1987

Utah v. Salvador Ayala : Brief of Appellant

Utah Court of Appeals

Attorney General's Office; attorneys for respondent.
Larry R. Keller; attorney for appellant.

BRIEF

IN THE UTAH COURT OF APPEALS

)CKET NO. 870533-CA

THE STATE OF UTAH, No. 870533-CA

Plaintiff/Respondent,

v.

SALVADOR AYALA,

Defendant/Appellant

BRIEF OF APPELLANT

Appeal from the Judgment of the
Third Judicial District Court, Salt Lake County,
Honorable Homer F. Wilkinson

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ARGUMENT PRIORITY CLASSIFICATION: 2

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITY

STATEMENT SHOWING JURISDICTION OF COURT OF APPEALS

The Utah Court of Appeals has jurisdiction of the above-entitled case because it involves the conviction of the Appellant on the charge of Unlawful Possession Of A Controlled Substance With Intent To Distribute For Value, a second degree felony. The conviction occurred in the Third District Court and jurisdiction is granted the Utah Court of Appeals by U.C.A. § 78-2a-3(2)(e).

STATEMENT SHOWING NATURE OF THE PROCEEDINGS

The nature of the proceedings is that of a criminal case brought by the State of Utah against the Appellant and involved a conviction on a felony of the second degree pursuant to U.C.A. § 58-37-8(1)(a)(ii) (as amended, 1953).

STATEMENT OF THE ISSUES

The following issues are presented for review in this Appeal:

1. The affidavit in support of the search warrant is insufficient because it fails to establish the reliability or veracity of either confidential informant as required by the Fourth Amendment of the United States Constitution and Article I, Section 14 of the Utah Constitution.

2. The evidence seized from the Appellant's person should be suppressed because the search violated his Constitutional right to be free from unreasonable searches and seizures.

3. The seizure of united states currency and a soft plastic bag containing balloons with a powdery substance was not a

legitimate seizure pursuant to a "pat down" search.

4. All alleged incriminating statements of the Appellant should be suppressed since Appellant could not speak English well enough to understand the nature of his Miranda rights, nor to enter valid waiver thereto.

5. Statements made by the Appellant after he invoked his Fifth Amendment right to remain silent should be suppressed.

6. Appellant's statements were "fruit of the poisonous tree" and should be suppressed.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES OR ORDINANCES AND RULES SET OUT VERBATIM

Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, Section 14 of the Utah Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

Utah Code Annotated, Section 77-7-16:

> Authority of peace officer to frisk suspect for dangerous weapon -- Grounds. A peace officer who has stopped a person temporarily for questioning may frisk the person for a dangerous weapon if he reasonably believes he or any other person is in danger.

STATEMENT OF THE CASE

This is an appeal in a criminal case from a judgment of conviction entered against the Appellant for the offense of Unlawful Possession Of A Controlled Substance With Intent To Distribute For Value by the Honorable Homer F. Wilkinson on October 30, 1987. In the lower court proceedings, Appellant filed a Motion to Suppress Evidence on April 14, 1986 and the court granted in part and denied in part said Motion on July 22, 1986. Further, on August 19, 1987, Appellant filed a Motion To Clarify Court Ruling On Suppression of Evidence and said Motion was denied by the court on or about September 28, 1987. The effect of the disposition of these orders was that certain evidence was introduced at trial and used against Appellant by the State. The Notice of Appeal was filed in the Utah Court of Appeals on December 1, 1987.

STATEMENT OF FACTS

On or about January 14, 1986, an affidavit for search warrant was signed under oath before the Honorable Sheila K. McCleve, a magistrate for the Fifth Circuit Court in and for Salt Lake County, State of Utah, by Detective John Conforti of the Salt Lake County Sheriff's Office (See Affidvait For Search Warrant, Addendum, Exhibit A). Judge McCleve on January 14, 1986 then issued a search warrant for the premises known as 8853 Julia Lane (3255 South) in the City of Salt Lake, County of Salt Lake, State of Utah (See Addendum, Exhibit B).

Pursuant to said search warrant, deputies of the Salt Lake County Sheriff's Office assisted by other police agencies,

arrived at the Julia Lane residence on or about January 15, 1986 at approximately 9:00 p.m. Upon arriving, Officers under the direction of Detective Conforti, began a search of the residence. Officer James Upton found a .38 caliber pistol under a bed between a mattress and box spring in the residence. In the closet of a bedroom, he found five rounds of .357 caliber ammunition wrapped up in a sock; said ammunition was not usable in the pistol found. No other guns or ammunition were found in the residence (R. 285 p. 6, 12, 15). Officer Upton also searched the bedroom, described to be the North bedroom, and found two balloons within a plastic-like baggie material containing a black tar substance suspected to be heroin, as well as a syringe and silver colored metal canister (R. 285 p. 8). Officer Upton was still in the process of his search in the North bedroom, and there was no evidence that he had found the heroin, when the Appellant and two other individuals arrived (R. 285 p. 11, 14). Appellant's arrival was approximately 9:55 p.m.; and upon his arrival, Detective Conforti testified that Appellant stated, "I live here, what's going on?" (R. 285 p. 25). Appellant testified that when he arrived at his home that evening, police officers pulled him by the hair and threw him up against a wall with pistols to his back and searched him (R. 283 p. 41-42). One police officer shouted, "Bingo" as they searched his pockets. He was never informed what was found in his pockets and could not see what the police were pulling from them (R.283 p. 42). In fact, Detective Conforti and the other officers removed 96 common

balloons containing a white powdery substance in a cellophane bag from one jacket pocket and $1,320.00 in cash apparently distributed between a second jacket pocket and a pants pocket (R. 285 p. 28). Detective Conforti testified that the search was conducted only for the officers' safety and because weapons had been found in the house. Detective Conforti specifically admitted he withdrew the "soft" money and balloons from Appellant's pocket while searching for weapons (R. 285 p. 43-44).

In the preliminary hearing in the matter, a transcript of which was used as evidence in the Motion To Suppress hearing held on or about July 22, 1986, (for which said preliminary hearing testimony was considered by the court by stipulation of the parties) (R. 284 p. 27, 42, 43), Detective Conforti had testified, "Initially I was conducting the search for weapons because we had found a hand gun in the house already. After it was determined that he was a resident of the house, I felt that he fell under the jurisdiction of the search warrant in conducting a more thorough search." (R. 168). Of course, the search warrant in the officers' possession did not contain authorization to search any particular person, or even residents of the house in question (See Addendum, Exhibit B). After the search of the Appellant, he was Mirandized and the search of the house continued (R. 285 p. 35).

A further search of the house turned up $9,550.00 in cash in a kitchen drawer (R. 285 p. 37). Another individual who came to the house and was arrested had $7,250.00 in cash removed from his person (R. 285 p. 63). A third individual was searched and 23

packets of heroin were found on his person (R. 285 p. 51). Another individual who arrived at the house was searched and a "hype kit and rolling papers" were taken from his person (R. 285 p. 63).

Defense counsel appropriately objected to testimony concerning the introduction of not only the evidence found on Appellant's person, but the use of the evidence found in the home and on the persons of all the other defendants, both in a pre-trial motion to suppress evidence and again at trial (R. 37, 39, 285 p. 12, 13, 34, 53, 54, 63, 77).

Appellant testified that he had only been staying at the Julia Lane house approximately 7-8 days when his arrest occurred (R. 283 p. 31). During that time, he slept on the couch in the living room (R. 283 p.32). Also at that time, he met the other arrested individuals at the house for the first time (R. 283 p. 34). Appellant denys ever seeing large sums of money in the house (R. 283 p. 36), and testified that he had never seen the package of 96 balloons prior to having them pulled from the jacket and did not know there was a large amount of cash in the jacket pocket. He testified he only had $25.00 in his pants pocket (R. 283 p. 37).

Appellant further testified that he had gone to a Mexican restaurant to eat on the night of January 15, 1986 with two other residents of the home who were also arrested, and had been given a coat by co-defendant Roberto Villalobos to put on since it was cold and he had not brought his own coat. He had only had Mr.

Villalobos' coat on for a short time prior to arriving at the house and had not looked in the pockets of the coat (R. 283 p. 40). After being searched by police officers at the Julia Lane residence, he was then taken into the North bedroom and was questioned by police officers (R. 283 p.42).

Initially, Appellant told Detective Conforti and other officers he did not wish to answer questions (R. 284 p. 29). The Appellant testified that while he understood some English, he did not understand the language very well and had to ask police officers to repeat their questions and statements to him when they resumed questioning. He further pretended to understand what he was being told and tried to give the answers the police officers wanted even though he did not fully understand the questions (R. 283 p. 43, 44; R. 284 P. 12, 13). Appellant denied understanding the "Miranda warning" and denied he understood he had a right to an attorney (R. 284 p. 11; R. 283 p. 43, 44).

Over defense counsel's objection, the prosecuting attorney asked Appellant on cross-examination about a conversation he had had with an Officer Jay Labrum, who had transported him to jail that night (R. 283 p. 87-91). Appellant talked about the conversation with Officer Labrum only after the court had overruled defense counsel's objection, which was later properly put on the record outside the presence of the jury (R. 283 p. 58, 59, 72, 83, 89).

Officer Jay Labrum was then called to testify in rebuttal by the State of Utah and Officer Labrum related statements made by

the Appellant in response to questions by him as he was transporting the Appellant to jail on the night in question (R. 283 p. 98, 99). Among such statements allegedly made to Officer Labrum were statements by the Appellant that he had been selling "dope" and he had made $15,000.00 over the past six months (R. 283 p. 90). In addition, Appellant allegedly said defendant Villalobos was holding his money, (approximately $7,250.00 was found on the person of defendant Villalobos) (R. 283 p. 91). Appellant's attorney strenuously objected to the admission of such evidence (R. 283 p. 89). Appellant was ultimately convicted by the jury of the offense of Possession Of A Controlled Substance With Intent To Distribute For Value, and was sentenced by the court to an indeterminate term of not less than one (1) nor more than fifteen (15) years in the Utah State Prison (R. 267).

SUMMARY OF THE ARGUMENT

The affidavit in support of the search warrant is insufficient because it fails to establish the reliability or veracity of either confidential informant as required by the Fourth Amendment of the United States Constitution and Article I, Section 14 of the Utah Constitution.

The evidence seized from the Appellant's person should be suppressed because the search violated his constitutional right to be free from unreasonable searches and seizures.

The seizure of united states currency and a soft plastic bag containing balloons with a powdery substance was not a legitimate

seizure pursuant to a "pat down" search.

All alleged incriminating statements of the Appellant should be suppressed since Appellant could not speak english well enough to understand the nature of his Miranda rights, nor to enter valid waiver thereto.

Statements made by the Appellant after he invoked his Fifth Amendment right to remain silent should be suppressed.

Appellant's statements were "fruit of the poisonous tree" and should be suppressed.

DETAIL OF THE ARGUMENT

ARGUMENT

I. THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT IS INSUFFICIENT BECAUSE IT FAILS TO ESTABLISH THE RELIABILITY OR VERACITY OF EITHER CONFIDENTIAL INFORMANT AS REQUIRED BY THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 14 OF THE UTAH CONSTITUTION.

The test for determining the sufficiency of an affidavit based on an informant's tip was established by the United States Supreme Court in Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969), which holds:

> The Fourth Amendment requires that affidavits based on informant's tips must set out 'underlying circumstances' sufficient (1) to reveal the basis of informant's knowledge and (2) to establish the veracity of the informant or alternatively, the reliability of his report in a particular case.
>
> State v. Bailey, 675 P.2d 1203, 1205 (Utah 1984) (citing Aguilar - Spinelli.)

The United States Supreme Court recently modified the two-prong Aguilar - Spinelli test in favor of a "totality of the circumstances" test adopted in Illinois v. Gates, 462 U.S. 213 (1983). Under Gates, the Aguilar - Spinelli test is not to be "mechanically applied" but is to be more flexible by allowing a magistrate to make a "common sense" decision based on the circumstances put forth in the affidavit. Gates, at 232. In other words, a deficiency in one prong can arguably be overcome by a strong showing as to the other prong.

Many courts have flatly refused to "follow blindly, the lead of the United States Supreme Court" in Gates, and have preferred to follow the "established jurisprudence of Aguilar - Spinelli which requires that each prong have "independent" status in insuring the validity of the information. State v. Jackson, 688 P.2d 136 (Wash. 1984). The Utah Supreme Court has also refused to abandon the Aguilar - Spinelli test realizing that a "common sense" decision still requires a consideration of both veracity and basis of knowledge:

> However, even under this standard compliance with the Aguilar - Spinelli guidelines may be necessary to make a sufficient basis for probable cause. . . a showing of the basis of knowledge and veracity or reliability of the person providing the information for a warrant may well be necessary to establish with a 'fair probability' that the evidence sought actually exists and can be found where the informant states.
>
> State v. Bailey, supra, at 1205.

See also, State v. Anderson, 701 P.2d 1099 (Utah 1985).

In both Bailey and Anderson the Utah Supreme Court found that there were sufficient underlying circumstances to support the reliability and credibility of the informant. The criteria relied upon by the court in arriving at that conclusion is completely absent in the affidavit for search warrant in the instant case. The information offered to establish the reliability of confidential informant #1, set forth in the affidavit is as follows:

> Another C.I. (#2) has stated that drugs, specifically heroin is and has been sold out of the residence of 8853 Julia Lane for some time.
>
> (See Appendix A).

There is no information offered whatsoever to establish the basis of knowledge, veracity, or reliability of confidential informant #2, yet his information is used as the sole basis for confidential informant #1's reliability. Under both Aguilar - Spinelli and Gates, confidential informant #2's information is insufficient. Confidential informant #2's information can't be used to support the reliability or veracity of confidential informant #1 without some basis for confidential informant #2's knowledge, reliability or veracity.

The criteria the Utah Supreme Court looked to in determining whether the affidavits in Bailey and Anderson supported the informant's veracity is whether the informant had previously given truthful information to the police concerning the existence of contraband. Bailey, at 1206; Anderson, at 1102. An informant's "track record" is an accepted method for establishing his veracity. McCray v. Illinois, 386 U.S. 300 (1967). The informant's "track record" refers to whether "he has provided accurate information to the police a number of times in the past." State v. Jackson, 688 P.2d 136 (Wash. 1984).

No "track record" is provided in the affidavit in this case. At the time the search warrant was sought, Deputy Conforti states that confidential informant #1 had been used for one week. Even

if this information had been in the affidavit, under Bailey and Anderson "one week" would not constitute a "track record." Moreover, there is no conceivable way the officer's testimony at the preliminary hearing or trial can now be used to support the information in the affidavit when it was initially a prerequisite to obtaining the warrant.

As to verification, the only information offered to support confidential informant #1's information is its corroboration by yet another confidential informant for which there is no basis of knowledge, reliability or veracity. By contrast, in Bailey and Anderson there was "verification of significant facts" by the officers. In Bailey, the affidavit "carefully set out and outlines the sources of verification of each factor." Bailey at 106. In Anderson, the police had verified "all but one piece of information" received from the informant. Anderson, at 1102. Moreover, in Bailey, the reliability of the informant's statement was supported by the "detail" with which he described his "personal observation". Bailey, at 106. Understandably, the magistrate had a "substantial basis" for concluding that probable cause existed.

In this case, the magistrate was provided no basis. It is almost impossible to ever test the sufficiency of the affidavit because it is so completely void of the standard requirements viewed by the court. It sets forth no "track record," no "verifiction of significant facts," and no "detailed personal observations." In short, neither prong of Aguilar - Spinelli is

met, making the affidavit insufficient under Bailey and Anderson. As the Utah Supreme Court recognized in Anderson:

> "The basis of the affiant's knowledge must be set forth in the affidavit together with some evidence supporting the veracity of the informant when the affidavit includes allegations of a confidential informant. Without such a foundation, a warrant becomes a "mere charade" and the basic liberty protected by the Fourth Amendment would constitute an unenforceable right or more realistically, no right at all."
>
> Anderson, at 1103 (Stewart J. Concurring).

The court's error in issuing the search warrant due to the insufficient affidavit in this case was amplified by the court's denial of Appellant's motion to disclose the names of the two unnamed confidential informants (R. 85, R. 91). Despite counsel's reference to the "legendary" case of Cannon v. Keller, 692 P.2d 740 (Utah 1984), the record does not reflect an adequate showing by the State of harm from disclosure, and Appellant maintains that the lower court's failure to disclose the names of the confidential informants relied upon compounded Judge McCleve's error is issuing the search warrant, and violated Appellant's Constitutional rights as indicated previously.

II. THE EVIDENCE SEIZED FROM THE APPELLANT'S PERSON SHOULD BE SUPPRESSED BECAUSE THE SEARCH VIOLATED HIS CONSTITUTIONAL RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES.

The Fourth Amendment to the United States Constitution provides that "no warrants shall issue, but upon probable cause. . . and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Art. IV. It is therefore a well-established rule that a warrant authorizing the search of a premises does not extend to authorize the search of a person found on the premises. Ybarra v. Illinois, 444 U.S. 85, 92 (1979). Though Ybarra involved the unauthorized search of a person in a public tavern while executing a warrant to search the premises, the rule applies equally to persons found on "private" premises. State v. Broadnax, 654 P.2d 96 (Wash. 1982); State v. Rollie, 701 P.2d 1123 (Wash.Ct. App. 1985); State v. Lambert, 38 CRL 2265 (Kan.Sup.Ct. Dec. 1985); State v. Weber, 668 P.2d 475 (Or.Ct.App. 1983).

The Ybarra rule is subject only to two exceptions. First, when officers have a reasonable suspicion that an individual is armed and dangerous, the individual may be "patted down" for weapons. Terry v. Ohio, 392 U.S. 1 (1968). The scope of a search for weapons is limited to a "patting of the outer clothing of the suspect for concealed objects capable of use as instruments of assault." Broadnax, at 100 (citing Sibron v. New York, 392 U.S. 40 (1968)). The second exception to Ybarra allows officers to "detain" an "occupant" of the premises while executing a

warrant to search the premises for contraband. Michigan v. Summers, 452 U.S. 692 (1980). A "search" of a person is authorized under Summers only if (1) the search of the premises results in evidence establishing probable cause to arrest that person, and (2) that person has in fact been arrested. Summers, at 695-96, n.4.

In this case, a search warrant was issued which authorized only a search of the "premises" where the Appellant resided. No person is named in the warrant or the affidavit supporting the warrant. (App. B). Under Ybarra, the Appellant then could not be searched pursuant to the warrant. Because a gun had been found on the premises, arguably a pat down frisk of the Appellant was justified under the Terry exception. However, there were other occupants in the house and no reason to believe the gun belonged to the Appellant.

According to Deputy Conforti's testimony, the Appellant was "initially" searched for weapons and none was found. (R. 168). Then, the Appellant was searched further under the mistaken belief that such a search was authorized by the warrant. Deputy Conforti stated that "after it was determined that he (Ayala) was a resident of the house, I felt that he fell under the jurisdiction of the search warrant in conducting a more thorough search." (R. 168). Under no circumstances does an individual "fall under the jurisdiction of a warrant" unless they are named in the warrant. Moreover, the United States Supreme Court has continuously rejected the argument that evidence searches of persons

who are on the premises subject to a search warrant should be permitted where police have a "reasonable belief that such persons" are connected with 'drug trafficking' and may be concealing or carrying away the contraband." Ybarra, 444 U.S. at 94. Nor did Summers extend the Terry exception to the "evidence gathering" function: "individualized probable cause is still a "prerequisite to an evidence search of any person on the premises." Broadnax, 654 P.2d at 104.

The Summers rule only allows occupants to be "detained" under a warrant authorizing a search of the premises. The court in Summers was careful to make the distinction between a "detention" and a "search." It notes:

> In this case, only the detention is at issue. The police knew respondent lived in the house and they did not search him until after they had probable cause to arrest him and had done so.
>
> Summers at 676 n.4 (emphasis added).

Deputy Conforti specifically establishes that he was not searching the Appellant incident to arrest but was searching him pursuant to the search warrant which was clearly not authorized.

Even assuming the search was not conducted pursuant to the warrant, there was no evidence to establish probable cause to arrest the Appellant at the time of the search of his person. The evidence found on the Appellant during the "more thorough" search of his person cannot be used to establish probable cause. "[O]ne cannot search first to gather evidence to establish probable cause needed to justify the initial intrusion. Otherwise,

the requirement of probable cause to arrest would be turned upside down." Broadnax, at 102.

In addition, other evidence eventually found during the search cannot establish probable cause if it is discovered after the search of a defendant. The court in Broadnax found that the discovery of controlled substances in the bedroom of the residence could not serve to establish probable cause to arrest or search the defendant in that case because "that evidence was found after the search of petitioner had already been completed and thus could not form the basis for the initial intrusion of petitioners' right of privacy." Id. at 103.

Because the Appellant was searched pursuant to the warrant, the search of his person was illegal under the well established rule of Ybarra that an authorized search of a premises does not likewise authorize the search of a person found on the premises. Assuming arguendo that the search was not made pursuant to the warrant, Summers only allows for the "detention" of an individual, not a "search" and requires that a search be made only incident to arrest. In this case, the Appellant was searched before he was arrested and before probable cause had been established to arrest him. Under Ybarra and Summers then, the search of the Appellant violated his Fourth Amendment right to be free from unreasonable searches and seizures, therefore the evidence derived as a result should be suppressed.

III. THE SEIZURE OF UNITED STATES CURRENCY AND A SOFT PLASTIC BAG CONTAINING BALLOONS WITH A POWDERY SUBSTANCE WAS NOT A LEGITIMATE SEIZURE PURSUANT TO A "PAT DOWN" SEARCH.

The evidence in this case is uncontroverted that officers from the Metropolitan Narcotics Squad contacted the Appellant when he arrived at a home where the officers were in the process of executing a search warrant (R. 285 p. 24). Upon arrival at the residence in question, the Appellant attempted to make inquiry of the officers as to what was going on, and he was placed up against a wall and "patted down" in a search for weapons (R. 168, R. 285 p. 26). The evidence is further uncontrovered that at that point the officers pulled a number of bills of United States currency and a small plastic bag containing approximately 96 balloons each of which contained small amounts of a powdery substance from the jacket pockets of the Appellant during this pat-down search (R. 285 p. 26, 28). It is clear that at the time the Appellant was searched he was not under arrest, since the police officers had found nothing incriminating prior to the search of his person, and did not have the name of the Appellant as an individual for whom they had probable cause to believe had committed any crime (App. B). It is clear that the act of arrest had not occurred, but that the officers were merely searching the Appellant for weapons to protect themselves, a proposition the lower court clearly ruled on previously in Appellant's favor (R. 149). It is Appellant's contention that while the officers were allowed to pat him down to determine whether or not he possessed

a weapon and therefore could be a threat to the officers, that it was a violation of his rights pursuant to the Fourth Amendment to the United States Constitution for them to have seized soft items which could not possibly have been weapons during this alleged "pat-down" search (See Judge Wilkinson's Minute Entry, App. C).

U.C.A. § 77-7-16 (1953) authorizes a peace officer to frisk a person for dangerous weapons if he reasonably believes that he or any other person is in danger. This particular statute is an exception to the general requirement that police obtain a warrant for all searches. See Const. Utah, Art. I, § 14 and U.S. Const. 4th Amend. However, in State v. Roybal, 716 P.2d 291 (1986) the Utah Supreme Court observed:

> "The section (77-7-16) must be interpreted to meet the constitutional requirements of Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 28 L.Ed 2d 889 (1968). In that case, the Supreme Court established a narrowly drawn exception to the requirement that police obtain a warrant for all searches."
>
> 716 P.2d at 292.

In the instant case, Appellant does not dispute the fact that when he arrived at a scene where the police officers were executing a search warrant, the police officers had a right to pat him down pursuant to the standard enunciated by Terry v. Ohio and U.C.A. § 77-7-16 in order to determine whether or not he possessed a dangerous weapon which would threaten the safety of police officers. Appellant asserts however, that once the police officers were able to pat him down and determine that he did not

possess a hard object such as a gun or knife, that their search must have ended at that point. They were not allowed to feel soft objects or soft bulges and go into the pockets of Appellant to obtain evidence. Even the limited intrusion into the right of privacy of the Appellant under such warrantless circumstances allowed by Terry is justified only by the officers' fear that the individual may possess a weapon.

In Roybal, the Utah Supreme Court found that a "limited pat-down" of defendant's beltline to obtain a weapon that police officers had reason to believe was concealed behind the defendant's back, was an appropriate seizure considering all of the facts and circumstances known to the officer at the time the search was made. Through this limited search, the officer felt a hard object which he then pulled out of the defendant's waistband, and said hard object was a loaded pistol. (716 P.2d at 292-293).

In Roybal, the Supreme Court clearly established the proposition that, all police officers can do, even when they have reason to believe that the defendant is armed, is to conduct a "limited pat-down" to determine whether or not the defendant is armed. Counsel has found no Utah Supreme Court case which directly deals with the situation where a police officer feels a soft object during this limited pat-down search, but Roybal makes clear that the purpose of such a limited pat-down search is to help the officer determine whether or not there is something that can harm the officer, specifically, a weapon. Other jurisdictions have dealt directly with the "soft object" issue and have

ruled very squarely in favor of the proposition that a peace officer who feels a soft object during a limited pat-down search for weapons cannot remove such soft object without further facts or circumstances which would justify a search of the Defendant independent of the search for weapons.

In United States v. Del Toro, 464 F.2d 520 (2nd Cir. 1972) the Court of Appeals held that where a police officer, in conducting a justifiable frisk for weapons, felt in the handkerchief pocket of suspect's suitcoat a folded ten dollar bill; the officer did not have authority under the "pat-down" exception of Terry v. Ohio to remove the object and inspect its contents, even though the officer had testified that when he first felt the object he feared that a knife or possibly a razor blade could have been contained inside the soft object. In Tinney v. Wilson, 408 F.2d 912 (9th Cir. 1969), the Court of Appeals for the Ninth Circuit held that the actions of a police officer whose initial search for weapons of the defendant who was found in an automobile of a girl arrested for prostitution, although constitutionally valid at its inception, became invalid when the officer squeezed a small, soft object and then removed such object from the defendant's pocket, since the search should have been confined in scope to intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for assault on the officer.

In United States v. Prim, 698 F.2d 972 (9th Cir. 1983), the Ninth Circuit Court of Appeals in a case later than Tinney, upheld

its earlier ruling and suppressed evidence presented by the prosecution during the course of defendant's narcotics trial where police officers had obtained a manila envelope containing narcotics when they were merely conducting a pat-down search of the defendant. In that case, the drug agents had no probable cause to arrest the defendant, but had reason to believe the defendant may have been in possession of narcotics. Therefore, the police officers used the pretext of a pat-down search to seize the soft envelope containing a soft powdery substance later identified as cocaine. In that case, the Court stated:

> ". . . The whole objective of the pat down was not aimed at a weapon search to protect against danger as permitted under Terry, but instead was conducted with the expectation of finding narcotics. Therefore, there was no justification for a pat-down and the pat-down conducted exceeded the permissable scope of a weapons search. (Citing U.S. v. Del Toro, supra) Thus, the manila envelope was seized as a result of an illegal pat-down and should have been suppressed."
>
> 698 F.2d at 977.

In United States v. Gonzales, 319 F.Supp 563 (U.S. D.C. Conn. 1970) the Court held that where a defendant was arrested at night in a high crime area preparing to exit from a car, it was possible that he might have tossed a weapon to his friend who was being arrested and therefore the initial frisk of the defendant was not unreasonable; but when the officer felt in defendant's pocket a soft packet wrapped in cellophane, a further search conducted on the theory that there might have been a razor blade

hidden in the packet was unreasonable and the packet containing heroin was ordered suppressed. This case has particular significance to the instant case in that Appellant's pocket contained a cellophane bag with soft balloons. The police officer has never enunciated a fear that there might have been any sort of object hidden in the packet; but even if he had done so, the Gonzales case stands for the proposition that such a fear in a soft object situation would be unreasonable and the evidence would be suppressed since it was beyond the limits of the Terry pat-down search limitations. See also, U.S. v. Reid, 351 F.Supp 714 (U.S.D.C. Ed. N.Y. 1972).

The state courts have been as consistent as the federal courts in significantly limiting the scope of pat-down searches. In People v. Collins, 463 P.2d 403 (Cal. 1970) the court held that in searching a legally detained individual reasonably suspected of being armed, a police officer must be limited to a careful exploration of the outer surfaces of the person's clothing until and unless he discovers specific and articulable facts reasonably supporting his suspicion. The court also held that the burden of pointing to specific and articulable facts which, taken together with rational inferences thereto, reasonably warranted a search of a suspect's clothing, properly rested with the government. The Court specifically said:

> "Feeling a soft object in a suspect's pocket during a pat-down, absent unusual circumstances, does not warrant an officer's intrusion into a suspect's pocket to retrieve the object. A pat-down must be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs or other hidden instruments

> for the assault of the police officer. . . . The obvious purpose of holding that officers cannot go beyond exploration of the surfaces of a suspect's clothing without being able to point to specific and articulable facts . . . is to ensure that the scope of such a search cannot be exceeded at the mere discretion of an officer, but only upon discovery of tactile evidence particularly tending to corroborate suspicion that the suspect is armed. To permit officers to exceed the scope of a lawful pat-down whenever they feel a soft object by relying upon mere speculation the object might be a razor blade concealed in a handkerchief or some other type of atypical weapon, invites a plenary search of an individual's person. Such a holding would render meaningless Terry's requirement that pat-downs be limited in scope absent articulable grounds for an additional intrusion."
>
> 463 P.2d at 406 (emphasis supplied).

The California court in Collins clearly held that an officer who exceeds a pat-down without first discovering an object which feels reasonably like a knife, gun, or club, must be able to point to specific and articulable facts which reasonably support a suspicion that the particular suspect is armed with an atypical weapon which would feel like the object felt during the pat-down. Only then can judges satisfy the Fourth Amendment's requirement of a neutral evaluation of the reasonableness of a particular search by comparing the facts with the officer's view of those facts. See also, Byrd v. Superior Court, 268 Cal.App.2d 495; People v. Britton, 264 Cal.App.2d 711.

The Supreme Court of the State of Washington ruled accordingly in the case of State v. Hobart, 617 P.2d 429 (1980). In that case, soft items seized from a defendant's pocket were later

determined to be balloons containing heroin. Again, this case has particular significance in the instant matter in that we are dealing specifically with balloons containing a white powdered substance alleged to be heroin. In Hobart, the defendant was standing on the street when he was recognized by a police officer as one who had been arrested previously for possession of marijuana and cocaine and for carrying a concealed weapon. The officer stated that he knew of the petitioner's prior record and for his own safety he got out of the car, asked for identification, and "patted" the petitioner for weapons. He found none, but did detect in the petitioner's shirt pocket two spongy objects which he squeezed and concluded were balloons containing narcotics. He attempted to reach into the pocket, and removed the balloons containing heroin only after a scuffle. The Washington Supreme Court recognized the exception to the warrantless search provided in the case of Terry v. Ohio but pointed out that in Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968) the United States Supreme Court said that before an officer places a hand on the person of a citizen in search of anything, he must have constitutionally adequate, reasonable grounds for doing so, and that in the case of the self-protective search for weapons, he must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous. Id. at 431. Using this rationale, the Washington Supreme Court suppressed the evidence seized from the defendant in that case under the pretext of a pat-

down search. The Court observed that the police officer's knowledge of the defendant's prior arrest for carrying a concealed weapon gave him reason to suspect that the defendant was armed and therefore it was appropriate for him to conduct the "pat-down" search for weapons. The Court then went on to say:

> "However, from his own description of the search which he made, it is evident that its scope was not strictly limited to a search for weapons, but included also an exploration of the possibility that the defendant might be in possession of narcotics. Having discovered 'spongy' objects (which could not reasonably be feared as dangerous weapons) in the defendant's pockets, the officer squeezed them with the obvious purpose of ascertaining whether they had the shape and consistency of balloons commonly used for narcotics. Such a search reaches beyond the scope permitted under the Fourth Amendment adding to the search for weapons a search for evidence of a crime."
>
> 617 P.2d at 433, 434 (emphasis added).

The Washington Supreme Court went on to say "we are aware of no instance in which the Supreme Court has condoned the use of a frisk to search for evidence of an independent crime. . . To approve the use of evidence of some offense unrelated to weapons would be to invite the use of weapons' searches as a pretext for unwarranted searches, and thus to severely erode the protection of the Fourth Amendment. Such a step this court is not prepared to take." 617 P.2d at 434.

In the instant case, officers reached in Appellant's pocket and removed a soft cellophane bag containing common balloons with a powdery substance and soft folding currency. No "hard" objects were retrieved. Appellant maintains that if this Court condones

this warrantless search under the guise of a "pat-down" search, the door would be opened for police officers to use weapons searches as a pretext for unwarranted searches for evidence and would fall squarely within the concerns expressed by every court that has ever dealt with this issue.

In People v. McCarty, 296 NE.2d 862 (1973) the Appellate Court of the State of Illinois clearly ruled that where police officers during a pat-down search for weapons removed a soft plastic bag from a pocket of the defendant, such seizure was invalid and the evidence obtained from the soft plastic bag could not be used against the defendant in trial. Further, the Court of Appeals of the State of Georgia in Holtzendorf v. State, 188 SE.2d 879 (1972) ruled that officers who removed marijuana in a very small plastic bag under a packet of cigarettes from the shirt of the defendant under the pretext of a pat-down search, had violated the defendant's Fourth Amendment rights, and reversed the conviction and ordered the suppression of such evidence. Further, in Blackburn v. Florida, 414 SO.2d 651 (1982) the District Court of Appeals of Florida ruled that "Even assuming a police officer had reasonable suspicion to justify the stop of the defendant, it was not permissible for him to seize a stocking in defendant's shirt pocket, and the arrest of the defendant based on the seizure of the stocking was invalid, as was the resulting search of the defendant's automobile." Further, in Dunn v. Florida, 382 SO.2d 727 (1980) the District Court of Appeals of Florida ruled that an officer who, during the course

of a lawful stop and frisk of the defendant, felt an object suspected to be marijuana, did not have the right to seize it where the officer had no belief that the object might be a weapon. And finally, in People v. Cobbin, 692 P.2d 1069 (Colo. 1984) the Colorado Supreme Court held that once a legitimate pat-down search has determined that the suspect is not armed, the police may not once again search the suspect and confiscate the contents of his pockets under the guise of said pat-down search.

In addition to the overwhelming weight of case law, Wayne R. LaFave in his Treatise On The Fourth Amendment, 2d Ed. 1987, indicates very clearly that under the prevailing view of evidence and search and seizure law, "A search is not permissible when the object felt is soft in nature. Even if the object felt is hard, the question is whether its size or density is such that it might be a weapon." LaFave at 523 § 9.4(c).

The overwhelming weight of authority on the subject of pat-down searches makes clear that police officers may not, during the course of a Terry stop and frisk situation, remove soft objects from a suspect's pocket unless thay have some articulable basis to believe that the object removed is a weapon. In the instant case, police officers violated the rights of the Appellant under the Fourth Amendment of the U.S. Constitution and under Article I, Section 14 of the Utah Constitution by seizing soft objects from his pocket under circumstances where such soft objects could not possibly have been weapons. The officers clearly exceeded the scope of their pat-down search and began an exploratory search of the Appellant for evidence.

IV. ALL ALLEGED INCRIMINATING STATEMENTS OF THE APPELLANT SHOULD BE SUPPRESSED SINCE APPELLANT COULD NOT SPEAK ENGLISH WELL ENOUGH TO UNDERSTAND THE NATURE OF HIS MIRANDA RIGHTS, NOR TO ENTER VALID WAIVER THERETO.

In Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the United States Supreme Court held that before a custodial interrogation may be conducted with a criminal suspect, the suspect must be informed of his right to have an attorney and to have a court-appointed attorney if he could not afford to hire one. Furthermore, the Court ruled that the suspect must be informed that everything he says could be used against him in a court of law and that he has the right to remain silent. Finally, the Court ruled that a person must knowingly and intelligently waive his right to remain silent and to have an attorney present before he may be interrogated by police officers. The U.S. Supreme Court clearly held that custodial interrogations are presumed to be involuntary unless the suspect is warned of his rights. In U.S. v. Martinez, 588 F.2d 1227 (9th Cir. 1978), the U.S. Court of Appeals for the Ninth Circuit amplified the Miranda language by saying:

> "We assume without so holding that if Miranda warnings are given in a language which the person being so instructed does not understand, a waiver of those rights would not be valid. . . ".
>
> 588 F.2d at 1235.

There are very few cases dealing with the language problem involved with the Miranda warning and the waiver of Miranda

rights. This is undoubtedly due to the fact that where the government fails to meet its burden of showing that the defendant clearly and knowingly understood the rights he was being given and knowingly and intelligently waived those rights, any statement made by the defendant would have to be suppressed. Any time police officers deal with a suspect whom they do not believe speaks good English, they cannot simply assume that he understands the Miranda warning when they read it to him and that a nod of his head or some other affirmation means that he knowingly and intelligently waives his right to remain silent. What police officers should do when they are dealing with Spanish-speaking subjects was pointed out by the U.S. Court of Appeals for the First Circuit in the case of U.S. v. Elles-Martinez, 761 F.2d 1 (1st Cir. 1985). In that case, Spanish-speaking crew members were arrested by the Coast Guard for smuggling. After their arrest, the crew members were informed of their Miranda rights in Spanish and the officers obtained acknowledgements of the rights from each defendant. Furthermore, each defendant was presented with a Miranda Rights Waiver form in the Spanish language upon which they individually signed an affirmation of having read and understood their rights. Prior to the booking process, they were again individually informed of their rights in Spanish, and even though some members of the crew knew some words of English, the government agents dealing with the defendants realized that in order to obtain a valid waiver, the defendants must be informed of their rights in Spanish. Their extra efforts in placing the

Miranda warning in writing in Spanish and obtaining written waivers thereof, were sufficient to pass the standards of the Miranda case and the Ninth Circuit refused to suppress the defendants' statements on the grounds that the individual defendants did not understand and voluntarily waive their rights given to them in Spanish since it was given to them with a Mexican accent and they were actually Panamanian.

In the instant case, it is clear that the police officers made no effort whatsoever to give the Appellant his Miranda warning in Spanish. For the officers to testify that they gave the warning in English and obtained a waiver in English is clearly insufficient to establish that the Appellant knowingly and intelligently waived his rights pursuant to the Fifth Amendment of the U.S. Constitution.

In the instant case, officers knew Appellant was a Mexican citizen who was in the country illegally (R. 285 p.40). They could tell he had at least some difficulty with the English language (R.285 p. 79; R.284 p. 26). In Coyote v. U.S., 380 F.2d 305 (10th Cir. 1967) the U.S. Court of Appeals, Tenth Circuit observed:

> "Surely Miranda is not a ritual of words to be recited by rote according to didactic niceties. What Miranda does require is meaningful advice to the unlettered and unlearned in language which he can comprehend and on which he can knowingly act. We will not indulge semantical debates between counsel over the particular words to inform an individual of his rights. The crucial test is whether the words in the context used, considering the age, background and intelligence of the individual being interrogated, impart a clear, understandable warning of all of his rights."
>
> 380 F.2d at 308 (emphasis supplied).

In a subsequent case, U.S. v. Obregon, 748 F.2d 1371 (10th Cir. 1984), the U.S. Court of Appeals for the Tenth Circuit indicated that the concept of informing the defendant of his rights is but one of a two-part procedure required by the Constitution before statements made by a defendant in a custodial setting may be introduced as evidence against him in a subsequent trial. The second step is making certain that the defendant waives his rights knowingly and intelligently. The Tenth Circuit, in order to emphasize their holding in Obregon, opined:

> "Law enforcement officials may find it desirable in the future, in order to avoid the problem presented here, to utilize two distinct forms, one perhaps captioned 'Advice of Rights' form setting forth one's rights under Miranda with a signatory line for acknowledgement that he or she has read the statement of rights and understands the same, and a second form perhaps captioned "Waiver of Rights' (making clear that the defendant is knowingly and intelligently waiving his or her Miranda rights). This approach may eliminate any confusion existing between the concepts of 'understanding rights' and 'waiver of rights'.
>
> 748 F.2d at 1381.

It seems very clear then that a defendant who speaks little if any English cannot be expected to fully and completely understand the Miranda warning, and especially cannot be expected to knowingly and intelligently waive his Miranda rights.

Another critical reason officers should obtain a knowing and intelligent waiver of Miranda rights involves the Sixth Amendment right to counsel. In the recent case of Edwards v. Arizona, 451 U.S. 476, 101 S.Ct. 1880 (1981), Justice White writing for the majority talked in terms of the waiver of the

right to counsel as being one of the essential elements of the Miranda warning. The Court reversed a decision by the Supreme Court of Arizona and held:

> "It is reasonably clear under our cases that waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case 'upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused.' (citing cases) . . . We note that in denying petitioner's motion to suppress, the trial court found the admission to have been 'voluntary' without separately focusing on whether Edwards had knowingly and intelligently relinquished his right to counsel."
>
> 451 U.S. at 483.

The Supreme Court pointed out in the Edwards decision that not only should the court's inquiry involving suppression of confessions concern the "voluntariness" of the defendant's statements, but also, whether or not the defendant knowingly and voluntarily waived his right to counsel as well as his right to remain silent. Even if the defendant understood that he had the right to remain silent and chose to speak anyway, the court must also determine whether or not he understood that he had the right to have counsel present during interrogation, and that one could be appointed for him if he could not afford to hire one.

In the instant case, it seems clear that even if this Court were to find that the Appellant had voluntarily decided to make a statement to police officers, that there must be a showing on the part of the State that he knowingly and intelligently waived

his right to counsel. Where, as in the case at bar, the police officers do not bother to obtain an interpreter for purposes of being certain the Appellant is understanding what they are telling him, and where they choose not to have the Appellant execute a waiver of his Miranda rights in writing in his native language, the state cannot possibly meet the burden of proving that the Appellant knowingly and intelligently waived both his Constitutional right to remain silent and his Constitutional right to counsel under the Sixth Amendment of the U.S. Constitution.

V. STATEMENTS MADE BY THE DEFENDANT AFTER HE INVOKED HIS FIFTH AMENDMENT RIGHT TO REMAIN SILENT SHOULD BE SUPPRESSED.

As stated earlier, in Miranda v. Arizona, supra, the United States Supreme Court provided safeguards to protect the constitutional rights of persons subjected to custodial police interrogation. Unless law enforcement officers give specific warning prior to questioning and follow specific procedures thereafter, any statements made by the person in custody are not admissible at trial even if the statement is voluntary. Michigan v. Mosley, 423 U.S. 96, 100 (1965).

The issue in this case involved statements made by the defendant while in custody after being given Miranda warnings. The procedure to be followed once warnings have been given was also established in Miranda:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates, in any manner, at any time, prior to or during questioning, that he wishes to remain silent, the interrogation must cease.
>
> Miranda, at 473-74 (emphasis added).

Implicit in this passage is the recognition that renewed questioning can eventually operate to overcome the will of an accused. Left unanswered in Miranda was the question of "under what circumstances, if any, "would a resumption of questioning be permissible." Mosley, at 101. The court answered this question in Mosley concluding that "the admissibility of statements obtained after the person in custody has decided to remain silent

depends under Miranda on whether his 'right to cut-off questioning' was 'scrupulously honored." Mosley, at 104.

In Mosley, the defendant charged with robbery, was given Miranda warnings and invoked his right to remain silent by stating that he did not wish to answer any questions at that time. Two hours later, after being given a second set of full and complete Miranda warnings, Mosley was questioned about an unrelated murder. The court found that the subsequent questions did not "undercut" the accused's previous decison because: (1) a "fresh" set of warnings were given and (2) the questioning concerned an "unrelated" offense. Mosely at 105.

The issue in this case then turns on whether the Appellant's right to remain silent was "scrupulously honored" as required by Miranda and Mosley. Under Mosley, resumed questioning must be accompanied by a "fresh" set of warnings and must be "unrelated" to the charged offense.

In response to being given Miranda warnings, the Appellant in this case clearly invoked his right to remain silent by stating that "he did not wish to answer questions at that time." (R.284 p. 28; R. 163). Five minutes later, without new Miranda warnings, Deputy Conforti resumed questioning the Appellant. He asked "How long have you been living in this house?" (R. 170-171). To which the Appellant responded that "he had been living there approximately six months and that he and the other two that had arrived with him were illegal aliens from Mexico." (R. 171). Then the officer asked which "other two" he was referring to as

they had arrested five persons that night (R. 171).

An hour and a half later en route to the jail, Deputy Labrum again resumed extensive interrogation without new Miranda warnings. The following questions were asked: (1) How much Appellant was paying for rent; (2) If he had any idea how much he made from the sale of heroin; (3) How much Appellant felt he had made over the last six months from the sale of heroin while he had been at that residence (R. 283 p. 102); (4) What he was going to do with the money; (5) Why he didn't send (to Mexico) small parts of the money a little bit at a time to his relatives; and (6) Why he was sending it all at once (R. 283 p. 102).

These questions were not preceded by a "fresh set of warnings" nor were they "unrelated" to the offense the Appellant was charged with as required under Mosley. Therefore, the Appellant's right to remain silent was not scrupulously honored.

Moreover, these questions were clearly designed to "elicit an incriminating response." Rhode Island v. Innis, 446 U.S. 291 (1980); Anderson v. Smith, 751 F.2d 96 (2nd Cir. 1984). If an incriminating response is made in response to any type of interrogation, after a defendant has invoked his right to remain silent, it is inadmissible. Miranda v. Arizona, 384 U.S. 436, 473-474 (196); Edwards v. Arizona, 451 U.S. 477 (1980); Anderson v. Smith, 751 F.2d 96 (2nd Cir. 1984). Voluntary statements not made in response to interrogation are admissible. Rhode Island v. Innis, 446 U.S. 291 (1980). In Innis, the United States Supreme Court established the standard for determining when

resumed questioning constitutes "interrogation" requiring a fresh set of warnings:

> The Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under Miranda refers not only to express questioning, but also to words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.
>
> Innis, at 300-301 (emphasis added).

The U.S. Court of Appeals for the Second Circuit in Anderson v. Smith, supra, applied the Innis standard in finding that the defendant's Fifth Amendment right to remain silent was violated by resumed questioning. Anderson at 103. In that case, the state argued that the defendant's statements were voluntary because he "obviously" knew how to invoke his right to remain silent having done so previously. Id. at 102. The burden is not on the accused to invoke his right a second time however.

> "[S]crupulously honoring a suspect's right for a few hours does not lessen the impact of subsequent coercive questioning. The police must honor the suspect's rights at all times."
>
> Id. at 103.

In the instant case, Deputy Conforti specifically states that the statements made by the defendant were not volunteered but were "in response to a question." (R. 170-171). These questions then constitute an "interrogation" under the Innis

standard as they were clearly designed to "elicit an incriminating response" concerning the very subject on which the Appellant had invoked his right to remain silent. Anderson, at 103. Innis prohibits this kind of questioning without the safeguards provided by Miranda. Therefore the statements were taker in violation of the Appellant's Fifth Amendment right to remain silent and should be suppressed.

At the trial of this matter, the court persisted in its rulings that statements by the Appellant after he had invoked his Constitutional right to remain silent should not be admissible in the State's case in chief. However, after the Appellant was called as a witness to testify on his own behalf at the trial, the prosecuting attorney asked questions of him on cross-examination and later presented previously ruled involuntary statements of the Appellant to a Detective Jay Labrum on the way to jail that night, as rebuttal evidence against the Appellant (R. 283 p. 88-102). Appellant's counsel strenuously objected to the introduction of such evidence (R. 283 p. 87). The court however, ruled that Detective Labrum's testimony regarding the involuntary statements of the Appellant would be admissible for rebuttal and impeachment purposes.

Although the Appellant cannot quarrel with the general rule laid down by the United States Supreme Court in Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971), Appellant argues that Harris allowed impeachment by the use of these unmirandized statements only for purposes of attacking credibility and not as

evidence of his guilt. In fact, in Harris, the jury was instructed that it could consider the Appellant's prior inconsistent statements "only in passing on (his) credibility and not as evidence of his guilt". Harris, supra, at 223.

In the instant case, the jury was not so instructed by the court and thus, the jury may have used the unmirandized statement of Appellant to Officer Labrum for purposes of determining his guilt and not for purposes of simply attacking his credibility. In addition, Appellant steadfastly denied that he had ever said such things to Officer Labrum, nor that he was capable of saying such things to Labrum since he did not understand English well enough to be able to do so (R. 283 p. 58, 59).

Further, Appellant submits that his testimony generally denying the crime in question did not open the door for the prosecution to bring in specific testimony it brought in through Officer Labrum.

VI. DEFENDANT AYALA'S STATEMENTS WERE "FRUIT OF THE POISONOUS TREE" AND SHOULD BE SUPPRESSED.

An additional issue to be confronted by the Court involves the fact that the statements made by the Appellant regarding controlled substances came after police officers violated his Fourth Amendment rights under the U.S. Constitution and his rights under Art. I, § 12 of the Utah Constitution to be free from unreasonable searches and seizures, in that the alleged pat-down search exceeded the limitations allowed by Terry v. Ohio as indicated in Points I, II and III of this Brief. In Oregon v. Elstad, 105 S.Ct. 1285 (1985) the U.S. Supreme Court clearly held that evidence discovered as a result of a search in violation of the Fourth Amendment must be excluded from evidence when the fruit of a Fourth Amendment violation is a confession. The Court pointed out that where a Fourth Amendment violation taints the confession, a finding of voluntariness for purposes of the Fifth Amendment is merely a threshhold requirement in determining whether the confession may be admitted into evidence and, beyond that, the prosecution must show a sufficient break in events to undermine the inference that the confession was caused by the Fourth Amendment violation. The Court once again reiterated the principle that the Miranda case stands for the proposition that there is a presumption of coercion in any custodial interrogation setting, and it is the duty of the prosecution to remove the presumption by showing the defendant has been appropriately advised of his Miranda rights and has knowingly and intelligently waived

them. See also, Wong-Sun v. U.S., 371 U.S. 471.

The statements allegedly made by the Appellant in the above-entitled matter are statements which apparently resulted from the fact that police officers had located a quantity of items which they believed to be heroin. The Appellant was then placed in the position of attempting to explain the circumstances and, despite the fact that he understood very little English, attempted to do so to the police officers. These statements of the Appellant were clearly the result of the impermissible search of his person by police officers and therefore should be suppressed on the ground that they were "fruit of the poisonous tree".

CONCLUSION

Wherefore, Appellant requests that the Court reverse his conviction and order the Third District Court to dismiss the case against him, or to grant him a new trial. If a new trial is granted, Appellant requests that the Court enter an Order indicating that the 96 balloons containing a white powdery substance identified as heroin and $1,320.00 in cash seized from his jacket pockets be excluded from evidence in his new trial. In addition, Appellant requests that the Court enter an Order indicating that all statements made by him after he invoked his right to remain silent, and particularly, his statements to Officer Labrum, should be suppressed and excluded from his new trial.

RESPECTFULLY SUBMITTED this 31 day of March, 1988.

LARRY R. KELLER,
Attorney for Appellant

MAILING CERTIFICATE

I hereby certify that on the ____ day of March, 1988, I served the foregoing Appellant's Brief by mailing four (4) copies thereof by first class United States Mail, postage pepaid, address as follows:

Utah Attorney General's Office
236 State Capitol Building
Salt Lake City, Utah 84114
Attorneys for Plaintiff/Respondent

_____

ADDENDUM

T.L. "TED" CANNON
County Attorney
By: MICHAEL J. CHRISTENSEN
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Salt Lake City, Utah 84111
Phone: (801) 363-7900

IN THE FIFTH CIRCUIT COURT, SALT LAKE DEPARTMENT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH)
): ss
County of Salt Lake)

AFFIDAVIT FOR SEARCH WARRANT

BEFORE: ~~Eleanor Van Sciver~~ Estella C McClellan — 450 South 2nd East
JUDGE — ADDRESS

The undersigned affiant being first duly sworn, deposes and says:

That he has reason to believe

That (X) on the premises known as 8853 Julia Lane (3255 South), yellow brick, yellow wood on front. White siding on sides and a split entry.

In the City of Salt Lake, County of Salt Lake, State of Utah, there is now certain property or evidence described as:

Heroin, cutting agents, weighing and packaging materials, transaction ledgers and other related controlled substances and/or devices.

and that said property or evidence:

(X) was unlawfully acquired or is unlawfully possessed;
(X) has been used to commit or conceal a public offense;
(X) is being possessed with the purpose to use it as a means of committing or concealing a public offense;
(X) consists of an item or constitutes evidence of illegal conduct, possessed by a party to the illegal conduct;
(X) consists of an item or constitutes evidence of illegal conduct, possessed by a person or entity not a party to the illegal conduct. [Note requirements of Utah Code Annotated, 77-23-3(2)]

Affiant believes the property and evidence described above is evidence of the crime(s) of POSSESSION OF CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE FOR VALUE.

The facts to establish the grounds for issuance of a Search [illegible] are:

Your affiant, a detective with the Salt Lake County S[illegible] Narcotics Unit states:

Your affiant made arrangements for a Confidential Informant to make a controlled drug buy at the residence of 8853 Julia Lane, Salt Lake County. The C.I. was given a body search by detectives of the Narcotics Unit, under the direction of your affiant, and no controlled substances or U.S. currency were found. Your affiant then gave the C.I. a predetermined amount of money.

Within the last seven (7) days the C.I. was transported to the area of 8853 Julia Lane. The C.I. was observed entering the residence and exit it a short time later; times being recorded by your affiant. The C.I. was never out of the visual contact (except for when inside the residence of 8853 Julia Lane) of the affiant and other detectives. The C.I. turned over to your affiant a quantity of heroin that the C.I. stated had been purchased inside the residence. The heroin was field tested and flashed positive by use of the Bectin-Dickinson Field Test Kit. The C.I. was again gaven a complete body search and no controlled substances or U.S. currency were found.

Your affiant considers the information received from the confidential informant reliable because (if any information is obtained from an unnamed source)

#2

Another C.I. has stated that drugs, specifically heroin is and has been sold out of the residence of 8853 Julia Lane for some time.

WHEREFORE, the affiant prays that a Search Warrant be issued for the seizure of said items:

(X) at any time day or night because there is reason to believe it is necessary to seize the property prior to it being concealed, destroyed, damaged, or altered, or for other good reasons, to-wit:

It is further requested that (if appropriate) the officer executing the requested warrant not be required to give notice of the officer's authority or purpose because:

(X) physical harm may result to any person if notice were given; or
(X) the property sought may be quickly destroyed, disposed of, or secreted.

This danger is believed to exist because:

Another C.I. #2 has seen on different occasions weapons inside the residence and knows that a handgun is inside the residence.

AFFIANT

SUBSCRIBED AND SWORN TO BEFORE ME this 16th day of January, 1986.

JUDGE IN THE FIFTH CIRCUIT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

T.L: "TED" CANNON
County Attorney
By: MICHAEL J. CHRISTENSEN
Deputy County Attorney
Courtside Office Building
231 East 400 South, 3rd Floor
Salt Lake City, Utah 84111
Phone: (801) 363-7900

IN THE FIFTH CIRCUIT COURT, SALT LAKE DEPARTMENT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

SEARCH WARRANT

No. _____

COUNTY OF SALT LAKE, STATE OF UTAH

To any peace officer in the State of Utah.

Proof by Affidavit under oath having been made this day before me by John Conforti - Salt Lake County Sheriff's Narcotics Division, I am satisfied that there is probable cause to believe

That (X) on the premises known as 8853 Julia Lane (3255 South), yellow brick, yellow wood on front. White siding on sides and a split entry.

In the City of Salt Lake, County of Salt Lake, State of Utah, there is now certain property or evidence described as:

Heroin, cutting agents, weighing and packaging materials, transaction ledgers and other related controlled substances and/or devices.

and that said property or evidence:

(X) was unlawfully acquired or is unlawfully possessed;
(X) has been used to commit or conceal a public offense;
(X) is being possessed with the purpose to use it as a means of committing or concealing a public offense;
(X) consists of an item or constitutes evidence of illegal conduct, possessed by a party to the illegal conduct;
(X) consists of an item or constitutes evidence of illegal conduct, possessed by a person or entity not a party to the illegal conduct. [Note requirements of Utah Code Annotated, 77-23-3(2)]

Affiant believes the property and evidence described above is evidence of the crime(s) of POSSESSION OF CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE FOR VALUE.

to make a search of the above-named or described person(s), vehicle(s), and premises for the herein-above described property or evidence and if you find the same or any part thereof, to bring it forthwith before me at the Fifth Circuit Court, County of Salt Lake, State of Utah, or retain such property in your custody, subject to the order of this court.

GIVEN UNDER MY HAND and dated this 14th day of January, 1986.

JUDGE OF THE FIFTH CIRCUIT COURT

FILE NO. CR86-154

TITLE: (✓ PARTIES PRESENT)	COUNSEL: (✓ COUNSEL PRESENT)
STATE OF UTAH	Ernie Jones
[redacted] VS	
Salvador V. Ayala	Larry R. Keller
Roberto Villalobos	Debra Loy

G. A. CHILDS CLERK
~~ALAN SMITH~~ REPORTER
~~GROVER MEDLEY~~ BAILIFF

HOMER F. WILKINSON
HON.
DATE: July 22, 198

Defendants' motion to suppress evidence and defendant Villalobos motion to sever having been previously heard by this court and the court having taken the matter under advisement now rules as follows:

- Defendants' motion to suppress evidence obtained under the search warrant is denied.
- Defendants' motion to suppress evidence seized by the search of the defendants prior to arrest unless it was obtained in a "pat down" search is granted.
- Defendant Ayala's motion to suppress answers given by Ayala in response to the officer's questions after the Miranda warning is granted.
- Defendants motion to disclose the name of the confidential informants is denied.

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APPENDIX C

PAGE 1 OF

FILE NO. CF 06-187

TLE: (✓ PARTIES PRESENT)	COUNSEL: (✓ COUNSEL PRESENT)
STATE OF UTAH	Ernie Jones
VS	
Salvador V. Ayala	Harry R. Keller
Roberto Villalobos	Debra Foy

G. A. CHILDS CLERK
~~ALAN SMITH~~ REPORTER
~~GROVER MEDLEY~~ BAILIFF

HOMER F. WILKINSON
HON. JUDGE
DATE: July 22, 1986

Based on the limited information the court has received as to the exculpatory testimony of the defendant Ayala the defendant Villalobos' motion to sever is denied

CC: to respective counsel

000150