1980

The State of Utah v. Marvin Whittenback And John Joseph Parrett : Brief of Appellants

Utah Supreme Court

THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, Plaintiff-Respondent, v. MARVIN WHITTENBACK and JOHN JOSEPH PARRETT, Defendants-Appellants.	:	CASE NO. 16575 and 16738

BRIEF OF APPELLANTS

Appeal from the Judgment of the Fourth
Judicial District Court of Utah County,
HONORABLE GEORGE E. BALLIF, Judge.

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THE SUPREME COURT OF THE STATE OF UTAH

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Plaintiff-Respondent,	:	
	:	CASE NO. 16575
v.	:	and 16738
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BRIEF OF APPELLANTS

STATEMENT OF THE NATURE OF THE CASE

Appellants were charged with the crime of Theft, a Felony of the Third Degree, in violation of Sections 76-6-40 and 76-6-412, Utah Code Annotated (as amended), in that on or about the 26th day of March, 1979, they exercised unauthorized control over the property of another with inten to deprive that other of his property, such property being o a value of more than $250.00 but not more than $1,000.00.

BRIEF STATEMENT OF THE FACTS

At approximately 1:00 A.M. of the day in question, Officer Geslison of the Provo City Police Department observe two individuals inside an all-night coin-operated laundry

in the City of Provo. Recognizing the individuals from prior contacts and knowing that they were not local residents (R. 41:15), he concluded without more that they might be in the act of robbing the laundry. The officer entered the premises to question the suspects and observed that the appellant Whittenback was sitting in a chair near the entrance and that the appellant Parrett was standing near a clothes-dryer in which several pairs of pants were being dried (R.40:14). They were in substantially the same positions as when he saw them from his patrol car, and had done nothing since he had first noticed them. (R. 40:30-41:4).

The officer began to question the appellants. Both answered that they were merely doing their laundry (R. 41:24-30). As the questioning continued, two other officers, Officers Mock and Latham, arrived in response to Officer Geslison's request for aid. One of the officers asked whether they could search the appellants' car, which was parked outside, and appellant Parrett, the owner of the car, gave his permission. (R. 42:27-43:4).

As Officers Mock and Latham conducted the search of the car, Officer Geslison ordered the appellants to empty their pockets (R.43:10-12). He had noticed that appellant Whittenback's pockets were bulging perceptibly, and on that basis demanded the search (R.43:14). Though neither of the appellants had been placed under official arrest at that

time, Parrett complied with the order, producing a ring of keys; Whittenback, however, refused to empty his pockets and demanded to know by what authority the officer could make such a demand. The officer asserted that he had the authority to search their pockets, and Whittenback thereafter moved to a table and emptied a large quantity of coins from his pockets. Officer Geslison then quickly patted down the clothing that appellant Whittenback was wearing, as part of the search.

At roughly the same time, Officer Mock, having discovered burglary tools in his search of the appellants' car, returned into the laundry and placed the appellants under arrest for possession of burglary tools (R.60:24; 65:19). The contents of the car were then inventoried at the scene (R.67:21).

The owner of the laundry examined the machines on the premises to determine whether any of their contents had been stolen. Fourteen machines had had their cash boxes emptied (R.15:18-24) but there was no record of what quanti of coins had been in them prior to that time. It was durin the following several days that the owner examined the contents of the other machines on the premises to determine, by comparison, how much money may have been in those which were empty (R.16:27; 23:22). At trial, the owner testified that different machines hold different amounts of

money at different times of the year (R.26:3-15; 26:23-27:6), and that because he kept no accurate records of their contents and did not account for their proceeds on any regular basis, he could only guess as to the amount of money that may have been missing (R.24:11; 32:24-33:3). He testified that it was his estimate that $600 to $800 was missing.

Prior to trial, appellants moved to suppress all the items of evidence found in their pockets and in their car, which motion was denied at the close of trial. Appellants also moved for dismissal on the grounds of the State's failure to offer substantial evidence on the issue of value, but that motion was denied, as was their motion for judgment notwithstanding the verdict.

DISPOSITION IN THE LOWER COURT

Appellants were tried in the Fourth Judicial District Court of Utah County, the Honorable George E. Ballif presiding, on the 29th day of March, 1979. On the basis of the denials of appellants' motions and the verdict of the jury, appellants were adjudged guilty of the charges against them. Appellant Whittenback was sentenced on the 29th day of June, 1979, and appellant Parrett on the 12th day of October, 1979. Notice of appeal was timely filed by both appellants, and their cases were joined for the purposes of this appeal on the 30th day of October, 1979.

RELIEF SOUGHT ON APPEAL

Appellants respectfully request that the Court reverse the decision of the District Court denying their Motion to Suppress and enter an order requiring that all evidence produced as a result of the appellants' detention be suppressed. Appellants also request, in the alternative that the court reverse the decision of the District Court denying their Motions for Directed Verdict and Judgment Notwithstanding the Verdict and enter an order granting them a judgment of innocence.

ARGUMENT

I. THE DETENTION AND QUESTIONING OF THE APPELLANTS WAS A VIOLATION OF THEIR RIGHTS UNDER THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION, AND ALL EVIDENCE OBTAINED AS A RESULT OF THAT DETENTION AND QUESTIONING SHOULD HAVE BEEN EXCLUDED.

The Fourth Amendment of the United States Constitution provides, in part, that:

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

It is undisputed that the requirements of the Fourth Amendment apply to a wide variety of situations in which law enforcement officers confront individuals for the purpose of investigating criminal activity. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L. Ed. 2d 889 (1968): Adams

v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L. Ed. 2d 612 (1972). Whether the stopping and questioning of a person in a public place constitutes a search or seizure of his person for the purposes of the Amendment, and whether it is reasonable or unreasonable under the circumstances, are questions which are dealt with by the courts almost as often as they are confronted by the police. A number of clear principles have become established by the decisions of the courts which demonstrate under what circumstances the police may lawfully, without a warrant, approach an individual whom they suspect of criminal activity and initiate an interrogation. Appellants submit that under the facts of this case, the police violated those principles and were not justified in approaching the appellants and questioning them concerning their presence in the laundry, and that as a result of that unlawful conduct of the police, all evidence obtained in the ensuing events should have been excluded from the trial.

In Terry v. Ohio, an officer of the Cleveland police department was serving in a plainclothes capacity and observed two persons who attracted his closer attention. The persons were standing on a corner, and while the officer watched, one and then the other left the corner and walked some distance down the street and returned, pausing momentarily both ways to stop and look into a particular store window. They repeated the procedure five or six times each.

The officer concluded that they might be casing the store for a robbery, and he approached them to ask some questions In the following interchange, he frisked the individuals for weapons.

The Supreme Court's opinion in the case deals primar with the issue whether the limited pat-down search for weapons, not based upon a warrant nor upon probable cause sufficient to arrest, was justified. It specifically reserved the question, under what circumstances an officer is justified in approaching a suspicious person for the purpose of questioning. See opinion, note 16. However, its statements concerning the scope and effect of the Fourt Amendment are applicable to such a question, and since that is the crucial question in this case, it is valuable to discuss the opinion here.

In regard to any intrusion upon the privacy of an individual, the court stated:

> [I]n justifying the particular intrusion the polic officer must be able to point to s cific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. Anything less would invit intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticu- lable hunches, a result this court has consistentl refused to sanction. Terry, 392 U.S. at 22.

The court rejected the proposition that the good faith of the officer would be sufficient to limit the effect of the intrusion. Even under such a circumstance, the individual

might perceive the conduct of the police as harrassment or as a violation of his privacy.

> Under our decisions, courts still retain their traditional responsibility to guard against police conduct which is overbearing or harrassing, or which trenches upon personal security without the objective evidentiary justification which the constitution requires. When such conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials. Id. at 15.

Although the persons questioned in Terry were not detained in their homes or in any other place where they would normally expect "privacy," the court held that their brief detention and questioning constituted a seizure for the purposes of the Fourth Amendment:

> [W]herever an individual may harbor a reasonable expectation of privacy, [cite omitted], he is entitled to be free from unreasonable governmental intrusions. . . . Unquestionably petitioner was entitled to the protection of the Fourth Amendment as he walked down the street in Cleveland. * * * It is quite plain that the Fourth Amendment governs "seizures" of the person which do not eventuate in a trip to the station house and prosecution for a crime--"arrests" in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person. Id. 9, 14.

Appellants submit that the conduct of the officers in this case constituted such a seizure, and that since the police could point to no articulable facts which justified their belief that a crime was in progress, that seizure was unjustified. Testimony at the hearing on the motion to suppress and at trial indicated that Officer Geslison knew

nothing more than that the two individuals were in an all-night establishment doing their laundry, that they were from out-of-town, and that the hour was late. None of thes facts singly nor together gives rise to a justifiable suspicion that the defendants were engaging in any criminal activity. The officer therefore acted unlawfully in approaching the appellants and interrogating them. For the purpose of argument, the facts that their car was subjected to a search and that they were compelled to empty their pockets all before formal arrest were sufficient to show that that freedom to leave was restrained.

A number of recent cases lend support to the appellan argument, under similar factual circumstances. In In re Tony C., 582 P.2d 957 (Calif. 1978), the California Supreme Court considered a case in which a police officer was on patrol in a residential area of La Puente, California durin school hours. He noticed two black youths walking along the sidewalk, both about 13 years of age. He made a turn and drove by them again, and saw one standing on a corner, but could not see the other. He drove on and made another turn to come back, and this time saw both of them again. The officer pulled over, stopped the youths, and began to question them about their identities and reason for being in the area. His interrogation led to the arrest of the defendant, one of the youths.

The court first concluded that the defendant was entitled to Fourth Amendment protection at the time he was stopped. It stated:

> Because of the limited scope of that invasion in the present context, it need not be supported by the actual belief in guilt required to arrest, book, and jail an individual on a named criminal charge. . . Yet the interest at stake is far from insignificant: it is the right of every person to enjoy the use of public streets, buildings, parks, and other conveniences without unwarranted interference or harrassment by agents of the law. * * * Balancing these factors, the courts have concluded that in order to justify an investigative stop or detention, the circumstances known or apparent to the officer must include specific and articulable facts causing him to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person he intends to stop or detain is involved in that activity. Not only must he subjectively entertain such a suspicion, but it must be objectively reasonable for him to do so: the facts must be such as would cause any reasonable police officer in a like position, drawing when appropriate on his training and experience . . . to suspect the same criminal activity and the same involvement by the person in question. The corollary to this rule, of course, is that an investigative stop or detention predicated on mere curiosity, rumor, or hunch is unlawful, even though the officer may be acting in complete good faith. (Terry v. Ohio, supra, 392 U.S. at p.22, 88 S.Ct. 1868) 582 P.2d at 959.

The court noted that the word "detention" is subject to a wide variety of constructions, and that police conduct which merely constitutes "contact" with persons requires no justification at all. However, the court rejected the use of the test by which a "detention" for Fourth Amendment purposes results when a person is not free to walk away from the

encounter, since the subtleties of the situation often make it impossible for the court, by hindsight, to determine whether the victim of the arrest was actually detained or only believed that he was. Instead, the court ruled that a "detention" falls under the protection of the Amendment whenever the police accost an individual whom they suspect to be involved in criminal activity. The court stated:

> A more fruitful approach focuses on the purpose of the intrusion itself. If the individual is stopped or detained because the officer suspects he may be personally involved in some criminal activity, his Fourth Amendment rights are implicated and he is entitled to the safeguards of the rule set forth above.

Finding that the officer in that case had stopped the defendant for the very purpose of investigating the defendant's suspected criminal activity, the court held that the Fourth Amendment test would apply, even though the questioning took place openly on a public sidewalk. Furthermore, the court held that the officer could not point to specific facts which justified the approach of the defendant and his questioning. The fact that two youths were walking on the sidewalk during school hours was easily explainable in terms of a number of innocent activities. The fact that there had been several burglaries in the area and that three male blacks were being sought for arrest had nothing to do with the defendant and his companion, who could not at first sight be identified in any way with those burglaries. "A day-old burglary report does not transform a residential

neighborhood into a no-man's land in which any passerby is fair game for a roving police interrogation." Even the fact that the two youths parted company in a suspicious manner did not justify their questioning. The court said:

> In short, viewed either singly or collectively, the circumstances known to [the officer] did not support a reasonable suspicion that Tony and his companion were involved in criminal activity when he observed them walking along the sidewalk. 582 P.2d at 963.

The stop and questioning of the defendant was therefore unlawful, though otherwise innocent and in good faith, and all knowledge obtained as a result of that conduct was inadmissible in court. Specifically, when another officer was called to the scene and recognized Tony as a suspect wanted on a warrant, the evidence found when he was searched after his arrest was inadmissible. Though his identification by the other officer did not itself require Fourth Amendment justification, its fruits were inadmissible because the defendant's initial stopping and questioning was illegal.

An almost identical case was decided in the same fashion by the Eighth Circuit Court of Appeals in United States v. Nicholas, 448 F.2d 622 (8th Cir. 1971). There, an officer in Missouri observed a black male sitting at the wheel of a new Cadillac parked in front of a pool hall. While he watched, another black male emerged from the pool hall and entered the car on the passenger side. Noting that the car had Nevada license plates, the officers

approached the individuals to question them about the license plates and about their purpose for being in the area. When one man rolled down the window of the car, the officer immediately smelled marijuana and placed the men under arrest.

Concluding first that the conduct of the officers constituted a "seizure" for the purposes of the Fourth Amendment, the court stated:

> [T]he police action here amounted to a "seizure" within the meaning of the Fourth Amendment as interpreted by Terry and Carpenter. Even though Nicholas may have been physically free to drive away when the officers stationed themselves on either side of Nicholas' car and flashed their badges, we find that the actions of the officers constituted sufficient show of authority to restrain Nicholas' freedom of movement.

The court then addressed the issue, reserved in Terry,

> [N]amely, whether an investigative "seizure" for less than probable cause, for purposes of "detention" and/or interrogation is constitutionally permissible. 448 F.2d at 623.

The court conceded at first that if the police acted unlawfully in detaining the defendant for the purpose of questioning, then the fruits of that detention, the evidence of the marijuana, would be inadmissible, even though its discovery could be justified otherwise on the doctrine of consent (in that the defendant voluntarily rolled down the window) or the doctrine of plain view (i.e., plain smell). The government contended that police are authorized in momentarily detaining individuals for the purpose of questioning on less than probable cause. The court answered:

> In light of these facts, we think that, at best, the police were acting upon a generalized suspicion that any black person driving an auto with out-of-state license plates might be engaged in criminal activity. The momentary detention of a citizen for questioning is not permitted on such scant basis. Id. at 625.

Thus, the court held that though questioning on less than probable cause may be permissible in some circumstances, it was not here, where police could not affirm that they were investigating any particular crime, that they had any information concerning the defendants or their car, that there was any indication of an actual crime in progress, or that there was anything else which pointed substantially to the existence of criminal activity.

The same reasoning, always drawn from the opinion in the Terry case, runs through a number of similar cases. In United States v. Robinson, 535 F.2d 881 (5th Cir. 1976), police officers stopped their car beside another car which was parked by the road, thinking that it contained two detectives whom they were waiting to meet. Seeing, instead, that the car contained two black men, the police concluded that it was the wrong car. But rather than drive on, they approached the men to question them. The court held that such conduct by the police was unlawful. They knew only that the car had been driving slowly, that it was a new car in a poor neighborhood, and that it looked like an unmarked police car. The court stated:

> In the instant case, the facts known to the offic at the time he stopped the defendant clearly did not rise to the required level, and in reality were so tenuous as to provide virtually no ground whatsoever for suspicion. . . In short, the officer simply stopped two black males because they were in a black Chevrolet. This fact alone, without additional reliable evidence sufficient to warrant the conclusion that either or both of the men had been or were involved in criminal activity did not constitute cause to stop the vehicle.

Similarly, in United States v. Mallides, 473 F. 2d 859 (9t Cir. 1973), a reversal resulted on a showing that an offic had stopped for questioning a car occupied by six Mexican-looking men who sat upright and did not turn to look at hi car as he drove by. On the reasoning of Terry, the court held the stop of the car unlawful, and also concluded that because the stop was unlawful, the search of the car's trunk, though conducted with the consent of the driver, wa also unlawful and the evidence found therein was excludabl The Terry rationale was also the basis of the decision of the Sixth Circuit in Riccardi v. Perini, 417 F.2d 645 (6th Cir. 1969), where officers merely observed a car traveling slowly through an area where burglaries had recently occurred and stopped the driver for questioning. The court held that the stop was unlawful and the fruits there inadmissible.

The Tenth Circuit applies the same rule as the cases cited above. In United States v. McDevitt, 508 F.2d 8 (10 Cir. 1974), an officer stopped a truck on the highway in

order to determine whether it was carrying goods for hire in violation of a New Mexico statute. The driver's papers were in order, but rather than release the truck, the officer continued investigating and finally learned that the driver was wanted on a military warrant and was in possession of marijuana. In overturning his conviction and ruling that all the evidence should have been excluded which resulted from the encounter, the court stated:

> In order for an officer to stop and search a vehicle there must exist some basis for suspicion, at least, that the driver has violated the law, even though the facts need not be sufficient to establish probable cause . . . . In the case at bar, there was no probable cause or even reasonable suspicion to justify the stop. 508 F.2d at 10, 11.

See also United States v. Fallon, 457 F.2d 15 (10th Cir. 1972). Both cases relied upon Terry and the rules applicable to seizure of persons for their rationale.

The rule is therefore well established, following the Terry decision, that police officers must be able to point to specific, articulable facts which justify a reasonable belief that criminal activity is in progress before they may approach for questioning any person who is suspected of being involved in such activity. If the police accost a person without first obtaining a knowledge of sufficient facts, any evidence obtained as a result of that encounter is inadmissible, disregarding the fact that it would otherwise be justified by some other exception to the warrant requirement, such as consent, plain view, search incident

to arrest , or probable cause with exigent circumstances. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

Appellants assert that in the case at bar, the police were unable to point to any specific facts which justified them in approaching the appellants or detaining them for the purpose of interrogation. Before the conduct in question, the police knew only that the appellants were from out-of-town, that they were in an all-night establishment late at night, and that they were doing their laundry. These facts gave the police no reasonable justification for questioning the appellants, and such questio when it was for the purpose of determining whether the appellants themselves were involved in criminal activity, was unlawful. Therefore, all evidence produced as a resul of that initial encounter was tainted by the illegality o the police conduct and should have been excluded.

II. THE SEARCH OF APPELLANTS' CLOTHING WAS UNLAWFUL, AND THE EVIDENCE FOUND IN THEIR POCKETS THEREFORE SHOULD HAVE BEEN SUPPRESSED.

In the alternative, assuming that the police did have a reasonable basis for questioning the appellants, th search of their pockets on less than probable cause was unlawful. Under the circumstances of this case, there are only two possible grounds for sustaining the search of the appellants' pockets, at a time when they were not under

arrest but were acting under the authority of the officer. Either the officer had probable cause to arrest the appellants, and therefore could search them pursuant to their arrest even though the arrest followed the search, or, lacking probable cause to arrest, the officer was nonetheless justified in conducting a limited search under certain circumstances.

Facts supporting the argument that the officer had probable cause to arrest the appellants do not appear in this case. In Beck v. Ohio, 379 U.S. 89, 85 S.Ct.223, 13 L.Ed.2d 142 (1964), the United States Supreme Court articulated the test applicable to determine whether officers have probable cause to arrest without a warrant. The same test applies to searches conducted substantially at the same time as the arrest. The court stated:

> Whether that arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it--whether at the moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.

In the present case, it is clear from a perusal of the testimony that there was not sufficient evidence in the officer's knowledge at the time of the search of the appellants to constitute probable cause to arrest them, and the same circumstance leads to the conclusion that the officer was not justified by probable cause in searching their persons.

However, Terry v. Ohio, supra, recognized that unde certain circumstances officers may make limited searches of the persons of suspects even though probable cause to arrest is lacking. Balancing the rights of the individual to be free from unnecessary and unreasonable intrusions upon his person against the need of the officer to ascertain whether the suspect is armed and dangerous to his or anyone else's safety, the court concluded that police officers, even in the absence of probable cause, may conduct limited searches of the persons of suspects in order to discover weapons. The court stated:

> Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer where he has reason to believe that he is dealing with an armed and dangerous individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.

The justification for searches allowed by Terry is limited however, to searches for weapons, and does not extend to searches for evidence or other contraband. The court adde

> Suffice it to note that such a search, unlike a search without a warrant incident to a lawful arrest, is not justified by any need to prevent the disappearance or destruction of evidence of crime. See Preston v. United States, 376 U.S. 364, 367, 84 S.Ct. 881, 883, 18 L.Ed.2d 777 (1964).

Furthermore, the courts have not, in the time since Terry

extended the rule of Terry to allow searches on less than probable cause for anything other than weapons.

Therefore, appellants argue that on the facts of this case, the police officer who questioned them, regardless of whether that questioning was lawful or unlawful, had no justification for ordering them to empty their pockets. His action in doing so and in patting down their outer clothing constituted a search without warrant and without probable cause, and was unlawful. The evidence obtained from their pockets therefore should have been excluded.

III. THE SEARCH OF THE APPELLANTS' CAR WAS WITHOUT A WARRANT AND WAS NOT JUSTIFIED UNDER ANY OF THE ESTABLISHED EXCEPTIONS TO THE WARRANT REQUIREMENT. THE EVIDENCE FOUND IN THE CAR THEREFORE SHOULD HAVE BEEN SUPPRESSED.

Appellants noted above that the search of the car would, under their first argument, be a product of the illegal questioning and detention of the appellants. As such, the fruits of that search would be inadmissible.

In the alternative, appellants argue that on the general principles of the Fourth Amendment, the search cannot be justified under the circumstances of this case. The Fourth Amendment requires that all searches be accompanied by a warrant, unless they can be supported by one of the well recognized exceptions to the warrant requirement. Here, none of those exceptions is applicable.

Under very similar facts, the United States Supreme Court in Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) held that the search of an arrestee's car which was parked in his driveway at the time he was arrested could not be justified under the Fourth Amendment. Here, as in that case, the police did not have probable cause to search the car, nor were there exigent circumstances which threatened the imminent removal or destruction of evidence, so that the probable cause exception would not apply. Coolidge, supra. Nor would the so-called automobile exception apply, for the reasons stated in Coolidge. Similarly, the plain view exception is irrelevant on the facts of this case, since it requires that the officer encounter evidence inadvertently, not as a result of a search. Coolidge, supra. The only exception upon which the state might rely is the exception allowing a search pursuant to consent given by the owner of the property. Appellants submit that the search of the car in this case was not based upon a voluntary consent.

In the case of Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L. Ed.2d 854 (1973), the Supreme Court reaffirmed that the guiding principle in the area of consentual searches is that in order for the search to be valid, the consent must be freely and voluntarily given. The court applied a "totality of the circumstances" test

and held that certain factors weigh heavily against a finding of consent. It stated:

> [I]f under all the circumstances it has appeared that the consent was not given voluntarily--that it was coerced by threats or force, or granted only in submission to a claim of lawful authority,--then we have found the consent invalid and the search unreasonable.

Appellants claim that under the circumstances of this case, the consent given to search the car was coerced and granted only in submission to the police officers' show of authority, and was therefore invalid and the search was non-consentual and unlawful.

A number of cases support the proposition that where the police obtain consent to search by asserting a false claim of authority, the consent must be found to be involuntary. In Bumper v. North Carolina, 391 U.S. 543, 412 U.S. 218, 93 S.Ct. 2041, 36 L. Ed.2d 854 (1973), officers went to the home of a suspect and informed the suspect's grandmother, who met them at the door, that they had a warrant to search the house for the suspect. In fact, they did not have a warrant. The state, at a hearing on a motion to suppress the fruits of the search, therefore attempted to justify the search on the grounds that the grandmother allowed the officers to enter and thereby consented to the search. The court held against the government, on the ground that a false claim of authority vitiates consent. The burden is on the party

seeking to prove consent to show that it was freely and voluntarily given, and such burden was not met where the consent followed a false claim of authority to search by police.

Some courts apply a rule which requires that consent obtained after any illegal act of the police is per se involuntary. In Taylor v. State, 355 So.2d 180 (Dist.Ct.App.Fla. 1978) the Florida appeals court stated:

> Some broad trends are discernible in the cases. One of those broad trends is that any serious illegal actions by a law enforcement officer, such as an illegal arrest, almost always renders involuntary any subsequent consent to search given by the victim of the illegal action . . . The only exception recognized by the cases in which a prior illegal arrest or search would not render a subsequent consent, confession, or admission involuntary is where there has been a clear and unequivocal break in the chain of illegality sufficient to dissipate the taint of the prior illegal action. 355 So.2d at 184.

Thus, many courts would recognize the rule that an illegal arrest would vitiate a later consentual search unless some event or influence intervened between the illegal arrest and the consent, to cure the taint of the illegal act.

Other courts do not accept the per se rule rendering consent involuntary whenever an illegal arrest precede the consent, but rather grant great weight to the fact that an illegal act has occurred in determining whether, on the basis of all the circumstances, the consent was voluntary. In United States v. Bazinet, 462 F.2d 982 (8th Cir. 1972), the Eight Circuit stated:

> The mere fact that a person has been arrested in violation of his constitutional rights casts grave doubt upon the voluntariness of a subsequent consent. The government has a heavy burden of proof in establishing that the consent was the voluntary act of the arrestee and that it was not the fruit of the illegal arrest.

Similarly, in United States v. Watson, 504 F.2d 849 (9th Cir. 1974) the Ninth Circuit held that such factors as the prior arrest of the appellant, the illegality of that arrest, and the failure of the police to inform the appellant that he had a right to deny consent to search were significant and weighty arguments for the contention that his later consent to a search was involuntary. Since the arrest in that case was ultimately found to be legal, and the consent therefore voluntary, the Ninth Circuit decision illustrates the importance of whether the consenting party is in custody lawfully at the time of his consent.

The same rule is followed in the Third Circuit, which stated in United States v. Molt, 589 F.2d 1247 (3d Cir. 1978):

> When evidence exists to show the opposite--that a defendant believed he must consent--such evidence weighs heavily against a finding that consent was voluntarily given. And when that belief stems directly from misrepresentations by government officials, however innocently made, we deem the consent even more questionable. 589 F.2d at 1251-1252.

Appellants submit that the circumstances of this case show that their consent to the search of the car was a product of the illegal actions of the officers and of

their false show of authority. Their argument above demonstrates that the initial contact of the appellants by the police was a violation of their constitutional rights. While they were unlawfully detained and questione in disregard of their rights, two more officers arrived on the scene to aid Officer Geslison in conducting the "investigation." The illegal detention, coupled with the reinforcement of the investigating officer by more office together with all other circumstances surrounding the encounter, raise a heavy presumption that the consent to search the car was not freely and voluntarily given. Appellants contend that the District Court failed to take note of this presumption.

Even if the detention and questioning of the appe lants were found to be lawful, the same rules concerning the voluntariness of their consent to search would apply, with the same result. Where a suspect is in custody, the courts have held that there is a strong inference that his consent to a search is not voluntary. In Oliver v. Bowens 386 F.2d 688 (9th Cir. 1967), where a suspect was subjected to a search of his person and then placed under arrest, after which he gave consent to search his apartment, the court stated:

> Equally was there basis for the court to regard the search made thereafter of Bowens' apartment as not being satisfying of a voluntary consent with the impact inherent from the official auth ority exercised over him, in having made a search of his person without expressed consent;

> in having placed him under arrest and put handcuffs on him; and in pressing him in implicational follow-up with whether "he minded if we took a look," when he had just declared to them that there was nothing in the apartment to conceal. 386 F.2d at 691.

See also U.S. v. Legato, 480 F.2d 408 (5th Cir. 1973); U.S. v. Nikrasch, 367 F.2d 740 (7th Cir. 1966).

Appellants therefore submit that where they were already in custody and subject to a coersive show of authority by the police officers, and especially where their interrogation was unlawful, the consent to search the car was not voluntary, and the search of the car was unlawful.

IV. BECAUSE THE STATE FAILED TO OFFER SUBSTANTIAL, COMPETENT EVIDENCE OF THE VALUE OF THE PROPERTY ALLEGED TO HAVE BEEN TAKEN, THE STATE FAILED TO ESTABLISH ALL THE ELEMENTS OF THE CRIME: AND THE APPELLANTS WERE THEREFORE ENTITLED TO A DISMISSAL.

Section 76-1-501 of the Utah Criminal Code states:

> (1) A defendant in a criminal proceeding is presumed to be innocent until each element of the offense charged against him is proved beyond a reasonable doubt. In absence of such proof, the defendant shall be acquitted.

One of the elements of the offense in the present case was that the value of the property alleged to have been taken was between $250.00 and $1,000.00. That element, along with all the other elements of the offense, was required to be proven beyond a reasonable doubt, before the appellants could be found guilty of the charges against them. Appellants submit that such element was not proven

beyond a reasonable doubt and that there was such a lack of evidence on that issue that the court should have granted either the appellants' motion to dismiss or their motion for a judgment notwithstanding the verdict.

The test on appellate review of the sufficiency of evidence to prove an essential element of an offense has been stated by a number of cases in Utah. In State v. Logan, 563 P.2d 811 (Utah 1977), the Utah Supreme Court stated:

> [T]he weight of evidence and credibility of witnesses are reserved exclusively for jury and reviewing court will not interfere unless evidence is found to be so lacking and insubstantial that reasonable men could not possibly have reached a verdict beyond a reasonable doubt

Similarly, in State v. Romero, 554 P.2d 216 (Utah 1976), the court asserted:

> This court has long upheld the standard that on appeal from conviction the court cannot weigh the evidence nor say what quantum is necessary to establish a fact beyond a reasonable doubt so long as the evidence given is substantial.

The fact that the judgment notwithstanding the verdict is subject to the same rules as the motion to dismiss or to render a directed verdict is confirmed by the case of Koer v. Mayfair Markets, 431 P.2d 566 (Utah 1967), in which the court held:

> The trial court's action in granting the post-verdict motion pursuant to Rule 50(b) Utah Rules of Civil Procedure is commonly referred to as one for judgment notwithstanding the

> verdict. In passing on such motion, the court is governed by the same rules as it is when passing upon a motion for a directed verdict. In other words, the trial court can enter the judgment notwithstanding the verdict only for one reason, the absence of any substantial evidence to support the verdict.

Therefore, if the court determines that there was not substantial evidence in this case on the question of the value of the property allegedly stolen, it is the duty of the appellate court to reverse the conviction.

In cases of larceny, the general rule applied to the determination of the value of the property stolen is that for the purposes of the criminal law, the value of the property is its fair market value at the time the property was taken. State v. Logan, 563 P.2d 811 (Utah 1977). On the question of fair market value, only evidence having a substantial relation to the fair market value at the time and place the theft occurred is relevant and admissible; and numerous decisions in the courts have held that evidence of value by any other method of valuation is incompetent and inadmissible. For example, in People v. Latham, 110 P.2d 101 (Ct.App.Calif. 1941), evidence of the replacement value of stolen machines was held to have been inadmissible on the question of the value of the machines for the purposes of the theft statute. In State v. Gallegos, 312 P.2d 1067 (N.M. 1957), evidence of the original cost of a plow and of its replacement cost were held inadmissible on the question of fair market value for the purposes of

criminal law. Similarly, in People v. Paris, 511 P.2d 893 (Colo. 1973), the court stated:

> While an owner of goods is always competent to testify as to the value of his property, it must, as we have said, relate to its value at the time of thecommission of the crime. Where, as here, the owner testifies only as to the purchase price of the goods, such testimony is competent evidence of fair market value only where the goods are so new, and thus have depreciated in value so insubstantially, as to allow a reasonable inference that the purchase price is comparable to current fair market valu

Finding that the purchase price testified to by the owner was not substantially equatable with fair market value, the court held the owner's testimony inadmissible and stated:

> Without competent evidence of fair market value the jury would have had to base its determinati of the value of the goods in question at the critical time on pure speculation.

Although the property involved in this case was cash and not some other kind of goods having an independe market value, the same principles governing the reliabili and admissibility of testimony concerning valuation shoul be followed here. The cases cited above establish the principle that when the issue concerns fair market value, evidence derived by other methods of valuation is not allowed because of the likelihood that the jury will be misled and that the actual value of the property will be misconceived. Unless the alternate method of valuation actually closely approximates the fair market valuation

under the circumstances, the testimony based upon that alternate method will be irrelevant and immaterial. The objective of such a principle is that where the property is of a type capable of close valuation, the evidence must be precisely related to that valuation.

In this case, the evidence presented on the issue of the value of the property taken was vague, imprecise, and speculative at best. The owner of the laundry testified that he examined the machines and determined which of them had been emptied of money. However, he was unable to say directly that they had been broken into, or even that they could not have been empty before the alleged theft. He testified that he returned to the laundry and during the next few days counted the money in the other machines to determine how much might have been in the machines that were found empty. Such a procedure is riddled with inaccuracies and vagueness, since the laundry was open during those days and the other machines were presumably constantly taking in more money. Further, the owner admitted that he could not say when was the last time he emptied the machines in question, nor had he kept, prior to the alleged theft, records of the amount of the proceeds produced by any particular machine. He could not even testify that all the machines were regularly or periodically emptied at the same time, or that they produced the same amount of proceeds regularly. In fact, he

testified that the machines were of varying sizes and capacities, as concerning the amount of change which they would hold. He testified also that he had a practice of emptying some of the machines occasionally, leaving the others, in order to obtain change to put in the dollar-bill changer; and he could not and did not testify that this may not have been why the suspected machines were empty.

In short, the kind of testimony introduced as to the value of the property allegedly taken was completely unrelated to that value, in the same sense that replacement or original costs are unrelated to fair market value. In light of the established rules requiring that methods of valuation be precise and avoid the possibility of misleading the jury, the method of valuation used by the State's witness here, and upon which his testimony was based, was unacceptable. Since the methods used by the owner of the laundry to determine the value of the proper taken did not bear the necessary reliability and did not on their face appear to arrive at a substantial equivalen of the actual value of the property taken, under the circumstances, the evidence offered on the issue of value was irrelevant and inadmissible, and presented a serious danger that the jury would be misled on the issue of valuation. The failure of the District Court to grant the

appellants' motions for dismissal and judgment notwithstanding the verdict was therefore prejudicial error and requires reversal.

Brief of Appellants

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF DELIVERY

I certify that I delivered the original and 10 copies of the foregoing Brief Of Appellants to the Utah Supreme Court this 22nd day of January, 1980.

/s/ Robert J. Schumacher

CERTIFICATE OF RECEIPT

I received the foregoing this _____ day of January, 1980,

_____

Clerk of the Utah Supreme Court

CERTIFICATE OF MAILING

I certify that I mailed two copies of the foregoing Brief Of Appellants to the Utah Attorney General, Robert B. Hansen, at 236 State Capitol, Salt Lake City, Utah 84114, this 22nd day of January, 1980.

/s/ Robert J. Schumacher