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State of Utah v. Rogelio Mora Virgen : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS

STATE OF UTAH

STATE OF UTAH, Appellee,	)	
	)	**APPELLANT'S REPLY BRIEF**
	)	Case 980071 CA
ROGELIO MORA VIRGEN, Appellant.	)	961600049

THIS IS AN APPEAL FROM A FINAL ORDER OF THE HONORABLE DAVID L. MOWER OF THE SIXTH DISTRICT COURT IN AND FOR KANE COUNTY, STATE OF UTAH

ORAL ARGUMENT IS REQUESTED

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IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR KANE COUNTY

STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. ROGELIO MORA VIRGEN, Defendant.	**APPELLANT'S REPLY BRIEF** Case No. 96160049 Judge: David L. Mower

ARGUMENTS

I.

THE VIDEOTAPE OF THE ENCOUNTER CLEARLY REVEALS THAT THE SEARCH OF APPELLANT'S VEHICLE WAS CONDUCTED AS A PURPORTED "INVENTORY SEARCH" AND APPELLANT SHOULD BE ALLOWED TO PROCEED WITH THE INSTANT APPEAL BECAUSE ANY ERROR MADE BY APPELLANT'S COUNSEL IS HARMLESS.

It is abundantly clear from the videotape of the encounter in the instant case that the police officers proceeded with the search of Appellant's vehicle as a purported "inventory search" and not as a search incident to arrest. As is apparent from the

videotape, the officers informed Appellant that his vehicle was allegedly **"being impounded"** and that the officers were proceeding with an **"inventory search"** of his vehicle. (Video at 18:45:40 - 18:53:00). Moreover it is apparent from the State's Brief of Appellee dated March 31, 1999, that the State repeatedly refers to the search of Appellant's vehicle as a so-called "inventory search" and never once refers to it as a search incident to arrest. See Brief of Appellee at 6,7. Nevertheless, the State argues that use of the wrong term to characterize the search somehow renders Appellant's entire Appeal, Brief and arguments therein invalid.

The State's reliance on State v. Rodriquez, 841 P.2d 1228, 1229 (Utah App. 1992) to support its contention that the instant appeal should be summarily dismissed because Appellant inadvertently neglected to properly label the trial court's decision upholding the search in this case as a search incident to arrest is misplaced. In Rodriquez, the court failed to address the constitutional claims raised in the defendant's appeal because **Appellant had neglected to argue in his appeal that he had standing to raise the constitutional issues.** Because standing is a threshold question when asserting Fourth Amendment rights, the Rodriquez court found that because the defendant had not even addressed much less demonstrated

standing, that the court need not reach the merits of the appeal.

Unlike Rodriquez, in the instant case, Appellant has not failed to address any threshold question such as standing or jurisdiction which is necessary to proceed with the appeal. While Appellant's counsel inadvertently neglected to argue in Appellant's Opening Brief that the search in this case was not a proper search incident to arrest, the error was due to the clear statements and actions of the officers in the videotape of the encounter from which the officers purported to conduct an "inventory search" of Appellant's vehicle. No rational inference could be drawn from the videotape that the search was performed as a search incident to arrest; and in any event, the search was not proper regardless of the particular label assigned to the officers' actions. Because Appellant has addressed the validity of the search as "a search incident to arrest" below, the error made by Appellant's counsel is harmless and Appellant should be permitted to proceed with the instant appeal.

II.

THE SEARCH OF APPELLANT'S VEHICLE CANNOT BE JUSTIFIED AS AN INVENTORY SEARCH OR A SEARCH INCIDENT TO ARREST.

The State has consciously avoided the arguments and authorities cited in Appellant's Opening Brief. Appellant clearly explained why the officers' alleged inventory search was invalid, and the State has presented no contrary argument or authority to demonstrate otherwise. Indeed, warrantless searches are presumptively illegal. Katz v. United States, 389 U.S. 347 (1967). A few specifically established exceptions which have been "jealously and carefully drawn," will justify the admission of evidence obtained from a warrantless search. Jones v. United States, 357 U.S. 493, 499 (1958). One such exception to the warrant requirement of the Fourth Amendment is that police officers may perform a search incident to arrest. Under this exception, "a contemporaneous, warrantless search of the area within an arrestee's immediate control is permissible for the purpose of recovering weapons the arrestee might reach, or to prevent concealment or destruction of evidence of the crime [for which he has been arrested]." State v. Harrison, 805 P.2d 769, 784 (Utah Ct. App. 1991) (citing Chimel v. California, 395 U.S. 752, 763, 89 S.Ct. 2034, 2040, 23 L.Ed.2d 685 (1969).

The State's reliance on this exception is as misplaced as its reliance at trial upon the inventory search exception.

The courts have been careful to ensure that the scope of a search incident to arrest remains closely limited to its underlying purpose. The Supreme Court stated in New York v. Belton, 453 U.S. 454, 458, 101 S.Ct. 2860, 2862, 69 L.Ed.2d 768 (1981) that the scope of a search incident to arrest must be "strictly tied to and justified by circumstances which rendered its initiation permissible." The Utah Court of Appeals has defined the search incident to arrest exception to the Fourth Amendment's warrant requirement as follows:

> [A]n arresting officer may, without a warrant, lawfully search the area surrounding the person he or she is arresting if: (1) the arrest is lawful, (2) the search is of the area within the arrestee's immediate control, and (3) the search is conducted contemporaneously to the arrest[.] In other words, the search must be conducted pursuant to a lawful arrest and cannot be remote in place or time from the arrest.

State v. Giron, 943 P.2d 1114, 1117-18 (Utah Ct.App. 1997) (quoting Chimel, 395 U.S. at 764, 89 S.Ct at 2040.

While it is true that "doubt about the arrestee's ability to access weapons or evidence in a particular area because of distance, or police restraint, does not [necessarily] prohibit the police from searching that area", State v. Moreno, 910 P.2d 1245, 1247 (Utah Ct.App.1996), Utah courts have noted that the arrestee's ability to reach into the area searched by the police

must be taken into account in determining the reasonableness of the search.

In the recent case of State v. Gallegos, 967 P.2d 973, 979 (Utah App. 1998), the Utah Court of Appeals stated that the reasonableness of a search incident to arrest must be determined from the totality of the circumstances with consideration given to the following factors:

> **(1) "[w]hether or not the arrestee was placed in some sort of restraints"; (2) "[t]he position of the officer vis-à-vis the defendant in relation to the place searched"; (3) "[t]he ease or difficulty of gaining access to the searched area or item; and (4) "[t]he number of officers present in relation to the number or arrestees or other persons."**

In Gallegos, police officers went to the defendant's home to execute an arrest warrant. Upon entry into the house, the officers discovered the defendant hiding in a hole which had been cut into the floor and covered by carpet. The officers ordered the defendant out of the hole with guns drawn and then immediately took him into custody and placed him in handcuffs. The officers then removed the defendant to the living room of the house. After another officer arrived to watch the defendant, the arresting officers then returned to the room where the defendant was arrested and conducted a further search to ensure that there were no unsecured additional weapons in the room. During this search, one of the officers noticed a purple tin on a shelf in the closet of the bedroom. The officer

inspected the tin and found five plastic baggies, two containing cocaine residue and two containing methamphetamine residue.

The defendant was then charged with possession of a gun by a restricted person, possession of cocaine and possession of methamphetamine. The defendant filed a motion to suppress the gun and the tin. The trial court denied the motion to suppress, finding that the gun was properly seized during the search incident to arrest of the defendant and that the tin was properly seized under the plain view doctrine.

On appeal, the defendant asserted that the tin was **not sufficiently within defendant's immediate control at the time of the arrest to justify the search.** The state countered that the search of a room in which a defendant is arrested is *per se* a reasonable search incident to arrest.

Refusing to accept such an expansive interpretation of the search incident to arrest exception to the warrant requirement, the Gallegos court stated:

> **Rejecting the State's contention as too broad, we hold that the State must demonstrate that the area searched was reasonably within defendant's control at the time of his arrest before evidence obtained in that search can be admitted under the "search incident to arrest" exception to the warrant requirement.**

Gallegos at 979.

The Gallegos court found that case similar to the Utah Court of Appeals decision in State v. Wells, 928 P.2d 386 (Utah

Ct.App. 1996). In that case, the court reviewed the search of a jacket liner when the defendant was not close to his jacket but the police had been informed by the defendant's girlfriend that there was cocaine in the jacket liner. Finding it troublesome that the arresting officer's testimony did not indicate how far the defendant was from the jacket when he was arrested and handcuffed, the Wells court refused to find the search of the lining of the jacket justifiable as a search incident to arrest, since defendant was in handcuffs, was separated from the jacket by two police officers, and was arrested in a room different from where the jacket was located.

As in Gallegos and Wells, no search of Appellant's vehicle incident to Appellant's arrest is justifiable in the instant case. The video tape of the encounter in the instant case clearly reveals that Appellant was not only separated by a considerable distance of approximately 20 feet, he had already been taken into custody and placed in handcuffs. Additionally, there were three officer between the hand-cuffed Appellant and the vehicle. It is further abundantly clear from the videotape of the encounter that due to the distance between Appellant and the vehicle, the fact that Appellant had been placed in handcuffs, and the fact that Appellant was separated from the vehicle by two police officers, that Appellant could not possibly have reached into the vehicle to obtain a weapon or

destroy evidence. Finally, the videotape reveals that during the lengthy search of Appellant's vehicle, the officers spent approximately twenty minutes using tools to dismantle the seat of Appellant's vehicle in order to gain access to the area behind the seat where the police found marijuana.

Clearly, the time-consuming process of dismantling the seat in order to gain access to the area where the marijuana was found reveals that Appellant could not possibly have reached into that area to obtain a weapon or destroy evidence even if he had been sitting inside the vehicle instead of being handcuffed in a police vehicle a considerable distance away. Due to the fact that Appellant was handcuffed in a police car several feet away from his vehicle, and that several officers were on the scene, the search of Appellant's vehicle cannot possibly be justified as a search incident to arrest and accordingly, the evidence should be suppressed.

RESPECTFULLY SUBMITTED this 29th day of April 1999.

BOOKER & ASSOCIATES

Christopher T. Beck
Attorney for Rogelio Virgen

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** has been mailed, first-class, postage-paid, this 29th day of April 1999, to the following:

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