1986

The State of Utah v. Russell D. Constantino : Brief of Appellant

Utah Supreme Court

David L. Wilkinson; Utah Attorney General; Attorney for Respondent.
Sumner J. Hatch; Attorney for Appellant.

MENT

IN THE SUPREME COURT OF THE

ET NO. 19862 21015 STATE OF UTAH

THE STATE OF UTAH,	
Plaintiff/Respondent,	Case No. 21015
v.	
RUSSELL D. CONSTANTINO,	Catagory 2
Defendant/Appellant.	

BRIEF OF APPELLANT

AN APPEAL FROM A JUDGMENT AND CONVICTION OF POSSESSION OF A CONTROLLED SUBSTANCE, TO WIT, MARIJUANA, IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR DAVIS COUNTY, STATE OF UTAH
THE HONORABLE RODNEY S. PAGE, PRESIDING

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CONSTITUTIONS CITED

STATUTES CITED

STATEMENT OF NATURE OF CASE

This is an appeal from a judgment and conviction in the Second Judicial District Court in and for Davis County, State of Utah, the Honorable Rodney S. Page, presiding, on a verdict by jury of possession of a controlled substance, to wit, marijuana, with intent to distribute, a third degree felony.

DISPOSITION OF CASE

The court sentenced defendant to the statutory 0 to 5 years and a fine of $5000; stayed the sentence for a 45-day evaluation and, thereafter, ordered probation on conditions including in-patient treatment and hospitalization.

RELIEF SOUGHT ON APPEAL

A. Reversal and remanding for a new trial, or in the alternative,

B. Reversal and dismissal.

STATEMENT OF FACTS

A Bountiful City Police Officer, Grant Hodgson, together with a reserve officer, David Jackman, was returning from the Davis County Juvenile Court on the 21st day of May, 1985. Officer Hodgson sasw defendant at the intersection of Burke Lane and Main Street in Farmington, Davis County, driving west if a Ford automobile. Defendant was accompanied by one Russell Brent Birdsall. Officer Hodgson claimed he had seen an arrest warrant for Birdsall. He, Hodgson, also claimed he had dispatch check on the computer and it confirmed that defendant's driver license was <u>still suspended.</u>

The vehicle was not registered to either occupant of the car. It belonged to one Mr. Groberg.

Officer Hodgson determined he would impound the car for safe keeping (T.14) and made an inventory search of the car.

During the search, he found a non-transparent paper sack on the passenger side of the front seat. Inside that sack, he found a large plastic bag containing two small transparent plastic bags. The two small plastic bags contained what Officer Hodgson believed to be marijuana. There is no evidence in the record of an impound receipt or a search of other portions of the car, nor is there an inventory therein.

Officer Hodgson put the plastic bags into the trunk of his patrol car and claims he delivered them to Steve Grey, an evidence technician for the City of Bountiful, and that he watched Officer Grey transfer the materials from the original baggie to other baggies. (T.24-25)

Officer Grey testified that he got the baggies from an evidence locker rather than from Hodgson and denied that Hodgson was with him at any time while he was testing the material. (T.49 Also, see T.54)

Officer Hodgson also testified that defendant was arrested after the purported inventory search, but before he delivered the substance resulting from the search to Officer Grey.

Officer Grey, the evidence technician, testified as to his training in identifying controlled substances, particularly marijuana, and his training in lifting, classifying, and identifying fingerprints. He claimed to have identified defendant's fingerprints on the large baggie which contained the two smaller baggies, but did not know whether they were from the inside or the outside of the baggie.

Officer Steve D. Brown, a police officer for Layton City, testified as to his background as a narcotics agent from 1977 to 1979 and was also allowed to testify over counsel's objection (T.58) as to the price of marijuaa on the street and as to his opinion as to whether an amount of seventy to eighty grams of marijuana would be for personal use or for distribution. The court overruled counsel's objection with the remark that "it goes to the weight" and not to the admissibility of the evidence.

Officer Grey also testified (T.47-48) that the process of lifting fingerprints from paper or plastic bags is rather new and that he had no formal training in that line. He also testified that a specific number of points of similarity were no longer required in identifying fingerprints (T.46)

Defendant objected as hearsay, which was sustained by the court, and the answer was stricken, but the jury had already heard the answer. Both sides rested.

Defendant made a motion for a directed verdict, which was denied by the court.

The jury retired to deliberate and returned with a verdict of guilty.

Defendant's motion to suppress evidence was heard by the court prior to the selection of the jury and was denied. (T. 1 through T.5) This motion (State's Exhibit A) includes a driver license print-out of defendant's driving record showing that his license had been suspended and was reinstated on July 18, 1984. It had been suspended again on August 2, 1985. The instant case arose from an arrest on May 21, 1985. (See plaintiff's Exhibit "A" marked and entered into evidence [T.3 and T.4] and Exhibit "A", the exhibit itself, at R.23, 24 and 25.)

The court denied the motion to suppress and proceeded to trial.

SUMMARY OF ARGUMENT

Appellant's argument is based on a claim in Point I that the court erred in denying defendant's motion to suppres evidence, contained in transcript pages 1 through 5, and in Point II, that the court erred in denying defense counsel's motion for a directed verdict as to Count I of the complaint on the bases of insufficient evidence for a proper foundation.

ARGUMENT

POINT I

THE COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE UNDER UTAH CONST. art I, section 14, and UTAH STATUTES UNDER TITLE 77.

The court denied defendant's motion to suppress the evidence seized from the automobile (T.7) on the grounds that the officer had information at his disposal that would constitute probable cause to make the stop in this case.

The court had before it at the suppression hearing, Exhibit "A", consisting of pages R.23, 24 and 25, over the certification of a proper Driver License Division official, dated and notarized on October 4, 1985, more than three months after the date of arrest. The exhibit at R.23 consists of a print-out of the defendant's driving record from March 18, 1984 to October 8, 1985, showing a reinstatement of his previously suspended license on July 18, 1984, and no further suspension until August 2, 1985. (R.24-28)

The judge further stated at T.7:

> "There is further evidence that's been proffered that the other individual in the vehicle was in fact an indi-

vidual known to the officer who also had an outstanding warrant."

The search testified to by Officer Hodgson was an "inventory search", however, there is no inventory search or receipt in evidence and no testimony from either officer at the scene as to any search other than the paper garbage bag found on the floor in the front seat on the passenger side of the car. This could not be a "plain sight" search as the materials sought to be suppressed were in two small plastic bags inside of a larger plastic bag which was inside of the paper sack with the top of the paper sack pushed down.

The writer is aware of the court's recent holding in State v. Earl, 30 Utah Adv. Rep. 3 (1986), however, the facts in Earl differ greatly from those in this case and the U.S. cases cited as authority therefor: U.S. v. Myers, 466 U.S. (1984) and U. S. v. Thomas, 458 U.S. 259 (1982).

A case seeming to be very close to the facts leading to the search in the instant case is State v. Hygh, 711 P.2d 264 (Utah 1985), wherein this court held that "pretext inventory search" was unconstitutional under Utah Constitution, article I, section 14. In that case, the pretext was an arrest for an outdated window sticker. In this case, because Officer Hodgson claimed he knew the defendant was driving on a suspended license, the car was pulled over. Officer Hodgson made the arrest and later testified to an inventory search. The record would make it appear that Officer Hodgson did not contact the registered owner, Mr. Grover, (T.26). Further, there is no evidence of an impound procedure as set forth in State v. Hygh, supra, nor any inventory list or record of inventory other than Officer Hodgson's testimony that the three baggies (a large baggie containing two smaller baggies) were delivered to Officer Grey (T.24), which Officer Grey

categorically denied on direct examination (T.49) and on cross-examination (T.49) where Officer Grey denies that he received the materials from Officer Hodgson or that Officer Hodgson was there when he, Officer Grey, conducted the tests on the materials.

As discussed by Chief Justice Hall in the majority opinion in Hygh at 269, quoting from U.S. v. Opperman, 428 U.S. at 376, 96 S.Ct 3100:

> "Inventories should not be upheld under Opperman unless the government shows that there exists an established reasonable procedure for safe-guarding impounded vehicles and their contents and that the challenged police activity was essentially in conformance with that procedure. This means that a purported inventory should be held unlawful when it is not shown, 'for [instance]. that standard inventory forms were completed and kept for future reference [showing presence or absence of valuables], nor that a place of safekeeping for valuables so secured was maintained.'"

The court further held that the burdon of proof is on the State to show these matters.

POINT II

THE COURT ERRED IN DENYING DEFENSE COUNSEL'S MOTION FOR A DIRECTED VERDICT AS TO COUNT I ON THE BASES THAT THE CONTROLLED SUBSTANCE WAS POSSESSED WITH INTENT TO DISTRIBUTE WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE.

The only evidence in the record regarding the question of intent to distribute for value is the testimony of Officer Steve Brown of the Layton City Police Department, who testified (T.56-62) as to having experience with narcotics from 1977 through 1979, and again in 1982. He was allowed, over

objection, to testify as to his opinion of the value of 78 grams of marijuana. The objection was on the bases of lack of sufficient foundation, Officer Brown's experience having been some six years earlier. The objection was overruled by the court (T.58):

> "THE COURT: I will overrule the objection, it goes to the weight."

After both sides had rested, defendant moved for a directed verdict as to Count I (T.68), which was denied by the court.

CONCLUSION

It is respectfully requested that the court reverse the conviction based on the reasoning and the decision of State v. Hygh, supra, citing particularly the concurring opinion by Justice Zimmerman urging the necessity of getting away from and avoiding the labyrinth of rules promulgated by Federal Courts under the Fourth Amendment of the United States Constitution and an examination of suppressions under article I, section 14, Utah Constitution, and the case law regarding inventory searches culminating several months ago in the Hygh case, supra, or in the alternative, to reverse the guilty finding on Count I on the basis of sufficiency of the evidence.

Respectfully submitted this 22nd day of April, 1986,

/s/

SUMNER J. HATCH
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I certify that on the 22nd day of April, 1986, four copies of the foregoing were delivered to David L. Wilkinson, Utah Attorney General, attorney for plaintiff/respondent, at 236 State Capitol Building, Salt Lake City, Utah.