1973

The State of Utah v. Billy Charles Harris, Patricia Ann Pearson Saunders And John Doe, aka Sammy : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,
Plaintiff-Respondent,

vs.

BILLY CHARLES HARRIS, PATRICIA ANN PEARSON SAUNDERS and JOHN DOE, a/k/a SAMMY,
Defendants-Appellants.

Case No. 13025

BRIEF OF APPELLANT

Appeal from the Verdict and Judgment of the Third Judicial District Court for Salt Lake County, Utah
Honorable Gordon R. Hall, Judge

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NATURE OF THE CASE

This appeal is taken from a verdict of guilty to a charge of sale of heroin by the defendant, Billy Charles Harris, and the codefendant, Patricia Ann Pearson Saunders, who did not appeal but filed an affidavit in the nature of a confession to delivering a controlled substance to one Guy and indicating that Harris had nothing to do therewith.

Saunders was put on probation on the condition that she voluntarily submit to a Federal commitment to a narcotics hospital.

The case was tried to a jury in the District Court for Salt Lake County, the Honorable Gordon R. Hall presiding. The defendant Harris moved for a new trial, which motion was denied, and he was sentenced to the statutory term in the State Prison by Judge Hall. Judge Hall signed a certificate of probable cause and set the appeal bond at $10,000.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the verdict and judgment.

STATEMENT OF FACTS

On November 16, 1971, a complaint was filed with the Salt Lake City Court charging the appellant, together with Patricia Saunders and John Doe, a/k/a Sammy, with selling a narcotic drug, to-wit: heroin, on the 29th day of August, 1971, some two and a half months before (R-15). On the 17th day of November, defendants Harris and Saunders were arrested, but there was never an arrest nor further mention of defendant John Doe a/k/a Sammy. See the City Court's bind-over report and the transcript of the trial in District Court.

Prior to trial the Information was amended by interlineation over objection to add the words "to Edward Guy" (R-16). At both the preliminary hearing and trial the principal testimony was by one Edward Guy and one John P. Sutton. Charles H. Bullock also testified (R-148-153), but his testimony related only to the chain of evidence of certain exhibits (see exhibit file). Charles B. Teer (R-153-161) testified to the effect that he was a chemist for the BNDD, his testimony in substance being that he had received certain exhibits containing 25 empty balloons and a brown powdery substance in a plastic bag, that substance containing less than one hundredth of an ounce of heroin from a total weight of the substance of 284 milligrams (R-159).

Edward Guy's testimony is to the effect that between August 25 and August 29 he and BNDD Agent Sutton contacted defendant Harris some 13 times at various places in an effort to purchase heroin from him, that he, in a back room alone with Harris, gave him $300 on or about the 26th day of August for a half ounce of "stuff," which they never received, that he received $300 back from defendant Saunders on or about the 30th day of August, 1971 (R-93). Throughout his testimony he had to refer to type-written reports in order to refresh his memory, being unable to answer questions without refering to said reports continually through the hearing. (See R-84, line 9 and 19; R-85, lines 24-26; R-89, line 2; R-90, lines 12-27; R-92, the entire page; R-93; R-96, line 20; R-111 and R-113.) At R-90, he testified that their purpose in the initial visit was to "set up Harris."

He further admitted at R-90, R-94 and R-96, R-101 that he had been hospitalized in the State Hospital and the Veterans Administration as an addict at least three times; that at all times during the period involved in the testimony he was under a charge of homicide and was working with the BNDD agent for leniency on the homicide charge. Also see Agent Sutton's testimony at R-138. Guy, who claims to have given Harris $300, admits at R-94 that no heroin or other consideration was received for that money, which he claims he received back from Saunders (R-94). Saunders in her affidavit filed after the trial and prior to motion for a new trial, indicates that she received the $300 from Guy in a parking lot with only the two of them present and that she returned it to him after being unable to procure the "half piece" she had agreed to get for him and that she did deliver to him 25 balloons, for which no consideration was paid (R-53 and 54). With regard to the continual reference to his notes in order to testify, Guy indicated that he had not dictated the notes or any notes (R-98). They were Agent Sutton's notes. He was unable to testify as to dates, times or happenings without his notes. See citations above from R-84 to R-113, inclusive. He testified that he got the 25 balloons in the exhibit file in a pool room at the Regal Cafe from defendant Saunders and not from Harris. There was no evidence that any consideration was ever paid for the 25 balloons. Agent Sutton testified that he had seen Harris some 11 times over a four to five day period in an effort to "set him up," but found it necessary to refer to his notes in order to give

times, places and occurrences. (See R-123, lines 17 and 18.)

He testified that he did not see defendant Saunders give the balloons to Guy, but Guy gave them a package after he had walked into the pool room (R-128). He testified that he gave Mr. Guy $300 to give to Harris, but did not see him give it to Harris (R-140). He testified that he had at that time either $250 or $300 or maybe $1,000 (R-140, 141 and 142). He testified that he got $300 back from Mr. Guy but not in the presence of either defendant. He had no testimony as to any consideration for the balloons containing one hundredth of an ounce of heroin. He testified that he never heard either Harris or Saunders mention the word heroin (R-136). He testified that his memory was better at the time of trial than it was during preliminary hearing and that he had had to refer to his notes and go over them at court recesses at preliminary hearing. He admitted that the notes he was using and the notes that Guy was using were xerox copies of his type-written report. He said he did not type Mr. Guy's report and stated at page 138 that some of the statements he took from Guy would be his (Guy's) reports. He denied typing Guy's report or dictating the report that Mr. Guy signed. He admitted a statement of trying to help Mr. Guy get an attorney because he believed Guy had a pending manslaughter case (R-138).

POINTS ON APPEAL

POINT I

THERE IS INSUFFICIENT EVIDENCE TO CONNECT THE DEFENDANT HARRIS WITH THE SALE OF HEROIN ON AUGUST 29, OR AT ANY OTHER TIME.

A reading of the transcript and principally the testimony of Edward Guy, an admitted narcotics addict (R-90) who could not testify as to the transactions between August 25 and August 29 other than by referring to his notes (R-84, 85, 89, 91, 92, 93 and 96), which he did continually during his testimony. He later admitted that the reports he was reading from were not prepared or dictated by him but were prepared by Agent Sutton (R-111).

"RECROSS-EXAMINATION BY MR. HATCH:

Q. Do you typewrite?

A. No. I don't

Q. Then I take it those typewritten reports were done by someone else, is that correct?

A. Well, if I don't I guess somebody else had to do it.

Q. Did you make long-hand written reports on which they were copied?

A. Did I do what, sir?

Q. Did you write our (sic) your reports in long-hand?

A. Did I write out my—

Q. That's right. With a pencil or a pen? Did you write

out the record of what you had done on each one of these days?

A. No, sir, I didn't.

Q. In other words, what you did you went and summarized what you had done to somebody else and somebody typed up that summary and you signed them, is that correct?

A. Agent John Sutton, yes.

Q. Oh, one of the narcotics agents type them up, is that right?

A. Well, he made out his report on what I—what had transpired. I read the report and signed my name to it, yes." (**R-110-111**)

Agent Sutton testified at **R-137**:

"Q. And the notes you have there are the original of what Mr. Guy has the second copy of, and has signed his notes, isn't that correct?

A. No. They are xeroxed copies of my typewritten report.

Q. That's right, but it's your typewritten report, and Mr. Guy's report was your typewritten report, too, isn't it, Mr. Sutton?

A. No. It wasn't.

Q. You mean he made his own?

A. Pardon?

Q. Mr. Guy made his own report?

A. I didn't type Mr. Guy's report.

Q. Well, the report which you typed or caused to be typed is the one that was signed by Mr. Guy, isn't it?

A. Well, yes. Someone—some of them would be ones that—some of the statements I took from him would be his reports.

Q. You didn't type any of his reports, huh?

A. No. I didn't even type this report."

Guy's testimony involving Harris as excluding Saunders indicates that he, with no one else present, gave Harris $300 on or about the 26th day of August at their second or third meeting (R-93), that he received the $300 back (R-93), that he never received the half ounce of heroin that the $300 was supposed to purchase (R-93). What he did receive, he received from defendant Saunders and not from Mr. Harris (R-94). He did not pay Mr. Harris or anyone else for the balloons which he did receive from Saunders (R-94). He admitted that at the time he was working with the BNDD on the Harris-Saunders case he was under homicide charges which had since been dispensed with. He indicated time and time again, especially at R-111 and R-113, that he was reading from reports that "we" made. He admitted at R-114 that he was testifying from type-written reports made up by Agent Sutton, not himself. Agent Sutton testified that he did not see Mr. Guy give Mr. Harris or any other person $300, that he did not see who handed the balloons contained in the exhibits to Mr. Guy, and that he got them from Mr. Guy. He testified that he got the $300 from Mr. Guy but not the same bills. He testified as to some 11 meetings with Mr. Harris trying to get him to sell him heroin, but on cross-examination admitted that the word heroin was never used (R-136 and 137).

He testified that his memory was better at the time of trial than it was at the preliminary hearing because he had been over his notes. He admitted that his notes were made up partially from statements to him by Mr. Guy. He admitted that Guy was working with him for consideration on a manslaughter charge which was pending against him, Guy.

In short, the only evidence against the appellant is that Guy, the under-cover person working for consideration on a criminal charge against himself, who admittedly had been hospitalized for narcotics addiction, had given Harris $300 for half an ounce of heroin which was admittedly never received, that he received the $300 back from Saunders, and received from her 25 balloons containing a powder which chemists testified contained less than a hundredth of an ounce of heroin, for which no consideration was ever received. Also, with respect to this point, we ask the Court to consider the complaint at R-15 and the warrants at R-12, 13 and 14 referring to John Doe a/k/a Sammy, who appears at no place in the testimony. We also ask the Court to consider the affidavit of the defendant Saunders at R-53 and 54 admitting her addiction, admitting the delivery by her of the 25 balloons entered in evidence, and stating that she received and returned to Guy $300 which he had given her on the 25th of August to get him "some stuff" which she was unable to procure. Also, consider that Harris was a black man before an all white jury and the charge involved the sale by him of heroin, the word which continually came up in the testimony of both Guy and Sut-

ton, although upon Sutton's cross-examination he freely admitted that the word heroin was never used and the references made were to "stuff" or "dope."

It would appear clear that the only testimony connecting Harris to the balloons which were admitted as exhibits and the only evidence of the transfer of any heroin came from Guy, who was testifying from reports which admittedly he did not make, and that testimony indicating that Saunders and not Harris had delivered the balloons to him.

POINT II

THE COURT'S GIVING OF INSTRUCTION 14 (R-36), IN CONJUNCTION WITH INSTRUCTIONS 13 (R-35), AND 15 (R-37), IS CONFUSING TO THE JURY AND PREJUDICIAL TO THE DEFENDANT.

A summary of all the evidence can only bring the conclusion that for a period of five days and 11 to 13 meetings the Government Agents attempted to "set up Harris" by buying from him a half ounce of heroin for a price of $300. Said $300 was returned without delivery of heroin. State's witnesses differed as to the number of contacts they had with Harris, Sutton testifying to 13 and Guy testifying to 11, but Guy's testimony being apparently from Sutton's notes, although Sutton denied this (R-137). Each testified that the money allegedly given to Harris by Guy out of Sutton's presence was

returned. Guy's testimony being that he received it from the defendant Saunders and Sutton's that he got the money back from defendant Guy. There is no evidence of either witness with regard to actually procuring any narcotics from Harris. *State v. McCornish*, 201 P. 637.

Instruction 13 properly makes the test "that by provocation and inducement it would be effective to persuade an average person to commit such an offense." On the other hand, Instruction 14 makes the test of finding "that the defendant was an *innocent person* whose natural reluctance to commit a crime to which he had no predisposition was persuaded by a police informer to sell narcotics." (Emphasis ours.)

The difference in the criterion describing the person to be entrapped makes instruction as to a reasonable doubt ineffective and without meaning to the jury and, therefore, prejudicial to the defendant. Defense counsel took proper exceptions to Instruction 14 (R-162).

POINT III

THERE IS NO SHOWING OF AGENCY OR CONSPIRACY BETWEEN THE DEFENDANT HARRIS AND SAUNDERS NOR ANY EVIDENCE TO MAKE HARRIS A PRINCIPAL TO THE TRANSFER OF THE BALLOONS (EXHIBIT 2) FROM SAUNDERS TO GUY.

The court properly refused a requested instruction (State's Requested Instruction 1, R-21) as to principals on the basis that there was no evidence beyond a reasonable doubt constituting a conspiracy between them or making one principal under 76-1-44, Utah Code Annotated (1953), as amended, to any crime committed.

The evidence is conclusive that Agent Sutton and informant Guy tried unsuccessfully for five days involving 11 or 13 meetings, depending on whose testimony is believed, to get defendant Harris to sell them a half ounce of heroin for $300. The evidence of both Sutton and Guy is also conclusive that $300 was returned to them. Defendant Saunders is in no way involved with the half ounce of heorin other than by her affidavit (R-53 and 54) wherein she states:

"5. That on or about the 25th day of May she heard Federal Agent Sutton and informer Guy attempt to buy narcotics from Billy Harris.

6. That she had known said Guy and had 'shot up with him' on numerous occasions.

* * *

8. That she met Guy in a parking lot behind the Regal Cafe in Salt Lake City later on the 25th day of August, 1971, and told him she knew where he could get 'some stuff'; that she later received $300 from Guy and agreed to procure for him 'half a piece'.

9. That neither Harris nor Sutton were present at the time.

10. That she made a trip out of town to procure the discussed narcotics and was unable to make the pur-

chase, but did procure the twenty-five balloons entered in evidence in the trial of the above case.

11. That she delivered them to Guy at the Regal Cafe in the pool room on the 29th day of August, 1971, and there was no one else present in that room at the time of delivery." (R-53 and 54).

Guy did testify as to a conversation with Saunders at the time of the return of the money, but that conversation was properly excluded by the court as to Harris. The only matter which might be considered a sale under Instruction 11 was the transfer of the balloons (Exhibit 2) from Saunders to Guy in the pool room (R-109). There is no evidence as to any consideration being given for the balloons containing approximately one hundredth of an ounce of heroin. The evidence when read in its entirety does not make Harris an accessory before the fact of the transfer shown to have been made by Saunders.

POINT IV

THE TRIAL COURT ERRED IN DENYING DEFENDANT HARRIS'S MOTION FOR NEW TRIAL.

Defendant Harris made a timely motion for new trial under 77-38-3(5), (6) and (7), Utah Code Annotated (1953) (R-56 and 57). The point in the motion for new trial under 77-38-3(5) has heretofore been discussed in Point II, *supra*, and that under subsection (6) in Point I, *supra*. The third basis claimed for new trial

was under subsection (7), Newly Discovered Evidence, based on the defendant Saunders' affidavit (R-53 and 54), and the facts set forth in the motion for new trial (R-56 and 57):

"That she did not inform counsel prior to the time of trial or testify at the trial on the belief that as Harris was not actually involved he would not be convicted and that his presence as a codefendant would probably result in her acquittal."

The evidence in the Saunders affidavit is factual and contradicts testimony by witness Guy and further amounts to admissions against interest of a party. See 58 Am. Jur. 2d 389, New Trial, §174. Additionally, there are facts which, if believed by the finder of fact, would probably change the outcome of the trial. Annotation at 49 A.L.R. 2d 1247, 1250 §2(d).

The trial judge apparently recognized the above requirements but denied the motion for new trial on the basis that Harris by due diligence could have been aware of the facts set out in the Saunders affidavit prior to trial.

This is not the case.

The fact that the defendants are jointly charged does not create any common knowledge, agency or conspiracy between them. Each is charged individually, and there is no basis in criminal law for imputation of knowledge of one to the other unless a conspiracy be alleged or an agency shown. Each of them is charged individually and alone and one is in no way responsible for the other, nor presumed to have the knowledge of the other.

The evidence in the case shows no agency relationship between Saunders and Harris, and even though they were both represented by common counsel, Harris had no way of knowing the mind of Saunders until Saunders revealed the facts in the affidavit to counsel.

In view of the disparities in the testimony of the witness Guy who was the only one to purportedly connect Harris with the money, and who testified he got the money back from Saunders and also the balloons (Exhibit 2) from Saunders, combined with Guy's admitted heroin addiction and hospitalizations, therefore, his interest in working for the BNDD for consideration on a homicide charge presently pending against him and his inability to testify without memoranda, said memoranda apparently being a copy of witness Sutton's notes (see Point I), it is not only probable but likely that Saunder's evidence would have changed the outcome of the trial as far as Harris was concerned. See *Taborsky* vs. *State*, 142 Connecticut 619, 116 A.2d 433, annotated at 49 A.L.R. 2d 1238.

SUMMARY

In view of the testimony of witness Guy discussed in detail in Point I and the fact that the purported delivery of the money, the return of the money and receipt of the balloons (Exhibit 2) was evidenced only by Guy, combining that basis with the nature of Guy's testimony, his admitted background and failure to be able to testify without reference to notes which were not made by him

at the time of the incident, combining Point I with Point III and the lack of evidence gainst Harris pointed out therein, and further considering the lack of evidence showing agency between defendants Harris and Saunders, it would appear that Point IV is well taken and the court erred in denying defendant Harris's motion for new trial.

The writer realizes that the motion for new trial was heard prior to completion of the transcript of the evidence and Judge Hall was without means of minutely reviewing the testimony. There is no evidence, presumption or indication that Harris knew or could have known what was in defendant Saunders's mind prior to her revealing that knowledge, and the reasons for concealing it, until after a guilty verdict against them both.

In view of our statute setting forth grounds for a new trial and the circumstances of this case, it is respectfully urged that the Court reverse the verdict and judgment and grant defendant Harris a new trial.

Respectfully submitted,

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