1983

State of Utah v. Victor Ontiveros : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :

Plaintiff/Respondent, :

- v - : Case No. 19021

VICTOR ONTIVEROS, :

Defendant/Appellant. :

BRIEF OF RESPONDENT

APPEAL FROM A VERDICT OF GUILTY ENTERED IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY, THE HONORABLE DAVID SAM PRESIDING.

DAVID L. WILKINSON
Attorney General
J. STEPHEN MIKITA
Assistant Attorney General

Attorneys for Respondent

MICHAEL D. ESPLIN
Aldrich, Nelson, Weight & Esplin
43 East 200 North
Provo, UT 84603

Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :

Plaintiff/Respondent, :

- v - : Case No. 19021

VICTOR ONTIVEROS, :

Defendant/Appellant. :

BRIEF OF RESPONDENT

APPEAL FROM A VERDICT OF GUILTY ENTERED IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY, THE HONORABLE DAVID SAM PRESIDING.

DAVID L. WILKINSON
Attorney General
J. STEPHEN MIKITA
Assistant Attorney General

Attorneys for Respondent

MICHAEL D. ESPLIN
Aldrich, Nelson, Weight & Esplin
43 East 200 North
Provo, UT 84603

Attorney for Appellant

TABLE OF CONTENTS

CASES CITED

Page

CASES CITED (Continued)

STATUTES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff/Respondent,	:	
- v -	:	Case No. 19021
VICTOR ONTIVEROS,	:	
Defendant/Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged by information with Distribution of a Controlled Substance for Value, Utah Code Ann., § 58-37-8(1)(a)(ii) (1953), as amended.

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury and found guilty of Distribution of a Controlled Substance for Value on January 12, 1983 in the Fourth Judicial District Court of Utah County, State of Utah, the Honorable David Sam presiding. On February 4, 1983, appellant was sentenced to an indeterminate term not to exceed five years and fined the sum of $500.00. Execution of the sentence was suspended and appellant placed on probation for a period of eighteen months.

RELIEF SOUGHT ON APPEAL

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

STATEMENT OF FACTS

Officer Richard Mack of the Provo Police Department worked as an undercover officer disguised as a taxi cab driver in the Springville, Utah area from February through September, 1982 (T. 15).[1] Two or three weeks prior to June 10, 1982 (T. 15), Officer Mack was contacted by Billy Roberts (T. 15). Roberts was unaware of Mack's true identity and had previously secured drugs for him in his undercover capacity (T. 15). Roberts told Officer Mack that "he knew where we could get some drugs" (T. 15) and took him to the home of appellant, Victor Ontiveros (T. 15).

Although Officer Mack sought initially to purchase mushrooms (T. 15), appellant replied that he didn't have any at the time -- that he was dry (T. 17). Officer Mack asked when appellant would get some mushrooms or some other drugs. Appellant said just "later" -- that Mack would need to contact him at some other time because he was dry (T. 17,53). Appellant claimed at trial, however, that at the initial meeting with Mack, "I just told him that I didn't know where

---

1 To avoid confusion, transcript references refer to the jury trial on January 12, 1903, while record references refer to the suppression hearing of November 22, 1982.

any was or I didn't know him, so I just decided I would rather not talk about it" (R. 59).

Officer Mack testified that his next meeting with appellant occurred on June 10 (T. 17. Appellant and his wife, however, both contended that Mack returned to appellant's residence three or four additional times before June 10 (T. 40, 52). Appellant recalled that Mack requested marijuana at each of these meetings (R. 59). Appellant described his response as, "I didn't want to sell him any. I didn't know where any was. I didn't know him that good" (R. 59). At trial, appellant claimed that he had explained to Mack after each of his requests that "I didn't sell drugs. I don't do drugs" (T. 40). although appellant admitted to having previously tried marijuana perhaps three times in his entire life (T. 46), he still insisted that he had "been clean" since he was married (T. 47), or after the first six months of marriage (T. 47), or for a period of at least one and a half years before June 10, 1982 (T. 47).

Officer Mack made two phone calls to appellant between their initial meeting and June 10 (T. 17). Mack stated that he had asked appellant "if he had got any drugs in yet and he [appellant] said that he was just checking to see if they had come in yet. . . . He said that he hadn't got it yet, that for some reason the dealer hadn't got to him yet -- or I mean his supplier" (T. 18). On the second phone call, appellant again replied "that they hadn't come in yet" (T. 18).

When Officer Mack stopped by appellant's home on June 10, appellant appeared to have company, although Officer Mack remembered only seeing a friend of appellant's wife and an additional child (T. 19-20). Appellant "just saw me [Mark] at the door. He was coming back from the hallway and from the bedroom area and he saw me and he said, 'I guess you want some weed,' and I said 'yes' and he said 'well come back in awhile.' He said, 'we are having a party here.'" (T. 20).

When Officer Mack returned an hour later on June 10, appellant invited him inside, offered him a beer (T. 20), and made a call to a number written on a list next to the phone (T. 50). Appellant then turned from the phone to quote Mack a price of $40 per half ounce of marijuana (T. 20-21). Then, appellant directed Mack to drive to 1090 West 200 North in Provo (T. 21). Upon their arrival, Mack gave appellant $40, who then exited the car and entered a residence (T. 21). After five or ten minutes, appellant returned to the car with a half ounce of marijuana that he gave to Mack (T. 21, 23).

As Mack drove appellant back to his home, appellant and the officer smoked a joint which had been rolled by appellant (T. 21, 47). Appellant then asked Officer Mack "to sell him enough for a joint out of the baggy. I [Mack] just told him 'go ahead and take a pinch,' so he took the baggy himself and took a little pinch" (T. 21). Appellant also remembers smoking the joint and taking the pinch of marijuana (T. 47).

After dropping appellant back at his home, Officer Mack was told by appellant "that he would probably get some mushrooms in this weekend and I [officer] said 'I want some,' and with that I left" (T. 21-22). Officer Mack did not follow through on appellant's offer to sell mushrooms (T. 27).

On January 12, 1983, the jury was convinced beyond a reasonable doubt that appellant was guilty of distribution of a controlled substance for value.

ARGUMENT

POINT I

APPELLANT WAS NOT ENTRAPPED INTO DISTRIBUTING A CONTROLLED SUBSTANCE FOR VALUE.

Appellant contends as a defense to the charge of distribution of a controlled substance for value that he was entrapped as defined in Utah Code Ann., § 76-2-303 (1953), as amended. However, in compliance with the objective test for entrapment, Officer Mack's conduct did not induce appellant 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 offense.

Appellant made a written motion claiming entrapment as a defense on November 22, 1982 (T. 12), at least ten days before the date of trial, January 12, 1983, as required by Utah Code Ann., § 76-2-303(4) (1953), as amended. Appellant's motion to dismiss by reason of entrapment was denied on December 1, 1982 (T. 17). Although a jury instruction on

entrapment was given (#8, R. 24), appellant was nonetheless found guilty of distribution of a controlled substance for value (R. 33).

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.[2] Although Pacheco, supra was construed initially as consistent with the passage in 1973 of § 76-2-303(1),[3] this Court later recognized that the explicit wording of § 76-2-303(1) incorporates an objective standard of entrapment. State v. Taylor, Utah, 599 P.2d 496 (1979).

---

2 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.

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

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, supra, at 503; Grossman v. State, 457 P.2d 226-230 (Alaska 1969).

Appellant's case law is not despositive of the facts of this case. Officer Mack did not initially contact appellant at random. Instead, appellant was introduced by Billy Roberts as one who could obtain drugs. This effectively distinguishes State v. Kourbelas, Utah, 621 P.2d 1238 (1980) where the undercover officer working at a marina on Lake Powell approached the defendant and offered to buy drugs without any information that the defendant had ever previously sold drugs. "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 a person to carry out his criminal intentions." State v. Curtis, Utah,

542 P.2d 744, 746 (1975). Roberts' introduction of appellant provided Officer Mack with a suspicion that appellant sold drugs, justifying Mack in providing appellant an opportunity to carry out his criminal intentions.

Although Mack did initiate each of his four contacts with appellant, the officer did so based on appellant's representations that he would be receiving drugs. Such conduct is also distinguishable from that of the Kourbelas, supra, officer who followed the defendant back to Salt Lake City, initiated contact again after a two-week silence by defendant, and followed up five times. Officer Mack contacted appellant three times before the sale, once at home and twice with phone calls. Each of the first three encounters ended with appellant saying that he had not yet received the drugs, not that he desired to terminate his relationship with the officer. Officer Mack's contacts were not so frequent or high pressured as to induce the normal person to secure him drugs.

State v. Taylor, Utah, 599 P.2d 496 (1979), involved entrapment by a police agent who was defendant's lover and who was suffering through heroin withdrawal. Especially given the defendant's former addiction, the lover's extreme emotional pleas were all the more manipulative. In contrast, Officer Mack in the instant case was merely a potential buyer in relation to appellant. There were no pleas of desperate illness, close friendship, or inordinate sums of money. On the contrary, appellant fixed the price of the marijuana by

contacting his supplier (T. 20-21). Appellant's off-hand explanation of why he invited Mack to return on June 10 was: "Then more or less to get him out of my hair, I just called this guy that I met" (T. 41). The officer's conduct was merely persistent enough to gain appellant's confidence, but was not a badgering or manipulation of appellant analogous to the addict girlfriend's conduct in Taylor, supra.

The subjective test applied in State v. Sorouskirn, Utah, 571 P.2d 1370 (1977) has been rejected. Taylor, supra, 499. Even if the facts of Sorouskirn constituted entrapment on the objective standard, they are distinguishable because the agent in Sorouskirn had infiltrated a college dormitory, thrown free pot parties and brought peer pressure to bear on defendant. Although likely to distribute a controlled substance, the defendant was entrapped by such police conduct into distributing a controlled substance for value. The agent drove the defendant to the point of sale, importuned the defendant to purchase the marijuana from a reluctant seller, and importuned the defendant to return for two additional bags. Id. at 1371. Appellant invited Officer Mack to return after the party, gave directions to the supplier's residence, and made the purchase without further efforts by Officer Mack. The conduct of the undercover agent in Sorouskirn, supra, was of a more extensive and qualitatively different sort than the conduct of Officer Mack.

The trial court had tried to find Sorouskirn guilty of distribution of a controlled substance for value charge.

In refusing to split hairs in that way, the Court held that the entrapment extended to the defendant's "pinching" of the marijuana baggie secured for the undercover agent. Sorouskirn, supra, 1371. This dicta of the Sorouskirn Court should not be confused with a defense of agency explicitly prohibited by Utah Code Ann., § 58-37-2(6), (8) (1953), as amended:

> (6) The word "deliver" or "delivery" means the actual, constructive, or attempted transfer of a controlled substance, whether or not there exists an agency relationship.
>
> * * *
>
> (8) The word "distribute" means to deliver a controlled substance. [Emphasis added.]

State v. Casias, Utah, 567 P.2d 1097 (1917)[4] found the defendant guilty of distributing a controlled substance for value, § 58-37-8(1)(a)(ii), despite defendant's contention that he was merely an agent of the undercover agent. Id. 1099. Neither the quoted language of Sorouskirn, supra, on agency, nor the facts of that case argue that appellant was entrapped.

In summary, Officer Mack's conduct did not entrap appellant because of the following factual circumstances:

---

[4] Although Casias, supra, applies a subjective test of entrapment now discarded in Utah, the Casias ruling on agency in connection with the Utah Controlled Substances Act was not overrulled.

1. The initial contact was made through a friend of appellant who described appellant as one who could obtain drugs for Officer Mack;

2. The officer initiated further contacts because he understood from appellant that appellant would be receiving drugs; and

3. Appellant admitted to using drugs in the past; that he didn't make any sale on the first three contacts because he didn't trust the officer; and that by the fourth contact appellant instructed the agent to come back in an hour, which the agent did, and the sale was completed.

The conduct of Officer Mack conforms to the objective test for entrapment. Four contacts over the course of three weeks were not such a persuasion or inducement as to persuade an average person, other than one who was merely given the opportunity to distribute a controlled substance for value. Any undercover effort to gain the confidence of a distributor would be effectively thwarted by a rule which found entrapment merely from multiple contacts initiated by the undercover officer. The nature of the contacts, their frequency, and the officer's rationale for pursuing contacts with appellant in a specific manner are all relevant to assessing the officer's conduct on the objective test of entrapment. Appellant has shown no undue pressure or such unfair conduct by Officer Mack as to constitute entrapment. The officer's contacts were of such a nature as to merely offer appellant the opportunity to distribute a controlled substance for value. Therefore, appellant was not entrapped.

POINT II

THE EVIDENCE WAS SUFFICIENT TO SUPPORT A CONVICTION FOR DISTRIBUTION OF A CONTROLLED SUBSTANCE FOR VALUE.

Appellant contends that there was insufficient evidence to prove that he received value from the marijuana distribution. Consequently, appellant claims he is guilty, if at all, not of distributing a controlled substance for value, Utah Code Ann., § 58-37-8(1)(a)(ii) (1953), as amended, but of arranging the distribution of a controlled substance for value, Utah Code Ann., § 58-37-8(1)(a)(iv) (1953), as amended. However, appellant raises an improper defense of agency and clearly both distributed the marijuana and received value for the distribution.

The standard for appellate review on insufficient evidence is stated in State v. Petree, Utah, 659 P.2d 443 (1983):

> We review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury. We reverse a jury conviction for insufficient evidence only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted.

Id. at 444, see State v. Kereckes, Utah, 622 P.2d 1161, 1168 (1980); State v. Lamm, Utah, 606 P.2d 229, 231 (1980). The evidence presented at trial was clearly sufficient by the Petree, supra, standard to establish the elements of distributing a controlled substance for value.

The statutory provisions at issue under Utah Code Ann., § 58-37-8(a) state:

> (a) Except as authorized by this act, it shall be unlawful for any person knowingly and intentionally:
>
> (ii) To distribute for value or possess with intent to distribute for value a controlled or counterfeit substance;
>
> * * *
>
> (iv) To agree, consent, offer, or arrange to distribute or dispense a controlled substance for value or to negotiate to have a controlled substance distributed or dispensed for value and distribute, disperse, or negotiate the distribution or dispensing of any other liquid, substance, or material in lieu of the specific controlled substance so offered, agreed, consented, arranged, or negotiated.

A defendant may be guilty of the arranging provision, § 58-37-8(1)(a)(iv), without receiving value for his act of arranging. State v. Harrisson,[5] Utah, 601 P.2d 922 (1979). As long as the seller receives value for the distribution, a defendant has arranged a distribution for value. Id. at 924. A defendant is guilty of distributing for value, § 58-37-8(1)(a)(ii), if he (a) distributes, and (b) receives value. Appellant both distributed and received value in the sale of marijuana to Officer Mack.

Appellant received $40 from Officer Mack before exiting the taxi and entering the supplier's residence

---

[5] Appellant at p. 8 refers to State v. Harris with the correct cite for State v. Harrisson.

21). Officer Mack testified that given the varying prices of marijuana of different qualities, and the quality of the received marijuana, that appellant could have received a profit from the $40 price (T. 121). Further, Appellant not only shared a joint with Mack on the return trip, but was allowed to retain a pinch of marijuana for himself (T. 115). Appellant's offer to purchase the pinch (T. 42, 115) shows its monetary value. Thus, appellant received value from the distribution.

Appellant also distributed the marijuana in obtaining possession from the supplier and retaining possession until his delivery of it to Officer Mack in the taxi. Under Utah Code Ann., § 58-37-2(8) (1953), as amended, "The word 'distribute' means to deliver a controlled substance." As defined in Utah Code Ann., § 58-37-2(6), "The word 'deliver' or 'delivery' means the actual, constructive, or attempted transfer of a controlled substance, whether or not there exists an agency relationship." Appellant transferred the marijuana from the supplier to Officer Mack.

The dicta of State v. Sorouskirn, Utah, 571 P.2d 1370, 1371 (1977) indicated that because the defendant was entrapped with regard to distribution for value that there was no separate offense of mere distribution of a controlled substance on the facts of that case. The entrapment of Sorouskirn, supra, does not stand for the proposition that defendants have available an agency defense under the Utah

Controlled Substances Act, Utah Code Ann., § 58-37-8 (1953), as amended. See State v. Casias, Utah, 567 P.2d 1097 (agency is not determinative in finding criminal culpability under the Utah _____.

CONCLUSION

Appellant's conviction for distribution of a controlled substance, Utah Code Ann., § 58-37-8(a)(ii) (1953), as amended, should be affirmed.

First, appellant was not entrapped by undercover Officer Mack. The undercover officer's conduct conforms to the objective test for entrapment in that it was not such persuasion or inducement as to persuade an average person, other than one who was merely given the opportunity to distribute a controlled substance for value.

Second, the evidence was sufficient to support a conviction for distribution of a controlled substance for value. Appellant both distributed and received value when he took $40 from Officer Mack, procurred the marijuana, gave the marijuana to the officer and then smoked a joint with the officer and retained a pinch of marijuana for personal use.

This Court should affirm the verdict and judgment of the trial court in appellant's trial for distribution of a controlled substance for value.

RESPECTFULLY submitted this 29th day of August, 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 Appellant, postage prepaid, to Michael D. Esplin, Attorney for Appellant, 43 East 200 North, Provo, Utah 84603, this 29th day of August, 1983.

Carol Dahlberg