1990

The State of Utah v. Gary Nicholas Avila : Petition for Rehearing

Utah Court of Appeals

R. Paul Van Dam; Attorney General; Charlene Barlow; Assistant Attorney General.
Nancy Bergeson; Ronald S. Fujino; Salt Lake Legal Defender Assoc.; Attorneys for Appellant.

IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
GARY NICHOLAS AVILA,	:	Case No. 900157-CA Priority No. 2
Appellant/Petitioner.	:	

PETITION FOR REHEARING

Petition for rehearing of an appeal from a judgment and conviction for Robbery, a second degree felony, in violation of Utah Code Ann. § 76-6-301 (1989), in the Third District Court in and for Salt Lake County, State of Utah, the Honorable John A. Rokich, Judge, presiding.

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INTRODUCTION

Pursuant to Rule 35 of the Utah Rules of Appellate Procedure, Petitioner Gary Avila files this petition for rehearing. In Cummings v. Nielson, 42 Utah 157, 129 P. 619 (1912), the Utah Supreme Court noted the appropriate standard for filing a petition:

> To make an application for a rehearing is a matter of right, and we have no desire to discourage the practice of filing petitions for rehearings in proper cases. When this court, however, has considered and decided all of the material questions involved in a case, a rehearing should not be applied for, unless we have misconstrued or overlooked some statute or decision which may affect the result, or that we have based the decision on some wrong principle of law, or have either misapplied or overlooked something which materially affects the result . . . If there are some reasons, however, such as we have indicated above, or other good reasons, a petition for a rehearing should be promptly filed and, if it is meritorious, its form will in no case be scrutinized by this court.

129 P. at 624. This petition for rehearing meets the preceding standards and should be granted for the reasons discussed below.

STATEMENT OF THE CASE

During the lower court proceedings, held on December 20, 1989, Petitioner Gary N. Avila moved to suppress evidence seized as

a result of an allegedly unlawful arrest. On January 8, 1990, Mr. Avila entered a conditional plea of guilty pursuant to State v. Sery, 758 P.2d 935 (Utah App. 1988), explicitly preserving his right to appeal the trial court's denial of his motion to suppress. (T 41). On December 12, 1990, Petitioner and the State orally argued the case pursuant to this Court's motion for an expedited decision. Utah R. App. P. 31. On December 13, 1990, this Court affirmed Mr. Avila's conviction. See Addendum A (expedited decision).

STATEMENT OF FACTS

For purposes of this petition, the pertinent facts are set forth and incorporated within the argument section below.

SUMMARY OF THE ARGUMENT

While this Court's decision may have properly allowed the admission of evidence seized pursuant to consent (i.e. beer, clothing, and weapons), the decision also improperly permitted the use of evidence (the show-up identification) unaffected by the involved consent. A probable cause analysis may not have been germane to the evidence seized pursuant to consent. However, a probable cause determination is relevant for the suppression of the show-up identification. Petitioner Avila requests this Court to determine whether the lower court erred in not suppressing evidence of the show-up identification--evidence unrelated to consent but directly related to his arrest. For purposes of this petition, Petitioner will not dispute further the admissibility of evidence seized pursuant to consent.

ARGUMENT

EVIDENCE OF THE SHOW-UP IDENTIFICATION SHOULD HAVE BEEN SUPPRESSED

During the December 12, 1990, oral argument, this Court noted that Petitioner Avila's argument (regarding a lack of probable cause) was not relevant to the evidence seized because it had been obtained pursuant to lawful consent. Mrs. Figueroa, the woman who lived at the involved residence, consented to the officers' request for entry into her house. (T 20). The officers ultimately seized evidence (beer, clothing, and weapons) which was believed to be related to the reported (Circle K) crime.

In addition to seizing this evidence, however, the officers also arrested Mr. Avila and brought him before the victim for a "show-up" identification. As noted by Mr. Avila during his motion to suppress proceedings and in his appellate brief:

> [Defense counsel]: Your honor, before we start, just so we can narrow the issues, to briefly let your honor know what the basis of this motion is.
>
> The Court: Fine.
>
> [Defense counsel]: The only issue before the court is whether or not there is probable cause to take my client and confront an alleged victim after a robbery at a Circle K. In other words, there's a show-up identification that is ultimately made, and our issue is whether or not at the time the officer seized the person of Mr. Avila there existed sufficient legal basis to do so.
>
> He is at another individual's house. I think as testimony develops, your honor will see a series of events leading over to the house. And they took him back to Circle K and did a show-up with the alleged victim. And that detention, that restraint, taking him there, needs to be, in our view, justified by probable cause, and that is the issue before the court.

> [The State]: I appreciate that, your honor. The State perceives this as an issue of probable cause to arrest the defendant on the night of July 23rd, 1989.
>
> The Court: So let's narrow it to that issue.

(T 2-3) (emphasis added); Appellant's reply brief at 2. Hence, the "show-up" identification was additional evidence which should have been suppressed.

Based on the questions and concerns expressed by this Court during oral argument, it appears that the Order of Affirmance stemmed from the distinction between a search and seizure incident to consent (in which case probable cause would not be relevant) as opposed to a search and seizure incident to an unlawful arrest (in which case probable cause would be relevant). This Court apparently found that all the evidence was seized pursuant to consent, thus rendering irrelevant a probable cause determination. However, even if the other evidence seized (the beer, clothing, and weapons) should not have been suppressed because of Mrs. Figueroa's consent, her consent could not have affected the admissibility of the show-up identification.

A separate analysis based on the existence or nonexistence of probable cause must still be made in order to justify the officers' actions in restraining Mr. Avila and bringing him to the Circle K for the show-up identification. See Steagald v. United States, 451 U.S. 204 (1981) (noting the difference between a search warrant [in which case probable cause would not be necessary because of Mrs. Figueroa's consent] and an arrest warrant [which would

require probable cause regardless of Mrs. Figueroa's consent]); Appellant's opening brief at 11.

While Petitioner Avila could not relate the appropriate distinction during oral argument, his brief did note the relationship between the show-up identification and the probable cause determination. Appellant's reply brief at 2. Immediately following oral argument, Petitioner Avila submitted supplemental authority in an attempt to reestablish the importance of the show-up identification. See Addendum B; cf. Tape of Oral Argument at 270-75 (December 12, 1990) (wherein the State indicated that if evidence had been seized incident to an allegedly unlawful arrest, the motion to suppress may have been proper).

Because of this Court's expedited decision, Petitioner Avila will not continue to request suppression of the items allegedly seized pursuant to Mrs. Figueroa's consent (the beer, clothing, and weapons). For purposes of this petition, however, Petitioner Avila respectfully requests this Court to determine whether the show-up identification should have been suppressed because the officers lacked probable cause for the arrest. Mrs. Figueroa's consent would have had no bearing on the admissibility of the show-up identification, a "fruit" of the allegedly unlawful arrest.

CONCLUSION

Petitioner Avila requests a rehearing by this Court to determine whether evidence of the show-up identification should have been suppressed.

SUBMITTED this 26th day of December, 1990.

NANCY BERGESON
Attorney for Appellant/Petitioner

Ronald S. Fujino

RONALD S. FUJINO
Attorney for Appellant/Petitioner

CERTIFICATION

I, RONALD S. FUJINO, do hereby certify the following:

(1) I am the attorney for Appellant/Petitioner in this case;

(2) This Petition for Rehearing is presented to this Court in good faith and not to unnecessarily delay disposition of this matter.

RESPECTFULLY submitted this 26th day of December, 1990.

Ronald S. Fujino

RONALD S. FUJINO
Attorney for Appellant/Petitioner

CERTIFICATE OF DELIVERY

I, RONALD S. FUJINO, 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 26th day of December, 1990.

Ronald S. Fujino

Ronald S. Fujino

DELIVERED by _____ this _____ day of December, 1990.

_____

ADDENDUM A

Rec'd. 12/13/90

FILED
DEC 17 1990
Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

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The State of Utah,	)	
	)	
Plaintiff and Appellee,	)	ORDER OF AFFIRMANCE
	)	
v.	)	Case No. 900157-CA
	)	
Gary Nicholas Avila,	)	
	)	
Defendant and Appellant.	)	

Before Judges Jackson, Orme, and Bench (On Rule 31 Hearing).

Defendant's conviction is affirmed.

DATED this 12th day of December, 1990.

ALL CONCUR:

Norman H. Jackson, Judge

Gregory K. Orme, Judge

Russell W. Bench, Judge

ADDENDUM B

SALT LAKE LEGAL DEFENDER ASSOCIATION

424 EAST FIFTH SOUTH, SUITE 300
SALT LAKE CITY, UTAH 84111
532-5444

Established in 1965

F JOHN HILL
Director

December 13, 1990

Ms. Mary Noonan
Utah Court of Appeals
400 Midtown Plaza
230 South 500 East
Salt Lake City, Utah 84102

Dear Ms. Noonan:

Re: State v. Avila
Case No. 900157-CA
CORRECTED LETTER

The letter addressed to Ms. Mary Noonan, dated December 12, 1990, should have read as follows:

> Pursuant to Rule 24(j) of the Utah Rules of Appellate Procedure, Defendant/Appellant Gary Nicholas Avila cites the following authority to clarify statements made during oral argument. Motion to Suppress proceeding at 2 ("our issue is whether or not at the time the officer seized the person of Mr. Avila there existed sufficient legal basis to do [a show-up identification]"); see also Appellant's reply brief at 2. A probable cause determination may not have been relevant to the evidence seized in Mrs. Figueroa's residence because of her consent. However, the motion to suppress also pertained to the "show-up" identification of Mr. Avila in which case a probable cause determination would be relevant.

Respectfully,

Ronald S. Fujino
Attorney for Appellant Avila