1990

The State of Utah v. Miguel Enrique Salas-Leyva : Reply Brief

Utah Court of Appeals

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Candice A. Johnson; Joan C. Watt; Attorney for Appellant.

IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
MIGUEL ENRIQUE SALAS-LEYVA,	:	Case No. 900418-CA Priority No. 2
Defendant/Appellant.	:	

REPLY BRIEF OF APPELLANT

Appeal from a judgment and conviction for Unlawful Possession of a Controlled Substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8(a)(i) (1990), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Leonard H. Russon, Judge, presiding.

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INTRODUCTION

Appellant's Statements of Jurisdiction, Issues and Standards of Review, the Case, and the Facts are contained in Appellant's opening brief at 1-9. Appellant relies on those statements and the arguments set forth in his opening brief and makes the following replies. Issues not addressed in this reply brief are adequately addressed in Appellant's opening brief.

SUMMARY OF THE ARGUMENT

Because Appellant was legally licensed to drive in Utah, the stop of his vehicle violated the fourth amendment. Nor did the officer have a reasonable articulable suspicion based on the informant's tip. The State makes this alternative argument for the first time on appeal. It objected to developing the facts surrounding such argument in the trial court, and the facts which were developed do not amount to an objectively reasonable suspicion.

The pretext doctrine is well established and based on important policy considerations. The State has not offered a

convincing reason for this Court to overrule its own recent precedent. The detention in this case was an invalid pretext stop.

The scope of any detention is a necessary part of any analysis as to the reasonableness of the detention. Terry and its progeny carved a limited exception to the warrant requirement where the detention is based on reasonable articulable suspicion and the intrusion is strictly limited to the purpose of the stop. Appellant preserved this issue for appeal.

Appellant did not voluntarily consent to the search of his vehicle.

The State did not establish that officers did not exploit the primary illegality.

Appellant properly marshalled and analyzed the evidence. The evidence failed to establish a sufficient nexus between the controlled substance and Appellant.

ARGUMENT

POINT I. THE INITIAL DETENTION VIOLATED THE FOURTH AMENDMENT.

A. THE OFFICERS DID NOT HAVE A VALID BASIS FOR THE STOP.

(Reply to Point I.A of State's Brief)

Appellant's argument in Point I.A of his opening brief, pages 11-16, is that because he was legally licensed to operate a motor vehicle in Utah, the stop of his vehicle was not objectively reasonable.

The first aspect of this argument is that since individuals can be licensed in other states and countries, the failure to locate a Utah license for the driver does not create a reasonable articulable suspicion that the driver has committed a traffic violation.[1]

Appellant also argues that because he was, in fact, legally licensed in Utah, the officer's erroneous belief that Appellant had committed a traffic violation was not objectively reasonable. The cases cited by Appellant on page 15 of his brief, although not directly on point, discuss situations where the information relied upon by police officers was incorrect. Appellant cited those cases for the proposition that a detention violates the fourth amendment where the officers rely on incorrect information in making the stop.

In the present case, the officer relied on information from other police or state agencies in reaching his conclusion that Appellant was not legally licensed to drive in Utah. Detective McCarthy claimed that he checked several possible names, including the name under which Appellant was licensed. Either Detective McCarthy or the agencies made an error since Appellant was legally licensed to drive. Hence, the seizure was not objectively reasonable. See generally United States v. Hensley, 469 U.S. 221

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1. Appellant's reliance on State v. Constantino, 732 P.2d 125 (Utah 1987), in his opening brief at 13-14 is meant to point out the factual distinction between confirming that a Utah license has been revoked and simply being unable to find a Utah license. It is not meant to suggest a new standard for this Court. See State's brief at 9.

(1985).[2]

The State argues for the first time on appeal that the officers had a reasonable articulable suspicion based on the informant's tip. State's brief at 11-13. The argument was not raised below, nor was it factually developed in the trial court. The prosecutor objected in the trial court when defense counsel attempted to explore the information given by the informant to the officers, and the officers claimed that they stopped the vehicle because of a traffic violation and not based on the informant's tip. T. 1:11. In addition, the facts in this case did not establish a reasonable articulable suspicion. See footnote 3 in Appellant's opening brief at 12.

Alabama v. White, 496 U.S. ___, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990), is distinguishable from the present case since the tip in White contained greater detail and the actions of the defendant corroborated more aspects of the tip than in the present case. In White, officers received an anonymous phone call, informing them that (1) Vanessa White would be leaving a specific address at a specific time in a particular car, (2) she would be going to Dobey's

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2. In United States v. DeLeon-Reyna, ____ F.2d ____ (5th Cir. April 17, 1991), 1991 WL 55881, cited by the State in a letter of supplemental authority dated May 14, 1991, the Court did "not question the good faith of the officers who made [the] stop," and applied a good faith exception to a warrantless stop. In the present case, the officer who made the stop was not acting in good faith. Furthermore, although the fifth circuit applies a good faith exception to warrantless arrests, such an application is not accepted in other jurisdictions, including Utah. In State v. Mendoza, 748 P.2d 181, 185 (Utah 1987), the supreme court recognized that the good faith or "Leon exception, by its own terms, could never apply to an investigatory stop and search."

Motel, and (3) she would be in possession of a brown attache case which contained cocaine. 110 L.Ed.2d at 306-7.

A short time later, officers watched a woman leave the designated apartment, enter the designated vehicle, and drive in the most direct route to the motel. Officers stopped the vehicle "just short" of the motel. Id.

Information that a woman would be leaving a specific apartment at around 4:00 p.m. would be more difficult to obtain and carry more weight when the activity actually occurred than information that an individual would be leaving his place of work during the lunch hour. An individual would merely need to know where Appellant worked in order to obtain that information in the present case. In addition, the tip did not provide officers with information as to where Appellant was going. Unlike the situation in White, the route traveled by Appellant did not corroborate information given in the tip.

State v. Brown, 798 P.2d 284 (Utah App. 1990), also cited by the State on page 12 of its brief in support of its argument that the officers had a reasonable articulable suspicion to justify stopping Appellant, involved a citizen informant. In reaching its decision, this Court recognized that "[C]ourts view the testimony of citizen informers with less rigid scrutiny than the testimony of police informers. [citation omitted]." Id. at 284. Hence, Brown is distinguishable from the present case.

Neither the informant's tip nor the officer's inability to find a Utah driver's license, despite the fact that Appellant was

legally licensed to drive in this state, created a reasonable articulable suspicion which would justify the initial detention.

B. THE STOP OF THE VEHICLE FOR A TRAFFIC VIOLATION WAS A PRETEXT TO SEARCH FOR DRUGS.

(Reply to Point I.B of State's Brief)

But for the officer's desire to search Appellant's vehicle, they would not have run a check to determine whether Appellant was legally licensed or have stopped Appellant's vehicle. The initial detention was therefore not objectively reasonable.

Although the State requests that this Court reject its previously outlined pretext doctrine, it has not offered a convincing reason for negating recent precedent. As this Court recognized in State v. Sierra, 754 P.2d 972, 977-9 (Utah Ct. App. 1988), overruled on other grounds, State v. Arroyo, 796 P.2d 684 (Utah 1990), the pretext doctrine reflects the responsibility of the courts to protect the constitutional rights of individuals against unreasonable searches and seizures. This Court stated:

> [I]t is impermissible for law enforcement officers to use a misdemeanor arrest as a pretext to search for evidence of a more serious crime. The violation of a constitutional right by subterfuge cannot be justified . . . were the use of misdemeanor arrest warrants as a pretext for searching people suspected of felonies to be permitted, a mockery could be made of the Fourth Amendment and its guarantees. The courts must be vigilant to detect and prevent such a misuse of legal processes.

754 P.2d 972, 977 (Utah App. 1988), quoting Taglavore v. United States, 291 F.2d 262, 266 (9th Cir. 1961).

In Sierra, this Court also recognized the importance of the pretext doctrine in light of the discretion generally afforded police officers:

> "'[I]n most jurisdictions and for most traffic offenses the determination of whether to issue a citation or effect a full arrest is discretionary with the officer,' and . . . 'very few drivers can traverse any appreciable distance without violating some traffic regulation,' this [pretextual traffic stop] is indeed a frightening possibility. It is apparent that virtually everyone who ventures out onto the public streets and highways may then, with little effort by the police, be placed in a position where he is subject to a full search. Nor is one put at ease by what evidence exists as to police practices in this regard; it is clear that this subterfuge is employed as a means for searching for evidence on the persons of suspects who could not be lawfully arrested for the crimes of which they are suspected."

Sierra, 754 P.2d at 978-979, quoting LaFave, Search and Seizure § 5.2(e) (2d ed. 1987) (footnotes omitted).

In State v. Holmes, 256 So.2d 32, 34 (Fla. 1972), the court explained that the pretext doctrine is also meant to protect equal protection principles in law enforcement:

> We conclude that at the bottom of the pretextual arrest doctrine is an unarticulated application of Yick Wo v. Hopkins [118 U.S. 356 (1886)]: "Though the law itself be fair on its face, and impartial in appliance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution." This interpretation of the Equal Protection Clause suggests that the real evil of searches and seizures incident to a traffic arrest is not that the arrest is a pretext for the search, but that

> the arrest is one which would not have been made but for the motive of the arresting officer.

Holmes, 256 So.2d at 34, quoting Yick Wo at 373-374. See also United States v. Guzman, 864 F.2d 1512, 1516 (10th Cir. 1988) ("[I]n the absence of standardized police procedures that limit discretion, whether we are simply allowed to continue on our way with a stern look, or instead are stopped and subjected to lengthy and intrusive interrogation when we forget to wear our seat belts, turns on no more than 'the state of the digestion of any officer who stops us or, more likely, upon our obsequiousness, the price of our automobiles, the formality of our dress, the shortness of our hair or the color of our skin.' [Amsterdam, Perspectives on the Fourth Amendment, 58 Minn.L.Rev. 349, 416 (1974).]").

The term "pretext" is defined by the court in State v. Holmes, 256 So.2d 32 (Fla. App. Dist. 2 1972), as

> "A purpose or motive alleged, or an appearance assumed, in order to cloak the real intention or state of affairs; excuse; pretense; cover; semblance."

Id. at 34 n.8, quoting Webster's New International Dictionary of the English Language, 2d ed. 1957.

Numerous courts have defined the pretext doctrine in search and seizure cases. See, e.g., United States v. Guzman, 864 F.2d 1512, 1515 (10th Cir. 1988) ("a pretextual stop occurs when the police use a legal justification to make the stop in order to search a person or place, or to interrogate a person, for an unrelated serious crime for which they do not have the reasonable suspicion necessary to support a stop."); United States v. Trigg, 878 F.2d

1037, 1039 (7th Cir. 1989) ("By definition, a pretextual arrest occurs when the police employ an arrest based on probable cause as a devise to investigate or search for evidence of an unrelated offense for which probable cause is lacking."); People v. Holloway, 330 N.W.2d 405, 412 (Mich. 1982) ("'Pretext arrests' are arrests in which the officer, although making an apparently lawful arrest, is making the arrest to conduct a search for which there is no independent probable cause. The basic principle is simply that '[a]n arrest may not be used as a pretext to search for evidence,' United States v. Lefkowitz, 285 U.S. 452, 467, 52 S.Ct. 420, 424, 76 L.Ed.2d 877 (1932)."); United States v. Smith, 799 F.2d 704, 710 (11th Cir. 1986) ("[W]hile Trooper Vogel's courtroom declaration of motive is intriguing, what turns this case is the overwhelming objective evidence that Vogel had no interest in investigating possible drunk driving charges.").

In the present case, where the officer made a traffic stop based on his desire to search for drugs, the stop and ultimate search violated the fourth amendment.

C. THE SCOPE OF THE DETENTION EXCEEDED THE PERMISSIBLE SCOPE OF A TRAFFIC VIOLATION.

(Reply to Point I.C of State's Brief)

Without addressing the merits of Appellant's argument that officers exceeded the scope of a traffic stop, the State argues only that Appellant failed to preserve this issue for appellate review.

Appellant has consistently argued that the detention and

subsequent search violated the fourth amendment. T. May 23, 1990: 2, 5. Analysis of any "level two"[3] detention by officers necessarily requires an analysis of the reasonableness of the initial stop along with an analysis of whether the scope was reasonably limited to the purpose of the stop. See Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968); State v. Schlosser, 774 P.2d 1132 (Utah 1989); State v. Johnson, 153 Utah Adv. Rep. 8, 9-10 (Utah 1991). In other words, the scope of any permissible Terry stop is strictly limited by the purpose for the stop and inextricably linked thereto. Hence, a claim that a particular detention violates the fourth amendment raises the issue of whether the officer had a reasonable articulable suspicion along with the issue of whether the officer's actions were strictly tied to the purpose of the stop. Id.

In Terry, the Court stated:

> This court has held in the past that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope. [citations omitted]. The scope of the search must be "strictly tied to and justified by" the circumstances which rendered its initiation permissible. [citations omitted].

Terry, 392 U.S. at 17-19. The Terry court carved a limited exception which necessarily limited the scope of any intrusions. Id. at 30-1.

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3. In State v. Deitman, 739 P.2d 616, 617-8 (Utah 1987), this Court outlined three levels of encounters between police and citizens. This case involves a level two encounter, which requires a reasonable articulable suspicion in order to be valid under the fourth amendment.

In State v. Ramirez, 159 Utah Adv. Rep. 7, 13 (Utah 1991), the Utah Supreme Court recognized that:

> The analysis that emerges from Terry and its progeny revolves around two closely interrelated analytical components: first, the specific and articulable facts that justified the action, and second, the scope of the interference. [citation omitted].

In Johnson, the Utah Supreme Court blurred the two components in holding that the detention of a passenger in a vehicle for a warrants check violated the Fourth Amendment.

> With the paucity of facts available to him, the officer's detention of the passenger beyond what was reasonably related in scope to the traffic stop was not justified by a articulable suspicion that defendant had committed a crime.

Johnson, 153 Utah Adv. Rep. at 10.

In Schlosser, 774 P.2d at 1135, the Utah Supreme Court reemphasized the limited scope of a traffic stop. The Court stated:

> In Arizona v. Hicks, 480 U.S. 321, 325, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987), the Supreme Court held that even a small intrusion beyond the legitimate scope of an initially lawful search is unlawful under the Fourth Amendment.

774 P.2d at 1135.

Hence, the scope of the intrusion is necessarily linked to the purpose of the detention; raising a claim that the detention violated the fourth amendment raises a claim that the permissible scope was exceeded.

Furthermore, Appellant discussed the scope of the intrusion, albeit briefly, during argument. In opening, counsel for Appellant stated:

> However, we have raised the issues of the reasonableness of the stop herein, whether or not there was a pretense search; and given that status, I believe it is the State's burden to establish that reasonableness . . . .

T. 2. In argument, counsel for Appellant stated:

> The issue is not whether Officer McCarthy could stop the vehicle. The issue is really would he have made the seizure of Mr. Leyva, absent any other kind of illegitimate [motivations]. And the issue here is that he was looking for a specific violation, but he could stop that car and he could effectuate some kind of an arrest, some kind of a citation [or] grievance to get that car, and he has been quite clear about that and I think quite honest. He suspected narcotics. He wanted to search that car and he was going to search that car.

T. 51.

Finally, the cases cited by the State at pages 18-9 do not address the issue of whether an argument regarding the scope of an intrusion is necessarily raised when the reasonableness of an investigatory stop is attacked.

In all of the cases cited by the State, the appellant raised a distinct legal argument which had not been raised below.[4]

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4. In State v. Johnson, 771 P.2d 326, 327-8 (Utah Ct. App.), rev'd on other grounds, 153 Utah Adv. 8 (Utah 1991), the issue was whether the appellant could raise a distinct state constitutional argument for the first time on appeal. In State v. Steggell, 660 P.2d 252, 254 (Utah 1983), the appellant failed to object in the trial court to some comments made by the court which the appellant then attacked for the first time on appeal. In State v. Carter, 707 P.2d 656, 660 (Utah 1985), the appellant attacked the search of his backpack for the first time on appeal; in the trial court, he had attacked only the frisk of his person. In State v. Lee, 633 P.2d 48 (Utah), cert. denied, 454 U.S. 1057 (1981), the appellant did not argue in the trial court that the seizure was illegal because the officer failed to obtain a warrant. In State v. Webb, 790 P.2d 65, 77 (Utah App. 1990), the appellant raised for the first time on appeal an (footnote continued)

By contrast, in the present case, the reasonableness of the detention, which necessarily includes the issue of whehter the scope of the detention was proper, was necessarily raised in the trial court.

POINT II. APPELLANT DID NOT GIVE A VALID CONSENT TO SEARCH THE VEHICLE.

(Reply to Point I.D of State's Brief)

A. APPELLANT DID NOT VOLUNTARILY CONSENT TO THE SEARCH OF HIS VEHICLE.

In State v. Ramirez, 159 Utah Adv. Rep. at 14, the Utah Supreme Court stated:

> We further note that in considering the lawfulness of the stop and the seizure and search, the trial court should regard with caution any claim that the suspect "consented." The realities of interactions between private citizens and the police are such that "consent" is often merely a fiction, particularly when it results from illegal police conduct. [citations omitted].

In this case, the totality of the circumstances establish that consent was not voluntarily given.

B. THE STATE DID NOT ESTABLISH THAT THE OFFICERS DID NOT EXPLOIT THE PRIMARY ILLEGALITY.

Without addressing the merits of Appellant's argument in this subsection, the State claims simply that the initial detention

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(footnote 4 continued)
argument that the officers failed to comply with statutory requirements in executing a search warrant.

was permissible, and that therefore this issue need not be addressed.

Two cases decided by this Court after Appellant filed his opening brief, State v. Carter, 156 Utah Adv. Rep. 17, 21 (Utah App. 1991), and State v. Sims, 156 Utah Adv. Rep. 8 (Utah App. 1991), offer further guidance in analyzing whether the taint of the primary illegality has been attenuated. Both Sims and Carter support Appellant's argument that the taint was not attenuated in this case.

POINT III. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT APPELLANT OF UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE.

(Reply to Point II of State's Brief)

Contrary to the assertion of the State that Appellant has failed to adequately marshal and analyze the evidence (State's Brief at 22-3), Appellant has cited the testimonies of Officer McCarthy and Agent Englin and has viewed the evidence in the light most favorable to the verdict.[5] Appellant's position is that, where a small amount of cocaine was found under the back seat of an automobile where such back seat was occupied by an individual, there was insufficient evidence to establish possession by Appellant despite the fact that he owned the vehicle.

Pursuant to State v. Fox, 709 P.2d 316, 318-9 (Utah 1985), and State v. Banks, 720 P.2d 1380, 1384 (Utah 1986), the evidence

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5. In his opening brief at 31-4, Appellant cited the same evidence cited by the State at pages 23-4 of its brief as well as the evidence argued by the State in closing. T. 2:82.

in this case failed to establish a sufficient nexus between the controlled substance and Appellant.

CONCLUSION

Based on the foregoing, Appellant Salas-Leyva respectfully requests that his conviction be reversed and the case remanded to the trial court for a new trial or dismissal.

SUBMITTED this 17 day of June, 1991.

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Attorney for Defendant/Appellant

CANDICE A. JOHNSON
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that eight copies of the foregoing will be delivered to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102, and four copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 17 day of June, 1991.

JOAN C. WATT

DELIVERED by _____ this _____ day of June, 1991.

_____