except that in a trial where the defendant testifies he may be asked of his past convictions for felonies . . ."

The question presented by this appeal asks whether Utah Code Annotated, Section 76-2-303(6) precludes evidence of unproven criminal or civil wrongs occurring subsequent to the date of the charged offense but prior to trial. The officer contacted the defendant subsequent to August of 1982 and procured another purchase of a controlled substance. Said evidence was admitted over objection.

Scholars have interpreted words such as "prior" and "past" to refer to any other crimes committed before the trial, both those committed before the indicted offense and those committed after it. See Roth W., Understanding Admissibility of Prior Bad Acts:

A Diagrammatic Approach, 9 Pepperdine L.R. 297 (pp. 297-298); B. Jefferson, California Evidence Bench Book, §21.4 (1972). See also State v. Gibson, 565 P.2d 783 (Utah 1978); State v. Daniels, 584 P.2d 880 (Utah 1978); and State v. Lopez, 451 P.2d 772 (Utah 1969). (Gibson and Daniels both involved subsequent offenses yet applied precedent set in cases ruling on prior offenses). See Jiminez v. State, 582 SW2d 91 (Tenn. Crim. App. 1979); Rios v. State, 557 SW2d 198 (Arkansas 1977); Morrison v. State, 202 SW2d 939 (Tex. Crim. App. 1947); and Evidence Benchbook, supra.

The interpretation is justified when one considers the prejudice such rules are intended to prevent.

> The purpose of the rule is to forbid and prevent the conviction of an accused for one crime by the use of evidence that he has committed other crimes, and to preclude the inference that because he had committed other crimes he was more liable to commit the crime for which he is indicted and tried. In other words, it is not competent to prove that the accused committed other crimes of a like nature, for the purpose of showing that he would be likely to commit the crime charged in the indictment, for ordinarily such proof will not shed any light upon the crime with which he stands charged . . .; one may be a habitual criminal and yet be innocent of the crime for which he is indicted and being tried. (29 AmJur2d, Evidence, Section 320).

The effect of Utah Code Annotated, Section 76-2-303(6) was to dissolve the exception permitting evidence of other crimes when defendant pleads entrapment.

The provisions of Rule 55, Utah Rules of Evidence, dictate that evidence of other wrongs are inadmissable with exceptions inapplicable here. Presently, the only justification for the admission of past offenses is impeachment. However, such use is strictly limited to convictions. Unproven criminal or civil

wrongs are inadmissable [Utah Code Annotated, Section 76-2-303(b)].

Section 78-24-9, Utah Code Annotated, limits the scope of inquiry upon cross-examination to previous felony convictions. It states: ". . . But a witness must answer as to the fact of his previous conviction of felony." See also State v. Kazda, 14 U.2d 166, 382 P.2d 407, finding it error to allow an officer to testify as to a conversation with the defendant concerning other unproven charges, and State v. Hodges, 30 U.2d 367, 517 P.2d 1322 (1974).

Jiminez, Rios, and Morrison, supra, involved cases similar to the one at bar. In each case, the Court concluded that permitting evidence of defendant's subsequent offenses was prejudicial error.

Under the standards established in those cases and in Utah Rules of Evidence, Rule 55, and for the reasons discussed above, the trial court was in error when it permitted evidence of defendant's subsequent offense to taint the proceeding; defendant was prejudiced in the jurors' minds and was submitted to the hardship of defending against an uncharged offense. He was thus denied a fair trial. The verdict arrived at in the trial court should be reversed.

CONCLUSION

The subsequent transactions between the defendant and Officer Toffer were improperly admitted into trial and require a reversal of the judgment and an order of new trial for the defendant

herein.

The facts as set forth herein relating to entrapment require reversal and dismissal. A young man, manifesting no indication of being in the business of selling, sold a small amount of marijuana upon the insistence and importuning of the officer. The defendant did not benefit by the transaction but acted as an agent of the officer to the sole benefit of the officer.

Further, the defendant submits that the facts of the case support a finding that the defendant was entrapped, or at the least, that there was a reasonable doubt as to the officer's entrapping the defendant into committing the crime and thereby requiring a reversal of the judgment entered herein.

RESPECTFULLY SUBMITTED this 10 day of August, 1983.

SHELDEN R CARTER
Attorney for Defendant/Appellant

I HEREBY CERTIFY that I mailed a copy of the foregoing to the Utah State Attorney General, Attorney for Plaintiff/Respondent, State Capitol Building, Room 236, Salt Lake City, Utah 84114, postage prepaid, this 11th day of August, 1983.