1984

State of Utah v. Ronnie Lee Cripps : Brief of Appellant

IN THE SUPREME COURT

STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff/Respondent,	:	
v.	:	Case No. 19140
RONNIE LEE CRIPPS,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLANT

Appeal From a Verdict of Guilty Returned
By a Jury in the Seventh Judicial District
Court, The Honorable Boyd Bunnell, District Judge,
Presiding.

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STATUTES CITED

NATURE OF THE CASE AND DISPOSITION IN LOWER COURT

This is an appeal of a criminal conviction, distribution of a controlled substance (marijuana), following a jury trial. The defendant/appellant was fined and placed on probation on the condition that he serve thirty days in jail, a portion of which was stayed by this Honorable Court pending this appeal.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the verdict and judgment with a remand for a new trial with appropriate jury instruction.

STATEMENT OF FACTS

The defendant was charged with selling an ounce of marijuana to Agent Spann of the State Drug and Liquor Enforcement Agency. The sole defense raised by the defendant was that he was entrapped into committing the offense.

The inducement for the sale began a week or two before the day of the sale. Agent Spann and two other Drug and Liquor Enforcement Agents became acquainted with the defendant's roommate, Mike Pilling, at the Comic Book Lounge in Helper. Pilling invited the agents to a keg party at his and the defendant's home following the close of the tavern. (T-55.)

The day of the party, Todd Evanoff had picked the defendant up and taken him to breakfast because the defendant was depressed

about being laid off from his employment. (T-106.) Evanoff drank and played pool with the defendant until he had to leave for his shift at the mine. (T-106.) When Evanoff returned, after work, the defendant was still at the bar drinking and was so intoxicated that Evanoff felt he should take him home where they found the keg party in progress. (T. 107.)

The agents testified that there were over thirty people at the party but they did not notice anyone smoking marijuana nor could they find anyone who could sell them any. (T-58,59.)

Agent Spann closely resembled the defendant in appearance and was introduced to people at the party as the defendant's brother. (T-57.) They began acting as if they were old friends. (T-102.) Photographs of the defendant and Agent Spann embracing each other at the party were introduced into evidence. (Exhibit D-2.)

The agents were claiming to be working as "tool runners" visiting the drilling rigs in the Roosevelt oil fields. (T-59.) Agent Spann admitted that the defendant asked him if he could get him a job (T-60), but denied that he offered to do so. (Id.)

Mike Pilling testified that Agent Spann told the defendant that there were a lot of jobs over in the oil fields; that he knew a lot of people there; and that he could probably get the defendant a job. (T-97.) The defendant testified that Agent Spann told him there was plenty of work in the oil fields; that he would keep an eye open for a position; and come back to Price and tell

him when he found one. (T-114.) It was in that context, according to the defendant, that he agreed, in return, to obtain some marijuana for the agent. (T-114.)

The defendant testified that Agent Spann came back the next morning but the defendant was too hung-over to do anything. (T-115.) The agent returned in four or five days and asked the defendant if he had found any marijuana but defendant had not. The agent told defendant that he was going to Roosevelt and would look for a job for the defendant (T-117) and asked the defendant to look for some marijuana for him which the defendant agreed to do. (T-115,117.)

The defendant obtained some marijuana from a friend and a scale to weigh it because he did not know how much Spann wanted. (T-117.) When Agent Spann returned the day of the sale, the defendant invited him and two other agents in to smoke some marijuana. The defendant asked Agent Spann how much he wanted and the agent replied, "One ounce." The defendant attempted to weigh out one ounce (28 grams) but was so inept at the use of the scales that he actually gave the agent 1.43 ounces (40 grams). (T-52, 118, 144.)

The defendant testified that he had never sold marijuana before.

Over the defendant's objection and exception (T-142), the trial court, in defining "entrapment" added to the statutory language the following paragraph:

> In assessing police conduct under the defense of entrapment, the test

> to determine an unlawful entrapment is whether a law enforcement official or agent, in order to obtain evidence of the commission of an offense, induced the defendant to commit such an offense by persuasion or inducement which would be effective to presuade [sic] an average person, other than one who was merely given the opportunity to commit the offense. (Instruction C.)

The prosecutor relied heavily upon this part of the instruction in his closing and rebuttal arguments, arguing that there was no entrapment under even the defendant's version of the facts since an "average person" would not sell drugs because someone promised to help him find a job. The prosecutor asked the jurors as "average persons" whether they would sell drugs under such circumstances. (T-146,147.)

ARGUMENT

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY BY SUBSTANTIALLY RAISING THE STANDARD FOR UNLAWFUL ENTRAPMENT ABOVE THAT DEFINED BY STATUTE AND THIS COURT.

The affirmative defense of entrapment has been codified by the legislature as follows:

> §76-2-303. Entrapment--(1) It is a defense that the actor was entrapped into committing the offense. Entrapment occurs when a law enforcement officer or person directed by or acting in co-operation with the officer induces 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.

This Court has approved giving the statutory definition of entrapment to the jury, State v. Salmon, 612 P.2d 366, 369 (Utah 197__). The defendant requested that the jury be so instructed in this case. However, the trial court, in addition to reciting the statutory definition added the following paragraph:

> In asessing the police conduct under the defense of entrapment, the test to determine an unlawful entrapment is whether a law enforcement official or an agent, in order to obtain evidence of the commission of an offense, induced the Defendant to commit such offense by persuasion or inducement which would be effective to presuade [sic] an average person, other than one who was merely given the opportunity to commit the offense. [Emphasis added.)

This paragraph did not merely clarify the statutory definition--it modified the test in two particulars.

First, the statutory definition merely requires a "substantial risk" while the trial court's test requires that the conduct "would be effective" to induce the commission of the offense.

Second, and more importantly, the trial court's definition requires that the conduct would induce an "average person" to commit the offense, while the statutory definition merely requires conduct that might induce "one not otherwise ready to commit it." Thus, under the statutory definition, it would be a defense if the police engaged in conduct which created a substantial risk that one who otherwise was not ready to commit the offense but did not possess the moral fiber and inhibitions of the average citizen would commit it; whereas, under the court's definition, it would

not be a defense if a jury believed the conduct would not have been "effective to induce the average person".

It is difficult to imagine the type of inducement that would be effective to induce the "average" Utah citizen to engage in drug dealing. The "average" Utah citizen regards drug dealing as not only unlawful but highly immoral and drug dealers as reprehensible people--that is why they elect legislators who will be tough on drug dealers. There are, however, thousands of drug users who do not believe that drugs are that immoral and who regard dealers as people who fulfill a need or demand. Such a person might be reluctant to sell drugs because it is a felony, but would certainly be easier to persuade to do so than the "average" citizen. The legislature has decided, for policy reasons, to allow even weak, immoral persons to raise the defense if the inducement raised a substantial risk that one otherwise not ready to commit the offense would commit it.

In the hands of a competent prosecutor, the trial court's definition practically eliminates the defense of entrapment because the defense must persuade a jury of "average citizens" that the police conduct shown by the evidence would have been effective to induce them to deal drugs--not an easy thing to do. Carbon County juries have a reputation for disliking the methods of the State Liquor and Narcotics Enforcement Officers but they are certainly not going to say that drug dealing is something the average person can be induced to do.

The trial court believed that this Court had mandated giving an "average person" instruction in State v. Salmon, 612 P.2d 366 (Utah 197__). (T-144.) As noted earlier, State v. Salmon upheld a conviction where the statutory definition had been given to the jury, 612 P.2d at 369. The Salmon decision does, however, in the course of analysis, state:

> As stated in Taylor, the objective test does not prohibit the police from affording a person an opportunity to commit crime, it only prohibits active inducements on the part of the government for the purpose of luring an "average" person into the commission of an offense. 612 P.2d at 368.

However, the author of that decision did not suggest that that sentence be taken out of context and delivered to a jury as the test. The "average person" language originated in State v. Taylor, 599 P.2d 496, 503 (197__) and, unfortunately, was reduced to a headnote in Utah Code Annotated, §8b U.C.A. 3 (1982 Supp.). However, the clear dictum nature of the language is made evident by reading the case. In Taylor, this Court reversed a jury verdict and held that there was entrapment, as a matter of law, because the police used a former girlfriend who induced the defendant to get heroin because she was going through withdrawal. Surely this Court was not saying that a jury must find that such inducment would be effective to persuade the "average person" to sell heroin. The "average person" might feel sorry for a drug addict and find treatment for him, but certainly would not go get heroin and sell it to him even if the addict was a former lover.

The one sentence headnote, taken alone, is actually in direct conflict with the holding of the case.

The instant case illustrates the danger of taking a single sentence out of a complex analysis of a rather esoteric legal point and incorporating it into a jury instruction. The statutory definition clearly states the test and neither Salmon nor Taylor modified the statutory test. The Salmon decision approved giving the statutory definition, 612 P.2d at 369, and the Taylor decision clearly did not apply an abstract "average person" test yet alone mandate that a jury be given an instruction requiring the application of such a test.

The trial court believed the issue to be a choice between the "subjective" and "objective" tests and that this Court had adopted the objective test. (T-144.) It is doubtful that the fine distinctions drawn by appellate courts in the course of "subjective" versus "objective" debates are particularly germane to the fact situation with which this jury was presented, and whether a jury would understand them in any event. The objective/subjective distinction is important primarily where there is evidence of predisposition on the part of a defendant, such as prior criminal acts. The objective test precludes such evidence unless the defendant "opens it up" himself. E.g., State v. Hansen, 588 P.2d 164 (Utah 197__). Here the defendant put his character in issue with evidence of no prior sales.

It is submitted that even the most ardent advocate of the

"objective test" would not instruct a jury with the language used in the instant case. One can apply the statutory test objectively by testing whether the police conduct might induce the commission of the offense by one not otherwise ready to commit it and who was not merely given an opportunity to commit the offense. The portion of the trial court's instruction which the appellant objects to did not concern the manner in which the test was to be applied but stated what the test itself was. The statutory test guarded against police conduct which would create criminals rather than discover them. Certainly, that half of the population which is below average is the most vulnerable to such conduct and should not be deprived of the defense.

CONCLUSION

It is respectfully submitted that this Court correct the misinterpretation of the dicta from Taylor and Salmon and order a new trial for defendant with a jury instruction comporting with the statutory test for unlawful entrapment.

DATED this 21st day of December, 1983.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of December, 1983, I delivered a true copy of the foregoing BRIEF OF APPELLANT to the attorney for the plaintiff/respondent herein, Attorney General, State of Utah, 236 State Capitol, Salt Lake City, Utah 84114.