1990

State of Utah v. Salas-Leyva : Unknown

Utah Court of Appeals

R. Paul Van Dam; Attorney General; Attorney for Appellee.
Candice A. Johnson; Joan C. Watt; Attorney for Appellant.

SALT LAKE LEGAL DEFENDER ASSOCIATION

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

Established in 1965

October 1, 1991

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. Salas-Leyva
Case No. 900418-CA

Pursuant to Rule 24(j), Utah Rules of Appellate Procedure, Appellant cites Ex parte Carpenter, Ala. Sup. Ct., No. 1900342, August 30, 1991 (49 Cr. Law Reptr. 1510), in support of his argument that the officers did not have a reasonable articulable suspicion to detain him based on an informant's tip. This argument is found at pages 12-13 of Appellant's opening brief and pages 4-6 of Appellant's reply brief and was discussed in oral argument. A copy of a digest of the opinion from Volume 49 of the Criminal Law Reporter is attached hereto.

Very truly yours,

Joan C. Watt
Chief Appellate Attorney

JCW:kll

Attachment

cc (w/attach.): Judith S. H. Atherton

CERTIFICATE OF DELIVERY

DELIVERED original and seven copies of the foregoing to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102, and a copy of the foregoing to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this _____ day of October, 1991.

Justice Act) may not be used to assist "in [the] pursuit of *state court* remedies" for unexhausted claims. Id. at 1505 (emphasis in original). Central to *Lindsey*'s holding was the court's conclusion that state court proceedings were neither "ancillary to" nor a "proceeding under section 2254." Id. at 1506, 1508. Consequently, the petitioner's request for the assistance of a federally appointed lawyer and psychiatric expert fell outside the terms of both Section 848(q) and Section 3006A.

[Text] Yet here, by contrast, petitioner has not presented a mixed petition to this court and is proceeding under section 2254. He is thus entitled to appointed counsel, which he has already received, and such ancillary services as are "reasonably necessary" to his representation. This court is persuaded that, after *McCleskey*, the research and investigation of new claims is reasonably necessary to the representation of this capital prisoner.

Although the doctrine of exhaustion forbids federal courts from adjudicating a petition that contains any unexhausted claims, *Rose v. Lundy*, 455 U.S. 509 (1982), it in no way prevents Congress from funding research and investigation in federal court that may touch on unexhausted claims.

Exhaustion "is principally designed to protect the state courts' role in the enforcement of federal law and [to] prevent disruption of state judicial proceedings." *Lundy*, 455 U.S. at 518. Under the exhaustion doctrine, it is for the state courts, in the first instance, to pass upon and correct alleged violations of prisoners' federal constitutional rights. *Id.* This requirement minimizes the instances in which federal courts, by deciding constitutional issues, will intrude into state processes. *McCleskey*, 113 L.Ed.2d at 544.

The *investigation* of possible claims under section 848(q) thus does no violence to the exhaustion doctrine, which is limited to the *adjudication* of constitutional claims. That attorneys Gardner and Derham, while the petition is pending in federal court, may research and investigate unexhausted claims—in precisely the same manner that privately retained attorneys may research and investigate such claims—does not intrude on state sovereignty. The federal court in no way has trod on the state court's resolution of the federal constitutional issues. Following the investigation, the prisoner either will decide that a claim exists and pursue it in state court, in accordance with the exhaustion requirement, or will decide the claim is not tenable and abandon it.

The rule that district courts should dismiss petitions that contain unexhausted claims does not mean that a district court should dismiss a petition merely because the attorney's *thought processes* turn to new claims. The latter rule would prove unduly burdensome both for counsel and for the court. Because legal claims do not spring fully grown like Athena from the head of Zeus, an attorney cannot determine, at the outset, whether this thinking and research will result in an exhausted or unexhausted claim. Counsel's duty to represent his client would be severely compromised if his talents and zeal, not to mention his compensation, were limited to exhausted claims. Similarly, it would be extraordinarily taxing for the district court to set the point at which the attorney's efforts were so directed to the pursuit of an unexhausted claim that compensation would be disallowed. The Supreme Court, in fact, has already warned district courts against engaging in the "difficult if not impossible task" of sorting exhausted from unexhausted claims. *Lundy*, 455 U.S. at 519. *[End Text]*

Once counsel has had the opportunity to conduct preliminary research and investigation sufficient to identify a viable claim, these proceedings may be stayed in order to permit exhaustion. At that point, the petitioner will be able to make an informed choice as to whether to pursue the claim in state court or waive it.

Comity and federalism address the federal court's consideration of the merits of a claim; we have found no case that extends these principles to the attorney's investigative process. Nothing would be gained by returning the case to state court every time counsel fancies the existence of an unexhausted claim. There is ample time to do that in the event the petitioner chooses to assert such a claim. "Federalism" does not require a game of ping-pong between the state and federal courts.

Coleman has presented a petition containing 13 exhausted claims. We have previously granted him the time to conduct an investigation in order to finalize his petition as required by *McCleskey*. Today we hold that Congress has granted him, by statute, the financial resources necessary to make that opportunity meaningful. — Peckham, J.

INFORMER'S TRACK RECORD OF RELIABILITY DIDN'T SUPPLY REASONABLE SUSPICION FOR STOP

Lack of verifiable details, basis of informer's knowledge preclude finding of reasonable suspicion, Alabama says.

A vehicle stop conducted by a police officer on the basis of a tip from a highly reliable informer was unconstitutional, a majority of the Alabama Court of Criminal Appeals held August 30, because of the officer's failure either to question the informer about the basis for the informer's rather unspecific claim and the lack of any corroboration of the tip. (Ex parte Carpenter, **Ala SupCt**, No. 1900342, 8/30/91)

The tip alleged that the defendant was then driving on a particular street while in possession of drugs and a weapon. The officer, who later testified that he considered tips from this informer to be like "money in the bank," did not ask for more detail or how the informer came about his information.

The majority concluded that the officer lacked the reasonable suspicion required for a stop under the Fourth Amendment. In *Alabama v. White*, 47 CrL 2148 (US SupCt 1990), the informer was anonymous; on the other hand, the *White* informer's credibility was enhanced by the fact that he gave predictive information that the police could verify. Here, in contrast, the tip concerned only the defendant's current conduct, and the only details the police could corroborate before making the stop were facts anyone observing the defendant could relate. Furthermore, the tip in *White* was somewhat more detailed than the unprobed accusation of the informer in this case. The mere fact that the officer knew the informer to be reliable cannot, without more, raise a bare allegation of this kind to the level of reasonable suspicion, the majority said.

Dissenting, Justice Maddox, joined by Justices Almon and Steagall, argued that the informer's tip was at least as reliable as the one in *White*.

Also dissenting, Justice Houston, noting that the tip was partially verified, argued that the tip supplied reasonable suspicion for the stop.

Digest of Opinion: Charles Carpenter was indicted for possession of a controlled substance on the basis of evidence gained through a warrantless search of his vehicle. The trial court suppressed the evidence, but the court of appeals reversed. Carpenter appeals.

Police officer Griffis testified that he received a telephone call from an "informant" who advised him that Carpenter would be driving up South Mobile Ave. in Fairhope in his own automobile and that he would be in possession of a firearm and controlled substances. Officer Griffis said that, before the arrest, he knew Carpenter and he knew what type of car Carpenter drove. He further testified that the identity of the informer was known to him and that the informer was reliable. Officer Griffis proceeded to South Mobile Ave., where he observed Carpenter in his car leaving a residential driveway. Griffis followed Carpenter for a brief period and then stopped him. After ordering Carpenter and a passenger to get out of the car, Griffis observed a pistol protruding from a zippered carrying case. Griffis then searched the car and discovered controlled substances inside the covering of the gearshift box.

Griffis placed Carpenter under arrest for the offense of carrying a weapon without a permit.

At the suppression hearing, defense counsel asked Officer Griffis what kind of drugs the informer said Carpenter had, where they were located in the car, whether he himself had seen the drugs and gun in the car, and how he knew they were there. To all these questions the officer replied, "I didn't ask him." The defense lawyer asked whether it wasn't "normal police practice" to ask a tipster questions or to find out about the reliability or veracity of the information. The officer replied that those steps are taken "if you don't have a reliable informant." In contrast, "this informant, if he tells me something, it's in there, it's like money in the bank. It's there." The officer testified that on previous occasions the informer had provided him with information that resulted in the arrest and conviction of 20 or more people.

The question is whether the officer had a reasonable and articulable basis to warrant stopping Carpenter's car. In *Alabama v. White*, the police received an anonymous tip that the defendant would be leaving a specific apartment building at a particular time in a brown Plymouth station wagon with the right taillight broken, that she would be going to a particular motel by a particular route, and that she would be in possession of cocaine inside a brown attaché case. Before stopping the defendant's vehicle, the police verified the apartment building from which the defendant exited, the particular vehicle she used, the time the defendant left the apartment building, and the route she took. The Supreme Court held that the police had reasonable suspicion to make the stop. The court based its decision on the fact that the informer was able to accurately state what would transpire in the future.

We hold, on the basis of the totality of the circumstances, that the facts of this case did not create a reasonable suspicion to justify stopping Carpenter on the street. It is clear that Officer Griffis relied solely on the fact that the informer in this case was known to him to be reliable. Absent evidence that the informer had given the police reliable information in the past, there are no specific or particularized facts on which Griffis could have based a reasonable suspicion. The informer said merely that Carpenter would be driving up South Mobile Ave. He did not state on what he based his knowledge of that fact. Unlike the facts in *Alabama v. White*, this information concerned Carpenter's present whereabouts, information available to anyone who knew him and was near that location. In *Alabama v. White* and *Dale v. State*, 466 So2d 196 (Ala CtCrimApp 1985), heavy emphasis was placed on the fact that the informers were able to state where the defendants would be headed in the future and the fact that the police could independently corroborate the informers' tips. Moreover, in *White* the informer was able to say what type of controlled substances the defendant would be carrying. In this case, there was no specific or particularized evidence concerning the type of controlled substance that Carpenter was carrying in his car, nor was there evidence that Carpenter had been previously suspected of possessing controlled substances.

The only factor that would create a reasonable suspicion that Carpenter was engaged in some kind of criminal activity was that the informer was known to Griffis to be reliable. This court is unwilling to say that a police officer, armed with the scant information from a known reliable informer that a person is engaged in criminal activity, has reasonable suspicion to stop the person suspected of the illegal activity. The trial court's suppression order is affirmed. — Kennedy, J.

Dissent: Alabama v. White involved an anonymous tip. This case involves a tip by a known and reliable informer. The tip had a high degree of reliability and the information conveyed by the tip was substantial. It clearly met the standard for an investigative stop set out in *Alabama v. White*. — Maddox, Almon, and Steagall, JJ.

Dissent: The officer had information from an informer who was known to him and whose reliability was established by extensive past experience. The information was partially verified. Under *White*, the stopping of Carpenter's vehicle was justified by at least reasonable suspicion. — Houston, J.

FEEL OF LUMP IN MAN'S POCKET DURING FRISK DIDN'T ALLOW OFFICER TO PULL OBJECT OUT

Pennsylvania court declines to extend plain-view exception to "plain touch."

A police officer who felt a small pebble-like lump in the pants pocket of a man he had detained and was patting down for weapons violated the Fourth Amendment by reaching into the pocket and pulling out the object, a majority of the Pennsylvania Superior Court ruled August 23. In so holding, the majority refused to recognize a "plain touch" variant of the plain-view exception to the warrant requirement, at least under the circumstances presented in this case. (Commonwealth (Pennsylvania) v. Marconi, **Pa SuperCt**, No. 2354 Philadelphia 1990, 8/23/91)

The officer justified his retrieval of the item from the defendant's pocket by testifying that he believed, from his experience in investigating drug trafficking and his knowledge that the defendant had a prior methamphetamine conviction, that it was a "rock" of methamphetamine. In fact, it was. But the majority decided that the chain of events leading up to the drug's discovery did not supply adequate grounds for the intrusion. The encounter began when the officer became suspicious of the defendant's conduct, approached him to investigate, and performed a protective frisk of him for weapons pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968). However, the majority pointed out, a Terry frisk is limited to a cursory pat-down of the subject's clothing for any weapons he may possess, and any further intrusion is justified only if the officer detects the presence of a weapon. None was detected here, it noted, so the search should have stopped at that point.

The majority declined to uphold the seizure on the ground that the officer's tactile perception of the lump gave him probable cause to believe it was drugs. There was no way that the "minute" quantity of the drug inside the pocket could have been identified by the officer through his sense of touch, it said; the feel of the object suggested only the possibility of crime, not the probability of it. The majority deemed the sense of touch qualitatively different from the senses of sight, hearing, smell, and taste, each of which yields consistent perceptions every time.

Judge Kelly, concurring in the result, agreed that the feel of the drugs in the defendant's pocket could not have given the officer probable cause, but disagreed with the majority's suggestion that tactile sensations cannot be factored into the probable cause equation.

Digest of Opinion: Officer Charles Palo, an experienced drug investigator, was on patrol duty at 7:15 p.m. when he saw a Cadillac pull into the parking lot of a church and school, which were closed. Officer Palo parked in a lot across the street and saw the car's driver, Robert Marconi, exit and vomit. Marconi then switched places in the car with a female passenger, Marconi's wife. Officer Palo drove over to the Cadillac to investigate and determine whether the occupants were intoxicated and why they were parked next to the school.

Officer Palo approached the Cadillac and, after identifying himself, saw Robert Marconi apparently trying to conceal something in the rear of his pants. He told Marconi to place his hands on the dashboard. The officer was concerned for his safety. He recognized Marconi and knew that he had previous-