1972

# State of Utah v. Sam B. Conover : Brief of Respondent

# In The Supreme C
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*Plaintiff-Ap*

vs.

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*Defendant-Re*

## BRIEF OF RES

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# In The Supreme Court of the State of Utah

STATE OF UTAH,
*Plaintiff-Appellant,*
vs.
SAM B. CONOVER,
*Defendant-Respondent.*

Case No. 12911

## BRIEF OF RESPONDENT

### NATURE OF THE CASE

This is an appeal from the trial court's ruling granting defendant-respondent's Motion to Quash the Information and dismissing the charges in this case.

### DISPOSITION IN LOWER COURT

The respondent's motion to quash the information charging him with violating Section 58-33-6(1), Utah Code Annotated (Supp. 1971), was granted at a hearing before the Honorable Allen B. Sorensen, Judge of the Fourth Judicial District Court on April 27, 1972, and an order was signed quashing the information and dismissing the complaint on May 4, 1972.

## RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the judgment of the district court and an order reinstating the information against respondent.

## STATEMENT OF FACTS

A complaint was filed against respondent on February 1, 1972, charging him with having committed a felony under Section 58-33-6(1) of Utah Code Annotated (Supp. 1971) by selling methamphetamine on December 19, 1971.

In 1971 the Utah Legislature passed the Utah Controlled Substances Act which was codified as Title 58, Chapter 37, Utah Code Annotated (Supp. 1971). This act took effect on January 1, 1972, and specifically repealed Title 58, Chapter 33 of Utah Code Annotated 1953 under which the defendant was charged.

Respondent was arraigned on February 14, 1972, and had a preliminary hearing on March 15, 1972, after which he was bound over to the Fourth Judicial District Court with an information being filed in the District Court on March 16, 1972. On April 4, 1972, a motion to quash the information was filed in the Fourth Judicial District Court. This motion alleged that the statute under which the defendant was charged had been repealed on January 1, 1972, and was not a proper basis for the complaint filed February 1, 1972. The motion

was granted on April 27, 1972, at a hearing before the Honorable Allen B. Sorensen, Judge of the Fourth Judicial District Court, who signed an order quashing the information and dismissing the case on May 4, 1972. The appellant, State of Utah, has appealed this order.

## ARGUMENT

### POINT I.

### THE TRIAL COURT WAS CORRECT IN GRANTING RESPONDENT'S MOTION TO QUASH THE INFORMATION AND IN DISMISSING THE CASE.

The law is well established that:

"The outright repeal of a criminal statute without a savings clause bars prosecution for violations of the statute committed before the repeal." *In re Dapper,* 77 Cal.Rep. 897, 454 P.2d 905 at 907 (1969). See also *Sakt v. Justice's Court of San Rafael,* 26 Cal.2d 297 at 304, 159 P.2d 17 at 21, 167 ALR 833 (1945).

Appellant contends that the Utah Code contains such a savings clause. The clause on which appellant relies is quoted in appellant's brief on pages 4 and 5. The important provisions for purposes of this case are Sec-

tions (1) (a) and Section 2 of 58-37-18 of Utah Code Annotated (Supp. 1971) which read as follows:

> "(1) (a) *Prosecution for violation of any law or offense occurring prior to the effective date of this act shall not be affected by this act;* provided, that sentences imposed after the effective date of this act may not exceed the maximum terms specified and the judge has discretion to impose any minimum sentence." (emphasis added)
>
> (2) This act does not affect right and duties that mature, penalties that are incurred, and *proceedings that are begun before its effective date."* (emphasis added)

Clearly, the legislature intended these provisions to apply to prosecutions which were pending. The language of the statute is clear, it provides that "prosecutions for violations occurring prior to the effective date" are saved and "proceedings that are begun before its effective date" are also saved. The proceedings against the respondent were clearly begun after the effective date of the new Controlled Substances Act.

The statutory saving clause found in Section 58-37-18 of the Utah Code Annotated was clearly intended to apply to pending proceedings. A criminal prosecution is pending within the meaning of a saving clause from the time of the arrest and commitment of

the accused. 22 C.J.S. 93, § 27. The Louisiana courts have been called upon to interpret and define the word "pending" as it refers to prosecution under saving clauses. The courts have held that:

> "A 'prosecution' is the means adopted to bring a supposed offender to justice and punishment by due course of law and consists of a series of proceedings *from the time when the formal accusation is made by filing of an affidavit or bill of indictment or information in the criminal court until the proceedings are terminated.* . . . . . the inception of the prosecution before a criminal court dates from the day that the affidavit and other proceedings coming from the committing magistrate are filed or returned unto the criminal court . . . . . ." *State v. Williams,* 192 La. 713, 189 So. 112, 122 ALR 665 cited in 22 C.J.S. 93, § 27 (1939). (Emphasis added.)

Other cases have held that:

> "Where a criminal statute is repealed without a saving clause as to pending actions, the reviewing court must decide the case according to the law at the time of final judgment in such court and cannot pronounce, enforce or inflict punishment for violation of a nonexisting statute." *City of Monmoth v. Lawson,* 345 Ill.App. 44, 102 N.E.2d 188 (1951).

In the case at hand we do have a saving clause as to pending actions, but clearly the proceedings against respondent were begun after the effective date of the new Controlled Substances Act.

Thus we return to the general rule that the repeal of an existing statute under which a proceeding is pending puts an end to the proceeding unless it is saved by a *proper* saving clause in the repealing statute. 22 C.J.S. 90, § 27. Though we have a saving clause in the repealing statute, it is not one which is proper to save proceedings that are begun after the effective date of said statute. The intent of the legislature was clear. It intended to save prosecutions of pending proceedings. It did not intend to save proceedings that were begun after the effective date of the new statute.

The cases cited in appellant's brief are clearly distinguishable from the case at hand. In *State ex rel. Huffman v. District Court*, 154 Montana 201, 461 P.2d 847 (1969), the Montana Supreme Court was asked to interpret a statute completely different from the one involved in our case. The statute in *Huffman* reads as follows:

> "The repeal of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the law so repealed unless the intention to bar such indictment or information and punishment is ex-

pressly declared in the repealing act." 461 P.2d 847 at 849.

The Montana Legislature clearly intended that any indictment, information or punishment of an act already committed in violation of the repealed statute should not be barred by the repeal of that statute. The court's opinion points out that the Montana savings clause was the child of a savings clause contained in the California Political Code, § 329. In 1880 the California Supreme Court held that this particular statute did not apply to criminal prosecutions by information, reasoning that the legislature could not have intended it to so apply. *People v. Teasdale,* 57 Cal. 104 cited in *Huffman,* 461 P.2d 847 at 849. The Montana Legislature, by adopting California Section 329 after the amendment which negated the Teasdale decision, eliminated the language relating only to pending actions. The court held in the Huffman case that this unmistakeably demonstrated that the Montana legislature did not intend to limit the scope of the statutory savings clause to pending actions. See 461 P.2d at 849. As respondent has already demonstrated, the Utah Statute is limited to pending actions. Actions that are begun after the effective date of the repealed statute are quite clearly outside the provisions of our savings clause.

Another case cited by appellant is *In re Dapper,* 77 Cal. Rep. 897, 454 P.2d 905 (1969). This case is again distinguishable on two counts. (1) The prosecution of Dapper in this case had been reduced to final judgment

after the applicable statutes were repealed, and (2) the Dapper case involved the interpretation of several municipal ordinances and whether these ordinances had been substantially reinacted. The court found that at least three of the statutes under which Dapper had been charged had not been substantially reinacted and that, therefore, no prosecution could be validly maintained against him for violation of those statutes. See 454 P.2d 905, at 909.

In our case we are involved with the interpretation of a statutory saving clause. Though appellant's brief briefly contends that there was a substantial reinactment of the repealed statute, respondent maintains that there clearly was not. The two statutes clearly differ in both their scope and their content.

Under the old statute methamphetamine was defined as a "depressant, stimulant or halucinogenic drug" under Section 58-33-1(d) (2). Under the new Controlled Substances Act methamphetamine is defined merely as a controlled substance under Schedule 2. See 58-37-4(3) (d) (iii) (B). The new act divides controlled substances into five schedules, including schedule 2, which includes drugs which have "an accepted medical use in treatment."

Under the new Controlled Substances Act a trial judge has a wide discretion to impose any minimum sentence, including presumably no sentence at all. The trial judge under 58-37-8(10) also has this wide discretion. He may discharge and dismiss without any court

adjudication of guilt. "Such discharge and dismissal shall not be deemed a conviction for the purposes of disqualifications or disabilities imposed by law for conviction of a crime." Thus respondent contends that the two acts are entirely different in scope and content. The new Controlled Substances Act does not constitute a substantial reinactment of the repealed statute.

Appellant also alleges that Section 68-2-8 of Utah Code Annotated 1953 constitutes a general savings clause in this case. Respondent maintains that this reasoning is in error. If the legislature had intended that Section 68-2-8 apply across the board as a general saving clause, such specific saving clauses as the one referred to in Section 58-37-18 would hardly be necessary. The annotations contained in Utah Code Annotated specifically point out the purpose of Section 68-2-8:

> "The plain intent of this section was to steer clear of any difficulty arising from the enactment of ex post facto laws and retain in force the former crimes and punishment act so far as it related to offenses committed prior to the time the penal code went into effect." *People v. Sloan,* 2 Utah 326 (1877).

This case was also cited in appellant's brief and clearly applies to this case but not in the manner asserted by appellant. The statute clearly was enacted to prevent difficulties arising from drafting of ex post facto laws and to retain a specific act, the Crimes and Punishment Act, in force prior to the time

that the then new penal code went into effect. The purpose of this legislation was specific not general.

The court should also note that these inferences are permissible from Section 76-1-2 of the Utah Code Annotated 1953:

> "The rule of the common law that penal statutes are to be strictly construed has no application to these revised statutes. The provisions of these revised statutes are to be construed according to the fair import of their terms with a view to effect the object of the statutes and to promote justice."

It should also be noted that there is no criminal common law in Utah. If the legislature had intended Section 68-2-8 of Utah Code Annotated 1953 were to generally apply as a saving clause to all statutes which were subsequently repealed, a specific savings clause such as the one contained in 58-37-18 would not be necessary. Further, the enactment of Section 68-2-8 was to accomplish a specific purpose as pointed out in *People v. Sloan.* Clearly this section does not operate to save the proceedings against respondent. The application of this section is urged by appellant as a general savings clause is manifestly unfair.

Finally, an appellate court should be cautious in overturning discretionary decisions of trial courts. A motion to quash may be granted for any number of

reasons including the one alleged by appellant. The decisions of a trial court are generally upheld if they can be upheld for any reason. See *State v. Romeo,* 42 Utah 46 at 69, 128 P. 530 (1912). Also an error in defendant's favor is generally considered harmless error. *State v. Yee Foo Lun,* 45 Utah 531, 147 P. 488 (1915).

It has also been accepted that even though the court may have errored in granting a motion on a particular ground, if it ought to have been granted on any of the other stated grounds, the ruling will be upheld. See *Burningham v. Burke,* 67 Utah 90, 245 P 977, 46 ALR 466 (1926).

## CONCLUSION

Therefore, based on the arguments listed below, respondent urges that the decision of the trial court be left undisturbed.

1. The specific statutory saving clause, Section 58-37-18, does not apply since the proceedings against respondent were begun after the effective date of the new Controlled Substances Act.

2. Appellant's cases and citations are not in point and can easily be distinguished from the case at hand.

3. There was no substantial re-enactment of the repealed statute.

4. Section 68-2-8 does not operate as a general saving clause referring to the revison and repeal of statutes.

5. Furthermore, the Controlled Substances Act provides that the trial court shall have a wide discretion as to penalties imposed under this statute. A discretionary opinion of the trial court should not be disturbed on appeal.

Respectfully submitted,

S. REX LEWIS, for:

HOWARD AND LEWIS

*Attorneys for Respondent*