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Utah v. Small : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS

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DOCKET NO.

900382

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,

Plaintiff/Appellee,

v.

LEMUEL T. SMALL,

Defendant/Appellant.

REPLY BRIEF OF APPELLANT

Case No. 900382-CA

Priority No. 2

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR MILLARD COUNTY
THE HONORABLE GEORGE E. BALLIF, JUDGE PRESIDING

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FILED

JAN 24 1992

Mary T. ...
Clerk of the Court

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IN THE UTAH COURT OF APPEALS

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REPLY BRIEF OF APPELLANT

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SUMMARY OF THE ARGUMENT

Appellant does not contest appellee's confession of error that the roadblock stop in this case violated the fourth amendment. However, this court should address the Utah constitutional issues raised in appellant's brief which are related to such stops. Any voluntary consent obtained as a result of the roadblock stop was invalid due to the lack of attenuation between the stop and the consent. Such consent was closely related in time to the roadblock stop. There were no intervening circumstances between the stop and the consent. Finally, the roadblock was established without legal authority and therefore constituted a flagrant violation of the Fourth Amendment to the United States Constitution and Article I, Section 14 of the

Utah Constitution. This court need not remand the case for further factual findings. Rather, the conviction should be reversed and the evidence ordered suppressed.

ARGUMENT

POINT I

THE ROADBLOCK STOP VIOLATED BOTH THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 14 OF THE UTAH CONSTITUTION.

Appellee concedes that the roadblock at issue in this case fails to meet the requirements of the fourth amendment. Appellant does not contest this confession of error. However, appellee failed to address the issues raised by appellant relating to Article I, Section 14 of the Utah Constitution. One of those issues was decided in State v. Sims, 808 P.2d 141 (Utah App. 1991).¹ However, this court in Sims did not address the issue of whether suspicionless stops are justifiable under Article I, Section 14 of the Utah Constitution. That issue was argued at length in appellant's opening brief and should be addressed in this case.

¹In Sims, the court held that the officers lacked legal authority to conduct a roadblock.

POINT II

ANY VOLUNTARY CONSENT IS INVALIDATED BY THE LACK OF ATTENUATION FROM THE ILLEGAL ROADBLOCK STOP AND THE EVIDENCE SEIZED PURSUANT TO THAT STOP IS INADMISSIBLE.

Appellee contends that this case must be remanded to the district court for factual determinations on the issues of the voluntariness of the consent and the attenuation of such consent from the initial violation. Additionally, appellee urges this court to clarify the legal standards to be applied to the determination of both of these issues. Based on the case law from this court and the record in this case, such a remand to the district court is not necessary.

A.

Voluntary Consent.

Appellant concedes that the rulings from the various panels of this court on the standard for determining whether a consent is voluntary have not been a model of consistency.² That issue may not need to be addressed in this case in light of the consistent rulings from this court in State v. Sims, *supra*; and State v. Park, 810 P.2d 456 (Utah App.) cert. denied, 171 U.A.R. 67 (Utah, 1991), regarding the effect of a prior illegal stop on a subsequent voluntary consent.

²Compare: State v. Bobo, 803 P.2d 1268 (Utah App. 1990); State v. Carter, 812 P.2d 460 (Utah App. 1991) and State v. Marshall, 791 P.2d 1105 (Utah App.) cert. denied 800 P.2d 1105 (Utah 1990).

B.

Exploitation.

Appellee urges this court to adopt a two part analysis to determine if evidence seized pursuant to a voluntary consent following an illegal stop is subject to the exclusionary rule. The test urged by appellee would require the court to first determine if the consent is rendered involuntary by the temporal proximity to the violation, the absence of intervening circumstances, or flagrant police misconduct. Appellee would have, the court next determine if the initial violation was so purposeful or flagrant that the evidence should be excluded to deter such misconduct. The primary problem with this approach is that it disregards the attenuation analysis provided by State v. Arroyo, 796 P.2d 684 (Utah 1990), and other courts.³ Second, the analysis urged by appellee is essentially a return to the pre-Arroyo standard which allowed a voluntary consent to violate any prior illegal seizure. That standard was expressly rejected by the Utah Supreme Court.

In State v. Arroyo, supra, the court held that a two step analysis must be applied to determine the admissibility of evidence when there has been an illegal

³United States v. Recalde, 761 F.2d 1448 (10th Cir. 1985); United States v. Guzman, 864 F.2d 1512 (10th Cir. 1988); United States v. Perez-Esparza, 609 F.2d 1284 (9th Cir. 1980); United States v. Bazinet, 462 U.S. 982 (8th Cir.) cert. den. 409 U.S. 1010 (1972); United State v. Cherry, 794 F.2d 201 (5th Cir. 1986); United States v. Gooding, 695 F.2d 78 (4th Cir. 1982); United States v. Miller, 821 F.2d 546 (11th Cir. 1987); State v. Rasheem, 464 So.2d 293 (La. 1985); Reyes v. State, 741 S.W.2d 414 (Tex. Cr. App. 1987); People v. Borges, 69 NY.2d 1031, 511 NE.2d 58 (1987); People v. Odom, 83 (IN. App. 3d 1022), 404 N.E.2d 997 (1980).

search or seizure followed by a voluntary consent. The first issue to be decided is whether the consent is in fact voluntary. If the consent is involuntary then the evidence clearly is inadmissible. If there has been a voluntary consent, the court must then determine if that voluntary consent resulted from the exploitation of the primary illegal stop. The court in Arroyo held that this exploitation issue is determined by an analysis of three factors: the temporal proximity of the illegal stop and the granting of the consent; the presence or absence of intervening circumstances; and the purpose and flagrancy of the misconduct. If there is a lack of attenuation, then the voluntary consent is rendered invalid.

The analysis urged by appellee fails to distinguish between the issue of voluntariness of the consent and the issue of exploitation or attenuation of that consent from the primary illegality. In other words, Arroyo requires courts to first answer the question: "Was the consent voluntary?" If that question is answered in the affirmative the next question to be decided if appellee's analysis were followed would also be: "Was the consent voluntary?" The practical effect is that a finding of voluntariness would relieve the taint of the primary illegality. Such an analysis was explicitly rejected in State v. Arroyo, supra. The only exception to this situation would be that of a particularly flagrant or purposeful violation requiring deterrence of police misconduct.

In support of this suggested analysis, appellee relies on the case of Florida v. Royer, 460 U.S. 491 (1983). In that case, the court held that an arrest made without

probable cause rendered a subsequent consent involuntary. Appellee asserts that Royer stands for the proposition that any attenuation analysis should focus on the voluntariness of the consent. That interpretation of Royer is wrong. The essence of the holding in Royer is that the circumstances of an unlawful arrest may be so coercive as to render a subsequent consent involuntary. Based on the finding that the purported consent was involuntary, the court did not have to reach the issue of attenuation or exploitation of the primary illegality. It is inappropriate to apply Royer to a determination of the attenuation or exploitation of a voluntary consent from an illegal stop.

Appellee also argues that there are two approaches followed by the courts in applying the attenuation analysis. The first approach focuses on the relationship between the consent and the primary illegality. The second approach focuses on the police misconduct and the taint resulting from that misconduct. Appellee mischaracterizes this as a mechanical, or "but for" analysis. It is actually a weighing process. However, appellee does correctly point out that the second approach, which does not mix the consent and attenuation issues, has been consistently followed by this court's decisions subsequent to Arroyo. State v. Sims, supra; and State v. Park, supra. The principle of stare decisis requires this court to follow the rulings and analyses from those two cases.

Both Park and Sims involved roadblocks that were indistinguishable from this case. There was no statutory authority to conduct the roadblocks. The roadblocks

were approved and organized by local law enforcement officers. Both cases involved voluntary consents to search that were obtained a very short time after the initial *illegal stops*. Likewise, in this case any consent was obtained with minutes of the roadblock stop. In both cases there were no intervening circumstances between the stop and the voluntary consent.⁴ The roadblock in this case just as the roadblock in Sims, was conducted without authority of law and therefore the search and seizure violation was purposeful and flagrant. The holding in both Park and Sims was that the illegal roadblock invalidated any voluntary consent by the defendant. This court should reach the same conclusion in this case.

The final aspect of appellee's response that needs to be addressed is the request to remand the case for further proceedings in the district court to make factual determinations. Appellee notes that the court in Arroyo ordered such a disposition. However, the record of the proceedings in Arroyo did not reflect what had occurred between the illegal stop and the purported consent. The record in this

⁴Intervening circumstances have been found to include such things as a release from custody, an appearance before the magistrate, discussions with a lawyer, or a conviction on an unrelated charge, United States v. Delgadillo-Velasquez, 856 F.2d 1292 (9th Cir. 1988). Other intervening circumstances that may establish sufficient attenuation between the unlawful detention and the voluntary consent have been described in the case law: giving of the Miranda warning and allowing the defendant to consult with a passenger, United States v. Berry, 670 F.2d 583 (5th Cir. 1983), Juarez v. State, 708 S.W.2d 772 (Tex. Crim. App. 1988), telling the defendant that he did not have to consent to the search, Reyes v. State, *supra*, developing probable cause from independent sources to justify the detention United States v. Cherry, *supra*, and whether the consent was volunteered or requested, People v. Borges, 69 N.Y.2d 1031, 511 N.E.2d 58 (1987).

case is indistinguishable from the facts in Sims and Park. In both of those cases, this court found that the lack of attenuation between the roadblock and the consent invalidated the voluntariness of the consent. This court is bound by the rulings in Sims and Park. Consequently, the appropriate action for this court is to hold that any voluntary consent was invalidated by the illegal roadblock and not remand the case for further findings.

CONCLUSION

The judgment and conviction rendered in the lower court should be ordered reversed. The case should be remanded to the district court for a new trial with an order to suppress all evidence seized as a result of the illegal roadblock stop.

DATED this ____ day of December, 1991.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Appellant's Brief was mailed/hand delivered on this ____ day of December, 1991, to:

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