

1996

Kaysville City v. Joseph Mulcahy III : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KAYSVILLE CITY,

Plaintiff/Appellant,

vs

JOSEPH MULCAHY III,

Defendant/Appellee.

Case No. 960468-CA

Priority No. 10

BRIEF OF THE APPELLEE

Appeal from the Interlocutory Order of
The Honorable Alfred C. Van Wagenen of
The Second Judicial Circuit Court of Davis County,
Layton Department, State of Utah

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JURISDICTION

The Court of Appeals has appellate jurisdiction in this matter pursuant to Utah Code Annotated (1953) § 78-2a-3.

DETERMINATIVE STATUTES

Utah Code Ann. § 77-7-15 is set forth verbatim in the Argument section of this brief.

STATEMENT OF THE CASE

Nature of the Case

Mulcahy has been charged with Driving Under the Influence of Alcohol in violation of U.C.A. § 41-6-44, a class B misdemeanor.

Course of Proceedings

Mulcahy moved the court for an order suppressing all evidence obtained subsequent to an illegal stop and detention and in violation of his Fourth Amendment protections under the United States Constitution and Article I § 14 of the Utah Constitution. On June 18, 1996, an evidentiary hearing was held to consider the motion, the Honorable Alfred C. Van Wagenen presiding.

Disposition at Trial Court

The trial court granted Mulcahy's motion and ordered any evidence obtained as a result of the illegal search and seizure be suppressed and not allowed as evidence in the case.

Statement of the Facts.

1. On April 7, 1996, at approximately 6:00 a.m., DeWayne Olsen ("Olsen") heard a car pull into his driveway. He observed an individual walk across the front of his yard to his front porch. The individual rang his door bell. Olsen did not answer the door but placed a 911 telephone call to report a suspected "drunk individual" on his doorstep. When Olsen failed to answer the door, the individual returned to his car and drove away. [R. at 77-80, 86-9].

2. The dispatcher asked Olsen if he knew who the individual was, and Olsen responded, "I can guess who he is, but I don't want to deal with him." Olsen did not identify the individual to the dispatcher. [R. at 78].

3. Olsen told the dispatcher the individual was in a "white car... [a]...Toyota Celica, maybe." [R. at 79]. The dispatch radioed officers the "suspect's in a white Toyota." [R. at 79].

4. Olsen did not know the type of vehicle Mulcahy drove and could not tie Mulcahy to the white car parked in his driveway. [R. 92].

5. Mulcahy had been to the Olsen home on numerous occasions and had dated Olsen's daughter. [R. at 73]. Olsen could have provided the dispatcher with Mulcahy's description, however, Olsen was unable to identify Mulcahy as the individual on his door step and he did not describe Mulcahy to the dispatcher. [R. at 86-7].

6. Olsen did not tell the dispatcher that he observed the individual walk in an impaired fashion, nor did he report the individual to be driving in an uncontrolled or erratic manner. [R. at 55, 89]

7. A patrol car was dispatched to Olsen's address, however the individual left Olsen's home before an officer arrived. [R. 79].

8. Officer Darin J. Heslop ("Officer Heslop") was going off duty at approximately 6:00 a.m. on the morning of April 7, 1996 when he overheard a dispatch to any unit in the Kaysville area. [R. 94].

9. The Officer responded to the dispatch and was heading northbound on Main Street in Kaysville when he observed a vehicle's headlights coming towards him. [R. 95].

10. As Officer Heslop passed the southbound vehicle, he noticed the vehicle was white. There were no other moving cars on the road at the time. Officer Heslop turned and stopped the white vehicle. [R. 96].

11. Officer Heslop did not notice the make of the vehicle. [R.102].

12. Officer Heslop stopped the vehicle because it was in the area of information received from dispatch, the car was white and there were no other vehicles on the road. [R. 102].

13. Officer Heslop did not observe any crime being committed by the driver of the white car. [R. 103].

14. Mulcahy was driving a Mazda, not a Toyota, at the time he was stopped by Officer Heslop. [R. 3].

SUMMARY OF THE ARGUMENT

It is irrelevant whether *Olsen* had a reasonable suspicion based on articulable facts that the man on his doorstep on April 7, 1996 was Mulcahy, or that Mulcahy was intoxicated because Olsen had an insufficient basis for his belief. *See*, Brief of the Appellant, p 8. The relevant inquiry here is whether *law enforcement officers* had a reasonable suspicion based on articulable facts that the driver of the white vehicle stopped in Kaysville City on the morning of April 7, 1996 was committing or had committed a crime.

The trial court reviewed the testimony and evidence presented at the suppression hearing and concluded the dispatcher did not have knowledge of articulable facts to create a reasonable suspicion that the defendant had committed or was committing a

crime. The trial court's factual findings are supported by evidence in the record and the appellant has failed to demonstrate that the evidence is legally insufficient to support the trial court's findings when viewing the evidence and inferences in a light most favorable to the decision. Therefore, the trial court's findings are not clearly erroneous and should not be disturbed.

ARGUMENT

TO STOP AND DETAIN A CITIZEN FOR INVESTIGATIVE PURPOSES, POLICE MUST FIRST ARTICULATE KNOWLEDGE OF OBJECTIVE FACTS SETTING FORTH A REASONABLE SUSPICION THAT A CRIME HAS BEEN OR IS BEING COMMITTED.

The Fourth Amendment to the United States Constitution and Article I § 14 of the Utah Constitution provide: "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Stopping an automobile and detaining its occupants constitutes a "seizure" within the meaning of the Fourth Amendment, even though the purpose of the stop is limited and the resulting detention quite brief. *State v. Case*, 884 P.2d 1274, 1276 (Utah App. 1994)(quoting *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S.Ct. 1391, 1396, 59 L.Ed 2d 660 (1979). Accord *State v. Strickling*, 844 P.2d 979, 982 (Utah App. 1992). See *Terry v. Ohio*, 392 U.S. 1, 16, 88 S.Ct. 1868, 1988, 20 L.Ed.2d 889 (1968) (seizure occurs whenever officer stops an individual and restrains his freedom to walk away).

For purposes of constitutional analysis, a traffic stop is characterized as an investigative detention rather than a custodial arrest. *United States v. Botero-Ospina*, 71 F.3d 783 786 (10th Cir. 1995), *cert denied*, 116 S. Ct. 2529 (1996).

An investigative detention must be based upon “specific and articulable facts which, taken together with reasonable inferences from those facts, reasonably warrant that intrusion.” *United States v. Lee*, 73 F.3d 1034, 1038 (10th Cir. 1996) quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968). To justify the stop, the detaining officer must have a reasonable articulable suspicion that the detainee has been, is, or is about to be engaged in criminal activity. *United States v. Nicholson*, 983 F.2d 983, 987 (10th Cir. 1993). Accord, *State v. Case*, 884 P.2d at 1277, citing UCA § 77-7-15 (1990); *State v. Carpena*, 714 P.2d 674, 675 (Utah 1986) (per curiam) (reasonable suspicion must be based on objective facts indicating criminal activity).

The required level of suspicion is lower than the standard required for probable cause to arrest, however, the same totality of facts and circumstances approach is used to determine whether there are sufficient “specific and articulable facts” to support reasonable suspicion. *Case*, 884 P.2d at 1277. (Citations omitted). If the investigating officer cannot provide independent or corroborating information through his or her own observations, the legality of a stop based on information imparted by another will

depend on the sufficiency of the articulable facts known to the individual originating the information subsequently received and acted upon by the investigating officer. *United States v. Hensley*, 469 U.S. 221, 105 S.Ct. 676, 83 L.Ed.2d 604 (1985) (stop in reliance upon bulletin issued in absence of reasonable suspicion violates Fourth Amendment). Accord, *Case*, 884 P.2d at 1277, 1279 (citing, *United States v. Ornelas-Ledesma*, 16 F.3d 714, 718 (7th Cir. 1994) (uncorroborated tip by itself does not justify stop, even if tip comes from law enforcement); *In re Eskiel S.*, 15 Cal. App. 4th 1638, 19 Cal. Rptr 2d 455,458 (1993) (record devoid of evidence showing officer who originated report had reasonable suspicion); (citations omitted)). The State bears the burden to show the articulable factual basis for the reasonable suspicion necessary to support the stop. *State v. Delaney*, 869 P.2d 4, 7 (Utah App. 1994).

In reviewing a trial court's determination whether reasonable suspicion justifies a Fourth Amendment seizure, the appellate court applies two different standards of review: one to the trial court's factual findings and the other to its legal conclusions. *State v. Case*, 884 P.2d 1274, 1276 (Utah App. 1994). The trial court's factual findings underlying its decision to grant or deny a motion to suppress evidence are examined for clear error. *Id.* citing *State v. Pena*, 869 P.2d 932, 935-36 (Utah 1994). The appellant must demonstrate that the evidence is legally insufficient to support the trial court's

findings when viewing the evidence and inferences in a light most favorable to the decision. *Stewart v. Board of Review*, 831 P.2d 134, 138 (Utah App. 1992).

The standard to be applied to the court's conclusion of law - whether the facts give rise to reasonable suspicion, "is reviewable ... for correctness..." *Id.* The nature of the determination of law, nonetheless, allows the trial court "a measure of discretion... when applying that standard to a given set of facts." *Id.*

Officer Heslop testified he did not observe Mulcahy commit any offense. The constitutionality of Mulcahy's seizure, therefore, turns on whether the dispatcher had knowledge of articulable facts upon which to base a reasonable suspicion that a crime had been committed. The evidence is that dispatch was notified that an individual was on Olsen's door step ringing his door bell. The individual did nothing more than park his car in Olsen's driveway, walk to Olsen's porch, and ring Olsen's doorbell several times. The individual did not linger on the doorstep when Olsen refused to answer, but simply returned to his vehicle and drove up the street.

**THE TRIAL COURT CORRECTLY CONCLUDED
THE RADIO DISPATCHER DID NOT HAVE KNOWLEDGE
OF FACTS CREATING A REASONABLE SUSPICION THAT
MULCAHY HAD COMMITTED OR WAS COMMITTING
A CRIME.**

Utah Code Ann. § 77-7-15 provides,

A peace officer may stop any person in a public place when *he* has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation.

(Emphasis added). Officer Heslop could stop Mulcahy if the officer had a reasonable suspicion Mulcahy had committed or was committing a crime. The testimony, however, established that the officer did not observe Mulcahy committing a crime. The investigative stop, nonetheless, “may survive the constitutional prohibitions of unreasonable searches and seizures if the officer relied upon. . . a bulletin” received from other law enforcement sources. *State v. Case*, 854 P.2d at 1277, citing *United States v. Hensley*, 469 U.S. 221, 232, 105 S.Ct. 675, 682, 83 L.Ed.2d 604 (1985) (investigating officer may rely on a bulletin to justify an investigative stop, but only if the police who issued the bulletin possessed a reasonable suspicion justifying the stop); (citations omitted).

In *State v. Roth*, the driver was arrested for DUI after his vehicle was stopped by a University of Utah police officer. 827 P.2d 244 (Utah App. 1992). The stop was made on the basis of a police dispatch reporting a drunk driver, as well as the officer’s independent observations. Prior to the arrest, emergency room personnel at the University Hospital observed Roth and noticed his eyes were glazed, his speech was slurred, he smelled “strongly” of alcohol and he had trouble standing. Based upon those

observations, they concluded Roth was intoxicated and he was asked to leave the hospital. University personnel then watched Roth as he tried to drive away in his car. Roth repeatedly started the vehicle, stalled, and then jerked to a stop. A University officer then asked another security officer to call police dispatch. Dispatch was provided with the make and model of the driver's vehicle, as well as the license number.

When police arrived at the hospital, one of the officers saw a car matching the make and model of the vehicle reported, and matched the plate number. The officer followed behind the driver and independently observed Roth to be "having a hard time driving" and driving "slow and jerky." As a result of the dispatch as well as the officer's independent observations, Roth was stopped and he was subsequently arrested for DUI. Roth filed a motion to suppress arguing that the arresting officer did not have the requisite suspicion to support the stop. The trial court found that the dispatch from the security office sustained the necessary reasonable suspicion and denied Roth's motion. *Id.* at 256.

In the instant case, trial court determined the only way reasonable suspicion can be imputed to Officer Heslop is through the dispatcher's knowledge because the officer did not have independent personal knowledge of facts to support reasonable suspicion. After an objective review of the evidence, trial court found Olsen did not articulate any facts to the dispatcher which would indicate a crime was being committed. According

to the court,

He [Olsen] only said, “I have a drunken individual on my doorstep ringing my door bell.” He told absolutely nothing to the dispatcher which would support his opinion that the individual was drunk. He didn’t know who the individual was, did not talk to him, and made no observations as to poor balance or bad driving or the physical condition of the individual.

[R. at 56].

The trial court’s conclusion the dispatcher, and therefore, Officer Heslop, did not have a reasonable suspicion based upon articulable facts to believe a crime was or had been committed was based upon the following facts:

1. If the dispatcher received information or facts that would support reasonable suspicion that the defendant had or was committing an offense, it would all have to have been communicated to the dispatcher by the complainant, Olsen. [R. 55].

2. The testimony and evidence elicited at the hearing showed that Olsen told the dispatcher: “I have a drunken individual on my doorstep, ringing my door bell.” [R. 55, 77-8]

3. Olsen reported the individual to be “getting into a white car in my driveway. Maybe a Toyota Celica...and he is driving off....” [R. 56, 79].

4. Olsen told absolutely nothing to the dispatcher which would support his opinion that the individual was drunk. [R. 56].

5. Olsen didn’t know who the individual was, did not talk to him, and he

made no observations as to poor balance or bad driving or to the physical condition of the individual. [R. 56, 89].

Based upon these facts, the trial court found the dispatcher did not have knowledge of any facts creating a reasonable suspicion the defendant had committed or was committing an offense. [R. 56]. When the officer stopped and seized the defendant in response to the dispatch which had been issued in absence of articulated facts setting forth reasonable suspicion, said stop constituted an unreasonable search and seizure in violation of the defendant's Fourth Amendment protections under the United States Constitution and under Article I Section 14 of the Utah Constitution. *Id.*

Unlike the witnesses in *Roth*, Olsen neither smelled an odor of alcohol, observed any physical incapacities or signs of inebriation, nor did he observe any erratic driving behavior. Olsen did not inform the dispatcher of the make, model and license number of the vehicle parked in his drive way. Unlike the dispatch in *Roth* which informed officers of a drunk driver, not the mere possibility of a drunk driver, officers in the instant case were dispatched to investigate an individual "believed" to be drunk. Unlike the officer in *Roth*, Officer Heslop did not follow Mulcahy and observe any driving pattern which would indicate Mulcahy was incapable of safely operating his car. Consequently, no specific facts support reasonable suspicion to prompt the dispatch

and permit the dispatcher's knowledge to be imputed to Officer Heslop.

**THE TRIAL COURT'S FACTUAL FINDINGS
ARE NOT CLEARLY ERRONEOUS.**

Despite the absence of any evidence Officer Heslop had contact with Olsen prior to his stop of Mulcahy, Appellant nonetheless argues Olsen had knowledge of information of facts to support a reasonable suspicion that Mulcahy was committing, or had committed a crime, therefore, the necessary reasonable suspicion may be imputed to the officer. The Fourth Amendment and Article I § 14 simply do not permit such a hollow transition. See e.g., *Hensley*, 459 U.S. 221, 232, 105 S.Ct. at 682 (bulletins may justify investigative stop but only if *police* who issued bulletin possesses reasonable suspicion justifying stop). The bridge of reasonable suspicion that permits limited government intrusion into the privacy of a citizen may span from one law enforcement officer to another, or from a citizen (e.g., an informant) to law enforcement, but the toll to the government for crossing that bridge is knowledge: *The government* must have knowledge of articulable facts which support a reasonable suspicion that the intrusion is warranted. In this case, the government simply failed to elicit any evidence that the radio dispatcher had reasonable suspicion justifying the stop when she issued the dispatch precipitating the illegal seizure of Mulcahy on April 7, 1996.

Even if Fourth Amendment jurisprudence were so empty as to permit an officer to stop an individual based solely upon the reasonable suspicion of a citizen, Appellant's argument is flawed because Olsen had nothing more than a belief Mulcahy was the individual on his door step and Olsen had nothing more than a belief Mulcahy was intoxicated. An unparticularized suspicion or hunch cannot create circumstances giving rise to reasonable suspicion. *United States v. Fernandez*, 18 F.3d 874, 878 (10th Cir. 1994); Accord, *State v. Bello*, 871 P.2d 584 (Utah App. 1994) (court has consistently refused to sanction intrusions upon constitutionally guaranteed rights based upon nothing more substantial than inarticulate hunches. Citing, *State v. Trujillo*, 739 P.2d 85, 88 (Utah App.1987) (quoting *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968)).

The trial court, having heard testimony and received evidence on Mulcahy's motion to suppress, made the following findings of fact:

1. Officer Heslop did not observe the defendant committing or attempting to commit a public offense. [R. at 55].
2. If the dispatcher received information or facts that would support reasonable suspicion that the defendant had or was committing an offense, it would all have to have been communicated to the dispatcher by Olsen. [R. at 55].

3. Olsen had only a hunch that the individual on his door step was the defendant and that Olsen only thought the defendant was intoxicated. [R. at 56].

4. Olsen did not articulate any facts to the dispatcher which would support an opinion that the individual was drunk. He didn't know who the individual was, did not talk to him, and made no observations as to poor balance or bad driving or the physical condition of the individual. [R. at 56].

Olsen could not identify the individual on his door step as Mulcahy, [R. at 86] therefore, Olsen could not link the earlier phone calls to the individual on his porch; Although Mulcahy had been to the Olsen home on several occasions, Olsen had not seen the white car before and could not tie Mulcahy to the vehicle, [R. at 92]; Olsen did not speak with the individual on his door step, therefore, he did not detect an odor of alcohol, [R. at 77-79]; Olsen did not report any observations to support his assertion the individual on his door step was intoxicated. [R. at 87-89]. In the absence of articulable facts that the driver has a blood alcohol level equal to or greater than .08 and the driver is incapable of safely operating a motor vehicle, mere unsupported beliefs do not, contrary to the appellant, meet the elements of the offense of driving while under the influence of alcohol.

Olsen did not report that the individual on his door step was illegally on the premises, only that he did not want to deal with him. From the evidence, it is clear that

rather than commit a criminal trespass, someone pulled into Olsen's driveway, walked to Olsen's porch and rang the door bell, returned to the car when no one answered the door, and then drove up the street. Appellant's argument that the individual could have been committing a trespass can only be considered grasping at straws for any basis to justify the officer's illegal conduct.

Regardless of Olsen's testimony that he was reasonably sure the individual on his doorstep was Mulcahy, such evidence is insufficient to justify a stop to investigate a completed telephone harassment offense, a misdemeanor. Police did not have a reasonable suspicion grounded in specific and articulable facts that the driver of the white Mazda was involved in telephoning and harassing Olsen. The State's attempt to justify the stop on grounds of investigation of a trespass, intoxication or telephone harassment are inadequate to warrant a determination that the trial court's findings were clearly erroneous. The evidence is not legally insufficient to support the findings when viewed in a light most favorable to the trial court's decision: To the contrary, the evidence overwhelmingly supports the trial court.

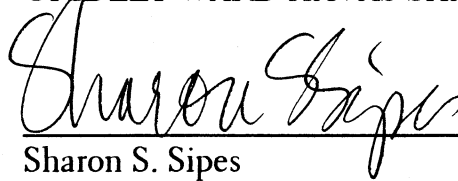
CONCLUSION

The trial court correctly concluded the radio dispatcher did not have knowledge of articulable facts to create a reasonable suspicion that Mulcahy had committed or was

committing a crime, therefore, reasonable suspicion to justify the seizure cannot be imputed to Officer Heslop. In addition, Appellant has failed to demonstrate that the evidence is legally insufficient to support the trial court's findings when viewing the evidence and inferences in a light most favorable to the decision. Therefore, this Court should affirm the trial court's decision granting defendant's motion to suppress.

DATED this 11th day of February, 1997.

GRIDLEY WARD HAVAS SHAW & THOMAS

A handwritten signature in cursive script, appearing to read "Sharon Sipes", is written over a horizontal line.

Sharon S. Sipes

CERTIFICATE OF SERVICE/MAILING

I hereby certify that on the 11 day of February, 1997, a copy of the foregoing was served in the manner indicated below upon the following:

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