

1978

# State of Utah v. Willie Mae Walker : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

\* \* \* \* \*

STATE OF UTAH,	:	
	:	
Respondent,	:	
	:	
vs.	:	Case No. 15568
	:	
WILLIE MAE WALKER, aka	:	
DELL WALKER,	:	
	:	
Appellant.	:	

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BRIEF OF APPELLANT

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FILED

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Clerk, Supreme Court, U. S.

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BRIEF OF APPELLANT

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STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a conviction for possession of narcotics with the intent to distribute and a sentence of fifteen years thereof.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of her conviction and either the direction of a verdict of acquittal or a new trial.

## STATEMENT OF FACTS

On the 14th day of July, 1976, police officers obtained a search warrant to search for narcotics at the premises of 511-513 West Second South, Salt Lake City, Utah (R. 37). The upstairs portion of that premises was a rooming house or apartment complex which contains approximately six apartments (See State's Exhibit 1). Several of the rooms or apartments were occupied (Tr. 79, 100). All of the apartments were searched by the police and narcotics were found in two of the rooms and on one person who was on the premises. Three arrests were made.

During the course of the search, 56 balloons of heroin were found in a night stand in Room 6 as appears on Exhibit 1 (Tr. 40-43). The defendant in this case, the appellant herein, is charged with possession with the intent to distribute those 56 balloons of heroin. The evidence was clear that the room in which the narcotics were found was not the bedroom of the defendant (Tr. 53). The room in which the narcotics were found appeared to be a bedroom in which there was also a desk containing business records from the restaurant below (Tr. 53-54). The defense witnesses testified that the room was occupied by a man by the name of Robert Westley (Tr. 165-166, 115). The police testified that none of Mr. Westley's clothes were found in the room, that the defendant indicated that Westley was not staying in the room, and that the defendant had control over the room (Tr. 80, 81, 82).

The defense proffered the testimony of Mr. James Housley for the purpose of showing that Mr. Westley did, in fact, occupy the room wherein the narcotics were found. Mr. Housley was a Salt Lake County Attorney at the time of the trial and it was hoped that his testimony would be persuasive because of the fact that he was a lawyer -- he was white -- and he was working for the prosecution. Mr. Housley, while in private practice, had consulted with Robert Westley and had observed him in that room in nightclothes getting out of bed. However, the Court refused to allow his testimony on grounds of foundation.

The jury convicted the defendant and she was sentenced from one to fifteen years to the Utah State Prison.

#### POINT I

THERE WAS INSUFFICIENT EVIDENCE WITH WHICH TO CONVICT THE DEFENDANT OF THE CRIME OF POSSESSION OF NARCOTICS WITH THE INTENT TO DISTRIBUTE.

The evidence in this case did not show the defendant's guilt and, in fact, the defendant has consistently maintained her innocence. As has been pointed out by legal scholars and noted practitioners such as F. Lee Bailey, a claim of innocence is the weakest claim that can be presented on appeal. Mr. Bailey has stated that he would rather defend on appeal a guilty person who was forced to confess or from whom evidence was obtained illegally rather than an innocent person whom the jury convicted.



argument that can be presented on appeal is that there is insufficient evidence for a jury to find a verdict of guilty. However, in light of such knowledge and because the defendant was innocent she will assert on appeal that there was insufficient evidence on which to convict the appellant.

The defendant was not found in actual possession of the narcotics. The narcotics were found in a room while the defendant was downstairs cooking in the restaurant. The prosecution argued a theory of constructive possession i.e., that the defendant had control over the room as she was the proprietor of the premises and that the room contained restaurant books and records and, therefore, she was in constructive possession of the narcotics. The only evidence brought before the Court was that the defendant was the proprietor of the premises; that the narcotics were found in a room which was not the defendant's bedroom; that the room in which the narcotics were found contained a bed and in a separate part of the room a desk containing records from the restaurant. Beside the bed was a nightstand or commode in which the heroin was found; the police officers testified that the defendant stated that she had "control over the room" or control over the entire premises. That is the entire evidence upon which the defendant was convicted.

The defense proffered testimony that the room was occupied by a Mr. Robert Westley. During the search of the premises, Mr. Westley was also searched (Tr. 96). The search of Mr. Westley uncovered four balloons of heroin on his person (Tr. 100). It was proven that the balloons that were taken from the suspect Robert Westley were identical to the balloons that were found in the room with which the defendant was charged of possessing.

The prosecution's chemist testified that the heroin with which the defendant was charged with possessing and which was found in the room was cut with quinine. He testified that he was quite surprised to find quinine inasmuch as quinine was primarily used as a cutting agent in the east while in the west lactose was used to cut heroin (Tr. 107-108). The evidence showed that Robert Westley was from Chicago.

The State's chemist also made an analysis of the four balloons of heroin that were recovered from the search of the person of Robert Westley. In the balloons that were recovered from the person of Robert Westley, quinine was also found (Tr. 112). Strangely enough, the balloons of heroin with which the defendant was charged with possessing and were found in the room were also cut with methapyrilene. Again, the prosecution's chemist testified that such was an uncommon cutting agent (Tr. 109). Coincidentally -- or not so co-  
incidentally -- the heroin found on Robert Westley was also

cut with methapyrilene (Tr. 112). The State's chemist testified that the chances of finding two samples on different persons with the same amount of quinine and the same amount of methapyrilene would be very small (Tr. 109).

The defense called their own expert to reaffirm these facts. Kevin L. McCloskey a biochemical toxicologist for the Center of Human Toxicology at the University of Utah was called to testify on behalf of the defendant (Tr. 151). He examined both the heroin that the defendant was charged with possessing which was found in the room and the heroin found in the possession of Robert Westley. He performed quantitative analysis of the two heroin and found that there were no physical dissimilarities (Tr. 153-154). Also Ladislav Kopjak, who was a forensic toxicologist for the Center of Human Toxicology at the University of Utah was called by the defense. A forensic toxicologist analyzes specimens for presence or absence of drugs or other toxic substances (Tr. 155). He analyzed both the specimens with which the defendant was charged with possessing which were found in the room and the specimens that were found in the search of Robert Westley. He testified:

"I found that quantitatively the samples seemed to be similar and there was heroin, quinine, and the antihistamine methapyrilene in the balloons from 3-P and also 7-D. (Tr. 158). . . . They both appeared to be similar quantitatively."

His report was introduced into evidence as Exhibit 11-D.

was normally used as a cutting agent in the eastern United States and not the western area (Tr. 158).

The prosecution -- not the defense -- elicited evidence from the defense witness on cross examination concerning the defendant's good character and lack of contact with narcotics. The defense witness Edward Barton who was a former police officer and presently an investigator for the Salt Lake Legal Defenders' Association, testified pursuant to questions asked by the prosecution on cross-examination as follows:

Q. Do you know Willie Mae Walker that well?

A. Yes, I have known her for some time.

Q. Have you, have you ever known her to be a user of narcotic drugs.

A. No sir, I have not.

Q. How long have you known her?

A. Probably five years. (Tr. 150).

Also the defense witness, James Frank Housley, a prosecutor for the Salt Lake County Attorney's Office was cross-examined by the prosecution:

Q. How did you characterize your relationship with the defendant.

A. I -- I was her lawyer for three and one half or four years and considered myself to be a good friend and her to be a good friend to me. (Tr. 136).

It is the defendant's contention that there can be

no other conclusion reached except that the narcotics found

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in the room -- the narcotics that the defendant was convicted of possessing -- was from the same source as the narcotics in the possession of Robert Westley. It is further the defendant's position that in view of Robert Westley's occupancy of or at least access to the room in which the narcotics were found and the fact that the defendant may also have access to that room is insufficient evidence on which to convict her of possession of heroin.

The defense moved for a directed verdict:

MR. LEEDY: The defense moves for a directed verdict of acquittal on the grounds and for the reason that there is insufficient evidence from which this jury could reasonably determine that the heroin contained in Exhibit 3P was possessed and belonged to the defendant Willie Mae Walker. (Tr. 221)

A statement of the law and a summarization of the pertinent cases is found in Mulligan v. State and Richardson v. State, 513 P. 2d 180 (1973), in that case marijuana was found in an apartment to which two persons had access. One of the persons was found guilty of possession and the Wyoming Supreme Court reversed. In so doing, it stated:

As to circumstantial evidence in a criminal case, we said in State v. Rideout, (Wyo.) 450 P. 2d 452, 454, 455, evidence creating a mere probability of guilt is not sufficient; much less is evidence which gives rise to mere suspicious or conjecture of guilt . . . If the circumstances, no matter how strong, can be reasonably reconciled with a

theory that some other person may have done the act, of the defendant should not be convicted and a verdict of guilty should be set aside as contrary to law. Gardner v. State, 27 Wyo. 316, 196 Pac. 750, 751; Thompson v. State, 41 Wyo. 72, 283 Pac. 151, 157.

In State v. Haynes, 25 Ohio St. 2d 264, 267 N.E. 2d 787, 788, the Court held that where the only evidence of possession was the police discovery of the narcotics in the general living area of the apartment occupied by defendant and four others, such evidence was not sufficient to convict for possession.

In Sturgeon v. State, Okl. Cr. 483 P. 2d 335, 338, it was held, where an unlawful drug is found in premises not occupied exclusively by the defendant, and nothing more is shown, the evidence is circumstantial and insufficient. . . . Conviction was reversed in Thompson v. United States, D.C.C.A. 293 A. 2d 275, 276, when the court commenting, someone in the apartment was in possession, actual or constructive, of the marijuana; but the evidence failed to make a showing beyond a reasonable doubt that appellant was that person.

In narcotic cases there is respectable authority for the proposition that if a person has control of premises on which the drugs are found, there is a presumption that he was in possession of the drugs. On the other hand, if possession is not shown to be exclusive, there must be other evidence to warrant such inference. One of the leading cases for this proposition is People v. Antista, 129 Cal. App. 2d 47, 276 P. 2d 177, 179 . . . A more recent case and one which like in Antista, is frequently cited is Brown v. State, Okl. Cr. 481 P. 2d 475, 477-478. It stands for the proposition that it cannot be inferred from merely being present in a place where marijuana is found the defendant had knowledge of its presence and had dominion and control. Citing from Antista, that court considered it neither for the State to prove either that the marijuana belonged to the defendant or that it had been left in his care by someone else.

The Brown court also referred to Petty v. People, 167 Colo. 240, 447 P. 2d 217, 220, where the defendant's conviction for possession of marijuana found in an apartment shared with another was reversed for insufficiency.

. . . . .

The rule to be derived in connection with an inference of possession of narcotics from possession of premises is well stated in Felts v. People, Colo. 498 P. 2d 1128, 1131, in these words:

" . . . where a person is in possession but not in exclusive possession of that premises, it may not be inferred that he knew of the presence of marijuana there and had control of that unless there are statements or other circumstances tending to buttress the inference" . . . . .

In the present case the evidence shows that Robert Westley had, at least access if not total occupancy, to the room where the 56 balloons of heroin were found. Under law as stated above, there will be insufficient evidence to convict the appellant for possession of heroin found in that room unless there was other evidence indicating that the heroin was hers. There was no such other evidence.

## POINT II

THE COURT ERRED IN REFUSING TO ALLOW TESTIMONY FROM THE WITNESS JAMES HOUSLEY THAT ROBERT WESTLEY OCCUPIED THE ROOM IN WHICH THE NARCOTICS WERE FOUND.

During the prosecution's case, the police officers attempted to imply that Robert Westley did not occupy the room in which the narcotics were found. This was done by virtue of testimony to the effect that no articles of men's clothing were found in the room (Tr. 80-82, 87). And also, by so-called "admissions" of the defendant herself that she

had control of the room (Tr. 82-83). The defense proffered evidence that Westley did, in fact occupy the room in which the narcotics were found. This was done through the testimony of the defendant herself (Tr. 165-172), and also another occupant of the apartment house, a Mr. Chalmers Hood (Tr. 115). The defense desired to support their testimony with the testimony of Mr. James Housley, who was a white, a lawyer, and a then prosecuting attorney. The prosecution attempted to prevent such evidence, first by a "motion in limine" (R. 76-77), and then objections during the course of the examination.

The defense strongly excepted to the prosecution's attempt to cover up that evidence as well as their removal of certain evidence from the courtroom during the trial.

In a motion for a directed verdict the defense counsel stated:

"I think it raises a Brady v. Maryland problem. I think this has been the case from the start. I believe it was well within the prosecution's knowledge that the room marked "0" was, in fact, Robert Westley's room. One of the prosecutors visited Mr. Westley in that particular room. Not only did they not disclose that to me, now I understand they are going to argue maybe it was at a different time. Now they have taken the dope out.

The prosecution responded that a Brady v. Maryland was not proper in that no demand was made for exculpatory evidence (Tr. 60). The court reprimanded the prosecution, but denied the defendant's motion.



"Well, the problem with it, Mr. Austin, is that when items come into evidence via the preliminary hearing stage, or at the trial stage, those are within the jurisdiction of the Court, and they are not to be removed."

When I say not to be removed, "they are not to be removed without a Court order."

In attempting to elicit the testimony from the witness James Housley, that he had seen Mr. Robert Westley occupy the room in which the narcotics were found, the following occurred:

Q. And did you have occasion to represent Mr. Robert Westley, or a male person known as "Billie"?

A. I had the man known to me as "Billie" consult with me and I charged him a fee. I didn't represent him any more than just a short consultation.

Q. Now, with respect to that confrontation, did you have occasion to visit with him in his room above Dell's Cafe?

MR. AUSTIN: Objection at this point, I believe that comes under the attorney-client privilege and Mr. Westley is not here to claim the privilege.

. . . .

THE COURT: Just a minute. Excuse me. The objection is overruled.

A. I didn't visit in his room, and it wasn't in connection with my representation of him, but I have seen him there.

Q. You have seen Mr. Westley in his room before at Dell's Cafe?

A. Yes.

Q. Would you describe for the jury which room that was?

MR. AUSTIN: Objection, foundation.

Q. I'll ask you to look at Exhibit 9D and ask if you can recognize what that is a diagram of?

A. I recognize it as a diagram of the second floor of what I know as Dell's Cafe on West Second South.

Q. And are you familiar with Dell's room on Exhibit 9D?

A. Yes. (Tr. 130-131).

. . . .

Q. During the period of time of July -- that is when this search was -- July of 1976, are you aware of which room was hers?

A. Yes.

Q. Which room would it have been?

A. This room right here.

Q. Now, you indicated also that you had occasion to visit Mr. Westley on Exhibit -- or excuse me, in the upstairs area of Dell's Cafe, is that correct?

A. Yes. . . I don't think I had occasion to visit with him there, I saw him there.

Q. You did see him in his room?

A. I saw him in a room that I thought was his room.

Q. Which room?

MR. AUSTIN: Objection to what he thinks, your Honor, only to what he knows.

Q. Why did you think the room you saw him in was his room?

A. Well, he was getting out of bed, he was undressed getting out of bed.

Q. Okay, what room was that you observed him in?

MR. AUSTIN: Objection, foundation, time period.

A. Not precisely.

Q. Could you give me your best recollection?

A. I knew the man that I knew as "Billie" from late December of 1975 until sometime in the summer of 1976, and I can't tell you the date. I know it was prior to the time that Dell was arrested on this charge.

Q. Now, would you point out for the jury what room it was that you observed Mr. Westley getting out of bed in, partially clad?

MR. AUSTIN: Objection to that, your Honor, it would be irrelevant, no foundation as to period of time.

THE COURT: The objection will be sustained.

MR. LEEDY: May I make a proffer. . . .

THE COURT: You may, outside the presence of the jury.

MR. LEEDY: Should we approach the bench?

Unfortunately, the proffer was not recorded by the Court reporter, but it has been submitted in the record. The proffer was that sometime prior to the search, but after December of 1975, Mr. Housley had seen Mr. Westley in the room in which the narcotics were found and that Mr. Westley was just getting out of bed and was partially clad.

It is the defendant's position that such evidence was relevant and a foundation had been laid. The fact that the observation was not made at the precise time of the search may go to the weight of the evidence, but would certainly not go to its relevancy, nor foundation.

The foundational objection was obviously not well taken as the witness had testified as to his personal knowledge concerning the events about which he was to be examined.

The relevancy objection was likewise improper. Relevant evidence is all competent evidence of facts and circumstances which afford reasonable inferences or throw light upon the matter or matters contested, 29 Am. Jur. 2d 299, Evidence, §251.

One of the extremely relevant issues in the lawsuit was whether or not Robert Westley had access to or occupied the room in which the heroin was found. His occupancy of that room at some time prior to the search would certainly be relevant inasmuch as a reasonable juror could infer present occupancy from prior occupancy. The fact that evidence

"Is remote in point of time. . . does not of itself preclude its admissibility. . . . In effect, the objection of the evidence is too remote goes to the credibility of the evidence rather than to its admissibility, unless the remoteness is so great that the proffer of evidence has no probative value at all."

Thus, the sustaining of the objection on grounds of relevancy and foundation to the witness Housley's testimony was improper and in error. The exclusion of such testimony was prejudicial in that it would have supported the defendant's position; that Robert Westley had access to the room and, thus, the defendant should not have been convicted for possession based upon the sole evidence that narcotics were found in the

### POINT III

THE COURT ERRED IN FAILING TO GIVE THE DEFENDANT'S REQUESTED INSTRUCTION NO. 1 AND NO. 3 CONCERNING ACCESS TO OR EXCLUSIVE CONTROL OF A ROOM WHERE NARCOTICS ARE FOUND.

The defendant requested that the District Court instruct the jury as follows:

Instruction No. 1. Members of the jury, you are instructed that the defendant Willie Mae Walker is charged with the crime of possession of heroin with the intent to distribute. Before the defendant may be found guilty of this offense, it is incumbent upon the prosecution to prove beyond a reasonable doubt that the defendant had possession of heroin.

The law recognizes two kinds of possession, actual possession and constructive possession. Before a person can be said to have actual possession, a person must knowingly have direct control over the substance of the time alleged, and in this case, with the required intent to distribute. A person may be in constructive possession with the intent to distribute rather than actual possession when a person knowingly and with specific intent to distribute has the power and intention at the time alleged to exercise dominion and control over the substance. A person is neither in control nor in actual possession nor in constructive possession unless they have actual power themselves to exercise dominion over the substance.

The mere fact that a person had access to premises or may be the legal owner or landlady of the premises where a substance is located does not establish that the person was in actual or constructive possession of the substance on such premises. Rather, the prosecution must establish control or dominion over the substance and, in this case, with the intent to distribute (R 92).

The defendant also requested the Court to instruct the jury:

Instruction No. 3. Members of the jury, you are instructed that the prosecution has the burden of proof beyond a reasonable doubt the 56

balloons of heroin introduced in this case belong to or were possessed by the defendant Willie Mae Walker. The mere fact that Willie Mae Walker may have had access to the room where the heroin was found is insufficient evidence to prove that she had possession or control of the substance found therein.

The court refused to give those instructions (R. 90-92).

The defendant excepted at (R 221).

MR. LEEDY: The defense will except to the Court's failure to give the proposed Instruction No. 3 concerning access to the room, and believes that the general instructions regarding possession and control are insufficient and would confuse the jury.

For the same reasons and rationale, in the cases stated under Point I, it was error for the Court to fail to give the defendant's proposed jury instructions. If more than one person has access to a room in which narcotics are found for a conviction to be sustained, there must be more evidence of possession by one than simply that the narcotics were found in the room. Further, if nothing more is shown than the fact that an unlawful drug is found on the premises not occupied exclusively by the defendant, then an acquittal should be had. That was the import of Instruction No. 1 and 3, and in no other place did the Court properly instruct a jury as to the law where more than one person had access to a room wherein narcotics were found. For this reason, the conviction should be reversed and a new trial granted with instructions to give the proper jury instruction regarding joint access to a room.

#### POINT IV

THE COURT SHOULD REVERSE THE CONVICTION AS THE EVIDENCE WHICH WAS INTRODUCED AGAINST THE DEFENDANT WAS SEIZED ILLEGALLY.

As pointed out in the Statement of Fact, the seizure of the evidence in this case took place pursuant to a search warrant. The search warrant directed a search of the entire premises at 511-513 West Second South. The cafe, the several different apartments occupied by different people and different persons. The search warrant is overly broad with respect to the description of the place and persons to be searched. The Court may recall that the Fourth Amendment requires that the place to be searched be described with particularity as well as the things to be seized or searched for. The search warrant in this case describes the business establishments, a cafe and apartment house, containing several apartments, at two addresses involving several tenants. The law regarding the search of hotels or apartments was laid down in U.S. v. Hinton, 219 F. 2d 324 (C.A. 7, 1955). In that case the Court stated at page 325:

The showing of probable cause and the particularity of the description of the place to be searched are usually treated separately, but in view of the many problems presented by this appeal, they must be considered together, for the scope of the warrant to search is dependent upon the extent of the showing of probable cause. The command to search can never include more than is covered by showing of probable cause to search.

In this case, one Jane Wilson signed an affidavit stating that on the date previous, she had seen heroin being sold in the premises. . .

(These are the precise facts that are shown in the affidavit in support of the search warrant in the present case.)

The affidavit failed to identify the particular apartment or apartments in which the sales were made and it did not allege the sales were made in apartments occupied by any of the alleged sellers.

(Again, these are the precise facts of the affidavit in the instant case.)

On the basis of these meager factual allegations in the affidavit, the government commissioner issued a warrant commanding the search of the entire building. . . . The address named in the warrant is an entire apartment building. . . .

For purposes of satisfying the Fourth Amendment searching two or more apartments in the same building is no different than searching two or more completely separate houses. Probable cause must be shown for searching each house or, in this case, each apartment. If such cause is shown, there is no reason for requiring separate warrants for each resident. A single warrant may cover several different places or residences in a single building. But probable cause must be shown for searching each residence unless it be shown that although appearing to be a building of several apartments, the entire building is actually being used as a single unit.

Federal Courts have consistently held that the Fourth Amendment requirement that a specific "place" be described when applied to dwellings referred to as a single living unit, (the residence of one person or family). Thus, a warrant which describes an entire building when cause is shown for searching only one apartment is void. United States v. Barkouskas, D.C. 38 F. 2d 837; United States v. Diange, D.C. 32 F. Supp. 944; United States v. Chin On, D.C. 297 F. 531; United States v. Innelli,



D.C. 286 F. 731, United States v. Mitchell, D.C. 274 F. 128. The basic requirement is that the officers who are commanded to search be able from the "particular" description of the search warrant to identify the specific place for which there is probable cause to believe that a crime has been committed. This requirement may be satisfied by giving the address of the building and naming the person whose apartment is to be searched. (Citations omitted). But the warrant here cannot be saved by the limiting effect of naming the persons whose residence are to be searched because it expressly commands the search of the entire building. . . .

The validity of the warrant depends upon the showing made before the commissioner at the time of its issuance. (Citations omitted). It may well be that the affidavits show probable cause to search the residences of the four women referred to, provided they would be accurately identified from the alias given. But the affidavit does not establish probable cause to search the entire building without the allegations of facts to show that each of the apartments in the buildings was the residence of at least one of the persons alleged in the affidavit to have been seen selling the narcotics. . . .

If the officers had found that the defendants were the only ones living in the apartment building and that no innocent persons had actually suffered an unjustified search, the warrant would still be invalid. The validity of the warrant is dependent on the facts shown in the affidavit before the issuing authority. . . .

We are not being overly technical in this. We are merely insisting as we must, that in issuing search warrants the requirement of the Fourth Amendment be met. If innocent persons were actually subjected to an unjust search under the warrant in question, here, as might well be the case, it would still be argued that the defendants were not harmed thereby and, thus, should not be able to challenge the warrant because its coverage was too broad. The cases already cited make it clear that this argument has not been accepted by the courts because they are determined to discourage the practice of issuing warrants without a sufficient showing of cause or, as in this case, where the cause shown does not cover as broad an area as the command search.

The record in this case does show that several people were living in the apartment portion of 511-513 West Second South (R. 164-167).

The rule as established in Hinton is also relied on in state cases. People v. Franks, 221 N.W. 2d 441, relying on Lyman v. United States, 297 F. 177, Cert. Den., 266 U.S. 604.

The above test satisfies the general rule behind the prohibition of the Fourth Amendment requiring the description of places with particularity which is that the adequacy of the description of a search warrant is determined by whether or not given specificity of the warrant, violation of personal rights is likely, either through a general search directed toward intended persons or a search incorrectly directed toward different and presumptively innocent persons. U.S. v. Bynam, 386 F. Supp. 449, affd. 573 F. 2d 533.

It is the defendant's position that the search warrant was so general as to allow the search of various tenants' apartments for which no probable cause was shown in the affidavit supporting the search warrant is so general as to be defective, nor does such a search warrant comply with the rules laid down in the cases above mentioned.

The warrant itself also commanded the search of persons for which no probable cause was shown. The search warrant commanded the search of a "male person known only as 'Billie'". In fact, the affidavit in support of the search warrant nowhere mentions the name "Billy" except as a person to be searched.

There is no question that the search warrant was overly broad and commanded the search of places and persons for which no probable cause was shown.

#### POINT V

THE COURT ERRED IN ADMITTING INTO EVIDENCE EXHIBIT 5 WHICH WAS TWO ENVELOPES ADDRESSED TO WILLIE WALKER, 511 WEST SECOND SOUTH, AND THE SEIZURE OF SUCH EVIDENCE FROM THE SEARCH OF THE PREMISES, WAS ILLEGAL AND OUTSIDE THE SCOPE OF THE WARRANT.

The search warrant in this case permitted and commanded the search for narcotics. The search warrant mentioned nothing about any envelope containing the name of the defendant which might subsequently be used as evidence. Thus, the seizure of the envelopes was not within the direction or confines of the search warrant; nor could a search warrant for the seizure of envelopes be issued.

Section 77-54-2, Utah Code Ann. 1953, provides the grounds for the issuance of a search warrant and allows the seizure of property

- (i) When stolen or embezzled;
- (ii) When it was used as a means for committing a felony;
- (iii) When it is in the possession of a person with the intent to use it as a means for committing a public offense.

Utah statute does not allow a search for "mere evidence. The envelopes being "mere evidence" and were not within the mandate of the search warrant and should have been suppressed and the introduction thereof into evidence was in error.

#### CONCLUSION

In summary,

There was insufficient evidence upon which to convict the defendant inasmuch as the only evidence of possession that narcotics were found in a room to which the defendant had access as others also had access.

The Court erred in refusing to allow the testimony of the witness James Housley to the effect that he had seen Robert Westley occupying the room in which the narcotics were found prior to the search; the refusal to allow such testimony was prejudicial inasmuch as access to the room was a key issue in the case and Housley would have been an important witness to the defendant as he was the only white witness who obviously had no reason to lie or be untruthful.

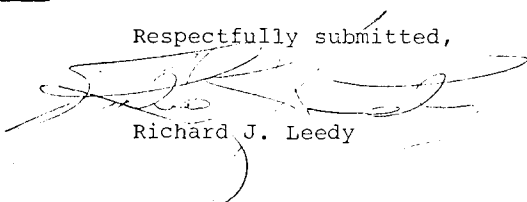
The Court erred in refusing to give the defendant's proposed instructions which provided that if more than one person had access to a room in which narcotics were found, then the prosecution must prove more than mere presence of a narcotic in order to convict the defendant of possession.

The search warrant in the instant case was overly broad and commanded the search of apartments and persons for which no probable cause was shown and such invalidates the entire search -- probable cause must be shown for the search of each apartment in an apartment building and the fact that there is probable cause to believe that narcotics may be present in some part of the apartment building does not justify a search warrant commanding the search of the entire building.

The seizure of the two envelopes was beyond the scope of the warrant and constituted mere evidence and the introduction thereof was improper and in error.

DATED this 15 day of April, 1978.

Respectfully submitted,



Richard J. Leedy

DELIVERY CERTIFICATE

I hereby certify that on this \_\_\_\_\_ day of April, 1978, I delivered a copy of the foregoing Brief of Appellant to the Office of the Attorney General, State Capitol Building, Salt Lake City, Utah 84114.

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