

2000

Ogden City v. Wesley Stites : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *Ogden City v. Stites*, No. 20000571 (Utah Court of Appeals, 2000).

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IN THE UTAH COURT OF APPEALS

OGDEN CITY, a Municipal Corp.,	}	
	}	BRIEF OF APPELLANT
Plaintiff/Appellee,	}	
	}	
Vs.	}	
	}	
WESLEY STITES,	}	Appellate Case No. 20000571-CA
	}	
Defendant/Appellant,	}	

Appeal from the Second District Court
Weber County, Judge W. Brent West

PRIORITY RULE 29(b)(2)
DEFENDANT/APPELLANT IS
NOT INCARCERATED

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FILED
Utah Court of Appeals
APR - 8 2002
Paulette Stang

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Constitutional and Statutory Provisions:

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STATEMENT OF JURISDICTION

This Court has jurisdiction over the instant appeal pursuant to Section 78-2a-3(2)(e), Utah Code Annotated, as amended.

STATEMENT OF THE ISSUES

Whether the evidence obtained against the Defendant was a result of an illegal search and seizure and whether the evidence was sufficient to convict Defendant of carrying a concealed dangerous weapon.

CONSTITUTIONAL PROVISIONS

Fourth Amendment to the United States Constitution:

The right of the people to be secured in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, ...

STATEMENT OF THE CASE

The Defendant/Appellant, Wesley Stites, was charged with carrying a concealed dangerous weapon, driving on a suspended license, driving without registration and trespass. Appellant demanded and received a jury trial on the charges. He was convicted of all charges except for the trespass charge for which he was found not guilty. Appellant filed a Notice of Appeal as to the conviction for carrying a concealed dangerous weapon only. Counsel was appointed to represent Appellant in the Appeal.

SUMMARY OF ARGUMENT

A review of the record shows that although Appellant did not raise the issue of illegal search and seizure at the time of trial, that there was a violation of the Appellant's Fourth Amendment Right against unreasonable searches and seizures. Further, an

examination of the record also indicates that the evidence elicited at trial was not sufficient to convict Appellant of carrying a concealed dangerous weapon.

ARGUMENT

The standard of review in this case is the clearly erroneous standard. The record at page 8 indicates that the officer stopped the Defendant originally because he was parked in an area where there was a no trespassing sign. At page 11 of the record, the officer indicated that as he was talking to Mr. Stites, he could see a wooden handle and stated that it was obviously some type of a weapon. The officer then indicated that he asked the Defendant to step out of the vehicle and then pulled the handle out and saw that it was an ice pick. The officer then asked the Defendant if he had any other weapons to which the Defendant responded “no”. Record at 14. The officer then inventoried the truck and found a long knife in the sun visor. Record at 14. The officer also indicated that he found another knife in a black case in the front of the truck under a blanket or some clothing (record at 16) and also found a B.B. repeater pellet pistol (record at 16), which the Defendant proved was not operating. Record at 18. No evidence was elicited as to why the officer originally felt that the wooden handle was a weapon, and the officer only indicated that it was obviously some type of weapon without any evidence as to why he believed that.

In State v. Williams, 636 P.2d 1092 (Utah 1981) the Supreme Court indicated that carrying a concealed weapon did not necessarily mean that the weapon had to be on the person, but had to be readily accessible to the person. In this case, there was no evidence indicated with respect to the two (2) knives and the B.B. gun as to whether they were readily accessible. The only testimony as to readily accessible was as to the wooden

handled ice pick. Thus, the Defendant should not have been convicted of carrying a concealed weapon as to the two (2) other knives and the B.B. gun.

The wooden handled ice pick was an illegal seizure of evidence, because the City did not prove all of the necessary elements for a seizure pursuant to plain view. In State v. McArthur, 996 P.2d 555 (Utah App. 2000), this Court indicated that for a seizure to be valid under the plain view doctrine, three elements must be present:

1. The officer is lawfully present.
2. The item is in plain view.
3. The item is clearly incriminating.

Assuming that the officer was lawfully present, because of the Defendant being parked in a no trespassing zone and assuming that the handle was in plain view, the City failed to elicit any testimony or evidence regarding the item being clearly incriminating. All the officer said is that he saw a wooden handle and that it was obviously some type of weapon, however, there was no evidence elicited from the officer as to why the wooden handle would be “obviously” some type of weapon. The wooden handle could have been attached to any sort of non-incriminating item. Because the item was not clearly incriminating, the seizure of it was illegal and thus, such evidence should have been suppressed by the lower court.

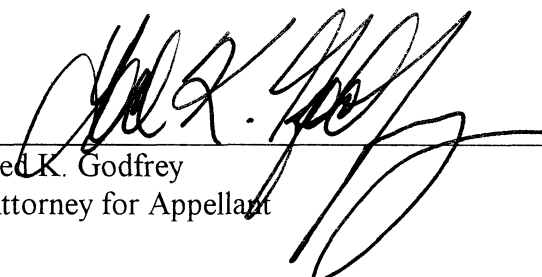
CONCLUSION

WHEREFORE, since there was no evidence to support the finding that the wooden handled ice pick was clearly incriminating, the evidence presented as to it was the result of an illegal search and seizure and should have been suppressed by the trial

Court. Since the City did not elicit any testimony as to the readily accessible element of the crime of carrying a concealed weapon as to the other two knives and the B.B. gun, the Defendant should not have been convicted of the carrying a concealed weapon as to those items.

THEREFORE, the Defendant requests this Court to reverse the conviction as to the carrying a concealed weapon charge.

Respectfully submitted this 8th day of April, 2002.



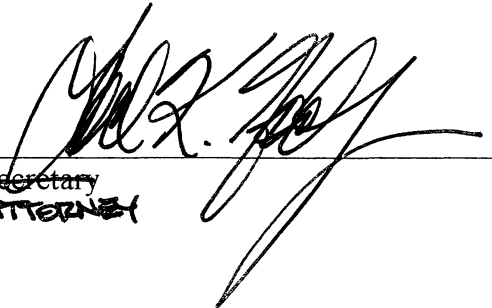
Ted K. Godfrey
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Brief of
Appellant, postage prepaid to

Michael S. Junk
Attorney for Appellee
2525 Grant Avenue
Ogden, Utah 84401

On this 8th day of April, 2002.


Secretary
ATTORNEY

APPENDIX "A"

1 Q. ALL RIGHT.

2 A. NO PURPOSE FOR IT.

3 Q. IS IT MARKED IN ANY FASHION?

4 A. IT'S MARKED WITH A SIGN THAT SAYS NO TRESPASSING.

5 Q. OKAY. AND IS THIS A HOMEMADE SIGN, A COMMERCIAL SIGN, IS
6 IT AN OGDEN CITY SIGN?

7 A. THIS WAS AN ORIGINAL OGDEN CITY SIGN.

8 Q. OKAY. AND THE WORDS AGAIN ON THE SIGN WERE PRECISELY
9 WHAT?

10 A. NO TRESPASSING BY ORDER OF OGDEN CITY.

11 Q. OKAY. NOW, THIS PICKUP TRUCK, HOW CLOSE TO THE SIGN WAS
12 IT?

13 A. IT WAS PARKED ABOUT BETWEEN TEN TO 15 FEET BEHIND THE
14 SIGN.

15 Q. OKAY. WHAT DID YOU DO AFTER YOU NOTICED THIS VEHICLE?

16 A. I CONTINUED DRIVING. I NOTICED THE DRIVER LOOK AT ME,
17 AND HE LEFT THE AREA AND TURNED AND WENT NORTHBOUND ON LINCOLN
18 AVENUE.

19 Q. ALL RIGHT. AND YOUR NEXT STEP WAS WHAT?

20 A. I STOPPED HIM ABOUT MID BLOCK, ABOUT 1750, SOMEWHERE IN
21 THAT AREA.

22 Q. OKAY. ALL RIGHT. ONCE YOU'D -- EXCUSE ME. ONCE YOU'D
23 STOPPED THE VEHICLE, HOW DID YOU IDENTIFY THE DRIVER?

24 A. I ASKED FOR HIS DRIVER'S LICENSE AND REGISTRATION, PROOF
25 OF INSURANCE.

1 OWNED THE VEHICLE. HE STATED THAT HE DID. ASKED HIM IF HE
2 KNEW THAT IT HADN'T BEEN REGISTERED FOR A YEAR, BUT YET IT HAD
3 A 2000 STICKER ON IT. HE SAID HE DIDN'T KNOW ANYTHING ABOUT
4 THAT.

5 Q. OKAY. YET HE MAINTAINED THAT HE WAS THE OWNER OF THE
6 VEHICLE.

7 A. WAS THE OWNER, UH-HUH.

8 Q. WHAT DID YOU DO NEXT, OFFICER?

9 A. I NOTICED -- I BELIEVE THAT I HAD NOTICED THE HANDLE,
10 WHILE I WAS TALKING TO MR. STITES THROUGH THE WINDOW, OF THE
11 ICE PICK, IT TURNED OUT TO BE LATER. ALL I COULD SEE WAS
12 WOODEN HANDLE THAT OBVIOUSLY WAS SOME TYPE OF A WEAPON,
13 SOMETHING THAT SHOULDN'T BE THERE WHERE IT WAS. AND I'D ASKED
14 HIM ACTUALLY TO STEP OUT OF THE VEHICLE AT THAT POINT SO I
15 COULD TALK TO HIM FURTHER, AND THEN I RETRIEVED THE ICE PICK
16 OUT OF THE COLUMN FOR SAFETY REASONS.

17 Q. ALL RIGHT. LET'S JUST TAKE ONE STEP BACK. WHEN YOU FIND
18 YOURSELF IN A SITUATION WHERE THERE IS NOT A VALID DRIVER'S
19 LICENSE AND THERE IS NOT A VALID REGISTRATION AS THERE WAS IN
20 THIS CASE, WHAT DO YOU NORMALLY DO WITH THE VEHICLE?

21 A. YOU IMPOUND THE VEHICLE.

22 Q. ALL RIGHT. AND DID YOU DO THAT ON THIS OCCASION?

23 A. YES, I BELIEVE I DID.

24 Q. OKAY. SO I WAS IN ERROR WHEN I STATED THAT THE VEHICLE
25 WASN'T IMPOUNDED?

1 TO DO?

2 A. AT THAT POINT I ASKED MR. STITES IF HE HAD ANY OTHER
3 WEAPONS. I WAS A LITTLE CONCERNED ABOUT THE MANNERISM OF THAT
4 ONE. AND HE STATED NO, THAT HE DID NOT.

5 Q. NOW, WHY WERE YOU SO PARTICULARLY CONCERNED ABOUT THIS
6 ICE PICK?

7 A. BECAUSE IT -- THERE'S NO LOGICAL REASON TO HAVE IT, AND
8 AS ACCESSIBLE AS IT IS, IT'S -- YOU KNOW, YOU COULD STICK
9 SOMEONE THAT'S LOOKING IN A WINDOW AS I WAS TALKING TO THEM.

10 Q. OKAY. ALL RIGHT.

11 A. JUST A NASTY DEAL.

12 Q. ALL RIGHT. SO YOU ASKED HIM, DO YOU HAVE FURTHER
13 WEAPONS, AND HE RESPONDS?

14 A. NO.

15 Q. OKAY. AT THAT POINT THEN, DO YOU INVENTORY THE TRUCK?

16 A. YES, THERE SHORTLY AFTER.

17 Q. OKAY. WHAT ELSE DID YOU FIND IN THE TRUCK?

18 A. ON TOP OF THE SUN VISOR ON THE DRIVER'S SIDE, I FOUND
19 ANOTHER KNIFE, A LONG KNIFE.

20 Q. OKAY. AND --

21 A. IN A TAN --

22 Q. -- IS THAT --

23 A. -- THAT ONE RIGHT THERE, YES.

24 Q. I'M HANDING YOU WHAT WHAT'S BEEN MARKED PLAINTIFF'S
25 EXHIBIT 3.

1 A. VERY SO, YES.

2 Q. OKAY. ALL RIGHT. WHAT ELSE DID YOU FIND IN THE TRUCK?

3 A. I FOUND UNDERNEATH A BLANKET OR CLOTHING, THERE WAS A LOT
4 OF STUFF IN THE FRONT OF THE TRUCK, IMMEDIATELY TO THE RIGHT
5 SIDE OF WHERE THE DRIVER WAS SITTING, THERE WAS ANOTHER KNIFE
6 THERE IN A BLACK CASE. IT WAS A FILLET-STYLE KNIFE. FISH
7 WITH IT.

8 Q. OKAY. AND IS THIS THE KNIFE THAT YOU FOUND IN THE -- IN
9 THE SEAT?

10 A. THAT'S IT, YES.

11 Q. WOULD YOU PLEASE PULL THAT OUT THEN DESCRIBE THAT
12 BRIEFLY, OFFICER?

13 A. IT LOOKS LIKE A FILLET STYLE KNIFE THAT BEEN MODIFIED
14 JUST A LITTLE BIT ON THE HANDLE. GENERALLY FOR FISHING AND
15 STUFF, BUT YES, A FILLET KNIFE.

16 MR. OLDS: I'D OFFER THIS AS AN EXHIBIT, YOUR
17 HONOR.

18 THE COURT: ANY OBJECTIONS, MR. STITES?

19 MR. STITES: CAN I (UNINTELLIGIBLE)

20 BY MR. OLDS:

21 Q. OFFICER, DID YOU FIND ANYTHING IN THE PICKUP TRUCK?

22 A. YES, I DID.

23 Q. WHAT ELSE DID YOU FIND?

24 A. I FOUND A BB REPEATER PELLET PISTOL.

25 Q. OKAY. AND I'M HANDING YOU WHAT'S BEEN MARKED CITY'S

1 **MR. STITES:** PARDON?

2 **THE COURT:** YES.

3 **MR. STITES:** IT'S NOT A REPEATER. IT'S BROKEN. AND
4 IT'S NOT A REPEATING GUN. IT'S BROKEN. THERE'S NO WAY TO
5 REPEAT IT. YOU CAN'T LOAD THE BB'S IN THE --

6 **THE COURT:** OKAY.

7 **MR. STITES:** THE ARM IS BROKEN OFF. THAT'S WHAT I
8 HAD IT THERE FOR. WE WAS LOOKING -- MY MECHANIC WAS LOOKING,
9 SEE IF HE COULD FIX IT. THE REPEATER'S GONE, SO IT'S NOT A
10 REPEATER. IT'S NOT FIRES AS YOU PULL THE TRIGGER.

11 **THE COURT:** ALL RIGHT. ANY OBJECTIONS TO THE JURY
12 LOOKING AT THAT?

13 **MR. STITES:** NO.

14 **THE COURT:** ALL RIGHT. VERY WELL. EXHIBIT -- WHAT
15 NUMBERS ARE THEY?

16 **MR. OLDS:** 5 AND 6.

17 **THE COURT:** ARE RECEIVED. PLEASE BE CAREFUL, FOLKS.
18 WE DON'T NORMALLY PASS AROUND GUNS, BUT THEY TELL ME IT'S
19 BROKEN AND IT'S --

20 **MR. STITES:** IT'S NOT A GUN.

21 **THE COURT:** -- SECURE.

22 **BY MR. OLDS:**

23 **Q.** OFFICER WIESE, AFTER FINDING THESE THINGS IN THE
24 DEFENDANT'S PICKUP TRUCK, WHAT DID YOU DO?

25 **A.** I WAS -- I WAS ACTUALLY GOING TO TAKE HIM TO JAIL, AND HE