1982

State of Utah v. Richard Allen Bradshaw : Brief of Respondent

Utah Supreme Court

Richard Allen Bradshaw; Pro Se;
David L. Wilkinson; Robert N. Parrish;

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 18255
RICHARD ALLEN BRADSHAW,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

Appeal from the judgment and conviction of Producing or Growing Marijuana and Possession of Marijuana with Intent to Distribute for Value, third-degree felonies, in the Fifth Judicial District Court in and for Beaver County, the Honorable Robert F. Owens, Judge Pro Tem, presiding.

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TABLE OF CONTENTS

Table of Contents

Page

Cases Cited

Table of Contents

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The appellant, Richard Allen Bradshaw, was charged with producing a controlled substance, a third-degree felony, in violation of Utah Code Ann., § 58-37-8(1)(a)(i) (1953), as amended, and with possession of a controlled substance, a class B misdemeanor, in violation of Utah Code Ann., § 58-37-8(2)(a)(i) (1953), as amended, and was tried before a jury in the Fifth Judicial District Court for Beaver County, the Honorable Robert F. Owens presiding.

DISPOSITION IN THE LOWER COURT

The jury found appellant guilty of both counts, and the trial court sentenced him to imprisonment in the Utah State Prison for a period not to exceed five years.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the appellant's conviction.

STATEMENT OF THE FACTS

On October 7, 1980, responding to informant information, Milford City Police Chief Richard Hannah and Deputy Sheriff Dennis Cox drove to a residence adjacent to appellant's home (Motion to Suppress Transcript 76, 77 hereinafter denoted ST). Receiving permission to enter the adjacent property, the officers discovered marijuana growing on appellant's property near a three-foot retaining wall (ST 77, 81, 103).

Sheriff Cox then reached over the retaining wall and plucked three leaves from a nearby marijuana plant (ST 81).

Based upon his observations, Chief Hannah executed a search warrant affidavit whereupon Justice of the Peace H. C. Cook issued a search warrant (ST 81, 90).

At 6:50 p.m. on the same day, Chief Hannah and Officer Cox, along with other police officers, returned to appellant's property to conduct a search pursuant to the warrant (ST 83). Finding no one at home, the officers searched the surrounding property and found six marijuana plants hidden from view by a colored plastic sheet approximately twenty-four feet from the southwest corner of appellant's easterly facing home (ST 84). Two other plants were found about twenty-six feet from the southeast corner of the home (ST 85). In a root cellar located behind appellant's

home, the officers found 110 marijuana plants hidden from view by a false well covered on top by window panes (ST 86). All marijuana plants seized by the officers were placed in black plastic bags and transported to the Milford City Police Department (ST 87, 88).

When appellant returned home later that evening, Chief Hannah served him the search warrant (ST 125). In the search of appellant's home, the investigating officers found marijuana stems, marijuana seeds, and ash residue from burned marijuana (Trial transcript 103, 131 hereinafter denoted TT). On the basis of this physical evidence, Sheriff Cox arrested appellant (TT 147).

ARGUMENT

POINT I

THE MARIJUANA TAKEN FROM APPELLANT'S RESIDENCE AND PROPERTY WAS PROPERLY ADMITTED AS EVIDENCE BY THE TRIAL COURT.

A. EVIDENCE DISCOVERED UNDER THE SEARCH WARRANT IS NOT FRUIT OF THE POISONOUS TREE.

During the evidence suppression hearing, appellant argued that the search warrant was based upon illegally seized evidence--the three plucked marijuana leaves--and thus derivative evidence seized under the search warrant was "fruit of the poisonous tree" and therefore inadmissible. The trial

court excluded as evidence the three marijuana leaves, but ruled, however, that the marijuana plants captured under the search warrant were admissible.

On his appeal before this Court, appellant argues that the marijuana plants seized under the search warrant should have been excluded as evidence and the lower court's failure to so rule constitutes reversible error. The relevant case law, however, belies appellant's claim and illuminates his misconstruction of the "fruit of the poisonous tree" doctrine.

The exclusionary rule of evidence was first enunciated in Weeks v. United States, 232 U.S. 383 (1914), wherein the Supreme Court held that evidence obtained by an unlawful search and seizure was not admissible against an accused in a federal court. Later, the exclusionary rule was held applicable to criminal prosecutions in state courts. Mapp v. Ohio, 367 U.S. 643 (1961).

The "fruit of the poisonous tree" doctrine, which merely extended the Weeks exclusionary rule to derivative evidence, was first articulated in Nardone v. United States, 308 U.S. 338 (1939). Citing Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), the precursor of the poisonous tree doctrine, the Nardone Court stated:

> To forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed "inconsistent with ethical standards and destructive of personal liberty." What was said in a different context in Silverthorne Lumber Co. [251 U.S. at 392] . . . is pertinent here: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all."

308 U.S. at 340, 341.

A standard for determining whether proffered evidence is fruit of the poisonous tree was articulated in Wong Sun v. United States, 371 U.S. 471, 487, 488 (1963), quoting Maguire, Evidence of Guilt, 221 (1959):

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

Thus, the efficacy of the fruit of the poisonous tree doctrine to any given case depends on whether there exists a sufficient connection between the initial illegal search or seizure and derivative evidence obtained therefrom.

One type of insufficient connection between fruit and tree occurs if derivative evidence has a source independent of the prior, illegally seized objects. Silverthorne Lumber Co., supra, 251 U.S. at 392. This exception to the fruit of the poisonous tree doctrine is explained further in People v. Eastman, 61 Cal. App. 3d 662, 132 Cal. Rptr. 510 (1976). There, defendant was convicted of selling heroin on the strength of the assistance and information provided by two drug users. The two users offered their assistance to the police in exchange for a promise that they would not be arrested for heroin possession. The police had discovered the heroin pursuant to an illegal search of the user's home. Following his conviction, the defendant appealed arguing that the heroin evidence upon which his conviction was based should have been suppressed because it was fruit of the poisonous tree. Construing the poisonous tree doctrine articulated in Wong Sun, supra, the Fifth District Court of Appeal stated:

> [T]here must be . . . a connection between the impropriety and the subsequent transaction so that it can be said, fairly, that the two transactions cannot be treated separately. In short, evidence is not rendered inadmissible against a defendant merely because there is a relationship between the evidence and some prior illegal police activity, if, for example, the evidence was obtained by the police as the result of an independent intervening act. . . .

132 Cal. Rptr. at 514. Applying this construction, the court of appeal affirmed defendant's conviction holding that the seizure of heroin which afforded the basis for his conviction was sufficiently separate from the unlawful search of the user's home, and thus the "fruit of the poisonous tree" doctrine did not apply.

In the instant case, the poisonous tree doctrine is similarly inapplicable. As Officers Hannah and Cox stood by the retaining wall, two separate, distinct and independent events occurred: first, both officers observed in open view marijuana plants growing in appellant's property; and second, following this observation, Sheriff Cox picked three leaves from a nearby marijuana plant. Based solely upon this observation before the three leaves were picked, the officers concluded that the plants growing on appellant's property were marijuana (ST 77, 134). That this conclusion was both accurate and reasonable is not for a moment in doubt. Both officers had had extensive training and much practical experience in the identification of marijuana plants (ST 81; TT 135). Furthermore, the plants actually observed by the officers were fully mature and located only three feet from the retaining wall, and thus were easily identifiable (TT 135, 136).

More importantly, the search warrant affidavit was founded solely upon the open view observation of marijuana

growing in appellant's property, and it was not based, in whole or in part, upon the subsequent seizure of the three marijuana leaves (Trial Record, p. 95). Thus, the search warrant itself was independent of the seizure of the three marijuana leaves; and as a corollary, all marijuana plants seized under the search warrant were independent also. Therefore, invoking Nardone and Wong Sun, supra, the marijuana plants seized under the search warrant were not fruit of the poisonous tree.

Appellant cites United States v. Paroutian, 299 F.2d 486 (2d Cir. 1962), as authority for his claim that the seized marijuana plants represented fruit of the poisonous tree. Paroutian, however, is distinguishable from the instant case. There, in a warrantless search of defendant's apartment, police officers uncovered heroin hydrochloride and a letter, both of which were hidden in a secret compartment in a closet. The heroin and the letter constituted the core of the government's case. Following his conviction, the defendant appealed, contending, inter alia, that the lower court erred when it failed to suppress critical evidence unearthed in the unlawful search.

The Second Circuit Court of Appeals reversed the defendant's conviction holding that evidence seized under the unlawful search represented fruit of the poisonous tree.

The court of appeals did recognize, however, the independent source exception to the poisonous tree doctrine:

> The unlawful search taints all evidence obtained at the search or through leads uncovered by the search. This rule, however, extends only to facts which were actually discovered by a process initiated by the unlawful act. If information which could have emerged from an unlawful search in fact stems from an independent source, the evidence is admissible.

Id. at 489 (emphasis added).

In Paroutian, damning evidence was actually discovered by a process initiated by an unlawful act (the illegal search); thus the evidence was fruit of the poisonous tree and should have been suppressed. In the case at bar, however, the search warrant under which the marijuana plants were seized was based solely upon informant information and an open view observation--acts that were completely independent of Sheriff Cox's seizure of the three marijuana leaves. Therefore, the plants seized under the search warrant were not tainted by the earlier seizure of the marijuana leaves. Hence, the trial court properly denied appellant's motion to suppress evidence obtained under the search warrant.

B. THE POLICE OFFICERS' OPEN VIEW OBSERVATION OF MARIJUANA LOCATED ON APPELLANT'S PROPERTY IS NOT A FOURTH AMENDMENT SEARCH.

Next, appellant argues that the officers' open view observation of marijuana growing on his property constitutes

an unreasonable search violating the Fourth Amendment. In addition, he contends that the plain view doctrine cannot extricate this alleged unlawful search because the officers' observation of the marijuana was not inadvertent, citing Coolidge v. New Hampshire, 403 U.S. 443 (1971).

Reliance upon the plain view doctrine and Coolidge, however, indicates appellant's confusion over basic Fourth Amendment search and seizure doctrine as applied to the instant case. The plain view doctrine, as construed in Coolidge, supra, applies when:

> . . . the police officer . . . [has] a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification--whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused--and permits the warrantless seizure.

403 U.S. at 466. Thus, the plain view doctrine articulates circumstances in which evidence may be seized without a warrant.

In the instant case, however, appellant's attack, based upon Coolidge, is directed not at a seizure of evidence, but at the police officers' observation of marijuana located on appellant's property. Thus, appellant employs the wrong

case and wrong principle in constructing his Fourth Amendment attack upon the officers' initial observation. Furthermore, plain view analysis presupposes a prior valid intrusion; i.e., hot pursuit, valid arrest, or a warrant authorizing a search for objects other than those actually seized. In the instant case, however, there was no prior intrusion by the police officers; thus, the Coolidge doctrine is not applicable.

While appellant's use of plain view is inappropriate here, the open view doctrine associated with Katz v. United States, 389 U.S. 347 (1967), is helpful in resolving his claim that the officers' observation of marijuana represents an unreasonable search proscribed by the Fourth Amendment. In Katz, the Supreme Court rejected any lingering notions that search and seizure analysis was grounded in trespass doctrine that presupposed a physical intrusion into constitutionally protected areas:

> For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Id. at 351, 352 [citations omitted]. The Katz standard entails a two-part test:

> first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable."

Id. at 361 (Harlan, J., concurring). Thus, if a police officer's observations broach a defendant's reasonable expectations of privacy, a search in the Fourth Amendment sense has occurred, and further Fourth Amendment analysis then addresses the reasonableness of that search. State v. Lee, Utah, 633 P.2d 48, 54 (1981) (Maughan, C. J., dissenting). See also: State v. Kaaheena, 575 P.2d 462, 466 (Hawaii 1978).

The facts of the instant case clearly reveal that appellant did not harbor a reasonable expectation of privacy concerning the marijuana growing on his property. Appellant grew marijuana openly without protective covering within arm's length of his neighbor's property. Furthermore, the investigating officers openly observed the marijuana without any precedent efforts to uncover or reveal the plants, nor did their observation require an intrusion upon appellant's property. Given such a bold enterprise conducted in broad daylight next to a neighbor's property where appellant must have known his efforts would be observed by others, there is simply no support for the proposition that appellant even harbored a subjective expectation of privacy, and it would

require an even greater leap of faith to conclude that society would deem such an expectation reasonable. Because appellant's brazen activities are not worthy of Katz protection, the investigating officers' open view observation did not constitute a Fourth Amendment search.

In addition, this Court's analysis in State v. Lee, supra, further buttresses respondent's claim that a search did not occur. In Lee, the defendant was suspected of burglarizing a mobile home sales park. As the investigating officer walked to the front door of defendant's home, he noticed heavy equipment in a truck camper parked in the driveway. Shining a light through the camper window, the officer noticed an arc welder and several tool boxes that had been stolen earlier that evening.

Following his conviction, the defendant appealed contending, inter alia, that the discovery of stolen equipment in his truck constituted an unconstitutional search. Rejecting this claim and affirming his conviction, this Court held:

> Thus, an officer is not expected to ignore what is exposed to observation from a position where he is lawfully entitled to be. . . . That does not constitute a "search" within the meaning of the constitutional provisions.

633 P.2d at 51. See also: State v. Seagull, 95 Wash. 2d 898, 632 P.2d 44 (1981).

Similarly, in the instant case, Officer Cox and Chief Hannah could not be expected to ignore marijuana plainly and openly exposed to observation, and viewed from a position where the officers were lawfully entitled to be. Thus, their observation does not constitute a Fourth Amendment search. Therefore, the trial court correctly denied appellant's motion to suppress evidence seized under the warrant.

POINT II

THE REQUESTING OFFICER'S FAILURE TO SIGN THE SEARCH WARRANT AFFIDAVIT DOES NOT NULLIFY THE SEARCH WARRANT.

Following the observation of appellant's property which revealed marijuana growing thereon, Chief Hannah executed an affidavit upon which a search warrant was issued. Altogether four or five warrant affidavits were executed by Chief Hannah, but the one returned to the magistrate following the search was not signed at the bottom, although it was signed by him at the top following the words "The peace officer undersigned, being sworn, states on oath" (Trial Record, ST 120). The other warrants not returned to the magistrate were signed by Chief Hannah at the top and bottom of the affidavit (Trial Record, ST 119-121). Appellant contends that Chief Hannah's failure to sign the returned affidavit in the space immediately above the executing magistrate nullified the search warrant.

In evaluating appellant's claim it is wise to consider the Supreme Court's admonition against highly technical objections to the completeness of a search warrant and the affidavit in support thereof:

> If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a common sense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once enacted under common law pleadings have no proper place in this area.

United States v. Ventresca, 380 U.S. 102, 108 (1965). Here, this Court is faced with such an objection. It is clear from his testimony that Chief Hannah thought that he was properly executing the affidavit by signing at the top (ST 118, 119). Furthermore, Chief Hannah did attach his signature, albeit at the top, swearing an oath that the statements that followed were true. In addition, at least one of the search warrant affidavits not returned to the magistrate was signed at both the top and the bottom.

In People v. Gloss, 109 Cal. Rptr. 583, 34 Cal. App. 3d 74 (1973). Appellant was charged with and convicted of both the possession and sale of marijuana. On appeal, appellant argued that the search warrant was defective

because a two-page statement of facts attached to the supporting form affidavit had not been signed by the affiant. Citing Ventresca, supra, the court of appeal rejected appellant's claim and held that "[s]uch an extremely technical and formalistic argument is inappropriate. . . ." and that "the two-page attachment was obviously incorporated into the affidavit." 109 Cal. Rptr. 587, 588.

Here, as there, appellant's formalistic argument is equally inappropriate, and certainly Chief Hannah affixed his signature with due regard to the requirements of his oath in stating facts and circumstances known to be true. Hence, the affidavit was not defective, and the warrant was not nullified.

POINT III

THE RESPONDENT LAID SUFFICIENT FOUNDATION AT TRIAL FOR ADMISSION OF THE SEIZED MARIJUANA AS PHYSICAL EVIDENCE.

The search of appellant's home and surrounding property produced marijuana plants, stems and ash residue that were placed in three plastic bags marked Trial Exhibits One, Two and Three. Following the search on October 7, 1980, the three bags were transported to the Milford City Police Department (TT 107). While at the station, Chief Hannah opened Exhibit Three and removed a sample for testing, whereupon he

resealed the exhibit and then turned all three bags over to Officer Clarence Hutchison, the property officer for the Beaver County Sheriff's Department (TT 108, 198, 199). Officer Hutchison then transported the three sealed plastic bags to the Beaver County Jail where he locked them in the property room (TT 199). There the bags remained until they were summoned by the trial court (TT 199).

On November 16, 1980, Officer Hutchison entered the property room and removed a sample from Exhibit Three which he placed in a box that was later mailed to the Utah State Health Laboratory for analysis (TT 200). The sample removed by Chief Hannah from Exhibit Three on October 7, 1980, was taken by him to the State Health Laboratory in Salt Lake City, and turned over to Mr. Bruce B. Beck, a toxicologist (TT 110, 177). Mr. Beck also received a sample from Officer Cox on October 10, 1980 (TT 179).

The samples received from Officers Cox and Hutchison were positively identified by Mr. Beck as marijuana, while the test results for Chief Hannah's sample were negative (TT 183, 184, 188).

On the first day of appellant's trial, November 9, 1981, respondent proffered as physical evidence Exhibits One, Two, and Three, the three plastic bags of marijuana (TT 202). Also proffered was a letter marked Exhibit Four that allegedly accompanied a sample sent to the State Health Lab (TT 202).

Appellant's objections to the admission of each of the four exhibits were sustained by the trial court (TT 202, 203, 206, 207).

In an effort to provide additional foundation for Exhibit Four, Gary Cartwright, the Beaver County Sheriff, was called to testify (TT 208). Following his testimony, respondent again proffered Exhibit Four which was received in evidence over appellant's objection (TT 211).

At 6:40 p.m. on the first day of trial, respondent moved the trial court for a continuance (TT 222). The court granted the motion over appellant's objection and continued the trial until Thursday, November 12, 1981 (TT 223). The court granted the motion to continue for two reasons: The lateness of the hour and the court's unanticipated rulings on the evidence (TT 224).

On November 10, 1981, pursuant to a court order, the court clerk removed the three bags of marijuana from the clerk's vault and delivered them to Chief Hannah (TT 283-285). Chief Hannah then delivered the three bags to Mr. Beck at the State Health Lab located in Salt Lake City (TT 291). In the presence of Chief Hannah, Mr. Beck removed a sample from each bag; he then analyzed each sample and concluded that the bags contained marijuana (TT 262-264). Following the analysis the bags were resealed and returned to Chief Hannah (TT 292). He then returned the bags to the Milford Police evidence locker where they remained until November 12, 1981 (TT 292).

On the second day of trial, respondent again proffered the three bags as evidence (TT 298). The respondent also proffered, as Exhibit Five, the sample removed by Officer Hutchison which was sent to the Health Lab by Sheriff Cartwright and later returned to Chief Hannah. Chief Hannah had placed the returned sample in the top drawer of his file cabinet where it remained until the second day of trial (TT 229, 230, 288). Based upon the officers' testimony and the test results, Exhibits One, Two, Three and Four were received as evidence.

Appellant contends that the marijuana seized pursuant to the warrant was admitted without proper foundation. Specifically, he argues that respondent failed to demonstrate a chain of possession that adequately links the marijuana plants seized on appellant's property to those plants actually admitted as evidence in court.

In State v. Madsen, 28 Utah 2d 108, 498 P.2d 670, 672 (1972), this Court held that before real evidence could be admitted "there must be a showing that the proposed exhibit is in substantially the same condition as at the time of the crime." The Madsen Court noted that chain of possession is one factor, inter alia, that is relevant in assessing whether real evidence has been altered. 498 P.2d at 672. See also: State v. Crook, 98 Idaho 383, 565 P.2d 576 (1977) (proof of chain of possession creates presumption that real evidence

is not materially altered). To admit the evidence, the trial court must only be convinced that in all reasonable probability the evidence is substantially unaltered. Crook, supra, 565 P.2d at 577. As a corollary, the party proffering the exhibit is not required to eliminate every conceivable possibility that the evidence was altered. Baughman v. State, 582 S.W.2d 4 (Ark. 1979). See also: State v. Eagle Book, Inc., Utah, 578 P.2d 73 (1978) (the trial court must be satisfied that the proffered exhibit has not been altered, then the court may, within its discretion, admit the exhibit).

Applying the aforementioned caselaw to the facts of the instant case, the trial court properly admitted as real evidence the marijuana plants seized on appellant's property. The trial transcript indicates that a clear chain of possession was established, and that the marijuana seized on appellant's property was the same marijuana introduced at his trial, without any material alteration. The three bags of marijuana were either in the possession of Chief Hannah, locked in the Beaver County Jail property room, in the possession of Mr. Beck, or locked in the court clerk's vault. There is absolutely no gap, no missing link, in the chain of possession of the marijuana from the time it was seized until the time it was proffered to the trial court. Furthermore, the officials responsible for the marijuana testified that the bags were properly marked for identification and always

sealed. Thus, respondent clearly established chain of possession, and, within all reasonable probability, established that no material alteration had occurred. Therefore, the trial court properly admitted the bags containing the seized marijuana.

As an addendum, citing Utah Code Ann., § 77-23-8 (1981) which states that an officer seizing contraband is responsible for its safekeeping, appellant contends that the chain of possession was broken when Chief Hannah turned the bags of marijuana over to Officer Hutchison, the property officer. He also argues that the foregoing statute was violated when samples taken from the bags were sent through the mail to the Health Lab. Thus, as construed by appellant, § 77-23-8 apparently required that Chief Hannah personally maintain possession of the three bags twenty-four hours a day until the trial began.

Appellant's construction is absurd, however. Certainly, § 77-23-8 was only intended to place ultimate responsibility on the seizing officer for the safekeeping of seized property. This does not mean that property officers and lab technicians should be denied temporary possession of seized property. The record here indicates that Chief Hannah acted responsibly in safeguarding the seized evidence, even though other officers temporarily possessed the three bags in discharging their duties.

POINT IV

SUFFICIENT EVIDENCE WAS PRESENTED AT APPELLANT'S TRIAL TO SUPPORT HIS CONVICTION.

Appellant contends that although 119 marijuana plants were found on his property, respondent failed to prove that he was the one responsible for their growth and cultivation. He argues that the culprit could have been his wife or other members of his extended family who visited his home regularly. Thus, as he contends, the evidence was insufficient to prove his guilt beyond a reasonable doubt.

When faced with an insufficiency of evidence claim, this Court has accorded great deference to conclusions reached by the jury in matters solely within its province:

> It is the exclusive function of the jury to weigh the evidence and to determine the credibility of the witnesses, and it is not within the prerogative of this Court to substitute its judgment for that of the fact finder. This Court should only interfere when the evidence is so lacking and insubstantial that reasonable men could not possibly have reached a verdict beyond a reasonable doubt.

State v. Lamm, Utah, 606 P.2d 229, 231 (1980). Furthermore, this Court has stated that its review of the evidence and those inferences reasonably deduced therefrom will be conducted in a light most favorable to the jury verdict. State v. Kerekes, Utah, 622 P.2d 1161, 1168 (1980). The

Kerekes court also stated that the burden lies with the defendant in demonstrating that the evidence was so inconclusive or insubstantial that reasonable minds must have entertained a reasonable doubt about his guilt. Id. at 1168.

Actual physical possession of a controlled substance is not necessary for a conviction since possession may be inferred from other evidence:

> Unlawful possession does not necessarily mean that the substance be found on the person of the accused or that he have sole and exclusive possession thereof. All that is necessary is that the accused have constructive possession, where the contraband is subject to his dominion and control.

State v. Carlson, Utah, 635 P.2d 72, 74 (1981). See also: State v. Ellis, 207 S.E.2d 408, 413 (S.C. 1974).

In State v. Villavicencio, 108 Ariz. 518, 502 P.2d 1337 (1972), the defendant was convicted of possession of heroin and marijuana. The narcotics had been found on a porch next to the back wall of the defendant's apartment, a location readily accessible to other tenants. On appeal, the defendant contended, inter alia, that respondent failed to prove possession. Although noting that the location in which the drugs were found was accessible to others, the Arizona Supreme Court held that because of their location the drugs were under the dominion and control of the defendant and thus constructively possessed by him. 502 P.2d at 1339.

In Landers v. State, 114 Ga. App. 687, 152 S.E.2d 431 (1966), the defendant appealed his narcotics conviction contending, inter alia, that he could not be deemed constructively in possession of narcotics when his wife held title to the home in which the contraband was found. Rejecting this contention and affirming his conviction, the Georgia Court of Appeals held:

> Therefore, if legal title to the real estate was in the wife, the defendant was the head of the household and possession of the narcotics was presumed to be his.

152 S.E.2d at 432.

Here, as in Villavicencio and Landers, supra, the jury could reasonably infer that appellant constructively possessed the marijuana plants because he exercised, by virtue of ownership, control and dominion over the property on which the plants were found. Furthermore, this inference is not rendered unreasonable merely because his friends, relatives, and wife had access to the property. Therefore, appellant has failed to show that the evidence was so inconclusive or insubstantial that reasonable minds must have entertained a reasonable doubt about his guilt. Thus, his conviction was supported by sufficient evidence.

POINT V

THE DEFENDANT WAS NOT PLACED IN DOUBLE JEOPARDY.

Appellant's trial began on November 9, 1981. At 6:40 p.m. that evening, the trial court granted respondent's motion for a continuance primarily because of the late hour, but also because of the trial court's refusal to admit certain real evidence (TT 224). Appellant's trial was reconvened on November 12, 1980, and concluded that morning. Appellant claims that this continuance placed him in double jeopardy.

A claim of double jeopardy presupposes that jeopardy has first attached. Jeopardy attaches when a "trial terminates after the trier of fact resolved, or may have resolved, the factual issues determinative of criminal liability favorably to the defendant. . . ." United States v. Sanabria, 548 F.2d 1, 6 n. 6 (1st Cir. 1976) (emphasis added).

In State ex rel. Fallis v. Vestrem, 527 P.2d 195 (Okla. Crim. App. 1974), the Oklahoma Court of Criminal Appeals addressed an issue virtually identical to the issue raised by appellant here. There, following the presentation of testimony, a dispute arose over the chain of possession of the evidence. The State requested a continuance to obtain additional witnesses and the defendant objected. Following the trial court's grant of the continuance, the defendant

filed a motion requesting the court to reconsider the continuance. The trial court dismissed the case but stayed execution of the dismissal pending appellate review. The State appealed contending that the lower court erred when it dismissed the case on the basis of former jeopardy. The court of criminal appeals held:

> It is this Court's opinion a continuance of this matter is not analogous to a mistrial and does not raise an issue of double jeopardy.

Id. at 197.

Similarly, in the instant case, there is no merit to appellant's claim that the continuance placed him twice in jeopardy.

POINT VI

THE SEARCH WARRANT SECURED BY CHIEF HANNAH, A DE FACTO POLICE OFFICER, IS NOT VOID.

On October 7, 1980, the date appellant's property was searched and his marijuana seized, Chief Hannah had failed to certify as a peace officer within eighteen months of his original appointment as prescribed by Utah Code Ann., § 67-15-7 (1953), as amended. Based upon this failure to certify, appellant contends that Chief Hannah was without authority to execute a search warrant.

Although an officer may not be qualified by law, he is cloaked with de facto authority when he has possession of an office and discharges his duties under color of right. Thompson v. Clatskanie Peoples P.U.D., 35 Or. App. 843, 583 P.2d 26, 28 (1978). Accord: Thibodeaux v. Comeaux, 243 La. 468, 145 So.2d 1, 8 (1962). Furthermore, a de facto officer is one who is recognized and accepted as the rightful holder of the office by those who deal with him: State v. Miller, 222 Kan. 405, 565 P.2d 228, 235 (1977); and the official acts of a de facto officer should be given the same effect as those of a de jure officer. State Dental Council and Examining Board v. Pollock, 318 A.2d 910 (Pa. 1974).

In the case at bar, Chief Hannah had uncontested possession of the office of Chief of Police of Milford City. Furthermore, he discharged his duties as an officer under color of right. Additionally, other police officers and public officials, including Justice of the Peace H. C. Cook, who issued the search warrant, recognized and accepted Chief Hannah as the rightful holder of his office. Therefore, Chief Hannah, although not a de jure officer, was nonetheless clothed with de facto authority and his acts and conduct should be given the same effect. Thus, the search warrant was not void for want of proper authority in its execution.

In State v. Franks, 7 Wash. App. 594, 501 P.2d 622 (1972), the Washington Court of Appeals addressed an issue

virtually identical to the one raised by appellant here. In Franks, the defendant appealed his drug possession conviction contending that a search warrant was invalid because it was not issued by a qualified judge. The facts revealed that the judge was not in full compliance with the statutory conditions required for his appointment. Affirming the defendant's conviction, the court of appeals held that the judge was indeed a de facto officer and was qualified to issue the contested search warrant. 501 P.2d at 623.

Here, as in Franks, supra, Chief Hannah was a de facto officer and was properly qualified to execute the search warrant which led to the seizure of appellant's marijuana.

POINT VII

APPELLANT WAS DENIED NEITHER A SPEEDY TRIAL NOR TIMELY REPRESENTATION BY COUNSEL.

Following his arrest, appellant was arraigned before Justice of the Peace H. C. Cook on October 24, 1980 (ST 29). During this hearing, Leo Kanell, a public defender, was appointed as counsel for appellant (ST 30). During the preliminary hearing on November 13, 1980, appellant asked Mr. Kanell to resign as his counsel because of alleged conflict of interest (ST 36). Appellant also indicated that he would earn enough income over Christmas to provide his own counsel. The hearing was then reset for December 12, 1980 (ST 38).

The appellant failed to appear at the December 12, 1980 hearing and it was reset for some time in January, 1981 (ST 38) (exact date not specified in the record). At this hearing appellant requested another public defender and Mr. COok informed him that Beaver County retained only one public defender--Leo Kanell (ST 38). Because Mr. Cook was not authorized to provide another public defender, appellant agreed to a transmittal of his case to the Circuit Court, with a hearing scheduled for February 11, 1981 (ST 40).

On February 26, 1981, during an appearance by appellant before Circuit Court Judge Ronnow, Mr. Scott Thorley was appointed his counsel (ST 64). Mr. Thorley resigned April 10, 1981 due to differences of opinion with appellant (ST 64). Mr. Dexter Anderson was then appointed appellant's counsel on April 15, 1981. Appellant contends that these delays denied him both a speedy trial and timely representation by counsel in violation of Utah Code Ann., §§ 77-32-1 and 77-35-7(4)(c) (1953), as amended.

The facts in the record clearly indicate that both claims lack merit. Utah Code Ann., § 77-35-7(4)(c) (1953), as amended, provides in relevant part:

> [The preliminary] examination shall be held within a reasonable time, but in any event not later than ten days if the defendant is in custody for the defense charged and not later than 30 days if he is not in custody; provided however that

these time periods may be extended by the magistrate for good cause shown.

(emphasis added). Each extension granted by the magistrate was the result of appellant's failure to attend a hearing, inability to provide his own counsel or inability to work with appointed counsel. In each case the magistrate was justified in ordering a time extension for appellant's preliminary hearing.

Furthermore, appellant's speedy trial claim lacks merit because the delays were caused by his conduct. State v. Velasquez, Utah, 641 P.2d 115 (1982); State v. Dolack, 216 Kan. 622, 533 P.2d 1282 (1975). In addition, appellant has failed to show that the delays in his preliminary hearing prejudiced him. State v. Freeman, 599 P.2d 368 (Mont. 1979).

In sum, appellant was not denied his right to a speedy trial, and the magistrate was justified in grainting time extensions for his preliminary hearing.

CONCLUSION

Appellant's conviction was sufficiently supported by evidence properly seized under a valid search warrant executed by a peace officer possessing the requisite authority. Furthermore, appellant was not denied either a speedy trial or timely representation of counsel. Therefore, respondent

respectfully requests this Court affirm appellant's conviction.

DATED this 24th day of August, 1982.

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CERTIFICATE OF MAILING

I hereby certify that I mailed two true and exact copies of the foregoing Brief, postage prepaid, to Dexter L. Anderson, Attorney for Appellant, P.O. Box 566, 61 South Main, Fillmore, Utah, 84631, this 24th day of August, 1982.

Susan Patton