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IN THE SUPREME COURT

OF THE STATE OF UTAH

STATE OF UTAH,)

Plaintiff-Respondent,)

-vs.-) Case No. 14624

ALBERT ROSS,)

Defendant-Appellant.)

BRIEF OF APPELLANT

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

TOM JONES
263 South Second East
Salt Lake City, Utah 84111

Attorney for Appellant

ROBERT B. HANSON
Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorney for Respondent

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R. refers to Record
Tr. refers to Transcript

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IN THE SUPREME COURT

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STATE OF UTAH,	)	
Plaintiff-Respondent,	)	
-vs.-	)	Case No. 14624
ALBERT ROSS,	)	
Defendant-Appellant.	)	

BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

The appellant, Albert Ross, was convicted before the Second Judicial District Court, in and for Weber County, State of Utah, of the crime of Distribution of a Controlled Substance for Value in violation of Utah Code Ann., 58-37-8 (1953). The Honorable Ronald O. Hyde, Judge, presided. From that judgment of conviction the defendant brings this direct appeal.

DISPOSITION IN THE LOWER COURT

The jury impaneled in the matter found the defendant

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guilty of the crime of Distribution of a Controlled Substance for Value. Subsequently, the trial court sentenced appellant to serve an indeterminate sentence in the Utah State Prison of from one to fifteen years, as provided by law.

STATEMENT OF FACTS

On December 9, 1975, at approximately 3:15 p.m., one Kenneth Goode, an undercover narcotics operative for the Ogden City Police, entered a residence located at 823 West Ellis Street, Ogden, Utah, for the purpose of making an alleged "controlled buy" of narcotics with money furnished him by the Ogden City Police. (Tr. 5-6, 12, 31).

At trial in this matter, the only testimonial evidence adduced by the State of Utah with respect to what transpired within said residence was furnished by Mr. Goode. Briefly, Mr. Goode's uncorroborated testimony was that, upon entering said residence, he encountered appellant and one Fred Eaton. After some brief preliminary conversation with defendant regarding the proposed buy, Mr. Goode testified that he gave Mr. Eaton $200.00 and received eight "ballons" of a substance identified at trial as Heroin (Tr. 63-65). No one other than Mr. Goode observed the alleged transaction nor even saw the defendant. (Tr. 25, 40). None of the money employed to make the

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alleged buy was ever recovered from defendant and defendant was not arrested nor charged in the matter until some two weeks later on December 23, 1975.

From the testimony of the undercover operative, Mr. Goode, it was clearly established that the State's chief witness, was a twice convicted felon (Tr. 5,8-9,12,57, R. 76); a "former" heroin addict who was, at the time of the alleged buy, under the influence of Methadone, a Class "A" narcotic (Tr. 5, 8-9, 10,21, 31, 40, 56, R. 76); a thief with two pending felony charges of Possession with Intent to Distribute for Value and Burglary arising out of an enormous recent burglary of a local drug store in Washington Terrace, Utah (Tr. 21-22, 27, 32, 89); a "former" dealer in controlled substances (Tr. 32) who had sold drugs in substantial quantity on numerous occasions and was widely regarded as "one of the biggest suppliers in Ogden" (Tr. 105); who had apparently received or was to receive some substantial consideration in exchange for his testimony in this and related cases in the Ogden area (Tr. 8-9, 12, 10-12, 21-23, 32-33, 82, 92, 118-122), and who, at one juncture during questioning at trial, found it necessary to invoke his privilege against self-incrimination (Tr. 71).

Upon trial, in the matter, subsequent to both parties having rested their respective cases, the jury retired to consider the matter. Upon deliberation, the jury returned a verdict against defendant-appellant of Guilty of Distribution for Value of a Controlled Substance, and judgment and sentence were duly entered by the trial court accordingly (Tr. 162-166, R. 86). From that verdict and judgment the defendant-

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appellant brings this appeal.

ARGUMENT

POINT I

THE EVIDENCE PRESENTED AT TRIAL IN THIS MATTER WAS LEGALLY INSUFFICIENT TO SUPPORT DEFENDANT'S CONVICTION

It is well established as a matter of law that, in a criminal prosecution, the State must establish beyond all reasonable doubt all of the elements of the offense charged, and that in the absence of such degree of proof the defendant is entitled to acquittal. Holt v. United States, 218 U.S. 245, 54 L. Ed. 1021, 31 S. Ct. 2 ( ); State v. Allgood, 28 Utah 2d 119, 499 P. 2d 269 (1972); State v. Shonka, 3 Utah 2d 124, 279 P. 2d 711 (1955); State v. Sullivan, 6 Utah 2d 110, 307 P. 2d 212 (1957); State v. Danks, 10 Utah 2d 162, 350 P. 2d 146 (1960). It is further well established that the Supreme Court, in reviewing the legal sufficientcy of the evidence submitted to the trier of fact, may set aside a verdict of guilty where the evidence was so inconclusive and unsatisfactory that reasonable men could and should have entertained reasonable doubt that the defendant committed the crime charged. (State v. Allgood, supra; State v. Shonka, supra; State v. Sullivan, supra; State v. Danks, supra.)

In State v. Sullivan, supra, Mr. Justice Crockett, speaking for the Court, enunciated fully the above standard:

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> The presumption of innocence and the requirement of proof of guilt beyond any reasonable doubt, are indeed of the utmost importance as safeguards against the possibility of convicting the innocent. We scrupulously adhere to them notwithstanding the difficulties encountered and the possibility that some guilty may escape punishment. It is an ancient and honored adage of our law that it is better that ten guilty go free than that one innocent person be punished. We appreciate the wisdom of that maxim and the importance of according every proper consideration to those accused of crime . . .
>
> Before a verdict may properly be set aside, it must appear that the evidence was so inconclusive or unsatisfactory that reasonable minds acting fairly upon it must have entertained reasonable doubt that defendants committed the crime. Unless the evidence compels such conclusion as a matter of law, the verdict must stand. (6 Utah 2d pp. 113-114).

Similarly, in State v. Danks, supra, Mr. Justice Callister wrote:

> Before setting aside a jury verdict it must appear that the evidence was so inconclusive or unsatisfactory that reasonable minds acting fairly upon it must have entertained reasonable doubt that defendant committed the crime. (10 Utah at 164).

This court has also stated:

> If the State's evidence is so inherently improbable as to be unworthy of belief, so that upon objective analysis it appears that reasonable minds could not believe beyond a reasonable doubt that the defendant was guilty, the jury's verdict cannot stand. Conversely, if the State's

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> evidence is such that reasonable minds could believe beyond a reasonable doubt that the defendant was guilty, the verdict must be sustained. State v. Mills, 122 Utah 306, 249 P. 2d 211 (1952). (See also State v. Horne, 12 Utah 2d 162, 364 P. 2d 109 (1961) for the same rule).

Finally, in what appear to be some what variant statements of essentially the same principle enunciated in the above cited cases, this Court has said that a jury verdict of guilty may be set aside when "taking the evidence in the light most favorable to the verdict," the "findings are unreasonable." State v. Berchtold, 11 Utah 2d 208, 357 P. 2d 183 (1960). Alternatively, if the verdict is "supported by sufficient competentevidence" a new trial is to be denied. State v. Rivenburgh, 11 Utah 2d 95, 355 P. 2d 689 (1960). See also State v. Schad, 24 Utah 2d 255, 470 P. 2d 246 (1970) for the rule that there must be a "reasonable basis" for the verdict.

It is apparent from these various statements of the law that this court does clearly have the power to reverse and remand in an appropriate case and to direct that a new trial be had.

This court has said that:

> We are not unmindful of the settled rule that it is the province of the jury to weigh the testimony and determine the facts. Nevertheless, we cannot escape the responsibility of judgment upon whether under the evidence, a jury could, in reason, conclude that the defendant's guilt was proved beyond a reasonable doubt. State v. Williams, 111

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Utah 379, 180 P. 2d 551, 555 (1947).

Applying the above cited cases and authority to the facts in the instant case, it is clear that the evidence presented herein was so inconclusive and unsatisfactory that the trier of fact must and should have entertained reasonable doubt with respect to defendant's guilt.

As previously noted in Appellant's Statement of Facts, supra, the State's case against defendant is predicated solely upon the testimony of one Ken Goode, an undercover operative for the Ogden City Police. Only Ken Goode witnessed the alleged transaction that was the basis of the State's case and only Ken Goode identified the defendant as one of the individuals purportedly involved in such transaction. (Tr. 25, 40). The State's case is founded entirely upon his testimony and his testimony alone.

As regards Ken Goode, the record in this matter clearly discloses that he is a twice convicted felon (Tr. 5, 8-9, 12, 57, R. 76), that at the time of his testimony herein there were pending against him two felony charges of Possession With Intent to Distribute for Value and Burglary (Tr. 21-22, 27, 32, 89), that he was a "former" dealer in controlled substances who was widely regarded as one of the biggest suppliers in the Ogden area, that he had apparently received or was about to receive some substantial consideration in exchange for his testimony in this and related cases (Tr. 8-9,

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12,10-12, 21-23, 32-33, 82, 92, 118-122).

Appellant does not contend, nor would appellant be so naive as to contend, that Ken Goode was not a competent witness to testify in the trial proceedings. (See in this regard Utah Code Annotated 78-24-1 (1953) and the cases and authority cited to thereafter). Appellant only contends that when this court has had an opportunity to review the uncorroborated and unsubstantiated testimony of such witness, with attention to all of the above mentioned matters of record with respect to such witnesses' character, background and apparent and obvious motives to fabricate, that this court will conclude that said witnesses' testimony was thoroughly impeached and unworthy of belief and that the trier of fact, upon the "reasonable man" standard set forth in the above-cited cases, must and should have entertained reasonable doubt that defendant committed the crime charged.

CONCLUSION

The verdict of guilty in the instant case was clearly not supported by the believable evidence. This court should reverse the verdict and judgment of the trial court and remand this matter for a new trial.

Respectfully submitted,

TOM JONES
Attorney for Appellant
263 South Second East
Salt Lake City, Utah

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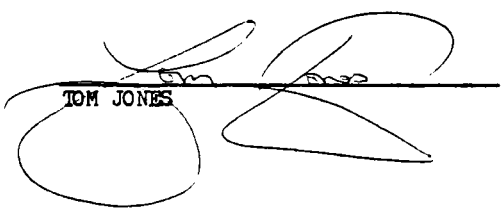
CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Appellant was duly served on counsel for the respondent, Robert B. Hanson, Utah State Attorney General, 236 State Capitol Building, Salt Lake City, Utah, by hand delivering three (3) copies thereof this 27th day of May, 1977.



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