1972

The State of Utah v. Thomas B. Madsen : Respondent's Brief

In The Supr
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STATE OF

THOMAS K.

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Supreme Court, U.S.

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In The Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff-Respondent,
-vs-
THOMAS B. MADSEN,
Defendant-Appellant.

Case No. 12700

BRIEF OF RESPONDENT

STATEMENT OF NATURE OF THE CASE

Thomas B. Madsen appeals from judgment and conviction entered against him in a jury trial before the District Court of the Fourth Judicial District, in and for Utah County, State of Utah, the Honorable Allen B. Sorensen, Judge, presiding.

DISPOSITION IN LOWER COURT

Appellant was found guilty of selling a stimulant drug by jury verdict, and was sentenced according to law to imprisonment in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

The judgment of the verdict of guilty rendered in the district court should be affirmed.

STATEMENT OF FACTS

Respondent agrees generally with the facts as expressed by appellant in his brief, with the following additions and clarifications.

The record is silent as to the character of the marks which may have originally appeared on the glassine baggy delivered to Officer Farr. There was no indication that any such marks were indelible and were not of a type likely to be inadvertently rubbed off through normal handling of the baggy (Tr. 66).

The expert witness for the State, Dr. Swensen, testified that he did not recall whether the bottle delivered to him by Officer Farr was sealed or unsealed at the time he received it from the officer (Tr. 109, 110).

ARGUMENT

POINT I

THE EVIDENTIARY CHAIN OF CUSTODY WAS SUFFICIENTLY ESTABLISHED TO ALLOW THE TESTIMONY OF

THE EXPERT WITNESS TO BE ADMITTED AS A MATTER OF LAW.

Officer Farr received a glassine baggy containing a suspected drug from Mr. Carr the evening of March 2, 1971 (T. 65). The baggy was then taken directly to the Brigham Young University Security Office by Officer Farr where it was put into a plastic pill bottle, sealed and tagged, and put into an evidence-holding locker (T. 66). On March 3, 1971, Officer West transferred the tagged evidence to the main evidence locker (T. 103). It remained in that locker until March 9, 1971, when Officer Farr transferred it to Dr. Swensen (T. 68). Upon receiving it, Dr. Swensen locked it in his safe (T. 109) and it remained there until Dr. Swensen removed it on March 15, 1971, for the purpose of making a chemical analysis (T. 109).

The testimony established the whereabouts, control and custody of the evidence at all times from its initial receipt on March 2, 1971, through the time it was tested by Dr. Swensen on March 15, 1971. Each person who handled the evidence, and its successive repositories, had been fully accounted for.

Appellant cites several cases in which evidence has been held inadmissible because a chain of possession had not been sufficiently established. In *Utah Farm Bureau v. Chugg*, 6 Utah 2d 399, 315 P.2d 277 (1957), the testimony of a laboratory technician who had analyzed a blood sample was excluded because the chain of custody from Chugg to the technician could not be established.

There was no evidence as to how, when or from whom she obtained the sample she tested, nor was there any evidence or information from which she concluded that the specimen she tested belonged to Chugg. No one could remember who had drawn the blood, nor to whom the blood specimen was given after it was drawn. In *Clayton v. Metropolitan Life Insurance Company,* 96 Utah 311, 85 P.2d 819 (1938) this Court upheld the exclusion of a histological report on the plaintiff's appendix because the nurse who allegedly delivered the appendix from the surgeon to the pathologist was not called as a witness, and therefore continuous custody had not been established.

In *Gallego v. United States,* 276 F.2d 914 (9th Cir. 1960), objection was made to the admission of a sack of marijuana, the custody of which was fully accounted for, but which had been kept in a safe accessible to two persons, only one of whom testified at the trial. The appellant sought to have the evidence excluded because of the opportunity that an acting deputy collector of customs had to tamper with the evidence had he so desired, and that the question of possible tampering should not have been concluded without his testimony. In dismissing this theory, the Ninth Circuit Court of Appeals stated:

> "The trial judge's determination that the showing as to identification and nature of contents is sufficient to warrant reception of an article in evidence may not be overturned

> except for a clear abuse of discretion . . . No abuse of discretion was shown here. Before a physical object connected with the commission of a crime may properly be admitted in evidence, there must be a showing that such object is in substantially the same condition as when the crime was committed. This determination is to be made by the trial judge. Factors to be considered in making this determination include the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it. If upon the consideration of such factors the trial judge is satisfied that in reasonable probability the article has not been changed in important respects, he may permit its introduction in evidence. Where no evidence indicating otherwise is produced, the presumption of regularity supports the official acts of public officers, and courts presume that they have properly discharged their official duties."

In the case at bar, physical custody of the evidence was at all times accounted for by testimony from those who had handled it. The chain of custody was fully established, and appellant's only basis for attacking it is Dr. Swensen's testimony that he could not remember whether the bottle was sealed at the time he received it from Officer Farr (T. 110). From this, appellant

draws the impermissible conclusion that the bottle was therefore unsealed, and further that its contents must necessarily have been surreptitiously adulterated by either the police or Dr. Swensen prior to the chemical analysis performed on March 15, 1971.

Even if it were conceivable that the evidence in question had been tampered with, the trial court did not abuse its discretion by admitting the exhibit into evidence. In *United States v. Stevenson,* 445 F.2d 25 (7th Cir. 1971) the court considered an allegation identical to that raised by appellant in the instant case. Stevenson was prosecuted and convicted for narcotics offenses, and had urged that the evidence was not sufficient because of a possibility of a break in the chain of custody of the narcotics introduced in evidence against him. In its opinion, the court said:

> "Stevenson concedes that on this question the trial judge is to determine the adequacy of the evidence of custody to warrant reception of physical evidence and that this decision can be overturned only for clear abuse of discretion. He also concedes that government witnesses testified to the whereabouts of the evidence during the entire period from its acquisition until trial. He contends, however, that due to the length of time between the alleged offense and his second trial, the number of people who had custody of the evidence, the fact that at one point the evidence was mailed to and from

> Washington, D.C., and the fact that government witnesses refreshed their recollection from official records, it is 'a bit more than conceivable that tampering with the evidence has occurred.' Such utter speculation cannot be credited on appeal in the face of government evidence showing a continuous chain of custody. As Stevenson further concedes, the mere fact that it is conceivable that tampering has occurred is not sufficient to require the exclusion of the evidence."

Appellant's summary of alleged changes, set forth at page 10 of Appellant's Brief, is based upon conclusions which cannot fairly be inferred from Dr. Swensen's inability to recall whether the pill bottle had been sealed when he received it.

In the instant case, the chain of custody having been fully established, the trial judge properly admitted the exhibit and testimony into evidence, and allowed what question, if any, regarding its identity, to go to the weight to be given it by the jury. *Eisentrager v. State,* 79 Nev. 38, 378 P.2d 526 (1963); *State v. McFarland,* 401 P.2d 824 (Supreme Court of Idaho, 1965); *People v. Levene,* 107 C.A.2d 125, 236 P.2d 604 (1951).

POINT II

THE TRIAL COURT DID NOT ERR BY DENYING APPELLANT'S MOTION TO DIS-

MISS BECAUSE THE STATE SUFFICIENTLY PROVED THAT APPELLANT HAD SOLD A PROSCRIBED DRUG.

Utah Code Ann. § 58-33-6 (1953) states that it shall be unlawful for any person to . . . sell . . . any . . . stimulant . . . drug as defined therein. Utah Code Ann. § 58-33-1 (d) (1953) defines "stimulant drug" as:

> ". . . (2) Any drug which contains any quality of (A) amphetamine: dl-methamphetamine; or any of their optical isomers; . . . or (C) any substance designated by regulations promulgated under the federal act as habit-forming because of its stimulant effect on the central nervous system."

Appellant contends that this provision proscribes only dl-methamphetamine and asserts that the State was obligated to prove that the substance in question was dl-methamphetamine to the exclusion of anything else. Not only does the statute specifically proscribe dl-methamphetamine, but Utah Code Ann. § 58-33-1(d) (2) (C) proscribes any substance designated by regulations promulgated under the federal act as habit-forming. Those federal regulations define as habit-forming stimulant drugs, d and dl-metamphetamine. 21 C.F.R. § 320.3(b) (Supp. 1971). Therefore, if the substance in question were either d or dl, it would specifically be proscribed under the Utah provision.

Dr. Swensen testified that d-methamphetamine and l-methamphetamine are optical isomers of each other (T. 123). He also testified that all methamphetamine is either d or l and that dl is a mixture of both (T. 122). The issue is whether l-methamphetamine is proscribed because if it is, then a chemical analysis which merely determines whether a substance is amphetamine or methamphetamine, as in this case, is sufficient proof that a substance thus identified is a proscribed drug under the statute.

Dr. Swensen testified that the d and l configurations have identical chemical properties, except for optical rotation, (T. 122) and that the physiological effects are identical (T. 123). The statute refers to amphetamine dl-methamphetamine, or any of their optical isomers. Since dl-methamphetamine is merely a mixture of the two configurations, each retaining its distinct property of optical rotation, the optical isomers of dl-methamphetamine are those of the separate component compounds d and l. As Dr. Swensen testified, each of those is the optical isomer of the other; therefore, the l configuration is one of the optical isomers of the dl-mixture and comes within the proscription of the statute. By determining that the substance was amphetamine or methamphetamine, Dr. Swensen had tested sufficiently to prove that it was a proscribed drug under the statute, because the statute, by including optical isomers, applies to all forms of methamphetamine.

POINT III

APPELLANT'S CASE WAS NOT PREJUDICED BY INSTRUCTION NUMBER 5, OR ANY OTHER INSTRUCTION TO THE JURY.

The information charged appellant with the sale of a stimulant drug in violation of Utah Code Ann. § 58-33-6. The word "sale" as used in that provision is defined in Section 58-33-1(h) which states that "sale" or "sell" includes barter, exchange, transfer, give, convey, deliver, etc. An information need only charge essential elements of a statutory offense, and when this is done the accused is fairly appraised of what he is called upon to meet at the trial. *People v. Holt,* 209 P.2d 94, 93 C.A.2d 473 (1949); *State v. Walsh,* 463 P.2d 41, 81 N.M. 65 (1969).

In the instant case, Instruction No. 5 (R. 31) stated:

> "Under the laws of this state, any person who intentionally sells, furnishes or gives away any stimulant drug is guilty of a felony. Any drug or derivative which contains any quantity of dl-methamphetamine is a stimulant drug."

The Instruction as worded conformed to the pleadings and the testimony received at the trial, and accordingly was a proper and satisfactory instruction. *State v.*

Aures, 127 P.2d 872, 102 Utah 113 (1942); *State v. Bray,* 472 P.2d 54, 106 Ariz. 185 (1970); *Barfield v. State,* 110 P.2d 316, 71 Okl.Cr. 195 (1941).

In the case at bar, Mr. Carr testified (T. 24, 25):

QUESTION: What happened then?

ANSWER: As I handed the money over, Mr. Madsen stood up, went outside for about a minute or so, and then came back in.

QUESTION: Who was in the booth at that time?

ANSWER: The same four.

QUESTION: What happened then?

ANSWER: Mr. Madsen put his hands down in a cupping fashion onto the table itself, lifted his hand up, and there was a small bag that he said was crank.

Instruction No. 5 conformed to the statutory definition of "sale"; it had a sufficient basis in the testimony received and was therefore not prejudicial. Appellant cites *State v. Pacheco,* ....Utah 2d...., (Supreme Court No. 12589) as authority for his assignment of error, but the *Pacheco* case is inapposite to the case at bar. *Pacheco* involved an instruction relating to a separate crime with which Pacheco had not been charged. Here, the instruction related solely to the crime with

which the appellant was charged, and the court committed no error by giving the instruction. Appellant asserts that instructions referring to sale of a "stimulant drug" effected a broadening of the charge; however, the charge as expressed in the information (R. 12) was sale of a stimulant drug. Instruction No. 7 informed the jurors that each instruction should be construed in light of and in harmony with all the other instructions. Instruction No. 5 contained a sufficient definition of "stimulant drug" to allow a finding that the substance in question was a proscribed stimulant drug, and in fact was supported by testimony received from Dr. Swensen to the effect that the substance he tested was dl-methamphetamine (T. 123).

POINT IV

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING THE DISTRICT ATTORNEY TO REOPEN PRIOR TO PRESENTATION OF APPELLANT'S DEFENSE.

Utah Code Ann. § 77-31-1 (1953) allows the court discretion to permit either party to offer evidence upon its original case, even after the offering party has rested, if the court feels there is "good reason in furtherance of justice." In the case at bar, appellant had not proceeded with his defense, and the court appropriately desired that a more positive connection be demonstrated

between the substance tested and the applicable statute. As was stated in *State v. Duncan*, 102 Utah 449, 132 P.2d 131 (1942) "the purpose of a trial is to obtain the facts . . . the court and counsel for both sides should aid in the presentation of . . . testimony to prevent a miscarriage of justice."

Contrary to appellant's assertion, the district attorney did not change his theory of the case. The information charged the sale of a proscribed stimulant drug. The testimony produced after the reopening showed that any form of methamphetamine was proscribed by the statute, and did not constitute a change of theory prejudicial to the appellant.

CONCLUSION

The court below committed no error and the judgment and conviction should be affirmed.

Respectfully submitted,

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