1989

State of Utah v. Arden Ray Warner : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, NO. 890226 :

Plaintiff-Respondent, : Case No. 890226-CA

v. :

ADREN RAY WARNER, : Priority No. 2
:

Defendant-Apellant.

BRIEF OF RESPONDENT

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THIS IS AN APPEAL FROM A CONVICTION OF POSSESSION OF A CONTROLLED SUBSTANCE, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37-8(2)(a)(i) (Supp. 1988), IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SUMMIT COUNTY, THE HONORABLE J. DENNIS FREDERICK, JUDGE, PRESIDING.

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BRIEF OF RESPONDENT

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B R I E F O F R E S P O N D E N T

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a conviction of possession of a controlled substance, a third degree felony in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (Supp. 1988), following a trial to the bench in Third District Court, in and for Summit County, State of Utah, the Honorable J. Dennis Frederick, judge, presiding. This Court has jurisdiction in this case under Utah Code Ann. § 77-35-26(2)(a) (Supp. 1989) and Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1989).

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

1. Whether the amount of methamphetamine found on a vial in defendant's possession was sufficient to sustain a conviction of possession of a controlled substance, and whether methamphetamine found in the vehicle in which defendant was a passenger at the time of arrest was the product of a constitutional search.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Code Ann. § 58-37-8(2) -- Prohibited acts -- Penalties:

> (a) It is unlawful: (i) for any person knowingly and intentionally to possess or use a controlled substance, unless it was obtained under a valid prescription or order or directly from a practitioner while acting in the course of his professional practice, or as otherwise authorized by this subsection;
>
> . . . .
>
> (b) Any person convicted of violating
>
> (2)(a)(i) with respect to . . . (ii) a substance classified in Schedule I or II, or marijuana, if the amount is more than 16 ounces, but less than 100 pounds, is guilty of a third degree felony;

STATEMENT OF THE CASE

Defendant, Adren Ray Warner, was charged with possession of a controlled substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i). He was convicted as charged following a bench trial on February 10, 1989, in Third District Court, Summit County, the Honorable J. Dennis Frederick, presiding. He was sentenced to an indeterminate term of zero to five years in the Utah State Prison. Imposition of the sentence was suspended and defendant was placed on parole.

STATEMENT OF THE FACTS

On October 29, 1988, defendant was a passenger in an automobile being driven by Vickie Courtney (T. 12). A highway patrolman, Trooper Simpson, pulled over the vehicle for a speeding violation on Interstate-80 in Summit County (T. 8,9). During the course of issuing the citation, Trooper Simpson noticed a twelve-

pack of beer on the floor beneath defendant's legs (T. 13). He went around to the passenger side of the car and requested the beer (T. 13). Upon opening the door, he noticed a cold cup holding an open can of beer wedged between the passenger seat and the door (T. 14). Trooper Simpson requested defendant's identification and issued him a citation for the open container of alcohol (T. 14). During a local warrants check, he found that there was an outstanding warrant for defendant from the Summit County Circuit Court (T. 15). Defendant was taken into custody and taken to the Summit County jail (T. 15). Ms. Courtney was free to leave but voluntarily chose to follow defendant to the jail (T. 16).

During the course of the booking search, Trooper Simpson found a brown vial with a white powdery substance caked around the lip in the front pocket of defendant's shirt (T. 16-17). Defendant initially denied any knowledge about the brown vial (T. 23). Based upon his observation of similar types of vials, Trooper Simpson believed the vial to contain cocaine (T. 18).

After discovering the vial, Trooper Simpson determined that there was probable cause to search Ms. Courtney's vehicle based upon the following: defendant was riding in the vehicle at the time it was pulled over; defendant cohabitated with Ms. Courtney and therefore was not just a temporary passenger; and, in Trooper Simpson's previous experience, it was common, after finding a controlled substance on a person, to find additional controlled substance in the vehicle (T. 19, 106). Defendant's

initial denial of knowledge of the vial in his shirt pocket added to the level of concern (T. 23). Trooper Simpson went outside and informed Ms. Courtney that he was going to search the vehicle (T. 18). During the course of this search, Trooper Simpson searched defendant's jacket and found a razor scraper, called a Widget, with a white paper bindle tucked into the edge (T. 20). Trooper Simpson opened the bindle and found it contained a white, powdery substance (T. 21). Defendant denied knowledge of the bindle, and claimed that he had lent the jacket to a friend who might have left the bindle in his jacket (T. 23, 112-114, 120-122).

The vial and the bindle were taken to the crime lab for analysis. The crusted white substance on the vial and the powdery substance in the bindle were both found to be methamphetamine, a Schedule II controlled substance (T. 60, 64, 171).

SUMMARY OF THE ARGUMENT

Defendant was properly convicted of possession of a controlled substance, methamphetamine, which was seized during a booking search. Defendant does not contest the booking search or the subsequent seizure of the brown vial, located in his shirt pocket. The amount of the controlled substance was relatively small, and consisted of methamphetamine caked around the top of the vial. Nevertheless, the amount was sufficient to be identified during analysis. Whether the amount was usable or would result in a physical reaction is not the test; the determinative factor is possession of the controlled substance.

Defendant was also in possession of a second source of methamphetamine. After the booking search during which the

initial substance was found, the trooper searched the car in which defendant was a passenger. The search, made pursuant to the automobile exception to the warrant requirement, revealed methamphetamine in defendant's coat pocket. Defendant claims that the seizure was the result of an unconstitutional search. Even if his contention were correct, the conviction must be sustained based upon his possession of the controlled substance brown vial, therefore, this court need not consider the validity of the search of the automobile.

ARGUMENT

POINT I

DEFENDANT WAS PROPERLY CONVICTED OF POSSESSION OF A CONTROLLED SUBSTANCE, METHAMPHETAMINE, WHICH WAS PRESENT ON A VIAL SEIZED DURING A BOOKING SEARCH THAT DEFENDANT CONCEDES WAS VALID; ADDITIONAL METHAMPHETAMINE WAS PROPERLY SEIZED DURING A SUBSEQUENT SEARCH OF THE AUTOMOBILE IN WHICH HE WAS A PASSENGER.

Defendant was convicted of possession of a controlled substance in violation of Utah Code Ann. § 58-37-8(2)(a)(i) which provides that it is unlawful "for any person knowingly and intentionally to possess or use a controlled substance . . . ." He was found to be in possession of two separate sources of methamphetamine: first, a vial which was found on his person during the course of a booking search pursuant to a valid arrest; second, a bindle found in his jacket pursuant to a search of the car in which he was riding at the time of arrest. Defendant seeks reversal based on two arguments. First, he contends that the warrantless search of the car was not constitutionally valid and the methamphetamine found during the course of this search was

inadmissible as evidence. Second, he contends that the amount of methamphetamine found on the vial located in his pocket during the booking search was insufficient to sustain a conviction of possession.

Defendant's second argument, that the amount of the controlled substance was insufficient to sustain his conviction, clearly contradicts Utah case law. In point II of his brief he argues that the amount of methamphetamine found on the vial, which he admits was the product of a legal search, was insufficient to sustain a conviction of possession. His argument seems to be that since the statute does not specify the quantity of controlled substance a person must possess to sustain a conviction, the amount of controlled substance possessed must be a usable amount. This position is clearly erroneous in light of this Court's decision in State v. Winters, 16 Utah 2d 139, 396 P.2d 872, 875 (1964), where the Court found:

> [The] contention that the trial court erred in refusing to instruct the jury that, in order to convict, the amount of narcotic drug possessed must be found to be usable has no merit. The determinative test is possession of a narcotic drug, and not usability of a narcotic drug.

See also State v. Forrester, 29 Or.App. 409, 564 P.2d 289, 291 (1977) (the gravamen of the offense is unlawful possession without regard to quantity); Judd v. State, 482 P.2d 273, 280 (Alaska 1971) (it is not necessary that a usable quantity be possessed so long as the amount is sufficient to allow analysis). Although the amount of methamphetamine on the brown vial was small, there was a sufficient amount to conduct the laboratory

analysis, with enough left over to likely conduct a second analysis (T. 67). The trial court correctly ruled that the methamphetamine found on the vial, which defendant concedes was in his possession and legally seized, was sufficient to sustain the conviction.

Consideration of defendant's first contention, that the methamphetamine found in the bindle was the product of an illegal search, becomes unnecessary as the methamphetamine on the vial is sufficient to sustain the conviction. Should the Court decide to consider this issue, defendant's argument on this point also fails. Defendant's argument seems to be threefold: first, the search was not incident to a valid arrest; second, the trooper did not have probable cause to search the car; and third, even if the trooper had probable cause, there were not exigent circumstances to justify a warrantless search.

The United States Supreme Court formulated the automobile exception to the warrant requirement in Carroll v. United States, 267 U.S. 132 (1925). More recently, in California v. Carney, 471 U.S. 386, 390 (1985), the Court reviewed the exception and noted that the rule was originally based upon the readily movable nature of automobiles, citing Carroll. Over the years, the Court developed an additional basis for the exception. In South Dakota v. Opperman, 428 U.S. 364 (1976), the Court emphasized that one has a significantly lesser expectation of privacy in an automobile than one has in a home or office. The lesser expectation of privacy does not derive only from the fact that the interior of a vehicle is usually in plain view, but also

from the fact that there is pervasive government regulation of vehicles.

In State v. Shields, 28 Utah 2d 405, 503 P.2d 848 (1972), this Court considered Chambers v. Maroney, 399 U.S. 42 (1970), relied upon by defendant. In Shields, the defendant took $500.00 from a cash drawer behind the counter of a store in Fillmore. A description of the defendant was given to police in adjoining towns, and the defendant was arrested in Parowan. The driver of the vehicle in which defendant was riding was not arrested, but he followed to the police station. Since the driver was not mentioned in the police bulletin he was allowed to leave, but was subsequently detained by police. His vehicle was taken to the police station where it was searched without a warrant. Defendant sought to suppress the evidence found during this search.

The Shields Court, relying on Maroney, found that "a search of a vehicle on probable cause proceeds on a theory wholly different from that justifying a search incident to an arrest. The right to search and the validity of a seizure . . . are dependent on the reasonable cause the seizing officer has for the belief that the contents of the automobile offend against the law." Id. at 849. The crux of the issues raised by defendant in the instant case turn on whether the arresting officer had probable cause to believe that the car contained contraband.

A "warrantless vehicle search is not invalid under the Fourth Amendment if probable cause for a search exists." State v. Dorsey, 731 P.2d 1085 (Utah 1986).

> Probable cause exists where "the facts and circumstances within [the officer's] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.

(Citing Brinegar v. United States, 338 U.S. 160, 175-76 (1949).)

> The determination of whether probable cause exists, therefore, depends upon an examination of all the information available to the searching officer in light of the circumstances as they existed at the time the search was made. The trial court's findings as to the facts and circumstances pertaining to probable cause will not be overturned on appeal unless it appears that the trial court clearly erred.

Dorsey at 1088.

The facts of this case indicate that the trial court was justified in finding that the trooper had probable cause to believe that the vehicle contained contraband. Defendant was riding in the vehicle when he was arrested. During a routine search of defendant's person at the police station, a small brown vial, with a white powdery substance encrusted on the lip, which the trooper thought to be cocaine, was found in his shirt pocket. The trooper testified that in his experience, five or six times within the previous few years, it was common to find additional controlled substances within the vehicle after finding a controlled substance on the person. The trooper also testified that he believed that defendant had certain property rights in the vehicle beyond that of a typical passenger, as defendant and the driver of the vehicle were living together as common law husband and wife. Defendant also initially denied knowledge of the existence of the vial on his person. Based on these facts,

this Court should uphold the trial court's finding that the trooper had probable cause to search the vehicle.

The Shields Court also held that "[i]n exigent circumstances, the judgment of a police officer as to probable cause will serve as sufficient authorization for a search." Id. at 849. In Shields, the search was carried out after the driver of the vehicle had been detained and was in police custody. In the instant case the exigent circumstances were even greater, as the driver of the vehicle was not in police custody nor had the automobile been seized. The Court stated that "for constitutional purposes, there is no difference between seizing and holding a car before presenting the probable cause issue to a magistrate and carrying out an immediate search without a warrant. Given probable cause, either course is reasonable under the Fourth Amendment. . . ." Id. at 849, 850.

Based on the above principles this Court should find that the search of the automobile was constitutional since the trooper had probable cause to believe that the automobile contained contraband, and, based on this belief, was justified in conducting the search without first obtaining a warrant. Regardless, defendant's conviction is supported by his separate possession of methamphetamine contained in the brown vial.

CONCLUSION

The defendant, Adren Ray Warner, was properly convicted of possession of a controlled substance. For the foregoing

reasons, and any additional reasons advanced at oral argument, the State of Utah respectfully requests that this Court affirm defendant's conviction.

RESPECTFULLY submitted this 19th day of September, 1989.

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CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Respondent were mailed, postage prepaid, to Elliott Levine, 4168 South 1785 West, West Valley City, Utah 84119, on this 19th day of September, 1989.