1973

State of Utah v. Colleen Mickey : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff-Respondent.	)	
vs.	)	Case No. 12876
COLLEEN MICKEY, Defendant-Appellant.	)	

BRIEF OF APPELLANT

Appeal from judgment of the Second Judicial District Court for Weber County, State of Utah, the Honorable Ronald O. Hyde presiding.

WILLIAM D. MARSH
1018 First Security Bank Bldg
Ogden, Utah 84401
Attorney for Defendant-Appellant

VERNON B. ROMNEY
Attorney General
State Capitol
Salt Lake City, Utah
Attorney for Plaintiff-Respondent

TABLE OF CONTENTS

CASES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff-Respondent, vs. COLLEEN MICKEY, Defendant-Appellant.	)	Case No. 12876

BRIEF OF APPELLANT

STATEMENT OF NATURE OF CASE

Appeal by the Defendant, Colleen Mickey, from a decision denying her motion for mistrial and from her conviction of the crime of possession for sale of a stimulant drug and the judgment committing her to the Utah State Prison.

DISPOSITION IN LOWER COURT

The Second Judicial District Court in and for the County of Weber, State of Utah, after trial before a jury, sentenced the Defendant to a term in the Utah State Prison upon her conviction of the crime of possession for sale of a stimulant drug.

RELIEF SOUGHT ON APPEAL

The Appellant seeks a reversal of the conviction and judgment thereon and an order directing the case be remanded to the District Court for a resentencing consistent with the crime of possession.

STATEMENT OF FACTS

On April 30, 1971, Philip Roche, an undercover police officer for the Ogden City Police Department, and Gary Spangler, a police

informer, went to an apartment in Ogden occupied by a Mrs. Nelson. The Defendant, Colleen Mickey, was visiting Mrs. Nelson at the apartment. Mr. Spangler was known to the Defendant. Officer Roche was not. Officer Roche testified that Gary Spangler asked the Defendant if she had any "grass" and that they both asked her if she would sell them any "speed" ! The officer testified that he purchased five dollars worth of the amphetamines from the Defendant and that he observed Gary Spangler make a one dollar purchase from her. (R. 62-66) Mrs. Mickey was charged with the crime of unlawfully possessing for sale a stimulant drug, to-wit: Amphetamine. (R. 60)

Colleen Mickey took the stand and

testified that she began using amphetamines to control her weight when she was eight years old and was then a user of amphetamines and that she had had them in her possession for personal use only. (R. 128) She stated that she considered Gary Spangler to be a personal friend and that, on the occasion in issue, she gave him some pills because he told her he needed a "fix". (R. 129) According to Mrs. Mickey, Officer Roche persistently requested her to sell him pills but she refused. After she gave Gary Spangler the pills, Officer Roche handed him a five dollar bill. Mr. Spangler offered this bill to the Defendant and when she refused it, he pressed it on her stating, "No, go ahead, I might not have it next time if I need any pills or if you need any pills. . . Take it

now." (R. 130) Mrs. Mickey specifically declined that her possession of the pills was with an intent to sell them. (R. 128)

Mrs. Mickey's testimony was corroborated in its essentials by that of Mrs. Nelson. She testified that Spangler had told the Defendant that he was "really hurting" and that the Defendant was reluctant to give him any pills because she did not have enough for herself. According to Mrs. Nelson the Defendant finally agreed, stating that she was doing so because of their long friendship. Mrs. Nelson agreed that there had been no mention of money by either party. (R. 105) She also testified that it was common practice among users, such as herself, to share pills with a friend so that they could them-

selves obtain pills by reciprocation. Also, that sometimes a person so obtaining the pills would reimburse the giver with their cost rather than replacing the pills themselves. (R. 110)

The State did not call Gary Spangler as a witness and he could not be found to testify for the defense.

The defense moved that the Court take the case from the jury and convict Mrs. Mickey of mere possession of the drug as there had been no showing of possession with intent to sell. This motion was denied. (R. 158)

During his final argument, the attorney for the State, Robert Neeley, stated his personal belief in Officer Roche's testimony (R. 145) and that he thought it entirely probable that Colleen Mickey would sell drugs. (R. 144) He

further stated that the number of pills that Mrs. Mickey testified she took daily was an excessive number and that such an amount would be likely to cause death. (R. 144-145) There was no evidence in the record to support his statement. He further appealed to the fears of the jurors as citizens and parents by telling them as follows:

> "It is left up to you. You are the only people that can find this Defendant guilty, and I ask you to do that. . . I ask you to think of the boys and girls out there in classes in junior high school and the girls and boys even in grade school. . ." (R. 156)

At this point the defense objected to the type of argument and the Judge told the prosecutor that he had gone beyond the rebuttal stage. (R. 156-7) Despite the

Judge's caution, the prosecutor continued in the same vein, telling the jurors that it could have been a young girl or boy who had gone to the apartment that day rather than the officer and that they had an obligation to the community to convict the Defendant because of the danger to young persons. (R. 157)

The defense moved for a mistrial on the basis that the prosecutor's remarks were prejudicial. The motion was denied. (R. 158)

Colleen Mickey was convicted as charged and was committed to the Utah State Prison to serve a term of up to ten years (R. 47).

ARGUMENT

POINT 1.

THE DISTRICT COURT ERRED IN NOT REDUCING THE CHARGE IN THE INFORMATION FROM POS-

SESSION WITH INTENT TO SELL TO POSSESSION.

The record is clear that Mrs. Mickey was in possession of the drugs as alleged. However, virtually all evidence pointed to one conclusion - that she possessed the drug for her own use to control obesity and personal use as an addict.

It is the position of the Defendant that as a matter of law the evidence was not sufficient to go to the jury on the question of possession with the intent to sell and that to allow it constituted reversible error. Defense counsel's motion for the Court to take the case from the jury as there had been no showing of intent to sell should have been granted, and the Court should have therein entered a finding of guilt as to the lesser

included offense of possession as requested. (R. 158)

It is necessary in a case wherein specific intent is an element of the crime charged for the State to prove such specific intent as an independent fact. Ogelsby v. State, 411 P.2d 974 (Okl. Cr., 1966). The Oklahoma Court of Criminal Appeals relied upon the rule stated in 22 C.J.S. Criminal Law Sec. 32 at page 117, as follows:

> "A specific criminal intent is not presumed, and conviction cannot be had on the basis of imputed intent. The general rule, stated infra Sec. 34, that a criminal intention will be presumed from the commission of the unlawful act does not apply. No intent in law or mere legal presumption, differing from the intent in fact, can be allowed to supply the place of proof of the requisite specific intent."

Clearly the transaction was made at the

initiative of the police officer and his agent and was not the product of Defendant's intention or desire. A criminal sanction cannot be imposed if the disposition to commit a crime is implanted in the mind of the person not otherwise disposed to commit an offense. Sorrells v. United States, 287 U.S. 435 (1932).

Where the evidence discloses that a sale of drugs was made at the request of a police officer or agent as in this case, entrapment is established as a matter of law unless there is also evidence of prior sales, large inventory, or other evidence which would indicate a predisposition to sell. In such cases the burden of proof is on the prosecution to show the existence

of the predisposition to sell. In the case at Bar all evidence clearly refutes any predisposition to sell. The police officers went to an apartment without invitation. The Defendant happened to be at the apartment as a guest. The officer and his informer first asked to buy "grass", and when that was denied them, asked to buy "speed". Compare Gary v. State, 231 N.E 2d 793 (Ind., 1967), an appeal from a conviction for the sale of heroin. There police officers, in cooperation with an informant, had gone to the Defendant's house, asked the Defendant to sell heroin, and effected a sale. Except for the single sale made at the request of the informant, the State offered no evidence as to prior sales, large inventory, or other factors which would indicate the Defendant was in the business of selling narcotics. In revers-

ing the conviction, the Supreme Court of Indiana reasoned:

> "Where the evidence shows. . . 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. . . 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 informers 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. . . 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." 231 N.E.2d at 796.

The degree of persuasion used by law enforcement officials is not significant where the first approach is made by the law and where there is no evidence of predisposition. United States v. Klosterman, 248 F.2d 191, 196 (3rd Cir., 1957). Even if the degree of persuasion were an issue in this case, the entire evening's activities were initiated by law enforcement officers and disclose that the Defendant was pressured into making a gift or sale of marijuana or amphetamines to Officer Roche and/or agent Gary Spangler.

In this case the charge was not selling a controlled substance but possessing a controlled

substance with the intent to sell it. In an attempt to show this intent, the police officer and his agent solicited a drug transfer to them which they hoped could be characterized as a sale. Without further evidence of predisposition, as discussed above, this evidence, even if concluded to be a sale, would not support a conviction for selling a controlled substance. As a matter of law, a transfer to a police officer made at his request and not supported by other evidence as to predisposition, is not sufficient to show the purpose for which Mrs. Mickey possessed the amphetamine pills and thus the State failed to meet its burden with respect to the element of intent. The defense's motion to withdraw the case from

the jury and find the Defendant guilty of simple possession should have been granted.

POINT 2

THE CLOSING ARGUMENT BY THE PROSECUTING ATTORNEY WAS IMPROPER AND PREJUDICIAL AND CONSTITUTED REVERSIBLE ERROR.

A. IT WAS IMPROPER AND PREJUDICIAL FOR THE PROSECUTING ATTORNEY TO EXPRESS HIS PERSONAL BELIEF AS TO RELIABILITY OF WITNESSES.

It is improper for a prosecuting attorney to express his personal belief as to the reliability of a witness. E.g., People v. Roberts, 55 Cal. Rptr. 412, 421 P.2d 420 (1966). The record reflects such impropriety at page 145, as follows:

> "I would submit to you that Officer Roche told you the truth when he got up there, an officer of the law, a man that you pay

his monthly salary to, a man who laid hif life on the line when he does his job as an undercover agent. I would submit to you that he told you that he told you the truth when he said: 'I received five dollars directly.' I would submit to you that he is telling you the truth when he said that Gary Spangler gave her a dollar and she gave him some drugs."

To allow a prosecuting attorney to submit his personal belief on the reliability of a witness is to allow him to usurp the function of the jury as ultimate trier of fact. In United States v. Lamerson, 457 F.2d 371 (5th Cir. 1972), the Court was faced with similar comments and reversed the conviction because such statements implied that the prosecutor has additional information or reasons for believing a witness has told the truth than have been disclosed to the jury.

It is particularly prejudicial in the case at Bar because of the paucity of corroborated testimony on which the jury is to make its decision. Officer Roche's testimony was entirely uncorroborated. The State failed to call the informant to testify and mocked defense counsel's request to produce him. (R. 156) If the State can further embellish the sole witness' testimony by the prosecutor's opinion, the Defendant is denied a fair trial.

B. IT WAS IMPROPER AND PREJUDICIAL FOR THE PROSECUTING ATTORNEY TO COMMENT ON MATTERS NOT IN EVIDENCE.

Argument by counsel is limited to the issues in the trial and to matters in evidence. E.g., Cole v. State, 175 P.2d 376 (1946); Sykes v. State, 238 P.2d 384 (Okl. Cr., 1951). In

the instant case the prosecutor stated "She even had the audacity to tell you that she takes 400 pills a day . . . That is an awful lot of those things to have to swallow . . . . I don't see now how anybody can take 400 pills of that trash and can be still alive today. . ." (R. 144-145) The prosecution in effect, testified as to the normal usage of a drug user and the medical effect of the quantity of the drug which the Defendant stated she used daily. There was no testimony by a sworn witness to either of these matters and there can be no doubt as to the impropriety of these statements.

C. IT WAS IMPROPER AND PREJUDICIAL FOR THE PROSECUTOR TO INFER TO THE JURORS THAT, IF COMMITTED, THE DEFENDANT

WOULD RECEIVE MEDICAL TREATMENT RATHER THAN PUNISHMENT.

After inferring that the daily dosage claimed by Mrs. Mickey was lethal, the prosecutor then went on to state that Mrs. Mickey ". . . needs to be put away somewhere. She needs some kind of help. I don't know if it is medical help or what, but she is in dire need of help." (R. 146) From this unwarranted statement the jurors easily could have believed that they should convict Colleen Mickey, regardless of whether or not she was in fact guilty, in order to keep her off drugs and perhaps save her life. In essence, they could easily have concluded that she would benefit from a conviction. The jurors might well have believed that, since the prosecutor considered Mrs. Mickey to

be in "dire need of help" that she would not be sent to prison but would be treated instead.

For the prosecution to lead the jurors to believe that the Defendant, if convicted would not be severely punished, is to lessen in the jurors minds the need for them to be convinced of guilt beyond a reasonable doubt in order to convict. Referring to the possibilities of probation or parole have frequently been held to be improper and prejudicial. People v. Hillery, 401 P.2d 382 (Cal. 1965); In re Imbler, 393 P.2d 687 (Cal. 1964). The same rationale should apply here.

D. IT WAS IMPROPER AND PREJUDICIAL FOR THE PROSECUTING ATTORNEY TO APPEAL TO THE EMOTIONS OF THE JURORS BY SPECULATING ON

MATTERS NOT IN EVIDENCE FOR THE PURPOSE OF PREJUDICING THE JURY AGAINST THE DEFENDANT AND TO AROUSE IN THE JURORS A FEAR OF PUBLIC DISAPPROVAL.

In his argument to the jury the State's attorney made a long and emotional appeal to the jurors to convict Colleen Mickey because of the threat of drugs to young people in the community. In State v. White, 144 S.E.2d 401, the prosecutor urged the jurors to envision their own female relatives in the place of the rape victim. The conviction was reversed. In the instant case the appeal was equally offensive. The prosecutor stated:

> "I ask you to think of the boys and girls out there in classes in high school and the boys and girls out there in classes in junior high school and the girls and boys even in grade school...! (R. 156)

Even when defense counsel objected and the Court admonished the prosecutor, he continued:

> "Very well, but I would submit to you that it can very well happen that there was a young girl or boy that had knocked on that door that day instead of an officer of the law, and I think you have an obligation to uphold in this community. Now I have done the best I know how, and it's in yours hands now, and I ask you to find the Defendant guilty. I ask you to uphold your stage in this community." (R. 157)

The Oklahoma Court of Criminal Appeals reversed for similar conduct in Lime v. State, 479 P.2d 608 (1971). There the prosecutor told the jurors that the Defendant would kill again if they acquitted and that the jurors would be responsible if he did. Certainly the clear implication of Mr. Neeley's

remarks is that, if acquitted, Mrs. Mickey would be a threat to the children of the community in that she would sell them drugs. Such comments are the equivalent of those found to be reversible error in Lime.

In State v. Agner, Ohio App.2d 96, 283 N.E.2d 443, a conviction was reversed because the prosecuting attorney called for a conviction to meet a public demand and not by reason of proof beyond a reasonable doubt. Where could one find a better example of this type of impropriety than Mr. Neeley's final utterance to the jury:

> "I think you have an obligation to uphold in this community. Now I have done the best I know how, and it is in your hands now, and I ask you to find the Defendant guilty. I ask you to uphold your stake in this community."

is a classic example of an improper argument for a prosecutor to make. It is a well-established rule of law that a prosecutor may not indulge in argument calculated to arouse in jurors fear of public disapproval, or of being regarded as recreant in their duty, which on either account tends to coerce jurors into a verdict of conviction.

The prosecutor's argument in State v. Makal, 455 P.2d 450 (Ariz. 1969), was that the Defendant was a danger to society and should be convicted; thus implying, as the Arizona Supreme Court found, that the jurors should convict without regard to the issue of insanity raised by the defense. The following statement was part of that argument:

". . . He is essentially dangerous to other people; he is very dangerous to himself. We can't afford - society can't afford to have Mr. Makal take the life of any other innocent victims. Society can't afford that." 455 P.2d at 452.

The case was reversed because of those improper prejudicial statements.

The defense has here catalogued only the most glaring examples of impropriety in the prosecutor's closing arguments. Read as a whole, the statement makes the prosecutor an unsworn witness calling for a conviction to meet the prosecutor's demand and not by reason of proof beyond a reasonable doubt. The arguments are replete with unwarranted statements and inflammatory language. Whether or not any one such statement was prejudicial to the Defendant is open to speculation. However, this Court has

long subscribed to the theory that where there are a number of errors, no single error considered alone needs to constitute reversible error if the cumulative effect of all errors is to deprive the Defendant of a fair trial. State v. Vasquez, 101 Utah 444 (1942); State v. St. Clair, 3 Utah 2d 230 (1955). The Arizona Supreme Court has taken the position that any doubt as to whether or not such statements were in fact prejudicial must be resolved in favor of the Defendant and that the reviewing Court must remand the case for a new trial or modify the judgment or sentence to fit the needs of justice. Sykes v. State, supra.

CONCLUSION

Appellant respectfully submits that

the record supports Appellant's contention that there was not sufficient evidence to allow the charge to go to the jury and the Trial Court erred in allowing the jury to speculate as to whether Appellant's unlawful possession of the stimulant drug was with the intent to sell or was for her own personal use. Appellant's motion that the Court take the issue from the jury and enter a finding of guilt as to unlawful possession, a misdemeanor, should have been granted.

Appellant's position is particularly persuasive in light of the numerous improprieties indulged in by the prosecutor in his oral argument. Where a jury is left to speculate as to the sufficiency of the State's evidence as they were in this trial, the prosecutor must not be allowed as an unsworn witness to resort to an

open appeal to prejudice and then call for a conviction to meet public demand and not by reason of proof beyond a reasonable doubt.

The cumulative effect of these errors deprived Appellant of a fair trial and it would be manifestly unjust to allow the conviction to stand. For these reasons, the Appellant urges that this Honorable Court reverse and remand this case.

Respectfully submitted,

WILLIAM D. MARSH
Counsel for Appellant
1018 First Security Bank Building
Ogden, Utah 84401