1972

State of Utah v. Byron Schultz : Appellant's Brief

IN THE SUPREME COURT
of the
STATE OF UTAH

STATE OF UTAH

Plaintiff and Respondent

vs.

BYRON SCHULTZ,

Defendant and Appellant

Case No. 12751

Appeal from the Judgment of the Second Judicial Court in and for Weber County, Utah,
The Honorable John F. Wahlquist, Judge

APPELLANT'S BRIEF

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APPELLANTS BRIEF

NATURE OF CASE

An appeal from conviction of a charge of illegal sale of narcotics.

DISPOSITION IN LOWER COURT

After a jury verdict against appellant, he was sentenced to a term of not less than five years in the Utah State Prison, where he is presently serving the sentence of the Court.

NATURE OF RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the judgment of the lower Court.

STATEMENT OF FACTS

The factual background of this case is not involved and, to a great extent, not disputed.

Appellant had been living in Salt Lake City with his wife and family for some six months (R-185) and working at Ketchums Builders Supply there (R-175). On May 17, 1971, he came to Ogden on the bus with his wife and child to visit his mother (R-176). After arriving in Ogden in the afternoon, he purchased some wine and they walked to the Ogden Municipal park to visit acquaintances they had known (R-177).

At about the same time Ogden City undercover policeman Philip Roche, in plain clothes and an unmarked car, approached the park with an informer named Gary Spangler (T-67-69). Roche had set up a meeting with a known dealer, Patrick Barnes, and had arranged with Spangler to solicit a sale from Barnes for purposes of prosecution (R-141, 142).

Unfortunately for appellant, Barnes did not show for the appointment (R-141). Spangler was not available to testify; all three officers testifying had no knowledge of his whereabouts at the time of trial. Therefore the sole evidence of what happened at the initial encounter between appellant and the police informant came from appellant (R-177):

> "Q. What happened after you got here?
>
> A. I was approached by this, I forget his name, the one that was with Roche.
>
> Q. Where were you at the time?

A. Gary Spangler, I believe. I was at the park talking to my friends.

Q. What happened when you were approached? What was said?

A. This certain Gary Spangler wanted to know where he could purchase some heroin and he looked to me as if he were a heroin addict. So I checked around. I was going to do him a favor. I checked around and found Terry Ebaugh and asked him if Mr. Gary Spangler could purchase some heroin from him. Then I made the transaction with the money, because Ebaugh was kind of afraid."

The approach by Spangler, although not witnessed by Roche (or anyone else) was nevertheless confirmed by him (R-141).

"Q. The purpose of Mr. Spangler going in the park was in effect to solicit the sale of a narcotic drug, I take it?

A. Yes, from the individual who didn't show up."

Following the conversation with Spangler, appellant asked around the park until he located someone who said he had a supply of heroin and would sell it. This was one Terry Ebaugh, who also could not be located by subpoena to testify. By stipulation (R-192) the jurors were instructed that if in fact he were present and sworn as a witness, he would refuse to testify on grounds of self incrimination.

After locating this source, appellant reported back to Spangler and by him was taken to the car where Roche was waiting. Roche was surprised when Spangler brought him over and the conversation they held was brief because the purchase was already set up by Spangler. (R-141).

After talking with Roche, appellant took $20.00 from him, walked back in the park, gave the money to Ebaugh, received the two packets of heroin (supposedly) and within one minute came back and delivered them to Roche. (R-143, 180). Appellant told both Roche and Spangler that he would have to make the buy from another person (R-178):

"Q. Now, what was said when you arrived there?
A. Well, Spangler told him that I could get some heroin for him and then Roche gave me the money.
Q. How much did he give you?
A. Twenty Dollars.
Q. What did you tell him, if anything?
A. That this Terry Ebaugh had some. He asked me if I could go get it. Then I went and got it for him and brought the heroin back.
Q. All right, now, tell us who is Terry Ebaugh?
A. He is a guy that hangs around the park, I didn't know him that well. I checked around and asked who had some heroin because this certain person wanted it, and I asked Terry Ebaugh and he told me that he had some."

Appellant received nothing from Terry Ebaugh for the sale (R-180, 183):

"Q. You gave the twenty dollars to Terry Ebaugh?

A. Yes.

Q. And, you got nothing from Mr. Ebaugh?

A. No."

"Q. Officer Roche told you he would like to score on some heroin, some smack?

A. (Nodding his head up and down.)

Q. And, you know that selling heroin is a serious offense?

A. Yes Sir.

Q. And yet, out of the goodness of your heart, because he looked like an addict, Officer Roche looked like an addict?

A. (Nodding his head up and down.)

Q. You decided to do him this favor and go find someone who could score him on some smack?

A. Right. Have you ever seen, excuse me."

Roche then delivered the suspected material to the chain of command, and it eventually ended with the State chemist, who testified it consisted of 100 m.g. (Milligrams) of whitish material, 16.5% morphine and .5 per cent codeine. (R-124, 125).

After several days lapse, appellant was arrested on a charge of violation of 58-13a-44 (8) U.C.A. 1953, Trial was held October 12th and 13th, 1971, resulting in this appeal.

The State rested (R-151) and after argument for a dismissal by appellant, the State was permitted to reopen and offer further testimony on the issue of en-

trapment. This was done over objection (R-155) and consisted of two matters:

Roche, upon recall, testified that on or about May 2, 1971, he purchased four unidentified tablets from appellant for $8.00 and they turned out to be completely negative from a drug standpoint (R 157, 158).

Burnett, a drug task force officer, also was recalled and began to testify as to a 1969 arrest he assisted in of appellant for the sale of marijuana. Over objection, the witness started to testify as to certain rather peripheral matters concerning plea negotiation (R-169); after further objection the jury was excused and it was determined this 1969 proceeding had resulted in a dismissal of the charges. The jury was then recalled, and instructed as follows (R-173):

> "THE COURT: Call your jury back in.
> (The jury returned to the courtroom).
> THE COURT: The parties to the trial are present. The jury is instructed to disregard any reference in the testimony or the evidence at all concerning the arrest in 1969. As far as the Court is aware the matter was dismissed in his favor, in the defendant's favor, so you may disregard that entirely unless you think it has some implication in Mr. Schultz favor. Otherwise disregard it in this case."

Appellant again moved for dismissal, which was denied (R-174).

After completion of the evidence, instructions to the

jury and arguments of counsel, the jury retired to consider its verdict. On two occasions, the jury interrupted its deliberations to request amplification of the Court's instructions on entrapment. Each time the Trial judge orally gave further instructions on the subject (R 216, 222). Appellant objected each time, not to the procedure itself, but to the substance of the oral instructions (R 218, 222). After some five hours of deliberation, the jury returned a verdict of guilty of selling a narcotic drug as charged in the information (R-224).

ARGUMENT

POINT ONE.

THE DEFENSE OF ENTRAPMENT WAS ESTABLISHED BY THE EVIDENCE AS A MATTER OF LAW.

POINT TWO.

THE TRIAL COURT ERRED IN ITS INSTRUCTIONS TO THE JURY IN THE ISSUE OF ENTRAPMENT.

As these two points are closely related they will for convenience be argued together. The general principles of this defense are well known and recognized:

> "The whole doctrine derives from a spontaneous moral revulsion against using the powers of government to beguile innocent, through ductile, persons into lapses which they might otherwise resist."
>
> United States v. Becker, 62 F. 2d 1007.

The original definitive opinion on the issue of entrapment, Sorrells vs United States of America, 287

U.S. 435, held that an accused was entitled to the defense of entrapment, and stated these general guide lines:

> "It is well settled that the fact that officers or employees of the Government merely afford opportunities of facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises. (cases cited). The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design; to expose the illicit traffic, the prohibited publication, the fraudulent use of the mails, the illegal conspiracy, or other offenses, and thus to disclose the would be violators of the law. A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."

This opinion was affirmed in Sherman vs United States of America 356 U.S. 369, 2L, Ed2 848, 78 S. Ct. 819. In holding the accused innocent as a matter of law, the Supreme Court said:

> "However, the fact that government agents 'merely afford opportunities or facilities for the commission of the offense does not' constitute entrapment. Entrapment occurs only when the criminal conduct was 'the product of the creative

activity' of law-enforcement officials. (Emphasis supplied.) See 287 U.S. at 441, 451. To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal. The principles by which the courts are to make this determination were outlined in Sorrells. On the one hand, at trial the accused may examine the conduct of the government agent; and on the other hand, the accused will be subjected to an 'appropriate and searching inquiry into his own conduct and predisposition' as bearing on his claim of innocence. See 287 US at 451."

Utah has recognized this defense in State vs Pacheco. 13 U.2 148, 369 P.2 494:

"For a peace officer to procure a person to commit a crime, which he otherwise would not have committed, for the purpose of apprehending and prosecuting him is entrapment. This is so discordant to the true function of law enforcement which is the prevention, not the causation, of crime; and so repugnant to fundamental concepts of justice that the conviction of an accused under such circumstances will not be approved."

This opinion has been enhanced by *State vs Perkins,* 19 *U.*2 421, 432 P.2*d* 50, affirming *Pacheco* and holding evidence of prior sales admissible to prove predisposition.

There is no conflict in the evidence as to solicitation of the crime by the police agent. The question then, is whether there was sufficient evidence of pre-

disposition to commit the crime on the part of appellant to avoid a ruling of entrapment as a matter of law. Initially the State made no effort in this area and was content to rest with simply the stark evidence of the sale itself. Only after being confronted by a motion to dismiss did the State bestir itself and over objection offered the testimony of Roche and Burnett as to prior dealings. The evidence of Burnett we need not consider as the trial Court directed the jury to disregard it and this ruling has not been appealed by the State. The evidence of Roche is similarly without probative value as it concerned a disputed sale of a non-narcotic substance.

Many courts have held that in such situations the State has not met its burden to show the intent to commit the crime originated with the defendant, rather than with the police officer. *Gray v. State, Indiana* 1967, 231 N.E. 2d 793 is such a case. In reversing a conviction for sale of a narcotic, the Indiana court quoted *Sorrells* at lenght and held:

> "Where the evidence shows, as in this case, that there was a plan devised by law enforcement officers to reveal a violation of the criminal law and such law enforcement officers participate actively in the transaction which is declared to be illegal, without further proof the evidence shows merely that it was the scheme, the idea, and the plan which originated with law enforcement officers. There must be in such instances evidence which will rebut that the illegal transaction was induced solely by the plan of the law

enforcement officers, since the burden of proof is on the State and does not shift to the defendant. The evidence must show that the illegal transaction was actually that of the appellant and not that of the law enforcement officials or informer who was acting at the instigation of the law enforcement officials.

"Here we have no evidence whatever that this appellant, before he was approached by this informant, had been engaged in the sale of heroin or that he had any intent to make a sale before he was asked to do so by a plan of law enforcement officers. The evidence further shows that a search of the appellant and the search of his home immediately following the sale revealed no other heroin in his possession and no $10.00 in his possession. Possession of a supply of heroin beyond the two capsules sold might raise an inference that he kept the supply for the purpose of sale. If law enforcement officers use a scheme or plan to disclose illegal activities of one charged with a crime, then they must also bring forward evidence to show that that party was not innocently lured and enticed to commit the illegal act."

United States vs Owens, 228 *F. Supp.* 300 (1964) while different factually in that considerable evidence of inducement was present, also dealt with the issue of absence of evidence of previous crimes:

"the sale made by defendant . . . was induced by a Government undercover agent . . . and that there

is no evidence to show that defendant was predisposed to commit the offense. Agent Turnbou had seen no prior sale by defendant, and he knew of no such sale . . . Defendant had merely been seen in the company of other users and some sellers - but such association is not sufficient to indicate a predisposition to sell narcotics."

The Trial Court refused Appellant's requested instruction No. 11, and exception to this ruling was taken (T-125) and argued at some length. This request in substance says that before the police can legally entrap a defendant, they must have reasonable grounds to believe the defendant is engaged in that particular type of illegal activity. This requirement has been recognized in a series of federal cases, and specifically applied to a narcotics case by our own TenthCircuit in *Ryles v. United States,* 10*th C.C.A.* 183 *F.* 2*d* 944. In that case the sale (as in our case) was made to a "decoy" who represented to the defendant he was a user and suffering from a lack of narcotics. The trial court's instruction was in part as follows:

"the burden is upon the government to prove by competent evidence to the satisfaction of the jury beyond a reasonable doubt that it was not entrapment. You are therefore instructed that if you find from the evidence and beyond a reasonable doubt that the defendant had a reputation for selling narcotics and that the officers of government had reasonable grounds to believe he was engaged in selling narcotics and in good faith sought to obtain evidence of such violations,

you should convict the defendant as to each count of the indictment if you further find beyond a reasonable doubt that he made the sales as charged.'"

The Circuit Court approved the instruction, affirming the conviction, and stated:

> "It is well recognized that officers may entrap one into the commission of an offense *only when they have reasonable grounds to believe* that he is engaged in unlawful activities. They may not initiate the intent and purpose of the violation. In a case of entrapment, it is incumbent on the government to prove reasonable grounds to believe that the intent and purpose to violate the law existed in the mind of the accused." Mitchell vs. U. S. 10 Cir. 143 F. 2d 953, 957. (Italics Added).

In the Mitchell case, our Circuit cited with approval *C. M. Spring Drug Co. vs. United States,* 12 *F. 2d* 852:

> "It is well settled by the decisions of the Supreme Court of the United States, we think now universally followed in the several circuits, that, where the government, through its agents, has reasonable cause to believe that the law is being violated by the defendant, they may legally entrap the defendant by decoy letters or by pretended purchases."

We think this approach reasonable, fair and essential to the proper objectives of law enforcement. The efforts of the task force on drugs should be directed at convictions of the known, or reasonably suspected,

dealers in the drug traffic. Then and only then, should agents be allowed to induce or solicit illegal sales for the purpose of prosecution. In a case such as this, where from *all* the evidence it was an insolated transaction, this Court should protect the unwary innocent who is solicited by the undercover agent. The distinction was well recognized by this court in the early case of *Salt Lake City vs. Robinson,* 40 *U.* 448, 125 *Pac.* 657:

> "While it may be conceded that the particular sale in question here would not have been made if the two officers had not asked to purchase the liquor, yet in view of the facts and circumstances the appellant was no more induced to make this sale than he would be induced to make any sale in his place of business. Moreover, the sale in question was seemingly only one of many that appellant was prepared to make. When the intoxicating liquor was called for by the officers, appellant seemed to have a stock of it on hand from which he could supply any reasonable demand. In case the officers had called for intoxicating liquor and had been informed by appellant that he did not have it for sale, or that he did not keep it in stock, and in such event they had induced him to obtain some for them from some one else, which he did, and after it was so procured upon their solicitation he had sold what he had procured *the case would be different.* Here, however, the sale was freely and voluntarily made from a supply which apparently was on

hand in appellant's store and which could have been kept on hand only for the purposes of making sales to those who desired to purchase. While it is true that one sale constitutes the offense, yet it is clear that it was not the purpose of the officers to induce the appellant to make a sale for the sole purpose of convicting him of making that sale, but it seems their object was to obtain evidence from which it was made manifest that appellant was engaged in the illegal traffic of intoxicating liquors and that they desired to break up such traffic." (Italics added).

The most recent Utah Law Review, Volume 1971, No. 2, has a penetrating comment on the position of some authorities that entrapment is a matter of due process for the Court to decide, rather than a factual issue of intent for the jury. As this article, beginning at page 266, and the *Grossman* case it springs from were not before the Trial Court, appellant does not here assert them other than as background for the decision in this case. We heartily endorse the authors concluding sentence:

> "No court can deny that entrapment-like conduct is abhorrent; there is no reason, therefore, to administer the defense in any other fashion than a constitutionally uniform standard that operates to restrain such conduct before it occurs."

The critical nature of this issue is reflected by the first inquiry of the jury following several hours of deliberation (R-216):

"FORMAN OLSEN: We haven't reached a unanimous verdict, and we would like to have a little clarification of your interpretation of the law of entrapment. Do you want me to go further?

"FOREMAN OLSEN: I would like to say, in the use of the law of entrapment is it possible or is it right for one of the law officers to use this entrapment when a person has not been proven, you know, guilty of a criminal charge.

"THE COURT: Before?

"FOREMAN OLSEN: Before."

The Court, following the second inquiry of the jury for clarification reflected as follows (R-220):

"THE COURT: What they want, what I think they want to know in substance can a man be entrapped in his first offense. I think he probably can."

This presents the heart of our argument - can the police agencies, without any reason, solicit the commission of crime from the man in the street, and prosecute him when he yields? Appellant submits such a concept is contrary to our system of justice, and the statements made by this court in previous entrapment cases.

POINT III. APPELLANT IS ENTITLED TO AN ACQUITTAL AS A MATTER OF LAW BECAUSE HE WAS ACTING AS AGENT FOR THE POLICE OFFICER, ROCHE.

POINT IV. THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT ON APPELLANTS AGENCY THEORY.

Appellant took the position during trial that as he performed the prohibited act at the request of Roche, he was in fact the agent of Roche and therefore not guilty. This issue was presented (other than in argument) by appellant's requested instructions 8 and 9. Exception was taken to the Court's refusal to so instruct, and to the instruction given by the Trial Court on aiding and abetting.

The "agency" theory here defended has impressive support.
United States v Prince, 3rd C.C.A., 264 *F. 2d* 850, approved without qualification the following instruction:

> "If you believe that the Federal Agent (Charles G. Hill) or the informer, who acted under instructions and authority of agents of the Federal Bureau of Narcotics, asked the defendant to get some heroin for him and thereupon the defendant undertook to act in the prospective purchaser's behalf rather than his own, and in so doing purchased the drug from a third person with whom he was not associated in selling, and thereafter delivered it to the buyer, the defendant would not be a seller and could not be convicted under this indictment."

In *Adams vs United States, 5th C.C.A.,* 220 *F. 2d* 297, the Circuit reversed a narcotics sale conviction and directed a verdict of acquittal:

> "We find it unnecessary to consider all of the specifications of error, since we believe that the appellant's motion for acquittal should have been

granted. We think that no reasonable jury could fail on this evidence to entertain a reasonable doubt that the appellant sold the heroin as alleged. In *United States vs Sawyer,* 3 *Cir.*, 210 F. 2d 169, the evidence as to the part played by the defendant in the transaction was conflicting, but the trial court refused to include in his charge an explanation as to the difference between dealing with a purchaser as seller and acting for him as a procuring agent. The Court held that this was error, and in reversing for a new trial the court said, 210 F. 2d 170:

'In these circumstances, we think the court should at least have pointed out to the jury that if they believed that the Federal agent asked the defendant to get some heroin for him and thereupon the defendant undertook to act in the prospective purchaser's behalf rather than his own, and in so doing purchased the drug from a third person with whom he was not associated in selling, and thereafter delivered it to the buyer, the defendant would not be a seller and could not be convicted under this indictment. This may be obvious to a lawyer, but we are not sure that in the circumstances of this case the distinction between a seller and a procuring agent was equally clear to laymen. The government having elected to charge the defendant with the crime of sale rather than illegal possession, the jury should have been alerted to the legal limitations of the sale concept in relation to the circumstances of

this case.'

"We agree with this statement of the applicable legal principle; in the present case, however, there was no materially conflicting evidence. All of the evidence was quite consistent with the appellant's acting only as a purchasing agent or messenger instead of as a seller. There was no evidence from which a sale from her to McKinney could be spelled out beyond a reasonable doubt; nor was there any evidence that she profited in any way from the transactions or was associated with her 'connection' in selling narcotics (except for the quite equivocal fact of the two purchases themselves). Therefore, the verdict of guilty of the offense of selling heroin must have been based upon speculation, and the court should have directed a verdict of acquittal."

These cases were decided under former 21 U.S.C. Sec. 174, prohibiting the sale of any narcotic drug. Admittedly this statute did not contain the sweeping definition of "sale" found in 58-13a-1 (10) U.C. A. This broad definition does not remove the problem, however. New York and Texas are states that have adopted the Uniform Narcotic Drug Act (the source of 58-13a-1 (10) and have answered the question squarely with the Federal Courts.

Durham vs State, Tex 1955. 280 S.W. 2d 737, held that an accused narcotic seller, who is interested in no way on behalf of the seller, but acts only as agent of the prosecutor, is not guilty of the crime charged.

People vs Hingerton, New York Supreme Court, Appellate Division, 277 New York Supplement 2d 754 holds:

> "Defendant's conviction for violation of the Publice Health Law with respect to narcotic drugs (Penal Law, Sec. 1751, subd. 1) rests on a single sale of marijuana to a special employee of the police department. The People's proof affirmatively established that defendant acted solely as an agent of this employee; and failed to show that he received any financial profit from the transaction or that he was acting in concert with the actual vendor. Under these circumstances, the learned trial court should have applied the rule that 'one who acts solely as the agent of the buyer cannot be convicted of the crime of selling narcotics' and should have granted defendant's motion to dismiss the indictment (People v Lindsey, 16 A.D. 2d 805, 228 N.Y.S. 2d 427, affd. 12 N. Y. 2d 958, 238 N.Y.S. 2d 956, 189 N.E. 2d 492; People v. Buster, 286 App. Div. 1141, 145 N.Y.S. 2d 437; People v. Branch, 13 A.D. 2d 714, 213 N.Y.S. 2d 535; People v. Silverman, 23 A.D. 2d 947, 260 N. Y.S. 2d 431; United States v. Moses, 3 Cir. 220 F. 2d 166; United States v. Sawyer, 3 Cir. 210 F. 2d 169.):

Smith vs State, Texas 1965, 396 S.W. 2d 876 wrestled specifically with the question of the Uniform Act definition of "sale". In affirming Durham, the court rejected the view of Illinois (People v. Shannon,

155 N.E. 2d 578) and New Jersey (State vs Weissman, 179 A. 2 748). In doing so, the Texas court pointedly reached the heart of our argument:

> "We think that the New York cases and the Durham case are correct and reject the view that one who acts only as an agent, servant or employee of a law enforcement officer in the purchase of narcotic drugs for evidence purposes, and who is in no way connected or associated with the seller and receives no financial profit from the single sale, can be guilty of selling the narcotic drugs when the law enforcement officer is not." See United States v. Sawyer, 3 Cir., 210 F. 2d 169; United States v Moses, 3 Cir., 220 F. 2d 166.

Another state to recently agree with appllant's position is Massachusetts in Commonwealth v. Harvard, 1969, 253 N.E. 2d 346. This case cites with approval the Federal and New York cases we rely on in this brief, and rejects the Illinois interpretation under the Uniform Act.

CONCLUSION

The evidence here compels the belief that appellant was not a narcotic dealer. He was induced to search out a seller and make a purchase from him with money supplied by the Ogden drug task force offices. He had no previous narcotics sales, and was not a target of suspicion in the drug field. He had been "going straight", living and working in Salt Lake City. It was just his misfortune to be at the particular place and time

when the suspected seller Barnes did not appear. For the reasons set out, the conviction must be reversed.

Respectfully submitted,

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