

2000

Utah v. Robert Todd Brown : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	Case No. 20000707-CA
ROBERT TODD BROWN,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

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APPEAL FROM A PLEA OF GUILTY TO ONE COUNT OF
POSSESSION OF A CONTROLLED SUBSTANCE, A THIRD
DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN.
§ 58-37-8(2)(a)(i) (1999), IN THE SECOND
JUDICIAL DISTRICT COURT IN AND FOR WEBER
COUNTY, THE HONORABLE MICHAEL D. LYON,
PRESIDING

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Utah Court of Appeals
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BRIEF OF APPELLEE

- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a guilty plea to one count of possession of a controlled substance, a third degree felony. This Court has jurisdiction over the appeal pursuant to Utah Code Ann. § 78-2a-3(2)(e)(1999).

STATEMENT OF THE ISSUES ON APPEAL AND

STANDARDS OF APPELLATE REVIEW

1. By asking defendant to come over and talk to him, did the officer violate defendant's Fourth Amendment right to be free from an unreasonable seizure?

Whether an encounter with the police constitutes a seizure under the Fourth Amendment is a legal conclusion, reviewed for correctness. As with a reasonable suspicion determination, the trial court is accorded a "measure of discretion" in applying the standard. Salt Lake City v. Ray, 2000 UT App. 55, ¶ 8, 998 P.2d 274 (citing State v. Pena, 869 P.2d 932, 939 (Utah 1994)).

2. Should this Court review the scope of a search where defendant explicitly waived his right to appeal the matter as part of a favorable plea negotiation and where, as a result of the plea negotiation, the trial court never ruled on the matter?

Where an issue has not been ruled upon by the trial court, no standard of review applies.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Resolution of the single issue properly before the Court requires analysis of no constitutional provisions, statutes, or rules.

STATEMENT OF THE CASE

Defendant was charged with one count of possession of a controlled substance (methamphetamine), a first degree felony; one count of possession of a controlled substance (marijuana), a second degree felony; and one count of possession of drug paraphernalia, a class A misdemeanor (R. 5-7). The offenses all occurred within 1000 feet of a church and followed a previous conviction for possession of a controlled substance. Id. Following a preliminary hearing and bindover on all charges, defendant filed a motion to suppress (R. 26-32). After an evidentiary hearing on the motion, the trial court ruled that the initial stop was proper but that it would defer a decision on the scope of the search pending further briefing by the parties (R. 57: 26-27). Prior to any further ruling from the court,

defendant entered a conditional guilty plea to a single third degree felony, preserving his right to appeal only the legality of the initial stop (Id. at 28). This timely appeal followed (R. 53-54).

STATEMENT OF THE FACTS

In June of 1999, Officer James Gent of the Ogden City Police Department stopped a motorcycle in front of an apartment building because the vehicle's registration had expired (Tr. 5).¹ The driver, Rocco Colantonio, said he was test-driving the motorcycle and that the owner was in his apartment (Id. at 5, 13). Rocco's girlfriend then emerged from the apartment to see what was going on. She confirmed both Rocco's identity and the presence of the owner in the apartment. She then went back inside to convey a request by the officer to speak to the owner about the expired registration (Id. at 6). A few minutes later, she returned and told the officer, "[H]e won't come out. He doesn't want to talk to you" (Id. at 7). The officer thought this was "kind of suspicious" (Id.).

Minutes later, a few neighborhood eight-year-olds came running up to the officer and told him that "a white man in a blue t-shirt" had just jumped out of Rocco's apartment window and

¹ The abbreviation, "Tr.", refers to the preliminary hearing transcript of May 11, 2000, which has not been paginated for purposes of this appeal.

had taken off running (Id. at 7, 13).² The officer searched the area but could not locate the individual (R. 7).

Two hours later, as Officer Gent was driving by the same apartment, he noticed a white man in a blue shirt knocking on the door of Rocco Colantonio's apartment (Id. at 7-8, 15). As the officer made a U-turn and came back to park, he saw the man, defendant, walk toward a parked vehicle. When the officer stopped and stepped from his marked police car, defendant "turned around and quickly went the other way" (Id. at 8). Officer Gent "called to him and asked him to come talk to me" (Id.).

Defendant approached Officer Gent, who later testified that defendant "was just shaking. I could see sweat forming on his forehead. He was just very unusually nervous" (Id. at 9). Defendant held a large cardboard cup in his right hand, and he kept putting his left hand in his front pocket (Id.). Although the officer told him repeatedly to remove his hand from his pocket, defendant continued to put it back in. From this, the officer concluded that "there was obviously something in his pocket that he doesn't want me to know about or something that he needs to keep his hand on and that raised my suspicion and my

² Suspecting the man who jumped from the apartment window was the owner of the motorcycle, the officer commented at the preliminary hearing, "I thought it was kind of unusual that someone would jump out the window instead of just coming out to talk to me" (Tr. 7).

concern for my safety" (Id.). The officer elaborated, "Well, he could have had a weapon in his pocket . . . and he's already got his hand on it. He's got the jump on me" (Id.).

The officer explained to defendant that he was going to conduct a weapons search (Id.). In doing so, the officer felt money in defendant's pocket and then a hard square box which was ultimately found to contain both methamphetamines and marijuana (Tr. at 10, 17; R. 57: 5).

SUMMARY OF ARGUMENT

Defendant appears to argue that the trial court erred in determining that the officer's initial stop of defendant was a consensual encounter. The facts demonstrate, however, that the police officer merely called to defendant, asking him to "come talk to me" (Tr. at 8). The record demonstrates that the remark was uttered as a request. There is no evidence suggesting coercion. Under the circumstances, the trial court correctly determined that the stop did not implicate the Fourth Amendment. Further, even if the Court were to interpret the stop as a level two seizure, it was supported by reasonable suspicion. Two hours earlier, when the officer had tried to follow up on an expired motorcycle registration, the owner had refused to come out of an apartment to talk with him. Some children had then reported a white man in a blue shirt jumping out a window of the same apartment and running away. When the officer saw a man meeting

that description knocking on the same apartment door, he had reasonable suspicion to detain him for a brief investigation. As either a consensual level one encounter or a level two detention, then, the trial court properly determined that the officer was justified in stopping defendant.

Additionally, defendant argues that the officers exceeded the scope of a proper search for weapons and that, consequently, all contraband seized as a result of the unconstitutional search should be suppressed. This argument fails at the outset because it is not properly before this Court for review. While defendant raised the issue in his suppression motion, he subsequently chose not to invoke a ruling on it for tactical reasons. By foregoing a ruling, he was able to negotiate a favorable plea bargain, which was specifically conditioned on preserving the right to challenge only the propriety of the initial stop.

ARGUMENT

POINT ONE

THE TRIAL COURT PROPERLY DETERMINED
THAT DEFENDANT WAS SUBJECT TO A
CONSENSUAL LEVEL ONE ENCOUNTER
WHERE THE POLICE OFFICER MERELY
ASKED DEFENDANT TO COME TALK TO
HIM; ALTERNATIVELY, THE STOP COULD
BE JUSTIFIED BASED ON REASONABLE
SUSPICION

Defendant appears to argue that the trial court erred in determining that Officer Gent's initial stop of defendant constituted a level one encounter. See Br. of App. at 9. To the

extent that defendant makes this argument, it must fail.

In ruling on the initial stop, the trial court stated:

I don't have any problems with this case insofar as the initial stop. A level one stop, complying with the law. I don't even have any problems with the fact that - that based on the description of this person and the - and his nervousness and his repeated efforts to put his hand in his pocket despite the officer telling him not to, that the officer had reasonable, articulable suspicion to detain him and to perform a weapons search.

R. 57: 18.

In light of the record facts, the trial court correctly ruled that the initial stop was a level one encounter. The law is well-settled that three levels of police encounters with the public are constitutionally permissible:

"(1) an officer may approach a citizen at anytime [sic] and pose questions so long as the citizen is not detained against his will; (2) an officer may seize a person if the officer has an 'articulable suspicion' that the person has committed or is about to commit a crime; however, the 'detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop'; (3) an officer may arrest a suspect if the officer has probable cause to believe an offense has been committed or is being committed."

State v. Deitman, 739 P.2d 616, 617-18 (Utah 1987) (per curiam) (citations omitted). This Court has stated that a seizure for Fourth Amendment purposes does not occur during a level one encounter, "when a police officer merely approaches an individual

on the street and questions him, if the person is willing to listen." State v. Trujillo, 739 P.2d 85, 87-88 (Utah App. 1987) (citation omitted). A level one encounter is thus voluntary, where a citizen may respond to questions posed by an officer, but is nonetheless free to leave at any time. State v. Jackson, 805 P.2d 765, 767 (Utah App. 1990).

In this case, the record evidence demonstrates that the initial stop of defendant was a level one consensual encounter. Officer Gent stated that he saw defendant at Rocco Colantonio's door and then made a U-turn and parked his patrol car (Tr. at 8). He testified, "I called to [defendant] and asked him to come talk to me" (Id.; accord id. at 15; R. 57: 4). Defendant then approached the officer (Id. at 9).

At the suppression hearing, defense counsel explored the tone of voice used by the officer in asking defendant to "come talk." While the record cannot reflect the precise tenor of the remark, it does contain a compelling interpretive clue. On cross examination of Officer Gent, defense counsel stated, "Two hours later you saw the defendant wearing a blue t-shirt, Mr. Colantonio's front door, and based upon that, you - as he started walking away from you, you said, come here. I need to talk to you" (R. 57: 4). The officer responded, "Not exactly that way, but - I didn't use that tone of voice" (Id.).

Later in the hearing, defendant argued that because Officer

Gent had "commanded" -- rather than "requested" -- defendant to talk with him, the encounter must necessarily be a level two detention, subject to the Fourth Amendment (Id. at 8). The trial court disagreed, stating, "But I don't think that's what Officer Gent just said. . . . He challenged the tone of your voice and he challenged the way that you even framed the word. . . ." (Id. at 8-9). Because the trial court was present to impartially judge the import of the officer's testimony, its determination should not be second-guessed by this Court on a cold appellate record. See, e.g., State v. Pena, 869 P.2d 932, 939 (Utah 1994); State v. Archuleta, 850 P.2d 1232, 1240-41 (Utah), cert. denied, 510 U.S. 979 (1993).

The record here thus indicates that Officer Gent merely requested defendant to talk with him. In addition, the record is devoid of any evidence suggesting that Officer Gent was accompanied by the threatening presence of other officers, or that he displayed a weapon, or used words or physical actions to compel defendant's presence. See Trujillo, 739 P.2d at 87 (enumerating factors tending to indicate seizure has occurred); State v. Bean, 869 P.2d 984, 986 (Utah App. 1994).

Factually, this case is quite similar to Deitman, where the officer "called to defendants and asked if he could speak to them. They responded by crossing the street to his vehicle and presented identification upon request." Deitman, 739 P.2d at

617. Defendants raised no objection to the officer's request, and the officer did not detain them against their will. Id. at 618; accord Bountiful City v. Maestas, 788 P.2d 1062, 1064 (Utah App. 1990). The supreme court determined that the facts in Deitman gave rise to a level one consensual encounter and did not implicate the Fourth Amendment. Id. With an essentially identical fact pattern in this case, the result should be the same.

Even if this Court were to interpret the stop as a level two seizure, however, it would nonetheless be justified by the officer's reasonable suspicion. The standard for initially detaining an individual in Utah has been codified:

A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions.

Utah Code Ann. § 77-7-15 (1999). See also State v. Menke, 787 P.2d 537, 541 (Utah App. 1990); State v. Carpena, 714 P.2d 674, 675 (Utah 1986). In determining whether reasonable suspicion exists, courts look to "specific and articulable facts, together with rational inferences from those facts, which warrant the intrusion." State v. Ramirez, 817 P.2d 774, 786 (Utah 1991). If reasonable suspicion exists, the officer "has not only the right but the duty to make observations and investigations to determine

whether the law is being violated; and if so, to take such measures as are necessary in the enforcement of the law." State v. Whittenback, 621 P.2d 103, 105 (Utah 1980) (quoting State v. Folkes, 565 P.2d 1125, 1127 (Utah), cert. denied, 434 U.S. 971 (1977)).

In this case, the officer was trying to locate the owner of a motorcycle with lapsed registration. He was told, first, that the owner was inside an apartment and second, upon further inquiry, that the owner refused to come out and talk with him (Tr. 5 at 5, -7, 13). The officer thought the refusal was "kind of suspicious" (Id. at 7). Moments later, some children reported that a white man in a blue t-shirt had jumped from the apartment window and run away, an activity the officer described as "unusual" (Id. at 7, 13). Two hours later, the officer spotted a man matching the children's description knocking at the door of the same apartment (Id. at 7-8, 15). As soon as the man saw the uniformed officer, he "turned around and quickly went the other way" (Id. at 8).

From this constellation of facts, the officer could reasonably infer that the owner of the motorcycle was trying to avoid the police and that the white man in the blue t-shirt who jumped from the apartment window was both the owner of the motorcycle and same person the officer saw knocking at the door two hours later. Under these circumstances, the office had

sufficient justification to stop defendant to at least ascertain his identity and whether he was the owner of the motorcycle. No more is necessary to justify a brief investigatory detention within the ambit of the Fourth Amendment.

Thus, whether the initial stop of defendant was a consensual level one encounter or a level two detention, this Court should sustain the trial court's ruling.

POINT TWO

WHERE DEFENDANT EXPLICITLY WAIVED
HIS RIGHT TO APPEAL THE SCOPE OF
THE WEAPONS SEARCH AS PART OF HIS
PLEA NEGOTIATION AND WHERE THE
TRIAL COURT DID NOT RULE ON THE
SCOPE OF THE SEARCH, THAT ISSUE IS
NOT PROPERLY BEFORE THIS COURT

Defendant argues that Officer Gent exceeded the proper scope of a weapons search. Accordingly, he contends, the search violated the Fourth Amendment, the contraband that the officer ultimately found should have been suppressed, and defendant should be permitted to withdraw his guilty plea and decide anew whether or not he wishes to enter a plea (Br. of App. at 9, 14-15).

Defendant's argument is not properly before this Court. After the hearing on defendant's motion to suppress, the trial court ruled that the initial stop by Officer Gent was a consensual level one encounter (R. 57: 18). Expressing concern about the scope of the subsequent weapons search, however, the

trial court postponed a decision on that issue until it could review the matter further (Id. at 23, 26).

Two weeks later, the case was back on the court's calendar. Substitute defense counsel opened the hearing by stating:

It's my understanding that there has been a suppression motion . . . The court has ruled on the issue of the stop . . . and you found that the stop was proper. It's my understanding that you had some other issues [sic] that there's a briefing schedule for. As a result of that, we've arrived at a negotiation. [Defendant] is going to enter a plea of guilty to possession of a controlled substance, a third degree felony, and the other counts will be dismissed. We are reserving the right to appeal your finding with regard to the stop.

R. 57: 28. The prosecutor explained further that review of the preliminary hearing tape had revealed ambiguity in certain pivotal evidence concerning the search, thus prompting the State to negotiate a plea with defendant (Id. at 29). Later in the hearing, in the course of the plea colloquy, the following exchange occurred:

The Court: Do you understand that any appeal that you file after today with the exception of one that has been referenced in the plea bargain would be very limited in scope. In other words, there's not much to appeal from on a plea of guilty?

Def. Counsel: Except that we are reserving the right to appeal that one issue.

Defendant: Yes.

The Court: As I understand, there is the issue of whether there was a proper level one stop. Is that what I understood was the negotiation?

Prosecution: That's correct, Your Honor. You ruled in the alternative that either it was a proper level one stop or that there was a reasonable suspicion for the stop based on the circumstances.

The Court: Okay.

Prosecution: And in my mind, that's the issues [sic] that - that they have a right to appeal.

The Court: Very well. Is that clear in your mind?

Defendant: Yes, Your Honor.

Id. at 31. Based on this understanding, defendant entered a plea of guilty to one third-degree felony. Id. at 34.

The law is well-settled that where a trial court does not rule on a defense motion and defendant fails to invoke a ruling, defendant waives the issue for purposes of appeal. State v. Ortiz, 782 P.2d 959, 961 (Utah App. 1989), cert. denied 795 P.2d 1138 (Utah 1990). Here, defendant did not invoke a ruling on the scope of the search as raised in his suppression motion for a tactical reason. By foregoing a ruling on the matter, he was able to negotiate a favorable plea with the State.

Indeed, defendant explicitly waived his right to appeal the

scope of the weapons search as part of the plea negotiation. Under such circumstances, where defendant's strategy is plain on its face and well-documented by the record, there can be no doubt that defendant waived any challenge to the weapons search and that the only issue properly preserved for appellate review is the propriety of the initial stop.

CONCLUSION

For the reasons stated, this Court should affirm defendant's third degree felony conviction for possession of a controlled substance.

ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

Because this decision rests wholly on well-established law and a formal opinion will add nothing new to the case law, the state requests neither oral argument nor a published opinion.

RESPECTFULLY submitted this 27th day of November, 2000.

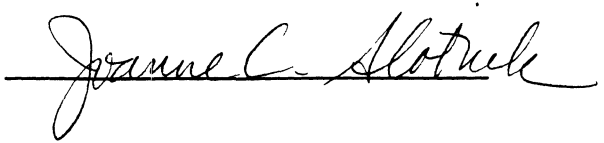
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A handwritten signature in cursive script, reading "Joanne C. Slotnik".

JOANNE C. SLOTNIK
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CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing brief of appellee were mailed first-class, postage prepaid, to Maurice Richards, Weber County Public Defenders Association, 2568 Washington Blvd., Suite 102, Ogden Utah 84401, this 27th day of November, 2000.

A handwritten signature in cursive script, reading "Joanne C. Slotnick", written over a horizontal line.