

1979

State of Utah v. Lester Ralph Romero : Brief of Respondent

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, :
-vs- : Case No. 16638
LESTER RALPH ROMERO, :
Defendant-Appellant. :

----- : -----
BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with the criminal offense of
Theft by Receiving, a second degree felony.

DISPOSITION IN THE LOWER COURT

Appellant was convicted at a bench trial on April
2, 1979. A Motion in Arrest of Judgment was heard and later
denied on May 17, 1979. On August 20, 1979, the appellant was
sentenced to one to fifteen years in prison which was stayed
pending a ninety day evaluation at the prison and further
stayed pending this appeal. The appellant was admitted to bail.

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmance of the trial court's
findings and its orders based thereon.

STATEMENT OF THE FACTS

Although respondent is in substantial agreement with appellant's outline of events relevant to this appeal, a number of omissions and distortions contained in appellant's Statement of Facts warrant attention.

First, appellant's account of the circumstances leading to the impounding of appellant's truck is misleading because it omits pertinent facts contained in the record. Appellant simply states that he refused to consent to a search of the truck he was driving, a deputy county attorney ordered that the truck be seized, and Investigator Collins impounded the vehicle and the documents it contained. In fact, Investigator Collins testified that in his attempt to determine ownership of the truck, he explained in detail to appellant the peace officer responsibility to dispose of the vehicle in accordance with its owners wishes (R. 109). Appellant then told Investigator Collins that the truck belonged to the Golden Circle Investment Corp., that Mr. Bill Hamilton should be contacted, but appellant could not supply a number at which Mr. Hamilton could be reached (R. 109, 110, 113). In accordance with standard procedure the vehicle was impounded.

Second, appellant's assertion that no impound inventory was made is erroneous. Investigator Collins testified that at the scene of the arrest he and Sargeant Harwood inventoried the

contents of the truck, describing specifically the papers taken with him for safekeeping and listing generically the items left in the rear of the vehicle (R. 113, 114). Investigator Collins later dictated a report containing the inventory list using the notes he made at the scene (R. 115). Investigator Collins stated that papers, documents, and items of apparent value were strewn across the front seat of the truck (R. 115, 116, 117). The defensive action of inventorying the contents of the truck was appropriate in light of Investigator Collins well-founded fear that he and his employer might be the target of false accusations of theft (R. 119). Investigator Collins action of opening the envelope offered as Exhibit 4 was motivated by the same desire to protect the owner, himself, and the County Attorney's Office (R. 124). It was apparent to Investigator Collins that the envelope contained a check or money order and under the circumstances the only reasonable course of action was to open the envelope and determine the exact value of its contents.

Third, appellant claims the search conducted by Investigator Collins was clearly investigatory in nature (App. brief p. 3). In support of this contention he offers the fact that Investigator Collins listed generically those items of little apparent value which he left in the truck. The fact that some miscellaneous tools, fishing gear, and

mechanical equipment were left in the truck becomes a hollow basis for appellant's argument when viewed in the light of Investigator Collins' testimony. The record reveals Investigator Collins was concerned only with protecting the owner's property from vandals and himself from accusations of theft (R. 241, 242). This singular motive was evidenced by the fact that he offered to return the seized papers to appellants' previous attorney, Mr. Bown, who corroborated this testimony (R. 263, 264).

Fourth, appellant's assertion that Investigator Collins "had no probable cause to believe that any of the items seized were contraband, instrumentalities, or evidence of an offense" misleads by innuendo. This representation implies that Investigator Collins must have had probable cause to conduct the search when in fact probable cause considerations are irrelevant to an inventory search.

Fifth, appellant claims information used by the county attorney's office to obtain a search warrant could have been gained only through access to privileged attorney-client conversation. Appellant moved to arrest judgment based on "newly discovered" information which would support this allegation. Appellant stated the newly discovered evidence was Mr. McLachlan's admission that he was the confidential informant who passed on information received

through access to privileged conversation (R. 225). Appellant never did present such testimony despite the fact that Mr. McLachlan was present and apparently willing to testify when the motion to arrest judgment was argued (R. 303).

Appellant's argument that information used to obtain the search warrant was gained in violation of an attorney-client privilege is clouded by appellant's own testimony. Appellant testified that he could have talked to "somebody" about the papers taken from the truck "at other times" (R. 160, 161).

POINT I

THE INVENTORY SEARCH OF APPELLANT'S
VEHICLE WAS REASONABLE AND THEREFORE
NOT A VIOLATION OF THE FOURTH AMENDMENT.

Appellant condemns as unreasonable the seizure of papers for safekeeping by officers conducting an inventory search of the vehicle appellant was driving at the time of his arrest. It is undisputed that the Fourth Amendment forbids unreasonable searches. However, courts have long recognized that inventory searches are reasonable and, therefore, an exception to the Fourth Amendment warrant requirement. This inventory exception was developed in order to insure protection of the owner's property, to protect the police against claims or disputes over lost or stolen property, and to protect the police from dangerous instrumentalities. South Dakota v.

Opperman, 428 U.S. 364, 49 L. Ed.2d 1000, 96 S.Ct. 3092 (1976).

In determining whether police have engaged genuinely in a caretaking search of an impounded vehicle, the United States Supreme Court in the Opperman case, supra, focused upon several factors as being dispositive of the issue. They are: the vehicle is lawfully impounded; the owner is not present or available to make other arrangements for the safekeeping of his belongings; the inventory is prompted by the presence in plain view of a number of valuables inside the vehicle; and that this standard procedure is not a pretext concealing an investigatory motive.

As the record in the instant case reveals, this test outlined in Opperman, supra, is easily satisfied. Testimony disclosed that appellant was under full custodial arrest pursuant to a felony warrant. Appellant disclaimed ownership of the vehicle and its contents and he could not locate an authorized agent of the corporate owner of the truck. Arrest officers relayed this information to a deputy county attorney who advised them to follow the standard procedure of impounding the vehicle. Investigator Collins testified that only after calling a tow truck to impound the vehicle did he realize the necessity of inventorying its contents. The judgment was made upon the observation of several papers and documents of apparent value strewn across the front seat of the truck.

During the inventory Investigator Collins found several bank checks drawn upon different accounts, one in the amount of over \$1,000.00. Investigator Collins also discovered an executed deed to real property, a title abstract, and a sealed addressed envelope. Close examination of the envelope revealed that it contained a check or money order. Investigator Collins testified that this discovery prompted him to open the envelope to determine the exact value of its contents. This action to protect the owner's property and to protect himself and his employer from subsequent allegations of theft was reasonable due to the ease with which an envelope could be opened.

Appellant cites United States v. Chadwick, 433 U.S. 1, 53 L.Ed.2d 538, 97 S.Ct. 2476 (1977), as controlling in the instant case. Chadwick involved the warrantless search of a double locked footlocker officers believed contained contraband. In Chadwick, supra, the Supreme Court stated that the fact that the footlocker was double locked indicated an expectation that its contents remain concealed from public view. This expectation of privacy could be violated only after officers had secured a search warrant. This singular consideration of Chadwick renders it easily distinguishable from the instant case which involved dual competing considerations. It is conceded that there is an expectation of privacy in sealed

envelopes. However, the record of the instant case reveals, unlike Chadwick, that the contents of the envelope were discernable upon outward examination. Investigator Collins saw through the envelope that it contained not a personal letter but a check or money order. This discovery diminished the importance of the privacy interest and emphasized the need to protect the arresting officers and department from subsequent accusations of theft. It also crystalized the need to safeguard the property. For unlike the situation in Chadwick, a thief could easily substitute an empty facimile for the envelope impounded or exchange the contents of the envelope leaving no sign of tampering. For example, the owner could have claimed that the money orders he found in the envelope upon its return were not those he originally placed in it which were of greater value. The police having impounded an item so easily tampered with would be helpless to refute such a claim.

The obvious inference to be drawn from appellant's argument is that Investigator Collins gave false testimony regarding the inventory nature of the search. Appellant alleged contrary to Investigator Collins' testimony, the search was merely a pretext concealing an investigatory police motive. The logic of this argument is seriously flawed. For if Investigator Collins had been willing to lie regarding the purpose of the

search he would also have lied about the very existence of the envelope. Such a lie would certainly have better served the alleged purpose of the search.

The questions of the reasonableness of the search and the veracity of the witness' testimony were resolved by the trial court. That ruling should not be upset unless persuasively shown to be in error. State v. Lopes, 552 P.2d 120 (Utah 1976). This standard for appellate review was elaborated upon by the Utah Supreme Court in State v. Criscola, 444 P.2d 517 (Utah 1968). In that case the Court stated:

Due to the responsibility of the trial court in controlling the admissibility of evidence, and his advantage position to pass on such matters, it is his prerogative to make this determination. For these reasons his ruling should be indulged with a presumption of correctness and should not be disturbed unless it clearly appears that he was in error.
[Citations omitted.]

Id. at 519.

Respondent submits that the inventory search was reasonable and, therefore the trial court's ruling should be upheld.

POINT II

THE AFFIDAVIT SUPPORTING THE SEARCH WARRANT CONTAINED A SUBSTANTIAL BASIS TO SUPPORT THE MAGISTRATE'S PROBABLE CAUSE DETERMINATION

Appellant contends Investigator Collins' affidavit

did not contain facts from which a magistrate could assess the credibility of the confidential informant and therefore it was inadequate to support a probable cause determination. This contention must be analyzed in the context of those Supreme Court cases which have defined probable cause for the purpose of obtaining a search warrant. Beck v. Ohio, 379 U.S. 89, 13 L.Ed.2d 142, 85 S.Ct. 223 (1964), established the proposition that only a probability, and not a prima facie showing, of criminal activity is the standard of probable cause. The Beck standard was affirmed in McCray v. Illinois, 386 U.S. 300, 87 S.Ct. 1056 (1967), which held that affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial. In United States v. Ventresca, 380 U.S. 102, 85 S.Ct. 741 (1965) the Supreme Court granted magistrates much leeway in making probable cause determinations. The Ventresca Court stated, "magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense." Id. at 112. Consistent with Ventresca, supra, was the earlier case of Jones v. United States, 362 U.S. 257, 80 S.Ct. 725 (1960). In Jones, supra, the Court held that an affidavit in support of a search warrant should be considered adequate if there is a "substantial basis" for crediting the hearsay it contains.

The Jones Court also noted that a magistrate's determination

of probable cause should be granted great deference by reviewing courts. Id. at 271.

In the context of these cases appellant's emphasis on the fact that the affidavit contained no averment that the confidential informant had furnished reliable tips in the past must be interpreted as an hypertechnical concern with the wording of the affidavit.

In support of his argument appellant cites the case of Spinelli v. United States, 393 U.S. 410, 21 L.Ed.2d 637, 89 S.Ct. 584 (1969), in which the United States Supreme Court applied and explained the test for probable cause announced in Aguilar v. Texas, 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509 (1964). These cases require that the affidavit contain information concerning underlying circumstances to allow the magistrate to judge the validity of the informant's conclusion and averments regarding past performance to support the reliability of an informants tip.

The first prong of this test is easily satisfied in the present case. The confidential informant stated that appellant told him a stolen black and silver semi-tractor truck was being kept at the ABC storage unit. Appellant was also linked to ABC through an envelope addressed to ABC containing money orders which was found in his vehicle at the time of his arrest. Additional information connecting

appellant to the stolen truck in the A.B.C. storage unit came from Mr. Ron Lyle an inmate at the Utah State Prison. Mr. Lyle admitted having stolen the semi-tractor at appellant's request. Mr. Lyle provided a detailed description of the truck including the alteration of its color which corroborated the confidential informant's statement. Mr. Lyle also placed the stolen truck in the A.B.C. storage unit ten months prior to the application of the warrant. An independent police investigation of the theft of the truck corroborated Mr. Lyle's statement. Finally, the owner of A.B.C. storage linked appellant to the storage unit through identification of the addressed envelope which was strikingly similar to those he usually received containing rent for the unit.

Mr. Lyle's statement against interest, corroborated by independent sources, in conjunction with the confidential informant's tip which was also supported by additional information provided a substantially detailed basis for crediting the hearsay contained in the affidavit. United States v. Harris, 403 U.S. 573, 580, 29 L.Ed.2d 723, 91 S.Ct. 2075 (1971). See also: State v. Fort, 572 P.2d 1387 (1977); State v. Treadway, 28 Utah 2d 160, 499 P.2d 846 (1972); and State v. Smelser, 23 Utah 2d 347, 463 P.2d 562 (1970).

Although the affidavit in the present case contains

no statement of prior reliability the United States Supreme Court in the Harris case, supra, observed that such statements were unnecessary since the inquiry as to probable cause concerns whether the informer's present tip was truthful or reliable. See also State v. Treadway, 28 Utah 2d 160, 499 P.2d 846 (1972).

In the present case the magistrate was presented with an affidavit containing a complex pattern of detailed corroborated information. Appellant attacks the sufficiency of the affidavit because it does not contain a statement regarding the past performance of the confidential informant or a statement of whether the named informant received a benefit in exchange for his information. In the Harris case, supra, the United States Supreme Court observed that neither statement urged as requisite by the appellant are necessary to a probable cause determination if a substantial basis for finding probable cause is evident. Respondent submits that the affidavit in question meets this standard.

POINT III

THE TRIAL COURT'S FAILURE TO COMPEL
DISCLOSURE OF THE IDENTITY OF THE
CONFIDENTIAL INFORMANT DOES NOT
CONSTITUTE REVERSIBLE ERROR.

The State has a privilege to refuse to disclose the identity of an informer unless the trial court finds that his identity has already been disclosed or disclosure is essential to assure a fair determination of the issues. Utah Rules of Evidence, Rule 36. The defendant has the burden of demonstrating that the informant would be a material witness on the issue of guilt. State v. Bankhead, 30 Utah 2d 135, 139, 514 P.2d 800, 803 (1973). Further, a defendant may not compel disclosure of an informant's identity to contest the probable cause for the issuance of a search warrant. Id. at 138, 514 P.2d at 802. Respondent avers that appellant has not carried his burden of showing that the informant was a material witness.

Appellant argues that he was prevented from raising a Sixth Amendment violation at the suppression hearing. In fact appellant was concerned at the hearing with challenging the validity of the search. In addition, there was ample testimony indicating that no Sixth Amendment violation had occurred. Investigator Collins testified that the source of the informer's tip was the appellant himself who told others

during a conversation at a trailer park that he had a stolen truck in storage at A.B.C. The informer was specifically told that privileged information was not wanted by the prosecutors office.

Most of the cases focusing upon Rule 36 have involved situations where disclosure is relevant and helpful to the accused's defense or is necessary for a fair determination of the issues. Courts have uniformly recognized:

An appellant seeking to overcome the state's policy of protecting an informant's identity, has the burden of proving that the informant is likely to have evidence bearing on the merits of the case. . . His burden extends only to a showing that, in view of the evidence, the informer would be a material witness on the issue of guilt which might result in exoneration and that nondisclosure of his identity would deprive the defendant of a fair trial.

State v. Tuell, 541 P.2d 1142, 1145 (Ariz. 1975). In the present case, appellant has not made any showing as to how the informant's testimony would have been material to the issue of appellant's guilt. In addition, appellant could easily have subpoenaed the person he felt was the informant as a witness if the informant's testimony would have helped appellant's defense. As the Supreme Court of Colorado recently stated:

. . . the accused is required to make at least a minimal affirmative

showing of the need for disclosure; and . . . a defendant's mere unsupported assertion that he desires disclosure is not enough. A defendant's speculations, without more, will not support a conclusion that the informant would be of any substantial assistance in his defense.

People v. Langford, Colo., 550 P.2d 329 (1976). See also State v. Bankhead, 514 P.2d 800 (Utah 1973).

Finally, and most importantly, it is clear from the record that appellant in fact knew the identity of the informant. Nevertheless, appellant did not call him to testify. Appellant's failure to call Mr. McLachlan is inconsistent with his present argument that Mr. McLachlan's testimony would have been relevant to his defense.

In the recent case of Lopez v. State, 574 S.W. 2d 563 (Tex. Cr. App. 1978), the court held that although normally disclosure would be required if the informant played a prominent part in bringing the offense about or was a material witness, where the defendant and his counsel know the identity of the informer and there is no indication that the defendant could not have produced the informant as a witness or that his testimony is unavailable, it is not error to refuse to compel disclosure. To the same effect is State v. Hull, 487 P.2d 1314 (Mont. 1971).

Respondent submits that the trial court's ruling not to disclose the identity of the confidential informant is not erroneous.

POINT IV

THE COURT BELOW PROPERLY DENIED APPELLANT'S MOTION TO ARREST JUDGMENT BECAUSE APPELLANT FAILED TO CARRY HIS BURDEN OF GOING FORWARD ON THE MOTION.

Appellant moved to arrest judgment based on "newly discovered" information. This information consisted of Mr. McLachlan's admission that he was the confidential informant who passed on information received from a privileged conversation (R. 225). Appellant never did present such testimony despite the fact that Mr. McLachlan was present and apparently willing to testify (R. 303).

Instead appellant presented testimony of Mr. Bown, appellants former attorney, indicating that appellant had discussed the contents of the A.B.C. storage unit with him in the presence of Mr. McLachlan. Mr. Bown's testimony is not relevant to the issue because he could not testify regarding additional conversations appellant may have had with other individuals. Appellant argues that the case of Black v. United States, 385 U.S. 26 (1966) and that of O'Brien v. United States, 386 U.S. 345 (1966) established a per se rule requiring reversal of any conviction if the case involved any breach of secrecy of attorney-client communications (App. brief p. 21). This argument is without merit. The United States Supreme Court in Weatherford v. Bursey, 429 U.S. 545, 51 L.Ed.2d 30, 90 S.Ct. 837 (1977) stated:

We cannot agree that these cases, individually or together, either require or suggest the rule announced by the Court of Appeals and now urged by Bursey. Both Black and O'Brien involved surreptitious electronic surveillance by the Government, which was discovered after trial and conviction and which was plainly illegal under the Fourth Amendment. In each case, some, but not all, of the conversations overheard were between the criminal defendant and his counsel during trial preparation. The conviction in each case was set aside and a new trial ordered. The explanatory per curiam in Black, although referring to the overheard conversations with counsel, did not rule that whenever conversations with counsel are overheard the Sixth Amendment is violated and a new trial must be had. Indeed, neither the Sixth Amendment nor the right to counsel was even mentioned in the short opinion. It is difficult to believe that the Court in Black and O'Brien was evolving a definitive construction of the Sixth Amendment without identifying the Amendment it was interpreting, especially in view of the well-established Fourth Amendment grounds for excluding the fruits of the illegal surveillance.

Id. at 432.

The Weatherford Court in discussing the contours of Sixth Amendment Rights stated that violation of those rights would occur only if there was tainted evidence, a communication of defense strategy to the prosecution, and a purposeful intrusion by an agent. The evidence in this case fell short of satisfying the Weatherford test.

The evidence presented by appellant at the hearing on his motion to arrest judgment failed to establish a Sixth Amendment violation. Appellant's failure to call Mr. McLachlan and his failure to present evidence in the light of testimony by the prosecution witness that no privileged information was obtained by the prosecution require affirmance of the ruling denying the motion to arrest judgment.

CONCLUSION

Respondent submits that the routine inventory search conducted by Investigator Collins was constitutional and therefore the prosecution was not obligated to ignore the nature of items impounded. In addition the search of the A.B.C. storage unit was made pursuant to a search warrant and was valid.

Appellant has failed to carry his burden in establishing that rulings of the lower court were erroneous. Therefore this conviction should be affirmed.

Respectfully submitted,

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