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Utah v. Howard : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff/Appellee, :
v. :
CARL DEAN HOWARD, : Case No. 990586-CA
Priority No. 2
Defendant/Appellant. :

REPLY BRIEF OF APPELLANT

Appeal from a judgment of conviction for Illegal Possession of a Controlled Substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (1998), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Roger A. Livingston, Judge, presiding.

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SUMMARY OF THE ARGUMENT IN REPLY

The news report did not supply objective facts which created a reasonable suspicion to believe that Lewis was wanted. The newscast indicated that Lewis had been lawfully released from jail; this alone precluded Sergeant Park from having a reasonable suspicion that Lewis was wanted. Moreover, the statement in the newscast indicating that the judge had ordered Lewis to remain in jail without bail at best created an inconsistency, which, in the absence of further research or verification by Sergeant Park, did not establish a reasonable suspicion.

The state's speculation that Sergeant Park might have thought the release of Lewis was inadvertent or might have decided, contrary to the news report, that Lewis had a violent history does not present specific, objective facts supporting a reasonable suspicion. Further research and verification by the officer would be required for this speculation to have any weight in establishing a reasonable suspicion.

Although the press plays an important role in our society, news reports are not automatically reliable. In order to detain Mr. Howard based on the news report, Sergeant Park would have had to verify the information to establish its reliability.

In addition to not creating a reasonable suspicion that Lewis was wanted, the newscast failed to create a reasonable suspicion justifying the detention of Mr. Howard since the photographs flashed on the screen showed a generic appearance which fits many people.

POINT. POLICE OFFICERS VIOLATED THE FOURTH
AMENDMENT WHEN THEY DETAINED MR. HOWARD WITHOUT
HAVING A REASONABLE SUSPICION FOR DOING SO.

The totality of the circumstances control whether the officers had a reasonable suspicion which justified the detention of Mr. Howard. The three-part test articulated in Kaysville v. Mulcahy, 943 P.2d 231, 235-37 (Utah App. 1997) provides a framework for assessing whether, under the totality of the circumstances, the officer had a reasonable suspicion based on information received from an informant or tip. See Appellant's opening brief at 11-12. That test is: (1) "the type of tip or informant involved," (2) "whether the informant gave enough detail about the observed criminal activity to support a stop," and (3) whether the police officer verified the information. Id. In this case, all three factors weigh against concluding that the officers had a reasonable suspicion justifying the detention of Mr. Howard.

In its brief, the state focuses primarily on the second factor, whether the

informant, in this case a news report, gave sufficient information to support a stop.

State's brief at 8-12, 15-16. In addition, with very little analysis, the state claims that a news report is reliable because free press is important to our system of government and because the "newscast did not come from the reporter alone," and instead, the reporter used sources to create her story. State's brief at 13-14. The state's arguments regarding the first two factors fail to demonstrate that the detention met the requirements of the Fourth Amendment. In addition, because it is uncontroverted that Sergeant Park made no effort to verify the information in the news report and the state makes no attempt to argue that the third factor in Mulcahy works in its favor, the lack of verification also weighs against a conclusion that the officer had a reasonable suspicion to detain Mr. Howard.

The news report failed to articulate objective facts which established a reasonable suspicion that Lewis was wanted and should be detained. At the outset, the clear statement in the news report that Mr. Howard had been released pursuant to the Federal Consent Decree and the follow-up interview with an officer who indicated that Mr. Howard's release was lawful precluded Sergeant Park from having a reasonable suspicion that Gary Lewis was wanted. Sergeant Park simply ignored this information that Gary Lewis had been lawfully released. The state again asks this Court to ignore the information when it argues that the stop was reasonable because the news report indicated that "Lewis had been ordered to remain in jail--with no bond until he heads to court on the stalking charge." State's brief at 10 (citing R. 02). Regardless of what had gone on in

Lewis's past, the newscast reported that he was ultimately lawfully released shortly before the newscast. When the newscast is viewed in its entirety, it fails to suggest that Mr. Howard was wanted at the time of the news report. In other words, under the second Mulcahy factor, the news report did not supply sufficient detail to support a detention. See Mulcahy, 943 P.2d at 236.

Even if the newscast had not clearly indicated that Mr. Howard was lawfully released, the inconsistencies in the newscast required further research and verification by Sergeant Park in order to support a reasonable suspicion. For example, the state argues that despite the information in the newscast that Mr. Howard was lawfully released, Sergeant Park could second guess that decision and form his own opinion as to whether Mr. Howard should be arrested based on (1) the seriousness of domestic abuse, (2) the officer's possible disagreement with the assessment that Gary Lewis did not have a violent history, and (3) the possibility that the release might have been inadvertent. State's brief at 11-12.

First, since Sergeant Park did not conduct any independent investigation, these purported bases offered by the state in support of its reasonable suspicion argument are simply speculation. While domestic abuse is taken seriously by authorities, given the information from the news report that Gary Lewis did not have a violent history, Sergeant Park would have had to do some follow-up work to have a reasonable suspicion of a contrary conclusion. Sergeant Park likewise needed additional information to form a

reasonable suspicion that the release was inadvertent. In fact, according to the information Park had, the release was *not* inadvertent and fit within federal guidelines.

In the face of information that Mr. Howard had been lawfully released and did not have a violent history, any speculation by Sergeant Park to the contrary could not form a reasonable suspicion that Mr. Howard was wanted without obtaining further information outside the newscast. Since Sergeant Park did not verify any of the information and did not research any questions raised by the newscast, he did not have a reasonable suspicion justifying the detention of Mr. Howard.

Johnson v. Williford, 682 F.2d 868, 871 (9th Cir. 1982), cited by the state on page 12 of its brief, has no application to this case. The issue in Johnson was whether the government could be estopped from incarcerating Johnson after he had incorrectly been released prior to serving the minimum term of his sentence. Id. The Court held that the government was estopped from asserting that Johnson was ineligible for parole and that it would violate due process to send him back to prison. Id. This case provides no support for the state's claim that Sergeant Park had a reasonable suspicion to detain Mr. Howard because Park might have thought Lewis was inadvertently released.

State v. Farrow, 919 P.2d 50, 54 (Utah App. 1996) and Utah Code Ann. §§ 77-36-1 to 77-36-9 (1999), cited by the state on page 11 of its brief, also have no application to this case. While the state is correct that when an individual makes a domestic violence complaint to police officers, this Court and the Legislature require "mandatory and

immediate attention of law enforcement" (Farrow, 919 P.2d at 54), this case does not involve a complaint made to police officers.

Moreover, the Fourth Amendment is not dispensed with simply because a complaint is based on domestic violence. Sergeant Park needed a reasonable suspicion, based on the totality of the circumstances, to justify the detention regardless of whether Gary Lewis had a history of domestic violence with his wife.

The state makes very little effort to demonstrate the reliability of the news report in this case. State's brief at 13. In fact, the only case it cites in support of its claim that the news report was reliable is Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 667, 110 S.Ct. 1391, 1401-1402 (1966). State's brief at 13. Michigan Chamber of Commerce focuses on the First Amendment to the United States Constitution and does not discuss the reliability of news reports for Fourth Amendment purposes. The case recognizes "the unique role that the press plays in 'informing and educating the public, offering criticism, and providing a forum for discussion and debate.'" Id. at 1402 (further citations omitted). This role is important because it helps protect against "abuses of power against governmental officials" and functions "as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve." Id. (further citation omitted).

While Michigan Chamber of Commerce recognizes the unique role of the press, it says nothing about the reliability of information disseminated by the press. Mr. Howard

is not challenging the right of the press to disseminate the information it broadcast in this case; instead, he is arguing that the information contained in the newscast did not rise to the level necessary to justify the intrusion which occurred in this case.

Common sense dictates that under a totality of the circumstances test, a news report prepared in haste requires some sort of corroboration as to its reliability before a police officer can intrude on constitutionally protected Fourth Amendment interests. In other words, because a news report is not on par with a police request for detention, the totality of the circumstances test requires some sort of verification as to the reliability of the information for a detention to be justified. In this case where Sergeant Park made no attempt to verify the information in the newscast, the officers did not have a reasonable suspicion to justify the detention.

The United States Supreme Court recently reaffirmed the importance of police officers verifying the information they rely on when deciding to detain an individual. See Florida v. J.L., ___ U.S. ___, 120 S.Ct. 1375 (2000). In J.L., police officers received an anonymous tip that a young black man in a plaid shirt who was standing at a specified bus stop was carrying a gun. Id. at 1376. Based solely on the tip, police officers detained J.L., who was standing at the bus stop wearing a plaid shirt. The high Court held that the detention violated the Fourth Amendment because reliability of the information about the illegality, as well as the reliability of the description of the suspect, must be demonstrated. Id. at 1377. In J.L., "[a]ll the police had to go on [] was the bare report of an unknown,

unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J.L." Id. at 1379.

While the present case does not involve an anonymous tip, the concern that officers verify the reliability of their information which is evident in J.L. applies. In this case where the officer detained Mr. Howard based solely on a news report without verifying any of the information contained in the report, the detention violated the Fourth Amendment.

In addition to the fact that the information in the newscast did not create a reasonable suspicion that Gary Lewis was wanted, Sergeant Park did not have a reasonable suspicion to detain Mr. Howard after briefly viewing photographs which showed a generic looking Gary Lewis. The state is correct that the trial judge found that Mr. Howard "substantially resembled" the photographs. R. 52. While Mr. Howard may have resembled the man in the photographs, the photographs themselves showed a generic appearance which fit many other whites males. R. 74:20. Without more unique or detailed information regarding an individual's appearance, an officer cannot have a reasonable suspicion. While United States v. Board, 744 F. Supp. 6, 8 (1990) and United States v. Jones, 619 F.2d 494, 498 (5th Cir. 1980) involve descriptions rather than photographs, they nevertheless stand for the proposition that when an officer has only a general sense of an individual's appearance which would include a large number of people, the officer does not have a reasonable suspicion to detain someone who resembles

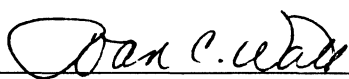
that appearance. See Appellant's opening brief at 19-20. In addition, given the fallibility of eyewitness identification and Sergeant Park's limited opportunity to view the photos, Park did not have a reasonable suspicion justifying the detention of Mr. Howard.

Under the totality of the circumstances, the officers did not have a reasonable suspicion justifying the detention of Mr. Howard. The information in the news report did not establish a reasonable suspicion to believe that Lewis was wanted. In addition, the news report was not of sufficient reliability to allow officers to act without verifying the information. Moreover, Sergeant Park's brief viewing of the photographs of Lewis failed to create a reasonable suspicion justifying the detention of Mr. Howard. The Fourth Amendment was violated in this case where officers detained Mr. Howard without having a reasonable suspicion to justify the detention.

CONCLUSION

Defendant/Appellant Carl Howard respectfully requests that this Court reverse the trial judge's order denying his motion to suppress, reverse his convictions and remand the case to allow him to withdraw his guilty plea.

SUBMITTED this 5th day of May, 2000.



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CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that I have caused to be delivered the original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, P. O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P. O. Box 140854, Salt Lake City, Utah 84114-0854, this 5th day of May, 2000.



JOAN C. WATT

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this _____ day of May, 2000.