

1989

Utah v. Palmer : Reply Brief

Utah Court of Appeals

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BRIEF

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

DOCKET NO. 890583-CA

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
RICKY PALMER,	:	Case No. 890583-CA
Defendant/Appellant.	:	Priority No. 2

REPLY BRIEF OF APPELLANT

Appeal from a judgment and conviction for Retail Theft, a third degree felony, in violation of Utah Code Ann. § 76-6-602(1) (1953 as amended), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Leonard H. Russon, Judge, presiding.

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COURT OF APPEALS

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
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INTRODUCTION

Appellant relies on his opening brief and refers this Court to that brief for the statements of jurisdiction, the issues, and the case.

STATEMENT OF THE FACTS

The State is correct that Mr. Palmer was placed under arrest and given his Miranda warnings prior to being x-rayed. The first sentence in the second full paragraph of the fact statement on page 6 of Appellant's opening brief should be amended to read: "The officers transported Mr. Palmer to the Salt Lake County Jail and placed him in an isolation cell."

Mr. Palmer takes issue with the State's claim that "Mayo's testimony is most fairly interpreted as indicating that a warrant could be obtained in no less than two hours." Appellee's Brief at 4. Sergeant Mayo actually testified that "[t]hey have sped up the procedure [for obtaining telephonic warrants]" and that he assumed he could obtain one "within two hours." T 40-1. See Addendum A for

transcript of testimony at issue.

This Court's determination of the issues raised in this case is a mixed question of law and fact. Although Mr. Palmer did not specifically attack the trial court's factual determinations in his opening brief, to the extent that such factual determinations are "clearly erroneous," they must be discarded by this Court in assessing the legal conclusions. See State v. Johnson, 771 P.2d 326 (Utah App. 1989), cert. granted, ____ P.2d ____ (Utah 1989).¹ An example of one such "clearly erroneous" finding is the trial court's determination that "it would have taken a minimum of two hours to obtain a search warrant." T 77. As set forth above, Sgt. Mayo testified that he could have obtained a search warrant within two hours. T 40-1. This testimony establishes that it would have taken a maximum of two hours to obtain a warrant.

Other than the clarifications set forth above, Appellant relies on the Statement of Facts contained in his opening brief at 2-6.

SUMMARY OF THE ARGUMENT

Defense counsel relied heavily on Schmerber v. California, 384 U.S. 757 (1966), in his argument in the trial court and argued all three prongs of the Schmerber test. He presented evidence that

¹ In the statements made by the trial court and attached as an addendum to the State's brief, the trial judge appears for the most part to be reiterating testimony rather than making formal findings.

the test was not a reasonable method nor done in a reasonable manner. The State responded to the reasonable means argument by arguing that the x-ray was a reasonable method done in a reasonable manner. The trial court ruled on the prong. Under such circumstances, the State's position that Appellant failed to preserve his argument that the x-ray was not conducted in a reasonable manner is without merit.

The State concedes that the trial court's depiction of exigent circumstances is "unique" but asks this Court to expand the concept beyond its traditional confines. The State offers no rationale for such an expansion. The exigent circumstances rationale would swallow the rule if expanded to this situation.

The inevitable discovery doctrine is not applicable to the circumstances of this case. An independent investigation which would have led to the recovery of the ring was not in place when the x-ray was taken, nor would routine procedures at the jail have led to the discovery. Applying the doctrine under these circumstances would widen the exception to cover almost any search.

ARGUMENT

POINT I: THE WARRANTLESS X-RAY OF APPELLANT VIOLATED THE FOURTH AMENDMENT.

The State agrees that taking an x-ray is the type of bodily intrusion to which the fourth amendment is applicable and that the analysis set forth in Schmerber v. California, 384 U.S. 757 (1966), is applicable to the instant case. Appellee's Brief at 5-6.

A. X-RAYING MR. PALMER UNDER THE CIRCUMSTANCES OF
THIS CASE WAS NOT A REASONABLE METHOD NOR WAS IT
DONE IN A REASONABLE MANNER.

Although the State has chosen not to respond directly to Mr. Palmer's argument regarding this prong of the Schmerber test, the State's lack of response by no means removes this issue from this Court's review. See Appellee's Brief at 6. As Mr. Palmer set forth in his opening brief at 10, 12 and 21, one of the three prongs of the Schmerber test requires that the method chosen be reasonable and that the test be conducted in a reasonable manner. The State agrees that Schmerber is applicable to the instant case and agrees that this prong is one aspect of the Schmerber test. Despite the fact that Appellant relied extensively on Schmerber in the trial court, presented evidence of the unreasonable method and manner of conducting the x-ray to the trial court, specifically addressed that prong in argument, albeit briefly, and received a ruling from the trial judge as to that prong, the State refused to respond directly to the serious claims raised by Mr. Palmer regarding the procedure utilized, claiming instead that the argument regarding this prong is expanded on appeal, was not raised in the trial court, and should not be considered by this Court.

Although the State's waiver argument has no basis in the context of this case, Mr. Palmer is compelled to briefly address it.

First, defense counsel extensively relied on Schmerber and the three-prong test set forth therein. T 63. He specifically articulated the reasonable method and manner test.

The first is the [methods] used to effectuate the search must be reasonable. In Schmerber, there was a blood test, hospital conditions, that sort of thing. I would simply submit it on the evidence presented.

T 63. Defense counsel had already presented evidence that x-rays were dangerous. T 53-54. He had also presented evidence that Appellant was physically restrained, pinned against a wall by three officers, grabbed at the throat by one officer while the other two held him, moved him toward the table, and physically held him down on the table while he struggled to get away. T 51-3.²

In the interest of saving time, avoiding repetition, and not belaboring the obvious, lawyers often raise an issue for a trial or appellate court, then submit it on the evidence, briefs or argument already presented. Submission of an issue does not mean, as the State seems to contend, that the lawyer concedes the issue does not have merit, is waived, or even that it is weak. It simply means that counsel will not present further argument on that issue

² In responding to defense counsel's argument regarding this prong of the Schmerber test, the prosecutor stated:

First of all, the reasonable methods have been used. I submit that in the medical environment, the doctor looking at him first . . .

.

I think the x-ray is a reasonable method to be used. There is no giving of Ipecac syrup making him regurgitate. That is a violation, I think, of due process. I think the case is about that. That is unreasonable but an x-ray is a minimal intrusion.

T 69. Hence, the prosecutor addressed both the manner and method employed.

and will submit it to the Court for the Court's decision.

If this Court were to accept the State's argument that the issue is waived in this context, trial courts will be deluged with endless arguments from counsel who is worried he or she has not said enough. The State's argument that trial counsel did not elaborate enough to preserve his argument ignores the practical realities of the trial court where, at times, an issue has been fully presented and the judge is eager to move on; a wise lawyer will submit his issue under such circumstances.

The State relies on State v. Carter, 707 P.2d 656, 660 (Utah 1985), for its position that this Court should not consider the argument as to this prong. Carter is easily distinguishable from the instant case.

In Carter, the defendant argued in the trial court that the officers did not have grounds to frisk him because there were not reasonable grounds to believe he was armed and dangerous. 707 P.2d at 659. On appeal, the defendant raised the additional argument, which had not been mentioned in the trial court, that the warrantless search of his backpack was invalid because it was not done incident to arrest. This second argument required a different legal analysis and a focus on different facts than the first argument.

By contrast, as the State points out in its brief (State's Brief at 1), "[t]he sole issue" presented in this case is whether the x-ray search was unlawful, requiring suppression of the ring and x-ray. Counsel relied on Schmerber and raised the issue regarding

this prong. This was sufficient to preserve the issue.

In addition to counsel adequately raising the issue, the trial judge issued a ruling on this prong. T 79-80. While it might be appropriate in some circumstances to find waiver where the trial judge has not had an opportunity to analyze the facts and law regarding a certain issue, where a trial judge has in fact had such an opportunity and actually issued an order, no rationale for finding waiver exists.

On appeal, counsel for Mr. Palmer simply developed an argument which had been raised in the trial court. Although the opening brief broke the issue down into two subcategories-- (1) whether the method itself was reasonable and (2) whether the manner in which it was conducted was reasonable--the two subcategories actually make up one prong of the Schmerber test. This prong was raised, and evidence was introduced and submitted; the issue was sufficiently preserved for appeal.³

**B. TRADITIONAL EXIGENT CIRCUMSTANCES DID NOT EXIST
IN THIS CASE AND THIS COURT SHOULD NOT EXPAND THE
EXCEPTION FOR EXIGENT CIRCUMSTANCES.**

The State acknowledges in its brief at 12 that the facts in this case do not fall within the realm of traditional exigent circumstances. The State points out that "[t]his is so because the

³ Mr. Palmer refers this Court to his opening brief at 21-26 for his substantive argument as to the serious violation which occurred in this case when a bodily intrusion search was conducted in an unreasonable manner by an unreasonable method.

exigent circumstances identified by the trial court involve the possible destruction or concealment of evidence not necessarily thought to be in the place to be searched--i.e., the interior of the defendant's body." State's Brief at 12-13.

The State acknowledges further that the rationale in People v. Williams, 510 N.E.2d 445 (Ill. App. 1987), regarding what constitutes exigent circumstances is "unique" and that the question of whether exigent circumstances existed in this case "is admittedly a close one" (State's Brief at 14, 15) but asks this Court to expand the concept of exigent circumstances beyond its traditional scope to include the circumstances of this case.

The State, however, offers no rationale in support of such an expansion, other than the argument that a single appellate court in Illinois expanded the concept in such a fashion. This is not sufficient to demonstrate the appropriateness of widening the concept beyond its traditional confines. In addition, it fails to address the concerns articulated by Mr. Palmer in his opening brief at 15-16 that such an expansion of the concept of exigent circumstances would swallow the rule and lead to a finding of exigent circumstances in almost every search.⁴

In State v. Larocco, Case No. 870412 (filed May 30, 1990),

⁴ In United States v. Gorski, 582 F.2d 692, 694 (2d Cir. 1988) (cited by the State on page 18 of its brief), the Court stated:

Exigent circumstances are one of the few "jealously and carefully drawn" exceptions to the need for a search warrant.

the Utah Supreme Court emphasized the importance of simplifying search and seizure rules. Larocco, slip op. at 15. The Court further emphasized that Article I, § 14 of the Utah Constitution requires a warrant unless traditional exigent circumstances exist. The Court stated, "warrantless searches will be permitted only where they satisfy their traditional justification, namely, to protect the safety of police or the public or to prevent the destruction of evidence [citation omitted]." Larocco, slip op. at 16. The Court continued by quoting Justice Zimmerman's concurring opinion in State v. Hygh, 711 P.2d 264, 272 (Utah 1985):

Once the threat that the suspect will injure the officers with concealed weapons or will destroy evidence is gone, there is no persuasive reason why the officers cannot take the time to secure a warrant. Such a requirement would present little impediment to police investigations, especially in light of the ease with which warrants can be obtained under Utah's telephonic warrant statute, U.C.A., 1953, § 7-23-4(2) (1982 ed.).

Larocco, slip op. at 16.

In the face of the Utah Supreme Court's recent attempt to simplify search and seizure law and its restriction of exigent circumstances to the "traditional justification," there is no basis for this Court to expand the concept of exigent circumstances to fit the circumstances of the present case.

C. THERE WAS NOT A CLEAR INDICATION THAT THE RING WOULD BE FOUND INSIDE MR. PALMER.

Mr. Palmer's argument regarding this prong of the Schmerber test is adequately argued in Appellant's opening brief at 18-21.

POINT II. THE "INEVITABLE DISCOVERY" ARGUMENT DOES NOT MAKE THIS OTHERWISE ILLEGAL SEARCH LAWFUL.

In his arguments in the trial court, the prosecutor focused on exigent circumstances as "what this case hinges on." T 69. Without developing any argument or citing any case law, the prosecutor did briefly state that "there is almost an inevitability of discovery." T 71. The trial court did not address the inevitable discovery argument in its ruling.

On appeal, the State contends that the officers would have inevitably discovered the ring and that even if this Court deems the search illegal, the evidence nevertheless would be admissible.

In Nix v. Williams, 467 U.S. 431 (1984), the United States Supreme Court refused to suppress evidence which was obtained in violation of the defendant's sixth amendment right to counsel, reasoning that the evidence would have inevitably been discovered. The Court reached its decision by relying on the facts in the record which established that search parties were already looking for the body and had approached the actual location of the body. Nix, 467 U.S. at 391. As Justice Brennan pointed out in his dissent,

the Court concludes that unconstitutionally obtained evidence may be admitted at trial if it inevitably would have been discovered in the same condition by an independent line of investigation that was already being pursued when the constitutional violation occurred.

Id. at 459 (emphasis added). Justice Stevens, in his concurrence, also focused on the necessity of having the independent line of investigation in place for the inevitable discovery doctrine to apply.

The majority is correct to insist that any rule of exclusion not provide the authorities with an incentive to commit violations of the Constitution. Ante, at 445-446, 81 L Ed 2d, at 388-389. If the inevitable discovery rule provided such an incentive by permitting the prosecution to avoid the uncertainties inherent in its search for evidence it would undermine the constitutional guarantee itself, and therefore be inconsistent with the deterrent purposes of the exclusionary rule [footnote omitted]. But when the burden of proof on the inevitable discovery question is placed on the prosecution, ante, at 444, 81 L Ed 2d, at 387-388, it must bear the risk of error in the determination made necessary by its constitutional violation. The uncertainty as to whether the body would have been discovered can be resolved in its favor here only because, as the Court explains ante, at 448-450, 81 L Ed 2d, at 390-391 petitioner adduced evidence demonstrating that at the time of the constitutional violation an investigation was already under way which, in the natural and probable course of events, would have soon discovered the body.

Id. at 456-7 (emphasis added). Hence, although in Nix v. Williams the Court did not articulate the precise parameters of the inevitable discovery doctrine, it did require that an independent line of investigation be in place at the time the constitutional violation occurred.

Various commentators and courts have criticized the application of the inevitable discovery doctrine and cautioned that it must be strictly applied so that police misconduct will not be sanctioned and the deterrence rationale of the exclusionary rule can remain effective. See 4 LaFave, Search and Seizure, § 11.4(a) at 381-3 (2d ed. 1987).

As LaFave notes:

As one commentator put it:
Such a rule is completely at odds with the purpose of the exclusionary rule. If the police will only

be deprived of that evidence which the defendant can show they would not have been able to obtain had they not engaged in the illegality, they will in no way be deterred from such conduct; all they will stand to lose is what they would not have otherwise had and they might gain some advantage if something slips by. Moreover, the illegal route is often faster and easier than the legally required route [footnote omitted].

Id. at 381. LaFave agrees that the concerns are legitimate but believes that the argument is "directed not so much to the rule itself as to its application in a loose and unthinking fashion." In his discussion of the appropriate application of the rule, LaFave suggests that the rule should be applied in a manner so as not to encourage "unconstitutional shortcuts" and that courts should be "extremely careful not to apply the 'inevitable discovery' rule upon the basis of nothing more than a hunch or speculation as to what otherwise might have occurred." Id. at 383.

Various courts have ruled that the inevitable discovery doctrine is not applicable "where its use would, as a practical matter, operate to nullify important Fourth Amendment safeguards." LaFave Supp. p.31. In People v. Knapp, 422 N.E.2d 531 (N.Y. App. 1981), decided prior to Nix, the Court refused to find that the evidence would have inevitably been discovered, pointing out that if it were to apply in that case,

[E]very warrantless nonexigent seizure automatically would be legitimatized by assuming the hypothetical alternative that a warrant had been obtained.

In Commonwealth v. Benoit, 415 N.E.2d 818 (Mass. 1981), the Court "declined[d] to apply the rule in a situation where its effect would be to read out of the Constitution the requirement that the

police follow certain protective procedures--in this case, the warrant requirement of the Fourth Amendment. [citation omitted]." Id. at 823. See also State v. Johnson, 301 N.W.2d 625, 629 (N.D. 1981) ("If the inevitable discovery theory applied when a short cut was taken, . . . the net result would be that the magistrate's determination of probable cause as required by the fourth amendment would be eliminated for all practical purposes.").

In the present case, application of the inevitable discovery rule would serve to "nullify important Fourth Amendment safeguards" and encourage "unconstitutional shortcuts." In all cases where officers seek to do a bodily intrusion search of an in-custody defendant, the State could argue that the person could have been placed in an isolation cell and the evidence eventually obtained. Allowing officers to use evidence obtained from a bodily intrusion search where the kicking defendant was held down on the table would completely undermine the deterrence rationale of the exclusionary rule. In the future, officers would commit the unconstitutional bodily intrusion because it was faster and easier than placing the defendant in isolation or obtaining a warrant, then argue for admission of the evidence saying "we would have done it the right way and gotten the evidence anyway." The deterrence rationale requires that the inevitable discovery doctrine not be applied in this case.

Where the rule is applicable, Nix v. Williams appears to limit relief under the rule only to situations where an independent investigation which was already in place would have led to the

discovery of the evidence. Nix, 467 U.S. at 445-6, 456-7, 459. In United States v. Satterfield, 743 F.2d 827, 846 (11th Cir. 1984), the Court pointed out that "if evidence is obtained by illegal conduct, the illegality can be cured only if the police possessed and were pursuing lawful means of discovery at the time the illegality occurred" (emphasis added). The Court noted that this requirement is "sound" because "a valid search warrant nearly always can be obtained after the search has occurred, [and] a contrary holding would practically destroy "the warrant requirement."

Since Nix was decided, both the Second and Ninth Circuit Courts of Appeal have extended the rule to include a requirement that either an independent investigation is in place or invariable, routine procedures would have unearthed the evidence. See United States v. Andrade, 784 F.2d 1431, 1433 (9th Cir. 1986) ("routine booking procedure and inventory would have inevitably resulted in discovery of cocaine"); United States v. Gorski, 852 F.2d 692, 696 (2d Cir. 1988) (discovery not inevitable since the "record reveals no evidence that [inventory] searches were an invariable, routine procedure in the booking and detention of a suspect at the particular FBI office involved"); United States v. Ramirez-Sandoval, 872 F.2d 1392, 1399 (9th Cir. 1989) ("[T]his circuit does not require that the evidence be obtained from a previously initiated, independent investigation. [citation omitted]. The government can meet its burden by establishing that, by following routine procedures, the police would inevitably have uncovered the evidence. [citation omitted].").

In Ramirez-Sandoval, the Court focused on the evidence which was present in the district court and held that although the officer could have questioned the individuals in the van, the government failed to prove by a preponderance of the evidence that it would have done so. The Court pointed out that the officer's testimony contained "no suggestion that he intended to question the occupants of the van, and no evidence to that effect was introduced in the hearing." 872 F.2d at 1400. See also LaFave at 384 ("The significance of the word 'would' cannot be overemphasized. It is not enough to show that the evidence 'might' or 'could' have been otherwise obtained. Once the illegal act is shown to have been in fact the sole effective cause of the discovery of certain evidence, such evidence is inadmissible unless the prosecution severs the causal connection by an affirmative showing that it would have acquired the evidence in any event. In order to avoid the exclusionary rule, the government must establish that it has not benefitted by the illegal acts of its agents; a showing that it might not have so benefitted is insufficient.").

The State contends that Mr. Palmer "effectively concedes" that the evidence would have been inevitably discovered by arguing in his opening brief that officers could have placed him in isolation. The fact that officers could have placed Mr. Palmer in isolation does not mean they would have, and Mr. Palmer by no means conceded this point in his opening brief.

In the present case, when the officers x-rayed Mr. Palmer, an independent investigation which would have recovered the evidence

was not in place. Sergeant Mayo telephoned the jail to find out whether the jail had the capability of keeping Mr. Palmer under surveillance and recovering the ring if it passed in feces. T 28, 32. As a result of the phone call, Sgt. Mayo apparently ascertained that the jail did not have such a capability. T 34-5. Although the jail could place Mr. Palmer in isolation, it could not provide personnel to keep him under surveillance. T 31-3. Sergeant Mayo was concerned that if Mr. Palmer were not under surveillance, he could repeatedly pass and reingest the ring. T 34. He apparently therefore did not consider placing Mr. Palmer in isolation as an option. T 34-5.

This testimony establishes that the officers had not taken independent steps to obtain the ring by placing Mr. Palmer in isolation. Although Sgt. Mayo could have provided one of his men to observe Mr. Palmer, the Sergeant's testimony does not indicate any attempts or even thoughts of doing so. The State failed to establish that an independent investigation was underway; in fact, all of the testimony demonstrates that no such independent investigation was underway or intended unless a positive result was obtained from the x-ray.

Nor did the State introduce any evidence which would support a determination that isolation and surveillance were an invariable routine process. In fact, Sgt. Mayo's testimony demonstrates the opposite--that the jail did not have the capability to carry out the procedure and did not routinely isolate suspects. See T 28, 32.

The only reason the State ultimately placed Mr. Palmer in isolation is because the illegal x-ray located the ring. As the Court pointed out in People v. Knapp, 422 N.E.2d at 536, where the subsequent recovery of the evidence is triggered by or the fruit of the illegal search, the inevitable discovery doctrine does not apply. See also United States v. Ramirez-Sandoval, 872 F.2d at 1396, quoting United States v. Boatwright, 822 F.2d 862, 864-5 (9th Cir. 1987) ("This doctrine requires that 'the fact or likelihood that makes the discovery inevitable arise from circumstances other than those disclosed by the illegal search itself.'").

In this case, officers made no other effort to obtain the ring and made the decision to isolate Mr. Palmer only after they were certain, as the result of the illegal search, that the ring would be found inside of him. Applying the rule in this case would encourage constitutional shortcuts and swallow the warrant requirement. The decision to isolate Mr. Palmer was the fruit of the illegal search. Because no independent investigation was underway and routine procedures would not have led to the discovery, allowing the inevitable discovery to "save" the illegal search in this case would nullify the fourth amendment requirements.

The fourth amendment was violated in this case, and the evidence seized should be excluded.

CONCLUSION

Mr. Palmer respectfully requests that this Court reverse his conviction and remand his case for a new trial absent the illegally seized evidence.

SUBMITTED this 5 day of July, 1990.



JAMES C. BRADSHAW
Attorney for Defendant/Appellant



JOAN C. WATT
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that eight copies of the foregoing will be delivered to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102, and four copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 5 day of July, 1990.



JOAN C. WATT

DELIVERED by _____ this _____ day
of July, 1990.

ADDENDUM A

1 A It was possible. We were going under the
2 degree of conviction that the Sears people had, that
3 Mr. Palmer was working alone.

4 Q They are not police officers?

5 A No.

6 Q What is a telephonic search warrant?

7 A It's a search warrant with the authorization to
8 conduct the search. It is obtained through a magistrate
9 by the use of a telephone.

10 Q When you called the County Attorney's Office,
11 did they advise you to get a telephonic search warrant?

12 A No, they did not.

13 Q Did they discuss that option at all?

14 A Yes.

15 Q And they told you, you didn't need one?

16 A Yes, that is correct.

17 Q That you didn't need a telephonic search
18 warrant?

19 A Right.

20 Q How long does it take to get a telephonic
21 search warrant?

22 A They have sped up the procedure to some degree.
23 If I had gone through Metro Narcotics, a procedure which
24 is fairly quickly, it would have taken me longer to find
25 someone in Metro Narcotics to open up their facility for

1 me, that probably for me to get the search warrant. I was
2 probably looking at a couple of hours.

3 Q You could obtain a search warrant within two
4 hours?

5 A I would assume so.

6 Q And when you say a search warrant, you mean a
7 written search warrant with a Judge's signature?

8 A As I say, it would have taken me about the same
9 period of time to do either one.

10 Q So, a telephonic search warrant may be quicker
11 and a regular, written search warrant within two hours?

12 A Yes. When I was in narcotics, I was able to
13 start the procedure for a search warrant. I think I
14 could get one in two or three hours.

15 Q This is a Tuesday at 6:30 p.m., that we are
16 talking about.

17 A I don't recall the day, but it was May 3rd
18 about that period of time.

19 Q And that is not a difficult time to get a
20 warrant either, is it? I mean, during the day?

21 A It is certainly more difficult than if it had
22 been 11 o'clock in the morning.

23 Q Certainly. But still the two hours is a
24 reasonable amount of time?

25 A I would think so.