1973

State of Utah v. Colleen Mickey : Brief of Respondent

In The Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff-Respondent,
-vs-
COLLEEN MICKEY,
Defendant-Appellant.

Case No. 12976

BRIEF OF RESPONDENT

APPEAL FROM JUDGMENT OF THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH, THE HONORABLE RONALD O. HYDE PRESIDING.

VERNON B. ROMNEY
Attorney General
DAVID S. YOUNG
Chief Assistant Attorney General
WILLIAM T. EVANS
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Attorneys for Plaintiff-Respondent

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

LORRAINE PRESS 1397 SOUTH MAIN STREET SALT LAKE CITY, UTAH PHONE 487-0481

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

Page

CASES CITED

TABLE OF CONTENTS—Continued

STATUTES CITED

AUTHORITIES 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 RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

An appeal from the conviction of the crime of possession for sale of a stimulant drug.

DISPOSITION IN THE LOWER COURT

After a jury verdict against appellant, she was sentenced to a term in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation of the judgment of the lower court.

STATEMENT OF THE FACTS

During the trial of Colleen Mickey, Philip Roche, an undercover police officer for the Ogden City Police Department testified for the state. His testimony established the following:

On April 30, 1971, he and Gary Spangler went to the Avon Apartment Complex located at 25th and Fowler to make a purchase of drugs (R. 63, 64). Upon arriving at the complex, the officer and Mr. Spangler went to Apartment 2, knocked on the door and Colleen Mickey, appellant herein, answered the door (R. 64). After entering the apartment, Officer Roche and Spangler asked Colleen Mickey if she had any "speed" (R. 65). He testified that he asked her once (R. 68, 80) and she did not hesitate to sell the drugs (R. 67). Upon being asked if she had any "speed" Officer Roche testified, ". . . she said the only thing she had was speed and she said that she wasn't going to sell anymore than five dollars worth because it wouldn't be worth it to her, so she said she would sell six tabs of 'speed' for a dollar, six tabs for a dollar, period, and no less than five dollars worth" (R. 65). He also testified he gave her five dollars and appellant gave him 25 tablets of "speed" which she had taken from her purse (R. 65). Gary Spangler bought one dollars worth to take the heat off him (R. 66). On cross examination, Officer Roche testified that Gary Spangler asked Colleen Mickey if she had any grass and she said: "I'm too hot now. I am only dealing in speed because that is

what I am using mostly." (R. 77). He purchased the pills in Weber County (R. 64).

Lynette Mitchell Nelson testified that if she bought speed on the black market, it would cost her $15.00 for 100 pills or about $5.00 for 25 (R. 109). This is about the same price as quoted by Colleen Mickey. If a person were to buy 100 pills, the cost would be fifteen cents a pill, for 25 pills, the cost is twenty cents a pill. Colleen Mickey's price of six for a dollar comes out to be about sixteen cents per pill. This information clearly shows that black market prices are similar to the prices set by Mrs. Mickey. Officer Roche significantly gave five dollars to the appellant and received 25 tablets wrapped in tinfoil instead of 30 as quoted in the purchase price (R. 65).

Mrs. Nelson also testified that she was in and out of the room because Officer Roche and Spangler made her nervous (R. 104, 114), and she did not know exactly what went on all the time (R. 120).

The defendant testified that she had 30 to 35 pills in her possession for her own use, and that she had no intention to sell the pills (R. 128). This is contrary to the officer's statement that she said she was "dealing" in speed.

Donald Boyd Gunderson, called by the State as an expert witness testified that he had analyzed the pills purchased from appellant and they contained a com-

pound known as amphetamine which is a stimulant drug (R. 95).

ARGUMENT

POINT I

THE DISTRICT COURT WAS CORRECT IN NOT REDUCING THE CHARGE FROM POSSESSION FOR SALE OF A STIMULANT DRUG TO POSSESSION.

The appellant mistakenly raises as her first point on appeal that the District Court erred in not reducing the charge in the information from possession with intent to sell, to possession. The information does not charge the appellant with the crime of possession with intent to sell; it charges the appellant with the crime of possession for sale of a stimulant drug (R. 12, 60). In *State v. Arce,* 107 Ariz. 156, 483 P.2d 1395, 1399, (1971), the Supreme Court of Arizona stated:

> "The gravament of the offense . . . is the possession of narcotics, for sale, as distinguished from the mere possession of narcotics on the one hand and the actual sale of narcotics on the other. Previous decisions of this court have discussed the elements necessary for a conviction for possession, or for an actual sale, but this is the first time we have been called upon to set forth the elements required under the in-between classification — i.e., possession for sale."

The Court then considered decisions of other courts which has dealt specifically with the question and wrote at 1399:

> "In order to convict on the more serious offense of possession of narcotics for sale, the prosecution must not only establish the elements required for a conviction for possession, . . ., but must also show that the possession was for the purpose of sale. Circumstantial evidence may be used to show that the accused possessed the narcotics for sale rather than for his individual use."

The Court then considered two California Appellate decisions wherein it was held that large amounts of heroin, its quality and the nature of its packaging and location supported the inference that it was held for sale.

In the case at Bar the testimonies of Officer Roche, Colleen Mickey and Lynette Mitchell Nelson establish that the appellant was in possession of a stimulant drug (R. 65, 105, 115, 128). Evidence that this possession was for the purpose of sale comes not only from all the facts and circumstances, but comes out of the mouth of the defendant herself. Officer Roche testified that Colleen Mickey, when asked if she had any speed, quoted him her selling price (R. 65), and when she was asked if she had any grass, her reply was that she was too hot, and that she was only "dealing" in speed because that was what she was using (R. 77). There is

conflicting testimony as to the purpose for which Colleen Mickey possessed the speed. However, in *State v. Laub,* 102 Utah 402, 131 P.2d 805, 809, (1942), (appeal on the conviction of the crime of grand larceny), this court stated:

> "The defendants contend that all of the evidence was directly controverted by them at the trial. . . . But the trial court had the witnesses before it and was convinced that the witnesses called by the State were telling the truth. It is not our province on appeal to judge the credibility of witnesses when their testimony is in direct conflict . . . ."

Furthermore, in *State v. Canfield,* 18 Utah 2d 292, 422 P.2d 196, 197, (1967), this court stated:

> ". . . It is our duty to respect the prerogative of the jury as the exclusive judges of the credibility of the witnesses and as the determiners of the facts. Consequently, we assume that they believed the State's evidence, and we survey it, together with all fair inferences that the jury could reasonably draw therefrom, in the light most favorable to their verdict."

Respondent submits that the crime of possession for sale was proved to the satisfaction of the jury, and their verdict should be affirmed.

Appellant's second point, subpoint A, lumps under one argument a matter respondent believes should be

segragated for consideration. The point urged by appellant under subpoint A is that the officer's testimony was not corroborated.

POINT II

THE TESTIMONY OF THE POLICE OFFICER DOES NOT REQUIRE CORROBORATION.

Respondent does ont concede that the testimony of Officer Roche was not corroborated by all the facts and circumstances. In meeting the appellant's argument, we urge that it need not be. In *State v. Kasai*, 27 Utah 2d 326, 495 P.2d 1265, 1266 (1972), (appeal from a conviction of unlawfully selling marijuana), this court said that ". . . [T]he conviction of a defendant may be founded on the purchasers uncorroborated testimony." To the same effect see: *Brooks v. United States,* 385 F.2d 279 (D.C. Cir. 1967), *Bush v. United States,* 375 F.2d 602 (D.C. Cir. 1967), *People v. Rodriguez,* 169 C.A. 2d 771, 338 P.2d 41, (1959).

A second point argued by appellant's first point is that the defendant was entrapped into committing the offense.

POINT III

THE APPELLANT WAS NOT ENTRAPPED.

In the lower court, no contention was made that the issue of entrapment was involved. The issue is raised for the first time on appeal. Parenthetically, it is observed that the defense of entrapment usually involves a sale. While appellant made a sale, the offense charged was "possession for sale". Appellant has created confusion by not correctly understanding the charge. It is therefore clearly understandable why the issue of entrapment was not raised below. It was not an issue then, and is not properly one now. In any event, appellant did not make it an issue below. In *State v. Starlight Club*, 17 Utah 2d 174, 406 P.2d 912, 913 (1965), wherein the defendants incurred a fine and revocation of their nonprofit corporate charter for illegally selling liquor, raised certain constitutional arguments for the first time. The Supreme Court said: "This was raised first time on appeal, and we are not constrained to canvass it". Therefore, respondent contends that in this case, the issue of entrapment is not properly before the court.

Even if we assume that the issue of entrapment, as a matter of law, is properly before this court, Officer Roche's testimony clearly establishes that the appellant was not entrapped. He testified that he asked her to sell him some speed (R. 68, 80), and that she did not hesitate to sell (R. 67). Other evidentiary facts from his testimony are discussed above, which conclusively proves the appellant's purpose for possessing

the "speed" and her willingness to sell. In *State v. Kasai*, supra, at 1267, this court stated:

> "Entrapment is not established, as a matter of law, where there is any substantial evidence in the record from which it may be inferred that the criminal intent to commit the particular offense originated in the mind of the accused. The fact that a government agent offers to buy narcotics from a suspect, thus giving him the opportunity to commit the offense, does not constitute entrapment."

In *State v. Cunningham,* (No. 12253, Jan. 30, 1973), the defendants were charged and convicted of violating Utah Code Ann. § 58-33-6(1) (1953. The state law enforcement agents, upon first meeting the defendants, asked if they could supply them with a large quantity of LSD. Later they purchased from the defendants eight tablets of LSD for $20.00. During the trial, the defense of entrapment was raised but the jury convicted the defendants. On appeal the court found, "[T]hat the conduct of the officers amounted only to a solicitation of the sale of a drug and that the defendants were not instigated or induced to commit the offense." The conviction was affirmed. In this case the facts prove that there was merely a solicitation for the sale of a stimulant drug and willing seller precluding any possibility of entrapment, especially under the crime charged in this case.

POINT IV

THE CLOSING ARGUMENT BY THE PROSECUTING ATTORNEY WAS NOT PREJUDICIAL AS ARGUED IN POINT II OF APPELLANT'S BRIEF.

In *State v. Johnson*, 25 Utah 2d 160, 478 P.2d 491, 492, (1970), this court wrote:

> "It is the mandate of our law, and the policy declared by our statute, that a conviction should not be reversed merely for any charged error or irregularity, but only if there is one which is substantial and prejudicial in the sense that there is a reasonable likelihood of a different result in its absence."
>
> Utah Code Ann. § 77-42-1 (1953); *State v. Neal*, 1 Utah 756, 262 P.2d 756, (1953); *State v. Cluff*, 48 Utah 102, 158 P. 701, (1916).

The appellant alleges four prejudicial statements made by the prosecutor in his summation. A close examination of these statements, considering all of the facts and circumstances, together with the court's instructions, shows that they were harmless or at most not prejudicial error. In appellant's brief at 16, the following is quoted from the Record at 145 wherein the prosecutor states:

> "I would submit to you that Officer Roche told you the truth when he got up there, . . . I would submit to you that he is telling the truth. . . ."

Appellant then cites *United States v. Tamerson,* 457 F.2d 371, (5th Cir. 1972), as authority for the above statement constituting reversible error. This case can be distinguished from the case at Bar. The court in *Tamerson,* supra, was concerned with the following language of the prosecutor at 372:

> "I firmly believe what they said was the truth. I know it is the truth, and I expect you do too."

Further argument by the prosecutor implying that the government prosecutes only the guilty resulted in the reversal of the defendants conviction. The prosecutor in *Tamerson,* supra, unequivocally stated that the witness was telling the truth because he knew it was the truth, whereas the prosecutor in this case prefaced each statement with the work "submit", which means "to commit to the discretion of another." Black's Law Dictionary (Revised 4th ed. 1968). Each case is concerned with different langauge and resulting inferences and are distinguishable.

Respondent in addressing sub-points B, C, and D in appellant's brief submits that the language of the Oklahoma Court in *Young v. State,* 357 P.2d 562, 571 (Okl. Cr. 1960), is appropriate in eliminating any pos-

sibility of prejudicial error, which the appellant has alleged the prosecutor committed during his summation to the jury. The court stated:

> "The right of argument contemplates a liberal freedom of speech, and the range of discussion illustration, and argumentation is wide. Counsel for both the State and the defendant have a right to discuss fully from their standpoint, the evidence and the inferences and deductions arising from it. It is only where argument by counsel for the State is grossly improper and unwarranted upon some points which may have affected defendant's rights that a reversal can be based on improper argument."

Respondent submits that as a result of the appellant's testimony as to the quantity of pills she took per day (200 to 300 pills a day and sometime 400, R. 128), a reasonable layman, the prosecutor and jury included, not knowing the effects that speed has on the body could reasonably infer that the dosage is lethal or would be highly dangerous to one's health. Also the fact that the appellant testified that she had been taken to the hospital subsequent to a prior charge of sale and was booked for the crime at Bar while in the hospital (R. 136) would infer that if the defendant were to be convicted, she would receive medical attention and possibly hospitalized. Therefore, respondent submits that the comments made by the prosecutor were not prejudicial.

In all jury trials, the rights of both plaintiff and defendant are given additional protection in the form of the court's jury instructions. These instructions are addressed to the relevant law to be applied to the case before the court, and the jury is required to base its verdict on the evidence introduced during the trial and the instructions of the court. The jury instructions in the present case sufficiently counteracted any alleged prejudicial comment by the prosecutor as to reduce it to pure advocacy or at the most harmless error. The appropriate instructions are as follows:

(No. 2, R. 28)

To this charge the defendant has entered a plea of not guilty. This plea casts upon the state the burden of proving beyond a reasonable doubt all of the elements of the crime charged, which elements are set forth in Instruction No. 6.

(No. 3, R. 29)

The fact that the defendant was held to answer to this court by the committing magistrate is not a circumstance which should be considered by you in determining the guilt or innocence of the defendant; nor is the filing of the information herein such a circumstance; but in arriving at your verdict you must be guided solely by the evidence presented at the trial and the law given by the court.

(No. 6, R. 31)

You are instructed that the defendant stands charged with the felony offense of Possession for Sale of a Stimulant Drug.

Before you can convict the defendant of this offense, the prosecution must prove to your satisfaction and beyond a reasonable doubt each of the following elements:

1. That on or about April 30, 1971 the defendant did unlawfully possess a stimulant drug; to wit, Amphetamine.

2. That the defendant possessed for sale said stimulant drug.

3. That said unlawful possession occurred in Weber County.

If the State fails to prove each of the above elements to your satisfaction beyond a reasonable doubt, you are instructed that you should find the defendant not guilty.

(No. 9, R. 34)

A person charged with a crime is presumed to be innocent until he is proved guilty beyond a reasonable doubt. The presumption of innocence is not a mere form to be disregarded by the jury at pleasure, but is a substantial, essential part of the law and is binding upon

the jury. This presumption is a humane provision of the law, intended, so far as human agency is capable, to guard against the danger of an innocent person being unjustly punished. This presumption attends the defendant through every stage of the trial, and if possible you should reconcile the evidence with this presumption, and in case of a reasonable doubt as to whether his guilt is satisfactorily shown, you should acquit the defendant.

(No. 10, R. 34)

By "reasonable doubt" is meant a doubt based on reason and which is reasonable in view of all of the evidence. It must be a real substantial doubt and not one that is merely possible or imaginary. It should arise fairly and reasonably out of the evidence or lack of evidence in the case. Proof beyond a reasonable doubt is that degree of proof which satisfies the mind and convinces the understanding of those who are bound to act conscientiously upon it.

(No. 11, R. 34)

If, after an entirely fair and impartial consideration and comparison of all of the evidence in the case, you can candidly say that you are not satisfied of the defendant's guilt, then you have a reasonable doubt and your verdict should be "not guilty". But, if after such consideration of all the evidence, you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and import-

ant matters relating to your own affairs, then you have no reasonable doubt and your verdict s h o u l d be "guilty."

(No. 13, R. 36)

You are the sole judges of all questions of fact, of the weight of the evidence and the credibility of the witnesses. In weighing the testimony you may consider the bias, if any is shown of any witness to testify for or against any party, his interest, if any, in the result of the trial, his appearance on the witness stand, and any probable motive which he may have to tell that which is not true; you may consider the reasonableness of the witnesses' statements, their apparent frankness and candor, or the want of it, their opportunity to know and understand, and their capacity to remember; and from all the facts and circumstances given in evidence determine what weight ought to be given to the testimony of any witness.

You are not bound to believe all that the witnesses have testified to, nor are you bound to believe any witness. You may believe one witness as against many or many as against one. If you believe that any witness has knowingly and willfully testified falsely as to any material fact in the case, you may disregard his whole testimony unless he is corroborated by other credible evidence, or you may give such weight to the testimony of such witness on other points as you think it is entitled. In case there is a conflict in the testimony of the

witnesses, it is your duty to reconcile such conflict so far as you can, but it is still for you to determine for yourselves where the ultimate truth of the case lies.

(No. 14, R. 37)

You should consider the evidence all together, fairly, impartially, and conscientiously. You should arrive at your verdict solely upon the evidence introduced before you at the trial and upon the instructions of the court. You should not consider or be influenced by any evidence offered and not admitted by the court, nor any evidence stricken out by the court.

(No. 15, R. 37)

These instructions, though numbered separately, should be considered together. Each instruction should be read and understood with reference to and as part of the entire charge and not as though such was intended to present the whole law of the case, as all of the law on a subject cannot be stated in a single paragraph or in a single instruction. The different subjects discussed in the instructions should be kept in mind and the evidence considered and weighed in the light of all of the instructions.

(No. 16, R. 37)

The court does not express to you any opinion on any of the facts in the case, as it is immaterial what the

views of the court thereon may be. Neither by these instructions nor by any words uttered or remarks made during the trial, does the court intimate or mean or wish to be understood as giving an opinion as to what the proof is or what it is not, or what the facts are or what are not the facts in this case.

CONCLUSION

Respondent respectfully submits that the crime of possession for sale of a stimulant drug was conclusively proved, and the closing argument by the prosecuting attorney was not prejudicial. Therefore, there is no valid reason why the lower court's jury verdict should not be affirmed.

Respectfully submitted,

VERNON B. ROMNEY,
Attorney General

DAVID S. YOUNG
Chief Assistant Attorney General

WILLIAM T. EVANS
Assistant Attorney General

Attorneys for Respondent