

1986

Utah v. Case : Brief of Appellant

Utah Supreme Court

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David L. Wilkinson; Attorney General; Attorney for Respondent.

Frank T. Mohlman; Mohlman and Young; Attorney for Appellant.

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DOCKET NO. 860263

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH	:	
Plaintiff/Respondent	:	
vs.	:	
WILLIAM SILAS CASE,	:	Case No. 860263
Defendant/Appellant	:	Category No. 2

BRIEF OF APPELLANT

Appeal from a verdict in the Third Judicial District Court, in and for Tooele County, State of Utah, the Honorable John A. Rokich, Judge, presiding: of conviction of Aggravated Assault, a Felony of the Third Degree.

FRANK T. MOHLMAN
Attorney for Appellant
MOHLMAN AND YOUNG
250 South Main Street
Tooele, Utah 84074
Telephone: 882-1618

DAVID L. WILKINSON
Attorney General
Attorney for Respondent
236 State Capitol Building
Salt Lake City, Utah 84114

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Clerk, Supreme Court, Utah

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FRANK T. MOHLMAN
Attorney for Appellant
MOHLMAN AND YOUNG
250 South Main Street
Tooele, Utah 84074
Telephone: 882-1618

DAVID L. WILKINSON
Attorney General
Attorney for Respondent
236 State Capitol Building
Salt Lake City, Utah 84114

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STATEMENT OF ISSUES

1. Should the District Court have excluded evidence obtained from a warrantless search of the motel room where the alleged crime occurred?

2. Should the District Court have excluded the receipt of the preliminary examination testimony of the main prosecuting witness (a) as violative of Defendant's right of confrontation of witnesses, or (b) because the State did not show the witness to be unavailable under Utah Rules of Evidence, Rule 804?

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH	:	
Plaintiff/Respondent	:	
vs.	:	
WILLIAM SILAS CASE,	:	Case No. 860263
Defendant/Appellant	:	Category No. 2

BRIEF OF APPELLANT

STATEMENT OF THE CASE

This is an appeal from a conviction and sentence imposed for Aggravated Assault, a Felony of the Third Degree, in violation of Utah Code Annotated, §76-5-103 (1953 as amended). The Defendant was found guilty following a jury trial which occurred on April 15 and 16, 1986 in the Third District Court, in and for Tooele County, State of Utah, the Honorable John A. Rokich, Judge, presiding. The same court on May 12, 1986 sentenced the Defendant to a term of not to exceed five (5) years in the Utah State Prison. An appeal was taken to this Court.

Statement of Facts

The defendant, WILLIAM SILAS CASE, a trucker, was

staying over at the Lakepoint Truck Stop in Tooele County because of bad winter road conditions (R.146-147). He met SUZANNE McPHERSON on or about the 6th day of February, 1986. Ms. McPherson was a 28-year-old female who had been hitchhiking with truckers to travel across the country (R.147 and Exhibit 40, the taped preliminary examination testimony).

The defendant stated that Ms. McPherson was depressed, suicidal and frightened and he was trying to help her out by giving her a room and some food (R.146-150, 154-155). The defendant stated that in her depressed state that she had attempted suicide and he became involved in a scuffle with her to take the knife away from her and stop the bleeding (R.162-163). Ms. McPherson accused him of assaulting her with a knife (Exhibit 40).

This incident occurred on the evening of February 6, 1986 in a motel room by the truck stop at Lakepoint, Utah. When the Tooele County Sheriff's deputies arrived, Ms. McPherson was in the motel manager's office (R.60-61) and the defendant met the sheriff's office personnel out on the balcony outside the door of the motel room where the incident was to have occurred (R.62). The door to the room was only partially opened (R.64). Without asking the defendant's permission or obtaining his consent and without obtaining a warrant to search the room, the sheriff's

deputies entered the room and conducted a search and took pictures and obtained evidence that was used at trial over the objection of defendant's counsel (R.63-65, 68-72, 7-8).

The alleged victim appeared and testified at the preliminary examination on February 18, 1986 but did not appear on the day of the trial (R.2-3). Ms. McPherson had not been subpoenaed to appear. Instead, the State relied on her promise to appear (R.20). The Court, without adequately inquiring into the defendant's "unavailability" or the reasons given for Ms. McPherson's failure to appear at trial, allowed the preliminary examination testimony of the alleged victim to be used at the time of trial over the objection of defense counsel (R.2-6, 14-31).

SUMMARY OF ARGUMENTS

The defendant, WILLIAM SILAS CASE, first contends that the District Court erred by allowing testimony and evidence relating to the search of the motel room. No search warrant was obtained and no "exigent circumstances" were presented which would have justified a warrantless search.

Next, the defendant contends that the preliminary examination testimony of the prosecuting witness should not have been received by the District Court. This receipt violated the defendant's right to confront the witnesses against him.

Furthermore, the District Court should not have received the preliminary examination testimony because it was hearsay and the witness was not legally "unavailable as a witness" under Rule 804 of the Utah Rules of Evidence.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN ALLOWING EVIDENCE WHICH WAS THE RESULT OF THE WARRANTLESS AND UNREASONABLE SEARCH AND SEIZURE WITHIN THE DEFENDANT'S MOTEL ROOM.

The Fourth Amendment protection of the United States Constitution and the protection of Article I, Section 14 of the Utah State Constitution regarding unreasonable and warrantless search and seizures have been applied to motel and hotel rooms as a person has an expectation of privacy while occupying said premises. (68 AmJur 2d, Searches and Seizures §18, 86 ALR 2d 984 et seq.) This constitutional protection was specifically held to extend to hotel and motel rooms by this Court in State v. Folkes, 565 P.2d 1125, 1127 (Utah 1977), wherein the Court stated as follows:

We are committed unreservedly to the protection of the right of privacy by guarding against any unwarranted intrusions upon the peace and dignity of persons in their homes, hotel rooms or wherever they are lawfully entitled to be in private. There can be no doubt that officers should not take it upon themselves to decide whether to enter such a sanctuary without a warrant when it is reasonably practical to obtain one.

In the Folkes case, the Court did not exclude the evidence because of its reliance on the plain view doctrine. However, the Court did extend protection to any situation or circumstance where a person has an expectation of privacy, and recognized the importance of requiring officers to obtain warrants and rely on the independent and protecting judgment of a magistrate to determine probable cause for the obtaining of a warrant.

In the instant case, the officers had probable cause to obtain a warrant, but a warrant was not obtained. It would have been a simple process for the officers to close the partially-opened door and station an officer in front to secure the premises while another officer obtained a search warrant. Instead, the officers pushed open the door of the motel room and conducted an extensive search and took pictures.

The judge admitted this evidence and denied the defendant's Motion to Suppress (R.7) stating, "I will probably deny that (Motion) because, unless you (talking to defense counsel) find out the basis if they have probable cause, what the basis of entering was..." (emphasis added). In effect, the Court was basing its later denial of defendant's motion to suppress on an incorrect standard, that of probable cause. Furthermore, the Court appeared to be requiring the defense counsel to establish

the absence of probable cause rather than placing the burden of showing correct police conduct on the State. Probable cause is the standard for the judge issuing a warrant, not the standard for a warrantless search by officers. In fact, a warrantless search is per se unconstitutional. This Court in State v. Christensen, 676 P.2d 408, 411 (Utah 1984) stated:

Warrantless searches and seizures are per se unreasonable unless exigent circumstances require action before a warrant can be obtained.

As in Christensen, the State in this case failed to establish the lawfulness of this search but, instead, focused on probable cause which is not the proper standard.

In interpreting and setting forth the constitutional requirements of our state and federal constitutions for warrantless search, the most enlightening case is State v. Harris, 671 P.2d 175 (Utah 1983). That was a case where officers had been called to Mr. Harris' property by a neighbor who complained that Mr. Harris was growing marijuana plants. The officers attempted to observe the garden area of Mr. Harris' property from the neighbor's yard and then from Mr. Harris' driveway. The police entered the backyard of Mr. Harris' home and were asked to leave. The officers discussed the propriety of obtaining a warrant and decided not to do so; reentered the backyard, arrested Mr. Harris and then obtained samples of the

alleged marijuana plants to be analyzed. Later, a search warrant was obtained to search inside the home of the defendant. This case is the authority, so to speak, in Utah on warrantless search. Justice Howe states:

There are of course justifiable intrusions when the right to be let alone must yield to the right of search. Johnson v. United States, 333 U.S. 10, 68 S. Ct. 367, 92 L.Ed. 436 (1948), but as a rule that justification must be sanctioned by a judicial officer and not asserted in discretion of a government official, because "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment--subject only to a few specifically established and well delineated exceptions." Katz, supra, 389 U.S. at 357, 88 S.Ct. at 514, 19 L.Ed.2d at 585. And the burden is on those seeking exemption to show the need. The intervention of a neutral magistrate not only guarantees a lawful search of a suspected offender, but in a larger sense it protects society against the erosion of those cherished rights that are still not taken for granted in many parts of the world. Courts do not enforce these procedural requirements to sanction the activities of one single individual, but to assure all citizens those continuing fundamental rights.

The officers in this case would have had probable cause to obtain a search warrant but this alone is not sufficient to search as stated in the Harris case at 179 and 180:

[They may have]...had probable cause to have a search warrant issued. But probable cause alone is never enough to search for and seize contraband without a warrant. If it were, the protection of the Fourth Amendment would be rendered a nullity and probable cause alone would make all warrantless searches per se

reasonable. Coolidge, supra. Absent exigent circumstances, a warrantless entry to search for weapons or contraband is unconstitutional, even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within. Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980).

In the Harris case at 179, Justice Howe lists five situations where "exigent circumstances" may exist in order to conduct a warrantless search. The State has the burden to establish the circumstances that would justify a warrantless search. The five areas are: (1) consent, (2) hot pursuit, (3) public places, (4) plain view after lawful intrusions, (5) incident to a lawful arrest based on probable cause under exigent circumstances. Each of these exceptions is addressed below as they relate to the instant case.

1. Consent: No consent was obtained in the instant case (R.64). Therefore, this exception does not apply here.

2. Hot Pursuit: The defendant met the officers outside the room--in effect, surrendering himself to the officers. There was no chase, no "hot" pursuit into the motel room or any other circumstance that would require the officers to enter the motel room (R.64).

3. Public Places: In the Folkes case cited above, this Court has recognized the expectation of privacy and protection afforded to hotel and motel rooms and the guests occupying them.

Thus, the motel room searched in this case was not a public place and the warrantless search cannot be justified under this exception.

4. Plain View After Lawful Intrusion: In this case, this exception fails because the intrusion by the officers was not lawful. The door was only partially open (R.64). The victim was in another room. The officer did not indicate that he saw anything at all in the room until after he entered the room without permission or any other proper justification. In most instances, the lawful intrusion is supplied by a warrant and the evidence that is seized under this exception is not listed in the warrant and is seen in plain view by the officer being where he had a right to be.

Commenting on similar circumstances of a warrantless search without permission in the Harris case where plain view was argued by the state to justify the seizure of evidence, Justice Howe states at 181:

To accede to the State's construction of the plain view doctrine would be tantamount to ignoring the maxim that plain view never occurs until a lawful search (usually under warrant) is in progress, and may not be used by government officials to bootstrap themselves into an exploratory search until they find what they are looking for. "Any evidence will be in plain view, at least at the moment of seizure". Coolidge, supra, 403 U.S. at 465, 91 S.Ct. at 2037, 29 L.Ed.2d at 582. The "plain view" doctrine comes into play only where the observation made is postintrusive. Pre-intrusive observations merely give rise to probable cause.

The evidence in this case of the statements of the alleged victim and the bloody footsteps in "plain view" give rise to probable cause which would be justification to obtain a warrant to enter the room and continue the criminal investigation there with a search warrant. Instead, here we have an uninvited intrusion to find evidence in "plain view". The circumstances here fail justify a warrantless search.

5. Incident to a Lawful Arrest Based on Probable Cause Under Exigent Circumstances: In the present case, the officers had probable cause based on the alleged victim's statements and the bloodied footprints to arrest the defendant. However, the State failed to establish the exigent circumstances requirement to search pursuant to a lawful arrest. The Court in Harris established the criteria for a search incident to arrest at 180:

The underlying justifications for a warrantless search of an arrestee's person and the area within his immediate control are two-fold: (1) to remove weapons the arrestee may use to resist an arrest or effect an escape, (2) to prevent concealment or destruction of evidence linking the arrestee with the crime. Neither situation obtained here. The defendant lived alone, the plants were well established in the garden, and there was no danger of their destruction, let alone their concealment. Further, they were not within his immediate control where he was arrested.

In the instant case, the defendant was out on the balcony in front of the motel room when he was arrested with no

weapon and he was secured before the officer entered the room. The victim was in the manager's office. No destruction of evidence was foreseeable nor under the defendant's control where he was arrested. The search pursuant to a lawful arrest fails here as in Harris because the state has failed to establish exigent circumstances which would justify a warrantless search.

POINT II

THE TRIAL COURT ERRED IN RECEIVING THE ALLEGED VICTIM'S PRELIMINARY EXAMINATION TESTIMONY.

Article I, Section 12, of the Utah Constitution and the Sixth and Fourteenth Amendments of the United States Constitution insure the defendant the right to be confronted by his accusers and to examine them. This right was violated by the Court receiving the preliminary examination testimony.

Rule 804(b)(1), Utah Rules of Evidence, allows former testimony to be received at a subsequent proceeding and the testimony is "not excluded by the hearsay rule if the declarant is unavailable as a witness." Rule 804(a)(5), Utah Rules of Evidence, defines "unavailability" as follows:

"Unavailability as a witness" includes situations in which the declarant...(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means.

The key issue is this case under this rule and the constitutional guarantee is whether the State's efforts to obtain

the witness were reasonable.

The facts of this case show that the victim was very transitory and claimed some fear of the defendant and had expressed to the officers some reluctance to testifying (R.20, 26). Despite this, no effort was made by the prosecution to have a subpoena served on the victim. On this issue, the Supreme Court has spoken in State v. Oniskor, 510 P.2d 929 (Utah 1973) which, though prior to the adoption of the present Rules of Evidence, stated, in effect, if the State has not made a good-faith effort to obtain the presence of a witness including subpoenaing the out-of-state witness, the testimony should not be allowed. The Court found in that case that the testimony should have been excluded, but it was harmless error not to exclude it because several other witnesses testified to the same facts. That certainly is not so in the instant case because the alleged victim's testimony was of paramount importance to the conviction of the defendant and, in fact, the tape recording received as an exhibit was taken by the jury to the jury room and we can assume they listened to it again.

The Court in Oniskor at 931 stated:

The instant action bears a strong similarity to Berger v. California, wherein a state investigator located the witness in Colorado, but the State failed to serve a subpoena on him. The court vacated the judgment and remanded the case to be reconsidered in light of Barber v. Page. The court observed that one of the important objectives of the right

of confrontation was to guarantee that the fact finder had an adequate opportunity to assess the credibility of witnesses. In the instant action, the State failed to sustain its burden that it had made a good-faith effort to secure the attendance of the witness and had been unsuccessful. The use of the depositions at the trial constituted a denial of defendant's constitutional right of confrontation. However, the testimony of these two absent witnesses was merely cumulative since others also testified to essentially the same facts. A survey of the record reveals that the other evidence against defendant was so overwhelming that this court is compelled to conclude beyond a reasonable doubt that the denial of defendant's rights constituted harmless error.

Hoping that the witness would appear when the prosecution could have required her presence by subpoena was not reasonable, especially in light of the past history of this witness.

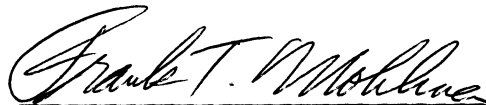
The Supreme Court more recently addressed this issue in State v. Brooks, 638 P.2d 537 (Utah 1981). In that case the prosecution put on testimony that the witness had basically disappeared, that an officer had contacted all known relatives, likely hangouts, local bus terminals, and out-of-state police and could not find the witness, and, there, the trial judge found and the Supreme Court concurred, that this was sufficient good-faith effort and the issuing of the subpoena would be worthless to establish unavailability because they could not locate the witness to serve the witness with a subpoena. That is clearly

not the case here. The State witness testified that the alleged victim had a telephone number and address and the State had had several telephone contacts with her, but they did not subpoena her to trial (R.16-19). The witness appeared at the preliminary examination because she was properly subpoenaed. She could have been subpoenaed to the trial very easily before she left the state. She should not properly have been considered "unavailable" and her preliminary examination testimony should not have been used. (See 38 ALR 4th 362 and 3 ALR 4th 73, especially §11)

CONCLUSION

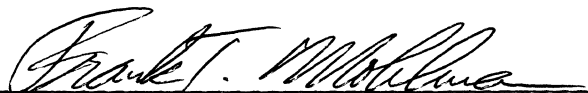
For the foregoing reasons, the defendant, WILLIAM SILAS CASE, seeks reversal of his conviction and remand of his case to the District Court with an order for new trial.

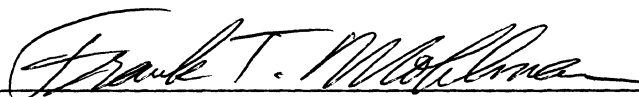
Respectfully submitted this 22ND day of October, 1986.


FRANK T. MOHLMAN
Attorney for Defendant, Appellant

CERTIFICATE OF SERVICE

I, FRANK T. MOHLMAN, hereby certify that four copies of the foregoing Appellant's Brief will be delivered to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah 84114, this 22ND day of October, 1986.


FRANK T. MOHLMAN
Attorney for Defendant, Appellant

DELIVERED by  this 22ND day of October, 1986.