2005

State of Utah v. Bernadette Duran : Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

STATE OF UTAH, Plaintiff/Petitioner, v. BERNADETTE DURAN, Defendant/Respondent.	: : :	Case No. 20051070-SC Ct. Appls. No. 20040421-CA

REPLY BRIEF OF PETITIONER

ON WRIT OF CERTIORARI
TO THE UTAH COURT OF APPEALS

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REPLY BRIEF OF PETITIONER

REPLY TO DEFENDANT'S ARGUMENT

Defendant does not dispute that the consumption of marijuana, and its consequent destruction, creates an exigency. *See* Br. Appellee. Rather, she claims that the odor of burning marijuana does not support a reasonable suspicion that marijuana is being consumed or destroyed. She claims that it is impossible to distinguish the odor of burning marijuana from that of burnt marijuana. *Id.* at 7-8. For that reason, she argues, the smell of burning/burnt marijuana does not establish with certainty that marijuana is being consumed and destroyed. *Id.* at 8-10.

I.

DEFENDANT'S UNPRESERVED CLAIM THAT THE OFFICERS DID NOT AND COULD NOT DECTECT THE ODOR OF BURNING MARIJUANA IS NOT PROPERLY BEFORE THIS COURT

Whether the officers smelled burning marijuana is an issue of fact. Defendant did not challenge the officers' ability to detect burning marijuana on cross-examination

during the hearing on the motion to suppress or in her written argument following the hearing. *See* R12, 60. She did not claim that marijuana was not being smoked. R60:58-68; 20. Rather, in arguing to the trial court that exigent circumstances did not justify the entry, defendant claimed that "the fact that marijuana is being smoked [cannot] by itself be considered [an] exigent circumstance." R20. Defendant did not in any way dispute the officers' testimony regarding their belief that marijuana was being consumed and destroyed and that they could smell it. *See* R12. Thus, she did not preserve any claim that the officers did not and could not smell burning marijuana.

On appeal, defendant made a one-sentence claim in her reply brief, arguing that it had not been established whether the odor the officers smelled "was from stale or fresh smoke." Reply Br. of Aplt. at 2. She provided no support or analysis for the claim. She did not argue any justification for raising the claim for the first time on appeal. *See State v. Pledger*, 896 P.2d 1226, 1229 n.5 (Utah 1995) (declining to consider waived claim where appellant did not argue "exceptional circumstances" or "plain error" to justify its review). She did not explain why she should be permitted to challenge on appeal the officers' testimony that the trailer occupants were "smokin' up the evidence" when she did not cross-examine them about that testimony or present any contrary testimony during the motion to suppress. R60:21. The court of appeals did not address her unpreserved claim.

The court of appeals' opinion, upon which this Court granted certiorari, holds that "[a]lthough the smell of burning marijuana provided the officers probable cause that a crime was being committed, it did not create exigent circumstances that would permit a

warrantless entry." *State v. Duran*, 2005 UT App 409, ¶ 22, 131 P.3d 246. The court did not distinguish between burning and recently burnt marijuana. *See id.* Defendant did not file a cross-petition challenging the court of appeals' implicit conclusion that the officers had, in fact, detected "the smell of burning marijuana." *Id.* Thus, the issue before this Court is not whether the officers could detect the odor of burning marijuana, a factual inquiry. *See Hansen v. Eyre*, 2005 UT 29, ¶ 7 n.3, 116 P.3d 290 (holding that claims were "not properly before this court because they were neither included in [the] petition for certiorari nor decided by the court of appeals"). The issue is rather "whether the detectable odor of burning marijuana indicates an exigent circumstance permitting a warrantless search of a residence." Order, dated February 8, 2006 (granting petition for writ of certiorari).

II.

IN ANY CASE, REASONABLE SUSPICION THAT MARIJUANA IS BEING OR IS ABOUT TO BE BURNED AND DESTROYED SUFFICES TO ESTABLISH AN EXIGENCY; THE CIRCUMSTANCES HERE SUFFICED TO SUPPORT A REASONABLE SUSPICION

Even should this Court consider the merits of defendant's unpreserved claim, defendant cannot prevail. Defendant cites no support for her claim that officers can never absolutely determine on the basis of odor alone whether marijuana is presently burning or already burnt, and the State does not concede that the distinction cannot be made. *See* Br. Appellee at 11. But even assuming that officers cannot always accurately ascertain from odor alone whether marijuana is still or was recently burning, the odor of burnt/burning marijuana is nonetheless sufficient to establish a reasonable suspicion that the drug is in

the process of destruction and may be further destroyed before a warrant can be obtained. Moreover, the officers here had not only the odor of burnt/burning marijuana, but additional circumstances establishing reasonable suspicion.

A. Reasonable suspicion does not require absolute certainty.

Officers need not be absolutely certain that an exigency exists before they may make a warrantless entry. Rather, "if circumstances support a reasonable suspicion of exigency," officers may enter. *United States v. Banks*, 540 U.S. 31, 37 (2003); *see also State v. Peterson*, 2005 UT 17, ¶ 10, 110 P.3d 699 (stating, in context of *Terry* stop, that "reasonable suspicion" does not require than an officer "be absolutely certain"). Officers need not be certain that the evidence is being or is about to be destroyed. Rather, they must have reasonable suspicion of that matter. In addition, the "mere fact that there might be an innocent explanation" for circumstances or conduct does not "vitiate[] reasonable suspicion." *Provo City Corp. v. Spotts*, 861 P.2d 437, 440 (Utah App. 1993) (addressing reasonable suspicion of criminal activity). Where circumstances are "conceivably consistent" with non-exigent circumstances, but also "strongly indicative" of exigent circumstances, reasonable suspicion of an exigency exists. *Id.*

B. Here, the circumstances supported a reasonable suspicion that an exigency existed.

Here, the odor of either burning or recently burned marijuana supported a reasonable belief that marijuana was in the process of destruction. That odor supports a reasonable suspicion that marijuana is being consumed. Even if the odor of freshly burnt marijuana may be "conceivably consistent" with circumstances in which the smokers

have recently doused the burning marijuana in their pipes or roach clips, the odor is still "strongly indicative" of ongoing usage and supports a reasonable suspicion that the marijuana is being burned and consumed.

Moreover, given that marijuana use is frequently a group activity, involving a number of people taking varying numbers of "hits" over varying periods of time, officers may reasonably suspect, based on the smell of recently-smoked marijuana, that usage, even if sporadic and even if briefly delayed, is ongoing, and that further destruction of evidence, if not actually in progress, is imminent.

Thus the smell of recently burned marijuana, like the smell of burning marijuana, supports reasonable suspicion that marijuana is in the process of being consumed and destroyed. While the smell may also be consistent with the recent use of marijuana, it is "strongly indicative" of ongoing use and therefore of ongoing destruction.

In addition, nothing in this case suggests that the officers merely smelled the odor of stale marijuana smoke. The officers received a report of ongoing marijuana use at approximately 4:00 p.m. R60:16-17. They responded, arriving on site at approximately 4:40 p.m. R60:18. One citizen informant told them that he had been out to the trailer and personally observed the occupants smoking marijuana. *Id.* As they talked with the informants, the informants again told them "that there were people in the trailer that were doing drugs." R60:42. As they approached the trailer, the officers smelled the odor of burnt marijuana "leakin' out of the cracks of the trailer." R60:19. The odor was unmistakable. *Id.*

Under these circumstances, the officers had reason to believe that the trailer occupants had been and were smoking marijuana. When the officers arrived on site, citizen informants told them that people were "doing drugs." R60:42. Citizen informants are presumptively reliable. *See State v. Deluna*, 2001 UT App 401, ¶ 14, 40 P.3d 1136 (stating that court presumes the veracity and reliability of information from ordinary unpaid citizen informants); *City of St. George v. Carter*, 945 P.2d 165, 169 (Utah App. 1997) (stating that "[a] tip from a citizen informant who gives his or her name is highly reliable because the police may verify the information and it subjects the informant to penalty if the information is false"); *see also Illinois v. Gates*, 462 U.S. 213, 233-34 (1983). Moreover, the officers themselves smelled the odor of burnt marijuana. R60:19. That odor did not just "hang in the air" or cling to clothing. It was "leaking," i.e., it was flowing out of the trailer. *See id.* It was still in movement, i.e., spreading outward from the point of origin. The officer's testimony that the odor was leaking out of the trailer indicated that the odor was either actually being created by present burning or that it had been freshly created and still had not stabilized.

Based on these matters, the officers had reasonable suspicion of an exigency—the likelihood that evidence was in the process of destruction.[1]

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[1] Defendant asserts that *State v. South*, 885 P.2d 795 (Utah App. 1994), *rev'd on other grounds*, 924 P.2d 354 (Utah 1996), controls the disposition of this case "because the State has not requested that this precedent be overturned." Br. Appellee at 17. This Court is not bound by any decision of the court of appeals. Moreover, defendant cites no authority for her implicit claim this Court is without power to overrule a case unless the petitioner formally requests that it do so.

CONCLUSION

Respectfully submitted this 6th day of June, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of June, 2006, I either mailed first-class postage prepaid or hand-delivered two copies of the foregoing Brief of Appellee to appellant's counsel of record, as follows:

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