1982

State of Utah v. Jahes E. Ballenberger : Reply Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
vs.	:	Case No. 17619
JAMES E. BALLENBERGER,	:	
Defendant-Appellant.	:	

REPLY BRIEF OF APPELLANT

Appeal from a Jury Verdict of the

Third Judicial Court in and for Salt Lake County

Honorable Jay E. Banks, Judge

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STATEMENT OF FACTS

The statement of facts as stated by respondent failed to include certain uncontroverted facts of paramount importance.

Upon Officer Hansen's arrival at the Oakwood Shopping Center, the uncontroverted testimony reveals that Mr. Ballenberger was asked to leave his car and was then handcuffed by Officer Hansen (Tr. 54, 55). At that point Officer Hansen shined his light under the seat (Tr. 54). Officer Hansen then took Mr. Ballenberger to his car and stated that he was under arrest for possession of stolen property (Tr. 55). Officer Hansen then read Mr. Fulton his Miranda rights (Tr. 38). At this time no theft had been reported, nor was there any indication that the property located in the back seat of the car was even stolen.

According to Officer LeVitre Mr. Ballenberger's vehicle was first observed at about 3:10 A.M. (Tr. 8). Mr. Ballenberger was read his rights at approximately 3:19 A.M. (Tr. 134). Mr. Ballenberger was subsequently questioned and required to stay with

Officer Hansen while Mr. Fulton traveled with Officer LeVitt five blocks away to awaken Mr. Ashby, question him and retur the Oakwood Shopping Center (Tr. 131-134). At that time approximately 3:40 A.M., some twenty minutes after Mr. Ballenberger was read his Miranda rights, he and Mr. Fulton formally placed under arrest (Tr. 134).

ARGUMENT

POINT I

MR. BALLENBERGER'S ARREST WAS WITHOUT PROBABLE CAUSE.

A. Probable cause existed only after it was establi that a crime had been committed.

What constitutes probable cause for a warrantless arr is stated in Beck v. Ohio, 379 U.S. 89 (1964). In Beck the defendants sought to suppress evidence of clearing house slip allegedly obtained by an unlawful search following a warrant arrest. The United States Supreme Court defined what consti probable cause and stated:

> Whether the arrest was constitutionally valid depends in turn on whether at the moment the arrest was made, the officers had probable cause to make it--whether the moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense. Id. at 91.

This court has explicitly adopted the Beck standard i case of State v. Whittenback, 621 P.2d 103 (1980), where the stated:

> . . . we first address the question of what constitutes probable cause for arrest without a warrant. The basic standard was set forth by the United States Supreme Court in Beck v. Ohio, later stated by this court as follows: The determination should be made on an objective standard: whether from the facts known to the officer, and the inferences which fairly might be drawn therefrom, a reasonable and prudent person in his position would be justified in believing that a suspect had committed the offense. Id. at 106.

Probable cause existed in this case only after it was established that a crime had been committed. Prior to the time that Mr. Ashby identified the property in the back of Mr. Ballenberger's car, there was no indication that a theft had occurred. The lateness of the hour and the fact that Mr. Ballenberger had property in the back of his car, which was not satisfactorily explained to the officer, did not provide the officer with probable cause. There simply was no reasonable justification at that time to believe that Mr. Ballenberger had committed or was committing a criminal offense. Only after Mr. Ashby identified the objects in the back of Mr. Ballenberger's car as his own did the officers have probable cause to make an arrest. The detention prior thereto constituted an illegal arrest, especially in light of the fact that Hansen had handcuffed Mr. Ballenberger and placed him in his patrol car.

The State contends that because Mr. Ballenberger did not ask to leave he cannot claim that he was detained. Such a contention, however, has no basis in law and has never been a position adopted by this court. The case law suggests that once a person has been detained more than momentarily or briefly, the

restraint must be viewed as an arrest. Rio v. United State U.S. 253 (1960); Terry v. Ohio, 392 U.S. 1 (1968). It is immaterial that he asks to leave if indeed he is detained u the color of legal authority. In fact, the mere calling b officer in the form of a command to stand still or to come a or any other expression indicating that a person is not fre as he pleases is sufficient to constitute an arrest. See Ra v. United States, 298 F.2d 310(C.A. D.C. 1961).

The fact that probable cause was later established i case does not legally justify the initial arrest. Neither c act of forcing Mr. Ballenberger into the patrol car after be handcuffed constitute a voluntary act on his part sufficien legally justify the officers in questioning Mr. Ballenberge before an arrest is made. Under the circumstances of this ca at the moment Mr. Ballenberger was forced into the patrol car was placed under arrest. It was at that point that probable for such an arrest did not exist.

B. The initial questioning of appellant was impermi under Utah law.

Respondent contends that the initial questioning of appellant was permissible since the officers had an "objecti credible reason" for stopping Mr. Ballenberger. However, suc standard is not the law in Utah and is contrary to provisions contained in the Utah Code of Criminal Procedure. Section U.C.A.(1953), as amended, specifically outlines the grounds required for an officer to stop and question a suspect.

> A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions.

According to the foregoing, a police officer must have a reasonable suspicion, not an objective credible reason, to believe that the suspect has committed or is in the act of committing an offense in order to justify a stop. In People v. LaPene, 40 N.Y.2d 210, 352 N.E.2d 562 (1976), upon which the State relies, the court indicates that the requirement of an objective credible reason is less stringent than that of a reasonable suspicion required by Utah law. According to the rationale of that court the reasonable suspicion standard requires a belief that criminal activity has occurred or is about to occur, while the requirement of an objective credible reason does not require any founded suspicion of criminal activity. This court has never adopted the objective credible reason standard and only makes reference to the lesser standard in dicta in Whittenback, supra. Thus, since the standard argued by the State is not the law in Utah, there is no validity to its argument that the initial stop of Mr. Ballenberger was legally justified.

In Re Tony C., 582 P.2d 957 (Cal. 1978), which is quoted in appellant's first brief in length, the court stated the circumstances known or apparent to the officer must include specific and articulable facts causing him to suspect some criminal activity relating to the crime has taken place and the person he intends to stop is involved in that activity. The court

stated that the officer must be able to articulate a reasonable suspicion and that mere curiosity, or rumor, or a hunch is not sufficient. See also State v. Thompson, 613 P.2d 525 (Wash. 1980).

The officers' action in stopping Mr. Ballenberger and questioning him as to identification and as to the property in the back seat was beyond the scope of a permissible stop. At the time the stop was made, there was no reasonable suspicion that Mr. Ballenberger was engaged in any criminal activity. Neither was there any indication that Mr. Ballenberger had violated any traffic ordinance. He was merely in a public place where he had a legitimate right to be. Under these circumstances the police officers could not have developed a reasonable suspicion.

The fact that Mr. Ballenberger was already stopped in a well lighted area in the Oakwood Shopping Center does not mean that the police could not "stop" him. A suspect is not required to be fleeing or to be in motion in order for an officer to effectuate a stop. The mere show of authority or the restraint of liberty of a citizen is sufficient. See Terry, note 16. The fact that Mr. Ballenberger had to stop what he was doing to respond to officers' questions constituted a stop. And certainly at the point the officer forced Mr. Ballenberger into his car and read him his Miranda rights, Mr. Ballenberger's liberty had been restrained. At either juncture, a stop occurred well before the officers had any indication that the back seat property had been stolen, or that the activity of Mr. Ballenger was reasonably

criminally suspicious to justify an investigative stop under Section 77-7-15.

CONCLUSION

Mr. Ballenberger's arrest and stop were made without probable cause or a reasonable suspicion that he was engaged in criminal conduct. Accordingly, for reasons stated above, it is clear that the lower court erred in failing to suppress evidence admitted at trial. The conviction of the trial court should be reversed and a new trial ordered.

RESPECTFULLY SUBMITTED this 18th day of February, 1982.

McKAY, BURTON, THURMAN & CONDIE

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MAILING CERTIFICATE

I hereby certify that on the 18th day of February, 1982, I mailed, postage prepaid, two true and exact copies of the foregoing Reply Brief to David L. Wilkinson, Attorney General, and Robert N. Parrish, Assistant Attorney General, at 236 State Capitol, Salt Lake City, Utah 84114.

Sheila Lund