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Criminal Law - Sale of Marijuana - Liability of Agents

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ernment. To add to the problem, the Union has countersuited for \$1,000,000. It is easy to imagine similar suits in the Philadelphia area if one of the contractors loses a Government contract because he has not met his good faith obligation. Any suit such as this must create friction between management and labor and especially so in a situation such as exists in Kansas City where a construction industry strike has already lasted more than five months.²⁵ It would seem that the Government could promote racial equality by other means which would be less conducive to labor-management strife.²⁷

One such method which would promote racial equality and which should not promote labor-management strife is indicated by the case of *United States v. Sheet Metal Wkrs. Int. Ass'n., Local 36*.²⁶ That case seems to recognize that it is better to direct racial equality efforts against the unions rather than the contractors. In *Sheet Metal Wkrs.*, the Court of Appeals for the Eighth Circuit ordered the union to undertake a public information program to show Negroes that they now have equal opportunities for union membership.²⁷ That action was undertaken by the United States Attorney General for the benefit of local minority groups. There is nothing in the digests²⁸ to indicate that any such action has been undertaken in the Philadelphia area. It is hard to understand how the Court in the instant case can say that the Philadelphia Plan is not arbitrary and capricious when there is a much more reasonable and efficacious method available as indicated by the *Sheet Metal Wkrs.* case.

It is not contested that the Government has the right and the duty to see that minority groups are properly represented in contracts involving federal money. It should be proper, however, to contest the methods which they have chosen to carry this out. It is suggested that applying pressure on the contractors rather than the unions is merely giving lip service to the intended goal.

MERVIN D. NORDENG

CRIMINAL LAW—SALE OF MARIJUANA—LIABILITY OF AGENTS—Appellant was arrested and tried for the sale of marijuana to Gregory Waxler, whom appellant claimed was his partner in the purchase of the marijuana.¹ On the evidence presented by Waxler, the

25. Kansas City Star, Sept. 9, 1970, at 2A, col. 3.

26. *United States v. Sheet Metal Wkrs. Local 36*, 416 F.2d 123 (8th Cir. 1969).

27. *Id.* at 140.

28. 5 WEST DECENNIAL DIGEST *Civil Rights* §§ 2-3 (7th ed. and 1967-1970 Supp.).

1. A reading of the trial transcript seems to sustain appellant's contention that Waxler was his partner.

[cross-examination of Gregory Waxler by Mr. Murphy]

appellant was found guilty of the sale of marijuana, a crime punishable by a fine of two thousand dollars or two years in prison or both.² A motion for a new trial on the grounds that the verdict of the jury was contrary to law and clearly against the evidence was denied by the district court and appellant appealed to the Supreme Court of North Dakota, alleging that there was no sale of marijuana as described in the North Dakota Century Code.³ The Court *held* that "sale," as used in connection with narcotics statutes, is broader in meaning than when used in connection with other statutes and the judgment of conviction was affirmed. *State v. Dwyer*, 172 N.W. 2d 591 (N.D. 1969).

The definition of "sale" as used in the North Dakota Century Code is taken verbatim from the Uniform Narcotic Drug Act.

Sale-includes barter, exchange, or gift, or offer therefore, and each such transaction made by any person, whether as principal, proprietor, agent, servant or employee.⁴

The Court focused on the question of whether the transfer of marijuana between an agent and his principal constituted a sale under the North Dakota statute. In holding that a "sale" did take place the court followed the lead of the Superior Court of New Jersey⁵ and adopted the language of the Supreme Court of Illinois.

We interpret the meaning of the word 'sale' as defined by the act, to be much broader than that usually given to it in other branches of the law.⁶

The construction of the term "sale" so as not to include the agent of the purchaser as seller originally comes from federal decisions that form the basis for later state decisions. The earliest was *United States v. Sawyer*,⁷ where it was pointed out that the dis-

Q. "And did you say at that time-would it be safe to say you decided between the two of you to purchase and sell marijuana?"

A. "Yes"

Q. "And as an outgrowth of that agreement would you say then that you and the defendant did purchase the very marijuana we are talking about today?"

A. "I think so."

[recross-examination]

Q. "Let me ask you this: This money you allegedly paid to the defendant, Richard Dwyer, that was part of an agreement that you and he had, would it be safe to say, this is part of your payment towards the purchase of this marijuana?"

A. "What?"

Q. "That this was part of the agreement between you and Richard Dwyer-would it be safe to say that this money was part of your share of the general scheme and plan to purchase marijuana and resell it?"

A. "Yes, I think you could say that."

2. N.D. CENT CODE § 19-03-28.1 (1969 Supp.).

3. N.D. CENT CODE § 19-03-01(9) (1960).

4. UNIFORM NARCOTIC DRUG LAW § 1(10), 9 B.U.L.A. (1966).

5. *State v. Weisssmen*, 73 N.J.Super. 274, 179 A.2d 748 (1962).

6. *People v. Shannon*, 15 Ill.2d 494, 155 N.E.2d 580 (1959).

inction between a seller and a purchasing agent is obvious to a lawyer and thus because defendant was acting for the buyer and not seller, he could not be convicted under an indictment for the crime of sale. The *Sawyer* decision was reaffirmed in *United States v. Moses*,⁸ in which the court stated that the United States Code⁹ treats selling and buying as separate offenses, and limits the offenses to selling and buying, setting up no general offense of participation in the transaction viewed as a whole.

The New York courts have followed the approach taken by the federal courts. They have stated that an agent of a purchaser cannot be convicted of selling narcotics to his principal¹⁰ since he receives no consideration.¹¹ The New York statute is similar to North Dakota's, except that it could be construed broader as it includes the word "gives" as one of the punishable acts under the statute.¹² The Supreme Judicial Court of Massachusetts has expressly stated that they will not follow the doctrine set up by the Illinois court in the *Shannon* case, but will follow the New York approach. The Massachusetts court focused on the facts that the defendant had no financial interest in the transaction, nor was employed by the seller to promote sales.¹³ The defendant in the Massachusetts case was tried under a Massachusetts statute¹⁴ which is exactly the same as the North Dakota statute. The Texas Court of Criminal Appeals, while searching for an interpretation of the term "sale" as described in the drug laws of Texas,¹⁵ chose to accept the decisions of the New York courts and reject those of Illinois, and thus held that the agent of the purchaser is not guilty of making a sale as the agent was in no way associated with the seller and received no financial profit.¹⁶

The Illinois and the New Jersey cases relied on by the North Dakota Supreme Court are distinguishable from the factual situation presented in the instant case. In the *Shannon* case the defendant received consideration for getting drugs for the purchaser. Appellant did not. The money received by appellant was Waxler's share of the cost of the marijuana. Appellant made no profit from the transfer of the marijuana, but the defendant in the *Shannon* case did. The Illinois court stated that they believed that any person who took part in such transaction was guilty of the crime of sale.¹⁷ The question

7. *United States v. Sawyer*, 201 F.2d 169 (3rd Cir. 1953).

8. *United States v. Moses*, 220 F.2d 168 (3rd Cir. 1955).

9. 26 U.S.C.A. §§ 2553-54 (1967).

10. *People v. Pulliam*, 28 App.Div.2d 786, 281 N.Y.S.2d 137 (1967).

11. *People v. Lindsey*, 16 App.Div.2d 805, 228 N.Y.S.2d 427 (1962) *affd.* 12 N.Y.2d 958, 238 N.Y.S.2d 956 (1962).

12. N.Y. PENAL LAW § 1751 (McKinney 1967). "Any person who shall barter or exchange with or sell, give or offer to give another any narcotic drug." (emphasis added).

13. *Commonwealth v. Harvard*, 69 A.S. 1341, 253 N.E.2d 349 (1969).

14. MASS. GEN. LAWS ANNO. ch. 94, § 197 (1958).

15. TEXAS PENAL LAW art. 725b, § 1(10) (Vernon's Anno. P.C.) (1961).

16. *Smith v. State*, 396 S.W.2d 876 (Tex. 1965).

17. *People v. Shannon*, 15 Ill.2d 494, 155 N.E.2d 580 (1955).

should have been asked of the Illinois court why the Illinois legislature made a crime of possession¹⁸ if the legislature meant the crime of sale to be all encompassing. In the *Weissmen* case, the transaction that the New Jersey court held to be a sale was between the defendant who sold the marijuana to the alleged agent who in turn sold it to the ultimate purchaser. This situation would be better likened to a wholesaler—retailer relationship rather than one between a principal and an agent. The alleged agent bought for three dollars and sold for five, thus receiving consideration for the transfer.¹⁹

It seems that the court was wrong in holding that this agency relationship gave rise to a sale. There are several questions that should be asked by every court when dealing with the agency situation in relation to sales. Did consideration pass from the principal to the agent for the purpose of a payment to the agent, or was the consideration merely to be delivered by the agent to the seller? A good test might be to look at any profit the agent might make by the transfer of the marijuana from himself to the buyer. Was there a transaction between the agent and the purchaser? Was the agent acting as an agent of the seller in a common scheme or plan? The court should look at who put the agent into motion, under whose orders was he working, and who employed him.

The real aim of the statute is to throw aside the defense of any "principal, proprietor, agent, servant, or employee" who seeks to insulate himself by imposing another between himself and the sale. It is aimed at the dispenser of marijuana, not the procurer.

The act of transfer of the marijuana from appellant to his partner does not fit any of the definitions given in the North Dakota statute. It is not a sale,²⁰ barter,²¹ exchange,²² gift,²³ or offer therefore. Appellant held the marijuana in trust for his fellow purchaser and thus the only act that took place between the two was a transfer of possession. The agent is like the arm of the principal. An arm does not sell food to the body, and neither does an agent sell marijuana to his principal. The principal cannot buy what he already owns.

The definition of "sale" has been broadened by the inclusion of the words barter, exchange, gift, or offer therefore within it. This writer does not believe that average men would consider these transactions a sale, so why should the court introduce the relationship between an agent and a principal as another element of sale and add still more confusion? It is for the state legislature to decree whether or not certain acts are to be criminal, not the courts.

18. ILL. CRIM. LAW AND PROC. ch. 38 § 22-3 (Smith-Hurd Ill. Anno. Stat. 1970).

19. *State v. Weissmen*, 73 N.J.Super. 274, 179 A.2d 750 (1962).

20. BLACK'S LAW DICTIONARY 1503 (rev. 4th Ed. 1968).

21. *Id.* at 191.

22. *Id.* at 671.

23. *Id.* at 817.

The Federal Courts have now found a method of including agents of the purchaser within the punishable class.²⁴ The agent is now held for facilitating the sale, but not for the sale itself. This is based on a federal statute which expressly lists facilitation as a crime.²⁵ The courts of North Dakota should be patient and wait for our legislature to do the same before they punish one who does something "bad" but not punishable under the present laws.

MARK THOMASON

24. *Lewis v. United States*, 337 F.2d 541, (D.C. Cir. 1964).

25. 21 U.S.C. § 174 "[O]r receives, conceals, buys, sells, or in any manner *facilitates* the transportation, concealment or sale," (emphasis added).