1998

State of Utah v. Paul Anthony Cerroni : Reply Brief of Defendant/Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. PAUL ANTHONY CERRONI Defendant/Appellant.	: : : : : : : : :	Case No: 980217-CA Priority No: 2 Defendant Not Incarcerated

APPEAL FROM A CONVICTION OF POSSESSION OF A CONTROLLED SUBSTANCE
THIRD JUDICIAL DISTRICT COURT
TOOELE COUNTY, STATE OF UTAH
THE HONORABLE L.A.DEVER PRESIDING

REPLY BRIEF OF DEFENDANT/APPELLANT

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ARGUMENT

Point I

THE STATE HAS FAILED TO MENTION TESTIMONY GIVEN BY ONE OF THE OFFICERS PRESENT DURING THE TRAFFIC STOP

Despite the existence of contradictory credible testimony, the State cites this Court only to testimony it believes supports its assertion that the baggy containing methamphetamine was pulled from Appellant's pocket **prior** to any patdown search. The following is an example:

> Appellee's Br. At 7; However, since the baggy was not the product of a patdown search (citations omitted), any discussion about a patdown is irrelevant.; Appellee's Br.At 9; The officer had not yet conducted a patdown search when he asked defendant if he had any weapons (citations omitted), and did not know that the bulge in defendant's pocket was not a weapon (citation omitted).

Despite the state's reliance on this testimony, Officer John McMahon testified that Officer Graham, the officer in question, did in fact conduct a patdown search of Appellant immediately after Appellant exited his vehicle--prior to the baggy being discovered in Appellant's pocket. The following colloquy took place at the Preliminary Hearing between the prosecutor and Officer McMahon:

(Beginning on P.7 L.17);

> A: From there he [Graham] stated for my safety and this Trooper's safety, as he pointed to me, "I'd like to perform a terry frisk [sic]." He had him face away from him, **began squeezing his pockets to check for any weapons that he may have had in his pocket.**

Q: And where were you standing when this was being accomplished?

A: I was to the right of Trooper Graham and Mr. Cerroni, approximately two feet away.

(Emphasis added).

Later, at the Suppression Hearing, McMahon again testified that Officer Graham **did** perform a patdown search of Appellant prior to discovery of the baggy.

(R.199 L.7);

Q: What happened next?

A: Graham had escorted, guided the defendant to the rear of the vehicle in preparation of performing Field Sobriety tests. Graham had asked him if he had any weapons in his pockets. He saw a bulge in the pants pocket, as did I. **I saw Trooper Graham's hand go down to pat the pocket.** He asked the defendant what was in his pocket, he said, from what I recall, "Nothing, it's a watch." **then** he voluntarily pulled, it was a watch on a chain, voluntarily pulled that from his right front pants [sic] pocket.

(Emphasis added).

McMahon testified to the following on cross-examination:

(R.206 L.24);

Q: Okay, then your testimony was also that Trooper Graham actually informed Mr. Cerroni that for his safety and for the officer's safety he was going to perform a Terry frisk on him, correct?

A: Yes, as I stated because he did observe a bulge in his pocket from the watch.

Q: So prior to Mr. Cerroni pulling the pocket watch out of his pocket, pulling on the chain, Trooper Graham had informed him he was going to do a Terry frisk, correct?

A: As he was, yes, as he was walking him from the driver seat to the back of his vehicle, **he advised him for his safety that he was going to do a Terry frisk and began patting the outside of his pocket.**

Q: Began, as soon as he advised him of that he began patting the outsides [sic] of his pocket?

A: **Just simultaneously while they were walking to the rear of his vehicle.**

(Emphasis added).

The State argues in Point IV of its Brief that Defendant's argument rests on a false premise.

> Appellee's Br. At 9; Defendant argues that the officer had no right to inquire about the object in defendant's pocket once he was convinced it was not a weapon...Defendant's argument rests on a false premise. The officer had not yet conducted a patdown search when he asked defendant if he had any weapons (citations omitted).

The above cited portions of the Record clearly indicate that such was not the case:

(Preliminary Hearing Transcript at 7 line 17);

> "From there he stated for my safety and this Trooper's safety, as he pointed to me, 'I'd like to perform a terry [sic] frisk.' He had him face away from him, began squeezing his pockets to check for any weapons that he may have had in his pocket. Et.Al.

Appellant fails to see how the argument which was made in his Brief rests on a "false premise"--the patdown search did in fact occur, and the State misguides this Court when it fails to recognize such evidence.

POINT II

THE TRIAL COURT DISREGARDED CREDIBLE IN FAVOR OF INCREDIBLE EVIDENCE

The Utah Supreme Court has held that a trial court has broad discretion when it evaluates evidence and facts, "[n]evertheless, this certainly does not extend to an arbitrary and unreasoning power to disregard credible, uncontradicted evidence and make findings inconsistent therewith and issue an order based thereon." *See*, King v. King, 478 P.2d 492, 495-96 (Utah 1970). Appellant is aware that such findings will not be disturbed unless clearly erroneous. State v. Lopes, 552 P.2d 120, 121 (Utah 1976). Appellant, however, asks this Court to review the issues under an abuse of discretion standard since the trial court misapplied the law to the facts. *See*, Woodhaven Apartments v. Washington, 942 P.2d 918, 920 (Utah 1997).

Appellant has clearly laid out the facts in the case at bar: 1) Graham, a Utah Highway Patrolman, testified he did not, at any time, ever touch Appellant--he simply asked Appellant a question; 2) McMahon, also a Utah Highway Patrolman, testified that Graham **did** in fact touch Appellant; 3) McMahon testified that Graham "began patting the outside of his [Appellant's] pocket...while they were walking to the rear of his vehicle. (R. 207).

Appellant argues that the trial court's decision to disregard one patrolman's credible evidence, in favor of another's

inconsistent and incredible testimony, was clearly erroneous, or in the alternative at least an abuse of discretion.

Graham's testimony was less credible because it was his search that was being questioned. His testimony, Appellant argues, should be presumed to be biased in light of McMahon's testimony which was more credible because McMahon had more to lose--he was testifying that a fellow officer violated Appellant's Constitutional rights. His testimony was against his and the State's interest. The trial court's refusal to adopt this more credible evidence was clearly erroneous.

POINT III

APPELLANT PRAYS FOR THIS COURT TO ESTABLISH A DUTY THAT THE STATE CITE THE REVIEWING COURT TO ALL RELEVANT EVIDENCE

Professor and well respected trial lawyer Moses Lasky stated the following regarding the duties of judges and lawyers:

> An opinion writer is entitled to the greatest leeway in his law as in his reasoning, for they are his. But honesty allows no leeway in his statement of the facts, for they are not his. There is no substitute whatever for adherence to the exact and precise record in the case. No 'result-orientation' can justify omission of a single relevant fact or the inclusion of a single factual statement that is false. This should go without saying. Unfortunately it needs saying.

Moses Lasky, A Return to the Observatory Below the Bench, 19 Sw. L.J. 679, 689 (1965).

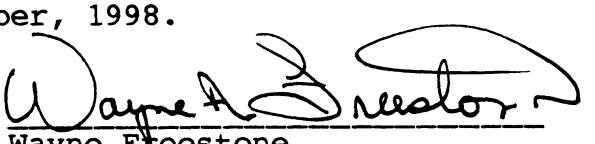
Appellant argues that the State's failure to observe the standard above should not be overlooked by this Court. By

disregarding this standard, the State turns the pursuit of justice into a contest between attorneys--advocacy is a noble pursuit, but truth should be paramount.

CONCLUSION

Appellant prays that this Court disregard the State's argument that no patdown search occurred in this case. The evidence is clear that a patdown search did occur and that the trial court's decision to the contrary was clearly erroneous. Had the trial court correctly concluded that it had occurred, the evidence which was derived from the illegal search would have been suppressed.

DATED this 25 day of September, 1998.



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CERTIFICATE OF SERVICE

I hereby certify that on this 25 day of September, 1998, I caused to be mailed, First-Class Mail, postage pre-paid, a true and correct copy of APPELLANT'S REPLY BRIEF to the following:

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