1982

The State of Utah v. Ernest Joe Velasquez : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,

Plaintiff-Respondent,

-v-

ERNEST JOE VELASQUEZ

Defendant-Appellant.

Appeal from [illegible]
Degree Murder in the [illegible]
Salt Lake County, State [illegible]
Durham, Judge, presiding

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 17242
ERNEST JOE VELASQUEZ	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

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Appeal from a judgment and conviction of Second Degree Murder in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Christine M. Durham, Judge, presiding.

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BRIEF OF RESPONDENT

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STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with one count of second-degree murder in violation of § 76-5-203, Utah Code Annotated (1953), as amended, for the murder of Richard Whitehead.

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury and found guilty of second-degree murder on June 9, 1980, in the Third Judicial District Court, the Honorable Christine M. Durham, presiding.

Appellant waived the minimum time for sentencing and was sentenced on June 9, 1980 by Judge Durham to serve an indeterminate term of from five years to life in the Utah State Prison as provided by law.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming the judgment and sentence rendered in the Third Judicial District Court.

STATEMENT OF THE FACTS

The decedent, Richard Whitehead, age 30 (T. 55), was found dead in his apartment located at 242-1/2 South 200 East, #3, Salt Lake City, on November 22, 1979 by his brother, Paul Whitehead. Paul Whitehead had been attempting to contact his brother for three days (T. 56-60). His first attempt was around 11:30 a.m. on the morning of November 19 after he had been notified by the victim's employer that he had failed to show up for work (T. 56). He received no answer at his brother's apartment and returned to try again later in the afternoon (T. 57). At that time, he saw Ernest Joe Velasquez, the appellant, outside the apartment complex. The appellant asked Mr. Whitehead who he was looking for, and when Paul Whitehead told him he was looking for his brother, Richard, the appellant told him that the victim had gone to Las Vegas with Steve Southwood, who also resided in the apartment complex (T. 58).

On the 20th of November, Paul Whitehead attempted three more times to locate his brother. On the 22nd at about 9:00 a.m. he saw Mr. Southwood, who told him that the victim

had not gone to Las Vegas with him (T. 59). Mr. Whitehead then contacted all the local hospitals in an attempt to locate his brother. Receiving no further information, he returned to the apartment and, with the aid of Mr. Southwood, gained entry into his brother's apartment through the bedroom window (T. 60). He saw his brother lying on the bed and covered in blood (T. 62). He entered the room, told Mr. Southwood to remain outside, and then went to the body of his brother to check for a pulse (T. 63). Finding none, he left the apartment and went to a phone to call the police (T. 64).

During the course of the investigation, Officer Voyles of the Salt Lake City Police Department discovered a set of blood-smudged prints located on the wall above the bed of the deceased. At trial those prints were identified as belonging to the appellant by Bill Simpson, an expert assigned to the identification bureau of the Salt Lake City Police Department (T. 351). He testified that by using a comparison technique he had found at least 11 points which matched (T. 360, 361, 370) the prints of the appellant.

In the apartment adjacent to where the victim was found were two individuals under the supervision of the Utah Division of Corrections, Adult Probation and Parole Office. These individuals were Jessie Garcia and Ernest Velasquez (T. 127, 133). On November 27, Officer Harris, the appellant's

parole officer (T. 114), went to the apartment of the appellant to finalize observations before verifying the appellant's transfer of supervision from New Mexico to Utah (T. 121). He was accompanied by Sergeant Hanks of the Sheriff's Office, who had been with him on another matter (T. 120). The sergeant informed Harris of the recent discovery of a body at the same location (T. 124). While at the apartment, Harris also discovered for the first time that Jessie Garcia, who he knew was on parole in Utah, was living with the appellant (T. 121). He also noted the presence of two females who appeared to be juveniles (T. 122).

While with the appellant, Officer Harris discussed appellant's need to obtain employment. Appellant told Officer Harris that it was difficult to obtain a job at that point because he would have to be travelling to New Mexico to testify in a murder case (T. 123). Appellant also told Officer Harris of another murder which he had witnessed in prison (T. 124). This knowledge of appellant's prior involvement in murder cases was taken by Officer Harris to the Salt Lake Police Department and to Officer Harris' supervising officer in the Adult Probation and Parole Office, Dennis Holm (T. 127, 133).

Appellant's transfer for supervision from New Mexico was completed on November 9, 1979 (T. 127, 133).

During the same time period, Officer Poulton, who was Jessie Garcia's parole officer, received information from the Salt Lake County Sheriff's Office that Garcia had offered to secure cocaine and was dealing in drugs (T. 143). He then learned that the appellant was on parole and that, in contravention of departmental policy, these parolees were living together (T. 143). He took this information to Dennis Holm (T. 28, 144), who was his supervisor.

Dennis Holm compiled all the information received from the individual parole officers and decided that a search of the parolees' apartment ought to take place because: 1) they were thought to be engaging in the sale of drugs, 2) they were violating departmental policy by living together, 3) they had no visible means of legal support, and 4) minor women had been seen on the premises. On November 29, six officers from the Adult Probation and Parole Department went to the parolees' apartment (T. 24, 144, 175, 184). On arrival, the appellant led them into the front room. Officers Poulton, Holm and Kelly went to talk to Jessie Garcia (T. 129).

Officer Harris, the appellant's parole officer, asked the appellant to go to his bedroom to get out of the commotion (T. 130). Officer Coombs accompanied them and entered the room first. While in the room, he saw in plain view on the shelf of the closet a box of .22-caliber shells which he showed to Officer Harris (T. 26, 131, 181). Harris

then placed handcuffs on the appellant. Dennis Holm then authorized a search of the entire premises (T. 25). The search produced a .22 automatic handgun (T. 111, 186) and a magazine (T. 187) which were seized along with the .22 shells and taken to Officer Voyles of the Salt Lake City Police Department (T. 188, 203).

At trial appellant made a motion to suppress the evidence obtained by the Adult Probation and Parole Department since it was obtained in the course of a warrantless search (T. 1, 106). The trial court denied this motion, finding that the search was reasonable and conducted in furtherance of the supervisory duties and obligations of the Division of Adult Probation and Parole (T. 169).

The appellant and Miss Brenda Valentine were charged with the murder of Richard Whitehead (T. 658). In a statement given on December 6, 1979 (T. 650) to the police, Miss Valentine claimed no involvement in the crime (T. 653). She stated that on either the 17th or 18th of November the appellant arose from bed, stated he wanted to fight with someone, and left the apartment. He returned a short time later, took something from the apartment, and left again. When he returned the second time, he was covered in blood and told Miss Valentine that he had just "dusted" someone (T. 654).

At trial, both the appellant and Miss Valentine changed their pre-trial stories and testified to a similar state of events which implicated Miss Valentine as the murderer (T. 429-447, 506-530). Allegedly the victim had been knocked unconscious by the appellant in a fist fight and Miss Valentine had then shot the victim.

The jury returned a verdict of guilty to second-degree murder on June 9, 1980 (T. 717). Appellant then waived the minimum time for sentencing and was sentenced to serve the indeterminate term of five years to life at the Utah State Prison (T. 721).

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED IN A WARRANTLESS BUT OTHERWISE REASONABLE SEARCH BY PAROLE OFFICERS.

Appellant, through counsel, made a timely motion to suppress all the evidence removed from the appellant's residence by parole officers. The trial court held an evidentiary hearing on the matter and determined that the warrantless search by the Division of Adult Probation and Parole was not unreasonable and did not constitute a per se violation of appellant's Fourth Amendment right to be free from unreasonable searches and seizures.

Appellant claims that searches by parole officers conducted without a warrant are the legal equivalent of searches of law-abiding citizens by police officers without a warrant. This characterization fails to recognize that persons on parole are not allowed the full extent of liberty accorded law-abiding citizens. The trial court recognized that the liberty interest and privacy interest of parolees are not the same as the ordinary citizen's, especially in the relationship between a parolee and his parole officer. For this reason, Article I-§12 of the Utah Constitution has a similar provision which this search did not violate. The trial court denied the motion relying on the reasoning of Latta v. Fitzharris, 521 F.2d 246 (9th Cir. 1975) (T. 170).

The trial court applied a reasonableness test to the actions of the parole officers and found that the circumstances of this case supported a reasonable suspicion that either criminal activity was occurring or a parole violation had occurred, and therefore in furtherance of the duty to supervise parolees, the action of the Adult Probation and Parole Division did not constitute an unreasonable infringement on the appellant's right to be free from unreasonable searches and seizures.

A. PAROLEES HAVE A LESSER EXPECTATION OF PRIVACY THAN ORDINARY LAW-ABIDING CITIZENS.

Although this Court has never addressed the application of Fourth Amendment rights to parolees before, it has examined the condition and limitations on individuals who are on parole. In Reeves v. Turner, 28 Utah 2d 310, 501 P.2d 1212 (1972) this Court stated that "a parole is in the nature of a grant of partial liability or a lessening of restrictions to a convicted prisoner" (Id. at 1214). The Court in that case adopted the theory that a parolee is still "in custodia legis" and subject to limitations of custody which do not apply to ordinary law-abiding citizens.

The appellant argues that the theory of "constructive custody" was buried in Morrissey v. Brewer, 408 U.S. 471 (1972) (Appellant's Brief at 23); however, that case did not totally disabuse the theory of legal custody except where that custody theory was used to deny a parolee basic elements of due process. When an individual is on parole, he may still be subject to limitations stemming from the custodial nature of parole. Demonstrating that the theory of legal custody has not been fully rejected in this jurisdiction, this Court, in Ward v. Smith, Utah, 573 P.2d 781, 782 (1978) affirmed the rationale of Reeves, supra, and stated that "The parolee remains in legal custody until such

time as his sentence is terminated." In that case, the Court also noted that "Parole is not absolute liberty as all law-abiding citizens enjoy, but only conditional liberty dependent upon compliance with parole restrictions." 573 P.2d at 782.

In a dicta statement of Reeves v. Turner, supra, this Court noted that "[t]he standards governing the arrest and search of citizens possessed of full civil rights are not applicable to the act of taking physical custody of a parolee." (Id. at 1214). This statement is consistent with the reasoning of the Ninth Circuit, where in Latta v. Fitzharris, 521 F.2d 246, 251 (1975), the Court noted that the parole system of regulation and supervision naturally diminishes the expectation of privacy of parolees.

B. NOT ALL WARANTLESS SEARCHES BY PAROLE OFFICERS OF PAROLEES' RESIDENCES VIOLATE THE FOURTH AMENDMENT STANDARD OF REASONABLENESS.

In Morrissey v. Brewer, 408 U.S. 471 (1972) the United States Supreme Court recognized that parolees cannot be deprived of due process under a constrictive theory of constructive custody. The Court stated that minimum due process had to be afforded to parolees in a revocation hearing. The Court, however, did not state that appropriate limits tied to the parolee status can never be placed on the constitutional rights afforded parolees. The historical

analysis of the parole system (Id. at 477-480) provides a backdrop to the imposition of legitimate restrictions on the liberty interests afforded to parolees. The Court recognized that the purpose of parole conditions are twofold in that:

> . . . they prohibit either absolutely or conditionally, behavior that is deemed dangerous to the restoration of the individual into normal society. And through the requirement of reporting to the parole officer and seeking guidance and permission before doing many things, the officer is provided with information about the parolee and an opportunity to advise him.

Id. at 478. However, the extent to which a parole officer may control a parolee is limited by standards of due process. As the Court has noted, "once it is determined that due process applies, the question remains what process is due." Id. at 481.

The Supreme Court has consistently recognized that due process is flexible and calls for such procedural protections as the particular situation demands. Thus, in determining whether the search of a parolee's residence without a warrant by his parole officer is a per se violation of the Fourth Amendment, the analysis must focus on the particular circumstances presented by such a search and by balancing the interests of the parolee against the state interest in having reasonable searches to determine whether the parolee is meeting the conditions of his parole.

Although the United States Supreme Court and this Court have never ruled on the extent to which the Fourth Amendment may be invaded to ensure that parolees are living up to the conditions of their parole, many state and federal courts have examined the issue. The leading case in the area was written by the Court of Appeals for the Ninth Circuit, sitting en banc. The case produced an entire spectrum of opinions regarding the nature of the privacy right held by parolees. The majority opinion in Latta v. Fitzharris, 521 F.2d 246 (9th Cir. 1975) held that a search by a parole officer, accompanied by police officers, of the appellant's home was reasonable when the officer believed that the search was necessary to the performance of his duty, as long as the search was based on a reasonable suspicion of either criminal activity or violation of parole.

The court in Latta recognized that the broad power to search which was traditionally allowed in California was subject to constitutional standards. However, the issues presented by the Fourth Amendment center around the reasonableness of the search and the acceptance or rejection of the traditional standard of probable cause required. The Ninth Circuit recognized that the fact that the traditional standard of probable cause could not be met does not end the Fourth Amendment inquiry. In California, as in Utah (see:

Reeves v. Turner, supra) a "parolee is in a different position from that of the ordinary citizen. He is still serving his sentence; he remains under the ultimate control of the Adult Authority and the immediate control of his parole officer." 521 F.2d at 249. It is because of this special relationship between a parolee and his parole officer, and the parole officer's duty to protect the parole system and the public, that reasonable warrantless searches by the parole officer are justified when the officer believes that the search is necessary in the performance of his duties (Id. at 250).

The cornerstone of the Ninth Circuit Court's reasoning is that not all searches without warrants by parole officers are a per se violation of the Fourth Amendment. The relationship of the parole officer and the parolee require that:

> the propriety of warrantless searches pursuant to proper conditions affixed to the status of parole cannot be determined by automatic reference to the law of ordinary search and seizure or to that of administrative searches.

Id. at 251.

The majority opinion then limited warrantless searches by parole officers to those which are reasonable. Respondent submits that this analysis is the appropriate

standard against which a balancing of the interests of the individual and the rights of society may be accomplished. The majority of state and federal courts that have examined the issue have adopted either the majority or concurring opinion in Latta (See Appendix A, infra).

C. THE TRIAL COURT CORRECTLY DETERMINED THAT THE SEARCH AND SEIZURE IN THIS CASE WAS REASONABLE.

The trial court adopted the majority's standard as delineated in Latta v. Fitzharris, supra, and Point I-B above (See also Appendix B, infra).

Prior to applying the Latta standard, the court made the following findings of fact:

> 1) Appellant was in fact a parolee subject to the supervision of the Utah Division of Corrections at the time the search was conducted.
> 2) The search was reasonable, and conducted in furtherance of supervisory duties and obligations of the Division of Adult Probation and Parole to discover whether:
> a) the appellant and Mr. Garcia were using or dealing in drugs,
> b) they were involved in criminal activities involving either drugs or juveniles.
> 3) There was the presence of minors on the premises;
> 4) There was information from an informant respecting drug dealing; and
> 5) Appellant and Garcia each had a record of prior similar crimes and were living next door to where a murder took place.

(T. 169).

These facts, when tested under Latta, justified the search of the premises by members of Adult Probation and Parole.

The cases cited by appellant do not detract from the position adopted by the district court. The Fourth Circuit Court is the only circuit where the dissenting opinion in Latta has been adopted. The other state cases cited by appellant are either distinguishable and/or recognize that the rights of a parolee may be limited by virtue of the parolee status.

In State v. Gansz, 297 So.2d 614 (Fla. App. 1974) the court recognized that a probationer (not a parolee) is not deprived of the constitutional guarantee of a search warrant. However, the court also noted that status of the probationer is an important factor "in determining whether a search and seizure is reasonable or whether there is probable cause for the issuance of a search warrant" (Id. at 616). Implicit in this language is the acknowledgment that the extent of applying the constitutional rights afforded probationers is not unnecessarily the same as applied against ordinary citizens.

In both State v. Fogarty, 610 P.2d 140 (Mont. 1980) and Roman v. State, 570 P.2d 1235 (Alaska 1977), the courts relied on the state and not federal constitution to invalidate

broad boiler plate conditions to parole and probation which did not take into account the individual differences of each parole in probation situation. Alaska, however, specifically limited the rejection of the form consent before it to the facts of the case and also rejected the sweeping stand of the Iowa Supreme Court in State v. Cullison, 173 N.W.2d 533, cert. denied, 389 U.S. 938 (Iowa 1970), in footnote 29 stating:

> . . . Cullison involved a search and seizure which was not conducted pursuant to a condition of a parole and the court did not there consider whether there were any valid limits on a parolee's or probationer's expectation of privacy.

The Alaska court then narrowly limited extensions of the Fourth Amendment requirements by relying on its state constitution.

In this case, the search was reasonable and therefore, the warrantless search by parole officers, who were simply doing their duty, did not violate appellant's right to privacy. At the very least there was not an invasion of the privacy interest to any greater than that which exists by virtue of the parole status.

The appellant also claims that the obtaining of the information that appellant and Mr. Garcia were selling and/or using drugs was insufficient to justify the search because it came from the police department. A similar argument is made with regard to the conversations of Officer Voyles and Dennis

Holms. In United States ex rel. Santos v. New York, 441 F.2d 1216 (2nd Cir. 1971) the court recognized that:

> The mere fact that the police officer was the first to suspect that appellant was engaged in criminal activity and related this fact to the parole officer and was present at the subsequent investigation in no way alters the legality of the parole officer's presence. It does not require the suppression of the seized evidence from use in a subsequent criminal prosecution.

Applying this standard and recognizing that in this case the Adult Probation and Parole Department already knew that at least one violation of parole standards was being violated (since two parolees were living together, contrary to departmental rules), the search and seizure of the evidence from the home of the appellant was reasonable and within the standards of the Fourth Amendment.

POINT II

CUMULATIVE ERROR WHICH IS NON-PREJUDICIAL DOES NOT JUSTIFY REVERSAL OF APPELLANT'S CONVICTION.

The appellant claims that numerous errors (cited in Point II of his brief at 26-38), although determined by the trial court to be non-prejudicial when considered individually, are transformed into prejudicial error warranting reversal when they are accumulated. This Court

has recognized that great deference is given to the trial court and reversal of verdicts which are sound will not be made where an appellant raises mere technicalities or irregularities unless they placed the defendant at a substantial disadvantage. In State v. Valdez, 19 Utah 426, 432 P.2d 53 (1967), this Court stated:

> [O]nce a fair trial has been afforded the defendant and a verdict which is supported by the evidence rendered, the proceedings are presumed to be valid; and we are not disposed to reverse for mere technicalities or irregularities unless they put the defendant at some substantial disadvantage or had some material bearing on the fairness of the proceedings or its outcome (footnote omitted).

Id. at 55. See also: State v. Scandrett, 24 Utah 2d 202, 468 P.2d 639 (1970); State v. Codianna, Utah, 573 P.2d 343, 349 (1977).

Acceptance of appellant's claim would require this Court to state that quantity of non-prejudicial error without demonstration of actual prejudice to the appellant somehow transforms the harmless error into reversible error. As demonstrated below, each error claimed by the appellant in the trial court was determined to have no actual prejudice to the appellant, nor influence on the outcome of the case. In this situation, the conviction of the appellant should be affirmed.

A. EXCLUSION OF WITNESSES IS WITHIN THE SOUND DISCRETION OF THE TRIAL COURT.

The right to exclude witnesses and others from certain types of proceedings is provided for by statute and is in the sound discretion of the trial court. The rule is found in § 78-7-4, Utah Code Annotated (1953), as amended, which states:

> RIGHT TO EXCLUDE IN CERTAIN CASES. --In an action of divorce, criminal conversation, seduction, abortion, rape, or assault with intent to commit rape, the court may, in its discretion, exclude all persons who are not directly interested therein, except jurors, witnesses and officers of the court; and in any cause the court may, in its discretion, during the examination of a witness exclude any and all other witnesses in the cause.

In this case, the trial court granted a motion to exclude non-testifying witnesses (T. 50) at the begining of trial. However, near the end of trial it was discovered on cross-examination that Officer Gillies had violated the exclusionary rule by discussing Officer Voyle's testimony prior to testifying himself (T. 681).

Appellant made a motion for a mistrial based on the violation of the exclusionary rule by the officers. This motion was denied when, outside the presence of the jury, the court determined that the testimony of Gillies had not been

affected by the discussion, the appellant was not prejudiced by the violation, and, in fact, the testimony of Gillies actually aided rather than harmed the appellant. The court ruled that no prejudice had occurred and denied the motion, stating:

> They should have known better; Miss Valentine should have known better. She was here in the courtroom when she was instructed. But I am unable to see any fashion in which Detective Gillies' testimony was influenced by his conversation.
>
> In fact, his recollection of what Detective Voyles told him about the testimony in the courtroom was not what Detective Voyles had in fact testified to, at least with respect to the intoxication. And to that extent it seems to me that the testimony you elicited was helpful to the defendant rather than prejudicial.

(T. 68, 69). Thus, although the court recognized that the officers were in error when they violated the exclusionary rule, it was not prejudicial and therefore no basis upon which the appellant could obtain reversal of his conviction. State v. Dodge, Utah, 564 P.2d 312 (1977) and State v. Carlson, Utah, 635 P.2d 72 (1981). Even in State v. Barboa, 506 P.2d 1222 (N.M. 1973), cited by the appellant, there is a requirement that some type of harm be shown to the appealing party before there is a basis upon which to reverse his conviction.

B. THE TRIAL COURT CORRECTLY DETERMINED THAT THE READING OF A NEWSPAPER ARTICLE BY TWO JURORS WAS NOT PREJUDICIAL.

The trial court admonished the jury to ignore press reports when the court recessed for the weekend (T. 586). In polling the jury on Monday, the court discovered that two of the jurors had read a newspaper article in the Salt Lake Tribune which summarized the evidence presented at trial on Thursday, June 5, 1979 (T. 596, 601). Both jurors who indicated exposure to the article, Mrs. Zabriskie and Mrs. Bancroft, stated that the article did not present anything which they had not already known from the presentation of evidence.

The appellant moved for a mistrial and the trial court denied the motion stating:

> Well, I don't think a juror's failure to follow the instructions of the court is, per se, grounds for a mistrial. I think you would have to demonstrate some prejudice thereby. And if this were a case involving multiple news reports and accounts which the court could not monitor, I think that I probably would have to, if anyone admitted to listening to them and reading them. But where we are dealing with one newspaper article, which I do have before me, I don't have it here today, but I have seen it in my own newspaper, and I expect that the one thing we need to do is make it an exhibit to the trial, although not a jury exhibit, in order for your to preserve the case.

(T. 611), and

> After I had read it I felt that even if a juror should inadvertently or improperly review that article that he or she could not be improperly influenced by it, because it was nothing more than a recapitulation of what they had heard the day prior in trial. And although I am very concerned that two jurors did that, and I intend to let the jurors know that it is a serious problem before the trial is out, it does not seem to me that in this instance it can or has influenced the outcome of the trial. And I will deny the motion for a mistrial on that basis.

This is not a case where the news reports were so numerous that they could not be monitored by the court. The court was able to determine that the only article which two of the eight jurors had read did not contain anything which was likely to prejudice a juror but was, rather, a simple reiteration of facts which did not cause actual prejudice.

In State v. Andrews, Utah, 576 P.2d 857 (1978) this Court recognized that the granting of a motion for a new trial based on exposure to media is a question which is within the sound discretion of the trial court. Furthermore, this Court stated the motion should be granted only where actual prejudice or the inflammatory nature of the publicity creates inherent prejudice against the appellant.

In this case, the newspaper article had been read by the judge who determined that it was not so influential as to in any way affect the jurors' ability to be impartial.

This determination is justified by the record and does not merit reversal of appellant's conviction.

C. THE TRIAL COURT DID NOT IMPROPERLY RESTRICT APPELLANT'S CROSS EXAMINATION OF AN EXPERT WITNESS.

Bill Simpson was qualified by the state at trial as an identification expert (T. 351). He testified that prints in blood, found inside the victim's apartment, had eleven points of comparison with prints belonging to the appellant, and it was therefore his opinion that the prints did in fact belong to the appellant (T. 361).

On cross-examination, appellant attempted to discredit the procedure used by the witness to compare the fingerprints found with those of the appellant (T. 369). Appellant's counsel was able to show that the expert had failed to use a method of identification which required measurement of the distance between certain ridges (T. 369). The appellant then attempted to impeach the reliability of the test used by posing hypotheses based in hypothetical results of the test which the expert admitted he did not use. The state objected to this line of questioning, claiming that it called for an opinion of the witness which could not be based on the facts in evidence (T. 370). The trial court sustained the objection, agreeing that the appellant could not pose

hypothetical questions which did not have a basis in the facts in evidence (T. 371). The court stated that appellant was entitled to hypothetical questions "unless you can establish that there are those variances in this case" (T. 371).

This Court has consistently held that the extent of cross-examination is a matter of discretion for the trial court. In State v. Starks, Utah, 581 P.2d 1015 (1978), this Court stated that:

> The matter of cross examination and the extent thereof rests largely in the discretion of the trial judge, and he will be reversed only if he abuses his discretion in a given case. Even if an error is made in limiting cross examination, it is not to be reversed unless it also is prejudicial (footnote omitted).

See also: State v. Maestas, Utah, 564 P.2d 1386 (1977) and State v. Tuggle, 28 Utah 2d 384, 501 P.2d 636 (1972).

Thus, in order to find reversible error in the restriction of cross-examining a witness, there must be clear abuse of discretion by the trial court and a finding that prejudice to the appellant resulted. Neither finding is justified in the present case. Here the district court limited the examination only when the appellant attempted to question the expert about facts which were not only not in the record, but which could not be placed in the record because the test from which the questions were derived was not used

in the present case. Because the court did not prohibit the defense counsel from shadowing the overall testing used by the expert in the absence of the measurement test, there is no showing that the failure to allow further questioning in any way prejudiced the appellant.

Rule 58 of the Utah Rules of Evidence, relied on by the appellant, does not apply to the facts of this case. That rule provides:

> HYPOTHESIS FOR EXPERT OPINION NOT NECESSARY. Questions calling for the opinion of an expert witness need not be hypothetical in form unless the judge in his discretion so requires, but the witness may state his opinion and reasons therefor without first specifying data on which it is based as an hypothesis or otherwise; but upon cross-examination he may be required to specify such data.

The rule recognizes the discretion of the trial court and is designed to allow exposure of the weaknesses of that which experts testify to, not that which is merely speculated upon and not based on the facts of the case.

Therefore, the limitation imposed upon the appellant was a correct exercise of the discretion of the trial court and does not justify reversal, especially where the jury was made aware of the fact that other mechanisms of testing were available and not used.

Furthermore, even the cases relied upon by the appellant, while not requiring all the facts to be in evidence, do require the hypothesis to be based upon a fair combination of facts supported by the evidence. See: Samuel v. Vanderheiden, 560 P.2d 636, 638 (Ore. 1977). Since the facts which the appellant attempted to question upon were not supported by the evidence, the trial court correctly exercised its discretion in sustaining the state's objection and the appellant was not harmed thereby.

D. ERROR IN FAILING TO STRIKE PORTIONS OF IMPROPER HEARSAY TESTIMONY WAS NOT PREJUDICIAL AND DOES NOT JUSTIFY REVERSAL.

After Brenda Valentine testified that she had lied to police officers in denying complicity with the crime when she had initially been arrested for the murder of Richard Whitehead (T. 529), the state called both police officers to the stand and elicited testimony regarding the prior inconsistent statement she had made on December 6, 1979. The defense counsel failed to object at the time the officers were questioned, but after the fact made a motion to strike the testimony claiming it was hearsay (T. 710). The trial court did not deal with whether the appellant had waived his right to contest the testimony but ruled that on the merits of the issue the testimony of the officers was hearsay but it

fell within Rule 63(1)(a) and (b) of the hearsay exceptions. The court stated:

> THE COURT: Rule 63(1) says that a prior statement of the witness is admissible, even though hearsay, if the judge finds that the witness had an adequate opportunity to perceive the event, provided that, (a) it is inconsistent with his present testimony, (b) it contains otherwise admissible facts which the witness denies having stated or has forgotten since making the statement. And that would apply, or it will support testimony made by the witness in the present case when such testimony has been challenged.
>
> Well, that would be if someone else offers it.
>
> So you rely on subparagraphs (b) and (a); inconsistency and contains otherwise admissible facts.

(T. 711) and:

> THE COURT: But that still doesn't render the prior statement consistent with all of her testimony, now. The jury is entitled to consider the inconsistency.
>
> I would rely, in denying the motion to strike, on subparagraph (b), that the testimony of the officers about her statements contains otherwise admissible facts and that the witness denied having stated or has forgotten it.
>
> She denied, if I can recall. If I can recall correctly there were at least three statements on which she was cross-examined that she denied.

> MR. HOUSLEY: And there were a couple she said she forgot she made, at least she can't remember whether she made them.
>
> THE COURT: So on the basis of Rule 63(1), subparagraph (b), I will deny the motion to strike.

(T. 712).

The court did recognize that it was possible to subject a portion of the testimony to a motion to strike but determined that:

> it would be impossible for me to instruct the jury on that question. I would have to explain all of Rule 63(1), subparagraph (b) to them, and I think that is not feasible.

This Court should not disturb that determination where, as here, the trial court is in the better position to observe and understand the limitation on the jury's ability to perceive and comprehend what portions the judge was attempting to strike. The further consideration of the trial court was that the trial court needed to take the route least likely to enhance any error to the detriment of the appellant. Therefore, the actions of the trial court were proper and did not result in prejudice to the appellant requiring reversal by this Court. This is supported by Rule 4 of the Utah Rules of Evidence which states that this Court, in examining errors of admission of evidence, should not reverse an otherwise sound

conviction unless the error had a "substantial influence in bringing about the verdict or finding."

E. INTRODUCTION OF PICTURES TO REBUT POINTS OF APPELLANT'S TESTIMONY WAS PROPER.

The appellant raised a motion in limine to pictures which the state proposed to introduce to rebut specific portions of the appellant's testimony at trial (T. 499). The court denied this motion in limine, determining that:

> Although they are not pleasant to look at, it is not this court's opinion that they are so shocking and unpleasant to se that they would constitute prejudice merely because of that aspect, and it is also my opinion that they definitely have probative value, that they may very well tend to show and that the prosecution could argue from them in closing argument that there are inconsistencies betwen the location and condition of the body and the defendant's testimony on the stand.

(T. 500). The court recognized that parties had entered into a stipulation that was perfectly sufficient at the time questions raised by the appellant's testimony made the exhibits proper mechanisms for rebuttal (T. 501).

The state also placed in the record the fact that the original stipulation was made more for defense than state purposes (T. 501).

Since the trial court determined that the probative value, in light of the doubt cast by the testimony of the appellant, outweighed the unpleasant (but not prejudicial) nature of the photographs, there was no error in their admission.

As noted by appellant in First of Denver Mortgage Investors v. C. N. Zundel, Utah, 600 P.2d 521, 527 (1979), this Court noted that parties may be relieved of their stipulations by the court. This was properly done in this case and the court did not clearly abuse its discretion in releasing the state from the stipulation.

Respondent has established that each of the alleged errors were either not error at all or if they were error were harmless. Where this is the case, accumulation of harmless errors cannot establish prejudice to a defendant unless the errors are so numerous and significant that the defendant's right to a fair trial has been denied. The harmless errors in this case are trivial both individuall and when examined together. Thus, they do not warrant reversal of appellant's conviction.

CONCLUSION

The judgment of the court below should be affirmed because the trial court correctly applied, in light of a lesser expectation of privacy, an exception to the search warrant requirement where a parole officer and a parolee are involved. Secondly, the errors claimed by the appellant on appeal were either non-existent or non-prejudicial and do not justify a reversal of the conviction.

DATED this 25th day of January, 1982.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that I mailed three true and exact copies of the foregoing Brief, postage prepaid, to Lynn R. Brown, Attorney for Appellant, Salt Lake Legal Defender Association, 333 South 200 East, Salt Lake City, Utah, 84111, this 26th day of January, 1982.

Robert N. Parrish

APPENDIX A

FEDERAL COURT DECISIONS

Randezzo v. Follette, 418 F.2d 1319 (2nd Cir. 1969)

Santos v. New York, 441 F.2d 1216 (2nd Cir. 1971)

Connelly v. Parkinson, 405 F.Supp. 811 (So. Dakota S.D. 1975)

United States v. Dally, 606 F.2d 861 (9th Cir. 1979)

United States v. Jeffers, 573 F.2d 1074 (9th Cir. 19__)

STATE COURT DECISIONS

Roman v. Alaska, 570 P.2d 1235 (Alaska, 1977)

State v. Montgomery, 566 P.2d 1329 (Arizona, 1977)

People v. Anderson, 536 P.2d 302 (Colorado, 1975)

People v. Hernandez, 229 Cal. App. 2d 143, 40 Cal. Rptr. 100 (1964)

State v. Gansz, 297 So.2d 614 (Florida, 1974)

State v. Bollinger, 405 A.2d 432 (New Jersey, 1979)

State v. Gardiner, 619 P.2d 847 (New Mexico, 1980)

People v. Huntley, 43 N.Y.2d 175, 371 NE2d 796 (1977)

Commonwealth v. Brown, 361 A.2d 849 (Penn. 1976)

State v. Simms, 10 Wash. App. 75, 576 P.2d 1088 (1974)

State v. Tarrell, 74 Wis. 2d 647, 247 NW2d 696 (1976)

APPENDIX B

the case of Mr. Velasquez or Mr. Garcia, but if that were the case, that he had had a prior history of doing that, that the parole officer would be able to focus in on that and make it a condition of somebody's parole or probation that they could conduct searches of this kind, make them knowledgeable of it, put it in the parole agreement, and have them sign it, which is quite frequently done, but not done in this particular case.

So I think there are situations where people on parole or probation in special circumstances, that condition could be brought about where they could search without a search warrant. I think it would have to be spelled out in their parole agreement or probation agreement in order to do that.

I don't think the court would be warranted in this case in adopting Mr. Housley's argument that the mere fact that they are on parole in any way diminishes their right to be secured in their own home from unreasonable search and seizure, and that the minimum requirement of the fourth amendment requires that they have a search warrant.

THE COURT: Well, that means of formulating the issue, though, sort of begs the question. Because it is not a question of their having a right to be secure from unreasonable searches and seizures. The question before us here is whether the search and seizure is reasonable, and one of the determinations, or one of the standards, used in that determination has to do with the expectation of privacy. And that gets us to the question of whether parclees have a different kind of expectation of privacy than ordinary citizens.

MR. BROWN: Well, with that balancing theory I don't think you can lump all the parolees into one group and treat them all the same.

THE COURT: Well, I think that is what Latta does in fact.

MR. BROWN: That is what Latta does. And that is what I am suggesting that I think the trend of the law is getting away from. Latta is only a Federal Circuit Court decision.

The other cases cited, that I have cited to the court that have held contrary to that, are certain court decisions.

THE COURT: I don't have any of those opinions before me, unfortunately.

Let me ask you this, too, Mr. Brown, which poses considerable problems for me, and I will grant you, at least based on the analysis provided by LaFave, according to LaFave's analysis, the weight of the jurisdictions or the weight of the precedent is in favor of warrantless searches of parolees as being constitutionally permissible.

He does suggest and strongly advocates in his analysis that the trend both ought to continue to be a waiver of that kind of analysis and towards an application of stricter standards or similar standards for parolees and other citizens.

MR. BROWN: Yes. I believe he does indicate the weight of the authority is that.

Now, if the court wants to count up the cases and see where the weight of the authority is, I am sure that the weight of the authority is considerably in support

court to --

THE COURT: No. I agree. But that was a preface to the question I wanted to ask you.

As far as you know, on the basis of the authorities you have submitted to me, this question has not been dealt with at all by the Utah Supreme Court.

MR. BROWN: Or the United States Supreme Court.

THE COURT: Or the United States Supreme Court. And you are literally requesting me to make some prediction, you are asking me to make an impossible prediction, because you are asking both for an indication of which way our Supreme Court will go on this issue and, as I understand it, if this motion to suppress is granted, the matter cannot be reviewed by our Supreme Court.

Is that correct?

MR. HOUSLEY: That's correct, Your Honor.

THE COURT: And then to consider the question of whether or not the Supreme Court of the United States may in fact be willing to rule on the question.

Has search been denied in cases involving this issue in the past?

MR. BROWN: Not to my knowledge.

MR. HOUSLEY: Sure. It was denied in the Santos case, Your Honor.

THE COURT: All right. Yes. The Santos case isn't as helpful, however.

MR. HOUSLEY: That case stands for the proposition, basically, of, although it is based on the same rationale as the Latta case, the thrust of that case, and I don't

where they used evidence that was not admissible at trial for the parole revocation hearing.

THE COURT: The court upheld the use of the evidence, I understood.

MR. BROWN: The court upheld the use of that at an administrative hearing.

MR. HOUSLEY: That was on the issue of consent. So it didn't really get into the question of the parolees.

THE COURT: It didn't deal with the search and seizure question at all, it sounds like.

MR. BROWN: But I would discourage the court, in ruling on this question, to base it on which party has the best vehicle for appeal.

THE COURT: Well, that clearly would not be the basis for my ruling. I simply indicated to you my concern in that area partly because it seems to me that there are two equally strong and equally leaning lines of authority on this question, neither of which has been considered and ruled upon either by our Supreme Court or by the Supreme Court of the United States. So I have absolutely no guidance whatsoever within this jurisdiction, and in that context I think it does become significant, to me at least, to assess the degrees to which my ruling would be reviewed in this jurisdiction.

MR. BROWN: The court has the material and the argument. I would ask the court to rule on the position that you feel is the one that favors the parolee having the same constitutional rights as an ordinary citizen.

THE COURT: All right. Thank you very much, Mr. Brown. Do you have anything additional, Mr. Housley?

MR. HOUSLEY: Your Honor, I would only mention Mr. Brown's interpretation of Latta. I think if you read Latta it does not stand for the proposition that there is a diminution of the parolee's constitutional rights. It merely says that it has to be reasonable. And in effect, it merely says that it has to be reasonable, and that is a parolee and his parole officer making a search is one of the factors that goes into testing the reasonableness of the search.

THE COURT: Yes. I agree. I don't think Latta stands for the constructive code theory at all. They discuss the constructive code there, and they identify it and isolate it as having been a ground for the ruling in a number of cases that they cited in analyzing.

MR. BROWN: They certainly wouldn't have permitted the search like that of an ordinary citizen.

THE COURT: No. I agree. However, the emphasis, and I think really it comes out of the part of the Latta opinion that discusses the fact that the warrant requirement in their view would frustrate the purposes of the search and the regulatory scheme of which it was a part, they emphasize the regulatory scheme and the involvement of the parole officer with the parolee as a part of the rehabilitation process.

They say, "We think it indisputable, in view of the nature of the parolee and of the parole agent's responsibilities, as we have anlayzed them, that, were a warrant required, the showing necessary would have to be substantially different from probable cause to avoid frustrating the end or the purposes of parole."

And then they go on to decide that that would in fact make the whole warrant process totally unnecessary. Frankly, I think that the sense is a very cogent thing about that approach. And in fact I think that the two approaches to the problem are very cogently set out in Latta, both in the majority opinion and in the dissent.

The majority opinion apparently makes a threshhold determination that in the case of parolees you are dealing -- and here is where the constructive code theory probably comes in in a secondary capacity -- you are dealing with a lesser expectation of privacy on the one hand and a very high degree of regulation and a specialized relationship between the parole officer and parolee on the other.

The dissent takes the position that warrantless searches are , per se, unreasonable, and proceeds with its analysis.

MR. BROWN: That is Coolidge vs. New Hampshire.

THE COURT: And proceeds with its analysis from there; whereas, the majority says, "No. Because of the special status of parolees we can deal with the reasonableness question from square one, rather than with the presumption that exists with respect to other kinds of citizens.

All right. I have had an opportunity to read all of the citations which have been submitted to the court by counsel and I have read LaFave's detailed analysis of the cases and the theories in this area, and I suppose it's clear from my comments during the course of your arguments that it is not an easy matter for me to resolve.

I will make the following findings of fact in connection with the motion to suppress:

Number one, I find that the defendant was in fact a parolee subject to the supervision of the Utah Division of Corrections at the time the search was conducted. I believe that has been shown by a preponderance of evidence in this hearing.

Number two, I am able to find as a matter of fact that the search was reasonable, as it was conducted in furtherance of the supervisory duties and obligations of the Division of Adult Probation and Parole at the time; that is, to discover whether Mr. Garcia, and also with respect to the defendant Velasquez, to discover, one, whether they were using drugs or dealing in drugs; and number two, whether they were involved in related criminal activities involving either the drugs or possibly the juveniles.

I think that the facts on which the reasonable suspicion of the parole officers was based have been set forth in the evidence; namely, the fact that Mr. Garcia and Mr. Velasquez were living together with no clear and visible means of support, the employment of Mr. Velasquez being a problem.

Number three, the existence of minors on the premises in the past; number four, information from an informant respecting drug dealing; and number five, the fact that a murder had taken place, or a killing, a violent killing, had taken place in the apartment next door to the location of the defendants and the past record of each of the defendants, each of them having been connected in the past with similar crimes, Mr. Garcia as a perpetrator and Mr. Velasquez as a witness, and the apparent confusion noted by witness Harris of the place in the investigation of that

particular offense as to the identity of these defendants.

Now, the reason I isolate all of those facts is I do not think and could not find as a matter of fact that all of these factors together would have met a probable cause standard, had application been made for a warrant. However, as a matter of law I am finding that a reasonableness standard may be applied in the special circumstances of parolees.

That leads us to the underlying question of whether the warrant requirement can be dispensed with in the State of Utah. And there being no law whatsoever on this question, under the circumstances of this case I am willing to take the progressive trend that's been argued for by Mr. Brown on behalf of the defendant, if in fact it is a progressive trend. That is how it is characterized by LaFave. I feel that it is unlikely that that would be adopted in the State of Utah, and I am concerned under the facts of this case about its application at the trial level.

Therefore, I am going to hold as a matter of law that the reasoning adopted by the Ninth Circuit in the LaFave case is sufficient to substantiate my ruling here. That's based, I think, in part, and of course anyone can read the opinion and decide what it is based on, but I think it is based in part on a finding that reasonable expectations of privacy belonging to a parolee are different in some fashion from those of other citizens.

Number two, the relationship between parole supervision and parolees is such that there is a necessity for unannounced searches based upon reasonable suspicion of criminal activity or parole violation, which I have found

as a matter of fact exist here.

I am going to take the position that the application of the reasonableness standard is sufficient, even though applied retroactively, and I do understand clearly the theoretical problems with that. But I am going to take that position.

MR. BROWN: Would the court state that again, please?

THE COURT: That the reasonableness standard applied retroactively to determine whether the searches of parolees were valid is adequate to protect the constitutional rights of parolees in the fourth amendment area.

For example, the LaFave case points out that in any given case what is done in the way of a search may be so unreasonable as to require that it be struck down under the fourth amendment, and they did not accept the notion that a parole officer may conduct full blown searches of parolees' homes whenever and as often as they feel like it. I agree with that characterization, and I don't think the LaFave rationale stands for the proposition that parole officers have complete discretion.

I think that wherever possible their discretion ought to be exercised in the direction of obtaining a warrant for searches, but in this case I am not going to hold that the search is unreasonable either, because it was without a warrant or on the basis of the fact that gave rise to it, which means that the motion to suppress is denied. We don't have to go on to the question of a mistrial motion because of the reference made in opening statements.

It is now a quarter of 12:00 and the jury has been waiting [illegible] 45 minutes. I suggest that we begin with