1982

The State of Utah v. Eugene O. Christensen : Brief of Appellant

Utah Supreme Court

David L. Wilkinson; William K. McGuire; Attorneys for Appellant;
C. Demont Judd, Jr.; Attorney for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff-Appellant,	:	
-v-	:	Case No. 18365
EUGENE O. CHRISTENSEN,	:	
Defendant-Respondent.	:	

BRIEF OF APPELLANT

Interlocutory appeal from a pre-trial Order granting the respondent's Motion to Suppress Evidence, in the Second Judicial District Court, in and for Davis County, State of Utah, the Honorable Douglas L. Cornaby, Judge, presiding.

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Respondent was charged by Information with Assault by a Prisoner, a third-degree felony, in violation of Utah Code Ann., § 76-5-102.5 (1978).

DISPOSITION IN THE LOWER COURT

Respondent filed a pre-trial Motion to Suppress Evidence in the Second Judicial District Court for Davis County, State of Utah, the Honorable Douglas L. Cornaby, Judge, presiding. On March 23, 1982, Judge Cornaby granted the Motion to Suppress based on a finding that there were no grounds nor probable cause for the initial arrest. The Utah Supreme Court granted this interlocutory appeal to review the lower court's pre-trial Order on May 4, 1982. The trial court proceedings were stayed on May 11, 1982, pending the decision of the Utah Supreme Court on appeal.

RELIEF SOUGHT ON APPEAL

Appellant seeks a judgment and order of this Court declaring the initial arrest in this case to be a lawful arrest and vacating the lower court Order granting respondent's Motion to Suppress Evidence.

STATEMENT OF FACTS

On September 24, 1981, Officers James Andrews and Roger Foote of the Layton City Police Department were dispatched to a location on Antelope Drive in Layton, Utah to respond to a citizen's report that there was a pickup truck and housetrailer stalled in the middle of the road and that nearby a man who appeared to be intoxicated was staggering down the roadway (T_1 p. 8-9; T_2 p. 5-7).[1] Neither respondent, Eugene Oscar Christensen, nor his son, Brett Christensen, was present when the officers arrived. The keys were in the truck's ignition, but the officers were unable to start it. An inspection of the truck produced an open container of alcoholic beverage which was found in the truck's passenger compartment (T_1 p. 2).

Respondent's truck had run out of gasoline and had come to rest, with the housetrailer in tow, partially

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[1] All references to the transcript of the Pre-Trial proceeding of March 2, 1982 will hereinafter be designated as T_1; all references in the transcript of the pre-trial Motion to Suppress proceedings of March 23, 1982 will hereinafter be designated as T_2.

obstructing the travelled portion of the roadway (T_2 p. 3). Respondent waited near the truck while his son went to get some gasoline, but when his son did not return quickly he became impatient and decided to walk to his son's house (T_2 p. 4). Respondent's son told the officers that when respondent arrived at his home they immediately returned to the stalled truck (T_1 p. 8). They arrived approximately five minutes after the officers arrived (T_1 p. 8), and as they approached the officers, Officer James Andrews asked respondent if he was the owner and driver of the truck. Respondent admitted that he was the owner and that he had been driving it before it stalled (T_1 p. 2; T_2 p. 4, 8). Later, during the suppression proceedings, respondent recanted, insisting that it had been his son, not he, who had been driving the vehicle (T_2 p. 3).

Officer Roger Foote did not notice an odor of alcohol when he spoke with respondent's son, but respondent had been drinking (T_2 p. 10; T_1 p. 2). The officers conducted field sobriety tests and arrested respondent for Driving Under the Influence and Open Container in a Motor Vehicle (T_1 p. 8). After respondent had been arrested and handcuffed he violently kicked Officer Andrews, striking him in the leg (T_1 p. 3).

Respondent was taken to the Layton City Jail. He asked if he could be given some medical attention for a

chronic back problem (T_1 p. 4). According to respondent, his back problem had been inadvertently aggravated during the arrest process, causing respondent to kick Officer Andrews (T_1 p. 3). Sometime after respondent was charged with Driving Under the Influence and Open Container in a Motor Vehicle, both misdemeanors, and also Assault by a Prisoner, a third-degree felony, he again retaliated against Officer Andrews, striking him in the face with a closed fist (T_1 p. 4). The Information charging Assault by a Prisoner was subsequently refiled after being amended to include both assaults by respondent (R. 2).

Judge Bean of the Circuit court of Davis County dismissed the Driving Under the Influence and Open Container in a Motor Vehicle charges and bound respondent over to the Second Judicial District Court for trial on the Assault by a Prisoner charge (R. 1). Respondent requested that preliminary examination of the Assault charge be waived and did not challenge the probable cause for the arrest at that time (R. 1).

Respondent filed a pre-trial Motion to Suppress Evidence in the District Court seeking to have suppressed the open container of alcoholic beverage found in the truck and the statements he made prior to his arrest admitting that he had been driving the vehicle. On March 3, 1982, Judge Douglas L. Cornaby granted the Motion to Suppress based on a finding

that there were no grounds nor probable cause for the initial arrest and that respondent was thereby entitled to have the evidence obtained prior to arrest suppressed (R. 43).

Appellant pursued an interlocutory appeal of the Order suppressing the evidence in the Utah Supreme Court. This Court granted appellant's petition on May 4, 1982 (R. 29, 45). On May 11, 1982, the trial proceedings in the instant case were stayed, pending the decision of this Court on appeal.

Appellant takes this appeal from the pre-trial order granting respondent's Motion to Suppress Evidence pursuant to Rule 26(c)(5) of the Utah Rules of Criminal Procedure.

ARGUMENT

POINT I

THE LOWER COURT ERRONEOUSLY RULED THAT THE ARREST OF RESPONDENT WAS INVALID.

The lower court's order granting respondent's Motion to Suppress Evidence was based on a finding that:

> At the time of the arrest the officers had no grounds to make the arrest or no probable cause to make the arrest. . . . Since there was no grounds for arrest, there is a defense to assult [sic] by a prisoner and thereby he has a right to suppression of the evidence of the circumstances.

(R. 43). Appellant submits that there was probable cause for the arrest which culminated in the Assault by a Prisoner

charge for which respondent is now being tried and that it was clearly error for the lower court to grant respondent's Motion to Suppress Evidence.

Although the evidence suppressed is not essential to establish the elements of Assault by a Prisoner as charged, the basis for the lower court's decision--that there was no probable cause for the arrest--is crucial in that it necessarily prevents the State from prosecuting the charge. The statute under which respondent was charged provides "Any prisoner who commits assault, intending to cause bodily injury, is guilty of a felony of the third degree." Utah Code Ann., § 76-5-102.5 (1978). Before respondent may be convicted of Assault by a Prisoner he must first be found to have been a "prisoner" at the time of the assault. Utah Code Ann., § 76-5-101 (1978) provides the applicable definition of "prisoner":

> For the purposes of this part "prisoner" means any person who is in custody of a police officer pursuant to a lawful arrest or who is confined in jail or other penal institution regardless of whether the confinement is legal [Emphasis supplied].

It is apparent from the above definition that in order to be deemed a "prisoner" respondent must have been lawfully arrested. Because the lower court judge based the grant of respondent's motion on a finding that there was no probable cause for the arrest, or in other words that respondent was

not lawfully arrested, he in effect decided the issue perceived to be the gravamen in this case.[2] If there was no probable cause for the arrest in this case, respondent's arrest could not have been "lawful." Thus, he could not have been a "prisoner" and as a result he could not have committed Assault by a Prisoner as defined by the statute. Were the lower court's finding of a lack of probable cause for the arrest correct, the State could not prove the elements of the offense charged.

However, there was probable cause for respondent's arrest. Utah Code Ann., § 77-7-2 (1978) provides that a police officer may arrest for a misdemeanor not committed

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[2]The record suggests that the lower court judge was inclined to adopt the view that this was the pivotal issue and that it would dispose of the case (T_2 pp. 13-14; R. 43). Such a conclusion would be correct, but only with respect to the first of the assaults for which respondent was charged. Utah Code Ann., § 76-5-101 (1978) defining "prisoner" provides that a "prisoner" is one who is in custody pursuant to a lawful arrest, "or who is confined in a jail . . . regardless of whether the confinement is legal." The record is not clear, but because the second assault occurred at the Layton Police Department after respondent had been booked for the two misdemeanors and the first assault, it apparently occurred while he was "confined" and therefore the State might be able to pursue the instant case based solely on the second assault. Appellant submits, however, that the State's apparent ability to go forward with the assault by a prisoner charge regardless of the suppressed evidence or the lower court's finding of insufficient probable cause for the arrest is immaterial to this interlocutory appeal. Even if viable, the opportunity does not mitigate the impropriety of the Order granting the Motion to Suppress Evidence, nor correct the lower court's error. Appellant should not be forced to proceed on only one assault because of the erroneous ruling.

in his presence:

> A peace officer may make an arrest under authority of warrant, or may without a warrant arrest a person: . . .
> (3) When he has reasonable cause to believe the person has committed a public offense, and there is reasonable cause for believing the person may:
> (a) Flee or conceal himself to avoid arrest;
> (b) Destroy or conceal evidence of the commission of the offense; or
> (c) Injure another person or damage property belonging to another person.

The term "public offense" includes all misdemeanors. Oleson v. Pincock, 68 Utah 507 251 P. 23, 24 (1926); People v. Sjosten, 68 Cal. Rptr. 832, 835 (Cal. App. 1968). "Reasonable cause" as used in the statute is essentially a synonym for "probable cause." Draper v. United States, 358 U.S. 307, 310 n. 3 (1959).

The United States Supreme Court has repeatedly held that:

> "[P]robable 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 (1979). See also: Beck v. Ohio, 379 U.S. 89, 91 (1964); Carroll v. United States, 267 U.S. 132, 162 (1925). The Supreme Court has

also stated:

> In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.

Brinegar v. United States, 338 U.S. 160, 175; reh. den., 338 U.S. 839 (1949). This Court has applied an essentially identical standard:

> The determination should be made on an objective standard: whether from the facts known to the officer, and the inferences which might fairly be drawn therefrom, a reasonable and prudent person in his position would be justified in believing that the suspect had committed the offense.

State v. Hatcher, 27 Utah 2d 318, 495 P.2d 1259, 1260 (1972). See also: State v. Whittenback, Utah, 621 P.2d 103, 106 (1980); State v. Eastwood, 28 Utah 2d 129, 499 P.2d 276, 278 (1972); State v. Lopez, 22 Utah 2d 257, 451 P.2d 772, 775 (1969). Contrary to respondent's argument in the lower court, the officers did not have to prove the corpus delecti of the crimes prior to the arrest.

Probable cause to arrest respondent for either Driving Under the Influence (Utah Code Ann., § 41-6-44 (1981)) or Open Container in a Motor Vehicle (Utah Code Ann., § 41-6-44.20 (1981)) would validate the arrest in this case.

Examination of the information available to the officers prior to the arrest reveals several facts and circumstances which, when taken together, support the officers' determination that respondent committed the offenses he was arrested for:

> 1. The officers had a report that an individual approximately matching respondent's description was seen staggering in the street and traveling away from the stalled truck and trailer a short time before the officers arrived to investigate (T_1 pp. 8-9; T_2 pp. 5-7).
>
> 2. Respondent admitted that he had left the stalled vehicle to walk to his son's house some time before the officers arrived (T_2 p. 4).
>
> 3. Respondent's son stated that upon respondent's arrival at the son's home, they immediately returned to the stalled truck (T_1 p. 8).
>
> 4. Respondent admitted that he was owner of the truck and had been driving it before it stalled (T_1 p. 2; T_2 4, 8).[3]
>
> 5. The officers discovered an open container of alcoholic beverage in the passenger compartment of the truck (T_1 p. 2).
>
> 6. Respondent's son did not appear to have been drinking (T_1 p. 2; T_2 pp. 4, 8, 10).

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[3]Respondent would not have to have been the driver of the truck to be found guilty under Utah's Open Container statute, Utah Code Ann., § 41-6-44.20 (1981). The statute applies to all persons in the passenger compartment of a motor vehicle.

> 7. The officers conducted field sobriety tests and determined that respondent was under the influence of alcohol (T_1 p. 8).

Clearly, the above information and the inferences fairly drawn therefrom provided reasonable or probable cause for respondent's arrest. Also clear is the reasonableness of the officers' belief that respondent might:

> (a) Flee . . . to avoid arrest; (b) Destroy or conceal evidence . . . ; or (c) Injure another person or damage property belonging to another person.

Utah Code Ann., § 77-7-2(3) (1978). Respondent and his son returned to the stalled truck intending to fuel it and drive it away. The officers could have reasonably assumed that in order to accomplish this respondent intended to drive one of the two vehicles present which were owned by either respondent or his son. Respondent might well have left the area, making evidence on or in his person, or contained in the truck, unavailable to the officers. In addition, because respondent was under the influence of alcohol, his driving one of the vehicles from the area would have created a definite possibility that injury to another person or damage to property would have occurred.

The arrest was valid under the requirements of Utah Code Ann., § 77-7-2(3) (1978). The lower court incorrectly ruled that the arrest was invalid, and the grant of respondent's Motion to Dismiss Evidence was error.

POINT II

EVEN IF THE ARREST OF RESPONDENT WAS INVALID, IT WAS ERROR TO SUPPRESS THE EVIDENCE ACQUIRED PRIOR TO THE ARREST.

Respondent successfully sought suppression of evidence obtained prior to his arrest, specifically, the open container of alcoholic beverage found in the truck and his statement to the officers admitting that he was the truck's owner and had been driving it before it stalled. Respondent did not challenge, and the court did not rely on, the propriety or constitutionality of the investigation of the truck which resulted in the discovery of the open container of alcoholic beverage or the query which produced the admission that respondent was the driver of the truck.[4] The lower court granted respondent's Motion to Suppress Evidence on the basis that "Since there was no grounds for arrest, . . . he has a right to suppression of the circumstances" (R. 43; T_2 p. 14, lines 3-8). This was error because an invalid arrest does not require the suppression of all of the evidence of the circumstances gathered prior to the arrest.

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[4]Respondent's statement is correctly termed an admission, not a confession. An admission is an acknowledgment by the accused of certain facts which tend, together with other facts, to establish his guilt; a confession is an acknowledgment of guilt itself. Fisher v. United States, 324 F.2d 775 (Ca. 8 1963), cert. den., 377 U.S. 999, reh. den., 379 U.S. 873.

Even if respondent was unlawfully arrested, his criminal prosecution would not be violative of due process under the Fifth or Fourteenth Amendments. Frisbie v. Collins, 342 U.S. 519, reh. den., 343 U.S. 937 (1952); State v. Anderson, Utah, 618 P.2d 42 (1980); State v. Beck, Utah, 584 P.2d 870 (1978). The State may still prosecute respondent, either based solely on the second assault committed by respondent (See footnote 1, page 2), or by amending the charge to a lesser included offense as the State requested at the close of the pre-trial suppression proceedings (T_2 pp. 14-15; R. 43). The suppressed evidence is necessary to fully explain the circumstances surrounding the assaults for which respondent is charged.

The suppressed evidence was obtained during the officers' normal performance of their duty.

> [The officers] are charged generally with the duty of searching out any crime, obtaining evidence and prosecuting those engaged therein. When a police officer sees or hears conduct which gives rise to suspicion of crime, he not only has the right but the duty to make observations and investigations to determine whether the law is being violated; and if so, to take such measures as are necessary in the enforcement of the law.

State v. Folkes, Utah, 565 P.2d 1125, 1127 (1977). In State v. Whittenback, Utah, 621 P.2d 103 (1980) this Court stated:

> Though there may be no probable cause to make an arrest, a police officer may, in appropriate circumstances and in an appropriate manner, approach a person for investigating possible criminal behavior.

Id. at 105. In the instant case the officers were obligated to investigate the unattended truck which was blocking the roadway and were entitled to ask respondent, when he arrived, whether he owned and had been driving the truck.

The "fruit of the poisonous tree" doctrine, discussed in the pre-trial proceeding, applies to incriminating statements made by an accused after law enforcement officers have unlawfully entered an area or unlawfully arrested an accused and renders the "fruit" of the unlawful entry inadmissible as evidence. Wong Sun v. United States, 371 U.S. 471 (1963). The doctrine does not apply to lawful investigation and questioning occurring prior to an unlawful arrest. Although an unlawful arrest may taint subsequently obtained evidence, it would not preclude the use of evidence obtained prior to the arrest where the investigation and questioning were warranted. This is particularly true where, as in the instant case, the evidence is to be used not to establish the elements of the offenses for which respondent was arrested, but rather to aid in fully explaining the circumstances behind the two assaults which occurred after the evidence was legally obtained and after respondent was arrested.

Under the circumstances of this case there is no legal nor logical reason to suppress the evidence in question. The lower court's decision to do so was clearly error.

CONCLUSION

The lower court suppressed evidence necessary to the prosecution based on a determination that the arrest of respondent was unlawful. The suppression of the evidence was error because the arrest of respondent clearly met the requirements of Utah Code Ann., § 77-7-2(3) (1978). Even if the arrest of respondent was invalid, it was error to suppress the evidence because the evidence was lawfully obtained prior to the arrest and because the crime for which respondent is being tried was committed after the arrest.

Respectfully submitted this 16th 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 C. DeMont Judd, Jr., Attorney for Respondent, 2650 Washington Blvd., Suite 103, Ogden, Utah, 84401, this 16th day of August, 1982.

Susan Patton