1998

State of Utah v. Clark Roy Friesen : Reply Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH	:	DOCKET NO. 981540-CA
Plaintiff/Appellant,	:	Case No. 981540-CA
v.	:	
CLARK ROY FRIESEN,	:	Priority No. 2
Defendant/Appellee.	:	

REPLY BRIEF OF APPELLANT

APPEAL FROM AN ORDER DISMISSING ONE COUNT OF POSSESSION OF MARIJUANA WITH INTENT TO DISTRIBUTE, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37-8(1)(a)(iv) (1996), IN THE FOURTH JUDICIAL DISTRICT COURT, JUAB COUNTY, THE HONORABLE RAY M. HARDING, PRESIDING

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REPLY BRIEF OF APPELLANT

In addition to the facts and arguments contained in the State/Appellant's opening brief, the State submits the following points in reply to the statements and arguments contained in defendant/appellee's responsive brief.

RESPONSE TO DEFENDANT'S ASSERTION THAT THE ORDER TO DISMISS DOES NOT COMPLY WITH *STATE V. TROYER*, 866 P.2d 528 (Utah 1980)

In a single document, the State moved to dismiss this case *with prejudice* after the trial court granted defendant's motion to suppress the evidence and the trial court dismissed the case (R. 67-68) (a copy of the motion and order for dismissal is contained in the addendum). On the first page, the dismissal motion clearly states that the suppression order substantially impaired the State's ability to proceed and cites *State v. Troyer*, 866 P.2d 528, 531 (Utah 1993) (R. 67). On the second page, the trial court granted the State's motion as follows: "Based on the foregoing Motion and good cause

appearing therefore, the Court hereby dismisses the above case." (R. 68). Notwithstanding, defendant asserts that the trial court's dismissal order is *without prejudice* and otherwise fails to meet the requirements of *Troyer*. Aple. Br. at 6-7. Defendant's contention lacks merit and should be rejected.

The concern addressed in *Troyer* was the development of a mechanism that would "preserve the State's statutory right to obtain review of suppression orders that amount to final judgments and at the same time ensure that defendants will be shielded from potential prosecutorial manipulation." *Id.* at 531. Accordingly, the supreme court held that the State would be allowed "to obtain review of suppression orders where they substantially impair the prosecution's ability to proceed with a case, " as long as certain conditions were met. The first requirement is certification from the trial court that the suppression order substantially impaired the State's case. *Id.* The supreme court noted that trial court certification, as opposed to prosecutorial certification, allows defendants a chance to object before the dismissal is entered, and yet still permits appellate review. *Id.*

Second, the supreme court required the State to request dismissal with prejudice in order to obtain review of suppression orders on an appeal of right from a dismissal. *Id.* at 531. This requirement prevents the State from refiling charges if the suppression order is affirmed on appeal. *Id.*

In this case, a single document contains the motion and order. Read in their natural context, the trial court's order of dismissal incorporates the *Troyer* requirements

set forth in the State's immediately proceeding motion (R. 68-69). Therefore, it is not reasonably argued that the trial court's dismissal order was based on any other grounds than those cited in the State's dismissal motion.

Even if the motion and accompanying order of dismissal could have been more artfully drafted, it complies with the policy concerns undergirding *Troyer*. Indeed, nothing prevented defendant from objecting to the motion to dismiss below. Moreover, the State views itself as fully bound by the motion and order for dismissal with prejudice, and will not seek to refile charges, no matter the appellate outcome.

Defendant's broad reliance on civil authority fails to demonstrate any basis for interpreting the dismissal of this criminal case as other than as a dismissal with prejudice. To do so on these facts would be to elevate form over substance. *Troyer*, 866 P.2d at 531 n.2. Where, as here, it is clear that the "suppression order destroys the prosecution's case," the State may properly seek appellate review. *Id.*

RESPONSE TO DEFENDANT'S ASSERTION THAT THE STATE'S ARGUMENT IS UNPRESERVED

It is uncontested that the missing front license plate on defendant's vehicle triggered Trooper Wilson's suspicions of a possibly stolen and/or improperly registered vehicle (R. 75: 3-4, 20, 26-27), *see* Aplt. Br. at add. C. *See also* Aple. Br. at p. 9. The focus in the trial court therefore, was whether Trooper Wilson's suspicions of such were reasonable, premised as they were solely on his belief that Wyoming law required the display of both front and back license plates. As set forth in the State's opening brief,

based on the entirety of the evidence before it, the trial court clearly erred in finding that "[t]he officer's 'assumption' does not support a reasonable suspicion that defendant was engaged in criminal activity" (R. 49), add. D. *See* Aple. Br. at 10-15.

In claiming that the State's argument regarding the reasonableness of the trooper's suspicions is unpreserved, defendant parses out the trooper's suspicions of criminality from his "assumption" concerning Wyoming traffic law, claiming that the State relied only on the latter argument below. Aple. Br. at 7-8. However, the trooper would have had *no* basis upon which to suspect the vehicle was stolen and/or improperly registered absent his belief that Wyoming law required the display of front and back license plates, therefore his suspicion of the former cannot be viewed in isolation from his suspicion of the latter -- they necessarily go hand in hand.

In arguing the reasonableness of the trooper's suspicions of criminality, the prosecutor did rely heavily upon a theory that the missing front plate violated Utah Code Ann. § 41-1a-1305(5) (1993),[1] and that this alone could justify the traffic stop (R. 45-44), *see* Aple Br. at add. B. While the scope of section 41-1a-1305 is a close question, it is

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[1]Section 41-1A-1305(5) provides that

> it is a class C misdemeanor to operate upon any highway of this state any vehicle required by law to be registered without having the license plate or plates securely attached, and the registration card issued by the division carried in the vehicle, except that the registration card issued by the division to all trailers and semitrailers shall be carried in the towing vehicle[.]

undisputed that failure to display a front plate *is* a violation of Wyoming law, an argument the prosecutor emphasized in his motion to reconsider (R.61-60), *see* Aple. Br. at add. B. Because Trooper Wilson was correct in his surmise of Wyoming law, his suspicion that the missing front plate in this case indicated a possibly stolen or improperly registered vehicle was reasonable. *See* Aplt. Br. at 10-15. If the trooper had been wrong as to the requirements of Wyoming law, his suspicion of a stolen and/or improperly registered vehicle based on the missing plate would have no basis. *See* Aplt. Br. at 13.

For these reasons, the issue as to the reasonableness of the trooper's suspicions of criminality is necessarily preserved and should be addressed by the Court.

RESPONSE TO DEFENDANT'S ASSERTION THAT THE LICENSE PLATE WAS MISSING FOR INNOCUOUS AS OPPOSED TO CRIMINAL PURPOSES

Defendant agrees that the basis for the trooper's suspicions of criminality in this case was the missing front license plate. Aple. Br. at 9. He asserts, however, that because the missing license plate was ultimately discovered on the dash of the car after the stop was effected, that there was an innocent explanation which "diluted" the reasonableness of the trooper's initial suspicion that the car was stolen and/or improperly registered. Aple. Br. at 11. Defendant is mistaken.

As set forth in the State's opening brief, *see* Aplt. Br. at 12-13, the fact that a suspect's conduct may be consistent with innocent behavior does not vitiate the reasonable suspicion of an experienced officer. "To the contrary, where a defendant's

conduct is 'conceivably consistent with innocent . . . activity,' but is also 'strongly indicative' of criminal activity, [this Court] will not hesitate to conclude that reasonable suspicion exists." *Provo City Corp. v. Spotts*, 861 P.2d 437, 440 (Utah 1993).

Here, the failure to display a front license plate is uniquely indicative of a potentially stolen and/or improperly registered vehicle. *See* Aplt. Br. at 13-15 (citing supporting case law). The nature of the missing license plate violation in this case thus distinguishes it from *Baird*, upon which defendant relies. *See* Aple. Br. At 10. As explained in the State's opening brief, the officer's "idle curiosity" in *Baird* about the color of the sticker on the out-of-state license plate was alone inadequate to raise any similar reasonable suspicion of a potentially stolen vehicle. Aplt. Br. at 14. This case, however, is more akin to *State v. Naisbitt*, 827 P.2d 969, 971 n.3 (Utah App. 1992), where the trooper properly effected a traffic stop of a vehicle with no license plates to determine if the vehicle in fact contained a proper temporary permit.

Based on the above, the trial court clearly erred in finding that Trooper Wilson could not reasonably suspect criminality in this case unless he knew with absolutely certainty that Wyoming law required both front and back license plate display. *See also* Aplt. Br. at 10-15. Instead, it is sufficient that in the trooper's experience Wyoming cars typically display front and back plates and from that experience he surmised, correctly,

that such was required by Wyoming law. Aplt. Br. at 13, add. B (R. 59). The trial court's erroneous suppression ruling should be overturned.[2]

CONCLUSION

Based on the above, the Court should reverse the trial court's suppression of evidence and remand this case for trial.

RESPECTFULLY submitted on 3 May 1999.

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[2]Assuming the Court agrees that the traffic stop was justified at its inception, the trial court correctly acknowledged that defendant's detention beyond the traffic purpose of the stop was valid, based upon the smell of marijuana emanating from the vehicle. Aplt. Br. at 15. As further set forth in the State's opening brief, defendant's subsequent consent to search was also valid and there is therefore, no need to remand for findings on the validity of his untainted consent to search. Aplt. Br. at 16, n.7. Defendant does not contest the validity of the trial court's findings and/or the State's argument in this regard. *See* Aple. Br. at 6-12.

CERTIFICATE OF MAILING

I certify that on 3 May 1999, I caused to be mailed, by U.S. Mail, postage prepaid, two accurate copies of this *REPLY BRIEF OF APPELLANT* to:

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ADDENDUM

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IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR

JUAB COUNTY, STATE OF UTAH

THE STATE OF UTAH,

Plaintiff,

vs.

CLARK ROY FRIESEN,

Defendant.

MOTION AND ORDER OF DISMISSAL

Criminal No. 971400205

The State of Utah, through the Juab County Attorney, hereby moves the court to dismiss the above entitled action against the defendants on the ground that the suppression order will substantially impair the prosecution's ability to proceed in the case. *See State vs. Troyer*, 866 P.2d 528, 531 (Utah 1993). Therefore, the State moves to dismiss the above entitled case with prejudice.

Dated this 14th day of September, 1998.

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David O. Leavitt
Juab County Attorney

ORDER

Based on the foregoing Motion and good cause appearing therefore, the Court hereby dismisses the above case.

Dated this 17 day of Sept, 1998.

District Judge