Ben MURRAY and Patricia LANGFORD *v.* STATE of Arkansas

CR 81-88 628 S.W. 2d 549

Supreme Court of Arkansas
Opinion delivered February 1, 1982
[Amendment to Opinion on Denial of Rehearing delivered March 22, 1982.]

1. CRIMINAL LAW — SALE OF MARIHUANA — SUFFICIENCY OF EVIDENCE. — There is amply sufficient substantial evidence to support the court's conclusion that both defendants were guilty of selling a bag of marihuana where the "buy" was arranged in a call to both defendants, both appeared in response to the call, and Langford completed the sale in Murray's presence.
2. CRIMINAL LAW — POSSESSION OF MARIHUANA WITH INTENT TO DELIVER — SUFFICIENCY OF EVIDENCE. — There is substantial

evidence to support the court's conclusion that the two defendants jointly possessed marihuana with intent to deliver where the evidence shows that two bags of marihuana were bought by an undercover agent and an acquaintance of defendants from defendant Langford, who got the drugs from the couple's bedroom where defendant Murray, Langford's husband, was talking on the telephone, and where the two had sold marihuana together the preceding evening.

3. CRIMINAL PROCEDURE — CHAIN OF CUSTODY OF MARIHUANA, FAILURE TO OBJECT TO — EFFECT. — The Supreme Court will not reverse on the basis of an argument by appellants that the State did not prove that the substance sold was marihuana, due to some confusion at trial concerning the handling and labeling of the two bags of marihuana which were analyzed, where the defense made no objection to the chain of custody and, if such an objection had been made, the witnesses were available for further questioning and the omission could have been easily remedied.
4. CRIMINAL PROCEDURE — SEARCH & SEIZURE — NIGHTTIME SEARCH, GROUND FOR. — A belief that objects to be seized are in danger of imminent removal is a ground for a nighttime search. [Rule 13.2 (c) (ii), A. R. Crim. P.]
5. TRIAL — DECISION ON MERITS — FAILURE TO OBJECT ON BASIS OF LACK OF NOTICE, EFFECT OF. — A litigant cannot speculate upon the chance of success by meeting an issue on the merits and then, after an adverse decision, insist for the first time that the proceeding should never have been conducted at all, for want of notice.
6. DRUGS — FORFEITURE OF TRUCK USED IN SALE OF MARIHUANA — REVIEW. — It would be futile for the Supreme Court to remand the case at bar to allow the trial judge to consider for the third time the forfeiture of a truck under Ark. Stat. Ann. § 82-2629 (Repl. 1976), which was used in the sale of marihuana, absent any indication that additional evidence is available.
7. EVIDENCE — HEARSAY EVIDENCE — COMPETENT WHERE NO OBJECTION IS MADE. — Hearsay, not objected to, is competent evidence to support the verdict.

Appeal from Saline Circuit Court, *John W. Cole*, Judge; affirmed.

Lanny K. Solloway, by: *Linda F. Boone* and *E. Alvin Schay*, for appellants.

Steve Clark, Atty. Gen., by: *Alice Ann Burns*, Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, The appellants, Ben Murray and Patricia Langford, who is called Bunny, are husband and wife. On December 17, 1980, they were jointly charged with six offenses involving the possession or sale or controlled substances. On trial to the court they were both found guilty of two offenses: Sale of marihuana on November 4 and possession of marihuana with intent to deliver on November 5, 1980. The other charges were dismissed for want of proof. Ben was sentenced to two consecutive four-year terms and two $5,000 fines. Bunny was sentenced to two consecutive two-year terms and two $1,000 fines. For reversal the appellants argue that the evidence was insufficient to support the convictions, that a nighttime search was not justified, and that there was a denial of due process of law in the proceedings resulting in the forfeiture of Bunny's pickup truck under Ark. Stat. Ann. § 82-2629 (Repl. 1976), which provides in subsection (a) (4) for the forfeiture of vehicles used to transport controlled substances for the purpose of sale. We affirm the convictions and forfeiture.

First, there is substantial evidence to support the court's conclusion that both defendants participated in the sale of a bag of marihuana on the evening of November 4. That sale took place outside a motel. Several undercover officers participated in arranging the "buy." Lee Smith, a woman who was cooperating with the officers, telephoned Ben, who agreed to bring a bag of marihuana to room 241 at the motel in about 45 minutes. He duly appeared in a pickup truck with two women, got out of the truck, and knocked on the door of room 241. Lee Smith came to the door and went outside with Ben to complete the purchase. She testified that Ben said Bunny was driving the truck. Such hearsay, not objected to, is competent evidence to support the verdict. *Ark. State Hwy. Commn.* v. *Bradford,* 252 Ark. 1037, 482 S.W. 2d 107 (1972); *McWilliams* v. *R & T Transport,* 245 Ark. 882, 435 S.W. 2d 98 (1968). Before the sale was completed Ben waved down the truck, which had been circling in the area. In Ben's presence Lee paid $40 to the woman driving the truck and received the marihuana from her. At the trial Lee was unable to identify the defendant Langford as the person who had driven the truck, having seen her (Bunny) only once before. Even so, there was sufficient substantial evi-

dence to support the trial judge's finding that the defendants were jointly guilty of selling marihuana. There was direct and circumstantial proof that the sale was arranged in a telephone call to Ben, that Ben and Bunny duly appeared in response to the call, and that Bunny completed the sale in Ben's presence. Furthermore, in proving appellants were both guilty of possession with intent to deliver marihuana on November 5, the State introduced evidence that a confidential informant went to Bunny's and Ben's mobile home and bought marihuana from Bunny, who got it out of their bedroom. This evidence, together with the evidence concerning the November 4 incident, is sufficient to uphold the conviction for sale of marihuana on November 4.

There is likewise substantial evidence to support the court's conclusion that on the following evening, November 5, the two defendants jointly possessed marihuana with intent to deliver. A purchase was arranged with the co-operation of Debra Patterson, who had previously lived in the mobile home with the defendants. Debra telephoned early that evening and arranged with Bunny that Debra would come out to pick up some jewelry she had left there and to buy a bag of marihuana. She then went to the mobile home accompanied by another woman, undercover officer Weaver. Each woman bought a bag of marihuana from Bunny, for $40 apiece. There was testimony that Bunny got the marihuana by going to the couple's bedroom, where Ben was then talking on the telephone. During the transaction Bunny told Ms. Weaver that if she bought drugs in quantity Ben might cut the price. When we consider that Ben and Bunny had sold marihuana together the previous evening, that the November 5 purchase had been prearranged with Bunny, that she got the drugs from the couple's bedroom, and that Ben was in that room at the time, talking on the phone, we hold that there is substantial proof to sustain the trial court's finding of joint possession, circumstantial evidence being sufficient. *Williams* v. *State,* 271 Ark. 435, 609 S.W. 2d 37 (1980); *Cary* v. *State,* 259 Ark. 510, 517, 534 S.W. 2d 230 (1976).

On this point Ben in particular argues that the State did not prove that the substance sold that evening was mari-

huana. There was proof from the state crime laboratory that a plastic bag of vegetable matter received from Officer Weaver was marihuana and that a similar bag received from Officer Jenkins was marihuana. There was some confusion at the trial about the handling and labeling of the two bags, but the defense made no objection to the chain of custody. Had such an objection been made the witnesses were available for further questioning. It is not our practice to reverse the action of the trial court when an omission such as this one could have been easily remedied upon a proper objection. *Ark. State Highway Commn.* v. *Newton*, 253 Ark. 903, 489 S.W. 2d 804 (1973).

The bags of marihuana were introduced in evidence, though that was not essential. *Moser* v. *State*, 262 Ark. 329, 557 S.W. 2d 385 (1977); *Washington* v. *State*, 248 Ark. 318, 451 S.W. 2d 449 (1970). Even if one of the two bags received by the laboratory was the one sold at the motel the night before, the other bag was apparently one of the two sold at the mobile home. Moreover, the two purchasers in the second transaction understood they were buying marihuana, and Bunny represented that the bags contained marihuana. The trial judge was justified in finding that the defendants jointly possessed marihuana for the purpose of sale.

With regard to the nighttime search, Officer Weaver stated in her affidavit for the search warrant (1) that earlier on the same evening, November 5, she had purchased marihuana brought from the bedroom of the mobile home, (2) that Benny (Bunny) had said that all of certain drugs except 20 had been sold, and (3) that that quantity could easily be sold. On the basis of those facts the affiant said that a search at night was necessary. The officer issuing the search warrant was certainly justified in relying upon the statements as a basis for the requested nighttime search. A belief that objects to be seized are in danger of imminent removal is a ground for a nighttime search. A. R. Crim. P., Rule 13.2 (c) (ii).

Finally, we come to the forfeiture of Bunny's truck. It must be remembered that neither defendant was aware at the time that on both evenings their sales of marihuana had been set up by undercover officers and were being observed.

Their first intimation of possible detection arose when they returned to their mobile home on November 6 after the search at about 11:00 o'clock the preceding night, and found a copy of a search warrant left on a table by the searching officers. The defendants consulted an attorney, with whose approval they voluntarily surrendered the truck to the sheriff on November 17, with Bunny signing a transfer of title to the vehicle. At that time no charges had been filed. Apparently the defendants and their attorney then believed that the only charge would be based upon the sales at the mobile home on November 5, when the truck was not used.

The information containing the six felony counts was not filed by the prosecutor until December 17. On that same day the two defendants were arraigned, with pleas of not guilty. The court then proceeded at once to what the court stated to be a forfeiture hearing. The State proved beyond question that the truck had been used in the sale at the motel and was presumably subject to forfeiture under the law. The defendants and their counsel were present at that hearing, but no objection was raised concerning any lack of notice that a forfeiture hearing was to be conducted, nor was there a plea of surprise or a request for a continuance to meet the State's proof. The hearing proceeded in its normal course, with the court declaring at its conclusion that the truck was forfeited under the statute.

It was not until 12 days after the hearing and the adverse decision that a motion for reconsideration was filed, raising in the record for the first time the arguments now urged on appeal: That the defendants came to the forfeiture hearing in the belief that only a motion for a restoration of the previously surrendered truck was to be heard (no such motion was actually made), that the defense had no prior notice that the State intended to seek a forfeiture of the truck, and that due process required such advance notice of the forfeiture proceeding. All those objections could have been interposed at the forfeiture hearing, but the record does not indicate that they were even mentioned. Instead, the defense met the issues on the merits, head-on, by taking part in the proceeding without objection and by cross-examining the State's witnesses. It was then too late for the defense, after having failed on the merits, to raise the issue that the hearing

should never have been held in the first place. A litigant cannot speculate upon the chance of success by meeting an issue on the merits and then, after an adverse decision, insist for the first time that the proceeding should never have been conducted at all, for want of notice.

Furthermore, the defendants and their counsel have never mentioned any possible evidence that might rebut the State's positive proof that the truck was used in the transportation of marihuana and was therefore subject to forfeiture. At the beginning of the trial on the merits defense counsel argued his motion for a reconsideration of the forfeiture. The trial judge ruled: "I think I have considered every argument that you made regarding the hearing to forfeit the vehicle and will rule at this time that the forfeiture was proper, and I will . . . deny your motion to reconsider." It would be futile for us to remand the case to allow the trial judge to consider the forfeiture for a third time, absent any indication that additional evidence is available.

Affirmed.