

1980

The State of Utah v. Marvin Whittenback And John Joseph Parrett : Appellant's Reply Brief

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. ROBERT J. SCHUMACHER and LYNN C. HARRIS; Attorneys for Appellants ROBERT B. HANSEN; Attorney for Respondent

Recommended Citation

Reply Brief, *Utah v. Whittenback*, No. 16575 (Utah Supreme Court, 1980).
https://digitalcommons.law.byu.edu/uofu_sc2/1841

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
vs.	:	Case No. 16575 and 16738
MARVIN WHITTENBACK and	:	
JOHN JOSEPH PARRETT,	:	
Defendants-Appellants.	:	

APPELLANT'S REPLY BRIEF

APPEAL FROM THE JUDGMENT OF THE FOURTH
JUDICIAL DISTRICT COURT OF UTAH COUNTY,
HONORABLE GEORGE E. BALLIF, JUDGE.

ROBERT J. SCHUMACHER and
LYNN C. HARRIS

Utah County Legal Defender Assoc.
107 East 100 South, Room 29
Provo, Utah 84601

Attorneys for Appellants

ROBERT B. HANSEN

Utah State Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorney for Respondent

FILED

JUL 31 1980

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
vs.	:	Case No. 16575 and 16738
MARVIN WHITTENBACK and	:	
JOHN JOSEPH PARRETT,	:	
Defendants-Appellants.	:	

APPELLANT'S REPLY BRIEF

APPEAL FROM THE JUDGMENT OF THE FOURTH
JUDICIAL DISTRICT COURT OF UTAH COUNTY,
HONORABLE GEORGE E. BALLIF, JUDGE.

ROBERT J. SCHUMACHER and
LYNN C. HARRIS

Utah County Legal Defender Assoc.
107 East 100 South, Room 29
Provo, Utah 84601

Attorneys for Appellants

ROBERT B. HANSEN

Utah State Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorney for Respondent

TABLE OF CONTENTS

ARGUMENT:

I.	THE INITIAL ENCOUNTER BETWEEN APPELLANTS AND POLICE WAS A SEIZURE AND THEREFORE DESERVING OF FOURTH AMENDMENT PROTECTION . .	1
II.	REQUIRING APPELLANTS TO EMPTY THEIR POCKETS IS NOT AUTHORIZED UNDER TERRY AND WAS NOT A SEARCH INCIDENT TO A LAWFUL ARREST	2
III.	THE SEARCH OF THE AUTOMOBILE WAS A VIOLATION OF APPELLANTS' FOURTH AMENDMENT RIGHTS	6

CASES CITED:

Chambers v. Maroney, 399 U.S. 43 (1970)	7
Coolidge v. New Hampshire, 403 U.S. 443 (1971)	7
Harless v. Turner, 456 F.2d 1337 (10th Cir. 1972) .	8
Jones v. U.S., 362 U.S. 257 (1960)	7
Rakas v. Illinois, 439 U.S. 128 (1978)	6
Sibron v. New York, 392 U.S. 40 (1968)	4
Simmons v. U.S., 390 U.S. 389 (1968)	6
Terry v. Ohio, 392 U.S. 1 (1968)	1, 4
U.S. v. McCormick, 502 F.2d 281 (9th Cir. 1974) . .	8

IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent.	:	
vs.	:	Case No. 16575
	:	and 16738
MARVIN WHITTENBACK and	:	
JOHN JOSEPH PARRETT,	:	
Defendants-Appellants.	:	

APPELLANTS' REPLY BRIEF

I. THE INITIAL ENCOUNTER BETWEEN APPELLANTS AND
POLICE WAS A SEIZURE AND THEREFORE DESERVING
OF FOURTH AMENDMENT PROTECTION

The Respondent asserts that the initial encounter and questioning by the police did not rise to the level of a seizure and was not therefore worthy of Fourth Amendment protection. We reiterate that the Supreme Court in Terry v. Ohio, 392 U.S. 1 (1968) expressly reserved the question of what minimum intrusion is necessary to constitute a seizure.

We thus decide nothing today concerning the constitutional propriety of an investigative "seizure" upon less than probable cause for purposes of "detention" and/or interrogation. Obviously, not all personal intercourse between policemen and citizens involves

"seizures" of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a seizure has occurred. 392 U.S. 1, 19, n. 16.

To say that the conduct of the three officers involved was not sufficient show of authority to in some way restrain the liberty of the Appellants is to ignore the dynamics of the situation. This is not the case of a pedestrian policeman stopping a bystander for identification. The Appellants were the only ones in the laundromat. The police action was directed exclusively at them. The entrance of Officer Geslison was followed almost immediately by the arrival of two more cars with two more officers--a total of three patrolmen arriving separately within two minutes. (R.159: 19; 168: 19-20; 182: 17) That would seem to be a considerably greater show of authority than is ordinarily necessary to check I.D. To say that in such a situation one would feel himself free to either go or stay as he pleased is to ignore reality.

II. REQUIRING APPELLANTS TO EMPTY THEIR POCKETS
IS NOT AUTHORIZED UNDER TERRY AND WAS NOT A
SEARCH INCIDENT TO A LAWFUL ARREST

The Respondent contends that the search of the Appellants' persons in the laundromat by Officer Geslison was incident to a lawful arrest and therefore justified. Respondent's assertion that Appellant Whittenback had been arrested by Officer Mock prior to his being searched is based on a selective reading of the record and not

supported by the weight of the testimony.

The Respondent relies on Officer Geslison's testimony at the suppression hearing. Geslison testified that though the order to "empty your pockets" had been given previous to Officer Mock's entrance, Appellant Whittenback had not actually begun to do so until after Mock's announcement that they were under arrest. (R. 149) At the preliminary hearing, however, Officer Geslison testified:

Q (Mr. Schumacher): I understood that. You said that after all of these items had been collected, then Officer Mock arrested him.

A (Officer Geslison): Okay. What I had stated, Mr. Parrett had already emptied his pockets previous to that. As I asked Mr. Whittenback about that same time as I was moving over to the table, etc., etc. -- at about the same time that Officer Mock came in. He could have started to empty his pockets just before that, but like I just told you, I--he had questioned me and I told him to empty his pockets.

Officer Mock, who presumably would be in a better position to recall the exact sequence of his entrance and Appellant Whittenback's emptying his pockets, testified that Whittenback was in the process of carrying out the order when he came in:

Q (Mr. Schumacher): Did you hear Officer Geslison tell him to empty his pockets?

A (Officer Mock): No, I did not.

Q Was he emptying his pockets as you came in?

A Yes. (R. 185)

The Terry case as well as subsequent decisions made it clear that any search conducted as a part of a Terry stop must be limited to a procedure reasonably designed to discover weapons of assault.

A search for weapons in the absence of probable cause to arrest, however, must, like any other search, be strictly circumscribed by the exigencies which justify its initiation. [citation] Thus it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a "full" search, even though it remains a serious intrusion. 392 U.S. at 25-26

The officers here never suggested that the Appellants were carrying weapons. Nor was there anything in the conduct of the Appellants that would give rise to apprehension as to their own safety or the safety of others. What's more, the general order to "empty your pockets" is hardly the sort of "strictly circumscribed" measure the Court intended to allow.

The case of Sibron v. New York, 392 U.S. 40 (1968), decided the same day as Terry, considered many of the same issues presented in the present case. In Sibron, a uniformed police officer had been keeping the defendant under continual observation over a period of eight hours. During that eight hour period the officer saw the defendant converse with six or eight persons whom he (the officer) knew from past experience to be narcotics addicts. The defendant then entered

a restaurant where he spoke with three more known addicts. The patrolman entered the restaurant and told the defendant to come outside. Once outside, the officer said to Sibron, "You know what I am after." The defendant mumbled something and reached into his pocket whereupon the officer thrust his hand into the same pocket discovering several glassine envelopes of heroin. The Court said that the action taken by the police was illegal under the Fourth Amendment and reversed the conviction.

In the case of the self-protective search for weapons, he [the officer] must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous.... 392 at 64. Even assuming arguendo that there were adequate grounds to search Sibron for weapons, the nature and scope of the search conducted by Patrolman Martin was so clearly unrelated to that justification as to render the heroin inadmissible. The search for weapons approved in Terry consisted solely of patting the outer clothing of the suspect for concealed objects which might be used as instruments of assault. 392 at 65.

The search of the Appellants' persons was made prior to the time they were placed under arrest. There was no authorization for the search under Terry since there was no indication the Appellants were armed. In any case, the order to "empty your pockets" was beyond the scope of anything envisioned by Terry.

The Respondent now asserts that there was probable cause for the arrest before the search was begun. A finding of probable cause would have to be based on the observation of the two doing laundry late at night in an all-night laundromat that was open for business; that one of them

had bulging pockets and that two keys were lying on the floor; no machines appeared broken into; no alarms had sounded; no report had been made to police of machines being entered. All that appeared to the officers were persons suspected (not convicted) in the past of machine break-ins. Appellant contends that such a scanty combination of facts does not meet the necessary minimum of probable cause.

III. THE SEARCH OF THE AUTOMOBILE WAS A VIOLATION OF APPELLANTS' FOURTH AMENDMENT RIGHTS

The Respondent next contends that Appellant did not have standing under Rakas v. Illinois, 439 U.S. 128 (1978) to challenge the search of the automobile. In Rakas, a petitioner who was merely riding as a passenger in a car owned by another and claimed no interest in either the searched auto or the property seized was held to have no standing to make a Fourth Amendment challenge. The Court rejected the petitioner's suggestion that any time a search is directed at a particular individual he has standing to challenge its legality. Instead the Court said the inquiry should focus on the substantive question of whether there has been a violation of the individual's reasonable expectation of privacy.

The Appellants clearly had standing under pre-Rakas rules in that they claimed an interest in the goods seized. Simmons v. U.S., 390 U.S. 389 (1968). The holding in Rakas does not alter that result.

The facts in the present case are similar to the case of Jones v. U.S., 362 U.S. 257 (1960) which the Court in Rakas expressly reaffirmed. In Jones the defendant was at the time of the search the temporary but sole occupant of an apartment owned by a friend. The Court in Rakas said that the status gave him a reasonable expectation of privacy as to the apartment. Here the Appellants had temporary but exclusive use of an automobile owned by another. By contrast, the defendants in Rakas were merely passengers in the car driven by the owner. The Court seemed to indicate that even they would have had standing had they claimed an interest in the property seized. 439 U.S. at 142 n. 11. It seems clear that the Appellants had a reasonable expectation of privacy as to the car.

Respondent's argument, if carried not much further, would give a lessor of a car no standing to challenge the search of his property in that car owned by another.

The Respondent argues that it was not necessary for the police to secure a warrant to search the car because of the automobile exception to the warrant requirement. The Supreme Court cases of Chambers v. Maroney, 399 U.S. 43 (1970) and Coolidge v. New Hampshire, 403 U.S. 443 (1971) make it clear that what is commonly denominated the automobile exception is simply an example of an exigent circumstance that makes the securing of a warrant impracticable. The Court said in Coolidge, quoting in part from Chambers,

that "exigent circumstances justify the warrantless search of 'an automobile stopped on the highway, where there is probable cause, because the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained.' ... The word 'automobile' is not a talisman in whose presence the Fourth Amendment disappears." [Emphasis original]

Federal Appeals Courts' decisions make clear the necessity of exigent circumstances to justify the warrantless search of an automobile. In the case of Harless v. Turner, 456 F.2d 1337 (10th Cir. 1972) the Court held the warrantless search of a parked rape suspect's car invalid.

Coolidge makes it clear that the warrantless search is the exception rather than the rule and that these exceptions are jealously guarded. Furthermore, it is said in Coolidge that the burden is on those seeking exemption to show the need for it. 465 F.2d 1338.

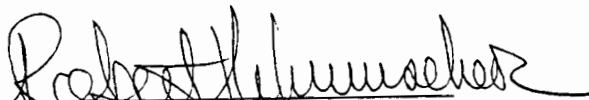
One situation the Courts have frequently recognized as not constituting an exigency that would allow the police to dispense with the securing of a warrant is the situation where the driver of the searched car is under arrest. In U.S. v. McCormick 502 F.2d 281 (9th Cir. 1974) the Ninth Circuit Court of Appeals said in a case similar to this one,

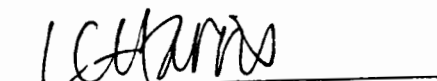
Six officers entered the house to arrest McCormick, and he was quickly handcuffed. Moreover, even if he could have gained access to his car, he could not have driven it away, because a police car was blocking the driveway. In Carroll and Coolidge terms, this automobile more resembled a house than a moving or mobile vehicle. Because there were no exigent circumstances at the time of the seizure, the

later search cannot be justified under Chambers v. Maroney. "No amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances,'" Coolidge v. New Hampshire, 403 U.S. at 468, 91 S.Ct. at 2039, and so the seizure here does not fall within the automobile exception to the warrant requirement. 502 F.2d at 287.

Likewise with the present case. The second sine qua non of the automobile exception was lacking; i.e. there were no exigent circumstances.

RESPECTFULLY SUBMITTED,


ROBERT J. SCHUMACHER,
Attorney for Appellant
Marvin Whittenback


LYNN C. HARRIS,
Attorney for Appellant
John Joseph Parrett

CERTIFICATE OF MAILING

I hereby certify that I mailed three (3) copies of the foregoing Appellants' Reply Brief to the Utah Attorney General, Robert B. Hansen, at 236 State Capitol, Salt Lake City, Utah 84114, this 30th day of July, 1980.

Dantelle Maynard