1984

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

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 18975
THOMAS LOWELL SPRAGUE,	:	
Defendant-Appellant.	:	

RESPONDENT'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, HONOARBLE DON V. TIBBS, JUDGE.

DAVID L. WILKINSON
Attorney General
J. STEPHEN MIKITA
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 533-7606

Attorneys for Respondent

SHELDEN R. CARTER
Young, Harris & Carter
350 East Center
Provo, Utah 84601
Telephone: (801) 375-9801

Attorney for Appellant

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Telephone: (801) 533-7606

Attorneys for Respondent

SHELDEN R. CARTER
Young, Harris & Carter
350 East Center
Provo, Utah 84601
Telephone: (801) 375-9801

Attorney for Appellant

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BRIEF OF RESPONDENT

STATMENT OF THE NATURE OF THE CASE

Appellant was chared by information with distribution of a controlled substance for value under Utah Code Ann. § 58-37-8(1)(a)(ii) (1982).

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury and found guilty of distribution of a controlled substance for value on December 6, 1982 in the Sixth Judicial District Court in and for Sanpete County, State of Utah, the Honorable Don V. Tibbs, presiding. On January 5, 1983, appellant was sentenced to a suspended, indeterminate term of imprisonment not to exceed five years and a suspended fine of $4,000. Appellant was fined $1,000 and placed in the county jail for a period of ninety days reviewable after thirty days in light of appellant's progress.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming the verdict and judgment of the trial court.

STATEMENT OF THE FACTS

Deputy James Tauffer of the Sanpete County Sheriff's Department was working as an undercover agent when he initiated contact with appellant on August 19, 1982 at 10 p.m. in a parking lot across from the Manti temple in Manti, Utah (T. 64-67). Tauffer and appellant conversed between their pickup trucks for a while before Tauffer asked appellant if he knew where Tauffer could purchase one quarter ounce of marijuana (T. 67). Appellant replied "at that time he didn't and that our best bet would be in Provo, that it was pretty dry down here at that time, and at this time he [appellant] gave me his name and his number and told me [Tauffer] that I could call him back later." (T.67).

No phone contacts occurred before Tauffer's second meeting with appellant on August 27, 1983 at appellant's place of work, Mr. Chainsaw in Manti, Utah (T. 68). When Tauffer again expressed an interest in the purchase of a quarter ounce of marijuana, appellant said that he was going to Gunnison and might find some (T. 69). Tauffer asked where they could meet and appellant suggested that he would find Tauffer later that evening in Ephraim (T. 69). Tauffer waited for appellant on August 27 in Ephraim, but appellant never appeared (T. 69).

A third contact occurred on August 31, 1982, as Deputy Tauffer encountered appellant at the Bright Spot restaurant in Manti (T. 69). Tauffer asked why appellant had missed their second meeting. Appellant replied that he could not find any marijuana in Gunnison but asked if Tauffer was then interested in purchasing a gram of marijuana (T. 69-70). Tauffer asked about the price and appellant said, "$10.00 a gram." (T. 70). Tauffer requested to see the marijuana before his purchase (T. 70). Appellant replied that he would have to go get it and left while Tauffer waited at the Brite Spot (T. 70).

Appellant returned "a little bit later" (T. 70) and brought Tauffer out to the parking lot (T. 70). Appellant showed Tauffer the marijuana, introduced him to a friend in appellant's car, and took the ten dollars from Tauffer.

Appellant testified that he had gone to the home of Clark Johnson, returned with Johnson to the Bright Spot and later that evening gave Johnson the ten dollars (T. 108-110).

ARGUMENT

POINT I

APPELLANT WAS NOT ENTRAPPED BY THE UNDERCOVER POLICE OFFICER.

Appellant claims as a positive defense that he was entrapped, Utah Code Ann. § 76-2-303 (1982), into distributing a controlled substance for value under Utah Code Ann. § 58-37-8(1)(a)(ii). Appellant's motion to dismiss on the basis of entrapment (T. 91) was denied (T. 95). Although a jury instruction on entrapment was given (#15, R.54), appellant was found guilty of distribution of a controlled substance for value (R. 61).

Entrapment is recognized as a defense in Utah Code Ann. § 76-2-303(1) (1953), as amended:

> It is a defense that the actor was entrapped into committing the offense. Entrapment occurs when a law enforcement officer or a person directed by or acting in co-operation with the officer induces 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 on offense does not constitute entrapment

Utah had traditionally adopted the subjective test of entrapment as exemplified in State v. Pacheco, 13 Utah 2d 148, 369 P.2d 494, 496 (1962). The subjective test asked (1) whether there was an inducement and (2) if so, whether the

defendant showed any predisposition to commit the offense.[1] Although Pacheco, supra was construed initially as consistent with the passage in 1973 of § 76-2-303(1),[2] this Court later recognized that the explicit wording of § 76-2-303(1) incorporates the objective standard of entrapment. State v. Taylor, Utah, 599 P.2d 496 (1979).

The objective test focuses not on the predisposition of the defendant, but "on whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power." Id. at 500. The test to determine an unlawful entrapment examines whether the officer "induced the defendant to commit such an offense by persuasion or inducement which would be effective to persuade an average person, other than one who was merely given the opportunity to commit the offenses." Id. at 503. Examples of prohibited police conduct are "extreme pleas of desperate illness or appeals based primarily on sympathy, pity or close personal friendship or offers of inordinate sums of money." Taylor, at 503; Grossman v. State, 457 P.2d 226-230 (AK. 1969).

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1 The subjective test is adopted in Sorrells v. U.S., 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932); see generally: 62 A.LR. 3d 110, Anno.: Modern Status of the Law Concerning Entrapment to Commit Narcotics Offense -- State Cases, § 2(a), p. 114.

2 State v. Curtis, Utah, 542 P.2d 744, 746 (1975).

Appellant was not entrapped but merely afforded an opportunity to commit the charged offense. Office Tauffer had met appellant three times. Their relationship of casual friendship, was not analogous to the emotional attachment used by the girlfriend police agent in Taylor (girlfriend was former lover, a cohabitant with the defendant and pleaded with the ex-addict defendant to help her avoid withdrawal pains). Each of the first two encounters between appellant and Tauffer ended with appellant expressing knowledge of available supplies in the area and making tentative promises to secure marijuana in contrast with the unencouraged and repeated phone followups by the police agent in State v. Kourbelas, Utah, 621 P.2d 1238 (1980). Officer Tauffer's three contacts were merely conscientious, police work follow-ups based on a contact.

At no time did appellant refuse to be involved in the sale of marijuana to Tauffer. The practicalities of police undercover investigations require that the officer make at least sufficient effort to earn the confidence of a wary seller. The line that distinguishes gaining the confidence of a wary seller from creating such confidence as to constitute an inducement or entrapment cannot be quantified by the number of contacts or magical words that are exchanged between one party and another. Instead, an examination of the quality of contacts occurring in a given situation will disclose "whether the police conduct revealed in the particular case falls below

standards, to which common feelings respond, for the proper use of government power. Taylor at 500. Appellant initiated the offer of a current sale during the meeting at the Brite Spot cafe. (T. 69-70). Therefore, Tauffer's effort in contacting appellant did not create a "substantial risk that the offense would be committed by one not otherwise ready to commit it." Utah Code Ann., § 76-2-303(1) (1982).

State v. Ontiveros, No. 19021 (Filed November 9, 1983) reversed a conviction of defendant under Utah Code Ann. § 58-37-8(1)(a)(ii) (1982) commenting that defendant should have been charged not with distributing a controlled substance for value but with arranging for the distribution of a controlled substance for value, Utah Code Ann. § 58-37-8(1)(a)(iv) (1982). Ontiveros at 3. Although the facts of this case are similar, appellant here returned with the marijuana and gave it to the officer and received payment. In Ontiveros, the defendant received money from the officer, then left to procure the marijuana from an assumed third party and then returned to give the marijuana to the officer. In the instant case, however, at no time did Tauffer see appellant give the money to a third party nor did appellant ever represent to Tauffer that the payment was for a third party.

Although the defendant in Ontiveros claimed insufficiency of the evidence, appellant does not argue on appeal either the insufficiency of the evidence or the provisions under which he was charged. A theory not presented

on appeal will re regarded as having been abandoned. Gunnar v. Brice, 17 Wash. App. 819, 565 P.2d 1212, 1214 (1977); Hojem v. Kelley, 21 Wash. App. 200, 584 P.2d 451, 454 n.1 (1978)

POINT II

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE THAT DEFENDANT HAD BEEN CHARGED WITH A SUBSEQUENT DRUG OFFENSE.

Appellant contends that the trial court improperly admitted evidence of a subsequent charge for the sale of mushrooms to Ed Spann, an undercover agent present at officer Tauffer's first meeting with the appellant. Appellant's counsel objected at trial that the cross-examination of appellant on the subsequent charge was irrelevant to appellant's defense of entrapment (T. 113-114). On the contrary, the trial court properly allowed such cross-examination under Ut. R. Evid. 55 (1983) as evidence of a prior criminal act to prove a material fact, i.e. appellant intended to keep for his own value the $10 given him by Deputy Tauffer.

Rule 55 provides that:

> Subject to Rule 47 evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his disposition to commit crime or civil wrong as the basis for an inference that he committed another crime or civil wrong on another specified occassion but, subject to Rule 45 and 48, such evidence is admissible when relevant to prove some other material fact including abscence of mistake or accident, motive, opportunity, intent, preparation, plan, knowlege or identity.

involves the prosecutor's cross-examination of appellant (T. 110-113). Appellant claimed that after having delivered the gram of marijuana to Deputy Tauffer, he got back in the car with Clark Johnson and gave Johnson the $10.00 (T.110-111). The prosecutor next asked appellant, "Now, is that something, Mr. Sprague, that you do often is sell marijuana for your friends?

A. No.

Q. Have You ever done it before?

A. No

Tauffer.

Q. Have you even been charged with a similar violation?

A. Never

Q. Never have been charged with a similar violation?

A. No.

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

A. No.

Q. Never?

A. No.

(T.111). After a conference outside the presence of the jury, objection by appellant's counsel was overruled. The

prosecutor continued his line of questioning to explore whether appellant was selling the drug:

> Q. Now, I think if I understood you correctly a moment ago you said you have never sold any drugs other than this one time for which we're here today. Would you care to give us some explanation to the Utah County charge?
>
> A. What I mean is I don't sell for a profit or anything like that. I don't get mixed in with money deals or anything.

(T. 114). Appellant's answer reflects this interpretion of the prosecutor's questions about the subsequent sales. The questions explore evidence of criminal drug sale to show appellant's intent to keep the $10.00 given him by the Deputy Tauffer in exchange for the marijuana.

In State v. Tanner, No. 17752 (Utah November 15, 1983) this Court reaffirmed the admissability under Rule 55 of "evidence of other crimes or civil [wrong] that is competent and relevant to prove some material fact, other to show merely the general disposition of the defendant." Id. at 9. In the instant case, the prosecutor's "other crime" inquires were relevant in proving appellant's intent to keep the ten dollars given to him by Officer Tauffer, a material fact of the charged offense of Distribution of a Controlled Substance for Value.

Appellant correctly argues that such evidence was irrelevant to rebut the defense of entrapment. However, the questions were relevant to prove a material fact of intent to

distribute a controlled substance for value under Utah Code Ann. § 58-37-8(1)(a)(ii) (1983). Ut. R. Evid. 55 (1983).

CONCLUSION

Appellant was not entrapped into distributing a controlled substance for value. Officer Tauffer initiated two casual contacts with appellant. On the third contact appellant offered to sell Tauffer a gram of marijuana. Officer Tauffer's efforts in no way badgered, pleaded or manipulated appellant to such an extent that appellant was entrapped via the "objective standard" of entrapment.

The trial court properly admitted evidence disclosed through cross-examination of appellant. The fact that appellant had been charged with a subsequent drug offense was relevant under Ut. R. Evid. 55 to estabish appellant's intent to keep the ten dollar payment received from Officer Tauffer in exhange for the gram of marijuana.

This Court should affirm appellant's conviction of distributing a controlled substance for value.

RESPECTFULLY submitted this 6th day of January, 1984.

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, postage pre paid to SHELDEN R. CARTER, attorney for appellant, 350 East Center, Provo, Utah 84601, this 6th day of January, 1984.

Kathleen Kellersberger