1989

The State of Utah v. Jerome Wallace Smith : Reply Brief of Appellant

Utah Court of Appeals

Francis Palacios, Joan C. Watt; Salt Lake Legal Defenders Assoc.; attorneys for appellant.
R. Paul Van Dam; attorney general; Barbara Bearnson; assistant attorney general; attorneys for respondent.

IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH, Plaintiff/Respondent,	:	
v.	:	
JEROME WALLACE SMITH, Defendant/Appellant.	:	Case No. 890008-CA Priority No. 2

REPLY BRIEF OF APPELLANT

Appeal from a judgment and conviction pursuant to a conditional plea for Unlawful Possession of a Controlled Substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(iv), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Timothy R. Hanson, Judge, presiding.

FRANCES M. PALACIOS
JOAN C. WATT
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Appellant

R. PAUL VAN DAM
ATTORNEY GENERAL
BARBARA BEARNSON
ASSISTANT ATTORNEY GENERAL
236 State Capitol Building
Salt Lake City, Utah 84114

Attorneys for Respondent

IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Respondent,	:	
v.	:	
JEROME WALLACE SMITH,	:	Case No. 890008-CA Priority No. 2
Defendant/Appellant.	:	

REPLY BRIEF OF APPELLANT

Appeal from a judgment and conviction pursuant to a conditional plea for Unlawful Possession of a Controlled Substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(iv), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Timothy R. Hanson, Judge, presiding.

FRANCES M. PALACIOS
JOAN C. WATT
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Appellant

R. PAUL VAN DAM
ATTORNEY GENERAL
BARBARA BEARNSON
ASSISTANT ATTORNEY GENERAL
236 State Capitol Building
Salt Lake City, Utah 84114

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH, Plaintiff/Respondent,	:	
v.	:	
JEROME WALLACE SMITH, Defendant/Appellant.	:	Case No. 890008-CA Priority No. 2

INTRODUCTION

The Statement of the Issues, Jurisdictional Statement, Statement of the Case, and Statement of the Facts are set forth in Appellant's opening brief at pages iv thru 7. Appellant takes this opportunity to respond to the arguments set forth in Points IA and B of Respondent's brief. The remaining arguments are adequately covered in Appellant's opening brief.

SUMMARY OF THE ARGUMENT

A careful reading of the facts in this case establishes that the officer seized Appellant's automobile. The officer characterized his actions as "stopping" the vehicle, and, regardless of whether he used his overhead lights or a spotlight to effectuate the stop, a seizure occurred when Appellant's ability to drive away was blocked by the police vehicle.

The officer did not articulate a reasonable basis for stopping the Appellant. The behavior of the person leaning inside the window who then walked away is similar to the nervous behavior in Mendoza and Schlosser and should not be given weight.

ARGUMENT

POINT I. THE DETENTION OF MR. SMITH AND THE SUBSEQUENT SEARCH OF HIS VEHICLE VIOLATED THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. OFFICER SMITH "SEIZED" APPELLANT.

In arguing that no seizure occurred in this case, the State ignores the clear testimony of Officer Smith.

> OFFICER: That was the reason I stopped him was no signal.
>
> DEFENSE COUNSEL: Did you cite him for the right-hand turn?
>
> OFFICER: Yes.
>
> DEFENSE COUNSEL: When you stopped him, you parked right behind him. Is that correct?
>
> OFFICER: As indicated, yes.
>
> DEFENSE COUNSEL: And his vehicle could not have moved one way or the other; is that correct?
>
> OFFICER: I don't believe he could have backed out of there without either striking my vehicle or getting close to it.

T. 14. Unlike the facts in Layton City v. Bennett, 741 P.2d 965 (Utah App. 1987), cert. denied, 765 P.2d 1277 (1987), the Appellant's path was blocked by the police officer and he was therefore not free to leave in the instant case.[1] Regardless of

---

[1] In Layton City, the officer followed defendant into a construction site; there is no indication that the officer blocked the driver's ability to leave as in the case currently before the Court. In a Memorandum Decision, this Court held that no stop occurred under the circumstances in Layton City.

whether the officer used his overhead lights or his spotlight to effectuate the stop, a stop occurred when the officer blocked Mr. Smith's ability to drive away.

Various courts have found that a seizure occurred under the fourth amendment where an officer blocked a defendant's ability to drive away. In People v. Guy, 329 N.W.2d 435 (Mich. App. 1983), an officer drove by a parked car. The car then pulled out from the curb and drove into a driveway of a house. The officer returned and parked his police car so as to partially block the driveway, then approached the car. Under such circumstances, the court held that the officer's actions "clearly constituted a detention." Id. at 440.

In United States v. Kerr, 817 F.2d 1384 (9th Cir. 1987), an officer pulled into a driveway as the defendant was backing out, blocking defendant's path. The defendant stopped, got out of his car and gave the officer identification without being asked. The Ninth Circuit overruled the trial court's decision that a seizure had not occurred[2], stating in part:

> Under the circumstances, Deputy Hedrick's authority and conduct provided Kerr no alternative except an encounter with the police.

Id. at 1387. The Court also noted that the defendant's perception of his inability to leave as evidenced by his disclosure that he had no driver's license, an admission against his interest, should be considered in determining that a seizure occurred. See also United

---

[2] The Kerr Court noted that "[w]e review de novo the district court's decision that no fourth amendment seizure occurred." Kerr, 817 F.2d at 1386.

States v. Zukas, 843 F.2d 179 (5th Cir. 1988) (parking car in front of airplane so as to block access to runway, then approaching pilot and asking for identification and registration is a seizure).

In this case, where the officer blocked the defendant's ability to drive away (T. 9, 14), then approached the defendant's vehicle and asked for identification, a reasonable person in Mr. Smith's position would have believed he was not free to leave. Running the warrants check is further indication that a seizure occurred. See United States v. Luckett, 484 F.2d 89 (9th Cir. 1973) (officer seized defendant when officer asked defendant to come to police car so he could run warrants check); State v. Johnson, 771 P.2d 326 (Utah App. 1989) (cert. granted June 12, 1989) (defendant seized when officer took defendant's name and birthdate "and expected her to wait while he ran warrants check").

Although the State claims that "Officer Smith did not do anything that caused Defendant to take this action [stop his vehicle in the parking lot] and did not use his overhead lights" (Respondent's brief at 8), such a statement ignores Officer Smith's statements that he stopped the vehicle (T. 14, 52-53, 15, 41-2) as well as the officer's uncertainty as to whether he used his overhead lights or his spotlight to effectuate the stop.

> OFFICER: I don't remember whether I turned on my overheads, or used my spotlight.
>
> PROSECUTOR: And what point would you have done that? At what point in space here?
>
> OFFICER: When I'm approaching to stop any vehicle, use the radio to call out, work the lights and/or the hand-held spotlight.

T. 41-2. The State's position that Officer Smith did nothing to effectuate the stop also ignores the officer's statements regarding the grounds for the stop.

> DEFENSE COUNSEL: When you got out of the vehicle, and Mr. Smith got out of the vehicle, did you tell him why you were stopping him?
>
> OFFICER: I did tell him during our conversation that he didn't signal.

T. 52.

> DEFENSE COUNSEL: You testified that you pulled him over, and stopped him for the turn signal; is that correct for the failure to turn?
>
> OFFICER: Yes. That's common terminology.

T. 53.

B. OFFICER SMITH DID NOT ARTICULATE A REASONABLE BASIS FOR STOPPING APPELLANT.

The State points out that "the common thread" in cases where the Utah Supreme Court has found that the officer lacked a reasonable articulable suspicion to detain an individual "is an officer stopping an individual on the luck-of-the-draw that something could be wrong." Respondent's brief at 14. This is precisely such a case; the officer had a hunch and hoped to be lucky enough to find something criminal to pursue when he stopped Appellant.

Although a police officer is entitled to rely on his experience (see Respondent's brief at 13), he must nevertheless articulate specific facts which, when viewed in light of the officer's experience, give rise to a basis for the stop. A stop

cannot be justified solely on an officer's statement that because he is a police officer, he knew something was amiss. In the instant case, Officer Smith could not articulate actions or facts which gave rise to a suspicion as the result of his experience.

The State's reliance on the officer's observation of an individual leaning into the Defendant's car (Respondent's brief at 15) as offering a basis for the stop is misplaced. First, although Officer Smith assumed the person leaning inside the car left because the officer approached (T. 39), the officer did not testify that the person looked up or looked at him. Instead, the person simply walked away from the car (T. 39). There are a number of reasonable explanations, totally unrelated to the officer's arrival, for walking away from the car.

In addition, the behavior of the individual in walking away from the car, even in light of the officer's experience, has an endless number of reasonable and legal explanations. On September nights throughout Salt Lake City, individuals lean inside car windows to chat with neighbors, say goodbye to friends, hand the checkbook to a husband going to the store. Nothing about this behavior makes it suspect.

In State v. Mendoza, 738 P.2d 181, 184 (Utah 1987), the Utah Supreme Court refused to give weight to the "nervous behavior" of a car's occupants in determining whether officers had a reasonable suspicion to justify a detention. And, in State v. Schlosser, 108 Utah Adv. Rep. 18 (May 17, 1989), the Utah Supreme Court again refused to give weight to the nervous behavior of an

individual, pointing out that:

> when confronted with a traffic stop, it is not uncommon for drivers and passengers alike to be nervous and excited . . .

Utah Adv. Rep. at 40. The Court concluded that:

> [a] search based on such common gestures and movements is a mere "hunch," not an articulable suspicion that satisfies the Fourth Amendment.

Id.

Although it is not clear in this case that the person who walked away did so because the officer approached, even if that were the case, nervousness around officers does not give rise to a reasonable articulable suspicion so as to justify a stop. Furthermore, the fourth amendment protects citizens against unreasonable detentions and, even under State v. Deitman, 739 P.2d 616 (Utah 1987) (per curiam), and United States v. Merritt, 732 F.2d 223 (5th Cir. 1984), a citizen is free to walk away from an officer where the officer does not have a reasonable articulable suspicion to justify a detention. Exercising fourth amendment rights by walking away from an officer where the officer has no basis for detaining that person does not give rise to a reasonable suspicion under the fourth amendment that criminal activity is afoot.

The State did not sustain its burden of establishing that the officer had a reasonable articulable suspicion so as to justify the stop.

CONCLUSION

For any or all of the foregoing reasons, Mr. Smith respectfully requests this Court reverse his conviction and remand the case to the trial court with an order of dismissal or suppression of the illegally seized evidence, or, in the alternative, remand the case for rehearing on the motion to suppress.

Submitted this 17 day of July, 1989.

FRANCES M. PALACIOS
Attorney for Defendant/Appellant

JOAN C. WATT
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that eight copies of the foregoing will be delivered to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102 and four copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114 this 17 day of July, 1989.

JOAN C. WATT

DELIVERED by _____ this _____ day of July, 1989.

_____