

2000

State of Utah v. Don Brokmeyer : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

vs.

DON BROKMEYER,

Defendant/Appellant.

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Case No. 20000280-CA

APPEAL FROM THE RULING DENYING THE DEFENDANT'S
SUPPRESSION MOTION BY THE SEVENTH DISTRICT COURT
IN AND FOR SAN JUAN COUNTY, STATE OF UTAH
THE HONORABLE LYLE R. ANDERSON, PRESIDING

REPLY BRIEF OF APPELLANT

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COURT OF APPEALS

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

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VS.

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Case No. 20000280-CA

REPLY BRIEF OF APPELLANT

INTRODUCTION

Defendant/Appellant, Don Brokmeyer, relies on his opening brief and refers this Court to that brief for the statements of jurisdiction, issues, standards of review, cases and facts. Mr. Brokmeyer responds to the State's answer to his opening brief as follows:

SUMMARY OF ARGUMENT

It is well established that the smell of burnt marijuana would justify the warrantless search of a vehicle. However, in order to safeguard constitutional rights, the requirement that the officer's smell be corroborated has been imposed. See, State v. Maycock, 947 P.2d 695, 697 (Utah Ct. App. 1997). In the case at hand, the deputies initial justification for the search and subsequent arrest for

possession of psilocybin was based solely on the presence of the marijuana seeds. That observation should have been corroborated. To allow an officer to change that testimony and escape corroboration requirement sabotages the constitutional protections against unreasonable search and seizures.

ARGUMENT

THE LACK OF CORROBORATION OF THE MARIJUANA SEEDS UNDERMINES THE LATER JUSTIFICATION FOR THE SEARCH.

(Reply to Points A & B)

In the case at hand, Deputy Begay's initial justification for expanding the scope of the stop was based solely on the presence of marijuana seeds on the floorboard. [R. 28: 35]. Ignoring the seeds, Deputy Begay simply asked if there were drugs in the vehicle. [R. 28: 54]. Mr. Brokmeyer admitted possessing the illegal mushrooms, which was the basis of his arrest. [R. 28: 16].

When the deputy testified, he justified the stop on the presence of the marijuana seeds and a portion of the illicit mushroom in the ashtray. [R. 28: 35]. Although the trial court expressed its concern about the deputy's inability to describe marijuana, it summarily dismissed any concern that the presence of the mushroom in the ashtray had not been mentioned in the initial report. [R. 28: 70]. The trial court simply stated that it was confident that the deputy saw the mushrooms. [R.28: 70].

Under these circumstances--where the existence of marijuana seeds was in question and where the justification for the search changed only after being challenged, the trial court should have required corroboration. To hold otherwise would defeat the purposes of Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) and its progeny which require a search to be justified at its inception. Indeed, the trial court allowed a corroboration requirement to be entirely circumvented.

That corroboration was necessary was also based on the deputy's inability to describe the psilocybin, even after he had, in fact, seized that substance. The Appellee dismisses any concern about this and simply refers to the trial court's statement that, "if he's a member of the human race, he knows what mushrooms look like." [Appellee's Brief, p. 9]. That Deputy Begay responded affirmatively to the prosecutor's question of whether a mushroom had an "umbrella-looking top of a mushroom kind of" adds little. [Appellee's Brief, p. 9]. Finally, that the deputy testified that an illicit mushroom was "kind of smashed up, inside a ziplock bag' or in a dried condition adds nothing. [Appellee's Brief, p. 9]. Brokmeyer admitted that the substance in the baggie was illicit mushrooms. [R. 28:17, 40].¹

In the case at hand, Deputy Begay could not describe marijuana. Yet, the presence of marijuana seeds is what his warrantless search of Mr. Brokmeyer's vehicle was based upon. Deputy Begay testified that marijuana was an illicit

¹The mushroom in the ashtray was not in a baggie. [R. 28:50].

substance, but he allowed the driver to continue on her way with this illicit substance and did not charge either occupant for possessing that substance. That this matter was summarily dismissed by the trial court in its statement that, "the whole story that leads up to [the reasonable cause to believe the defendant committed an offense] is completely irrelevant" is troubling. [R: 28: 70]. Looking at all of the circumstances certainly brings forth questions about the deputies justification for searching. The trial court's reasoning borders on justifying the search based on what was ultimately seized. Such a reasoning cannot be reconciled with the constitutional prohibitions against unreasonable search and seizure.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court reverse the trial court's denial of the Defendant's suppression motion.

DATED this 6th day of October, 2000.



ROSALIE REILLY
Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing were mailed, postage prepaid, to Jeffrey S. Gray, Assistant Attorney General, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114-0854 on this 6th day of October, 2000.



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