1998

State of Utah v. Henry Thomas DeBooy : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee,	*	Case No. 980172-SC
vs.	*	Priority 2
HENRY THOMAS DeBOOY, Defendant/Appellant.	*	

SUPPLEMENTAL OPENING BRIEF OF THE APPELLANT

APPEAL FROM THE RULING OF THE SEVENTH DISTRICT COURT
IN AND FOR SAN JUAN COUNTY, STATE OF UTAH
THE HONORABLE LYLE R. ANDERSON, PRESIDING

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IN THE UTAH COURT OF APPEALS

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vs.	*	
HENRY THOMAS DeBOOY, Defendant/Appellant.	*	

SUPPLEMENTAL OPENING BRIEF OF APPELLANT

INTRODUCTION

Pursuant to the Court's Order, dated June 3, 1999, the Appellant submits his supplemental brief addressing only the constitutionality of Utah Code § 77-23-104 under Article I, Section 14 of the Utah State Constitution and under the Fourth Amendment to the United States Constitution.

The Appellant relies on his opening brief for the statement of jurisdiction, statement of the case, and statement of facts, supplementing only the statement of facts.

SUPPLEMENTAL STATEMENT OF FACTS

In addressing the constitutionality of Utah Code § 77-23-104, the trial court refused to "hold that act unconstitutional." [R. 61 at p. 14] In reaching that decision, the trial court reasoned, in part, as follows:

> I realize the Defendant's position that under *Michigan v. Sitts* [sic] more is required than the legislative determination that the roadblocks that meet the standards of the act may be authorized, but . . . the legislative determination manifest in the Administrative Traffic Checkpoint Act satisfies the same purpose as the . . . Sobriety Checkpoint Advisory Committee in the Michigan case. In fact, it . . . goes beyond that. The committee was composed of people in the executive branch, prosecutors and police officers, and the . . . Traffic Checkpoint Act was passed by legislators.

[R. 61 at p. 11-12].

SUMMARY OF ARGUMENT

Utah Code §77-23-104 cannot pass constitutional muster under the Fourth Amendment to the United States Constitution, let alone the constitutional analysis under Article 1, Section 14 of the Utah State Constitution.

As outlined in *Michigan Dept. of State Police v. Sitz,* 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990), in order to withstand federal constitutional scrunity, a roadblock must pass the three-prong balancing test as set forth in *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed2d 357 (1979). The roadblock in the instant case fails the second and third prongs of that balancing test.

Article 1, Section 14 of the Utah Constitution provides additional protection to the federal law concerning search and seizure of automobiles. Utah case law has consistently upheld search and seizure law based on the analysis set forth in

Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968). Since *Terry* requires a reasonable articulable suspicion of criminal activity, about a particular person, *prior* to the seizure, roadblocks cannot be justified.

ARGUMENT

POINT I: UTAH CODE § 77-23-104 CANNOT WITHSTAND CONSTITUTIONAL SCRUNITY UNDER THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION

The Fourth Amendment to the United States Constitution provides, in relevant part, as follows:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated.

In *Terry, supra*, the United States Supreme Court established a limited exception to the general probable cause requirement under the Fourth Amendment. In order to justify a particular detention, an officer must be able to point to specific articulable factors which, when viewed under an objective standard, create a reasonable suspicion that a particular person has committed, is committing or is about to commit a crime. *Id.* , 392 U.S. at 29-30.

The United States Supreme then established an exception to the *Terry* doctrine, allowing vehicles to be stopped at a roadblock without the requisite showing of reasonable suspicion.

In *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49

L.Ed.2d 116 (1976), the United States Supreme Court upheld a permanent roadblock at which Border Patrol agents stopped vehicles to search for aliens illegally entering the country. There, the Court required that such roadblocks be permanently located at an international border, or its functional equivalent, and that the search be limited to what which is necessary and reasonable to search for aliens illegally entering the country. *Id.* 428 U.S. at 566-67.

In *Delaware v. Prouse*, 440 U.S. 648, 663, n.26, 99 S.Ct. 1391, 59 L.Ed.2d 460 (1979), the Court suggested that roadblocks conducted for license and registration checks could be constitutionally permissible: "Questioning of all oncoming traffic at roadblock-type stops is one possible alternative." *Id.* at 663. Relying on that dicta, courts have allowed roadblocks without a showing of reasonable suspicion for the purposes of checking licenses, registration and insurance. *See generally, United States v. Prichard*, 645 F.2d 854, 856 (10th Cir.) *cert. denied*, 454 U.S. 832 (1981).

In *Sitz, supra*, the United States Supreme Court upheld the constitutionality of roadblocks operated as sobriety checkpoints. In reaching this decision, the Court relied on the balancing test set forth in *Brown, supra*, : (1) the gravity of the public concerns served by the seizure, (2) the degree to which the seizure advances the public interest and (3) the severity of the interference with individual liberty:

The roadblock in the instant case failed the second and third prongs. With respect to the second prong, absolutely no empirical or expert evidence was offered to show that the roadblock could or would advance the public interest.[1] [R. 61, at p. 5, 8]. *See generally, Brouhard v. Lee*, 125 F.3d 656 (8th Cir. 1997) ("DWI Task Force selected nine checkpoint sites, each having a history of alcohol-related accidents and frequent DWI arrests," resulting in "a 19 percent overall traffic reduction, and a 10 percent reduction in alcohol related accidents.") *See also, State v. Kitchen*, 808 P.2d 1127, 1129-1131 (Utah Ct. App. 1991)(Stressed the expert testimony as to effectiveness of roadblock).

Another problem lies with the 'committee'. The trial court noted that the committee was made up of individuals from the executive branch and approved by legislators. This "committee"stands in sharp contrast to the *Sitz* committee. There, the committee was made up of state police forces, local police forces, state prosecutors **and** the University of Michigan Transportation Research Institute. The involvement of that research group would certainly neutralize any suggestion that the committee was made up primarily by the group (law enforcement) that Article 1, Section 14 was designed to curb.

This is further compounded by the fact that the role assumed by the "committee" in the instant case is illusory. Presumably, a committee would look

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[1]Appellant disregards Trooper Hall's testimony regrading the effectiveness of the roadblock because he was involved in the roadblock

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Unlike *Sitz* and *Martinez-Fuerte*, law enforcement officials, in the instant case, were not attempting to target an area and curb drunk driving nor were they seeking to prevent aliens from illegally crossing an international border. Rather, they were simply choosing various locations, at various dates and times, to set up roadblocks in the hopes of discovering criminal activity. That they did find violations of the law was inevitable.

This Court and the United States Supreme Court have not, and should not, condone such a blatant violation of Fourth Amendment protection. The protection against illegal search and seizure is much too precious to forfeit for the furtherance of law enforcement objectives, no matter how valuable those objectives may be.

POINT II: THE COURT SHOULD HOLD THE UTAH CODE §77-23-104 UNCONSTITUTIONAL UNDER ARTICLE I, SECTION 14 OF THE UTAH STATE CONSTITUTION.

It is fundamental that when, an officer by means of physical force or by show of authority has in some way restrained the liberty of a person, a seizure has occurred. *Terry*, 312 at 19, n.1. Likewise, it is fundamental that the officer must justify the seizure by articulating a reasonable suspicion that the person seized was, is or is about to be involved in criminal activity. *Id.*

The reasonable suspicion requirement set forth in *Terry* is codified at Utah Code §77-7-15. That statute provides:

> A peace officer may stop any person in a public place when he has reasonable suspicion to believe he has committed or is in the act of committing a public offense and may demand his name, address and an explanation of his actions.

The protection offered by *Terry* and by Utah Code § 77-7-15 have been relaxed considerably by such the roadblock exception set forth in *Martinez-Fuerte* and *Sitz*. Utah should retain protection by declining to adopt the exception, thereby rejecting generalized notions about the criminal activity of travelers.

In the concurring opinion of *State v. Simms*, 808 P.2d 141, 146 (Utah Ct. App. 1991), Justice Orme urged the rejection of the roadblock exception in applying the principles of *Terry*:

> *Terry* [citation omitted], uniformly applied by Utah courts, is a matter of Utah constitutional law that simply may not be balanced away by a branch of our government and that is not amenable to a roadblock exception.

In *Simms*, the appellate court addressed the constitutionality of roadblocks under Article 1, Section 14. In holding that roadblock unconstitutional[3], the appellate court suggested that if a roadblock was authorized by statute, then it would "trigger at least some presumption [that the roadblock was] constitutionally permissible." *Id.* at 150. The appellate court further suggested that in the event that a roadblock statute was passed, then the legislature would be obligated to

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[3]The roadblock in that case was held prior to the enactment of Utah Code §77-23-104.

"perform the Sitz-type balancing function." *Id.* at n. 17. Justice Orme, however, urged the 'solidification' of the

> long-standing constitutional precepts as at the core of article I, section 14, than to borrow the troublesome "balancing" approach embraced in *Sitz,* adopt some variation of that approach, and beginning the journey down that nebulous path.

Noting this Court's concern in *State v. Larocco*, 794 P.2d 460, 469 (Utah 1990) where this Court addressed an independent Utah constitutional determination under Article I Section 14 for the purpose of simplifying search and seizure rules[4], Justice Orme discussed search and seizure decisions in the context of *Terry*:

> Under established Utah decisional law, in the absence of any individualized suspicion, only a level one stop is permitted. E.g., *State v. Jackson*, 805 P.2d 765 . . . (Utah Ct. App. 1990); *State v. Menke*, 787 P.2d 537, 570 (Utah Ct. App. 1990); *State v. Trujillo*, 739 P.2d 85, 87-88 (Utah Ct. App. 1987). A level one stop is a purely voluntary encounter. *Id.* And one does not lose the right to decline to participate in a level one encounter simply because one chooses to drive rather than to walk. See *State v. Smith*, 781 p.2d 879, 881; *State v. Johnson*, 771 P.2d 326, 328 (Utah Ct. App. 1989), *rev'd on other grounds*, 805 P.2d 7612 . . . (Utah 1991). *See also, Delaware v. Prouse*, 440 U.S. 648, 663, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), (persons do not lose the protections of the fourth amendment "when they step from the sidewalk into their automobiles"); *State v.*

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[4]In *Larocco,* this Court departed from the confusing federal law and held, that under Article I, Section 14 a warrantless automobile search is per sa unconstitutional unless supported by probable cause and exigent circumstances. *Id.* at 470.

> If, as seems clear, the police cannot require every pedestrian on a stretch of sidewalk to stop and answer police inquiries, I am hard-pressed to see how they can stop every car on a stretch of the interstate highway and require the driver to answer inquires . . . the only roadblock that is sure to pass state constitutional muster is one which would qualify as a level-one stop."

Id.

That Orme's analysis remains valid is supported by decisions that have been issued since *Simms* and which rely on the reasonable suspicion standard set forth in *Terry*. *See generally, State v. Rodriquez-Lopi*, 954 P.2d.1290 (Utah Ct. App. 1998); *State v. Tetmyer*, 947 P.2d. 1157 (Utah Ct. App. 1997); *State v. Patefield*, 927 P.2d.655 (Utah Ct. App. 1996); and *State v. Bean*, 869 P.2d.984 (Utah Ct. App. 1994).

That *Terry* should be applied to any analysis regarding roadblocks is further supported by *State v. Lopez*, 873 P.2d 1127, 1135 (Utah 1994). There, this Court abolished the pretext doctrine on the basis that it was superfluous and that *Terry* provided sufficient protection against unreasonable searches and seizures. *Id.* Certainly, if *Terry* is important enough to justify reversing the pretext doctrine, then it should also govern whether a roadblock exception is warranted.

Finally, this Court has never approved of a roving patrol. Yet practically speaking that is precisely what a roadblock becomes. Consider Justice Rehnquist's dissent in *Prouse,* when he criticized the decision to allow roadblocks

but not random stops as nothing short of "eleva[ting] the adage 'misery loves company' to a novel role in Fourth Amendment jurisprudence."

CONCLUSION

This Court is urged to not follow United States Supreme Court in its continual relaxation of fourth amendment protection. The crisis facing this state and this country does not license the aggrandizement of governmental power in lieu of civil liberties. Despite the devastation wrought by crimes in communities nationwide, we cannot suspend the precious rights guaranteed by the Constitution in an effort to "fight crime".

For the foregoing reasons, it is respectfully requested that this Court reverse the trial court's ruling.

DATED this 30th day of August, 1999.

ROSALIE REILLY
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CERTIFICATE OF MAILING

I hereby certify that I mailed two true and correct copies of the foregoing Supplemental Opening Brief to Joanne C. Slotnick, Assistant Attorney General, 160 East 300 South, 6th floor, Post Office Box 140854, Salt Lake City, Utah 84114-0854, postage prepaid, this 30th day of August, 1999.