

1989

Utah v. Marshall : Response to Petition for Rehearing

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Respondent,

vs.

GREGORY J. MARSHALL,

Defendant/Appellant.

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Case No. 890121-CA

Category No. 10

SUMMARY OF THE ARGUMENT

Respondent's Petition for Rehearing does not demonstrate that the Court failed to consider material facts nor misconstrued or overlooked controlling case law. The Court correctly ruled that standing may not be raised for the first time on appeal and there was no consent to the search. Respondent's new request to consider the reasonableness of the Officer's action is improper.

POINT I

**RESPONDENT HAS NOT MET THE LEGAL STANDARDS
NECESSARY FOR REHEARING**

Pursuant to Rule 35 of the Rules of the Utah Court of Appeals, a petition for rehearing must state with particularity the points of law or fact which the petitioner claims the Court has overlooked or misapprehended. Since the Respondent is seeking rehearing, it is the Respondent's burden to establish that the Court erred. The Respondent has failed to meet this burden.

Respondent's argument that the Court failed to consider material facts is stated in the Respondent's Statement of Fact rather than its Argument. (See

Petition for Rehearing pp. 2-5) Additionally, it does not identify any material facts which the court failed to consider or added improperly. Instead, the Respondent makes the argument that neither party took the position that Mr. Marshall consented to search of the suitcases both in the lower court and on appeal, therefore, the Defendant waived its challenge to the search and seizure of the suitcases. That assertion in the Respondent's statement of the fact misstates the record in the lower court, misstates the legal burden of production and proof on the issue of consent, and attempts to change the basis for validating the search that the State has asserted throughout these proceedings.

Warrantless searches and seizures are *per se* unreasonable unless exigent circumstances justify them. *State v. Cole*, 674 P.2d 119 (Utah 1983); *State v. Romero*, 660 P.2d 715 (Utah 1983). Once the Defendant has raised the issue of illegal search and seizure in a warrantless search, the burden is on the State to prove that the search was legal. *State v. Christensen*, 676 P.2d 408 at 411 (Utah 1984). Until this matter came up on appeal, the State has persisted in a claim that the search was legal only because Mr. Marshall consented to the search of the property at issue in this case. (*See e.g.* T1 and Record pp. 164-70). As noted by this Court in its opinion, the State has never argued that any basis other than consent validated the search of the suitcases in this case nor does the record support any other basis. *State v. Marshall*, 124 Ut. Adv. Rpts. 60 at 66 n. 7 (Ut. Ct. App. Dec. 26, 1989). Since consent is the basis the State is relying upon, "it is the State's burden to establish that from the totality of the circumstances a valid consent was properly obtained and freely given." *State v. Iacono*, 725 P.2d 1375

at 1377 (Utah 1986), citing *State v. Wittenback*, 621 P.2d 103, 106 (Utah 1980). Additionally, as noted by the court, the ruling of *State v. Sierra*, 754 P.2d 972 at 980 (Ut. Ct. App. 1988), that includes a burden to establish that consent was voluntary.

The Respondent's argument herein is intended to shift that burden to the Appellant in contradiction of controlling case law and constitutional standards. In examining the record to determine whether or not the Respondent has met its burden, a review of direct examination at the hearing on the Motion to Suppress¹ discloses the only evidence the Respondent presented to show consent. As that record indicates, no consent to search was evidenced or proven. (T1 pp. 4-5). Appellants have specifically and continually argued that the Respondent did not meet its burden of proving consent as to the areas and items searched, both in the Brief of the Appellant and at length in the lower court during argument on this matter.

Counsel for the Defendant's closing argument at the time of the suppression hearing on the issue of consent is as follows:

I think it's clear that the Officer had an attitude that he was gonna search this vehicle, regardless, and that his drug courier profile and hunch, based on that, was sufficient for him to go ahead and search this vehicle without Mr. Marshall's consent. I don't think that his testimony's established that there was consent to search the whole vehicle. I think that when Mr. Marshall said, "You could look around in the car," Mr. Marshall believed that he was gonna do a plain view cursory search

¹ The record also contains the preliminary hearing transcript and a deposition of the Officer. It is counsel for Appellant's position, upon review of the same, that the examination contained therein add no more than the testimony on direct examination at the suppression hearing.

of that car. And at some point, because Mr. Marshall is continuing to be detained, and it was obvious he was being detained, this turned into directions of: "Would you open the trunk." I don't believe, therefore, there was consent to search that trunk. Additionally, there's no evidence that there is any consent to search those bags. And Your Honor, there's a recent Supreme Court case, additionally, that states that closed containers should not be searched without probable cause and without a search warrant, even in an inventory search.

T1 pp. 34-35

. . . .

MR. MCPHEE: He says, "Look in the vehicle."
THE COURT: Now we've got a consent, haven't we?
MR. MCPHEE: I don't think so, Judge.
THE COURT: Well, that is the whole issue.
MR. MCPHEE: Okay. And I don't think that the case law would show that there was consent. First of all--
THE COURT: Well, he said it. "I consent." Isn't that a consent?
MR. MCPHEE: Well, Your Honor, the questions becomes what's legal consent. "Now, can I look in the vehicle?" That's one thing. I may understand that to mean one thing. The Court may understand that to mean one thing. but we're talking now about an individual who's from New York City. We now have to deal with a subjective standard. What did Mr. Marshall give consent to do? What did the Officer ask for?

"I want to look in the vehicle." "Fine. Look in the vehicle." And then, "Well let me see in the trunk," or whatever was said. T1 pp. 41-42

. . . .

For the Respondent to argue that the Defendant waived a challenge to the search and seizure of the bag misstates the record and is merely an attempt to excuse the Respondent's failure to meet its burden of proving consent in the lower court.

The Respondent's Statement of Facts also asserts that the alleged "waiver" by the Defendant allows the Court to hear the issue of standing. (See Petition for

Rehearing at p. 3). Conversely, for the reasons stated hereinbelow, the standing issue was waived by the State and the record presumes, and establishes, standing.

The Statement of Facts additionally argues that this Court should now consider the reasonableness of the Officer's actions and allow the State to bootstrap a standing and abandonment argument into an argument of "reasonableness". (Petition for Rehearing at p. 3) The only issue in this case is consent. There is no issue of "reasonableness".

The balance of the Respondent's Statement of Facts attempts to reargue what the Respondent has already presented to this Court. Moreover, it persists in stating that a disclaimer of ownership was raised *sua sponte* as an issue of consent by the Court. In doing so, the Respondent attempts to ask this Court to focus on issues not raised on appeal and to ignore the fact that the State failed to meet its burden regarding consent in a lower Court. As set forth in its opinion, and from the extensive record in the lower court, it was established that there was no consent to search the suitcases. *State v. Marshall*, 124 Ut. Adv. Rpts. 60, 63-65. (Ut. Ct. App. 1989).

Finally, Respondent failed to demonstrate in its Petition for Rehearing that this Court has overlooked controlling case law in the basis for its decision in this case. *State v. Schlosser*, 774 P.2d 1132 (Utah 1989) is the controlling case law. The Respondent is improperly asking the Court to overturn *State v. Schlosser*, *supra* or to make a skewed interpretation thereof. Based thereon, the Respondent has failed to demonstrate a legal basis for rehearing and the Petition for Rehearing should be denied.

POINT II

STANDING MAY NOT BE RAISED FOR THE FIRST TIME ON APPEAL AND IS NOT AN ISSUE BEFORE THIS COURT

In their Petition for Rehearing the Respondent urges this Court to consider several issues that were not raised on appeal and were presumed to have been established in the lower court.² (Petition for Rehearing pp. 6-15). The Respondent has never argued at any juncture that there was a question of Mr. Marshall's privacy interest. Consequently, the Respondent has waived the issue according to the *Schlosser* ruling.

In Point I, Respondent contends that this Court applied *Schlosser* and its ruling in this case to allow automatic standing. Appellant has never asserted that automatic standing is the applicable rule of law and this Court's ruling does not adopt that rule. To support its standing argument, the Respondent is once again asking this Court to reach the issue of abandonment, relying on an alleged disclaimer of ownership of the property by the Defendant, another new issue. Moreover, a review of the record indicates that Respondent failed to argue or establish abandonment. The cross examination of the Officer at the suppression hearing establishes that abandonment was not relied upon in this case to validate the search or defeat standing.

MZ. [sic] SMITH

Q At that time you placed him under arrest, after searching the clothes containers; is that correct?

A Which clothes containers? You mean--

² The record establishes, and the Respondent concedes that the Defendant had a privacy interest in the vehicle and trunk and there is no competent or clear evidence of abandonment which would legally defeat his privacy interest in the bags contained therein.

Q The clothes bags.
 A In the back? In the back of the trunk?
 Q Yes.
 A Yes.
 Q Did it ever occur to you at that time to get a search warrant on opening those bags?
 A No.
 Q Why did you believe you had the right to do it? Because you felt they were abandoned property? What?
 A No. Because I knew exactly what was going to be in them, or a facsimile. I knew that there was illegal contraband inside the bags.

T1 p. 29

Moreover, as noted by this Court in its opinion, the abandonment argument is supported by the State only with what is described as "somewhat ambiguous disclaimer" of ownership, *State v. Marshall*, 124 Ut. Adv. Rpts. 60 at 65. That disclaimer is legally insufficient in this jurisdiction to establish abandonment.

In *State v. Holmes*, 774 P.2d 506 (Utah App. 1989), this court specifically set forth the standard which must be met by the state when a disclaimer is asserted to support abandonment and defeat standing. In that case, drug paraphernalia was discovered in a roll of paper towels that the Defendant attempted to stuff between a car seat and console in a vehicle. In a footnote the court ruled as follows:

When the arresting officer asked defendant for the roll of paper towels, she denied it was hers. The state points out that if defendant's disclaimer of ownership were truly credible, she would have no legitimate expectation of privacy in the roll of paper towels and thus no standing to contest the validity of the search. *See, e.g., Rakas v. Illinois*, 439 U.S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978); *State v. Larocco*, 742 P.2d 89 (Utah App. 1987). In making its ruling on the evidence, the trial court here necessarily determined that standing was not an issue. We note that a mere disclaimer of ownership in the context of a police query is insufficient in itself to make such an assertion. *Accord State v. Allen*, 93 Wash.2d 170, 606 P.2d 1235, 1236 (1980) (since the evidence was found on defendant's person and was to be

used against him, there was no question that defendant had standing to contest the search).

Id. at 511, n. 5.

As in *Holmes*, the trial court in this case, having ruled on the evidence, necessarily determined that standing was not an issue.³

The Respondent next argues that the *Marshall* decision imposes a duty on a prosecutor to object to all possible grounds raised and unraised when confronted with a motion to suppress. (Petition for Rehearing p. 10). Once again, the Respondent is claiming that it should not be required to meet its burden under controlling case law and that the burden should therefore shift to the Defendant to do the State's job for them. That statement proposes that a Defendant should address all issues which the State may want to raise to validate the search at any point in the litigation, despite whose burden it is to present and prove them, or that Defendant waives his right to contest new issues being raised on appeal.

Next, the Respondent argues that this Court has misconstrued the *Schlosser* ruling. (Petition for Rehearing at p. 11) As stated by this Court in its opinion, the *Schlosser* "standing" rule was fashioned to protect the Defendant from being required to deal with new legal issues on appeal when it had no warning of the necessity to develop the relevant facts below." *State v. Marshall, supra*, at 61. As further noted, Defendant's counsel may have put the Defendant on the stand

³ An examination of the record and the lower court's ruling in *Holmes* evidences that the ruling was even less specific than that in this case and no standing issue was raised. Therefore it was not an issue and is not an issue in this case.

if they had ever known it was an issue.⁴ *State v. Marshall, supra* at 61. It is precisely for that reason that this Court should not consider that new claim on appeal but should rather adhere to its rule that new issues cannot be raised by either party on appeal. The conferences between co-counsel for Defendant, evidenced on the record, were specifically for the purpose of determining what evidence to present given the State's development of the record.

The Respondent next urges the Court to rule that the Appellant cannot raise new issues on appeal but that the Respondent can.⁵ It has never been the position of this Court that one party may raise new issues on appeal while the other cannot. It certainly would be in violation of equal protection provided for in under the State and Federal Constitutions to allow this argument. The ruling in *State v. Schlosser* is both clear and controlling; not subject to the interpretation attempted by the Respondent. Standing for Fourth Amendment purposes is not jurisdictional. It is a substantive doctrine and therefore, shall not be raised *sua sponte* or on appeal for the first time. That position is supported by the United States Supreme Court case *Steagald v. United States*, 451 U.S. 204 (1981).

The Respondent also argues that this Court's interpretation of *Schlosser* is inconsistent with prior Utah case law and in conflict with the recent Utah Court of Appeals decision of *State v. Tebbs*, 126 Ut. Adv. Rpts. 16 (Ut. Ct. App. 1990)

⁴ In fact, the Defendant was present at the suppression hearing having traveled from New York City to give testimony if necessary. Based on the State's development of the record and arguments made by the State, a tactical decision was made not to have him testify.

⁵ The Respondent has already required the Appellant to file a Reply Brief to the new issues in their Brief.

(Petition for Rehearing at p. 12). The cases cited are distinguishable, do not stand for the proposition that the Respondent claims, and in part, are not directly applicable to a standing issue under the Fourth Amendment.

The Respondent is urging an interpretation that "standing" is the same for all purposes in all types of cases. However, standing is a generic legal term which does not have the same legal interpretation in all cases. In fact, "standing", as applied to a Fourth Amendment or Article I Section VII privacy interest is unique in its type and application.

State v. Tebbs, supra, addresses a question of standing to raise an issue on appeal that has nothing to do with the Fourth Amendment or Article I, Section VII. In that case, the Defendant was challenging the constitutionality of the statute and an element of criminal intent therein. His standing to challenge this issue only arose when the issue was appealed and did not involve standing in connection with search and seizure rights. The Court in *Tebbs* found that he was not allowed to question the State's burden to prove the criminal intent element of the crime because he had pled to the charge and therefore waived that burden. Having done so, his standing to challenge that portion of the statute became an issue only when the appeal was filed.

The State also relies on *State v. Tuttle*, 780 P.2d 1023 (Utah 1989). An examination of *Tuttle* evidences the same distinction. In *Tuttle*, there was an appeal of the Court's failure to death qualify a jury. The Court found that because the Defendant did not receive the death penalty he did not have standing on appeal to bring that issue before the Court. Once again, the question of the Defendant's standing only became an issue after trial when the appeal was taken.

In *State v. Constantino*, 732 P.2d 125 (Utah 1987) the opinion, the motion to suppress was made at the beginning of trial and denied. There was apparently no prior opportunity or necessity for either party to develop the issues in the lower court. The opinion does not indicate whether or not the Defendant's expectation of privacy in the property was raised for the first time on appeal. In fact, the opinion treats it as if it were an issue at all stages of the litigation. The same appears true in *State v. Valdez*, 689 P.2d 1134 (Utah 1984). Neither case evidences that the Defendant objected to the raising of standing in the Appellate court as done here.

In *State v. Valdez, supra*, and *State v. Iacono*, 725 P.2d 1375 (1986), both of the Defendants conceded, by affirmative testimony at trial, that they did not have an expectation of privacy in the area searched. There was no concession made in this case regarding the same. Apparently having only the trial record to examine, it appears that the Defendant took an affirmative contradictory position, regarding standing to defend against his criminal responsibility. Also in *Iacono, supra*, there was no motion to suppress or objection to the admissibility of the evidence made in the lower court. Nonetheless, those cases were decided before *State v. Schlosser, supra* and *Schlosser* presently stands as controlling case law. If there is any perceived conflict in the law, *Schlosser* should govern.

The other Utah cases cited by the Respondent are civil cases that do not address standing in the context of the Fourth Amendment or Article I, Section VII. They are therefore distinguishable from the type of standing that the Respondent is attempting to raise before this Court. *Society of Professional Journalists*,

Utah Chapter v. Bullock, 743 P.2d 1166, 1169, (Utah 1987); *Terracor v. Utah Board of State Lands and Forestry*, 716 P.2d 796, 798 (Utah 1986); *Utah Restaurants Assoc. v. Davis Co. Board of Health*, 709 P.2d 1159, 1160 (Utah 1985) involve standing of an association in a civil case. None of those cases raised standing in the context of the constitutional protections raised in this case. A different type of standing is involved.

Additionally, in civil cases where standing of the Plaintiff is in question it is Plaintiff's burden in the lower court, to proceed and establish their case. The burden is different in criminal, search and seizure cases and standing in a search and seizure context is properly akin to an affirmative defense which must be raised.⁶

The cases cited by the Respondent in its argument that the Court's position is in conflict with the majority of jurisdictions in the United States are not dispositive or binding on this Court nor does it demonstrate a majority of jurisdictions hold that way. (Petition for Rehearing at p. 13) *State v. Schlosser*, *supra*, is dispositive and binding on this Court.

The Respondent next attempts to argue that the Court misinterpreted the ruling in *Steagald v. United States*, 451 U.S. 204 (1981 Slip. op. 4) In fact, *Steagald v. United States* validates the underlying logic of the decision in this

⁶ The Respondent appears to be suggesting, contrary to establish procedural law, that this Court shift the initial burden of proof and production at a suppression hearing and require the Defendant to proceed. They are further requesting this Court apply this procedural change to this Defendant *ex post facto*. For the court to provide that the Defendant proceed first would be impractical and shift time honored burdens of proof that have been engrained as procedure in the courts of this state since its founding, a procedure which was properly relied upon by Appellant's counsel.

case, that the State should not be allowed to take a contrary position at the time of appeal on a matter. At the lower court proceedings, standing was asserted and assumed. The Respondent now attempts to argue, contrarily, that abandonment can be claimed when the record reflects that the Officer did not rely on abandonment and any alleged "disclaimer" on the record would not legally establish abandonment. By virtue of the totality of the evidence on the record, standing is not an issue.

The above-stated argument does not demonstrate that this Court's ruling was contrary to controlling case law. It only urges the court to hear an argument that was not raised and is not supported by the record.

POINT III

THE COURT CORRECTLY LOOKED AT THE ISSUE OF CONSENT AND CORRECTLY DECIDED IT

The Respondent's argument in Point II of its Brief is merely an effort to once again bring the issue of abandonment before the Court, apparently under a theory of reasonableness of the search.⁷ Reasonableness is not an issue in this case and never has been. Consent to the search has been and is the only issue. Additionally, there is no support on the record for that argument, as stated hereinabove. Respondent is now bringing yet another new argument before the Court, asking this Court to ignore whether their burden was met, and examine a search under a new standard, not the legal standards applicable.

⁷ The argument colorably appears to be a "good faith" argument. The Utah Supreme Court has rejected any good faith exception to warrantless searches. *State v. Schlosser, supra*.

The Respondent further argues for a remand for entry of "appropriate" factual findings, or in the alternative, for additional briefing on the issue by the parties based upon the record now before the Court. (Petition for Rehearing at p. 17). The unvarnished truth of Respondent's petition is that they want the Court to allow them to cure what they consider to be a deficient record in the lower court, a record that is not deficient, or is only deficient as a result of the Respondent's inability to adequately develop the record for its purposes. There is an abundant and sufficient record of the lower court proceedings. It not only includes the transcript of the suppression hearing and extensive briefing thereon, but also includes a deposition and the testimony at the preliminary hearing. Respondent had more than ample opportunity to develop any theories it wanted to rely upon to meet its burden. To suggest that this matter should be remanded so that the Respondent may attempt to have yet another "bite of the apple" is patently inappropriate and unfair; would be a manifest injustice and undermine the judicial system developed in this state. The record is presently complete and factually establishes what is necessary to support the court's ruling in this case applying controlling case law.

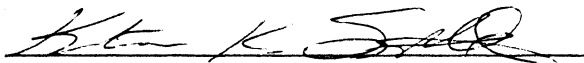
Additionally, the argument that supplemental briefing on the issues by the parties based on the record before the Court, should be required, is also without merit. The record does not support a claim of abandonment but establishes consent was the only basis under which this search could have been deemed legal. Finally, standing was determined and the Respondent conceded the Appellant's standing in this case.

CONCLUSION

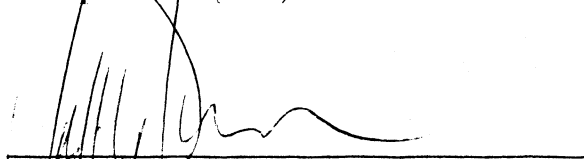
The Petition for Rehearing fails to demonstrate any legal basis to warrant rehearing. It is apparent the petition is really asking this Court to overrule controlling case law to allow the Respondent to change the record to its benefit and the Defendant's detriment.

The Petition for Rehearing should be denied in this matter and the Court should affirm its ruling on the issues of standing and consent to search the suitcases.

RESPECTFULLY SUBMITTED this 15th day of March, 1990.



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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Respondent,

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GREGORY J. MARSHALL,

Defendant/Appellant.

Case No. 890121-CA

Category No. 10

CERTIFICATE OF SERVICE

I here by certify that four copies of the Defendant's/Appellant's ANSWER TO PETITION FOR REHEARING was mailed on the 15th day of March to the following:

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