2008

State of Utah v. Michael Duke Tanner : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff / Appellee vs. MICHAEL DUKE TANNER, Defendant / Appellant	:	Case No. 20080043-CA

REPLY BRIEF OF APPELLANT

APPEAL FROM THE FOURTH DISTRICT COURT, UTAH COUNTY,
STATE OF UTAH, FROM A CONVICTION OF SIX FELONY CONTROLLED
SUBSTANCE VIOLATIONS, BEFORE THE HONORABLE CLAUDIA LAYCOCK

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ARGUMENT

THE TRIAL COURT ERRED WHEN IT APPLIED THE RELEVANCY STANDARD RATHER THAN GOOD CAUSE IN DENYING TANNER'S MOTION TO COMPEL DISCOVERY UNDER RULE 16(A) OF THE UTAH RULES OF CRIMINAL PROCEDURE.

The State does not address Tanner's argument that "good cause" rather than relevance at trial should be the determining factor in the trial court's decision on the motion to compel. Rather the State argues that there was no error when the court denied Tanner's motion to compel when the court found that the subpoenaed records might lead to potentially irrelevant evidence. However, the test for good cause as laid out by the Utah Supreme Court does not require a showing that the subpoenaed documents have to lead to relevant evidence, but "only a showing that

disclosure of requested evidence in necessary to the proper preparation of the defense" and "such a showing is made whenever the trial court is appraised of the fact that the evidence is material to an issue to be raised at trial." *State v. Mickelson*, 848 P.2d 677, 690.

In regards to the October 25, 2006 search, Tanner argued at the hearing on the motion to compel, that the credibility of the Confidential Informant is an issue that it intends to raise at trial. Further, Tanner argued the warrant return might show that the police found no evidence of a controlled substance, scales or even a computer desk in a search of Tanner's home after the Confidential Informant claims that, in a controlled buy, he purchased methamphetamine from Tanner at Tanner's home and that Tanner stored methamphetamine in a computer desk along with scales. If the return showed that the police did not find any evidence to substantiate the Confidential Informant's claims it might be material evidence regarding the Confidential Informant's credibility. (R. 297: 3-5)

Tanner argues that this showing was sufficient to show good cause. The credibility of the CI is perhaps the most important issue in Tanner's case, due to the fact that the CI was the State's only witness to the alleged transactions. During sentencing the trial court noted "... the testimony from a confidential informant was the testimony that the jury believe [sic]; and on that testimony, they found Tanner guilty." (R. 298: 13)

At the hearing on the motion to compel, the State confused the subject by arguing that the return was not relevant, in that the search was authorized on October 18th, but the house was not searched until one week later, so the lack of evidence is not relevant. "From the 18th to the 25th, he could have sold the drugs, used the drugs, or anything else." "It's just not relevant to what was bought, the drugs that were purchased on the dates in question."

However, two additional alleged buys occurred on October 19th and 24th, after the warrant was issued. The last alleged buy occurred less than 24 hours before the search was conducted. While the lack evidence substantiating the Confidential Informant's affidavit might not be relevant to what was bought during the controlled buys, it certainly is material to the Confidential Informant's credibility and reliability.

The trial court then held that the warrant return was not relevant to the "dates in Counts IV through VIII" (R. 297: 17). Explaining its ruling the court then stated that

> "The fact that there was or wasn't a computer desk can be testified to by the CI, and any other officers that have gone through executions of search warrants there.
>
> Whether or not there were drugs in that computer desk on the 25th, which is after these dates, becomes irrelevant, in my estimation. Tanner could have used them, he could have sold them. They might not have ever been there, but I don't think finding – if it could be found -- to return on the warrant, helps us at all with any of the issues that are relevant to this case. So I'm going to deny the motion to compel on that issue." (id.)

The court did not address Tanner's argument that the lack of evidence substantiating the Confidential Informant's testimony in a sworn affidavit, goes directly to the credibility of the CI, nor did the court explain how Tanner could learn of which officers were involved in the search absent the warrant return.

The State argues in its brief that the trial court denied the motion to compel discovery of warrant return for two reasons. The State believes that a short interchange between the prosecutor and the court concerning *Anderson v. Taylor* 2006 UT 79, 149 P.3d 352, rises to the level of a denial of the motion.

At the time the October 18th warrant was issued, the Fourth District Court was embroiled in litigation before the Utah Supreme Court concerning the violation of the civil rights of those served with search warrants issued by the magistrates in the Fourth District. At issue was the practice of magistrates to issue warrants on probable cause and not keeping a copy of the affidavit, warrant or warrant return. (Id. at 356-357)While the Utah Supreme Court decided the issue on a statutory basis and did not reach the constitutional issues, the Supreme Court concluded "that the practice followed by the Fourth District Court is sufficiently troubling to warrant the imposition of this court's [Supreme Court] 'inherent supervisory authority over all court of this state.'" (Id. at 357.)

The next sentence warns of the potential abuse of the Fourth District's practice. "The policy of the Fourth District Court is sound only if we may

confidently assume that law enforcement always acts with complete honesty, integrity, and competence. Unfortunately, it is much more likely that even the most honest and well-intentioned officer will occasionally make mistakes in handling, preserving, and filing the warrant documents. Were it not so, there would be no need for a warrant requirement at all. (Id. at 358.)

Exposing Tanner, who was facing 5 First Degree Felony Counts, to the exact harm that the Supreme Court warned of in *Anderson,* the State, in its brief argues: "The prosecutor also explained that he had tried, but failed, to locate the warrant return" pointing to the Record R297:16. The record on line 20 of that page through line 5 of the following page gives us the exact interchange which the State claims is the trial court's alternative basis for denying the motion.

> The court: "Frankly, the real question is whether anybody can find a copy of the return on the warrant, since I think – I can't remember when the Anderson case came – case came down, and when it was we [the court] started keeping all of these things down in the clerk of the court's office.
>
> Prosecutor: "It was after this. We've tried to locate it."
>
> The Court: "That's what I thought. So I'm not sure the Court has one. If you haven't found it here, I don't know that we can find it either, because in those days there wasn't an organized way of doing it.
>
> At any rate, I am not persuaded that the return on the warrant is relevant to the dates in Counts IV through VIII, which are now set for trial." (R: 16-17.)

Although Tanner has not made an accusation of prosecutorial misconduct in this appeal over the missing warrant return, the State argues that the prosecutor had

no knowledge of the return and therefore was not responsible for disclosure. (Appellant's Brief page 12.) The State correctly points out that the prosecutor has a duty to disclose upon request only those materials of which he has knowledge. Further, the knowledge of the prosecutor's staff and the investigating police officers is imputed to the prosecutor.

The trial court determined that a piece a misplaced warrant return was irrelevant to Tanner's case without having seen it. Further, the court made no substantive inquiry into who was involved in looking for the return, how extensive the search was, or how the warrant return came to go missing in the first place. If the trial court had actually explored the issue with the required diligence needed to actually deny the motion to compel based on the fact that the warrant return was missing, evidence of prosecutorial misconduct, which in and of itself is mitigating, might have surfaced.

Affirming on the basis of the State's argument of 'oops, we can't find it' without requiring a substantive inquiry by the trial court into how critical evidence like a warrant return was lost, would allow a less honest and less well-intentioned officer to make "mistakes" affecting Tanner's critical liberty interests in handling and preserving exculpatory evidence, opening the door to potentially dangerous prosecutorial misconduct.

Frankly, despite the State's argument, the trial court never came to the conclusion that the materials could not be found and that the prosecutor, prosecutor's staff and law enforcement had no knowledge of the return. In fact it assumed that at the very least the investigating officer had knowledge of the return when the court suggested that defense counsel could cross examine officers involved in the search. (R. 297: 17.) The court simply held that the evidence was irrelevant to the "dates in Counts IV through VIII, which are now set for trial. (Id.)

The State makes the claim that "...nothing in the record shows that Arthur Allred, the CI who conducted the controlled buys, provided any information to support the warrant executed on October, 25, 2006." (Appellant's Brief page 13.)

The prosecutor clearly stated in his opening argument that "the police officers investigated that, arranged to have somebody else who – his name's Arthur Allred. You will hear him referred to as a CI or a confidential informant... We arranged for him to go in and purchase drugs from Mr. Tanner on a couple of different occasions, and those are the days we're here for." (R. 288: 54.) This intorduction completely consistent with the description of the Confidential Informant relied upon in Sgt. Mark Troxel's affidavit (R. 191, 190) Further, defense counsel identified Arthur Allred as the CI who provided the information for the affidavit (R: 180) without any rebuttal by the State anywhere in the record.

Based on Sgt. Troxel's probable cause affidavit for the October 18, 2006 search warrant (executed on October 25th) it became apparent that Sgt. Troxel had been involved in previous searches of Tanner's residence. (R: 191) Accordingly, Tanner moved to compel the production of all probable cause affidavits, and warrant returns on all searches between January 2006 and January 2007. Tanner argued that the fact that Tanner had not been charged from any of these searches, might mean that the police never found illegal drugs at his home and defense counsel argued that if the searches yielded no evidence these executed search warrants might be exculpatory or mitigating in nature. Further, the lack of evidence might show that the CI was less than reliable.

Although the State did not admit that the searches yielded nothing before or during trial, at sentencing, Sgt. Troxel stated to the court that he and other officers had been seeking evidence against Tanner for nearly a decade. (R: 298: 6)

> The Court noted that: "As I look at his history, from '96 on, I've got disturbing the peace, I've got driving without registration, I've got possession of paraphernalia... that's up to 2000. In 2002, I've got a simple assault. Finally in 2004, we have an attempted possession or use of controlled substance, and a possession of paraphernalia, both Class A's."
>
> The court then asked: Now I have, finally, in 2007, these felonies. So, why haven't there been felonies all along the way? If he's done everything you're telling me he's done...? (Id. at 8.)

Sgt. Troxel, in response to the court's questioning, responded: "... During those searches that I have been involved in previously, quantities of drugs were not

found, so the charges could be brought; but the search warrants were still completed...." (Id.)

Evidence that the police officer who was to testify at Tanner's trial had been pursuing Tanner for a decade without recovering any quantity of drugs resulting in any charges, despite repeated searches might have had a mitigating effect in the mind of the jury. Especially if the jury learned that in a search executed less than 24 hours after an alleged transaction Tanner was on trial for, a search of Tanner's residence occurred and no drugs were found. (The October 25th warrant return would show the timing of the search, which might be substantially less than 24 hours after the last alleged transaction occurred.)

It is possible that if the court had not denied the motion to compel the discovery of all probable cause affidavits and warrant returns, Tanner might have been able to show a pattern of unreliable Confidential Informants, which is particularly important in this case where the CI had already been arrested for and admitted to prescription and credit card fraud. (R. 288: 126.)

The affidavits and search warrant returns sought by Tanner were important to the preparation of the defense and Tanner apprised the trial court of the fact that the evidence was material to the issue of the credibility of the one and only State's witness to the all five of the First Degree Felony Counts Tanner faced at this trial.

Despite Tanner's showing of good cause, the trial court applied a relevance standard to the evidence sought rather than the required good cause standard.

CONCLUSION AND PRECISE RELIEF SOUGHT

Tanner requests this Court to reverse his conviction and remand it to the Fourth District Court for new proceedings.

Respectfully submitted this 4th day of October, 2010

Margaret P. Lindsay
Counsel for Appellant

CERTIFICATE OF MAILING

I herby certify that I mailed a true and correct copy of the foregoing postage prepaid to the Utah State Attorney General, Appeals Division, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114 on the 4th day of October, 2010.