

1980

# State of Utah v. Roger anderson and Thomas E. Brackenbury : Petitioner Roger N. anderson's Reply To Respondent's Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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STATE OF UTAH :  
Plaintiff-Respondent, : Case No. 16,372  
vs. :  
ROGER ANDERSON and THOMAS E. :  
BRACKENBURY, :  
Defendants-Appellants. :

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PETITIONER ROGER N. ANDERSON'S REPLY  
TO RESPONDENT'S BRIEF

---

APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE  
FOURTH JUDICIAL DISTRICT IN AND FOR WASATCH COUNTY,  
STATE OF UTAH, HONORABLE J. ROBERT BULLOCK, JUDGE

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Attorneys for Respondent

FILED

AUG 7 1980

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IN THE SUPREME COURT OF THE  
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Plaintiff-Respondent,

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REPLY

vs.

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ROYCE ANDERSON and THOMAS E.  
BRACKENBURY,

:

Case No. 16,372

Defendants-Appellants.

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PETITIONER, Roger N. Anderson, submits the following:

In its brief, respondent, State of Utah, advanced two arguments which are factually inaccurate and otherwise misleading.

First, this Court, in its May 29, 1980 opinion, declared that in this case the State had met its burden at the preliminary hearing to demonstrate that a crime had been committed and that probable cause existed to believe petitioner had committed it. The majority founded their conclusion upon the assumption that certain so-called "false statements" made by Ray Applegate were admissible at the preliminary hearing, notwithstanding the fact that the affidavit attached to said false statements was unconstitutionally admitted into evidence at the preliminary hearing. It was petitioner's argument in his brief on rehearing that the so-called "false statements" could not be considered in determining whether the State had met its burden at the hearing. Petitioner argued first, that the so-called "false statements" were part and parcel of the constitutionally tainted affidavit and, therefore, were unconstitutionally admitted into evidence against petitioner. Because the affidavit could not constitutionally be received into evidence at the hearing,

the accompanying "false statements" could not be considered in the determination of whether the State had achieved its burden at the preliminary hearing. Petitioner also argued that, in any event, false statements were not supported by any evidentiary foundation at the time of their admission into evidence.

The State, in its brief on rehearing, in effect concedes that the so-called "false statements" were not supported by evidentiary foundation. But the State advances the argument that petitioner was precluded from raising this argument because he allegedly failed to object to the lower court's error at the time of the preliminary hearing. The State's argument is inaccurate and misleading.

It is difficult to conceive of a case where a defendant could have more vociferously objected to the procedure employed by the lower court than this case. Petitioner's counsel repeatedly objected to the admission of the tainted hearsay affidavit. Such objections were made on various constitutional and evidentiary grounds, and repeatedly reiterated throughout the pretrial proceedings in this case. (See R. 14-15; Preliminary Hearing Transcript (PHT) 12, 21, 23, 28, and 29.) At one point during the course of the proceedings, counsel for petitioner objected to the admission and use of the tainted affidavit and "false statements" on the ground that they were "completely inadmissible in any event." (PHT 46.) Thus, petitioner strenuously and repeatedly objected to the admission and use of these materials at the hearing. The statement to the contrary in respondent's brief is inaccurate and misleading.

Second, petitioner argued in his brief on rehearing that the constitutionally inadmissible procedure followed by the lower court

at the preliminary hearing deprived him of a fair trial because such procedure hampered his ability to prepare a meaningful defense for trial through pretrial discovery. In response to this argument, the state made the following assertion: "the [lower] court made arrangements with the prosecutor on the record to have Applegate available one day prior to trial."

Respondent's statement is extremely misleading. There is little question that Judge McGuire at the preliminary hearing ordered the prosecution to produce Ray Applegate at least one day prior to trial so that he could be interviewed by petitioner's counsel in the course of petitioner's preparation for trial. (PHT 17-19.) The prosecutor, after some resistance, agreed in open court to produce Applegate at least one day prior to trial. (PHT 29-30.) Notwithstanding the court's order and counsel's promise, Applegate was not produced as ordered and promised.

Petitioner's counsel made strenuous objections to the state's failure in this regard. The following exchange between the trial court and petitioner's counsel, is illuminating:

THE COURT: . . . [Are] there any other matters, law matters [that] we can dispose of at this time? If so, let's do. If not, why we'll just go along with the trial and dispose of any law matters that arise as they arise.

MR. LEWIS: There was a motion made, your Honor, to produce Mr. Applegate . . . . And I think the affidavit, an affidavit was taken into evidence, which was not proper. I previously brought that matter to the court's attention.

THE COURT: Yes.

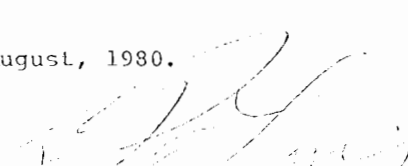
MR. LEWIS: There was a motion made to produce that witness for his deposition, and that was never done. I think that he was to be here a day before, at least a day before the hearing so he could be interviewed.

He was here yesterday, [the] report [had] come to me [that] he was there, but he did not want to be interviewed. So I'd state to the Court I had the opportunity to interview Mr. Apple, i.e., we didn't really know what his testimony would be until we heard it here today. I think that is a violation of the rights of these defendants and have previously pointed out to the Court. I formally made to remand, and in it is a violation of Article I Section 12 of the Utah Constitution, [and] in violation of 77-15-11 of the Utah Code.

(Trial Transcript 70-71.)

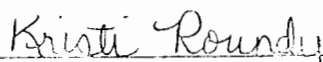
Although Applegate may have been in the State on the day before trial, he was not produced pursuant to Judge McGuire's order. Thus, petitioner was wholly denied the ancillary benefits of the preliminary hearing, including the important right to discover evidence in preparation for a meaningful defense at a fair trial.

SUBMITTED this 7th day of August, 1980.

  
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#### MAILING CERTIFICATE

MAILED two copies of the foregoing document to Robert Hansen and Earl F. Dorius, Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah 84114 this 7th day of August, 1980.

  
Secretary