2011

State of Utah v. Jeremy D. Penick : Reply Brief

Utah Court of Appeals

Samuel P. Newton; Law Office of Samuel P. Newton, PC; Counsel for Appellant.
Jeannae B. Inouye; Assistant Attorney General; Mark L. Shurtleff; Utah Attorney General; George F. Vo-Duc; Salt Lake District Attorney's Officel; Counsel for Appellee.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, **v.** JEREMY D. PENICK, Defendant/Appellant.	Case No. 20110495-CA

REPLY BRIEF OF THE APPELLANT

Appeal from a conviction for one count of Attempted Murder, a First Degree Felony, in violation of Utah Code Ann. § 76-5-203(2)(A) in the Third District Court, State of Utah, the Honorable Royal I. Hansen, Judge, presiding.

JEANNE B. INOUYE (1618) Assistant Attorney General MARK L. SHURTLEFF (4666) **UTAH ATTORNEY GENERAL** 160 East 300 South, 6th Floor PO BOX 140854 Salt Lake City, Utah 84114-0854 George F. Vo-Duc Salt Lake District Attorney's Office Attorneys for Appellee	SAMUEL P. NEWTON (9935) **LAW OFFICE OF** **SAMUEL P. NEWTON, PC** 1206 University Circle Ogden, Utah 84408-1206 Attorney for Appellant

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, v. JEREMY D. PENICK, Defendant/Appellant.	Case No. 20110495-CA

REPLY BRIEF OF THE APPELLANT

Appeal from a conviction for one count of Attempted Murder, a First Degree Felony, in violation of Utah Code Ann. § 76-5-203(2)(A) in the Third District Court, State of Utah, the Honorable Royal I. Hansen, Judge, presiding.

JEANNE B. INOUYE (1618) Assistant Attorney General MARK L. SHURTLEFF (4666) **UTAH ATTORNEY GENERAL** 160 East 300 South, 6th Floor PO BOX 140854 Salt Lake City, Utah 84114-0854 George F. Vo-Duc Salt Lake District Attorney's Office Attorneys for Appellee	SAMUEL P. NEWTON (9935) **LAW OFFICE OF** **SAMUEL P. NEWTON, PC** 1206 University Circle Ogden, Utah 84408-1206 Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, v. JEREMY D. PENICK, Defendant/Appellant.	Case No. 20110495-CA

INTRODUCTION

Defendant responds to the State's arguments in its brief, and contends that the police officer lacked probable cause to effectuate an arrest and that his counsel ineffectively failed to move to suppress the evidence as required.

I. THE OFFICER LACKED PROBABLE CAUSE TO ARREST THE DEFENDANT

The State claims that the probable cause standard was met. However, the officer's conduct did not fit within the law defining probable cause. Secondly, the additional facts mentioned by the State still would not have provided the officer with probable cause to arrest Mr. Penick. Consequently, defense counsel remained ineffective for failing to move to suppress the evidence.

a. The Standard for Probable Cause

The State claims, citing one authority, that the police officer had probable cause to arrest Mr. Penick because a "fair probability" existed that Mr. Penick was the suspect. Aple's Br. at 13, 15-16, citing *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

The "fair probability" standard does not apply in situations in which probable cause to arrest is needed. *Gates* involved an anonymous tip that a person was dealing drugs. *Id.* at 213. The Supreme Court held that magistrates were not restricted to a two-prong test for evaluating probable cause to search, but instead, they required magistrates to apply a totality of the circumstances test to determine if "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.* at 238. The Court cautioned using mere statements in an affidavit as a basis to support the issuance of a warrant, stating that a witness's or officer's sworn statement "will not do." *Id.* at 239. Rather, according to the Court, the affidavit must give a magistrate "a substantial basis for determining the existence of probable cause." *Id.* To that end, the Court emphasized that it has "consistently recognized the value of corroboration of details of an informant's tip by independent police work" and that "bare bones" affidavits did not rise to the level of probable cause. *Id.* at 239, 241.

Gates does not create a "fair probability" test. Rather, it merely articulates that in cases involving tips from an anonymous witness, magistrates must determine the existence of probable cause based on the totality of circumstances. The Court took

great care to emphasize that a magistrate must have a "substantial basis" to conclude that probable cause exists and that officers must exercise great care to corroborate an informant's tip. *Id.* at 239-41.

Probable cause, at detailed in Mr. Penick's opening brief, *see Aplt's Br.* at 19, requires an objective basis to believe that a particular person has committed an offense. The Supreme Court "repeatedly has explained that 'probable cause' to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Michigan v. DeFillippo*, 443 U.S. 31, 37, 99 S. Ct. 2627, 2632, 61 L. Ed. 2d 343 (1979). In other words, the standard essentially requires the police to have facts from which one could reasonably, and objectively, conclude that this particular person committed the offense at hand. Thus, the standard is not one of "fair probability," but of an objectively reasonable determination, using the totality of the circumstances, that the suspect committed the offense.

b. The Defendant Presented an Adequate Record of the Lack of Probable Cause in this Case

The State also contends that Mr. Penick failed to consider five specific facts which it asserts strengthens its position. First, the defendant "locked eyes" with the officer after averting his eyes. Aple's Br. at 16-17. Second, the detective stated that Mr.

Penick was wearing the same pants as the black suspect from the video. Aple's Br. at 17. Third, Detective Coats used still shots from the surveillance video in making his identification. Aple's Br. at 18. Fourth, the anonymous tipster provided "both a name and an address" of the suspects. Aple's Br. at 18. Finally, the detective spoke with the VOA director prior to arresting Mr. Penick. Aple's Br. at 18-19. Taken together, the State contends, the Court may make several key assumptions from which it must conclude that counsel's actions were the product of sound trial strategy. Aple's Br. at 19-20.

Mr. Penick will address each of these five facts in turn before examining the cumulative effect of these facts on defense counsel's actions.

The defendant's "locked eyes" do nothing to establish the existence of probable cause. The officer testified that Mr. Penick "then approached me, he came back, locked eyes with me and walked up to me asking me why I was there, if I was going to help with donations for the VOA and what was I investigating." R. 211:24. If someone intends to talk with another person, the abnormal response would be to avoid eye contact. The normal response would be to make eye contact. The State cites an unpublished decision, which only references "unusual conduct" of a defendant as indicative of a consciousness of guilt. Looking someone in the eyes when speaking to him is not an unusual response, nor does it evince a consciousness of guilt. Defendant has been unable to find a single reported case in which "locked eyes" were indicative

of guilt. By extension, if the avoidance of eye contact does not support a determination of probable cause, then the maintenance of eye contact would also not support that determination since it, too, is "consistent with innocent" behavior. *See State v. Duhaime*, 2011 UT App 209, ¶ 18, 258 P.3d 649, 657 (quoting *State v. Robinson*, 797 P.2d 431, 436 (Utah Ct. App. 1990)).

The detective testified while reviewing the video tape that "the pants that [Penick's] wearing are the pants that he had on the day that I interviewed him." R. 211:74. There are several problems with this identification. First, the officer testified that the colors were better on the computer. *Id.* In fact, he said that "[t]his video on this screen right here is not a very good representation because in this video it looks either a blue-grey or a blue." *Id.* The officer's only specific testimony about the pants were that they were "grey pants." R. 211:18. He did not identify any distinguishing characteristics that made them unique. Grey pants are a very common item and nothing in the officer's testimony tends toward the conclusion that these pants had any qualities that made them unique to the defendant. In fact, the officer did not see Mr. Penick until two days after the crime. R. 211:77. Because the detective cannot account for the passage of time between those two days, he cannot conclude that Mr. Penick was the same person in the video based off of the pants alone. The pants worn have little or nothing to do with a probable cause determination—no less an identification—considering that multiple days passed between the viewing of the

video and the defendant's arrest. Defendant could have received those pants from the perpetrator or the shelter, for example.

The fact that the officer used video surveillance footage and circulated it to the news media was referenced repeatedly in the defendant's brief. *See* Aplt's Br. at 20-21, 23. The fact that there were other still shots in the record of the same footage does not change the analysis in any significant way since defendant already addressed the impact of the surveillance footage. The officer still needed to confirm with the witness, Mr. Magack, that the person in the surveillance footage and the person he was talking to at the VOA, Jeremy Penick, were one and the same. This could have been done by a simple lineup procedure.

The defendant acknowledged that the anonymous tipster gave the officer a name and that the person was possibly staying at the VOA shelter. Aplt's Br. at 21. He also acknowledged that the officer spoke with the director. *Id.* The State contends that this Court can assume from these facts that: 1) the anonymous tipster gave the name of Jeremy Penick, 2) that the officer identified the person he was speaking with as Jeremy Penick in his conversation with the director, and 3) that defense counsel knew all of these facts. Aple's Br. at 18-19. In fact, the State acknowledges that "the record presented does not include any evidence on these matters" but that because defendant failed to present evidence of these conclusions, this Court must assume that counsel performed effectively. Aple's Br. at 19.

The State claims that "[a]bsent evidence to the contrary, a reviewing court *must* assume that trial counsel 'knew of materials outside the record' ..." Aple's Br. at 19, quoting *Harrington v. Richter*, 131 S. Ct. 770, 788, 178 L. Ed. 2d 624 (2011) (emphasis added). However, the full quotation from *Richter* does not support the State's interpretation of that language.

> Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence."

Id. The Court does not say that courts are to presume defense counsel knew of facts beyond the record—it only says that courts should defer to counsel's representation. *Richter* does not mandate the imputation of knowledge; it only addresses the standard of deference.

While the defendant bears the burden of demonstrating an adequate record, *see State v. Litherland*, 2000 UT 76, 12 P.3d 92, the key issue is whether trial counsel should have moved to suppress evidence. None of these pieces of evidence, even assuming their truth, affects this decision. Assuming the officer was given the name of Jeremy Penick by the anonymous tipster and that he spoke with the director of the VOA, who told him that Jeremy Penick was a resident there, the officer still could not connect Mr. Penick to the crime for purposes of probable cause.

Jeremy Penick was clearly a resident of the VOA and the director could have confirmed that fact. The detective needed only to corroborate the anonymous tipster's information and verify that Mr. Magack believed this individual to be his assailant. Nothing in the record demonstrates that the officer asked Mr. Penick his name prior to arresting him. Nor did the officer ask Mr. Magack whether Mr. Penick and the perpetrator were the same person. Nor did he ask the anonymous tipster how he or she knew information about Mr. Penick.

The proper investigation would have been easy. The officer could ask Mr. Penick his name. At that point, he would have corroborated the tip (that a person by that name was at the VOA), but he still would not know whether Mr. Penick committed the crime in question. To verify and corroborate that fact, he could have asked Mr. Penick questions (instead of arresting him). He could have asked him to voluntarily come in for questioning or for a lineup. The detective could have obtained a photograph of Mr. Penick and conducted a lineup with Mr. Magack to ensure that Mr. Penick and the suspect were one in the same.

Under the State's line of reasoning, this Court is to make several key logical leaps. First, it must assume that the anonymous tipster gave the name of Jeremy Penick. It must also assume that the tipster saw the picture of Jeremy Penick (which does not appear to be the case, since the tipster mentioned that two males were talking about attacking a taxi driver). R. 211:21. Then the Court must assume that when the

detective spoke with the director, she confirmed that the person downstairs was, in fact, Jeremy Penick. But, even assuming all of these facts are true, one cannot get over the final, critical assumption: this Court must still assume that Jeremy Penick was the one who assaulted Mr. Magack. At the stage of arrest, the detective lacked probable cause of that fact.

Mr. Magack had identified the person in the photo as his attacker. The tipster potentially said that Jeremy Penick talked about being the attacker. The officer potentially discovered that the individual who spoke with him was Jeremy Penick. Thus, the officer needed only confirm that Jeremy Penick was the person who attacked Mr. Magack and he would have had probable cause to effectuate an arrest. Yet, he failed to take further steps to confirm that fact and he arrested Mr. Penick without probable cause.

This failure was critical because defense counsel would have no objective basis upon which to fail to move to suppress the evidence. As demonstrated in Mr. Penick's opening brief, the motion would have been granted and the result would have been different. *See* Aplt's Br. at 18-30.

CONCLUSION

Based on the foregoing, Mr. Penick asks this Court to find that the officer lacked probable cause to arrest him and that his counsel ineffectively failed to move to suppress evidence found as a result of that arrest.

RESPECTFULLY SUBMITTED this 22 day of May, 2012.

SAMUEL P. NEWTON
Attorney for the Defendant/Appellant

RULE 24 CERTIFICATE OF COMPLIANCE

Pursuant to rule 24(f)(1)(C), Utah Rules of Appellate Procedure, I certify that this brief has been prepared in a proportionally-spaced font using Microsoft Word for Mac 2011 in Minion Pro 13.5 point, and contains 2202 words, excluding the table of contents, table of authorities, and addenda.

SAMUEL P. NEWTON
Attorney for the Defendant/Appellant

ADDENDUM STATEMENT

Pursuant to Rule 24(a)(11) of the Utah Rules of Appellate Procedure, no addendum is necessary given the arguments made in this brief.

CERTIFICATE OF SERVICE

I hereby certify that on 22 May, 2012, I have caused to be

☐ mailed ☒ hand-delivered eight copies of the foregoing to:

Utah Court of Appeals
450 South State Street
Salt Lake City, Utah 84114-0230

I certify that on 22 May, 2012, two copies of the foregoing brief were

☐ mailed ☒ hand-delivered to:

JEANNE B. INOUYE
Assistant Attorney General
160 East 300 South, 6th Floor
PO BOX 140854
Salt Lake City, Utah 84114-0854

A digital copy of the brief was also included: ☒ Yes ☐ No