ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY

STATE OF ARIZONA v. KEVIN OTTAR
and RUAN JUNIOR HAMILTON
CR-12-0462-PR

PARTIES:

Petitioners: Kevin Ottar and Ruan Junior Hamilton

Respondent: State of Arizona

FACTS:

In this "reverse sting" operation, undercover officers posed as sellers and set up a transaction with Ottar and Hamilton ("Defendants"), unwitting buyers who both physically inspected and handled marijuana shown them in a secured warehouse. There was no possible way for Defendants to leave with the marijuana. Defendants left the warehouse without any marijuana and went to a hotel where they were later arrested. Count III of the indictment filed against Defendants stated:

> RUAN JUNIOR HAMILTON and KEVIN OTTAR on or before the 1st day of October, 2010 and the 18th day of October, 2010, knowingly possessed for sale an amount of marijuana having a weight of four pounds or more, having a weight or value which exceeded the statutory threshold amount, in violation of A.R.S. §§ 13-3401, 13-3405, 13-3418, 13-301, 13-302, 13-303, 13-304, 13-701, 13-702, and 13-801.

Before trial, Defendants moved to dismiss Count III, citing Rule 16.6(b), Arizona Rules of Criminal Procedure, which requires that an indictment be dismissed on a defendant's motion if it is "insufficient as a matter of law." Defendants argued they could not be guilty of the charged offense because the "facts" set forth in police reports and grand jury proceedings established they never possessed marijuana. Because officers never intended to let them leave with the marijuana, they could not possess it or exercise the dominion or control required to transfer or sell it.

The trial court granted the motion in part, ruling the State could proceed on Count III as *attempted* possession of marijuana for sale only. Defendants never criminally possessed marijuana as stated in the indictment because officers were never going to allow them to possess it.

The State appealed. The appellate court noted a person is guilty of possession of marijuana for sale if he knowingly possessed marijuana for the purpose of sale. A.R.S. § 13-3405(A)(2). To "possess" is "knowingly to have physical possession or otherwise to exercise dominion or control over property." A.R.S. §13-105 (34). That officers never intended to let Defendants leave with the marijuana did not make it impossible for them to have committed the charged offense. The court reversed the dismissal of the charge of possession of marijuana for sale.

ISSUE PRESENTED BY OTTAR:

Did the court of appeals err in holding that the defendants may legally be charged with possession of marijuana for sale in a "reverse sting" case where the defendant buyers did not leave the transaction with marijuana and it was stipulated by the parties below that the undercover officers never would have allowed the defendants to leave with any marijuana?

ISSUE PRESENTED BY HAMILTON:

In a traditional "sting" operation undercover police officers pose as drug buyers and set up a transaction with unwitting drug sellers. When the transaction occurs and the sellers bring the drugs to the deal, the sellers are arrested, the drugs are seized, and the sellers are charged with possession of drugs for sale. By contrast, in a "reverse sting" operation, undercover police officers pose as sellers and set up a transaction with unwitting buyers. When the transaction occurs the undercover officers bring drugs from their evidence lockers, and the buyers bring only money. Did the Arizona Court of Appeals err in holding that the defendant buyers may be charged with possession of marijuana for sale in a "reverse sting" case where the defendants did not bring any marijuana to the transaction, they did not leave the transaction with any marijuana and it was stipulated by the parties below that the undercover officers never would have allowed the defendants to leave the transaction with any marijuana?