1999

The State of Utah v. Clayton Burningham : Reply Brief

Utah Court of Appeals

Catherine M. Johnson; Assistant Attorney General; Attorney for Appellee.
Robert Breeze; Attorney for Defendant; Attorney for Appellant.

BEFORE THE UTAH COURT OF APPEALS

STATE OF UTAH,	)	
	)	
Plaintiff/Appellee,	)	
	)	
vs.	)	
	)	
CLAYTON BURNINGHAM,	)	Court of Appeals Case No. 990592-CA
	)	
Defendant/Appellant.	)	
	)	Priority Classification No. 10

REPLY BRIEF OF APPELLANT

THIS IS AN INTERLOCUTORY APPEAL OF THE ORDER OF THE SIXTH DISTRICT COURT ENTERED ON JUNE 24, 1999, DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE FOR ILLEGAL SEARCH AND SEIZURE, HONORABLE DAVID L. MOWER PRESIDING

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CASES CITED

CONSTITUTIONAL PROVISIONS

STATUTORY PROVISIONS

None.

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ARGUMENT

Point I.

THE SPECIAL NEEDS OF BENCH PROBATION DOES NOT REQUIRE ABROGATION OF THE FOURTH AMENDMENT

The issue before the Court is whether the U. S. Supreme Court decision in Griffin v. Wisconsin, 483 U.S. 868, 97 L.Ed. 709, 107 S.Ct. 3164 (1987) supports the claim by the State of Utah that police can conduct warrantless probation searches by claiming to be probation officers. (See State's brief at page 17 wherein the State claims that the search was valid because it was undertaken to protect the public and to prevent Defendant from violating his probation).

A number of facts bear repetition in light of this claim by the State of Utah.

1. Deputy Perkins admitted that he was "strictly a peace officer" and that he had no probation officer status. (Tr. Preliminary Hearing 6-26-98 at 38:12-15).

2. Deputy Perkins admitted that he went to contact Defendant for the purpose of investigating whether or not a crime had occurred. (Id. At 39:1-5). This admission stands in stark contrast to any claim by the State that the purpose of the visit was to protect the public or to prevent Defendant from violating his probation.

3. When pressed, Deputy Perkins further admitted that he was investigating to see "if there had been a crime committed," Id. 39:22, and that the probation order ". . . . gave me the authority to request a test." Id. 39:25.

4. Deputy Perkins' understanding was that Defendant ". . . had to submit a urine sample on demand to any police officer." Id. 40:13-16.

5. On October 15th the deputy suspected Defendant of committing a crime, i.e. use of illegal drugs. Id. 42:18

6. The October 15th activities of Deputy Perkins were strictly in his capacity as a law enforcement officer. Id. 48:17-25.

7. No one from the Court or the Probation Department asked or directed Deputy Perkins to go out and conduct a drug test. Id. Tr. 50:15-19.

In Griffin the Court ruled that it was reasonable to dispense with the warrant requirement when a probation officer conducted a search, at least in part because, [a]lthough a probation officer is not an impartial magistrate, neither is he a police officer who normally conducts searches against the ordinary citizen." Griffin 483 U.S. 876.

This instant prosecution presents a far different scenario, i.e. it is not reasonable to dispense with the warrant requirement because this case involves a police officer who

normally conducts a search against the ordinary citizen.

The Griffin court went on to state that it would impair the probationer/probation officer relationship if the probation officer was requested to obtain a court approved search warrant. Griffin at 483 U.S. 879.

Again, there was no probationer/probation officer relationship involved in this instant prosecution because the Defendant did not have a probation officer.

The Utah Supreme Court clearly held in State v. Johnson, 748 P.2d 1069 (Ut. 1987) that while a parole search is not in violation of the Fourth Amendment just because the police are involved or because evidence helpful to the police is obtained, such a search is invalid when the probation officer merely acts as a tool of the police. See Johnson, footnote 1 and 2 at page 1072.

The police officer was the person conducting the alleged probation search, there was no probation officer involved, the purpose was to conduct a police investigation and the officer used the illegal probation condition to further his work as a police officer, without any involvement by the Court or probation department. This was not a probation search and not ordered or requested by the probation department or the Court.

CONCLUSION

This Court should rule that the conduct of Deputy Perkins violated the provisions of the Fourth Amendment to the Constitution of the United States.

DATED this 29 day of March 2000.

ROBERT BREEZE
Attorney for Appellant

ADDENDUM

No addendum is necessary pursuant to Rule 24(a)(11), U.R.Ap.P.

CERTIFICATE OF MAILING

I certify that I personally mailed/hand delivered 2 true and correct copy of the foregoing to:

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this 29 day of March 2000.