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The State of Utah v. Willie Folkes : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH, Plaintiff-Respondent, -vs- WILLIE FOLKES, Defendant-Appellant.	Case No. 14330

BRIEF OF RESPONDENT

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE JAY E. BANKS, JUDGE, PRESIDING

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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	CASE NO. 14330
-vs-		
WILLIE FOLKES,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with the crime of unlawful possession of a controlled substance (Heroin) with intent to distribute for value, a violation of Utah Code Ann. § 58-37-8(i)(ii) (as amended, 1973).

DISPOSITION IN THE LOWER COURT

Appellant was tried and convicted by a jury on November 12, 1974, before the Honorable Jay E. Banks, of the Third Judicial District Court. Appellant was sentenced to one to fifteen years in the Utah State Prison as provided by law.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the decision of the trial court.

STATEMENT OF THE FACTS

At approximately 2:00 a.m. on May 26, 1974, two policemen (Officers Bell and Niemann) were stationed on the roof of the Rio Grande Products Building for the purpose of observing prostitution activity on West Second South. The officers were on the roof by permission of the owners of the building (T. 33). While in the process of observation, Officer Bell heard voices from a window of the Baywood Hotel. These voices were discussing heroin and "shooting up". At the same time the officer observed a hand reach out underneath a window, holding a syringe. A clear liquid was expelled from the syringe (T. 33). The Baywood Hotel is adjacent to and connected with the Rio Grande Building (T. 143,144,33). After motioning to his companion to join him, the officer approached the window and observed the following activity.

Appellant came out of the bedroom of the two-room apartment (T. 34) and into the kitchen with a small amber bottle. From it he produced two capsules which he sold to a woman who was in the kitchen (T. 36,37). That

woman, with the help of another woman present, emptied the contents of the capsules into a spoon and added some water. This mixture was heated and was drawn into a syringe. Finally each woman injected a portion of the substance into the other's arm. The women then left (T. 37,38).

The police observed appellant return the small amber bottle to the bedroom (T. 39). A short time later appellant again went into the bedroom and brought out the bottle. He took one capsule from it and gave it to a man in the kitchen (T. 39). This man then followed the same procedure as the women had done (T. 39). The police a second time observed appellant return the bottle to the bedroom (T. 40). Officer Bell had seen the bottle at all times, however Officer Niemann, because of his vantage point had not. Officer Bell motioned to his campanion and mouthed the words that appellant was taking the evidence into the bedroom. Officer Niemann responded by nodding his head up and down (T. 66,67).

The officers inadvertantly made a noise and appellant got up to investigate. Appellant went into the bedroom where the bottle was and there he looked out the window. Officer Niemann aimed his gun at him

and told him not to move (T. 40). The other man, who was still in the kitchen made a move for the door. Officer Bell, however, stuck his revolver through the kitchen screen and ordered the man to remain still (T. 41). Officer Niemann then climbed in the bedroom window and accompanied appellant into the kitchen where he could keep his eye on both men. When the situation was thus secured Officer Bell also climbed in the bedroom window (T. 41). After the men the were handcuffed Officer Niemann returned to the bedroom and retrieved the small amber bottle which Officer Bell had observed appellant put there (T. 43).

POINT I

POLICE OFFICERS HAVE A RIGHT AND A DUTY TO INVESTIGATE SUSPICIOUS ACTIVITY WHICH MAY INVOLVE CRIMINAL ACTION.

Appellant contends that police may not spy on people and that people must be protected from invasions of their right to privacy in their homes. Respondent admits as much. However, respondent submits, the above has absolutely nothing to do with this case. Appellant cites Katz v. United States, 389 U.S. 347 (1967) and other similar cases as authority for the position that eaves-

dropping without a search warrant by peering in a window is a violation of the right to privacy. Respondent submits however, that there are overridding considerations. In the light of all of the facts and circumstances, this is not a Katz case at all, rather it is a Terry v. Ohio case. (Terry v. Ohio, 392 U.S. 1 (1968)). Terry stands for the proposition that a police officer can and should investigate suspicious circumstances in order to prevent or curtail criminal activity. Terry v. Ohio, respondent submits, is controlling in this case.

As this Court is aware, Terry involved a situation where a police officer observed some young men walking up and down a street in Cleveland, Ohio. He felt that the situation "didn't look right to me." He further watched the men who would walk up and down the street, always looking in a certain store. The officer then approached the men, asked a question to which he received no response, and conducted a search. Finding a gun, he then arrested the men (392 U.S. 5-7).

The men sought to have the gun supressed because the search was allegedly an invasion of their

right to privacy. The Supreme Court, however, upheld the search. Their reasoning is as follows. The Court first specifically said that Terry was not a Katz type case:

> "We deal here with an entire rubric of police conduct - necessarily swift action predicated upon the on-the-spot observations of the officer on the beat - which historically has not been, and as a practical matter could not be, subjected to the warrant procedure." (392 U.S. at 20).

The Court then went on to outline the test to be applied to the officer's conduct. The officer must be able to point to specific and articuable facts which, taken together with rational inferences of these facts, reasonably warrant an intrusion. (392 U.S. at 21). In other words:

> "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?" (392 U.S. 21-22).

Applying this law to the facts of the instant case, it is obvious that Officer Bell's actions in investigating a suspicious activity was both prudent and constitutionally acceptable. The officer was in a place where he had a right to be (T. 33). A short distance away was an open window of a hotel room. From that window

the officer overheard people talking about "shooting up heroin". (T. 33). He also saw a hand extend out the window holding a syringe. A clear liquid was emitted from the syringe. This later act happened twice (T. 33).

Based on the above occurances the officer made the decision to investigate further. Respondent submits that it would be inconceivable for a police officer with four years of experience (T. 31) to shut his mind to a circumstance so patently suspicious as that just described. As an officer of the peace he had a legal duty to investigate.

It is helpful to compare the knowledge of the officer in the Terry case to that of Officer Bell. In Terry the policeman merely saw some men walking up and down a street looking suspiciously in a store window. On the other hand Officer Bell heard individuals actually discussing the commission of a crime, "shooting up heroin". Further, he not only heard those words but at the same time he saw a hand holding a syringe. Officer Bell, armed with a great deal of probable cause, had the full right if not the moral duty to investigate.

Appellant characterizes this as a case where his actions were:

> ". . . private conversations and activities. . . within the confines of his private residence [which] were not exposed to the public and were preserved as private."

Respondent submits that the facts do not justify such a characterization. If it was a private conversation why was the window left open? Further, the hand and the syringe were extended out of the window and into the "plain view" of an officer who had a right to be where he was.

Appellant's entire authority can be distinguished thus, on the basis that in none of his cited cases was an officer drawn to ongoing suspicious activity which he inadvertantly discovers. In Katz, supra, and State v. Kent, 20 U.2d 1, 432 P.2d 64 (1967), as well as the other cases cited by appellant, a police officer, without a search warrant, specifically set up an eavesdropping type of surveillance the main target of which was a certain individual. The burden of those cases is that if an officer had time to set up the eavesdrop, then he had time to obtain a warrant, and that a warrant would not be issued if it would be used to invade a place where a person had reasonably expected privacy.

Katz and the others do not stand for the proposition of appellant, that a police officer is not entitled to

investigate suspicious activity simply because he sees it or hears it from a private residence. Appellant would suggest that if a policeman heard a scream for help, he could not climb up a fire escape and look through a window to see what the trouble was. This however, is not the law.

In summary, when a policeman inadvertantly sees and hears suspicious activity, he has the right, under Terry v. Ohio, to investigate.

POINT II

THE SEIZURE OF THE HEROIN WAS LEGALLY ACCOMPLISHED.

In the instant case, police observed the following take place in a small two-room apartment (T. 34). Appellant came out of the bedroom and into the kitchen with a small amber bottle. From it he produced two capsules which he sold to a woman who was in the kitchen (T. 36,37). That woman, with the help of another woman present, emptied the contents of the capsules into a spoon and added some water. This mixture was heated and then drawn into a syringe. Finally each woman injected a portion of the substance into the others arm. The women then left (T. 37,38).

The police observed appellant return the small amber bottle to the bedroom (T. 39). A short time later appellant again went into the bedroom and brought out the bottle. He took one capsule from it and gave it to a man in the kitchen (T. 39). This man then followed the same procedure as the women had done (T. 39). The police again observed appellant return the bottle to the bedroom (T. 40).

After the police inadvertantly made a noise outside the window appellant got up to investigate. Appellant went into the bedroom where the bottle was and looked out the window (T. 40). Officer Niemann pointed his revolver at appellant and told him to stand still (T. 40). The other man, who was still in the kitchen made a move toward the door. Officer Bell, however, stuck his revolver through the kitchen screen and ordered the man to remain in the kitchen (T. 41). Officer Niemann climbed in the bedroom window and accompanied appellant into the kitchen where he could keep his eye on both men. When the situation was secured in this way, Officer Bell also climbed through the bedroom window (T. 41). After the men were searched and handcuffed one officer returned to the bedroom to retrieve the small amber bottle which they had observed appellant put there (T. 43).

Appellant argues that the actual arrest was in the kitchen and therefore the seizure of the heroin-filled bottle was illegal as being outside appellant's control. Respondent submits, however, that if the retrival of the bottle constituted a search at all then it was lawful on either of two exceptions to the warrant requirement: search incident to arrest and plain view. Respondent points out that the arrest occurred in the bedroom placing the bottle easily within appellant's control. Also, since the seizure of the bottle did not constitute a wide-ranging exploratory type search it is legally permissible under the circumstances.

A. There Was No Search In This Case

The facts show that the officers personally witnessed a crime. One of them personally observed the bottle from which the heroin was taken. They saw where the appellant kept the bottle. Therefore, after the arrest they simply picked up the bottle as evidence. There was no search. The officer knew what was in the bedroom and merely picked it up as evidence. It is absurd to suggest that a search warrant was necessary in this case. If the police officers had accosted appellant in the kitchen and had seen him toss a bottle into the other room, there is no doubt but that they could go and pick it up. They would not have to get a warrant merely because

the evidence was in that manner placed out of appellant's reach. It is the same in this case except that the bottle was placed in the bedroom right before the arrest instead of right afterward. Appellant would have this Court illogically restrict the police from doing that which is dictated by common sense. Appellant's proposals are directly contrary to the public interest.

B. The Seizure Is Permissible Under The "Plain View" Doctrine.

Respondent refers the Court to the third point in this brief for a discussion of the "plain view" doctrine. Suffice it to say, at this point that while observing the drug sale the police were in a place where they had a right to be, the amber bottle was in plain view, the discovery was inadvertant, and its incriminating nature was immediately apparent. Therefore, the officers had a right to seize the bottle notwithstanding the fact they lost visual contact with it for a moment.

C. Even If There Was A Search, It Was Permissible Under Chimel Standards.

In Chimel v. California, 395 U.S. 752 (1969), the United States Supreme Court said that in connection with a lawful arrest, police officers are justified in searching the area surrounding the arrestee from which he

might gain possession of a weapon or destroy evidence (395 U.S. at 763). The Court also said that the extent of the search must be "tied to and justified" by the circumstances of the arrest (395 U.S. at 762). Respondent submits that the "search" in this case, if it can be called that, was justified by the circumstances of the arrest. Also the arrest occurred in the bedroom and not in the kitchen. Therefore, the seizure of the bottle is permissible.

As indicated supra, Chimel holds that the extent of a search incident to arrest is to be justified by the circumstances of the case. The Utah Supreme Court also adheres to this position. In State v. Farnsworth, 30 U.2d 439, 519 P.2d 244 (1974), this Court said:

> "The question to be answered is whether under the circumstances the search or seizure is one which fair minded persons, knowing the facts, and giving due consideration to the rights and interests of the public, as well as to those of the suspect, would judge to be an unreasonable or oppressive intrusion against the latter's rights." (30 U.2d at 438-439) (Emphasis added.)

Thus, in determining whether a search is valid, the trier of facts must give due consideration to the circumstances of the case. The fact finder must then

apply a balancing test with the rights and interests of the public being weighed against those of a defendant. In this case, it is submitted that the circumstances overwhelmingly suggested that a seizure of the bottle was legal, if not logically mandated. Further this very brief and minor intrusion on appellant's rights carries insignificant weight as opposed to the rights and interests of the public.

People v. Concepcion, 341 N.E. 2d 823 (New York 1975) is very similar to the instant case. There, two undercover agents knew from personal observation that a bartender kept narcotics in a refrigerator, and that he sold drugs to patrons of his tavern. The police confronted the man, had him open the refrigerator, at which time they seized its contents. The New York Courts of Appeals said:

> "We conclude that the courts below could properly have found that the search and seizure were properly conducted; that 'there was not a wide-ranging, exploratory, rummaging, or routine search of the character condemned in Chimel. . . .'"(341 N.E. 2d at 824).

This logic applies to the present case. In Chimel a defendant was arrested and then police went through

his whole house looking for incriminating materials. Drawers were opened, closets, boxes, etc. The search included everything. However, in the present case, as in Concepcion, the officers knew right where to go to get the evidence. There was nothing but the slightest of intrusions on appellant's rights.

Finally, appellant was arrested in the bedroom, not in the kitchen, therefore the seizure of the bottle is valid. In People v. Hall, 226 N.W. 2d 562 (Michigan 1975), a man was ordered by a police officer to get out of a car. He did, whereupon the arrest was completed and he was handcuffed. Then the officers went back and seized a packet in the car. The Court held that the seizure was okay since:

> "We do not deem the slight change in defendant's position with regard to the packet as significant since the packet was obviously within the zone of defendant's immediate physical control at the time the police began arresting him, which is the crucial point of reference for Chimel. (226 N.W.2d at 563). (original emphasis).

Likewise, in the present case, the arrest started in the bedroom. That is where the officer pointed his gun at appellant and ordered him to freeze. The arrest was not placing of handcuffs on the appellant. Rather, it occurred

when he was restricted so that he knew he was not free to leave. Henry v. State, 494 P.2d 661 (Okla. Cri, 1972), State v. Sullivan, 395 P.2d 745 (Wash. 1964), State v. Vaughn, 471 P.2d 744 (Ariz. 1970), State v. Frazier, 537 P.2d 711 (N.M. 1975), Rodarte v. City of Riverton, 552 P.2d 1245 (Wyo. 1976). Therefore, since the arrest was in the bedroom, the bottle could be seized. This position was espoused in State v. Noles, 546 P.2d 814 (Ariz. 1976). A man was arrested while lying on a a motel room bed. He was then handcuffed and placed on the floor and surrounded by four police officers. An officer than went over to a nightstand and found a gun in the drawer. The court sustained the validity of the search since the nightstand had been "within the immediate control of the defendant at the time of arrest." (at 817-818). Likewise, in the instant case, the officer could go and get the bottle at the original location of the arrest although the defendant had been handcuffed and moved a few feet.

In summary, Respondent submits that under the circumstances the seizure was valid. A very brief and slight intrusion on appellant's rights was more than justified by the facts known by the officers. This slight

intrusion was heavily outweighed by the rights of the people of the State of Utah. The decision of the lower court, validating the seizure, should be affirmed.

POINT III

THE SEIZURE OF AND INTRUSION INTO THE BOTTLE WAS CONSTITUTIONALLY VALID.

Both the Utah Supreme Court and the United States Supreme Court have said that contraband which is in plain view may be seized by police. State v. Sims, 30 U.2d 251, 516 P.2d 354 (1973), and Coolidge v. New Hampshire, 402 U.S. 443 (1971). However, four conditions must be met: (1) the officer must be lawfully present where the search and seizure takes place; (2) the discovery must be "inadvertant"; (3) the seizable object must be in plain view; and (4) its incriminating nature must be immediately apparent. Coolidge v. New Hampshire, supra, and Ringle, Searches, Seizures, Arrests and Confessions, Section 162 (1975 Supp. at 94).

Respondent submits that all of the above requirements were met and that the seizure of the bottle was legally accomplished.

First, the officers were lawfully present when they saw the amber bottle in plain view. They were on

the roof of the Rio Grande Products Building, by permission, to watch for illegal prostitution activity on Second South (T. 33). Second, the discovery was inadvertant. The Baywood Hotel physically adjoins the Rio Grande Building and the Hotel has windows on the adjoining side (T. 143-144, 33). As one officer was walking on the roof of the Rio Grande Building he heard voices talking about "shooting up" heroin. Then he observed a hand reach underneath a window holding a syringe. A clear liquid was squirted out of the syringe (T. 33).

Third, the seizable object must be in plain view. After observing and hearing apparently illegal activity the officer looked into the window and saw the bottle in plain view (T. 36). Fourth, the incriminating nature of the bottle was immediately apparent. Capsules were taken from the amber bottle, opened and the contents was injected into the arms of persons present (T. 37). Thus, all of the requirements of the plain view doctrine are satisfied. Therefore, when the officers entered the apartment, they seized the small amber bottle from the place where they had observed appellant put it.

All the authority used by appellant does not apply to this case for the simple reason that he views the actions from a much too narrow scope. If extended, his argument is that if the police eye-contact with an incriminating item is ever broken, plain view is lost. This is not the law. In People v. Hauschel, 550 P.2d 876 (Colo. 1976), police officers viewed incriminating items in "plain view" but did not seize them. Then, about 12 hours later that same day, the items were seized. The court sustained the seizure even though eye-contact with the incriminating evidence was disrupted for an extensive period. In the instant case, the incriminating evidence was viewed and a right to seize it was established prior to the officers ever entering the apartment. The bottle was merely sitting on a dresser in the bedroom and one officer there retrieved it (T. 84).

Further, the bottle wasn't just an innocent looking bottle as appellant alleges. The officers had personally observed people inject the contents of that bottle into their arms (T. 37).

Finally, appellant claims that although one officer knew all about the bottle, the second didn't and it was this latter officer that seized the bottle.

Appellant argues that since the knowing officer didn't communicate his knowledge to the seizing officer, the latter must have randomly seized the bottle. Respondent, however, directs the Court to the testimony of Officer Bell.

> "Q. [by Defense Council] Had you made any comment prior to [the arrest] to Mr. Niemann about the amber bottle, or had he made any comment to you about it?
>
> A. Yes, I made the comment to him about it.
>
> Q. Prior to entering the room?
>
> A. Oh yes.
>
> Q. What comment had you made to him?
>
> A. Well, as we were motioning as he brought the bottle into the room, I just mouthed the words he was taking it to the bedroom and pointed to the bedroom like this (indicating), and he nodded up and down. We didn't converse too much out there on the ledge between the two of us. (T. 66,67).

Respondent must admit that the other officer was less than sure about whether or not he was told of the amber bottle. His testimony was that he simply could not remember.

> "Q. Prior to [seizing] the amber bottle of pills, did you have any knowledge of it whatsoever?
>
> A. I don't recall if Don mentioned it to me as we went in or not. I know I didn't see it before entering, but I really can't remember if he told me that it was there or if I just visually observed it and picked it up." (T. 96).

In other words, one officer remembered the conversation and the other officer didn't. The evidence is a matter for the trier of facts and its weight is to be determined by him. State v. Mills, 530 P.2d 1272 (Utah 1975), Fritz v. State, 554 P.2d 819 (Colo. 1976). On appeal the evidence must be viewed in the light most favorable to the jury verdict. State v. Berchtold, 11 Utah 2d 208 at 214, 357 P.2d 183 (1960), State v. Danks, 10 Utah 2d 162, 350 P.2d 106 (1959). In other words, unless there is a clear showing of lack of evidence, the decision of the lower court must be affirmed. State v. Romero, 554 P.2d 216 (Utah 1976).

Finally, even if the seizing officer (Niemann) didn't fully comprehend what he had seized, it is nothing more than harmless error since Officer Bell probably would have retreived the bottle if his partner had not already done so.

In summary, since the "plain view" exception to the search requirement is satisfied, the seizure of the amber bottle should be sustained.

CONCLUSION

Wherefore, based upon the arguments presented above, it is urged that this Court affirm appellant's conviction.

Respectfully submitted,

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