2001

State of Utah v. Randy Peter Krukowski : Reply Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellant, vs. RANDY PETER KRUKOWSKI, Defendant/Appellee.	Case No. 20010585-CA

REPLY BRIEF OF APPELLANT

AN APPEAL FROM AN ORDER DISMISSING THE INFORMATION CHARGING DEFENDANT WITH ENGAGING IN A CLANDESTINE LABORATORY OPERATION, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37D-4(1) (1998), AND UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT SUBSTANCE WITH INTENT TO DISTRIBUTE, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37-8(1)(A)(III) (SUPP. 1999), IN THIRD DISTRICT COURT OF UTAH, SALT LAKE COUNTY, THE HONORABLE TIMOTHY R. HANSON PRESIDING

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IN THE UTAH COURT OF APPEALS

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REPLY BRIEF OF APPELLANT

ARGUMENT

In his brief, defendant argues that the trial court correctly found that police were prompted to secure the search warrant by what they observed during their initial, unlawful entry in the storage shed. Aple. Brf. at 8-16. He also contends that suppression was required under *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674 (1978), because the search warrant affidavit did not advise the magistrate of the initial entry and consequent discovery of the methamphetamine lab. Aple. Brf. at 16-24.[1] As fully explained in the State's opening brief, defendant is mistaken. *See* Aplt. Brf. at 12-22.

[1]Defendant also contends that Officer McNaughton violated the *Franks* doctrine "by implying that the [drug detection] dog had alerted to the area immediately south of unit 16, without acknowledging that the dog in fact alerted on unit 15." Aple. Brf. at 22-24. This claim has no merit. Immediately after indicating in his affidavit that the dog "hit on the area immediately South of unit #16," Officer McNaughton stated that the dog "indicated the presence of narcotics ***from under the doorway of unit #15***." R. 163 (emphasis added). Officer McNaughton could not have been more forthright with the magistrate.

Defendant also advances several challenges to the validity of the search warrant itself. For the reasons explained below, those challenges fail.

A. The Search Warrant Was Supported By Probable Cause.

In the third point of his brief, defendant contends that the search warrant affidavit did not establish probable cause that evidence of a methamphetamine lab would be found in the storage shed. Aple. Brf. at 24-29. Because warrants are favored under the Fourth Amendment, a magistrate's probable cause determination is afforded great deference. *State v. Deluna*, 2001 UT App 401, ¶ 10, 40 P.3d 1136. "Consequently, a magistrate's decision to grant a search warrant should only be reversed if it was arbitrarily exercised." *See United States v. Greene*, 250 F.3d 471, 478 (6th Cir. 2001). Defendant has not made that showing.

Defendant argues that the magistrate could not rely on the confidential informants because police did not conduct any controlled buys, perform surveillance of the storage shed, or determine whether a Randy Kawalski rented shed 16, had a prior history of drug-related offenses, or even existed. Aple. Brf. at 27. While these steps may very well have aided the magistrate in assessing reliability, they were not necessary. "Probable cause for a search warrant is nothing more than a reasonable belief that the evidence sought is located at the place indicated by the [officer's] affidavit." *United States v. Dill*, 693 F.2d 1012, 1014 (10th Cir. 1982) (quoted with approval in *State v. Brooks*, 849 P.2d 640 (Utah App.), *cert. denied*, 860 P.2d 943 (Utah 1993)). In other words, "[t]here is no requirement that the belief be shown to be necessarily correct or more likely true than false." *United States v. Feliz*, 182 F.3d 82, 87 (1st Cir. 1999), *cert. denied*, 528 U.S. 1119, 120 S.Ct. 942 (2000). As explained

in the State's opening brief, the information in Officer McNaughton's affidavit was more than sufficient to establish the informants' reliability and to otherwise support the magistrate's probable cause determination that evidence of the crime would be found in the storage shed. *See* Aplt. Brf. at 17-19.

B. The Search Warrant Was Not Overbroad.

In his fourth point, defendant argues that the provision in the warrant permitting the search for "all items determined to be collateral or proceeds from narcotics transactions" was so overbroad and lacking in particularity that it constituted an invalid general warrant and that, correspondingly, there was no probable cause to support issuance of such a broad warrant. Aple. Brf. at 29-32. This claim is meritless.

To prevent general exploratory searches, the Fourth Amendment requires that warrants "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV; *see Andreson v. Maryland*, 427 U.S. 463, 480, 96 S.Ct. 2737, 2748 (1976). "[A] warrant's description of things to be seized is sufficiently particular if it allows the searcher to 'reasonably ascertain and identify the things to be seized.'" *United States v. Finnigin*, 113 F.3d 1182, 1187 (10th Cir. 1997) (quoting *United States v. Wolfenbarger*, 696 F.2d 750, 752 (10th Cir. 1982)); *cf. State v. McIntire*, 768 P.2d 970, 972 (Utah App. 1989) (holding that "the description is sufficient if the officer executing the search warrant can with reasonable effort ascertain and identify the place to be searched"). The test, therefore, is a "practical" one. *Finnigin*, 113 F.3d at 1186-87.

Particularity. The affidavit here authorized the search for and seizure of twelve categories of evidence, including the following:

> 11. U.S. currency believed to be in close proximity to the narcotics being searched for, *and any and all items determined to be collateral or proceeds from narcotics transactions*.

R. 161 (emphasis added).[2] Defendant challenges the latter phrase of the provision, arguing that it is open-ended and otherwise confers upon police virtually "unlimited discretion to rummage about and seize whatsoever they wished," but he does not acknowledge the provision's initial reference to U.S. currency. Aplt. Brf. at Aple. Brf. at 29-31. In doing so, he distorts the authorization intended in the warrant.

The Sixth Circuit Court of Appeals recently observed that "general descriptions of property are appropriate if descriptions of specific types of that property have already been furnished, and different types of that property would be relevant in determining the crime." *Greene*, 250 F.3d at 478; *see also United States v. Peagler*, 847 F.2d 756, 757 (11th Cir. 1988) (observing that although "while the Fourth Amendment prohibits general exploratory searches, elaborate specificity in a warrant is unnecessary").[3] Here, the affidavit first specifically referred to U.S. currency, followed by a more general description of payment

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[2]Although defendant reproduces a warrant purportedly issued by the magistrate here, *see* Addendum to Aple. Brf., the search warrant was not made part of the record. Accordingly, this Court should not consider it on appeal. The State nevertheless assumes that the warrant's description of the property to be seized coincided with the affidavit's description.

[3]This Court has also observed that "generic descriptions of property, although not favored, have been held permissible in cases involving contraband." *State v. Stromberg*, 783 P.2d 54, 58 (Utah App. 1989), *cert. denied*, 795 P.2d 1138 (Utah 1990).

forms. Fairly read, therefore, the authorization in the warrant was not "open-ended," but limited to U.S. currency and other forms of remuneration.

Even in isolation, the phrase cannot be fairly interpreted to reach as far as defendant claims. The challenged phrase cannot be reasonably read to permit the seizure of furniture, books, photographs, magazines, appliances, or other items that one might typically find in a storage shed. Nor can it fairly be read to permit the seizure of personal diaries or financial records that bear no relation to defendant's drug operation. To the contrary, the challenged phrase was at least limited to evidence likely associated with the drug trade and thus did not give police "unlimited discretion to rummage about and seize whatsoever they wished." *See* Aple. Brf. at 31.

Scope of Probable Cause. Defendant also argues that the warrant was overbroad because nothing in the affidavit indicated "that anyone had seen proceeds from narcotics sales in the premises to be searched, or any intimation that such things would be found." Aple. Brf. at 31. This claim too is meritless.

Contrary to defendant's claim, the affidavit included sufficient information to support a search for these items. In support of the provision authorizing the seizure of "all items determined to be collateral or proceeds from narcotics transactions," Officer McNaughton stated:

> Your affiant believes that the premises should be searched for methamphetamine and U.S. currency because your affiant's training and experience has shown it is very common for suspects of narcotics offenses to keep related evidence in their premises. Your affiant knows from training and experience that distributors of narcotics do so for financial gain and that

> quantities of U.S. Currency are found where narcotics search warrants are served. For reasons included in this affidavit your affiant believes the storage unit is being used as a drug distribution and manufacturing center.
>
> Your affiant believes that the premises should be searched for packaging material, paraphernalia, clandestine laboratory equipment and records of controlled substances. . . . Your affiant knows from the past execution of numerous controlled substance search warrants that suspects often keep records to show dates, times, amounts purchased, who purchased, financial gain and drug indebtedness. Your affiant also believes the premises should be searched for lease records and ownership records of the named premises. Also these items are consistently found during the execution of narcotics search warrants.

R. 164.

Although no one observed any monies at the storage shed, "[a] magistrate is entitled to rely on the expert opinions of officers when supporting factual information is supplied in the affidavit." *See United States v. Cook*, 949 F.2d 289, 292-93 (10th Cir. 1991); *cf. State v. Comer*, 2002 UT App 219, ¶ 23, — Utah Adv. Rep — (observing that an officer's experience may be considered in determining probable cause). In his affidavit, Officer McNaughton indicated that he had received extensive training in drug-related investigations and had served as a member of the DEA Metro Narcotics Task Force for the past three years. R. 162. The magistrate's reliance on Officer McNaughton's testimony was therefore warranted.

C. The Magistrate Did Not Abandon His Role as a Neutral and Detached Judicial Officer.

In his fourth and fifth points, defendant argues that the magistrate abandoned his role as a neutral and detached judicial officer. *See* Aple. Brf. at 30-33. He argues that issuance of the "broad" search warrant was akin to the conduct condemned in *Lo-Ji Sales, Inc. v. New*

York, 442 U.S. 319, 99 S.Ct. 2319 (1979). *See* Aple. Brf. at 30-31. Defendant misreads *Lo-Ji Sales*.

In *Lo-Ji Sales*, a state investigator purchased two reels of film from an adult bookstore and presented them to the town justice in support of a search warrant. 442 U.S. at 321, 99 S.Ct. at 2321-22. The warrant application also requested that the town justice accompany police during the search to determine what other materials were in violation of New York's obscenity law. *Id.* After viewing the two films and the investigator's supporting affidavit, the town justice signed the warrant. *Id.* at 321, 99 S.Ct. at 2322. The warrant not only authorized the seizure of copies of the two films purchased by the investigator, but also the seizure of unspecified material "'that the Court independently [on examination] has determined to be possessed in violation of [the New York obscenity law] . . . .'" *Id.* at 321-22, 99 S.Ct. at 2322 (quoting the warrant) (first brackets in original). During the six-hour-long search, the town justice authorized the seizure of nearly 400 magazines and more than 400 films. *Id.* at 322-23, 99 S.Ct. at 2322-23. The defendant's subsequent motion to suppress was denied and the state intermediate appellate court affirmed. *Id.* at 325, 99 S.Ct. at 2323.

The United States Supreme Court reversed. *Id.* at 329, 99 S.Ct. at 2326. The Court held that "[t]he Town Justice did not manifest [the] neutrality and detachment demanded of a judicial officer" in issuing a warrant, but instead "allowed himself to become a member, if not the leader, of the search party which was essentially a police operation." *Id.* at 326-27,

99 S.Ct. at 2324. In other words, the magistrate "was not acting as a judicial officer but as an adjunct law enforcement officer." *Id.* at 327, 99 S.Ct. at 2324-25.

In this case, the magistrate did not participate in any manner in the execution of the search warrant. He did not accompany police on the search. He did not add to the warrant and he did not otherwise become involved in the investigation. He simply reviewed the affidavit and made a determination that the facts therein supported the seizure of those things particularly described in the warrant, including items that were "collateral or proceeds from narcotics transactions." Contrary to defendant's claim, therefore, the magistrate's conduct is nothing like that condemned *Lo-Ji Sales* and did not otherwise compromise his neutrality and detachment as a judicial officer. *Cf. United States v. Ramirez*, 63 F.3d 937 (10th Cir. 1995) (holding that magistrate's common sense additions to the search warrant affidavit did not violate his duty of neutrality and detachment); *United States v. Conley*, 856 F.Supp. 1010, 1025-26 (W.D. Pa. 1994) (holding that the district justice did not abandon her neutral role as a magistrate by cooperating with the police in processing 55 warrants), *aff'd*, 92 F.3d 157 (3rd Cir. 1996), *cert. denied*, 520 U.S. 1115, 117 S.Ct. 1244 (1997); *Connally v. Georgia*, 429 U.S. 245, 250, 97 S.Ct. 546, 548-49 (1977) (*per curiam*) (holding that Georgia's justices of the peace cannot be neutral and detached where they are paid based on the number of warrants they issue, not review).

Defendant also contends that the magistrate compromised his duty of neutrality and detachment because he authorized a nighttime entry even though police had secured the premises. Aple. Brf. at 32-33. However, the premises were not secured until after 4:00 in

the afternoon, *see* R. 195: 4-7, and the warrant was not obtained until approximately 8:30 that evening, *see* R. 78. Under these circumstances, the police cannot reasonably be required to keep the premises secured until the following morning. Accordingly, the magistrate cannot be said to have abandoned his role as a detached and neutral judicial officer in permitting the immediate search of the premises.

* * *

In summary, the search warrant was supported by probable cause and was properly limited to the search for and seizure of evidence relating to the manufacture and distribution of drugs. In executing the warrant, the magistrate did not compromise his duty of neutrality and detachment.[4]

CONCLUSION

For the reasons stated above and in the State's opening brief, the State respectfully requests that the Court reverse the trial court's order suppressing the evidence and remand the case for trial.

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[4]Because the warrant was supported by probable cause and properly issued, the State need not address defendant's good faith exception argument. *See* Aple. Brf. at 33. Moreover, even if the Court were to conclude that the search warrant affidavit did not provide a substantial basis for determining the existence of probable cause, it is not "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *United States v. Leon,* 468 U.S. 897, 923, 104 S.Ct. 3405 (1984).

Respectfully submitted this 10th day of July, 2002.

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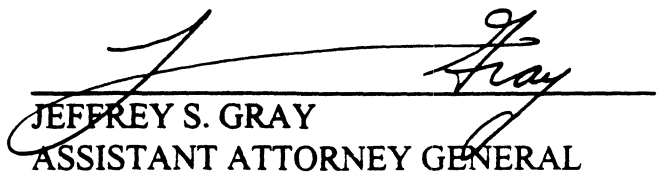

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of July, 2002, I served two copies of the attached Reply Brief of Appellant upon the defendant/appellee, Randy Peter Krukowski, by causing them to be delivered via first class mail, postage prepaid, to his counsel of record, as follows:

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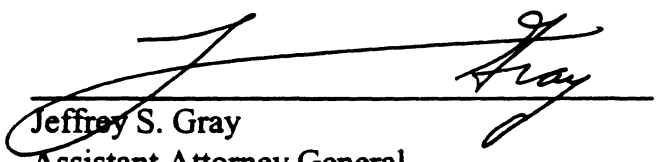

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