1989

Bountiful City v. Luis Lee Maestas : Brief of Respondent

Utah Court of Appeals

Russell L. Mahan; Bountiful City Prosecutor; Attorney for Plaintiff/Respondent.
Aron Stanton; Attorney for Defendant/Appellant.

IN THE UTAH COURT OF APPEALS

BOUNTIFUL CITY,	:	
Plaintiff/Respondent,	:	BRIEF OF RESPONDENT
vs.	:	Priority No. 2
LUIS LEE MAESTAS,	:	Case No. 89-0054-CA
Defendant/Appellant.	:	

BRIEF OF RESPONDENT

Appeal from Conviction Entered in the
Bountiful Department of the Second Circuit Court
of Davis County, Utah,
the Honorable Judge S. Mark Johnson, Presiding

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this appeal from a Circuit Court criminal conviction under the provisions of Section 78-2a-3 of the Utah Code Annotated, as amended.

STATEMENT OF THE NATURE OF THE PROCEEDINGS

This case concerns an appeal by the Defendant of his conviction in the Bountiful Department of the Second Circuit Court of the charge of driving under the influence of alcohol, in violation of a Bountiful City ordinance.

STATEMENT OF THE ISSUES

Whether tips from two separate unidentified citizen complainants, together with corroborative observation by the police officer, gave sufficient reasonable suspicion for the officer to approach the Defendant.

Whether an intoxilyzer affidavit is rendered inadmissable by the maintenance technician checking the 'yes' box for the fixed absorption calibrator test when the particular intoxilyzer involved was not equipped with a fixed absorption calibrator.

Whether the trial Court committed reversible error in the admission of intoxilyzer affidavits when the motion of the prosecution to admit them included a recitation of the affirmative findings required by 41-6-44.3 and the Judge granted the motion but did not again recite those findings.

STATEMENT OF THE FACTS

The Respondent accepts the Appellant's statement of the facts.

SUMMARY OF ARGUMENT

The tips of two separate and unidentified citizen informants, corroborated by the officer's own follow-up investigation showing the statements of the informant to have been reliable, justified the officer's reasonable suspicion that a crime may be being committed. The officer was then entitled to approach the running but parked vehicle and speak to the driver.

When an intoxilyzer is not equipped for a fixed absorption calibrator test, the fact that the maintenance technician checked

the 'yes' box on the intoxilyzer affidavit is not reversible error.

When the motion of the prosecution to admit the intoxilyzer affidavit includes a recitation of the affirmative findings required by Section 41-6-44.3, the Court's granting of the motion is a ratification of those findings, and they need not be not be re-verbalized by the Court.

ARGUMENT NO. 1

THE TIPS OF TWO SEPARATE CITIZEN INFORMANTS THAT A PERSON WASDRIVING UNDER THE INFLUENCE OF ALCOHOL, CORROBORATED BY THE OBSERVATIONS OF THE POLICE OFFICER, JUSTIFIED THE POLICE OFFICER IN HAVING A REASONABLE SUSPICION THAT A CRIME WAS BEING COMMITTED.

While Officer Mike Boyle of the Bountiful Police Department was making an unrelated traffic stop, he was approached by two separate citizens (page 4, lines 16-17) who informed him that (1) there was an intoxicated individual, (2) that he was driving a specific motor vehicle, (3) that the license plate had a certain number, and (4) he was asking for directions to the liquor store.

After clearing up the unrelated matter, Office Boyle went to the liquor store to investigate. There he found (1) the vehicle that was described, (2) that it bore the license plate that was stated, and (3) that it was at the place where they said it would be.

At that point Officer Boyle approached the driver of the vehicle, who had the engine running but had not yet started to move, and spoke to him. Officer Boyle was lawful in making this approach for two reasons. First, anyone, whether a police officer or not, can walk up to someone and speak to him. This was not a stop of a moving vehicle. Second, he had a reasonable suspicion that a crime is being committed. The Appellant states that an officer must have probable cause, but this is in error, as Section 77-7-15, Utah Code Annotated 1953, as amended, requires the lower standard of "a reasonable suspicion."

In State v. Sierra, 754 P.2d 972 (Utah App, 1988), it was held by the Utah Court of Appeals at page 979:

> ...in traffic violation stops, in balancing the rights of individuals to be free from arbitrary interference by law enforcement officers and the government's interest in crime prevention and public protection, if a hypothetical reasonable police officer would not have stopped the driver for the cited traffic offense, and the surrounding circumstances indicate the stop is a pretext, the stop is unconstitutional.

In this situation, Officer Boyle's actions are just what a hypothetical reasonable police officer would do. Having received complaints from two separate citizens of a man driving under the influence of alcohol, and finding the allegations of vehicle type, license plate and location to be corroborated by his own observation, he approached the vehicle as it sat

running but motionless in the parking lot. It is imminently reasonable for an officer to do such a thing. In fact, it would be unreasonable for an officer to simply turn and walk away. As Officer Boyle spoke with the driver, he detected the odor of alcohol on his breath (page 7, lines 4-5). At that point all allegations of the citizen informants were confirmed without a stop of the vehicle. The officer, with this corroboration of the witness statements and upon his own observations, moved on to the field tests of the driver.

These actions pass the balancing test of Sierra. The intrusion of the officer in speaking to a driver of a parked vehicle is trifling, and is outweighed by the governmental interest in preventing drunk driving. The officer had the right to approach the vehicle and speak to the driver just as anyone else could do, and in any even he had a reasonable suspicion that a crime was being committed.

ARGUMENT NO. 2

THE FACT THAT THE MAINTENANCE TECHNICIAN CHECKED THE "YES" BOX ON THE INTOXILYZER AFFIDAVIT WHEN THAT PARTICULAR INTOXILYER WAS NOT EQUIPPED FOR A FIXED ABSORPTION CALIBRATOR TEST IS NOT REVERSIBLE ERROR.

The intoxilyzer machine which was used in this case was located at the Bountiful Police Department. It was one that was not equipped with a fixed absorption calibrator test (pages 60-61).

The state regulations on intoxilyzers state:

> FIXED ABSORPTION CALIBRATOR CHECK: With the test card in the printer, run a test on the fixed absorption calibrator to see that the instrument gives the correct reading on the digital display and the printed test card. THIS CHECK IS NOT REQUIRED ON INSTRUMENTS NOT EQUIPPED WITH THE FIXED ABSORPTION CALIBRATOR.

When the intoxilyzer maintenance technician tested this machine and filled out the respective intoxilzer affidavits for the tests, the document said as follows:

THE FOLLOWING TESTS WERE MADE:	YES	NO
( ) Fixed absorption calibrator test (if equipped) (Reads within +/- .01 of calibration setting)....	( )	( )

The technician checked the brackets for "yes." The Appellant claims that this means that the affidavit did not comply with state standards. This is not so. By checking "yes" the technician was showing that the machine met the state standards. The test is not required because the machine is not equipped for it, as was testified to in court. The checking of the 'yes" box does not make the affidavit inadmissable. Even if so checking was an error, it was harmless.

ARGUMENT NO. 3

WHEN THE PROSECUTION'S MOTION FOR ADMISSION OF THE INTOXILYZER AFFIDAVITS INCLUDED THE RECITATION OF THE FINDINGS REQUIRED BY 41-6-44.3, THE GRANTING OF THAT MOTION RATIFIED THOSE FINDINGS AND IT WAS NOT REQUIRED THAT THE COURT AGAIN RE-VERBALIZE THOSE SAME FINDINGS.

When the City moved for the admission into evidence of the intoxilyzer affidavits, it was done as follows (pages 14 15):

> These are the certificates that are provided by the highway patrol concerning the Bountiful intoxilyzer, and I ask the Court to accept those and to make the findings that - I ask the Court to make the findings that are required by 41-6-44.3, and as further elaborated in Murray City versus Hall. That is, that the calibration of the testing of the intoxilyzer were performed in accordance with the standards. The affidavits were prepared in the ordinary course of duties. That they were prepared contemporaneously with the testing, and that the source of information [from] which made and the method [and] circumstances of their preparation is such as to indicate that they're trustworthy.

Various objections were raised, there was further testimony, and the Court ultimately made its ruling (page 62, line 11):

> THE COURT: The objection is overruled. Exhibits D and E are received.

In its granting of the motion to admit the intoxilyzer affidavits, the Court did not re-state the findings required by 41-6-44.3. This is not reversible error. The prosecution's motion was two-fold, i.e., to make those findings and to admit the affidavits. The granting of the motion was in fact the Court making those affirmative findings.

Rule 103 of the Utah Rules of Evidence states that "error may not be predicated upon a ruling which admits or excludes

evidence unless a substantial right of the party is affected." This requirement for error is not met here. The required findings were stated in the motion, and the court approved the motion. The failure of the Court to re-verbalize those findings did not in any way affect a substantial right of the party.

Furthermore, when a Court grants a motion, it is not required that the Judge re-state every term of that motion. When the motion is granted, unless modified the terms of the motion as state by the movant are ratified by the Court and in effect incorporated by reference.

ARGUMENT NO. 4

THE INTOXILYZER AFFIDAVITS WERE MADE UPON THE PERSONAL KNOWLEDGE OF THE AFFIANT.

The Appellant claims "the affidavits show on their face the affiant did not attest from his own personal knowledge." This is not supported by an examination of the intoxilyzer affidavits themselves. Trooper Dale Neal, who alone signed the affidavits, states as follows (eliminating the "we" language) directly in the affidavit:

> I..., the undersigned, being first duly sworn, state that:
>
> 1. Breath testing instrument, INTOXILYZER, serial number 94001070 located at Bountiful was properly checked by me. [Emphasis added.]
> 2. ...
> 3. This was the official record and notes of this procedure which were made at the time these tests were done.

It is clear to be seen that the person making the affidavit did the tests himself, that the records were made at the time he did the tests, and that he signed from his own personal knowledge.

CONCLUSION

The conviction of the Defendant in the Circuit Court for driving under the influence of alcohol should be affirmed.

Dated this 11th day of September, 1989.

Russell L. Mahan
Attorney for the Respondent

MAILING CERTIFICATE

I hereby certify that I mailed three true and correct copies of the foregoing BRIEF OF RESPONDENT, with first class postage prepaid thereon, on September 12, 1989, to Aron Stanton, 2035 East 3300 South #314, Salt Lake City, Utah 84109.