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The State of Utah v. Raymond J. Vigil : Brief of Appellant

Utah Court of Appeals

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For the Defendant-Appellant; Stephen I. Oda.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	)	
Plaintiff-Respondent,	)	BRIEF OF DEFENDANT-APPELLANT
vs.	)	
RAYMOND J. VIGIL,	)	Case No. 900147-CA
Defendant-Appellant.	)	Priority 2

BRIEF OF APPELLANT, RAYMOND J. VIGIL

ON APPEAL FROM A CONVICTION OF
THE SECOND JUDICIAL DISTRICT COURT
DAVIS COUNTY, STATE OF UTAH
HONORABLE DOUGLAS L. CORNABY, JUDGE PRESIDING

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RAYMOND J. VIGIL, Defendant-Appellant.	)	

BRIEF OF DEFENDANT-APPELLANT

STATEMENT OF JURISDICTION

This appeal is taken pursuant to the provision of Rule 3, Title II, Utah Rules of Appellate Procedure in which Defendant-Appellant appeals his conviction from the District Court, Second Judicial District, Davis County, State of Utah.

NATURE OF PROCEEDINGS

This is an Appeal from a criminal conviction in which Defendant-Appellant was convicted of (1) Burglary, a felony of the second degree, in that he is alleged to have entered into a dwelling with intent to commit a theft and (2) Habitual Criminal.

STATEMENT OF ISSUES PRESENTED FOR APPEAL

The issues presented in this appeal are:

1. Did the officer have reasonable grounds or suspicion to follow Defendant's car and make an investigative stop?

2. Was the arrest of the Defendant and all other occupants of the auto proper or was it a pretext to impound the car?

3. Was the owner's consent to search the vehicle freely

and voluntarily given.

DETERMINATIVE STATUTE

The following statute is determinative in this case:

United States Constitution, amend. IV:

> 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.

STATEMENT OF THE CASE

Defendant-Appellant was charged with Burglary of a dwelling, a second degree felony in violation of Utah Code Annotated Sec. 76-6-202. Defendant moved to suppress evidence which was denied. Defendant was convicted by jury trial conducted on April 19, 1989 before the Honorable Douglas L. Cornaby, District Judge. Defendant was then tried by jury under the Habitual Criminal Statute, Utah Code Annotated, Sec. 76-8-1001 and determined to be a habitual criminal. Judge Cornaby sentenced Defendant to the Utah State Prison for a term of five years to life.

STATEMENT OF FACTS

Defendant-Appellant, Raymond J. Vigil (hereinafter referred to as Vigil) was one of two passengers in an automobile driven by his juvenile nephew. All occupants of the car are Hispanic. A Police Officer saw the three Hispanic males in an affluent area of Bountiful, Utah and became suspicious. The officer had no knowledge of a burglary having been committed or any other criminal act on the part of the vehicle occupants. The officer followed the car for a

substantial distance when he stopped the driver for speeding 45 mph in a 35 mph zone. When the car was stopped, the driver was cited for speeding and open container. All three occupants of the car were arrested and transported to jail and the car impounded for normally citation only type of cases. The owner of the automobile (mother of the driver) contacted the police later that evening. She requested information of her automobile. The arresting officer implied that the car must be searched before being released to her. She gives a guarded consent. The car is searched without a warrant and items from a burglary are found in the car.

SUMMARY OF ARGUMENT

Defendant is entitled to Fourth Amendment protection against unreasonable searches and seizures. The police officer followed the automobile in which Defendant was a passenger solely because there were three Hispanic occupants in an auto in East Bountiful. The speeding citation was a pretext resulting from the officers trailing Defendant in excess of 23 blocks within Bountiful City. The officer arrested the driver and two passengers for speeding and open container violations, thereby necessitating impoundment of the vehicle. The subsequent warrantless search is without free and voluntary consent and is illegal. The items confiscated from the car trunk is illegally seized evidence which should have been suppressed by the trial court.

ARGUMENT

POINT ONE

DID THE ARRESTING OFFICER HAVE REASONABLE SUSPICION TO FOLLOW DEFENDANT'S AUTO AND MAKE AN INVESTIGATIVE STOP?

Defense Counsel Vanderlinden and Prosecutor Harward stipulated to the facts of the auto stop by officer Johns. (Tl. 13, 17, 18) [1] Deputy Johns saw three male Hispanics in an automobile traveling in an affluent Bountiful area. He becomes suspicious and turns around and follows the car from approximately 550 South 1100 East, Bountiful to 1130 North 400 East in Bountiful, (Tl. 74) a distance of approximately 24 blocks until he determines a speed violation. Officer Johns has no knowledge of a burglary or any other criminal offense having occurred.

Based on objective and articulable facts, Officer Johns had no basis to document a reasonable suspicion of criminal activity to justify an investigatory stop of Defendant's automobile. State v. Carpena, 714 P.2d 674, 675 (Utah 1986); Utah Code Annotated Sec. 77-7-15 (1982). He followed the vehicle 24 blocks obviously on a "hunch", eventually culminating in a speeding citation. This Court has clearly set forth the standards which govern police officer's actions in circumstances such as the instant case. In the case, State of Utah v. Sigifredo Sierra, 754 P.2d 972 (Utah App. 1988) this Court addressed a factual circumstance similar to the case at bar. In Sierra, this Court adopts the

[1] Three transcripts have been prepared and each numbered sequentially. Therefore the transcript of the suppression hearing shall be designated Tl; the trial as T2 and the Habitual Criminal transcript as T3

Brignoni-Ponce, 422 U.S. at 885, 95 S.Ct. at 2582, test of whether a stop is a pretext. We must make an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time to determine the true purpose of the stop and search.

The Trial Court applied this form of test but mistakenly found the arresting officer had immediately perceived a speed violation (Tl. 35-36) when in fact the officer trailed the car for 23+ blocks before citing a violation of speed.

This Court held in Sierra, that

> ...in traffic violation stops, in balancing the rights of individuals to be free from arbitrary interference by law enforcement officers and the government's interest in crime prevention and public protection, if a hypothetical officer would not have stopped the driver for the cited traffic offense and the surrounding circumstances indicate the stop is a pretext, the stop is unconstitutional.

This Court further adopted language from the dissent in United States v. Robinson, 471 F.2d 1082, (D.C. Cir. 1972) which states "...very few drivers can traverse any appreciable distance without violating some traffic regulation."

The arresting officer followed his hunch based solely on the nationality of the occupants of the car in which Defendant was riding. No reasons existed to stop the car at the inception of the officer's observation. No reasonable officer would have stopped the car in a reasonable distance, say 4-5 blocks. All surrounding circumstances point to a pretext stop by the arresting officer and the ensuing search was unconstitutional.

POINT TWO

THE ARREST OF THE DEFENDANT AND ALL OTHER OCCUPANTS OF THE CAR WAS A PRETEXT TO IMPOUND AND THEREBY INVENTORY SEARCH THE CAR.

The driver of the automobile was charged with speeding 45 mph in a 35 mph zone and for open container of alcohol in an automobile. The Defendant and second passenger were both arrested for open container of alcohol. It is very pertinent that at the time of arrest, the officer had no other criminal charges or specific suspicions about the occupants. Although the police officer's determination to arrest individuals for these kinds of offenses is discretionary, very rarely is arrest utilized. Giving the offenders a citation to appear is the standard practice in Davis County, State of Utah. Impounding an auotmobile for speeding and open container offenses is clearly unusual and not standard practice. The arrest in the case at bar is so out of the ordinary that when viewed in the totality of the circumstances (the officer's trailing for 23 blocks; the officer's commitment to search the trunk; the impound of a car for speeding; the attraction to the car because of the occupants' race) it can only be deemed a pretext arrest. The arrest was a subterfuge to search the vehicle and the search was therefore illegal Lane v. Commonwealth, 386 S.W. 2d 743, 10 ALR3d 308.

For a search of an automobile incident to an arrest for a traffic citation to be valid, the search must have been conducted contemporaneously with the arrest. In the case at bar, the auto in which Defendant was a passenger was towed to Dewaal's in Bountiful,

Utah. The car was locked in a fenced yard. Given these circumstances, a warrantless search is not justified since at this point (1) the need to search for weapons is minimal (2) no evidence will be destroyed (3) there was no danger of the car being driven away. The U.S. Supreme Court held evidence derived from such a warrantless search, inadmissable as violation of the Fourth Amendment of the U.S. Constitution. Preston v. United States, 376 U.S. 364, 11 L.ed. 2d 277, 84 S.Ct. 881.

The Supreme Court had further consistently ruled that automobile searches after arrest for traffic citations must have some reasonable relation to the offense for which the arrest was made. General exploratory searches made solely to find evidence of other wrongdoing are unconstitutional and evidence derived therefrom is not admissable United States v. Tate, 209 F.Supp 762; Am Jur, Searches & Seizures (1st ed. Sec. 19)

The officer's actions in the case at bar falls directly in this area. The evidence he needs to sustain a conviction for open container of alcohol in a vehicle is already in his possession. Furthermore, it is irrelevant if additional alcohol were found in the locked trunk of an automobile and therefore any search is pointless except to find evidence of other wrongdoing. On the issue of speeding, no further evidence could possibly be found in the trunk that has a relation to the speeding charge.

POINT THREE

WAS THE OWNER'S CONSENT TO SEARCH THE VEHICLE FREELY AND VOLUNTARILY GIVEN?

In State v. Sierra, this Court followed the majority view that a search conducted pursuant to voluntary consent is valid for Fourth Amendment analysis and that "voluntary" consent cannot be the result of duress or coercion, express or implied. Schnockloth v. Bustamonte, 412 U.S.218, 219, 93 S.Ct. 2041; 36 L.ed.2d 854.

In the case at bar, Officer John made telephone contact with the owner of the automobile in question, a Sally Salazar. This conversation took place after the arrest of Defendant and impound of the vehicle. With regards to the issue of voluntariness of consent to search, officer John's conversation is defective on two points:

1. Officer John implies that Mrs. Salazar cannot get her car released until he looks through it (T1.9).

2. Officer John implies to Mrs. Salazar that he has a right to search the car trunk because he has the key but can't do so because the key is damaged (T1.7,8). Officer John further implies the purpose of the search is to make sure nothing is missing (T1.9) or to simply "make sure everything is okay" (T1.10).

Based on Officer John's implied threat that Mrs. Salazar will not get her car back without a search and that the search is merely for the purpose of insuring nothing is missing is a flagrant misrepresentation of the facts and law. Mrs. Salazar's strained consent (T1.9) is not voluntary, is coerced, and is based on deliberate misrepresentation of facts by Officer John.

CONCLUSION

Officer John has singled out the automobile in which

Defendant was a passenger solely because of their nationality. The facts of the case indicate the officer was determined to investigate the occupants of the car. A speeding charge after 23 blocks of tailing can be nothing more than a pretext which is compounded by the arrest of all occupants on citation only type offenses. A reasonable officer given officer John's knowledge at the time would not have taken the action he did. The improper stop, arrest, and impoundment should not be cured by the consent obtained from the auto owner under misrepresentation and duress by Officer John. All evidence obtained as a result of the search should be suppressed.

Respectfully submitted this 26 day of June, 1990.

STEPHEN I. ODA, Attorney for
Defendant-Appellant

CERTIFICATE OF MAILING

I, STEPHEN I. ODA, hereby certify that I have mailed four (4) true and accurate copies of the aforegoing Brief of Defendant-Appellant to the following persons at the following addresses, by depositing same in the U.S. Mail, postage prepaid, on the 26 day of June, 1990:

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Stephen I. Oda

ADDENDUM

TO BRIEF

STATE OF UTAH

vs.

RAYMOND VIGIL

Case No. 900147-CA

"Q And then the car was supposed to stay at your house?"

"A Yes."

"Q Do you have any idea why he would be in Bountiful?"

"A I have no idea."

"Q Okay. Who -- Who was supposed to be with him?"

"A He was supposed to have been by himself."

"Q He was supposed to be by himself?"

"A Yes."

"Q Virgil wasn't supposed to be with him?"

"A Nobody was supposed to be with him."

"Q Okay. Where's all the keys to the vehicle other than than the...."

"A Well, I have okay, the ignition key, I have that on there, but the trunk key is messed up. So I was getting it to get fixed 'cause it's bent, really damaged."

"Q So you can't get into the trunk?"

"A I can't get into the trunk. And, you know, I take back the original key which not really, won't even go into the hole to open the trunk."

"Q So what about the glove box?"

"A The glove box is the same key as the

trunk."

"Q And it was on the ring; right?"

"A It was supposed to have been there on the ring."

"Q But it -- you can't get it into the trunk at all?"

"A I can't get into the trunk 'cause the key's no good."

"Q Okay."

"A I left my son -- left that key with his uncle and that, but you see" (Not audible) "somebody else to fix the keys. But I don't know. I haven't talked with my brother yet or not."

"Q But he was supposed to get that key fixed for you, and you don't know whether he's done that or not?"

"A I don't know whether he's done that or not."

"Q Is it possible that your boy headed out with your brother and got the key?"

"A Umm, I've had -- umm, I have no idea. It could be possible, though."

"Q Okay."

"A When I talked to my son, I was pretty angry. I didn't even ask him anything. I just

wanted to know where -- where my car was and what the hell was going on."

"Q Do you know who Armando is?"

"A I -- No, I don't know Armando."

"Q But you know Virgil?"

"A Virgil?"

"Q Uh-huh (affirmative)."

"A Umm, no, not...."

"Q Virgil Raymond or Raymond Virgil?"

"A Raymond Vigil, I do."

"Q And who is that?"

"A Umm, he's related, umm, to my friend, to his father."

"Q Well, we need to look through your car before we can let it go. Is that all right with you?"

"A Umm, will I have to be there?"

"Q No, you don't have to be there. There's been a list done on the car. Nothing's going to be missing or anything. We just need to look through it. But we want to make sure that's all right with you."

"A Yeah. Yeah, I guess so."

"Q So that is fine with you?"

"A Uh-huh (affirmative)."

"Q And what was your name?"

"A My name's Salazar."

"Q Salazar?"

"A Uh-huh (affirmative)."

"Q Okay, and that car does come back to you?"

"A Yeah. It is my car."

"Q Okay. What's your current address?"

"A 334 East 1300 South."

"Q 1300 South?"

"A Uh-huh (affirmative)."

"Q In Salt Lake City?"

"A Yes."

"Q And what's your phone number?"

"A 466-4724."

"Q Okay. You can give them a call and see if they'll release that car to you. And like I said, if it's all right, we'll go down and look at it and make sure everything's okay."

"A Umm, you don't have -- you don't -- you don't happen to have" (Not audible)

"Q You what?"

"A You don't happen to --"

"Q The telephone number?"

"A The telephone number, yeah."

"Q 292-8036."

which defendant was riding was stopped. It deals with the lawfulness of the search of the vehicle and seizure of evidence from the vehicle.

Mr. Vanderlinden and I have had a conversation, and I anticipate we'll be able to stipulate for purposes of the suppression hearing on some evidence. And if the Court will allow, I'll now make my best effort to recite the stipulated facts.

The date in question is the 14th of January 1989. The city we are concerned with is Bountiful. The residence involved was secured by the owner at 2 o'clock in the afternoon. The burglary was discovered at approximately 4:21 in the afternoon of the same day. On that day, J.R. John who is a deputy Davis County sheriff paramedic was on duty in the Bountiful area, had an associate from the sheriff's department with him.

And at approximately 3:06 p.m. on that day, he saw the vehicle in question in the same area of town where the burglarized house is. At that moment in time, Deputy John knew nothing of the -- had no information whatsoever, and he didn't learn about a burglary until a substantial time later. When he saw the car, there was circumstances that attracted his attention to it. He is a certified

Court has listened to the tape. I would rather have the Court listen to the tape rather than recite what Mr. Harward said.

THE COURT: I have listened to the tape.

MR. VANDERLINDEN: Thank you. And I submit it on that, your Honor.

THE COURT: Thank you.

MR. HARWARD: Let me look at this motion to see if I have recited the facts that would be towards the issues.

Yes, your Honor, it is praying in the motion to suppress that there was not a search warrant for the vehicle. That is true. There was no warrants to search the vehicle. And it also is true that there was not a warrant to seize the shoes.

Mr. Vanderlinden?

MR. VANDERLINDEN: Yes. Carvel, there are a couple of facts that should be in evidence if I could address the Court.

I would stipulate if those people were called to testify that's what they would testify to, your Honor. There are a couple of additional facts to be brought in evidence.

If Officer Johns -- I would like the Court -- It is my understanding the first thing that

called his attention to the vehicle prior to the stop was three Hispanic males in the vehicle, and they were dressed in a certain way, that they appeared to be out of California. Based on that, he turned and followed the vehicle. That was the only basis for it, because there were three Hispanic males in the vehicle.

THE COURT: You mean in spite of the speed?

MR. VANDERLINDEN: No. That was before the speed. The only reason he originally went after that car was three Hispanic males, as he put it, and one was dressed -- and one was dressed -- I don't know this word. Well, "cholo," c-h-o-l-o. And he's got this in his report. And that's the only reason he went after them.

Further, the only thing that Mr. Vigil was arrested for was an open container of alcoholic beverage in a vehicle. Nothing else. And the other ones was speeding and an open container. And based on those misdemeanors was arrested. The car was impounded. Those are the only arrests that were made.

And also the times are critical, your Honor. If the Court could indicate -- If Detective Gray were called to testify, first of all, he would

determined other than an open container in the car. Based on that, we submit it, your Honor.

MR. HARWARD: We submit it.

THE COURT: In ruling on the matter, I'll make several observations. What I really need to do is rule on each one separately because each one really becomes an individual claim.

First we ought to deal with the stop. Our appellate courts have generally said that pretext stops will not be acceptable. Sometimes those are done. You see a vehicle or a person or persons in a vehicle, and you decide to stop them and then you look for a violation, and you may find a taillight out. You may find they had too thin on the tire, whatever it may be in there. The appellate courts say that is just a pretext, and we won't let you use that pretext to search a vehicle and make inquiry.

Now, it does appear that the stipulated fact was that Deputy Johns saw the individuals in the vehicle, and they were Hispanic and they were dressed in California style, and, umm, were in an area of Bountiful which was unusual to expect them to be in that kind of car. And so he followed them. And, of course, he checked the speed and apparently checked the speed immediately and they were in the speed

violation.

Under this kind of situation, umm, it does not appear to the Court that it is a pretext stop and is in violation he had a right to check for the speeding. And it's 10 miles over the speed limit. And that is the amount that one would -- most officers would normally stop and ticket a vehicle for speeding. So the fact that there are Hispanic persons in the vehicle seemed to make no difference at that point in time. So the stop was proper.

It's also true that normally when there's a stop for speeding, it's satisfied with a citation. You have the further violation apparently that each of the three in the vehicle, they have open containers. They're consuming alcoholic beverages which is a separate offense for which sometimes a citation is given and sometimes an arrest made. You have a juvenile driving the car who has no right to use alcohol at all.

Parties didn't really stipulate to the Court what the facts were with regard to how intoxicated the parties were except that the State argued that because of that they had enough intoxicating liquor that the officer couldn't let any one of the three drive.

I did, yes, sir.

Q Did you see a vehicle in that area before you stopped it?

A Yes, sir, I did.

Q This vehicle eventually stopped. Where did you first see it?

A Approximately 550 South 1100 East, Bountiful.

Q Where was the vehicle when you pulled it to a stop?

A Approximately 1130 North 400 East in Bountiful.

Q What kind of vehicle was it?

A 1975 Monte Carlo.

Q I show you -- I'm sorry.

A Maroon in color.

Q I show you a photograph of the vehicle marked for identification as Exhibit 22. In that photograph, do you see the same 1975 Monte Carlo that you're talking about?

A Yes, sir.

Q Does the photograph fairly represent that 1975 Monte Carlo, at least as far as the view that is displayed in the photograph is concerned?

A Yes, sir, it does.