

1985

State of Utah v. Orlando F. Roybal : Brief of Respondent

Utah Supreme Court

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David Wilkinson; Attorney General; Sandra L. Sjogren; Assistant Attorney General.

Lynn R. Brown; Salt Lake Legal Defender Assoc.; Attorney for Appellant.

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**UTAH SUPREME COURT
BRIEF**

**UTAH
DOCUMENT
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IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH, :

DOCKET NO. 20560
Plaintiff-Respondent, :

-v- : Case No. 20560

ORLANDO F. ROYBAL, :

Defendant-Appellant. :

BRIEF OF RESPONDENT

APPEAL FROM CONVICTION OF POSSESSION OF A
DANGEROUS WEAPON BY A RESTRICTED PERSON,
A SECOND-DEGREE FELONY, IN VIOLATION OF
UTAH CODE ANN. § 76-10-503 (1978), IN THE
THIRD JUDICIAL DISTRICT COURT, IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH, THE
HONORABLE HOMER F. WILKINSON, PRESIDING.

DAVID L. WILKINSON
Attorney General
SANDRA L. SJOGREN
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

LYNN R. BROWN
Salt Lake Legal Defender Assoc.
333 South Second East
Salt Lake City, Utah 84111

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :
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-v- : Case No. 20560
ORLANDO F. ROYBAL, :
Defendant-Appellant. :

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DAVID L. WILKINSON
Attorney General
SANDRA L. SJOGREN
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

LYNN R. BROWN
Salt Lake Legal Defender Assoc.
333 South Second East
Salt Lake City, Utah 84111

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STATEMENT OF ISSUES

1. Was the warrantless frisk of defendant based on an articulable reasonable suspicion that defendant was armed and dangerous or that he had committed or was committing a crime?

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :
Plaintiff-Respondent, :
-v- : Case No. 20560
ORLANDO F. ROYBAL, :
Defendant-Appellant. :

STATEMENT OF THE CASE

Defendant was charged with possession of a dangerous weapon by a restricted person, a second-degree felony, in violation of Utah Code Ann. § 76-10-503 (1978).

Defendant was convicted of the charged crime, in a non-jury trial held August 29, 1984, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Homer F. Wilkinson, presiding. Judge Wilkinson sentenced defendant on February 15, 1985, to an indeterminate prison term of 1 to 15 years and a \$10,000 fine. The Judge stayed execution of the prison term and the fine and placed defendant on probation in the intensive supervision program for 18 months. The court also imposed a fine of \$1,000 and a 90-day jail term which defendant elected to serve by participating in 450 hours of community service. As a further condition of probation, defendant was required to maintain full employment.

SUMMARY OF ARGUMENT

The brief detention of defendant for purposes of a limited frisk for weapons was justified by the officer's reasonable suspicion that defendant was carrying a concealed weapon, which is a crime. The facts as known to the officer, viewed from an objective standard, supported the officer's suspicion of defendant's criminal activity and the officer's desire to protect himself from defendant's possible use of a concealed weapon. The trial court, therefore, properly denied defendant's motion to suppress the pistol that the officer discovered during the pat-down search.

STATEMENT OF FACTS

On May 21, 1984 at approximately 9:00 a.m., Officers Mitchell and Baird of the Salt Lake County Sheriff's Office responded in separate patrol cars to a suspicious vehicle complaint (T. 66-67, 105-106). The name of the complainant given to them by dispatch was Orlando Roybal (T. 68, 106). The address given was 3387 South 145 East (T. 67, 74). The complainant said the vehicle was a green sedan carrying three male Mexicans (T. 106).

Both officers had received information earlier that morning from their car partners that Orlando Roybal, the defendant, had been arrested at approximately 5:30 a.m. that day (T. 68, 107). The car partners said defendant was arrested at that time for a domestic disturbance at the same address (T. 68, 113). Defendant's girlfriend had called in the police

when defendant allegedly shot holes through a window of their apartment with a firearm (T. 68-69, 113). The car partners reported that the firearm was not recovered when defendant was taken into custody (T. 68, 114).

Mitchell and Baird began talking over their car radios immediately and exchanged the information their car partners had related to them earlier (T. 108-110). Mitchell asked dispatch if defendant remained in jail at that time and was told that he was in jail (T. 70, 107). Mitchell then asked dispatch for the complainant's location and was given the address of a telephone booth near the Grand Central store on 3400 South and State Street, two blocks west of defendant's apartment (T. 70-71, 106). Mitchell asked dispatch to call the telephone number and to send a deputy to the telephone booth (T. 73). When the deputy arrived at the booth, the phone was ringing and there was no one there (T. 73).

Mitchell and Baird continued on to the apartment complex arriving at the same time (T. 75). They saw no green sedan and no one on foot in the area (T. 75, 115). They parked their cars on opposite corners of the west side of the complex and waited a few minutes (T. 75, 115). After a short time, a male Mexican emerged from between two buildings, hesitated for a moment, looked up and down the street, and walked across the lawn toward Mitchell's car (T. 76-77, 115, 117-118).

Mitchell stepped out of his marked patrol car but stood behind the car door as the man, identified at trial as

defendant, approached the driver's side of Mitchell's car (T. 76-77, 83-84). When he arrived at the driver's side of Mitchell's car, defendant turned so that he was not facing Mitchell but his side was toward Mitchell and leaned back against the car in front of the open door as if he was concealing his back from Mitchell (T. 78).

Mitchell had never seen defendant before that time and did not know that he was Orlando Roybal (T. 82) nor did Baird (T. 120). Mitchell stated that he asked defendant when he got out of jail but that he did not know why he asked him that (T. 78, 103). He said defendant did not identify himself but defendant testified that he did identify himself as Orlando Roybal as he walked toward Mitchell (T. 85, 138).

As defendant leaned against Mitchell's car, Baird approached them (T. 79, 119). Mitchell was concerned for his safety because of the nature of the call and the nature of the offense the previous night (T. 81). Mitchell, therefore, began a pat-down search of defendant by grasping defendant's arm with one hand and running his other hand around defendant's belt line (T. 79). Rolled into defendant's underwear waistband at the small of his back, Mitchell found a loaded pistol (T. 100-101).

Mitchell said at trial that defendant made no movements that indicated he was armed (T. 81-84). Rather, Mitchell said the situation as a whole appeared suspicious to him including the nature of the previous call, the fact

that defendant was supposedly still in jail at the time the suspicious vehicle complaint was made by a person using his name, and the way defendant leaned against the car with his side toward Mitchell which forced him to turn his head to talk with Mitchell (T. 89-90, 100).

Defendant testified elaborately about the events leading up to his arrest both on the previous call and the call which resulted in the possession of a dangerous weapon charge. He insisted that he did nothing to cause the officers to suspect that he was armed (T. 138-139) and claimed that he borrowed the pistol on the morning of his arrest to protect himself from a group of persons who were after him (T. 136, 155).

Judge Wilkinson admitted the pistol which was seized from defendant after considering defendant's motion to suppress the evidence (T.38). Thereafter, Judge Wilkinson found defendant guilty of possessing a firearm while being a restricted person (T. 178).

ARGUMENT

POINT I

THE WARRANTLESS FRISK OF DEFENDANT
WAS CONSTITUTIONALLY PERMISSIBLE
AND THE EVIDENCE SEIZED AS A RESULT
OF THE FRISK WAS PROPERLY ADMITTED
AT TRIAL.

There are three separate levels of police encounters with the public. They are:

(1) An officer may approach a citizen at anytime [sic] and pose questions so long

as the citizen is not detained against his will; (2) an officer may seize a person if the officer has an "articulable suspicion" that the person has committed or is about to commit a crime; however, the "detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop"; (3) an officer may arrest a suspect if the officer has probable cause to believe an offense has been committed or is being committed. See Florida v. Royer, 460 U.S. 491, 498-499 (1983).

United States v. Merritt, 736 F.2d 223, 230 (5th Cir. 1984).

The encounter between Officer Mitchell and defendant fit all three levels of contact described in Merritt. First, Mitchell merely spoke with defendant without detaining him as defendant voluntarily approached Mitchell. Second, after defendant leaned against the patrol car, Mitchell became suspicious of defendant's behavior and detained defendant by grasping his arm while performing a limited weapons search. Third, Mitchell arrested defendant after discovering the pistol concealed in defendant's waistband.

Defendant challenged only the second level of contact in the trial court, and on this appeal, claiming that Mitchell did not have a reasonable articulable suspicion of criminal activity to justify the detention and frisk of defendant. He does not challenge the arrest as lacking in probable cause.

To justify the detention of defendant, Mitchell must have had "a reasonable suspicion, based on objective facts, that the individual [was] involved in criminal activity." State v. Swanigan, 699 P.2d 718, 719 (Utah 1985); quoting

Brown v. Texas, 443 U.S. 47, 51 (1979). The reasonableness of the frisk of defendant for weapons must also be judged by an objective standard; i.e., "would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" Terry v. Ohio, 392 U.S. 1, 21-22 (1968); see also State v. Carter, No. 19522, slip op. at 3 (Utah filed Sept. 27, 1985).

In this case, the facts that justify the detention are the same facts that justify the search. Officer Mitchell knew the following: (1) defendant was arrested in the early morning hours of the same day for a domestic disturbance during which a firearm was discharged (T. 68, 113); (2) NO firearm was recovered at that time (T. 68, 114); (3) the caller making the suspicious vehicle complaint identified himself as Orlando Roybal, defendant's name (T. 68, 106); (4) dispatch said that defendant was in jail at the time the officers were responding to the complaint; (5) the location of the suspicious vehicle was defendant's address (T. 68, 74, 113); but (6) the location of the caller making the complaint was a telephone booth two blocks from defendant's home (T. 71, 106); (7) there was no one at the telephone booth when officers checked it (T. 73); (8) there was no green sedan or persons on foot around the apartment complex fitting the description of the suspicious vehicle or persons (T. 75, 115); defendant approached Mitchell's patrol car

voluntarily after a brief hesitation and identified himself as Orlando Roybal (T. 118, 138); when defendant reached the driver's door of Mitchell's car, he stopped, turned sideways to Mitchell, and leaned his back against the front of the car as if to conceal his back from Mitchell and Baird who was at that time approaching the scene (T. 77-78, 120). On these facts, Mitchell had reason to suspect that defendant was committing the crime of carrying a concealed weapon and that he might be about to commit a crime by using that weapon against Mitchell and Baird. Because there was no suspicious vehicle in the area and no other persons around, Mitchell was justified in thinking that defendant's complaint was a ruse, intended to create the opportunity for revenge against the officers who had arrested him hours earlier for domestic violence involving discharge of a firearm. Because the firearm was not recovered in the previous arrest, Mitchell reasonably suspected that defendant still had access to it.

Although Mitchell testified that he was not afraid of defendant, there is:

no legal requirement that a policeman must feel "scared" by the threat of danger. Evidence that the officer was aware of sufficient specific facts as would suggest he was in danger satisfies the constitutional requirement . . . so long as it is clear that he was aware of specific facts which would warrant a reasonable person to believe he was in danger.

United States v. Tharpe, 536 F.2d 1098, 1101 (5th Cir. 1976).

On the facts known to Mitchell at the time, regardless of

whether they were in fact ultimately erroneous as defendant claims, any reasonable person in the same position would have believed he was in danger and, therefore, the detention and frisk were justified.

CONCLUSION

The State requests this Court to uphold the trial court's denial of the motion to suppress, to deny defendant's request for a new trial, and to affirm defendant's conviction.

DATED this 21st day of October, 1985.

DAVID L. WILKINSON
Attorney General



SANDRA L. SJOGREN
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that I mailed four true and exact copies of the foregoing Brief, postage prepaid, to Lynn R. Brown, attorney for appellant, Salt Lake Legal Defender Association, 333 South Second East, Salt Lake City, Utah 84111, this 21st day of October, 1985.


