1980

The State of Utah v. Marcella Rae Griffin : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
v.	:	
MARCELLA RAE GRIFFIN,	:	Case No. 16669
Defendant-Appellant.	:	

BRIEF OF APPELLANT

An appeal by the defendant, MARCELLA RAE GRIFFIN, from the conviction and judgment of Aggravated Robbery in the District Court of the Third Judicial District, in and for the County of Salt Lake, State of Utah, the Honorable David B. Dee, Judge presiding.

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellant, MARCELLA RAE GRIFFIN, appeals from her conviction of the crime of Aggravated Robbery in the District Court of the Third Judicial District, in and for the County of Salt Lake, State of Utah, the Honorable David B. Dee, Judge presiding.

DISPOSITION IN THE LOWER COURT

Following trial by jury the Court entered judgment of guilty for the crime of Aggravated Robbery against the appellant, and subsequently committed appellant to the Utah State Prison for the term as provided by law.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the lower Court's conviction reversed and to have the case remanded to the Third Judicial District Court for a new trial, or in the alternative, to have the matter dismissed.

STATEMENT OF THE FACTS

On the 18th day of July, 1978 the patrons of a beauty salon known as the House of Sherman were robbed by two armed gunmen who were wearing disguises. Just previous to the time of the robbery various police officers had been following the black and silver Camaro containing four persons in the area of the House of Sherman. Shortly after arriving at that vicinity, police officers lost contact with the car. Subsequently, Detective Labrum of the Salt Lake County Sheriff's Office relocated the car and observed Marcella Griffin come from the area of the House of Sherman, carrying several purses. After contacting other law enforcement agents, Detective Labrum proceeded into the House of Sherman where he was confronted by an armed man who appeared to be black with an Afro, and disarmed Detective Labrum, and subsequently handcuffed him with his own handcuffs, and both robbers fled the area. Shortly thereafter law enforcement officers stopped the black and silver Camaro containing Cindy Vigil and Marcella Griffin, and located several of the purses taken in the robbery in the vehicle.

When Marcella Griffin was taken into custody, she subsequently gave police officers permission to enter her residence for the purpose of securing her children, and checking for the presence of two suspects. Mrs. Griffin was taken to the police station. Police officers proceeded to her house and waited for some time. Subsequently, the defendants Shawn Henline and Dennis Griffin were apprehended at the home of Marcella Griffin. An athletic type bag containing certain evidence was seized, a second vehicle was impounded and a search of that vehicle revealed additional evidence later identified as having come from the robbery of the House of Sherman.

ARGUMENT

POINT I

POLICE OFFICERS EXCEEDED THE SCOPE OF CONSENT GIVEN BY APPELLANT TO ENTER HER PREMISES FOR EXPRESS PURPOSES AND EVIDENCE OBTAINED FROM THE SEARCH WHICH EXCEEDED THOSE PURPOSES SHOULD HAVE BEEN EXCLUDED.

The law enforcement agents were allowed to enter the home of Marcella Griffin, appellant, to take care of the children, and to check to see if the suspects were in the home. After they had performed the function for which they had been given permission, they remained on the premises with the express intention of waiting for the arrival of the co-defendants, Dennis Griffin and Shawn Henline. The officers arrested the co-defendants and seized a duffle bag at the home of appellant.

The motion to suppress the duffle bag was denied and that evidence was used to convict appellant. It is the contention of the appellant that the actions of the law enforcement agents exceeded their authority and was in violation of the Fourth Amendment of the United States Constitution.

The Fourth Amendment of the United States Constitution proscribing unreasonable searches and seizures, together with the federal exclusionary doctrine, is obligatory upon the states through the Fourteenth Amendment to the United States Constitution. Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L.Ed. 2d 1081 (1961). The Fourth Amendment requires the issuance of a warrant based upon probable cause before a search may be conducted. However, there are exceptions to the warrant and probable cause requirements. A search conducted pursuant to a valid consent is constitutional permissible and is an established exception to the Fourth and Fourteenth Amendment requirements of both a warrant and probable cause. Schneckloth v. Bustamonte, 1973, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed. 2d 854; State v. White, 577 P.2d 552, (Utah, 1978). However, the practice of substituting consent for the authorization of a serach warrant is not viewed favorably by the courts, United States v. Dichiarinte, 445 F.2d 126, 129 (7th Cir., 1971), particularly where no reason is shown why a search warrant was not obtained. United States v. Arrington, 215 F.2d 630, 637 (7th Cir., 1954). See also

Catalanotte v. United States, 208 F.2d 264, 268 (1953), where the Sixth Circuit Court expressed a similar sentiment. The United States Supreme Court has stated that "police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure." Terry v. Ohio, 392 U.S. 1, 20, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968). The Tenth Circuit Court, in setting out the specifics necessary to sustain the Government's burden to establish justification for a warrantless search based on consent, stated that "the courts will indulge every reasonable presumption against the waiver of fundamental constitutional rights", and there must be convincing evidence that such rights were waived. Villano v. United States, 310 F.2d 680, 684 (10th Cir., 1962).

Thus, the State has the burden of showing that the accused's rights were not violated by reason of an improper search. This extends not only to the validity of the consent but to the scope of the consent as well. Appellant contends that police officers exceeded the scope of the consent given them to search her residence, and the State has failed to sustain the burden that it acted within the scope of consent. The Tenth Circuit Court applied the Villano criteria in United States v. Abbot, 546 F.2d 863 (1977), to determine that the government failed to show that they had not improperly searched beyond the scope of the consent given by the accused's wife. The defendant's conviction was reversed with directions

to sustain the motion to suppress. The Seventh Circuit has also stated the rule that the government has the burden of showing that it acted within the scope of defendant's consent in United States v. Dichiarinte, supra, a leading case on consent searches. Accord, State v. Koucoules, 343 A.2d 860 (Mo., 1974).

The rule regarding the scope of consent searches is stated generally:

> When the police are relying upon consent as the basis for their warrantless search, they have no more authority than they have been given by the consent. It is thus important to take account of any express or implied limitations or qualifications attending that consent which establishes the permissible scope of the search in terms of such matters as time, duration, area, or intensity. LaFave, Search and Seizure: A Treatise on the Fourth Amendment (1978) Vol. 2, §8.1 Consent Searches, p. 624. (Emphasis Supplied)

Though consent can legitimize what would be an otherwise illegal and unreasonable search, the search is reasonable only to the extent that the accused has consented. This rule is recognized and applied in three of the leading consent search cases. In McNear v. Rhay, 398 P.2d 732 (Wash., 1965), it was held that a search which exceeds the scope of the consent is unreasonable and in violation of defendant's constitutional rights. The Court determined that the evidence procurred as a result of the unreasonable search should be suppressed. The defendant in McNear was arrested for shoplifting. After he was booked, he was asked to sign a consent form which, in broad terms, granted to the police the authorization to search

his apartment for stolen goods. They discovered no stolen goods, but did discover a marijuana cigarette. Officers from the narcotics squad arrived shortly thereafter, and after confirming the content of the cigarette as marijuana, a search for additional narcotics began. The Court, in determining that the search for narcotics was unreasonable because it was beyond the scope of consent, stated:

> In this respect, the testimony is undisputed that the official request for the consent to search was predicated solely upon a belief that stolen property, in the nature of "shoplifted" articles, would be found. Petitioner was so informed by a member of the larceny detail and signed the consent with that understanding. Under such circumstances, the consent to search, which under any circumstances amounts to no more than a waiver of a search warrant, was limited in its scope, despite the all-encompassing language thereof. It would not and could not support a general exploratory search or seizure. 1 Varon, Searches, Seizures and Immunities, Ch. IV, §3(c), p. 231, 398 P.2d at 738. (Emphasis Supplied)

The scope of a consent search is limited much like a search warrant is limited. Police officers are only allowed to search for those items listed in the warrant. In the case of a consent search, where the request for consent is predicated on the search of specific items, the police officers are not authorized to search further and conduct a "general exploratory search." The Seventh Circuit Court, in United States v. Dichiarinte, supra, has also noted the parallel between a search warrant and a consent search in terms of the limitations

imposed on both:

> A defendant's consent may limit the extent or scope of a warrantless search in the same way that the specifications of a warrant limit a search pursuant to that warrant. 445 F.2d at 129.

Additionally, the Court continued:

> Our holding that the search was unreasonable because it went beyond the scope of defendant's consent would be the same if the agents had conducted the search under a search warrant. . . 445 F.2d at 130.

The Court in State v. Koucoules, 343 A.2d 860 (Mo., 1974), determined from defendant's words and actions that she placed no limitations on her consent to search and the search that followed was well within the broad scope of consent which defendant impliedly defined. In that case, defendant called police officers to her home where they discovered her husband's body with a bullet wound in the head. Officers asekd defendant's permission to search the home and she consented. Defendant was not a suspect at the time, and hence imposed no limitations on the search. In fact, she left with friends while the police officers were searching, a fact the Court read as her indifference to the presence of the police in her home. In view of her indifference, the Court concluded her consent was broad and unlimited. The Court noted, citing several cases, the rule that "the scope of a consent search is limited by the bounds, and determined by the breadth, of actual consent itself." General and broad consent has been

found to exist when defendant, in response to a request by police to simply search, gives authorization to "look around". Lamb v. State, 516 P.2d 1405 (Nev., 1973), "go ahead and find it" (stolen property), State v. Rye, 471 P.2d 96 (Wash., 1970), or "be my guest", State v. Johnson, 427 P.2d 705 (Wash, 1967). Note, however, that is all these cases, the police officers made no representations about the specific objects or purpose of their search. Ordinarily, a limitation is not expressly stated by the consenting party. Rather it arises by implication from the fact that the consent is being sought for a particular purpose. The Courts will look at the facts and circumstances to determine if they give rise to a limit by implication. McNear v. Ray, supra, State v. Koucoules, supra. When a purpose is included in the request, then the consent must be construed as authorizing only the intensity of police activity necessary to accomplish the stated purpose. In United States v. Dichiarinte, supra, the Court so held, stating:

> The evidence at the suppression hearings contains repeated reference to the agents interest in narcotics; and there was no indication that they desired to look for anything other than narcotics themselves . . . Under these circumstances, defendant's statement that the agents could "come over to the house and look"must be taken to mean at most that they might come and conduct only such a search as would be necessary to establish whether he had any narcotics. Government agents may not obtain consent to search on the representation that they intend to look only for certain specified

items and subsequently, use that consent as a license to conduct a general exploratory search.
445 F.2d at 129 (Emphasis Supplied)

The effect of this is that the police officer himself may limit the scope of the search and the defendant consents only to the extent that the police officer has indicated in his request. In Dichiarinte, the defendant consented to a search of his home in response to a police inquiry whether he had any narcotics. The police, in the course of their search, opened and read incriminating documents which led to defendant's conviction for income tax evasion. The Seventh Circuit Court held that the evidence should have been suppressed.

The Tenth Circuit Court in United States v. Abbott, supra, viewed the surrounding facts and circumstances to find an implied limitation on defendant's wife's consent to search. As stated above, defendant does not ordinarily expressly limit his consent, however, the facts and circumstances must be viewed to determine whether a limitation has arisen by implication.

Applying the preceding case law to the facts of the instant case, the appellant contends first, that assuming that the consent was valid, it was nonetheless limited. The limitation on the scope of the consent search arose by implication. The officer asked if the police officers could enter the Griffin home for two distinct purposes, and Mrs.

Griffin, the appellant, answered in the affirmative. The police officer himself limited the scope when she asked for permission to enter her home. Police Officer Carl Voyles, Salt Lake City, Police Department, testified:

> A. At this time [after Ms. Griffin's arrest just outside her home] I was informed that there was a problem of children in the home, these children being hers. And I asked her at this time if we could go to her home, obtain the children for safekeeping, and also, make a search for the suspects in the situation.
>
> Q. What was her response?
>
> A. She indicated, yes. (T. 846).

The officer asked for entry into the home for two express purposes. First, to remove the children from the home for safekeeping and second, as Police Officer Voyles stated on direct examination "to see if the suspect Henline was still in the house and to make the area safe." (T. 851). Appellant consented to an entry into the privacy of her home for those two purposes. Once those purposes were accomplished, the police officers had no further authorization to search. Consequently, their subsequent seizure of the duffle bag was unreasonable and the trial court should not have denied defendant's motion to suppress. (T. 865).

The case law requires that the surrounding facts and circumstances be viewed to determine if there is in fact, a limit on the scope of the consent search. In addition to Police Officer Voyles limiting the scope of search in his request, there is also the fact that appellant, once arrested,

was concerned with the welfare of her children. Thus, when asked if the children could be removed, she would, of course, consent to that. The record shows that appellant herself understood her consent as limited for purpose of entering the home to get her children (T. 835). But even assuming that the officer also requested to search for the suspects and make the area safe, the co-defendant probably, and reasonably, concluded that when the officers entered the home for the children, they might look for the suspects as well, since they were already on the premises and could not ignore them once they were there. Appellant consented then to a single entry on the premises for those two purposes. She was arrested and being taken to jail, therefore, it is unlikely that she was indifferent or consenting to the police officers' extended stay on her premises. The police officer's took the appellant's limited consent and used it as a license to conduct what amounts to a surveillance and a general exploratory search. Police officer Voyles limited the scope of the consent search (T.846, 858). He admitted that a search for evidence of the robbery or any other search except that directed to determine if the suspects were in the home was a "different thing". Voyles also testified that they did not have permission to search the home for items as evidence of robbery. (T. 848-850). Officer Kenneth L. Thirsk, of the Salt Lake City Police Department, later testified that he arrived at the premises after it had already been entered and that he then made the decision to remain on the premises

(T. 858). He also testified that Detective Darrell M. Ondrak did not inform him of the limited permission to enter the home (which police officers Voyles had previously obtained from Ms. Griffin) (T. 850). Thirsk also testified that they waited an hour and a half for the suspects to return (T. 860). In other words, they were no longer searching for the purposes for which consent was given. That search had ended once it was determined that the suspects were not in the home. The police officers continued presence on the premises and subsequent seizure of the duffle bag were actions beyond the actual consent given. Thirsk also testified that he directed Officer Voyles to go to the jail and obtain a written consent from appellant. Thirsk interpreted that request for written consent as a "verification" of the previous oral consent (T. 861). Yet Officer Voyles, the police officer who obtained and limited the consent to enter the premises interpreted the request for a written consent as a request to search the appellant's home - a search that had <u>not</u> been previously consented to (T. 850, 851). One officer received limited consent while another officer interpreted that consent to allow a general,exploratory search. Then the State contends that the officers wanted to verify that search in writing when, in viewing the inconsistent testimony of the officers, they were, in fact, seeking a consent for a search already conducted, but in excess of the consent given.

The rule of law is that the State must carry the burden of proving with clear and convincing evidence that the

search and seizure of evidence does not exceed the scope of consent. Appellant contends that the State has not met this burden. The State has offered the testimony of two officers which is conflicting in terms of what the scope of consent was. The subsequent interpretation of the consent obtained is not controlling, however. What is controlling is the representation made by the officer requesting the search and the appellant's consent to that limited search. The officers admittedly remained on the premises after the search was made therefore, beyond the scope of the consent. The seizure of the duffle bag during the time the officers were illegally on the premises was unreasonable and should not have been allowed into evidence in violation of the appellant's constitutional right against unreasonable searches and seizures.

The trial judge concluded that the motion to suppress should be denied because the seizure of the duffle bag was incident to arrest of Shawn Henline and Dennis Griffin, co-defendants in this case. The judge, however, failed to address the question of the scope of consent. As appellant contends above, since the scope of the consent was exceeded, any seizure after that was unreasonable and the evidence procurred from the illegal presence on the premises is "tainted" with illegality and hence should not be admissible. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Wong Sun v. United States, 371 U.S. 471 (1963). A subsequent

arrest should not be used to try to validate the seizure that was initially illegal.

CONCLUSION

For the reasons set out in the petition above, the appellant asserts that the conviction should be reversed, or in the alternative, the appellant should be granted a new trial.

Respectfully submitted,

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