1998

Utah v. William Brownlee : Brief of Appellant

Utah Court of Appeals

IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH,

PLAINTIFF/APPELLEE,

vs.

WILLIAM BROWNLEE,

DEFENDANT/APPELLANT.

APPEAL NUMBER 981455-CA

981295-CA

ARGUMENT PRIORITY 2

BRIEF OF APPELLANT

APPEAL FROM JUDGMENT AND SENTENCE ENTERED JULY 10, 1998, BY AND FROM HONORABLE HOMER M. WILKINSON, THIRD JUDICIAL DISTRICT COURT JUDGE

ATTORNEY FOR DEFENDANT/APPELLANT
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: PAGE

STATUTES:

JURISDICTION

This is an appeal from a judgment of conviction of recklessness, incendiary device 2nd degree felony and possession of a controlled substance, a third degree felony, in violation of Utah Code Ann. §76-10-306(3) and possession of a controlled substance, a third degree felony, 58-37-8(2)(a)(1) U.C.A., in the Third Judicial District Court, the Honorable Judge Homer M. Wilkinson presiding. This Court has jurisdiction over this appeal pursuant to Utah Code Ann. §78-2a-3(2)(e) (1996). *See* Addendum A (Judgment and Conviction).

STATEMENT OF ISSUES PRESENTED AND STANDARD FOR REVIEW

This appeal presents the following issue for resolution by this Court:

Did the trial court err in denying defendant's motion to suppress evidence based upon lack of probable cause where the only probable cause for the arrest was that defendant was asleep in a vehicle legally parked during daytime hours and when awakened by an officer knocking on his window, and when he opened his eyes, they were bloodshot and he acted confused. This issue was preserved below on the record ("R.") for appeal at R. 124-125.

Standard of Review: "We review a trial court's determination of whether a particular set of facts constitutes

probable cause non-deferentially for correctness, affording a measure of discretion to the trial court". State v. Spurgeon, 904 P2d 220, 225 (Ut. Ct. App. 1995).

Did the trial court err in denying Appellant's motion to suppress evidence where prior to the arrest, there was no evidence that any offense had been or was being committed. This issue was preserved below on the record at R.124-125.

DETERMINATIVE AUTHORITIES

The following provisions, statutes, ordinances, rules and/or regulations are determinative of this appeal or are of central importance to this appeal.

State v. Lovegren 829 P2d 155 (Ut App 1992)

State v. Smith, 781 P2d 879 (Ut App 1989)

State v. Struhs, 319 UAR 37

State v. Spurgeon, 904 P2d 220, 225 (Ut. Ct. App. 1995)

State v. James, 361 UAR 49 (Ct. App. 1999)

STATEMENT OF FACTS:

The testimony of the arresting officer at the preliminary hearing (R. 38-41), which was attached to appellant's motion showed the following facts:

1. The officer was told by an unidentified person who

flagged him down, that, "there was a vehicle parked around the corner with out-of-state plates on it and a man sleeping in it. He said that they'd had problems in the area and he asked me if I would check the car out and the person." (R. 38). However, there was no evidence that any crime had been committed, or was in progress.

2. The officer proceeded to the address designated where he found the defendant sleeping in a vehicle with Illinois plates, which had "a whole bunch of property in (it)." (R. 38-39)

3. The officer wondered if the automobile may have been stolen or that there had been a burglary, or that the driver was intoxicated (p. 39) although there were no reports of any such offenses, nor was there any evidence upon which to base such a "hunch."

4. The officer knocked on the window to wake up the defendant who:

> "Acted kind of unsure of what to do at first and just like he was kind of stunned and startled and didn't know what was going on.
>
> And he appeared to have blood shot eyes and he was acting kind of weird, and so I would continue to ask him to roll down the window so I could talk to him.
>
> ... so he went and reached for the keys a second time and I brought my hand back and told him that I was going to break the window if he didn't open the door.

> So at that point, he did unlock the door and I was able to open it." (TR. ps. 8-9 or Rec. 88 at 40-41).
>
> The officer had his fire arm out so the defendant could see it just before the defendant opened the door. (Rec. 88, page 24).

SUMMARY OF ARGUMENT:

There was no probable cause to arrest the appellant and search his automobile where the appellant was asleep in a legally parked automobile, there was no evidence of the commission of any crime, and when the officer awoke him, he acted confused and had blood shot eyes.

ARGUMENT

There are three (3) levels of constitutional permissible contacts between police and the public. State v. Smith, 781 P2d 879 (Ut. App. 1989).

> "[A]n officer may approach a citizen at anytime (sic) and pose questions so long as the citizen is not detained against his will."

Probable cause is present when "'the facts and circumstances within [the officers] knowledge and of which they have reasonable trustworthy information [are] sufficient in themselves to warrant a [person] of reasonable caution in the belief that "an offense has been or is being committed.'" (alterations in original) State v. Spurgeon, 904 P2d 220 (Ut. Ct. App. 1995); State v. Wright, 365 Ut. Adv. Rpts. 15 (Ut. Ct.

App. 1999).

Also, see State v. Struhs, 319 UAR 37, in which the Court of Appeals ruled that the parking of a vehicle late at night in an isolated area where the officer was concerned was not sufficient probable cause to warrant a level 3 stop as the officer did in the instant case.

In the instant case, the only information that the officer had was that a person was asleep in the drivers seat of a vehicle legally parked which had personal property in it. Upon waking up the defendant from sleep, the officer took the position that the defendant's confusion and blood shot eyes gave the officer probable cause to believe that he was intoxicated, therefore giving the officer the right to restrict the defendant's freedom to leave, which the officer clearly did by drawing his gun. (R. 88, pgs. 24-25).

The matter of nervous or confused conduct and blood shot eyes as probable cause was considered by this Court in State v. Lovegren, 829 P2d 155 (Ut. App. 1992) in which this Court observed:

> "It is well settled that nervous behavior when confronted by a police officer does not give rise to a reasonable suspicion of criminal activity. See e.g. State v. Godina-Luna, 826 P2d 652, 654, (UT. App. 1992) ... '"such nervous conduct ... is consistent with innocent as well as with criminal behavior. State v. Sierra, 754 P2d 972."'

In the instant case, the confusion of the defendant is even easier to understand. The defendant was asleep in a motor vehicle legally parked when awakened suddenly by an officer who is demanding to talk with him and then draws a gun, even though the vehicle is not moving, nor is there any discernable crime.

In addition the Court in Lovegren, made the following comment about blood shot eyes:

> "And while blood shot eyes can indicate the present of drugs or alcohol, they are equally indicative of dust in one's eyes or lack of sleep."

Certainly where a person is awakened from sleep or is sleeping because of lack of sleep, as the Court in Lovegren observed, blood shot eyes are equally indicative of lack of sleep.

In the instant case, as in Lovegren, the arresting officer never conducted any sobriety or blood tests to confirm any such suspicions which indicates clearly that the actual context of the officer's assertion of drug or alcohol related driving is an after the fact claim and being asserted to support a such arrest by the officer.

In the case of State v. James, 361 UAR 49, (Ct. App. 1999), the Court ruled that the search of a truck without a warrant was unreasonable and suppressed the evidence gained by such a search. The officers had a citizen complaint by erratic

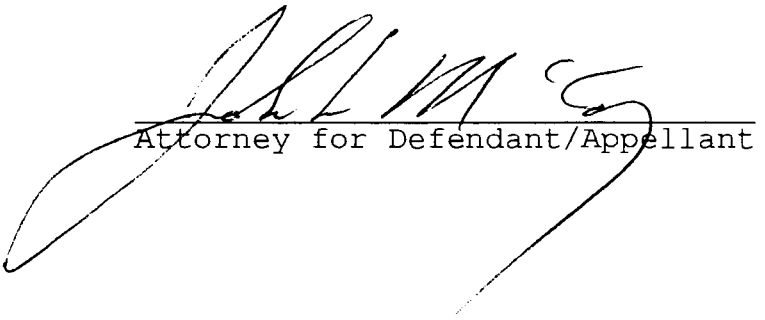
driving and the license number of the defendant's truck. In the instant case, no allegation was made that an offense had been committed by anyone. The officer simply would not accept the fact that a person would not talk to him and arrested that person for such refusal, then searched the vehicle.

CONCLUSION:

The decision by the trial court denying defendants' motion to suppress violates the current case law by the Court of Appeals which show clearly that an officer does not have sufficient probable cause based upon blood shot eyes or confused and nervous behavior. This court should reverse the trial court's order that all of the evidence gained by the officer after the stop be suppressed and remand this case for a trial.

The motion to suppress evidence should be granted.

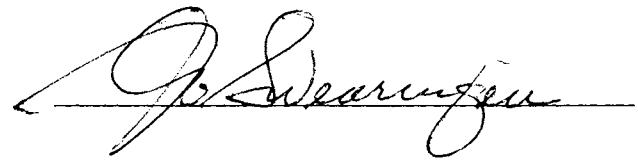
DATED this 7th day of September, 1999.



Attorney for Defendant/Appellant

MAILING CERTIFICATE:

I hereby certify that I had delivered four (4) copies of Appellant's Brief to the Utah Attorney General's Office, Heber M. Wells Building, 160 E. 300 S., 3rd Floor, Salt Lake City, Utah 84111, this 7th day of September, 1999, by U.S. Mail, postage prepaid.



THIRD DISTRICT COURT - SLC COURT
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff,	:	MINUTES SENTENCE, JUDGMENT, COMMITMENT
vs.	:	Case No: 971900791 FS
WILLIAM J BROWNLEE, Defendant. Custody: Prison	:	Judge: HOMER WILKINSON Date: May 1, 1998

PRESENT
Clerk: jaredl
Prosecutor: RICH HAMP
Defendant
Defendant's Attorney(s): JOHN L. MCCOY

DEFENDANT INFORMATION
Date of birth: February 5, 1970
Video
Tape Count: 9.13

CHARGES

2. POSSESSION OF A CONTROLLED SUBSTANCE (amended) - 3rd Degree Felony
Plea: Guilty - Disposition: 12/10/1997 Guilty Plea

SENTENCE PRISON

Based on the defendant's conviction of POSSESSION OF A CONTROLLED SUBSTANCE a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

COMMITMENT is to begin immediately.

To the SALT LAKE County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the

Case No: 971900791
Date: May 01, 1998

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defendant will be confined.

SENTENCE RECOMMENDATION NOTE

THE COURT ORDERS CREDIT FOR TIME SERVED.

DEFENDANT IS RESPONSIBLE FOR FULL RESTITUTION IN THIS MATTER.

Dated this 8 day of June, 1998

HOMER F. WILKINSON
District Court Judge

SALT LAKE COUNTY STATE OF UTAH DISTRICT COURT

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IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff/Appellee, vs. WILLIAM J. BROWNLEE, Defendant/Appellant.	)	**AMENDED ORDER** Case No. 971900791 Appeal No. 981295-CA Judge Homer Wilkinson

The Defendant's Motion for Amended Order having been entered and read by the Court, and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the Minutes, Sentence Judgment, Commitment entered by the Court on May 1, 1998, be amended to reflect the following:

1. On December 10, 1998, defendant pled guilty to the charge of possession of a controlled substance in this Court.
2. Defendant's pleading was conditional, reserving the right to appeal the trial court's decision as to the police officer's probable cause for arresting the Defendant.
3. Counsel for the State consented to the conditional plea.

4. Defendant's attorney stated, "[T]his will be a guilty plea, wherein, however, we preserve – the defendant does preserve the right to appeal the previous decision of the court with respect to probable cause."

5. Counsel Howard Lemke confirmed the conditional plea, noting "It's our understanding the defendant will plead under Seary (sic) to my understanding, and we'll move to dismiss the remaining counts."

6. The Minutes, Sentence, Judgment, Commitment entered by this Court on May 1, 1998, which constituted the Final Order in this matter for the purpose of filing an appeal, did not reflect that the defendant's guilty plea was conditional under the Sery doctrine.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court approves the defendant's conditional plea under Seary.

DATED THIS 10 day of February, 1999.

HONORABLE JUDGE HOMER WILKINSON