

1993

## Utah v. Squire : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :  
Plaintiff/Appellee, : Case No. 930746-CA  
v. : Priority No. 2  
MICHAEL SQUIRE, :  
Defendant/Appellant.:

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BRIEF OF APPELLEE

APPEAL FROM A CONVICTION FOR DISTRIBUTION OF  
A CONTROLLED SUBSTANCE, A THIRD DEGREE  
FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-  
37-8(1)(a)(ii) (SUPP. 1993), IN THE SIXTH  
JUDICIAL DISTRICT COURT IN AND FOR SANPETE  
COUNTY, STATE OF UTAH, THE HONORABLE DON V.  
TIBBS PRESIDING.

UTAH COURT OF APPEALS  
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930746

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Utah Court of Appeals

JUL 20 1994

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Defendant/Appellant.	:	

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BRIEF OF APPELLEE

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JURISDICTION AND NATURE OF THE PROCEEDINGS

Defendant Michael Squire appeals from his conviction for distribution of a controlled substance in violation of Utah Code Ann. § 58-37-8(1)(a)(ii) (Supp. 1993), a third degree felony. This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1993).

STATEMENT OF ISSUES AND STANDARDS OF APPELLATE REVIEW

1. Did the trial court properly permit the State to cross-examine defendant about his prior conviction for attempted distribution of a controlled substance where defendant supported his entrapment defense by repeatedly asserting that he was not a drug dealer? Section 76-2-303 controls the determination of whether the trial court properly permitted the inquiry into the prior conviction; therefore, this court reviews the trial court's ruling for correctness. State v. Jaimez, 817 P.2d 822, 826 (Utah App. 1991). In this case, defendant led the trial court into any error that may have resulted from its ruling and therefore cannot rely on it as a basis for reversal. State v. Dunn, 850 P.2d

1201, 1220 (Utah 1993) ("a party cannot take advantage of an error committed at trial when that party led the trial court into committing the error").

2. Did the trial court properly refuse to give defendant's proposed entrapment instructions even though the court accurately instructed the jury on the elements of entrapment? A trial court's decision not to give a requested jury instruction presents a question of law reviewed for correctness; however, the trial court has discretion to select between accurate, but different instructions. State v. Gallegos, 849 P.2d 586, 588 (Utah App. 1993).

#### CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Addendum A contains the text of the relevant constitutional provisions, statutes, and rules.

#### STATEMENT OF THE CASE

The State charged defendant with distribution of a controlled substance, a third degree felony, pursuant to Utah Code Ann. § 58-37-8 (Supp. 1993) (R. 1). At the conclusion of a one-day trial, the jury found defendant guilty of the crime charged (R. 89, Tr. June 23, 1993<sup>1</sup> at 317-19). The trial court sentenced defendant to the statutory prison term of 0-5 years, ordered defendant to pay a \$5,000 fine, and ordered defendant to pay restitution of \$50 (R. 111-12). The trial court suspended execution of the sentence and placed defendant on 24 months

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<sup>1</sup> The trial transcript was not separately numbered for the appellate record. All further references to the trial transcript will be identified as "Tr."



probation, requiring defendant to comply with certain terms and conditions of probation (R. 112). Defendant timely filed his notice of appeal on November 24, 1993 (R. 116).

#### STATEMENT OF FACTS

In January 1992, Brian Barson moved to Sanpete County to attend school and to begin undercover narcotics work (Tr. 90-91, 121). The local narcotics officer, John Cox, instructed Mr. Barson to develop sources for drug buys, but did not identify any particular suspects, including defendant, for Mr. Barson to pursue (Tr. 93-94, 134-35, 171).

Sometime after Mr. Barson began his work, he attended a party where he participated in a conversation about drugs (Tr. 97-98). Defendant eventually joined the conversation and volunteered to procure marijuana for Mr. Barson (Tr. 97-98, 141). Defendant indicated that he thought he could procure a quarter of an ounce for approximately \$50 (Tr. 99-100). Mr. Barson accepted defendant's invitation and agreed to meet defendant at a third person's home on April 18, 1992 to give defendant the money for the marijuana and to arrange a time when defendant would turn it over to Mr. Barson (Tr. 98-104, 107-109).

After obtaining the money from Mr. Barson on April 18th, defendant went to Salt Lake City on the 19th to procure the marijuana (Tr. 282). When defendant returned that evening, he met Mr. Barson and gave Mr. Barson the marijuana (Tr. 109, 112-14). Mr. Barson wore "wires" to both the April 18th and 19th meetings, and Officer Cox monitored and recorded both

conversations (Tr. 103-104, 110, 174). The tape recordings were played for the jury (Tr. 182-88, 188-92).

During the conversation on April 19th when defendant delivered the marijuana to Mr. Barson, defendant boasted to Mr. Barson about the quality of the marijuana, stated that he got a good deal for \$50, asked Mr. Barson to give him a "bowl" out of the marijuana for getting it, joked with Mr. Barson about not smoking it without him, said he needed to get more, and said that he could get more at any time (Tr. 189-192). On cross-examination, defendant described his statement that "[t]his is good F'in Bud" as a "sales pitch" (Tr. 286). (Tr. 189-92 & 286 are attached as addendum B.)

Additional facts are recited in the argument sections to which they are relevant.

#### SUMMARY OF THE ARGUMENT

1. Cross-examination on prior conviction. The trial court properly allowed the State to cross-examine defendant about his prior conviction for attempted distribution. First, subsection 6 to § 76-2-303 only prohibits the State from introducing evidence of prior convictions in its case in chief to show defendant's predisposition to sell drugs; it does not preclude the use of that evidence to address issues raised by defendant. Second, even if the trial court did err by admitting the evidence, defendant led the court into that error and therefore cannot rely on it as a basis for reversal. Finally, this court may affirm the trial court's decision on the alternative basis that the

evidence of defendant's prior conviction was admissible to attack his credibility.

2. Jury instructions. The trial court properly instructed the jury on defendant's entrapment defense; therefore, the trial court's refusal to give defendant's proposed instructions does not constitute an abuse of discretion warranting reversal. Alternatively, even if it would have been appropriate for the trial court to include in its instructions language requiring the jury to consider whether defendant sold Mr. Barson drugs as a result of defendant's own initiative or desire, the failure to do so did not affect the outcome in this case. The evidence precluded any reasonable likelihood that the jury would have believed that Mr. Barson's conduct induced defendant to sell him marijuana.

## ARGUMENT

### POINT I

THE TRIAL COURT PROPERLY PERMITTED THE STATE TO CROSS-EXAMINE DEFENDANT ABOUT HIS PRIOR CONVICTION FOR ATTEMPTED DISTRIBUTION OF A CONTROLLED SUBSTANCE BECAUSE DEFENDANT REPEATEDLY ASSERTED THAT HE WAS NOT A DRUG DEALER AND THAT HE NO LONGER USED MARIJUANA

Defendant supported his defense in part by offering evidence of his good character. Through his own testimony, the testimony of his witnesses, and his counsel's statements to the jury, defendant repeatedly asserted that he no longer used marijuana and denied that he had been a drug dealer or had ever sold drugs prior to this transaction (Tr. 80, 85-87, 230, 233-35, 252-53, 261-62, 269).

In support of his claim that he no longer used marijuana, defendant volunteered that he had frequent urine drug screens that always came back negative (Tr. 261). When the prosecutor began to question defendant about why he was having the drug screens, defendant's counsel asked to discuss the line of questioning outside the jury's presence (Tr. 269-70). Defendant's counsel then objected to allowing the State to cross-examine defendant about his previous guilty plea to a charge of attempted distribution -- the drug screens were a condition of probation for the prior conviction -- arguing that subsection 6 of § 76-2-303 precluded admission of that evidence.<sup>2</sup> The State responded that it was entitled to introduce the evidence because defendant had opened the door by testifying about the urine drug screens, and because it was admissible under State v. Hansen, 588 P.2d 164 (Utah 1978) to rebut defendant's entrapment evidence. The trial court allowed the State to question defendant about the prior offense, relying on both bases argued by the State. (Tr. 270-77.) (Transcript pages 270-77 are attached as addendum C.)

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<sup>2</sup> Subsection 6 reads as follows:

(6) In any hearing before a judge or jury where the defense of entrapment is an issue, past offenses of the defendant shall not be admitted except that in a trial where the defendant testifies he may be asked of his past convictions for felonies and any testimony given by the defendant at a hearing on entrapment may be used to impeach his testimony at trial.

Utah Code Ann. § 76-2-303(6) (1990).

- A. The trial court properly allowed the State to cross-examine defendant about his prior conviction for attempted distribution of a controlled substance to rebut evidence defendant introduced in support of his entrapment defense.

In Utah, "[e]ntrapment occurs when a law enforcement officer or a person directed by or acting in cooperation 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." Utah Code Ann. § 76-2-303 (1990). This definition requires applying an objective standard in determining the validity of an entrapment defense. State v. Taylor, 599 P.2d 496, 499-503 (Utah 1979). The defendant's predisposition to commit the crime, a relevant consideration under the rejected subjective standard, has no relevance to this inquiry; therefore, subsection 6 precludes the use of prior offenses to avoid consideration of a defendant's predisposition. Id. at 503.

However, subsection 6 does not raise an absolute bar to introducing evidence of prior convictions. In State v. Hansen, 588 P.2d 164 (Utah 1978), the Utah Supreme Court reversed the defendant's conviction because the State introduced evidence of his other wrongs in its case in chief. Id. at 166-67. However, the court went on to state that once defendant had introduced the issue of entrapment, subsection 6 did not preclude the State from introducing any evidence necessary to address that issue. Although Hansen preceded Taylor and presumed a subjective inquiry

in considering an entrapment defense, the fundamental reasoning of Hansen still controls: once a defendant introduces an issue into the trial, subsection 6 does not operate to preclude the State from introducing evidence of prior convictions to address it.

In this case, subsection 6 precluded the State from using defendant's prior conviction for attempted distribution in its case in chief to establish his predisposition to sell drugs. However, once defendant introduced the issues of his urine drug screens and his prior drug sales, he could not cry foul when the State sought to explain and rebut his evidence, and subsection 6 does not require a different result. See also State v. Green, 578 P.2d 512, 514 (Utah 1978) (if a defendant "offers himself as a witness, he then becomes subject to being treated the same as any other witness," which includes being cross-examined on anything that "would tend to contradict, explain or cast doubt upon the credibility of his testimony"). Therefore, the trial court properly allowed the State to cross-examine defendant about his prior conviction.

Moreover, even if this court finds that the trial court erroneously permitted the cross-examination, defendant invited that error and therefore cannot rely on it as a basis for reversal. Although § 76-2-303 would normally preclude inquiry into defendant's predisposition to sell drugs, defendant, not the State, introduced the issue of his predisposition to sell drugs. By supporting his entrapment defense with testimony that he no

longer used marijuana and that he was not and never had been a drug dealer, defendant invoked the subjective entrapment standard by asserting, in effect, that he had no predisposition to sell the marijuana he sold to Mr. Barson. He only sought the protection of the objective test for entrapment when it would have prevented the State from rebutting his predisposition evidence. Section 76-2-303 directs the fact finder's attention away from a defendant's predisposition to commit the crime. However, where a defendant introduces evidence of his lack of predisposition, § 76-2-303 does not preclude the State from rebutting that evidence. Because defendant created any error in the first place, he cannot rely on it as a basis for reversal. State v. Dunn, 850 P.2d 1201, 1220 (Utah 1993) ("a party cannot take advantage of an error committed at trial when that party led the trial court into committing that error"); State v. Barney, 681 P.2d 1230, 1231 n.3 (Utah 1984) (the defendant cannot complain about evidence of his prior bad acts elicited by his own counsel's cross-examination of the State's witness) (citing State v. Hansen, 588 P.2d 164 (Utah 1978)).

- B. Alternatively, the trial court properly permitted the State to cross-examine defendant about his prior conviction in order to attack his credibility.

Finally, an alternative basis exists for upholding the trial court's decision on this issue: the trial court properly allowed the State to cross-examine defendant about his prior conviction

to attack his credibility.<sup>3</sup> State v. Reed, 820 P.2d 479 (Utah App. 1991). At the same time defendant presented evidence of his good character to support his entrapment defense, he attacked the character of the State's witnesses. Defendant claimed that Mr. Barson frequently used marijuana and drank heavily at the parties they attended (Tr. 220-21, 225, 227-28, 243-46), and that both Officer Cox and Mr. Barson singled him out for investigation because they had individual, personal grudges against him (Tr. 80-82, 83-85, 206-13, 258-61, 262-64).

In addition to his character evidence, defendant supported his entrapment defense by claiming that Mr. Barson repeatedly and incessantly requested that he acquire drugs for him and even asked defendant's friends to prevail upon defendant to do so (Tr. 85-87, 221-30, 233-35, 241-49, 252-53, 261, 265-68). Defendant specifically denied ever offering to sell marijuana to Mr. Barson (Tr. 266-68). The State's evidence contradicted defendant's. Mr. Barson testified that defendant solicited the sale, not the other way around (Tr. 97-98, 141). Both Mr. Barson and Officer Cox denied that they held grudges against defendant or that they had singled him out for investigation (Tr. 93-94, 126-32, 133-35, 141, 170-71, 202).

In State v. Reed, as in this case, the defendant's evidence directly contradicted the State's, the defendant attacked the

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<sup>3</sup> Although the trial court did not rely on this basis for admitting the testimony, this court "may affirm the trial court's decision to admit evidence on any proper grounds, even though the trial court assigned another reason for its ruling." State v. Gray, 717 P.2d 1313, 1316 (Utah 1986) (citation omitted).



character of the State's witness while presenting his character in a favorable light, and the defendant denied using drugs. Id. at 481. On appeal, this court upheld the trial court's decision to introduce testimony that police found drug paraphernalia in the defendant's apartment because it impeached defendant's credibility. Id. at 482.<sup>4</sup>

Similarly, defendant in this case offered evidence of his good character to support his defense, repeatedly asserting both that he did not use marijuana and that he had never been a drug dealer. Having done so, he cannot complain because the trial court allowed the State to cross-examine him about his prior conviction for attempted distribution in order to rebut the credibility of his character evidence. Id. at 481-82. See also State v. Green, 578 P.2d at 513-14 (in a prosecution on two charges of selling narcotics, testimony about defendant selling drugs on occasions other than those charged was properly admissible where defendant claimed he was not a drug dealer). Additionally, defendant's evidence directly contradicted the State's. Therefore, credibility became a crucial issue, and the State was entitled to introduce evidence suggesting that defendant had lied about his prior dealings in drugs in order to

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<sup>4</sup> This court also rejected the defendant's claim that the trial court should have excluded the evidence under rule 403, Utah Rules of Evidence, holding that "[i]t would be a mockery of our justice system to allow a defendant to take the stand and testify as to his own good character while impugning the character of an opposing witness, and then claim that his testimony is not subject to cross-examination because such inquiry would be too prejudicial." Id.

attack his credibility generally. State v. Reed, 820 P.2d at 481-82.

The record clearly establishes that the State used defendant's conviction for no other purpose than to attack the credibility of his statement that he was not a drug dealer. After cross-examining defendant about his prior conviction, the State made only one other reference to it. In his closing argument, the prosecutor made the following comment:

"[Defendant] says he's not a drug dealer. He has a conviction, a drug conviction, besides the one we're here dealing on today" (Tr. 301). Subsection 6 of § 76-2-303 does not preclude cross-examining defendant about his prior convictions in order to attack his credibility. The subsection's purpose is to preclude offering evidence of predisposition. State v. Taylor, 599 P.2d at 503. Allowing evidence of prior convictions to attack credibility does not thwart that purpose, and the State used defendant's prior conviction only to attack his credibility.

For all of the reasons stated above, the trial court properly permitted the State to cross-examine defendant about his prior conviction. In any event, even if the trial court erred, defendant created the error and therefore cannot rely on it as a basis for reversal.

## POINT II

THE TRIAL COURT'S ENTRAPMENT INSTRUCTION PROPERLY INSTRUCTED THE JURY AS TO THE ELEMENTS OF THE DEFENSE; THEREFORE, THE COURT PROPERLY REFUSED TO GIVE DEFENDANT'S PROPOSED INSTRUCTIONS.

A trial court's decision not to give a requested jury instruction presents a question of law reviewed for correctness. State v. Gallegos, 849 P.2d 586, 588 (Utah App. 1993). However, the trial court has discretion to select between accurate, but different instructions. Id. Defendant has not shown that the trial court committed reversible error by rejecting his proposed instructions.

A. Defendant has preserved his appellate claim only as to his proposed instruction nos. 4 and 7.

At the outset, it is necessary to define the scope of the claim defendant has preserved for appeal.<sup>5</sup> Defendant originally submitted ten proposed entrapment instructions. However, when the court and counsel discussed the instructions, defendant specifically stated only that the trial court should give his instruction nos. 4 and 7,<sup>6</sup> and that he did not have any other objections to the instructions. Therefore, defendant waived any challenge that the failure to give the other eight instructions was error. See State v. Medina, 738 P.2d 1021, 1023 (Utah 1987)

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<sup>5</sup> On appeal, defendant has not identified with specificity which of his proposed jury instructions he claims the trial court should have given. He only identifies the general substance of what he believes the instructions should have included.

<sup>6</sup> It is not clear whether defendant wanted these instructions given in addition to or instead of the trial court's entrapment instruction.

(where counsel read and affirmatively represented that she had no objection to a proposed jury instruction, defendant had affirmatively waived any challenge to that instruction, even under a manifest injustice analysis).

**B. The trial court's entrapment instruction accurately defined the defense for the jury.**

The trial court's entrapment instruction repeated the statutory definition of that defense (R. 67).<sup>7</sup> Therefore, the trial court accurately instructed the jury on defendant's theory of the case. State v. Cripps, 692 P.2d 747, 748-49 (Utah 1984) ("[t]his Court has approved giving the statutory definition of entrapment to the jury") (dicta, citation omitted).

Because the trial court accurately instructed the jury, it did not abuse its discretion by refusing to give defendant's requested instructions.<sup>8</sup> State v. Gallegos, 849 P.2d 586, 590

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<sup>7</sup> The court's instruction reads as follows:

You are hereby instructed that 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 cooperation 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.

The defense is available even though the actor denies commission of the conduct charged to constitute the offense

(R. 67).

Defendant's proposed instruction no. 4 reads as follows:

If you find that there is reasonable doubt as to whether the offense committed was the product of Michael

(Utah App. 1993) ("Our inquiry therefore must center on the jury instruction actually used and determine whether it accurately states the law. So long as the jury instruction used was accurate, it was not error for the trial court to refuse a different instruction that was also accurate."). This court need not even consider whether defendant's proposed instructions were accurate or even preferable to the one given. State v. Pedersen, 802 P.2d 1328, 1331-32 (Utah App. 1990), cert. denied, 815 P.2d 241 (Utah 1991). Therefore, defendant has not and cannot establish that the refusal to give his proposed instructions constituted an abuse of discretion warranting reversal.<sup>9</sup>

- C. The trial court's refusal to include in its instructions what defendant claims on appeal it should have did not affect the outcome.

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Squire's initiative and desire then you must find Michael Squire not guilty of the offense of distribution of a controlled substance

(R. 27). His proposed instruction no. 7 reads as follows:

In evaluation [sic] the course of conduct between the government representative and Michael Squire, the transactions leading up to the offense, the interaction between the agent and Michael Squire, and the response [sic] to the inducements or persuasion of the police agent are all to be considered in judging what the effect of the governmental agent's conduct would be on a normal person

(R. 30).

<sup>9</sup> Although the State maintains that defendant has only preserved this claim with respect to his proposed instructions 4 and 7, the State's argument on the merits would dispose of any claim based on the failure to give any of defendant's other eight proposed instructions. That is, the trial court accurately instructed the jury on defendant's entrapment defense; therefore, it did not err by not giving any of defendant's proposed instructions.

On appeal, defendant claims that the "jury should have been instructed upon the issue of reasonable doubt as to whether the crime committed was a product of the defendant's own initiative and desire or the persistent efforts of the police authority to induce him or create a substantial risk that he would commit the crime with which the state would charge him." Appellant's Brief at 13 (emphasis added). Even if these consideration would have been appropriate, the failure to include them does not undermine confidence in the outcome. Therefore, it does not warrant reversal. Utah R. Crim. P. 30(a) (1994) ("Any error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded"); State v. Knight, 734 P.2d 913, 919-20 (Utah 1987) (an error does not warrant reversal unless it undermines the reviewing court's confidence in the outcome).

At trial, the State played a tape of the conversation when defendant gave Mr. Barson the marijuana. See addendum B. During that conversation, defendant boasted about the quality of the marijuana and the low price for which he obtained it, asked Mr. Barson to give him some of the marijuana, and told Mr. Barson that he could get more (Tr. 189-92). On cross-examination, the prosecutor asked defendant what he meant when he said that the marijuana was "good F'in Bud" (Tr. 286). Defendant responded that this statement was a "sales pitch" (Tr. 286). These unchallenged statements from defendant rebutted any inference that defendant went through with the sale only as a result of Mr.

Barson's alleged pestering: typically, only a sales person uses sales pitches. The refusal to include instructions that would have required the jury to consider whether the sale resulted from defendant's own initiative and desire does not affect the outcome of the case because the jury would not likely have concluded otherwise. Therefore, it does not require reversal.

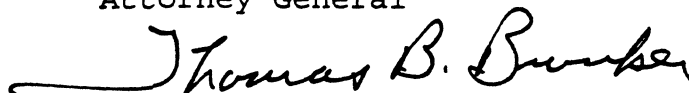
Based on the above, the trial court's entrapment instruction does not constitute reversible error.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm defendant's conviction and sentence.

RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of July, 1994.

JAN GRAHAM  
Attorney General

A handwritten signature in black ink, reading "Thomas B. Brunker". The signature is written in a cursive style with a long horizontal stroke at the beginning.

THOMAS BRUNKER  
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing BRIEF OF APPELLEE was mailed by first-class mail, postage pre-paid, to the following on this 20<sup>th</sup> day of July, 1994:

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Moroni, Utah 84646-0600  
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Thomas B. Brunker



ADDENDA

## ADDENDUM A

an oral prescription, that is not obtained within ten days of the date the prescription was written or authorized, may not be filled or dispensed.

(g) An order for a controlled substance in Schedules II through V for use by an inpatient or an outpatient of a licensed hospital is exempt from all requirements of Subsection (7) if the order is:

(i) authorized by the physician treating the patient and designates the quantity ordered;

(ii) entered upon the record of the patient, the record is signed by the prescriber affirming his authorization of the order within 48 hours after filling or administering the order, and the patient's record reflects the quantity actually administered; and

(iii) filled and dispensed by a pharmacist practicing his profession within the physical structure of the hospital, or the order is taken from a supply lawfully maintained by the hospital and the amount taken from the supply is administered directly to the patient authorized to receive it.

(8) No information communicated to any licensed practitioner in an attempt to unlawfully procure, or to procure the administration of, a controlled substance is considered to be a privileged communication.

**History:** L. 1971, ch. 145, § 6; 1972, ch. 21, § 1; 1977, ch. 29, § 5; 1979, ch. 12, § 4; 1980, ch. 6, § 39; 1984 (2nd S.S.), ch. 15, § 96; 1985, ch. 187, § 81; 1986, ch. 23, § 4; 1986, ch. 194, § 13; 1987, ch. 92, § 99; 1987, ch. 161, § 202; 1989, ch. 225, § 61; 1989, ch. 253, § 2; 1991, ch. 198, § 3; 1993, ch. 39, § 2.

**Amendment Notes.** — The 1991 amendment, effective April 29, 1991, rewrote Subsec-

tions (1)(a) and (2), rewrote the introductory paragraph of Subsection (3)(a), rewrote Subsection (3)(b), rewrote the introductory paragraph of Subsection (4)(a), and rewrote Subsection (5)(a).

The 1993 amendment, effective May 3, 1993, inserted "denied" and made punctuation changes in Subsection (4)(a)(iv).

## 58-37-8. Prohibited acts — Penalties.

### (1) Prohibited acts A — Penalties:

(a) Except as authorized by this chapter, it is unlawful for any person to knowingly and intentionally:

(i) produce, manufacture, or dispense, or to possess with intent to produce, manufacture, or dispense, a controlled or counterfeit substance;

(ii) distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or counterfeit substance;

(iii) possess a controlled substance in the course of his business as a sales representative of a manufacturer or distributor of substances listed in Schedules II through V except that he may possess such controlled substances when they are prescribed to him by a licensed practitioner; or

(iv) possess a controlled or counterfeit substance with intent to distribute.

(b) Any person convicted of violating Subsection (1)(a) with respect to:

(i) a substance classified in Schedule I or II is guilty of a second degree felony and upon a second or subsequent conviction of Subsection (1)(a) is guilty of a first degree felony;

(ii) a substance classified in Schedule III or IV, or marijuana, is guilty of a third degree felony, and upon a second or subsequent conviction punishable under this subsection is guilty of a second degree felony; or

(iii) a substance classified in Schedule V is guilty of a class A misdemeanor and upon a second or subsequent conviction punishable under this subsection is guilty of a third degree felony.

**(2) Prohibited acts B — Penalties:**

**(a) It is unlawful:**

(i) for any person knowingly and intentionally to possess or use a controlled substance, unless it was obtained under a valid prescription or order, directly from a practitioner while acting in the course of his professional practice, or as otherwise authorized by this subsection;

(ii) for any owner, tenant, licensee, or person in control of any building, room, tenement, vehicle, boat, aircraft, or other place knowingly and intentionally to permit them to be occupied by persons unlawfully possessing, using, or distributing controlled substances in any of those locations;

(iii) for any person knowingly and intentionally to be present where controlled substances are being used or possessed in violation of this chapter and the use or possession is open, obvious, apparent, and not concealed from those present; however, a person may not be convicted under this subsection if the evidence shows that he did not use the substance himself or advise, encourage, or assist anyone else to do so; any incidence of prior unlawful use of controlled substances by the defendant may be admitted to rebut this defense;

(iv) for any person knowingly and intentionally to possess an altered or forged prescription or written order for a controlled substance;

(v) for a practitioner licensed under this chapter knowingly and intentionally to prescribe, administer, or dispense a controlled substance to a juvenile, without first obtaining the consent required in Section 78-14-5 of a parent, guardian, or person standing in loco parentis of the juvenile except in cases of an emergency; for purposes of this subsection, a juvenile means a "child" as defined in Section 78-3a-2, and "emergency" means any physical condition requiring the administration of a controlled substance for immediate relief of pain or suffering;

(vi) for a practitioner licensed under this chapter knowingly and intentionally to prescribe or administer dosages of a controlled substance in excess of medically recognized quantities necessary to treat the ailment, malady, or condition of the ultimate user; or

(vii) for any person to prescribe, administer, or dispense any controlled substance to another person knowing that the other person is using a false name, address, or other personal information for the purpose of securing the same.

**(b) Any person convicted of violating Subsection (2)(a)(i) with respect to:**

(i) marijuana, if the amount is 100 pounds or more, is guilty of a second degree felony;

(ii) a substance classified in Schedule I or II, or marijuana, if the amount is more than 16 ounces, but less than 100 pounds, is guilty of a third degree felony; or

(iii) marijuana, if the marijuana is not in the form of an extracted resin from any part of the plant, and the amount is more than one ounce but less than 16 ounces, is guilty of a class A misdemeanor.

(c) Any person convicted of violating Subsection (2)(a)(i) while inside the exterior boundaries of property occupied by any correctional facility as defined in Section 64-13-1 or any public jail or other place of confinement shall be sentenced to a penalty one degree greater than provided in Subsection (2)(b).

(d) Upon a second or subsequent conviction of possession of any controlled substance by a person previously convicted under Subsection (2)(b), that person shall be sentenced to a one degree greater penalty than provided in this subsection.

(e) Any person who violates Subsection (2)(a)(i) with respect to all other controlled substances not included in Subsection (2)(b)(i), (ii), or (iii), including less than one ounce of marijuana, is guilty of a class B misdemeanor. Upon a second conviction for possession of a controlled substance as provided in this subsection, the person is guilty of a class A misdemeanor, and upon a third or subsequent conviction he is guilty of a third degree felony.

(f) Any person convicted of violating Subsections (2)(a)(ii) through (2)(a)(vii) is:

(i) on a first conviction, guilty of a class B misdemeanor;

(ii) on a second conviction, guilty of a class A misdemeanor; and

(iii) on a third or subsequent conviction, guilty of a third degree felony.

**(3) Prohibited acts C — Penalties:**

(a) It is unlawful for any person:

(i) who is subject to this chapter to distribute or dispense a controlled substance in violation of this chapter;

(ii) who is a licensee to manufacture, distribute, or dispense a controlled substance to another licensee or other authorized person not authorized by his license;

(iii) to omit, remove, alter, or obliterate a symbol required by this chapter or by a rule issued under this chapter;

(iv) to refuse or fail to make, keep, or furnish any record, notification, order form, statement, invoice, or information required under this chapter; or

(v) to refuse entry into any premises for inspection as authorized by this chapter.

(b) Any person convicted of violating Subsection (3)(a) shall be punished by a civil penalty of not more than \$5,000. The proceedings are independent of, and not in lieu of, criminal proceedings under this chapter or any other law of this state. If the violation is prosecuted by information or indictment which alleges the violation was committed knowingly or intentionally, that person is upon conviction guilty of a third degree felony.

**(4) Prohibited acts D — Penalties:**

(a) It is unlawful for any person knowingly and intentionally:

(i) to use in the course of the manufacture or distribution of a controlled substance a license number which is fictitious, revoked, suspended, or issued to another person or, for the purpose of obtaining a controlled substance, to assume the title of, or represent himself to be, a manufacturer, wholesaler, apothecary, physician, dentist, veterinarian, or other authorized person;

(ii) to acquire or obtain possession of, to procure or attempt to procure the administration of, to obtain a prescription for, to prescribe or dispense to any person known to be attempting to acquire or obtain possession of, or to procure the administration of any controlled substance by misrepresentation or failure by the person to disclose his receiving any controlled substance from another source, fraud, forgery, deception, subterfuge, alteration of a prescription or written order for a controlled substance, or the use of a false name or address;

(iii) to make any false or forged prescription or written order for a controlled substance, or to utter the same, or to alter any prescription or written order issued or written under the terms of this chapter;

(iv) to furnish false or fraudulent material information in any application, report, or other document required to be kept by this chapter or to willfully make any false statement in any prescription, order, report, or record required by this chapter; or

(v) to make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling so as to render any drug a counterfeit controlled substance.

(b) Any person convicted of violating Subsection (4)(a) is guilty of a third degree felony.

**(5) Prohibited acts E — Penalties:**

(a) Notwithstanding other provisions of this section, a person not authorized under this chapter who commits any act declared to be unlawful under this section, Title 58, Chapter 37a, Utah Drug Paraphernalia Act, or under Title 58, Chapter 37b, Imitation Controlled Substances Act, is upon conviction subject to the penalties and classifications under Subsection (5)(b) if the act is committed:

(i) in a public or private elementary or secondary school or on the grounds of any of those schools;

(ii) in a public or private vocational school or post-secondary institution or on the grounds of any of those schools or institutions;

(iii) in those portions of any building, park, stadium, or other structure or grounds which are, at the time of the act, being used for an activity sponsored by or through a school or institution under Subsections (5)(a)(i) and (ii);

(iv) in or on the grounds of a preschool or child-care facility;

(v) in a public park, amusement park, arcade, or recreation center;

(vi) in a church or synagogue;

(vii) in a shopping mall, sports facility, stadium, arena, theater, movie house, playhouse, or parking lot or structure adjacent thereto;

(viii) in a public parking lot or structure;

(ix) within 1,000 feet of any structure, facility, or grounds included in Subsections (5)(a)(i) through (viii); or

(x) with a person younger than 18 years of age, regardless of where the act occurs.

(b) A person convicted under this subsection is guilty of a first degree felony and shall be imprisoned for a term of not less than five years if the penalty that would otherwise have been established but for this subsection would have been a first degree felony. Imposition or execution of the sentence may not be suspended, and the person is not eligible for parole until the minimum term of imprisonment under this subsection has been served.

(c) If the classification that would otherwise have been established would have been less than a first degree felony but for this subsection, a person convicted under this subsection is guilty of one degree more than the maximum penalty prescribed for that offense.

(d) It is not a defense to a prosecution under this subsection that the actor mistakenly believed the individual to be 18 years of age or older at the time of the offense or was unaware of the individual's true age; nor that the actor mistakenly believed that the location where the act occurred was not as described in Subsection (5)(a) or was unaware that the location where the act occurred was as described in Subsection (5)(a).

(6) Any violation of this chapter for which no penalty is specified is a class B misdemeanor.

(7) Any person who attempts or conspires to commit any offense unlawful under this chapter is upon conviction guilty of one degree less than the maximum penalty prescribed for that offense.

(8) (a) Any penalty imposed for violation of this section is in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law.

(b) Where violation of this chapter violates a federal law or the law of another state, conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this state.

(9) (a) When it appears to the court at the time of sentencing any person convicted under this chapter that the person has previously been convicted of an offense under the laws of this state, the United States, or another state, which if committed in this state would be an offense within this chapter and it appears that probation would not be of benefit to the defendant or that probation would be contrary to the interest, welfare, or protection of society, the court, notwithstanding Section 77-18-1, may if there is compliance with Subsection (9)(b), impose a minimum term to be served by the defendant, of up to  $\frac{1}{2}$  the maximum sentence imposed by law for the offense committed.

(b) (i) Before any person may be sentenced to a minimum term as provided in Subsection (9)(a), the prosecuting attorney, or grand jury if an indictment, shall cause to be subscribed upon the complaint, in misdemeanor cases, or the information or indictment, in addition to the substantive offense charged, a statement setting forth the alleged past conviction of the defendant and specifically stating the date and place of conviction and the offense of which the defendant was convicted. The allegation shall be presented to the defendant at the time of his arraignment, or afterwards by leave of court, but in no event

later than two days prior to the trial of the offense charged or the defendant's entering a plea of guilty. At the time of arraignment or a later date when granted by the court, the court shall read the allegation of the previous conviction to the defendant, provide him or his counsel with a copy of it, and explain to the defendant the consequences of the allegation under Subsection (9)(a). The allegation of the past conviction of the defendant is not admissible in a jury trial, except where the admissibility in evidence of a previous conviction is otherwise recognized as admissible by law.

(ii) The court, following conviction of the defendant of the substantive offense charged and prior to imposing sentence, shall inform the defendant of its decision to impose a minimum sentence under Subsection (9)(a) and inquire as to whether the defendant admits or denies the previous conviction. If the defendant denies the previous conviction, the court shall afford him an opportunity to present evidence showing that the allegation of the past conviction is erroneous or the conviction was lawfully vacated or the defendant was pardoned. The evidence shall be made a matter of record. Following the evidence, the court shall make a finding as to whether the defendant has a previous conviction, which finding is final, except for a showing of abuse of discretion. Following the findings by the court, the defendant shall be sentenced under Subsection (9)(a) or under the appropriate penalty provided by law, as the court in its discretion determines.

(c) Any person sentenced on a second offense to probation who violates that probation is subject to Subsections (9)(a) and (9)(b).

(d) Nothing in this section in any way limits or restricts Sections 76-8-1001 and 76-8-1002.

(10) In any prosecution for a violation of this chapter, evidence or proof which shows a person or persons produced, manufactured, possessed, distributed, or dispensed a controlled substance or substances, is prima facie evidence that the person or persons did so with knowledge of the character of the substance or substances.

(11) This section does not prohibit a veterinarian, in good faith and in the course of his professional practice only and not for humans, from prescribing, dispensing, or administering controlled substances or from causing the substances to be administered by an assistant or orderly under his direction and supervision.

(12) Civil or criminal liability may not be imposed under this section on:

(a) any person registered under the Controlled Substances Act who manufactures, distributes, or possesses an imitation controlled substance for use as a placebo or investigational new drug by a registered practitioner in the ordinary course of professional practice or research; or

(b) any law enforcement officer acting in the course and legitimate scope of his employment.

(13) If any provision of this chapter, or the application of any provision to any person or circumstances, is held invalid, the remainder of this chapter shall be given effect without the invalid provision or application.



History: L. 1971, ch. 145, § 8; 1972, ch. 22, § 1; 1977, ch. 29, § 6; 1979, ch. 12, § 5; 1985, ch. 146, § 1; 1986, ch. 196, § 1; 1987, ch. 92, § 100; 1987, ch. 190, § 3; 1988, ch. 95, § 1; 1989, ch. 50, § 2; 1989, ch. 56, § 1; 1989, ch. 178, § 1; 1989, ch. 187, § 2; 1989, ch. 201, § 1; 1990, ch. 161, § 1; 1990, ch. 163, § 2; 1990, ch. 163, § 3; 1991, ch. 80, § 1; 1991, ch. 198, § 4; 1991, ch. 268, § 7.

**Amendment Notes.** — The 1990 amendment by ch. 161, effective April 23, 1990, inserted "to obtain a prescription for" and "or failure by the person to disclose his receiving any controlled substance from another source" in Subsection (4)(a)(ii) and corrected two reference errors in Subsection (13).

The 1990 amendment by ch. 163, § 2, effective from April 23, 1990 until July 1, 1990, corrected reference errors in Subsections (9)(a) and (13)(b).

The 1990 amendment by ch. 163, § 3, effective July 1, 1990, substituted "Section 77-18-1" for "Rule 20, Utah Rules of Criminal Procedure" in Subsection (9)(a).

The 1991 amendment by ch. 80, effective April 29, 1991, in Subsection (5)(a), inserted Subsection (ii), redesignated former Subsection (ii) as (iii), substituted "or institution under

Subsections (5)(a)(i) and (ii)" for "under section (5)(a)(i)" in Subsection (iii), inserted Subsections (iv) through (viii), redesignated former Subsections (iii) and (iv) as (ix) and (x), and substituted "Subsections (5)(a)(i) through (vii)" for "Subsection (5)(a)(i) or (ii)" in Subsection (ix); substituted "Chapter 37a, Title 58, Utah Drug Paraphernalia Act or Chapter 37b, Title 58, Imitation Controlled Substances Act" for "Chapters 37a or 37b, Title 58" in Subsection (13)(a); and added Subsection (14) (appearing as Subsection (13) after January 1, 1991).

The 1991 amendment by ch. 198, effective April 29, 1991, substituted all of the present language after "Schedules II through V" in Subsection (1)(a)(iii) for "under an order or prescription," and made stylistic changes in the introductory paragraph of Subsection (5)(a).

The 1991 amendment by ch. 268, effective January 1, 1992, deleted former Subsection (13), imposing a fee of \$150 against each person convicted of, and each juvenile found within the court's jurisdiction because of, committing an offense and providing for the use of funds generated by the fee.

This section is set out as reconciled by the Office of Legislative Research and General Counsel.

## NOTES TO DECISIONS

### ANALYSIS

Constitutionality.  
Admissibility of evidence.  
Arranging sale.  
Distribution.  
— Distribution for value.  
Evidence.  
Possession.  
— Amount.  
Search and seizure.  
Cited.

#### Constitutionality.

In accord with bound volume. See *State v. Pelton*, 801 P.2d 184 (Utah Ct. App. 1990).

Subsection (5) does not violate a defendant's due process rights by imposing an enhanced penalty for violations that take place within 1,000 feet of a school. *State v. Moore*, 782 P.2d 497 (Utah 1989).

Subsection (5)(d), which eliminates lack of knowledge about the aggravating factor's presence as a defense for the enhanced penalty, does not violate due process. *State v. Moore*, 782 P.2d 497 (Utah 1989).

Subsection (5) does not violate equal protection on the ground that it treats drug dealers in small towns differently from those in large cities, since all defendants state-wide who distribute a controlled substance for value within

1,000 feet of a public school are governed by the statute and susceptible to its enhanced penalties. *State v. Moore*, 782 P.2d 497 (Utah 1989).

The penalty enhancement provision of Subsection (5)(a)(iii) is not unconstitutional, since the distinction between simple possession of controlled substances and possession in proximity to a school is a valid one, reasonably related to the legislative purpose of creating a drug-free environment around schoolchildren. *State v. Moore*, 782 P.2d 497 (Utah 1989).

#### Admissibility of evidence.

Evidence of defendant's possession of marijuana, similarly packaged, twelve days prior to the offense charged, was properly admitted, where the contested evidence was particularly probative on the issue of constructive possession and was illustrative of defendant's common plan of marijuana distribution. *State v. Taylor*, 818 P.2d 561 (Utah Ct. App. 1991).

#### Arranging sale.

The offense of arranging the distribution for value of a controlled substance does not require the actual distribution. All that is needed is the arrangement for such distribution, coupled with knowledge or intent. Evidence of an actual sale may be helpful, or even necessary, in proving knowledge or intent, but sale itself is

jury asserted defense of coercion where defendant admitted his escape but claimed he did so because of trouble with the prison inmates caused by his failure to pay for broken radio. *State v. Pearson*, 15 Utah 2d 353, 393 P.2d 390 (1964).

To avail himself of the defense of compulsion due to threats of violence, a defendant in a trial for escape must present evidence that he was compelled to escape by threat of imminent violence which he could not have reasonably resisted; for a threat to be imminent, it would have to appear that it had been communicated to the defendant that he would be subjected to physical force presently. *State v. Harding*, 635 P.2d 33 (Utah 1981).

In the context of escape, the threat or use of unlawful physical force alleged in support of a compulsion defense must be at least that which would cause substantial bodily injury. *State v. Tuttle*, 730 P.2d 630 (Utah 1986).

#### —Instructions.

Trial court's instruction requiring that the threat of substantial bodily injury be specific was proper at defendant's trial for escape. *State v. Tuttle*, 730 P.2d 630 (Utah 1986).

Trial court properly instructed the jury that

the duress defense was not available in response to an escape charge unless there was no time for complaint to the authorities or a history of futile complaints. *State v. Tuttle*, 730 P.2d 630 (Utah 1986).

Trial court properly instructed the jury that duress would not be a defense to an escape charge unless the defendant reported to the authorities immediately after the escape. *State v. Tuttle*, 730 P.2d 630 (Utah 1986).

#### Standard.

Where record was replete with evidence that would sustain, if not compel, a finding that defendant was not coerced or threatened with immediate use of unlawful physical force when he aided and abetted in rape, there was no need to determine whether to use a subjective or objective standard as to defendant's perception of coercion or threat of force. *State v. Alexander*, 597 P.2d 890 (Utah 1979).

Defendant's claim of compulsion in prosecution for theft was rejected because the defendant failed to demonstrate specific imminent threats and that there were no reasonable legal alternatives to committing the crime. *State v. Ott*, 763 P.2d 810 (Utah Ct. App. 1988).

#### COLLATERAL REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d Criminal Law § 148.

**C.J.S.** — 22 C.J.S. Criminal Law § 49.

**A.L.R.** — Coercion, compulsion, or duress as defense to charge of kidnapping, 69 A.L.R.4th 1005.

Construction and application of statutes justifying the use of force to prevent the use of force against another, 71 A.L.R.4th 940.

**Key Numbers.** — Criminal Law ⇐ 38.

### 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 a person directed by or acting in cooperation 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.

(2) The defense of entrapment shall be unavailable when causing or threatening bodily injury is an element of the offense charged and the prosecution is based on conduct causing or threatening the injury to a person other than the person perpetrating the entrapment.

(3) The defense provided by this section is available even though the actor denies commission of the conduct charged to constitute the offense.

(4) Upon written motion of the defendant, the court shall hear evidence on the issue and shall determine as a matter of fact and law whether the defendant was entrapped to commit the offense. Defendant's motion shall be made at least ten days before trial except the court for good cause shown may permit a later filing.

(5) Should the court determine that the defendant was entrapped, it shall dismiss the case with prejudice, but if the court determines the defendant was not entrapped, such issue may be presented by the defendant to the jury at trial. Any order by the court dismissing a case based on entrapment shall be appealable by the state.

(6) In any hearing before a judge or jury where the defense of entrapment is an issue, past offenses of the defendant shall not be admitted except that in a trial where the defendant testifies he may be asked of his past convictions for felonies and any testimony given by the defendant at a hearing on entrapment may be used to impeach his testimony at trial.

**History:** C. 1953, 76-2-303, enacted by L. 1973, ch. 196, § 76-2-303.

#### NOTES TO DECISIONS

##### ANALYSIS

Consent to police visits.  
Evidence of past offenses.  
Hearsay.  
Jury question.  
Nature of defense.  
Objective standard.  
Offense involving threat of injury.  
Officer's knowledge of defendant's identity.  
Providing opportunity to commit offense.  
Specific police conduct.  
—Persistent requests by officer.  
—Use of attractive female undercover officer.  
—Use of close friendship.

##### Consent to police visits.

Defendant was not entrapped for unlawful distribution for value of a controlled substance where, although the police officer visited the defendant's office on several occasions, the visits were with defendant's invitation or consent. *State v. Erickson*, 722 P.2d 756 (Utah 1986).

##### Evidence of past offenses.

State is not permitted during its case in chief at trial to introduce into evidence past offenses committed by defendant where entrapment is an issue; however, state must be allowed to present any evidence in impeachment or rebuttal that would show defendant's disposition to commit the crime charged; the fact that this may include prior acts of crime or misconduct would not render such evidence inadmissible. *State v. Hansen*, 588 P.2d 164 (Utah 1978).

Where defendant charged with attempted theft by receiving stolen property raised defense of entrapment, it was reversible error to permit undercover police officer to testify on direct examination in state's case in chief as to matters relating to defendant's previous transactions relating to stolen property. *State v. Hansen*, 588 P.2d 164 (Utah 1978).

##### Hearsay.

Excluded testimony offered, not to prove the truth of what informant said to defendants, but rather to show that informant made statements that induced defendants to commit the offense should not have been excluded as hearsay since truth of statements was irrelevant, the crucial factor being whether statements were made and whether they influenced the defendants' behavior. *State v. Salmon*, 612 P.2d 366 (Utah 1980).

##### Jury question.

Where private citizen warned authorities that defendants were coming from California to Utah for purpose of robbing some Utah drugstores and thereafter drove the defendants around to various drugstores at their request and where government's conduct was limited to placing a listening device on the informant and tailing defendants until they carried out their preconceived intentions, entrapment was a factual question properly presented to the jury. *State v. Salmon*, 612 P.2d 366 (Utah 1980).

The question of entrapment was properly left to the jury, where an undercover police officer, who had reason to believe that defendant was involved in drug trafficking, asked defendant to sell him cocaine on four occasions over a forty-day period and, on the fourth contact, defendant agreed to sell him cocaine, made arrangements to pick it up, and sold him a gram. *State v. Udell*, 728 P.2d 131 (Utah 1986).

##### Nature of defense.

Though it is sometimes said that entrapment is an affirmative defense, it is properly regarded as a factor tending to raise a reasonable doubt that defendant freely and voluntarily committed the offense charged; in determining the validity of an entrapment defense, the court must therefore consider (1) whether it appears beyond a reasonable doubt that the

## CHAPTER 2a

# COURT OF APPEALS

## Section

78-2a-3. Court of Appeals jurisdiction.

**78-2a-3. Court of Appeals jurisdiction.**

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

- (a) to carry into effect its judgments, orders, and decrees; or
- (b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, Board of State Lands, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and

(ii) a challenge to agency action under Section 63-46a-12.1;

(c) appeals from the juvenile courts;

(d) appeals from the circuit courts, except those from the small claims department of a circuit court;

(e) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(f) appeals from a court of record in criminal cases, except those involving a conviction of a first degree or capital felony;

(g) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(h) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons except in cases involving a first degree or capital felony;

(i) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity;

(j) appeals from the Utah Military Court; and

(k) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63, Chapter 46b, in its review of agency adjudicative proceedings.

**History:** C. 1953, 78-2a-3, enacted by L. 1986, ch. 47, § 46; 1987, ch. 161, § 304; 1988, ch. 73, § 1; 1988, ch. 210, § 141; 1988, ch. 248, § 8; 1990, ch. 80, § 5; 1990, ch. 224, § 3; 1991, ch. 268, § 22; 1992, ch. 127, § 12.

**Amendment Notes.** — The 1992 amendment, effective April 27, 1992, added Subsection (2)(h) and redesignated former Subsections (2)(h) through (j) as Subsections (2)(i) through (k).

## NOTES TO DECISIONS

## ANALYSIS

Habeas corpus proceedings.  
Scope.  
Cited.

**Habeas corpus proceedings.**

Appeal from the dismissal of a habeas corpus petition, in which defendant claimed only that his due process rights were violated at a hearing before the parole board, lay to the Court of Appeals rather than the Supreme Court; the latter has jurisdiction only over direct appeals of first degree or capital felony convictions and appeals in habeas corpus cases where the con-

viction or sentence is challenged. *Padilla v. Utah Bd. of Pardons*, 820 P.2d 473 (Utah 1991).

**Scope.**

This statute does not authorize the Court of Appeals to review the orders of every administrative agency, but allows judicial review of agency decisions "when the legislature expressly authorizes a right of review." *Barney v. Division of Occupational and Professional Licensing, Dep't of Commerce*, 828 P.2d 542 (Utah Ct. App. 1992).

Cited in *State v. Humphrey*, 176 Utah Adv. Rep. 8 (1991).

## CHAPTER 3

### DISTRICT COURTS

## Section

78-3-4.

Jurisdiction — Transfer of cases to circuit court — Appeals — Jurisdiction when circuit and district court merged.

78-3-11.5.

State District Court Administrative System.

## Section

78-3-16.5.

Repealed.

78-3-21.

Judicial Council — Creation — Members — Terms and election — Responsibilities — Reports.

78-3-21.5.

Data bases for judicial boards.

#### **78-3-4. Jurisdiction — Transfer of cases to circuit court — Appeals — Jurisdiction when circuit and district court merged.**

(1) The district court has original jurisdiction in all matters civil and criminal, not excepted in the Utah Constitution and not prohibited by law.

(2) The district court judges may issue all extraordinary writs and other writs necessary to carry into effect their orders, judgments, and decrees.

(3) Under the general supervision of the presiding officer of the Judicial Council and subject to policies established by the Judicial Council, cases filed in the district court, which are also within the concurrent jurisdiction of the circuit court, may be transferred to the circuit court by the presiding judge of the district court in multiple judge districts or the district court judge in single judge districts. The transfer of these cases may be made upon the court's own motion or upon the motion of either party for adjudication. When an order is made transferring a case, the court shall transmit the pleadings and papers to the circuit court to which the case is transferred. The circuit court has the same jurisdiction as if the case had been originally commenced

association or relation to attorney in case, 65 A.L.R.4th 73.

Disqualification from criminal proceeding of trial judge who earlier presided over disposition of case of coparticipant, 72 A.L.R.4th 651.

Power of state trial court in criminal case to change venue on its own motion, 74 A.L.R.4th 1023.

**Key Numbers.** — Criminal Law ⇐ 115 to 145.

### Rule 29A. Change of judge as a matter of right.

(a) **Notice of change.** In any criminal action commenced after April 15, 1992 in any district, circuit or justice court, all parties joined in the action may, by unanimous agreement and without cause, change the judge assigned to the action by filing a notice of change of judge. The parties shall send a copy of the notice to the assigned judge and the presiding judge. The notice shall be signed by all parties and shall state: (1) the name of the assigned judge; (2) the date on which the action was commenced; (3) that all parties joined in the action have agreed to the change; (4) that no other persons are expected to be named as parties; and (5) that a good faith effort has been made to serve all parties named in the pleadings. The notice shall not specify any reason for the change of judge. Under no circumstances shall more than one change of judge be allowed under this rule in any action. A change of judge under this rule is available only after a judge has been assigned to the case for trial. A notice of change may not be filed prior to or during a preliminary examination.

(b) **Time.** The notice shall be filed no later than 7 days after notice of assignment or reassignment of judge. Failure to file a timely notice precludes any change of judge under this rule.

(c) **Assignment of action.** Upon the filing of a notice of change, the assigned judge shall take no further action in the case. The presiding judge shall promptly determine whether the notice is proper and, if so, shall reassign the action. If the presiding judge is also the assigned judge, the clerk shall promptly send the notice to the Chief Justice, who shall determine whether the notice is proper and, if so, shall reassign the action.

(d) **Nondisclosure to court.** No party shall communicate to the court, or cause another to communicate to the court, the fact of any party's seeking consent to a notice of change.

(e) **Rule 29 unaffected.** This rule does not affect any rights under Rule 29. (Added effective April 15, 1992; amended effective May 1, 1993.)

**Amendment Notes.** — The 1993 amendment, effective May 1, 1993, in Subdivision (b) substituted the first sentence for "In misdemeanor cases, the notice shall be filed no later than 7 days after arraignment. In felony cases, the notice shall be filed no later than 7 days after arraignment or notice of assignment of judge, whichever occurs first."

**Compiler's Notes.** — In a minute entry dated January 21, 1993, the Utah Supreme Court provided that this rule, "originally adopted on an emergency basis effective April 15, 1992, has now been published for public comment. The Advisory Committee proposed amendments to paragraph (b). Those amendments are adopted, effective May 1, 1993."

### Rule 30. Errors and defects.

(a) Any error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded.

(b) Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court may order.

**Cross-References.** — Arraignment, necessity of objection to preserve error, U.R.Cr.P. 10.

Indictments and informations, harmless errors, U.R.Cr.P. 4.

#### NOTES TO DECISIONS

##### ANALYSIS

omission of photographic evidence.  
 rical mistakes.  
 efendant's right of allocution.  
 rmless error.  
 or defect.

Substantial right affected.  
 —State's burden of persuasion.  
 Variances.  
 Cited.  
 Admission of photographic

## ADDENDUM B

1 Ouch! Shit. Fuckin' dog.

2 MR. SQUIRE: Ha-ha ha.

3 MR. BARSON: Bit my--[INAUDIBLE]--off.

4 MR. SQUIRE: That's right.

5 Where's Linda?

6 MR. BARSON: She's at home doin' some homework.

7 [INAUDIBLE]

8 Where do you want to go?

9 MR. SQUIRE: Just up the--[INAUDIBLE].

10 [INAUDIBLE]

11 MR. SQUIRE: Oh, you sure knew that dog.

12 [INAUDIBLE]

13 MR. BARSON: That's cool.

14 [INAUDIBLE]

15 How much did you get?

16 MR. SQUIRE: [INAUDIBLE]--under a quarter.

17 MR. BARSON: Under a quarter?

18 [INAUDIBLE]

19 MR. SQUIRE: You can smell it from here.

20 MR. BARSON: Holy shit. Yeah, it is. It's

21 fuckin' good, man.

22 MR. SQUIRE: It's good fuckin' Bud, dude.

23 MR. BARSON: Is it? Do you use it?

24 MR. SQUIRE: Huh?

25 MR. BARSON: Do you use it?



1 MR. SQUIRE: One bowl with that, dude, is  
2 what--[INAUDIBLE]--

3 MR. BARSON: All right, man. Thanks a lot.

4 MR. SQUIRE: That look good?

5 MR. BARSON: Looks better than that other crap we  
6 got.

7 MR. SQUIRE: [INAUDIBLE] For 50 bucks, that aint  
8 fuckin'. I got a good deal, dude.

9 MR. BARSON: Yeah, you did.

10 MR. SQUIRE: Turn your dome light up.  
11 Maybe--[INAUDIBLE]. See, it's all buds.

12 MR. BARSON: Holy cow! All buds, huh? That  
13 smells good. All right.

14 MR. SQUIRE: Let me have a bowl out of it for  
15 goin' and gettin' it for you.

16 MR. BARSON: Go ahead and take a pinch.

17 MR. SQUIRE: [INAUDIBLE]--yeah, that's a good buy.

18 MR. BARSON: Thanks a lot, man.

19 MR. SQUIRE: Yeah.

20 MR. BARSON: Kind of hard there.

21 MR. SQUIRE: A little bud?

22 MR. BARSON: Yeah. That's cool.

23 MR. SQUIRE: [INAUDIBLE]

24 MR. BARSON: Bud. All right. We'll run you back.

25 MR. SQUIRE: Fuckin' it's a good bud, dude.

1 MR. BARSON: [INAUDIBLE]--it's done. I  
2 should--[INAUDIBLE]--we got some--

3 MR. SQUIRE: Don't smoke it without me. Ha-ha  
4 ha-ha ha.

5 MR. BARSON: All right.

6 MR. SQUIRE: I was just givin' you shit. Fuck,  
7 smoke till your heart's content. I need to get more.

8 MR. BARSON: Can you?

9 MR. SQUIRE: Yeah. Any time I want to.

10 MR. BARSON: How much in a quarter--[INAUDIBLE]?

11 MR. SQUIRE: A quarter?

12 MR. BARSON: Yeah. What's--

13 MR. SQUIRE: 80, but it's a lot bigger than that.

14 MR. BARSON: 80 bucks?

15 MR. SQUIRE: Yeah.

16 MR. BARSON: All right. [INAUDIBLE]

17 MR. SQUIRE: See, this--and I really didn't know  
18 that's why it cost so much when I got up there.

19 [INAUDIBLE]--bad shit from it, you know?

20 MR. BARSON: Yeah.

21 MR. SQUIRE: I left a few other bags--[INAUDIBLE].

22 MR. BARSON: [INAUDIBLE]

23 Are you goin' next week?

24 MR. SQUIRE: Yeah. I'd like to.

25 MR. BARSON: All right. We're plannin' on it now.

1 MR. SQUIRE: Fuck, I got to go to work tomorrow  
2 and the next day.

3 MR. BARSON? All right. And you know--he's got my  
4 number, so just give me a call.

5 MR. SQUIRE: Okay.

6 MR. BARSON: Okay.

7 MR. SQUIRE: You bet.

8 MR. BARSON: 6268, man.

9 MR. SQUIRE: 6268?

10 MR. BARSON: Yeah.

11 MR. SQUIRE: All right.

12 MR. BARSON: See ya. Thanks."

13 [INAUDIBLE, WHEREUPON MR. COX STOPPED PLAYING THE  
14 SECOND TAPED CONVERSATION]

15 PROCEEDINGS CONTINUED

16 MR. BERRY: Your Honor, the tape wasn't finished.

17 THE COURT: It wasn't finished?

18 MR. BERRY: No. And I'd like the jury to hear the  
19 last remark on this tape, of the confidential informant, if  
20 they're gonna hear it.

21 [WHEREUPON MR. COX STARTED TAPE AGAIN AS FOLLOWS.]

22 SECOND TAPED CONVERSATION CONTINUED

23 "MR. BARSON: Shiah!"

24 [WHEREUPON MR. COX STOPPED THE TAPE]

25 MR. BLACKHAM: We offer 2 and 3, Your Honor.

1                   WITNESS:     A     Um, I gave him the money back  
2 for that.

3     1     Q     You gave Brian money back?

4             A     Yes. I did.

5     2     Q     How much?

6             A     I can't remember.

7     3     Q     Okay. Did you--what did you mean when you said,  
8 "This is good F'in' Bud."

9             A     Sales pitch.

10    4     Q     Sales pitch?

11             A     Yeah.

12    5     Q     What do you mean a "sales pitch"?

13             A     It was because I told him that I could get it for  
14 him--

15    6     Q     Okay.

16             A     --that earlier that day.

17    7     Q     What do you mean when you told him it looked  
18 good.

19             A     What?

20    8     Q     What did you mean when you told Brian the stuff  
21 looked good?

22             A     Well, from what I knew of it, it looked like it  
23 was alright.

24    9     Q     Okay. Did you ask him if he would let you have a  
25 bowl?

## ADDENDUM C

1 an error that may cause a mistrial.

2 MR. BLACKHAM: Let's discuss it.

3 THE COURT: Ladies and gentlemen I'd like you to  
4 go into the Jury Room in just a moment. But I admonish you  
5 again, don't talk about this case with anyone.

6 [WHEREUPON JURY WENT TO THE JURY ROOM]

7 PROCEEDINGS OUTSIDE THE JURY

8 THE COURT: Close the door, Sheriff.

9 [BAILIFF RESPONDED AND CLOSED COURTROOM DOOR]

10 MR. BERRY: Mr. Squires was convicted--

11 THE COURT: For the purpose of the record, this  
12 conversation is now taking place outside the presence of the  
13 jury.

14 All right. Go ahead.

15 MR. BERRY: Mr. Squires was convicted of  
16 possession of marijuana, of a controlled substance.

17 MR. BLACKHAM: That's not correct, counsel. Let's  
18 get it correct. He was convicted of attempted distribution  
19 of a controlled substance.

20 MR. BERRY: I'll just take a look.

21 [MR. BLACKHAM HANDED DOCUMENT TO MR. BERRY]

22 THE COURT: What is that? A Class-A?

23 MR. BERRY: A Class-A Misdemeanor.

24 Obviously, the statute says that he can't ask  
25 about anything, other than felonies.

1 MR. BLACKHAM: I want to address that, too, Your  
2 Honor. But let's finish here.

3 THE COURT: Go ahead.

4 MR. BLACKHAM: Well, obviously what he's getting  
5 at here is he doesn't want me to pursue about the urinalysis  
6 test that Mr. Squire volunteered. He questioned him about  
7 it; he answered it, Your Honor, and I want to pursue the  
8 urinalysis test. And obviously, why he's on urinalysis test  
9 is that's required by his Probation Officer.

10 They brought it up, Your Honor, and I'm entitled  
11 to pursue it. And I want the Court--in fact, I'm gonna flat  
12 out ask him, Your Honor, about this conviction. And I want  
13 the Court to read.

14 [INDICATED]  
15 I've got a case right on point--

16 THE COURT: Let me see the case.

17 MR. BLACKHAM: --on this issue that I'm entitled  
18 to ask this question: State vs. Hansen.

19 [HANDED DOCUMENT TO THE COURT AND COURT EXAMINED  
20 SAME]

21 MR. BERRY: I'd like to take a look at that, too.

22 MR. BLACKHAM: Here, your copy, counsel.

23 [HANDED COPY TO MR. BERRY AND MR. BERRY CONFERRED  
24 WITH HIS CLIENT]

25 THE COURT: Do you want to look at this, counsel?

1 MR. BERRY: I have a copy of the case, Your Honor.

2 THE COURT: May I see the the conviction  
3 statement.

4 MR. BLACKHAM: Yes, Your Honor.

5 [MR. BLACKHAM HANDED COPY OF STATEMENT TO COURT]

6 THE COURT: All right. Have you had a chance to  
7 look it over?

8 MR. BERRY: I have read the case.

9 THE COURT: All right. I'll hear you, if you want  
10 to talk any more about it.

11 MR. BERRY: I would like to.

12 I think that there are later cases that are  
13 directly on point, as well. I think that this case that Mr.  
14 Blackham has produced here is an early case, a 1978 case,  
15 that the statute specifically prohibits Mr. Blackham from  
16 addressing any offenses, other than felonies, and that this  
17 case focuses on a subjective intent of the defendant here.  
18 Now that has been changed by our Supreme Court. In the  
19 early Ron & Chapman it was subjective intent of the  
20 defendant that was important. But the entrapment defense,  
21 by virtue of later decisions of our Supreme Court--

22 THE COURT: Well, do you have any, counsel?  
23 Specifically show them to me.

24 MR. BERRY: I have several cases.

25 THE COURT: Just point out where, so I don't have



1 to sit and read all of them. Point out where you want me to  
2 read.

3 MR. BERRY: The--was this case shepherdized?

4 MR. BLACKHAM: Yes, Your Honor. And I'm not  
5 arguing about the subjective intent issue. My point here is  
6 what I'm allowed to bring up in the way of rebuttal to an  
7 entrapment defense and Hansen says I am entitled.

8 I can't do it on direct, and the Supreme Court  
9 reversed this case. They did it on direct. But on  
10 rebuttal, Your Honor, for rebuttal evidence, I am allowed to  
11 do it to rebut entrapment, and Hansen is right on point on  
12 that issue, Your Honor.

13 MR. BERRY: Well, I don't think he's testified to  
14 anything that would even open the door here.

15 THE COURT: Well, he has testified to this.

16 Of course, it doesn't appear to me like it makes  
17 any difference, because you're using the defense of  
18 entrapment and that alone would make it possible for him to  
19 bring it in. But in this case he's testified that besides  
20 that, he's been taking these urinalysis--was it urinalysis  
21 tests?

22 MR. BERRY: He has. And he's on probation. But  
23 he didn't testify to the probation.

24 THE COURT: Well, I know. But he's saying, "Don't  
25 convict me. I've been taking these urinalysis tests and

1 that shows that I'm clean." Isn't that the purpose?

2 That's the purpose I got out of his testimony.

3 Now Mr. Blackham says, "All right. If that shows you're  
4 clean, why are you taking the urinalysis test?"

5 MR. BERRY: He also testified that he'd used  
6 marijuana before and stopped using it; and he didn't testify  
7 that he was getting urinalysis testing in a probation  
8 agreement entered into by the Court because he was convicted  
9 of a crime.

10 THE COURT: Well, go ahead. Anything else?

11 MR. BLACKHAM: No, Your Honor.

12 THE COURT: Anything else, Mr. Berry?

13 Something in those cases that would show me?

14 I wish you would. Have you got the rules of  
15 evidence thereupon which this is based? I'd like to see  
16 that rule.

17 MR. BLACKHAM: Yes, Your Honor. They cite the  
18 statute, of course, the entrapment statute. But they also  
19 cite what is now Rule 404, Your Honor

20 THE COURT: That's what I wanted to look at

21 MR. BLACKHAM: And it's under (b) that they cite  
22 this, that this is also a proper question under 404, Your  
23 Honor, where this is also a knowledge of intent. Where this  
24 is a knowledge, Your Honor, where this is entrapment.

25 [COURT REVIEWED RULE 404]

1 MR. BERRY: I'm missing. Where are you reading  
2 there, Ross?

3 MR. BLACKHAM: 404.

4 MR. BERRY: (b)?

5 MR. BLACKHAM: 404(b), other crimes, wrongs, or  
6 acts. And this case cites statute is supporting it. It's  
7 ruling that the prosecution is allowed to ask questions like  
8 this to rebut entrapment.

9 MR. BERRY: Of course, that's 404(b) states that  
10 they're not admissible.

11 MR. BLACKHAM: Unless--

12 MR. BERRY: It doesn't say "unless".

13 MR. BLACKHAM: Oh, yeah, it does, too.

14 MR. BERRY: It may however be admissible to other  
15 purposes.

16 MR. BLACKHAM: Yeah, such as intent, knowledge,  
17 motive, and specifically what's the issue in this case is  
18 his intent. The Hansen case cites that rule in support of  
19 their decision.

20 MR. BERRY: I think that is the whole approach  
21 here obviates the purpose. I think it's highly prejudicial  
22 to the jury.

23 THE COURT: All right. Anything else?

24 MR. BLACKHAM: No, Your Honor.

25 MR. BERRY: I'd cite the case of State of Utah

1 vs. Ronald E. Wright, 744 PACIFIC II, 315 Utah Appellate  
 2 Court 1987: "Character--"--and it states, and I'll read it:  
 3 "Character of the suspect predisposition to commit the  
 4 offense and subjective intent are irrelevant to determine  
 5 whether the police entrapped the suspect. If the police  
 6 conduct creates the substantial risk, than a normal law  
 7 bidding citizen would be induced to commit the crime,  
 8 entrapment has occurred."

9 Also, State vs. Belt, 780 PACIFIC II, 1271, a  
 10 1989 Utah case. The objective for the test determining  
 11 whether defendant has been entrapped is whether the police  
 12 conduct used in obtaining evidence of the commission of the  
 13 offense produced persuasion."

14 THE COURT: Well, I agree with that, but that  
 15 isn't this case.

16 MR. BERRY: I think that's what he's focusing on  
 17 here is Mr. Squire's intent. I just cited a case that says  
 18 it's not even pertinent in an entrapment defense.

19 THE COURT: Well, do you have anything else?

20 MR. BLACKHAM: No, Your Honor.

21 MR. BERRY: I might have one moment.

22 [CHECKED NOTES]

23 MR. BERRY: I believe that if the jury heard the  
 24 evidence of this prior conviction, that it would be highly  
 25 prejudicial of Mr. Squire.

1 THE COURT: Well, I'm going to allow the jury to  
2 hear it. I think you've opened the door up. Mr. Squire  
3 opened the door with his statement. And also, I think that  
4 this case controls in the State vs. Hansen  
5 588 PACIFIC II, 164, and authorize that you bring the jury  
6 back in.

7 [BAILIFF RESPONDED AND BROUGHT THE JURY BACK IN]

8 PROCEEDINGS CONTINUED WITH JURY PRESENT

9 THE COURT: The record should indicate the jury is  
10 back in the jury box.

11 You may ask your next question.

12 CROSS EXAMINATION CONTINUED

13 BY MR. BLACKHAM: Yes.

14 1 Q Mr. Squire, I was asking you about your statement  
15 about taking urinalysis tests; do you recall that?

16 A Yes, I do.

17 2 Q What is a urinalysis test?

18 A It's a test where I go in to a Parole--Probation  
19 Officer and he gives me a test.

20 3 Q Are you currently taking those tests?

21 A Um, I haven't for a few months.

22 4 Q Okay. You say it's when you go in to a Parole or  
23 a Probation Officer and he asks you to take a test; correct?

24 A Yes.

25 5 Q Do you currently have a Parole or a Probation