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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 19,021
vs.	:	
VICTOR ONTIVEROS,	:	
Defendant-Appellant.	:	

BRIEF OF APPELLANT

APPEAL FROM A VERDICT OF GUILTY ENTERED
IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY

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IN THE SUPREME COURT OF THE STATE OF UTAH

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Defendant was charged with Distribution of a Controlled Substance for Value, in that on or about the 10th day of June, 1982, in violation of 58-39-8(1)(a)(ii), the Defendant did distribute for value a controlled substance, to wit: marijuana.

DISPOSITION IN LOWER COURT

Defendant was tried by jury in the Fourth Judicial District Court of Utah County, the Honorable DAVID SAM, JUDGE, presiding, on the 12th day of January, 1983. The jury found the Defendant guilty as charged. The Court had previously ruled on December 1, 1982, that Defendant was not entrapped as a matter of law. The Court also denied Defendant's Motion for Directed Verdict of Aquital on the 18th day of January, 1983.

Defendant was sentenced on the 24th day of February, 1983, to serve 0-5 years in the Utah State Prison, but the sentence was stayed and Defendant granted probation.

RELIEF SOUGHT ON APPEAL

Appellant respectfully requests that the Court reverse the verdict of guilty entered in the District Court.

STATEMENT OF FACTS

Approximately two weeks prior to the 10th of June, 1982, the Defendant was contacted by a Provo City undercover police officer at his home in Springville, Utah. The police officer was accompanied by an acquaintance of the Defendant named Billy and had not previously had any contact with the Defendant. The officer had no prior knowledge that Defendant was a drug dealer or involved in drugs. (TR 16, 28, 36) The purpose for the police officers interest in the Defendant was to purchase drugs from the Defendant. The undercover officer was told by the Defendant that he had no drugs and that he didn't sell drugs. At that time the officer gave the Defendant a business card with his undercover name and two numbers. He indicated that he was a taxi cab driver and he could be reached at one of the numbers on the card should the Defendant have any drugs he wanted to sell. (TR 37) Following the initial contact with the Defendant, the undercover officer followed up with two phone calls to the Defendant's home and three or four visits to his apartment each lasting from twenty to forty minutes on which occasions the Defendant was asked to procure drugs for the officer. On each of those occasions, with the exception of the last, the Defendant informed the officer that he didn't have any drugs and he didn't sell drugs. (TR 38-40) The Defendant's wife was present during part of the conversations on those occasions when the police officer was at the home of the Defendant and Mrs. Ontiveros was also the individual who answered the phone on both occasions when the officer called. (TR 52-55) At no time during the time period between the initial contact

Between the undercover police officer and the Defendant and the date of June 10, 1982, did the Defendant ever contact the officer either by telephone or otherwise. All contact between Defendant and the undercover police officer was initiated by the officer. (TR 30-31, 38) On the 10th of June, the undercover officer came to the Defendant's home in Springville, without any prior invitation, and asked if the Defendant had any drugs to sell. The Defendant had some company at home since the 10th was his son's birthday and asked the officer to come back later. When the officer returned he was invited in and Defendant indicated that he still did not have any drugs but that he knew someone who might have some marijuana for sale. Defendant indicated that he offered to find some drugs for the undercover officer "more or less to get him out of my hair". (TR 41) The Defendant made a phone call and indicated to the officer that the third party was willing to sell him a half an ounce of marijuana for forty ($40.00) Dollars. The Defendant took the officer to the location, received forty dollars from the officer, went into an apartment, brought out one-half ounce of marijuana and delivered it to the officer. (TR 20-22, TR 42) There was no evidence that the Defendant received any money for himself. (TR 28)

After the marijuana had been exchanged, and on the way back to Springville, the parties smoked a joint of marijuana from the baggie. On their arrival at Springville, the Defendant requested the officer to sell him enough marijuana for one joint out of the baggie. The officer declined to sell him any marijuana but did agree to let him take enough out of the bag for one joint. (TR 21, 42-43) After the sell which occured on the 10th of June, 1982, there were no other contacts between the officer or the Defendant until the Defendant was arrested on this charge. (TR 43-42)

At the close of the State's case, the Defendant made a motion for a directed verdict based on the argument that the Defendant had not made a distribution of a controlled substance for value. (TR 62) The motion was denied by the Court.

ARGUMENT

POINT I

THE DEFENDANT WAS ENTRAPPED BY THE UNDERCOVER OFFICER.

The Defendant raised the issue of entrapment both prior to trial in an evidenciary hearing on motion in compliance with Utah Code Annotated 76-2-303, 1953 as amended, and at the time of trial. The Court found there was no entrapment as a matter of law at the time of the evidenciary hearing.

The present case before the Court, is substantially similar to the situation which existed in a previous case decided by this Court in State vs. Kourbelas, 621 P.2d 1238. In Kourbelas, the Defendant was engaged in a conversation with an undercover agent who first suggested the purchase of marijuana from the Defendant, then followed the initial contact with a renewed contact and request with approximately five telephone calls to purchase marijuana. There was no evidence that the Defendant had previously possessed or dealt in the drug prior to the contacts by the officer. The conviction of Kourbelas was reversed, the Court finding there was reasonable doubt as to whether or not the offense committed was a product of the Defendant's initiative and desire or was induced by the persistent request of the undercover officer.

In the present case, there was no evidence that the Defendant had any prior history of dealing drugs or any evidence that he had even possessed drugs prior to the officers contact. The officer, after the initial contact, continued

[illegible] the Defendant to sell him drugs although the Defendant never at any [illegible] prior to the date of the transaction agreed to do so. Additonally, although the Defendant had been furnished two telephone numbers where the officer could be contacted and, in addition, having been informed that the officer would be willing to purchase drugs from the Defendant, never contacted the officer on any occasion concerning the distribution of drugs. All contacts were initiated by the officer. The officer never found any drugs or observed any at the Defendant's residence. In fact, when the substance of marijuana was actually purchased for the officer by the Defendant, the purchase was accomplished through a third party and the Defendant requested the officer to sell him a joint for his own use. It appears from this evidence to be clear that the Defendant had no drugs in his home for either use or sale.

The present case also bears a striking simularity to that of State vs. Soroushirn, 571 P.2d 1370. In Soroushirn, the Defendant was charged as is the Defendant in the present case, with felony distribution of marijuana for value. The Soroushirn case also involved an undercover narcotics officer who befriended a black student who in turn introduced the officer to the Defendant. As in the present case, the officer had no previous indication that the appellant was an individual who would get involved in selling drugs. In Soroushirn, the officer took the appellant to a place in town to which he had been directed to and gave the appellant twenty ($20.00) Dollars and asked him to get two bags of marijuana. The appellant went into the house and returned with two bags and delivered them to the officer. Approximately eight days later, following several requests in visits by the officer to the appellant, all designed to obtain marijuana from the appellant, the appellant again rode with

the officer to the home of the third party, received forty ($40.00) Dollars from the officer and bought two bags of marijuana from the third party which he delivered to the officer. Immediately following the purchase of the first two bags, the officer convinced the appellant to obtain two additional bags from the same source immediately following the purchase of the first two bags. The officer gave the appellant a couple of joints when appellant requested him to do so.

The Court found, based upon the foregoing facts, that Soroushirn did not distribute the substance at all but that the substance belonged to the officer and it was the officer who made the distribution. The Court stated at 571 P.2d 1371;

> What is wrong here is that the appellant did not distribute the substance at all. It belonged to the officer and it was the officer who gave the appellant a couple of joints and thereby made the distribution.
>
> The Court was correct in holding that the appellant had been entrapped. He manifested no indication of being in the marijuana business; but at the importuning of the undercover officer, did act as aided to buy from real seller. There is nothing to suggest that the appellant would have ever dealt in marijuana except at the instance of and for the benefit of the officer.

Again, the instant case is not distinguishable from the foregoing situation. Defendant was introduced to the officer by a friend. The officer befreinded the Defendant by visiting at his home and calling him on the telephone. The Defendant did a favor for the officer. The money is supplied by the officer and the drug was supplied by a third party. The officer allowed the Defendant to pinch the bag after being requested to sell the Defendant some of the substance, and the officer, prior to contacting the Defendant, had no

[illegible]ication or evidence that the Defendant was engaged in the selling of [illegible]ntrolled substances. The only fact which distinguishes the two cases, is the fact that in the Soroushirn case the Defendant was induced into purchasing marijuana on three different buys, two occuring on the same date whereas in the present case, there was only one purchase of marijuana by the Defendant for the officer.

Again, in State vs. Taylor, 599 P.2d 496, at 504 this Court stated as follows:

> From the testimony induced by the State, the evidence establishes as a matter of law that Annette Stubbs induced the commission of the offense by methods creating a substantial risk that the offense would be committed by one not otherwise ready to commit it. It should be emphasised Defendant engaged in conduct perscribed by statute and was guilty of a crime. However, his conviction cannot stand for the reason the statute condemns the conduct of the State in inducing the crime, as a perversion of the proper standards or administration of criminal law.

Based on the facts and the cases cited above, the conviction of the Defendant should be reversed by reason of his entrapment by the undercover officer.

POINT II

THE EVIDENCE DID NOT SUPPORT A CONVICTION FOR DISTRIBUTION OF A CONTROLLED SUBSTANCE FOR VALUE.

The Defendant was charged under the provisions of Utah Code Annotated 58-37-8 (1)(a)(ii) with distributing a controlled substance for value. Under State vs. Soroushirn, supra, the Court found that in fact whether the money was provided by the narcotics officer, the drug was delivered to the officer by the Defendant and was the only participation by the Defendant was as an agent

for the officer, there had been no distribution. 571 P.2d 1370 at 1371 Since the trial of this matter, this Court has considered the above-mentioned statute in connection with facts in a situation where the Defendant was also charged with distribution of a controlled substance for value for substantially similar acts to those performed by Defendant in the present case. In State vs. Hicken, ___P.2d_____, number 18321, the Court upheld the decision of the trial court which dismissed the information against the Defendant on the grounds that the Defendant had not engaged in distribution of a controlled substance for value but should have been charged with the violation of Section 58-37-8 (1)(a)(iv) for arranging the sale of a controlled substance for value. The acts of the Defendant in the Hicken case were that when approached by the undercover officer he called a third party and arranged the terms of the sale, the price, took the officer to the location of the sale and was present when the drug was transferred for value.

Additionally, in State vs. Harris, 601 P.2d 922, the Court upheld a conviction of the Defendant for arranging the distribution and providing a controlled substance under circumstances similar to the present case and the Hicken case. In the Harris case, the Court stated as follows:

> Defendant's second point, that the State failed to prove the element of value, is directly contradicted by the evidence. It is first pointed out that the Defendant himself did not receive any cash for arranging the sale. It is clear that this is not the intent of this statute. Were it otherwise, the arranging of drug sales would be perfectly legal, so long as it is done gratuitously. The aim of the law is to make the arrangement of drug sales unlawful, whether they be profitable or not. So far as any claim that seller of the substance does not receive value, this is directly contradicted by the testimony of the informant who stated on the stand that he paid the twenty-five ($25.00) Dollars issued

:um by the Vernal City Police in exchange for three bags of marijuana.

Based on the foregoing cases, it is respectfully submitted that Defendant's crime, if any, was in arranging the distribution of the controlled substance for value under the arranging portion of the statute cited above, rather than distributing a controlled substance for value. Whereas in the present case, the Defendant had no marijuana for sale, made no money on the sale, and acted as the intermediary between the officer and the actual dealer, the State should have charged him under the arranging portion of the statute. Therefore, his conviction for distribution for value should be reversed.

CONCLUSION

The Defendant's conviction for the crime of distribution of a controlled substance for value should be reversed in that the Court or the jury should have found that the Defendant was entrapped into committing the acts which led to his arrest and prosecution in this matter. While the job and duties of an undercover police officer are difficult, there is a substantial danger that the activities of the officer in attempting to induce bonefide drug dealers to sell to him may also induce someone who is not engaged in dealing but who is aware of the availability of drugs to engage into activity which he would not otherwise have done. In this case, based on the evidence before the Court, it is submitted that the Defendant was not engaged in distributing controlled substances for value and that his involvement with the undercover police officer in this case was initiated by the officer, developed by the officer, and created by the officer.

Further, the activities of the Defendant aside from the entrapment issue

constitute the crime, if any, of arranging the sale of a controlled substance rather than a distribution for value of a controlled substance. The Defendant cannot be convicted for distribution where his sole participation was arranging the sale.

Based on the foregoing, the Defendant respectfully requests that his conviction in this matter be reversed.

Respectfully submitted this 29th day of June, 1983.

ALDRICH, NELSON, WEIGHT & ESPLIN

MICHAEL D. ESPLIN
Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that I delivered two copies of the foregoing Brief of Appellant to the Utah Attorney General, DAVID L. WILKINSON, at 236 State Capitol, Salt Lake City, Utah, 84111 this 29th day of June, 1983.