2010

State of Utah v. Christopher Duane Ellis : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH Plaintiff/Appellee v. CHRISTOPHER DUANE ELLIS Defendant/Appellant	**Case No. 20100563-CA**

REPLY BRIEF OF APPELLANT

Appeal from judgment, sentence, and commitment in the Fourth District Court, Utah County, State of Utah, the Honorable David N. Mortensen presiding, on one count of possession or use of a controlled substance, a third degree felony, and one count of purchase, transfer, possession or use of a dangerous weapon by a restricted person, a class A misdemeanor.

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ARGUMENT

I. The cases raised in the State's brief do not justify Officer Moore's removal of the entire contents of Ellis' pockets.

The State argues that Officer Moore was justified in removing all of the contents of Ellis's pockets out of concern for his safety. *See* Br. of Appellee at 13-21. In support of this argument, the State raises four cases not addressed in Ellis' brief. Only one of these cases was published and is citable as precedent. All four cases, including the only one with precedential value, are distinguishable from the present case.

The first of the new cases raised by the State is the unpublished *Haynes v. State*, 2008 WL 1759086 (Alaska App.).[1] In *Haynes*, the Alaska Court of Appeals decided that an officer was justified in removing the entire contents of the defendant's pocket because

[1] *Haynes* is an unpublished memorandum opinion carrying, at the direction of the Alaska Court of Appeals, the following notice: "Memorandum decisions of this court do not create legal precedent. . . . Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law." 2008 WL 1759086. Contrary to the State's assertion, *Haynes* is not dispositive in this case. Br. Of Appellee at 15.

the officer could not determine whether the pocket contained a weapon. *Id.* at *1. The key difference between *Haynes* and the present case is that in *Haynes*, the officer conducted the search in the course of serving two arrest warrants on the defendant. *Id.* Although the court characterized the search as a pat down for weapons, it should have characterized the search as a search incident to a lawful arrest. *See Id.*

A search incident to arrest clearly justifies searching the entire contents of defendant's pockets. *See e.g. United States v. Rabinowitz*, 339 U.S. 56, 64, 70 S.Ct. 430, 94 L.Ed. 653 (1950), *overruled in part by Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969) (valid search incident to lawful arrest extends to the areas within the arrestee's "immediate control"). In the present case, Ellis was not under arrest at the time of the search, but was only subject to an investigatory stop. Any search and seizure in the course of an investigatory stop is strictly limited by *Terry* and its progeny to those items which a reasonable person would suspect to be dangerous weapons. *See e.g. State v. Fowler*, 883 P.2d 338, 340 (Wash. App. 1994); *see also State v. Baker*, 2010 UT 18, ¶ 41, 229 P.3d 650 ("The only permissible objective of the…frisk is the discovery of weapons that may be used against the officer or others") (internal citations and quotations omitted).

The State also cites *State v. Heitzmann*, 632 N.W.2d 1 (N.D. 2001). The State's reliance on this case is misplaced. Contrary to the State's assertion, the *Heitzmann* court did not conclude that an officer's removal of non-weapons from the defendant's pockets was reasonable simply because he was unable to tell what the contents consisted of.

Rather, the *Heitzmann* court held that the officer acted reasonably in asking the defendant to remove the contents of his own pockets because, in addition to the unidentified bulges in defendant's pockets, the officer knew that there was a gun in the vehicle in which defendant was a passenger, the officer had been advised that the defendant had recently received a shipment of methamphetamine, the defendant was becoming progressively more nervous, and another deputy had advised the officer to be "cautious" with the defendant because the defendant had become agitated during a prior search. *Id.* at 8.

When the defendant in *Hetizmann* refused to comply with the officer's orders to empty his pockets, the officer himself removed the defendant's wallet and a wad of money, items he knew not to be weapons, from defendant's pockets because, similar to Officer Moore's justification in the present case, "the wallet could have contained razor blades and the wad of money could have contained needles." *Id.* at 9. Also similar to Officer Moore's justification in the present case, the officer in *Heitzmann* removed these items to make sure that the defendant didn't have anything else in his pocket. *Id.* However, the *Heitzmann* court held that the additional intrusion was justified only by "extenuating circumstances" related to the defendant's attempts to prevent the officer from performing an effective pat-down. *Id.* at 10.

Specifically, the defendant "made quick evasive movements as though he was going to run around the front of the truck." *Id.* at 8. The defendant's sudden movements required the officer to "hang[] onto [the defendant's] right arm" as he conducted the frisk. *Id.* at 9. The defendant then "pulled his arm out of the jacket, necessitating that the

officer hold him by the back of his pants." *Id.* The court held that this threatening conduct by the defendant entitled the officer to make an immediate intrusive search of the suspect. *Id.*

The *Heitzmann* holding is limited to the circumstances of that case. The *Heitzmann* court held that "[u]nder the circumstances of this case, we believe the officer's actions were a proportionate response to [the defendant's] actions. . . . We conclude that the officer's removal of [the contents of the defendant's] pockets was reasonable under these extenuating circumstances." *Id.* at 10 (emphasis added). Noticeably absent from the present case are any such extenuating circumstances. Ellis was at all times cooperative and docile. Ellis complied with all requests from Officer Moore and made no attempts to evade him. *Heitzmann* is inapplicable to this case.

The State seeks to distinguish this case from *Fowler*, 883 P.2d 338, on the basis of the unpublished cases *State v. Rubio*, 2007 WL 2085348 (Wash. App. Div.1), and *State v. Barboza,* 2010 WL 4514196 (Wash. App. Div.2).[2] However, *Rubio* and *Barboza* are not analogous to the case at hand.

In *Rubio*, the officer was in the process of removing a potential weapon from the defendant's pocket. 2007 WL 2085348 at *1. Before the officer put his hand in the defendant's pocket, he asked the defendant "what was in the pocket." *Id.* The officer put

[2] To clarify, *Rubio* and *Barboza* are not published in the Washington Appellate Reports. The pages indicated in the initial citations to *Rubio* and *Barboza* given in the State's brief, namely 139 Wash.App. 1069 and 158 Wash.App. 1034 respectively, only report that an unpublished decision was reached in the case.

his hand in the pocket and felt a plastic baggie. *Id.* At the same moment, the defendant "responded, 'It's only for personal use.'" *Id.*

The unpublished *Rubio* decision held that "Where police, during the course of a protective search for weapons, happen across some other item that is 'immediately recognizable' as incriminating, the item may be seized." *Id.* at *2. The court found that the defendant's statement "It's only for personal use," rendered the plastic baggie immediately recognizable as contraband. *Id.* The basis of the court's holding was the immediately recognizable incriminating character of the baggie, and was not, as indicated by the State, that the officer could not reasonably be expected to remove only suspected weapons. In the present case, however, Officer Moore did not immediately recognize any of the items seized from Ellis as incriminating before they were removed from Ellis' pocket. *Rubio* is thus inapplicable to the present case.

Barboza is also inapplicable. In *Barboza*, the officer felt a hard object in the defendant's pocket which could have been a weapon, but he "was unable to tell that there was anything inside [the defendant's] pocket other than the hard object. [The officer] testified that he did not intend to remove anything other than the hard object in [the defendant's] pocket." 2010 WL 4514196 at *2. The officer in *Barboza*, reaching for a possible weapon, inadvertently removed other items from the defendant's pocket, which the officer did not even know existed at the time of the search. *Id.* at *3 n. 3.

The search in *Barboza* is a far cry from Officer Moore's search of Ellis. Officer Moore intentionally removed everything from Ellis's pockets to lay it out in the open. *Barboza* reaffirmed the central holding of *Fowler*, the principle most applicable to

present case, that "during the course of a protective frisk, the police may not intentionally seize items they know are not weapons." *Id.* Officer Moore knew that many of the items seized from Ellis's pockets were not weapons. There was no justification for indiscriminately extracting those items which a reasonable person would not believe could have been weapons.

When conducting a *Terry* frisk, officers are limited to seizing those items reasonably believed to be weapons. The cases raised by the State do not indicate otherwise. By intentionally seizing items he did not reasonably believe to be weapons, Officer Moore exceeded the scope of a lawful *Terry* frisk. Items discovered as a direct result of such an unlawful seizure should have been suppressed by the trial court.

CONCLUSION AND PRECISE RELIEF SOUGHT

Ellis asks that this Court reverse the trial court's denial of his motion to suppress, and remand this matter to the Fourth District Court with instructions that the evidence is to be suppressed and that Ellis's plea may be withdrawn.

DATED this 21 day of September, 2011.

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CERTIFICATE OF M AILING

I hereby certify that I delivered two (2) true and correct copies of the foregoing Reply Brief of Appellant to the Appeals Division, Utah Attorney General, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 21 day of September, 2011.