

1992

Utah v. Ruiz : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DOCKET NO. 92-0126-CA

THE STATE OF UTAH,	:	
	:	
Plaintiff/Appellee,	:	
	:	
v.	:	
	:	
RENE RUIZ,	:	Case No. 920126-CA
	:	Priority No. 2
Defendant/Appellant.	:	

REPLY BRIEF OF APPELLANT

Appeal from a judgment and conviction for Unlawful Possession of a Controlled Substance, a third degree felony, in violation of Utah Code Ann. §§ 58-37-8(2)(a)(i) and 58-37-8(2)(ii) (1990), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Timothy R. Hanson, Judge, presiding.

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FILED

Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

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SUMMARY OF ARGUMENT

The State's argument that magistrates should issue nighttime search warrants, and reviewing courts should affirm the issuance of no-knock nighttime search warrants, if there is "some evidence," but not probable cause justifying the no-knock nighttime authorizations, is at odds with Utah statutes and constitutional law.

The warrant in this case failed to meet constitutional particularity requirements and was not supported by probable cause. The lack of probable cause stems from the fact that the affidavit supporting the warrant refers to two separate apartments (8 and 18) when the warrant authorizes the search of one apartment (8); from the undisclosed age of most of the information in the affidavit; and from the failure of the affidavit to establish the reliability, veracity, and/or bases of knowledge of the confidential informants. The warrant should not have authorized a no-knock nighttime search. The fact that the magistrate signed this patently defective warrant

demonstrates that the magistrate was not acting as a neutral and detached arbiter of probable cause.

The State's procedural arguments concerning waiver of issues and the propriety of summary affirmance are factually and legally unpersuasive.

ARGUMENT

I.

THIS COURT SHOULD REVIEW THE SEARCH WARRANT AFFIDAVIT
DE NOVO, WITHOUT DEFERENCE TO THE MAGISTRATE.

In response to Mr. Ruiz's contention that this Court should review the search warrant affidavit in his case without deference to the magistrate and determine whether the affidavit provided probable cause for the issuance of a no-knock nighttime search warrant, the State argues that 1) Mr. Ruiz's legal authority is wanting, 2) police deserve deference because they have expertise in performing searches and are "the ones at risk" in serving the warrants, and 3) the non-deferential "some evidence" standard proposed by the State will promote consistent results. Respondent's brief at 15-16.

The State's complaint about lack of authority for de novo review of no-knock nighttime search warrants is based on a misperception that Mr. Ruiz is challenging solely the means of executing the search warrant in this case, and is not challenging probable cause for the search warrant.¹

1. See Respondent's brief at 14-15 ("[Weaver] deals solely with the question of probable cause to issue a warrant. This issue, again, is not presented on this appeal."). See also Respondent's brief at 3 ("[D]efendant does not challenge the underlying probable cause finding.").

To the extent that Judge Orme's Weaver concurrence might be limited in scope to the review of probable cause for search warrants, rather than to the review of no-knock and nighttime authorizations, it is persuasive in this case, where probable cause for the warrant is challenged and lacking. One aspect of Mr. Ruiz's no probable cause argument, discussed at pages 7, 20, 21 and 23-24 of his opening brief, is that the search warrant affidavit refers to two separate apartments -- #8 and #18, while the warrant authorizes the search for one apartment -- #8. Another aspect of Mr. Ruiz's no probable cause argument, discussed at pages 21 and 22 of the opening brief, is that the affidavit fails to show an adequate basis of knowledge for and the credibility of the confidential informants. Another aspect of Mr. Ruiz's no probable cause argument, discussed at page 22 of the opening brief, is that the majority of the information in the affidavit is not tied to any date demonstrating probable cause at the time of the search. Further, the warrant fails to meet constitutional particularity requirements. As is discussed at pages 19 and 20 of his opening brief, the warrant authorizes the search for and seizure of "U.S. Currency, and all items which are determined to be collateral or proceeds from narcotics transactions," granting the police total discretion to search for and seize virtually anything they pleased. The discrepancy between the apartments mentioned in the affidavit and the warrant also demonstrates a lack of constitutional particularity. Because the issuance of the warrant was improper, regardless of the no-knock nighttime authorizations, Judge Orme's

Weaver concurrence continues to be persuasive authority for straightforward non-deferential review of the warrant in this case.

Additional authority for the proposition that reviewing courts owe no deference to magistrates in reviewing the issuance of no-knock nighttime search warrants is found in State v. Humphrey, 823 P.2d 464 (Utah 1991), where the Utah Supreme Court ruled that district courts are to review magistrates' probable cause findings without deference in the context of bindover orders. Id. at 466. Magistrates are ministerial officers who do not act as courts, and courts have the capacity and should have the obligation to review the magistrates' legal conclusions as to probable cause for search warrants by reviewing the information falling within the four corners of any search warrant and affidavit to determine whether the evidence upon which a criminal case is premised was legally seized. Cf. Humphrey at 466-467.

The State's argument that appellate review should be deferential to the magistrates because police have expertise in performing searches and are "the ones at risk" in serving the warrants, respondent's brief at 15, is flawed. Assuming arguendo that police deserve deference in obtaining no-knock nighttime authorizations, such deference would not carry over to the magistrates' probable cause determinations in issuing warrants because magistrates must be separate, neutral and detached from the police, and reviewing courts must insure this rule. E.g. Allen v. Lindbeck, 93 P.2d 920 (Utah 1939). The police are not the only ones at risk in the execution of warrants. Courts have historically been

alert to the need for careful consideration of no-knock nighttime searches because the courts have recognized that no-knock nighttime searches threaten the safety of not only the police, but also of the suspects and innocent bystanders and property and privacy and solitude. See brief of appellant at 17. Furthermore, an officer's willingness to endanger herself does not earn the officer carte blanche to override the constitutions, or absolve the courts of their duties to see that the officer comports with her duty to conduct herself within constitutional bounds. See id.

The State's argument that the non-deferential "some evidence" standard proposed by the State would promote consistent results, respondent's brief at 16, is correct in that the standard would allow the State to successfully defend the issuance of no-knock nighttime authorizations in virtually every case. Such whitewashing would be inconsistent with numerous Fourth Amendment values, including the preservation of the integrity of the courts. See State v. Arroyo, 796 P.2d 684, 689 (Utah 1990) (courts should not be party to lawless invasions of citizens' rights); State v. Vigil, 815 P.2d 1296, 1299-1300 (Utah App. 1991) (development of common law is best served when appellate courts fully engage all appellate resources).

In short, this Court should hold under Article I section 14 of the Utah Constitution that courts reviewing the issuance of no-knock nighttime search warrants are to do so by simply reading the search warrants and affidavits, to determine if there is

probable cause for the issuance of the no-knock nighttime search warrants. Brief of appellant at 8-13.

II.
MAGISTRATES MUST HAVE PROBABLE CAUSE
TO ISSUE NO-KNOCK NIGHTTIME SEARCH WARRANTS.

The State argues that while search warrants must be supported by probable cause, when Utah magistrates authorize the nighttime execution of the warrants, magistrates should not require probable cause for the nighttime authorizations, but merely require "some evidence," or evidence meeting a "reasonable suspicion" standard. Respondent's brief at 12-14. It is the State's rationale that because a finding of probable cause must underlie the issuance of a warrant, and because a warrant will result in some intrusion on one's privacy rights, magistrates should defer to the police as to the manner of execution of warrants once some intrusion has been justified by a search warrant based on probable cause. Respondent's brief at 12-13. In other words, as long as there is probable cause for warrants, magistrates should not much concern themselves with whether a police officer approaches a home in the daytime, knocks on the door, explains her authority and purpose, and proceeds to search, or whether a team of unidentifiable police officers go breaking and entering into and looting a person's home with guns drawn in the middle of the night.

The State and Federal Constitutions both explicitly require reasonable searches and probable cause for all search warrants. Because no-knock nighttime searches are more intrusive, more

dangerous and more prone to constitutional unreasonableness than other searches, the constitutions and logic compel as a minimum a showing of probable cause to justify no-knock nighttime search warrants, and certainly do not tolerate the miniscule "some evidence" standard proposed by the State.²

The cases the State cites in support of its "some evidence" standard are inapposite or misinterpreted. In Dalia v. United States, 441 U.S. 238 (1979), cited in respondent's brief at 13, the Court held, in pertinent part, that the Fourth Amendment did not require courts issuing wiretap orders under federal law to explicitly authorize covert entry for installation of the wiretap equipment. Id. at 257-259. Dalia's holding does not support the argument that magistrates should defer to the police in no-knock nighttime search warrant cases because the facts at issue in wiretapping are different from the facts at issue in no-knock nighttime cases. Covert entry is essential to any successful wiretap and would necessarily be considered by a judge issuing a wiretap order, and covert entry does not pose the dangers that inhere in no-knock nighttime searches. See LaFave, Search and Seizure, supplement §4.8 at 53-54.

United States v. Searp, 586 F.2d 1117 (6th Cir. 1978), does not support the State's "some evidence" standard, but demonstrates why the Dalia wiretap analysis does not apply in the context of nighttime searches. In Searp, the police obtained at night

2. See generally LaFave, Search and Seizure, §§4.7 and 4.8 at pages 260, 263-276, 270-280, 287-290; supplement, §4.8 at 49-54.

a warrant authorizing an immediate search of a woman's home, but failed to obtain an explicit authorization for a nighttime search. Id. at 1121-1122. The court held that the officers violated federal law in executing the search warrant at night without obtaining an explicit nighttime authorization. Id. While the State's quotation of Searp at page 14 of the respondent's brief is correct, when read in context, it demonstrates the Searp Court's awareness of the need for careful consideration of nighttime searches by those issuing nighttime warrants. The opinion states,

The federal Rule requires explicit authorization for a night search, and "reasonable cause shown" to the issuing magistrate justifying the unusual intrusion of a search at night. . . . The Rule requires only some factual basis for a prudent conclusion that the greater intrusiveness of a nighttime search is justified by the exigencies of the situation. The procedural requirements of the Rule ensure that the fact that a nighttime search is contemplated by the police is brought to the attention of a magistrate and that he or she consciously decide whether such a particularly abrasive intrusion is called for in a given situation.

Id. at 1121 (emphasis added). Rather than assuming that the judge who signed the warrant at 11:27 p.m. to be executed immediately had necessarily considered the nighttime execution of the warrant, as would have been done under a Dalia approach, the Searp court indicated that a record of the judge's explicit consideration of an adequate justification for an intrusive nighttime search was essential. The court stated,

In this case, even if we were to accept the argument that the preprinted word "immediately" meant more than the phrase "forthwith," commonly used in warrants, and could suffice as explicit

authority for a night search in a warrant issued at night, there is no record of any "reasonable cause shown" to justify a nighttime search. The affidavit contains no request for a night search, and discloses no facts which would justify such a search, particularly of a private home occupied by a lone woman who was not suspected of being a participant in the crime.

To hold under these circumstances that there has been compliance would eviscerate a federal rule intended to be a substantial protection against unnecessarily abrasive behavior by the police. . . . The Rule is so constructed that it simply cannot be complied with by chance, because it requires, first, conscious recognition and consideration of the fact that an extraordinary search is contemplated, and secondly, some record of that consideration in the affidavits and the warrant itself.

Id. at 1121-1122 (emphasis added).

State v. Menke, 787 P.2d 537 (Utah App. 1990), does explain the reasonable suspicion standard, respondent's brief at 13, a standard that must be met in order to justify an officer's detention and questioning of a citizen. Menke, however, does nothing to justify the State's position that this standard, or a "some evidence" standard, should be the threshold to justify a nighttime search, which radically exceeds the scope of a level two Terry stop.

The State cites State v. Lee 633 P.2d 48, 51 (Utah 1981), for the proposition that "[e]fforts to avoid the detection of criminal activity do not create a[n] expectation that such activity will remain 'private.'" Respondent's brief at 14. Lee is a plain view case, wherein the defendant had placed stolen property in the back of his truck, where the property was clearly visible through a window. It was in this context that the court explained that Mr.

Lee's mere desire to avoid detection of criminal activity was an insufficient basis to establish a privacy interest in the property, which Mr. Lee had left in the officer's plain view. Id. at 51. Lee is inapposite to the State's argument that magistrates should issue no-knock nighttime warrants if there is "some evidence" to justify the no-knock nighttime authorizations.

The State's argument that a reasonable suspicion or "some evidence" standard is the appropriate standard for a magistrate to follow under Utah Code Ann. section 77-23-5 (1), which requires reasonable cause for a nighttime search fails to appreciate prior Utah caselaw. When Utah statutes codify principles of constitutional law, such as the need for probable cause to search and seize, Utah Courts consistently construe the statutory term "reasonable cause" to mean probable cause.³ State v. Rowe, 806 P.2d 730 (Utah App. 1991), correctly interprets this statute as requiring a particularized showing that a search is required at night because of nighttime destruction of property, or for other good reason. Id. at 733.

It is important to note that the State apparently does not argue for this reasonable suspicion standard in the issuance of no-knock warrants. See Utah Code Ann. section 77-23-10(2) (in order to issue a no-knock warrant, the magistrate must have facts in the

3. The State cited State v. Bartley, 784 P.2d 1231, 1236 (Utah App. 1989) (interpreting warrantless arrest statute). See also State v. Banks, 720 P.2d 1380 (Utah 1986) (same); State v. Cole, 674 P.2d 119, 125 (Utah 1983) (same); and State v. Hatcher, 495 P.2d 1259, 1260 (1972) (same).

affidavit or supplemental record which provide "proof, under oath, that the object of the search may be quickly destroyed, disposed of, or secreted, or that physical harm may result to any person if notice were given." (emphasis added).

III.
THE SEARCH WARRANT AND AFFIDAVIT
WERE FATALLY DEFECTIVE.

The State argues that the warrant was supported by probable cause because of the confidential informant's controlled buy from Mr. Ruiz's apartment seven days prior to the search. Respondent's brief at 3-4. The controlled buy was from an unspecified person or persons in that apartment, and yet the warrant authorized the search of Mr. Ruiz and his apartment. Mr. Ruiz's residence in the apartment where a controlled buy occurred sometime in the week prior to the issuance of the warrant does not necessarily establish probable cause to search him or his apartment. See Ybarra v. Illinois, 444 U.S. 85, 91 (1979) ("a search or seizure of a person must be supported by probable cause particularized with respect to that person [and] [t]his requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be"); Ashley v. State, 241 N.E.2d 264 (Ind. 1968) (even though probable cause may have once existed for searching a building, probable cause no longer exists after an 8 day lapse because drugs could have been moved). See also Utah Code Ann. section 77-23-3 (stating conditions precedent to and limitation of

warrants issued wherein person or entity in possession of illegal evidence is not a probable cause suspect).

More importantly, the State fails to note defects in the warrant and affidavit which preclude a finding of probable cause, and which demonstrate that the magistrate acted as a rubberstamp in signing the search warrant without addressing these defects.

The State's only mention of the discrepancy between the warrant's authorization of a search of apartment #8, and the affidavit's reference to apartments #8 and #18 is a waiver argument found at page 7 note 2 of the respondent's brief, wherein the State refers to Mr. Ruiz's contentions about the discrepancy as a "particularity argument." The waiver aspect of the State's argument is addressed in Point IV of this brief, but the State's limited view of the legal impact of the discrepancy must be addressed. The discrepancy demonstrates a failure of the warrant to meet constitutional particularity requirements. See e.g. Dalia v. United States, 441 U.S. 238, 255 (1979) ("[W]arrants must particularly describe the things to be seized, as well as the place to be searched.") (citation omitted). However, the discrepancy also demonstrates that the magistrate was not acting as a neutral and detached arbiter of probable cause in signing the warrant without addressing the discrepancy. See e.g. id. ("[W]arrants must be issued by neutral, disinterested magistrates."). The discrepancy also goes to the absence of probable cause for the search and the no-knock nighttime authorizations. The information in the affidavit relating to apartment #8 mentions one controlled buy by a

confidential informant from (an) unspecified person(s). The information in the affidavit relating to rumors of a Rene Montoya dealing in large quantities of drugs, threatening to use a gun to protect his drugs, and countersurveillance is tied to apartment #18. See brief of appellant at 20-21; Dalia, supra ("[T]hose seeking the warrant must demonstrate to the magistrate their probable cause to believe that the evidence sought will aid in a particular apprehension or conviction for a particular offense.") (citations omitted).

The State's characterization of Mr. Ruiz's contentions about the warrant's authorization of a search for "U.S. Currency, and all items which are determined to be collateral or proceeds from narcotics transactions" as a particularity argument again places an undue limitation on the legal impact of the defect. While this phrase in the warrant did transform the warrant into an illegal general warrant, in violation of the particularity rule, see Dalia, supra, the fact that the magistrate signed the warrant without questioning or eliminating this improper language demonstrates a failure of the magistrate to function as a neutral and detached arbiter of probable cause, as well. Id. Again the State does not respond on the merits to the overbreadth of the warrant, but relies on a waiver argument in a footnote, which will be addressed in Point IV of this brief.

The State makes no response whatsoever to Mr. Ruiz's contention that the affidavit is deficient in probable cause because it provides an inadequate showing of the reliability, veracity,

and/or bases of knowledge of the confidential informants. See appellant's brief at 21-22.

The State makes no response whatsoever to Mr. Ruiz's contention that the affidavit fails to establish probable cause at the time of the search because the majority of the information in the affidavit is not tied to any date. See appellant's brief at 22.

The State's argument that the no-knock nighttime search was appropriate because of reports of countersurveillance, and the State's inference that the countersurveillance meant that evidence would be destroyed if the officers approached in the daytime, respondent's brief at 17, fail to note that the countersurveillance was apparently observed at night, logically counselling against a nighttime execution of the warrant. See appellant's brief at 24-25.

The State's argument that the no-knock nighttime search was proper because of the informants' statements that Rene was armed and would defend his drugs, overlooks the fact that this information was tied to apartment #18 in the affidavit, while the warrant authorized search of apartment #8. See Appellant's brief at 23-24. The State's reliance on the officer's general accusation that drug dealers are frequently armed, respondent's brief at 17, fails to account for the rule that a magistrate issuing a warrant must do so on the basis of independent facts, and may not rely on the general beliefs of the officer. E.g. Allen v. Lindbeck, 93 P.2d 920, 924-925 (Utah 1939) ("A warrant to search and seize, which follows upon a statement based solely upon the belief of the affiant, rests

upon the reasoning of the affiant, based upon the secret facts of which he may have knowledge, and the conclusion which results from such reasoning is affiant's, not that of the judicial officer. The judicial process to ascertain probable cause is then transferred from the judicial officer to the affiant. The Constitution permits no such thing." (citation omitted). See also Giordanello v. United States, 357 U.S. 480, 486-87 (1958) (arrest warrant); Aguilar v. Texas, 378 U.S. 108, 109, 111-14 (1964); Nathanson v. United States, 290 U.S. 41, 47 (1933); Illinois v. Gates, 462 U.S. 213, 239 (1983).

IV.
THIS CASE IS PROCEDURALLY RIPE
FOR REVERSAL ON THE MERITS.

Despite the fact that the specifics of the trial court's ruling were never resolved in the trial court and therefore are not before this court on review, see opening brief of appellant at 3 n.1 and respondent's brief at 6 n.1, the State argues that Mr. Ruiz may not address various issues before this Court because they were waived in the trial court. The State argues that Mr. Ruiz has waived the issue concerning the absence of justification for the no-knock authorization, and that Mr. Ruiz has also waived issues relating to the discrepancy between the apartment number identified in the warrant and the apartment numbers in the affidavit, and to the warrant's authorization of a general search and seizure. Respondent's brief at 7 and n.1.

The first reason to reject the waiver arguments is that in reviewing the issuance of search warrants, this Court reviews the

search warrant and affidavit, without regard to the trial court's analysis. E.g. State v. Weaver, 817 P.2d 830 (Utah App. 1991).

While the focus of the argument in the trial court was on the nighttime authorization, the motion to suppress alleged violations of Article I section 14 of the Utah Constitution and the Fourth Amendment to the United States Constitution and the nighttime statute, and referred to and provided a copy of State v. Rowe, 806 P.2d 730 (Utah App.), cert. granted, 817 P.2d 327 (Utah 1991), which fully discusses the issuance of no-knock nighttime warrants. The parties repeatedly indicated that it was proper for the trial court to consider all materials within the warrant and affidavit, which were both presented to the trial court (e.g. T. 4, 10). The parties discussed the justification for the no-knock authorization before the trial court (e.g. T. 18), and the trial court referred to the no-knock justification in the search warrant affidavit during the argument and in his ruling (T. 10, 13, 21), discussed the dangers posed by no-knock nighttime searches (T. 12, 18-19), and discussed what the court perceived as evidence of a need for a no-knock warrant in this case (T. 14, 21). The trial court apparently reviewed the entire warrant and affidavit, and eventually ruled that the warrant was properly issued (T. 18-21). The trial court had a full opportunity to address the shortcomings in the warrant and affidavit, and this Court need not refer to the court's analysis in reviewing the search warrant and affidavit. Weaver, supra.

Even if the waiver doctrine could apply to arguments about the contents of a search warrant and affidavit on review before this

Court, the shortcomings in this affidavit and warrant are plain on the face of the documents before this Court, and would merit plain error review. See Utah Rule of Evidence 103(d) (explaining plain error doctrine); State v. Eldredge, 773 P.2d 29 (Utah), cert. denied, 493 U.S. 813 (1989) (same).

The State's argument that this Court's disposition of this case on the merits would result in an advisory opinion because the parties stipulated not to present evidence concerning the execution of the search warrant (T.6/14/91 4), respondent's brief at 11, fails to appreciate the distinction between challenges to the issuance of warrants, which seek to correct errant magistrates (and police presenting the defective warrants and affidavits), and challenges to the reasonableness of the execution of searches, which seek to correct police misbehavior. See Utah Constitution Article I section 14 (requiring both reasonable searches and the proper issuance of warrants); United States Constitution, Amendment IV (same). E.g. State v. Ayala, 762 P.2d 1107, 1109 (Utah App. 1988) (defendant challenged search warrant for lack of probable cause established in the supporting affidavit, and the reasonableness of the search of his person). Mr. Ruiz is not challenging the reasonableness of the search; he is arguing that the search should not have occurred at all because the warrant and affidavit were deficient and should not have been issued by the magistrate.

The State cites States v. Buck, 756 P.2d 700 (Utah 1988), and People v. Barber, 449 N.Y.S.2d 140 (N.Y.App. Div. 1982), for the proposition that the absence of evidence that the police conducted a

no-knock nighttime search in this case precludes this Court from addressing the propriety of the magistrate's issuance of the no-knock nighttime warrant. Respondent's brief at 8-9. Neither Buck nor Barber establishes a burden on a defendant challenging the issuance of a search warrant to make an evidentiary showing of the execution of the search. If the State wished to contest Mr. Ruiz's motion by showing that the warrant was not executed as authorized, the State should have presented the necessary evidence in the trial court. Compare the stipulation of the parties in this case that no evidence was necessary to the motion (T.6/14/91 4), with State v. Buck, 756 P.2d at 701 (evidence demonstrated facts of execution of search), and People v. Barber at 145 (same).

The State's argument that this Court is not in a position to evaluate the propriety of excluding the evidence in the absence of the facts surrounding the execution of the warrant, respondent's brief at 10, fails to recognize that it is the State's burden to establish facts demonstrating an exception to the exclusionary rule, which applies because Mr. Ruiz has demonstrated a fourth amendment violation. State v. Mendoza, 748 P.2d 181, 186 (Utah 1987).⁴

In the instant case, Mr. Ruiz moved to suppress the evidence seized by the police, alleging violations of his statutory

4. The good faith exception would not apply in this case because the magistrate wholly abandoned his role as a neutral and detached magistrate, because the warrant is lacking in particularity, and because the warrant was so deficient that an officer could not reasonably rely on it. United States v. Leon, 468 U.S. 897, 923 (1984).

rights and his fourth amendment and Article I section 14 rights. In support of this motion, the trial court received in evidence a copy of the search warrant and affidavit. Mr. Ruiz has carried his burden in his challenge to the warrant and affidavit. State v. Sessions, 583 P.2d 44, 45 (Utah 1978).

V.

SUPPRESSION IS THE APPROPRIATE REMEDY.

The State challenges State v. Rowe, 806 P.2d 730 (Utah App.), cert. granted, 817 P.2d 327 (Utah 1991), arguing that suppression of evidence may not be necessary in cases involving improper nighttime searches. Respondent's brief at 10 and n.3.

Rowe correctly recognizes that violation of the nighttime search warrant requirements requires suppression of evidence, given the historical recognition of the dangers and extreme intrusions posed by nighttime searches. Id. at 738-739 and accompanying notes. The Rowe court properly recognized that suppression is the appropriate remedy under the Utah statutory scheme, and also properly recognized that the Utah statutory scheme may codify constitutional law governing nighttime searches. Id. In his concurring Rowe opinion, Judge Garff correctly reiterated the need for a magistrate's careful examination of nighttime search warrants prior to their issuance. Id. at 740.

It appears that under the Utah statutory scheme, suppression is the presumptive remedy for violations of the search warrants chapter. The legislature explicitly notes when violations

of the chapter shall not result in suppression, implicitly presuming suppression for other violations. Compare Utah Code Ann. section 77-23-6 ("Failure to give or leave a receipt shall not render the evidence seized inadmissible at trial.") with Utah Code Ann. section 77-23-10(2) (no-knock statute; does not prohibit suppression), and Utah Code Ann. section 77-23-5(1) (nighttime statute; does not prohibit suppression).⁵

The cases upon which the State relies in challenging Rowe were not decided under the Utah search and seizure statutory scheme, do not involve the improper issuance of no-knock nighttime search warrants, and are thus inapposite.⁶

Given the state constitutional rights to life, privacy, property and the proper issuance of warrants, which are all at stake in no-knock nighttime search cases, this Court should hold under

5. While Utah Code Ann. section 77-23-12 indicates that "property or evidence seized pursuant to a search warrant may not be suppressed at a motion, trial, or other proceedings unless the unlawful conduct of the peace officer is shown to be substantial," it appears that this statute, which is part of the Fourth Amendment Enforcement Act, is no longer in effect, inasmuch as the Utah Supreme Court struck as unconstitutional a different provision of the Fourth Amendment Enforcement Act, and the act indicates that the provisions are not severable, but fall together if one provision is stricken. See State v. Mendoza, 748 P.2d 181, 186 (Utah 1987).

6. See State v. Fixel, 744 P.2d 1366, 1368-1369 (Utah 1987) (case involved police officer acting outside of his statutory geographical jurisdiction; did not involve constitutional violation; "Unfortunately, the legislature has not seen fit to enact a statutory remedy."); United States v. Searp, 586 F.2d 1117 (6th Cir. 1978) (case involved police officers performing nighttime search without warrant authorization, in violation of federal rule).

Article I section 14 of the Utah Constitution that suppression is the appropriate remedy for the improper issuance of no-knock nighttime search warrants.⁷ This rule will encourage police and prosecutors to seek no-knock nighttime search warrants in properly limited circumstances and to do so carefully, and will also encourage magistrates to review the affidavits seeking no-knock nighttime searches with appropriate care.⁸

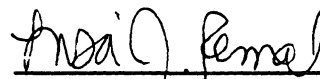
CONCLUSION

This Court should reverse the trial court's denial of Mr. Ruiz's motion to suppress and remand this case to the trial court for further proceedings.

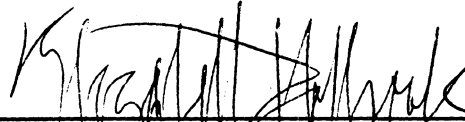
7. See Constitution of Utah, Article I section 1 ("All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property[.]"); Article I section 7 ("No person shall be deprived of life, liberty or property, without due process of law."); Article I section 14 ("The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.").

8. See State v. Rowe, 806 P.2d 730 (Utah App. 1991), Appendix at 741-743 (history of federal exclusionary rule and public policy call for suppression in cases involving improper issuance of warrants); State v. Mendoza, 748 P.2d 181, 185 (Utah 1987) (court reserves judgment on whether or not United States Supreme Court correctly views the purpose of the exclusionary rule as solely to prevent police misconduct); State v. LaRocco, 794 P.2d 460, 465-73 (Utah 1990) (plurality) (noting that federal exclusionary rule has been viewed as not only deterring police misconduct, but also as a constitutionally-required constitutional enforcement mechanism, and reserving question of purposes to be served by Utah exclusionary rule, which, unlike the federal fourth amendment exclusionary rule, currently applies whenever Article I section 14 is violated).

RESPECTFULLY SUBMITTED this 21 day of Sept.,
1992.



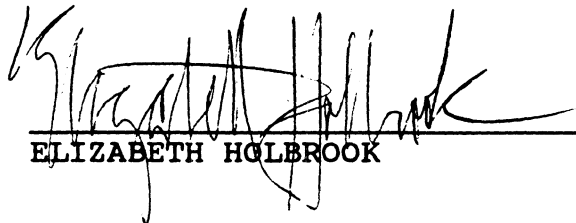
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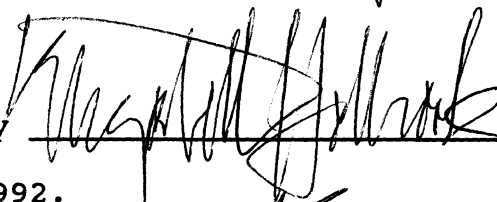


ELIZABETH HOLBROOK
Attorney for Mr. Ruiz

CERTIFICATE OF MAILING

I, Elizabeth Holbrook, hereby certify that I have caused to
be served eight copies of the foregoing on the Utah Court of Appeals
and four copies of the foregoing on the Attorney General's Office,
236 State Capitol, Salt Lake City, Utah 84114, this 21 day
of Sept., 1992.


ELIZABETH HOLBROOK

DELIVERED by  this 21 day
of Sept., 1992.

