1972

State of Utah v. Larry Treadway : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,

vs.

LARRY TREADWAY,
Defendant-Appellant.

Case No. 12812

BRIEF OF APPELLANT

Appeal from a conviction for possession of marijuana for sale in the Third District Court for Tooele County, the Honorable Gordon R. Hall, Judge

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ROBERT VAN SCIVER
Attorney for Defendant-Appellant
321 South 6th East
Salt Lake City, Utah

VERNON B. ROMNEY
Attorney for Respondent
Attorney General-State of Utah
State Capitol Building
Salt Lake City, Utah

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STATEMENT OF THE CASE

The defendant appeals his conviction for the crime of Unlawfully Possessing Marijuana for Sale. He was convicted in the District Court for the Third Judicial District in and for Tooele County, State of Utah, the Honorable Gordon R. Hall, Judge presiding.

DISPOSITION IN THE LOWER COURT

Appellant was found guilty of Unlawful Possession of Marijuana for Sale.

RELIEF SOUGHT ON APPEAL

The Appellant prays the judgment of the lower court should be reversed.

STATEMENT OF FACTS

An May 10, 1971, two maids entered defendant's room at the Best Western Motel in Wendover, Utah. One of the maids, Eloise Lee, noticed a greenish substance on the dresser, but she did not know what the substance was. (T. 64) A third, maid, Bobby Avilos, entered the room and was asked by the other maids if she knew what the substance was. (T. 64) Avilos was not sure, but told the other maids it *looked like* marijuana. (T. 69). Her conclusion was based entirely on the fact the substances was green in color (T. 70), and she was not sure the substance was in fact marijuana. (T. 71)

Eloise Lee subsequently took a work break and went to get some soda pop. At this time, she encountered Lynn Poulsen, the motel manager, who was filling the pop machine. She told Poulsen there was something green on the dresser in the room and it looked like some kind of grass. (T. 64, 65)

Poulsen went to the room and observed a greenish gray, dry substance on the dresser. He then called Deputy Sheriff Marion Carter of the Tooele County Sheriff's Office and told him he thought someone was using marijuana. Carter went to the motel around noon to talk with Paulsen.

Later the same day, May 10, 1971, Carter went to the motel again at about 4:00 p.m., and at this time Carter and Poulsen entered the defendant's room. The alleged purpose of this entrance was to determine if the defendant had left the motel without paying his bill. The need for such a determination was based on Poulsen's advice to Carter that Poulsen *thought* the defendant *might be* skipping out without paying his bill. (T. 8). Carter apparently thought this search was necessary, despite the fact he knew defendant's car, although inoperative, was still at the motel, and despite the fact Carter knew the defendant had made prior arrangements to pay his motel bill. (T. 9).

According to Carter, he was in the defendant's room for only 10-15 seconds. (T. 11). But according to Poulsen, Carter was in the room for approximately three to four minutes. (T. 76).

The defendant paid his motel bill some time after Carter had entered the room, and Carter knew of this fact, but continued to keep the defendant under surveillance. The reason for Carter's continued surveillance was that he thought he had smelled marijuana when he entered the defendant's room (T. 10).

At the time of his first visit to the motel, Officer Carter called Fay Gillette of the Tooele County Sheriff's Office and informed him that he, Carter, thought the defendant was on marijuana and one of the maids had observed what she thought to be marijuana. Gillette advised Carter that he wanted a search warrant and that

Carter should keep surveillance of the defendant. (T. 11, 12).

Officer Gillette made an Affidavit in Support of a Search Warrant and a search warrant was issued on the basis of this Affidavit. A search was made purusant to the warrant and marijuana was found in the defendant's motel room.

Prior to trial, the defendant brought a Motion to Suppress evidence of the marijuana. The Court denied defendant's motion, finding the warrant was sufficient on its face. (T. 58-59)

ARGUMENT

POINT I

THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT IS INSUFFICIENT TO ESTABLISH PROBABLE CAUSE UNDER BOTH UTAH AND FEDERAL LAW BECAUSE:

A. THE AFFIDAVIT IS BASED ON HEARSAY ON TOP OF HEARSAY.

B. THE AFFIDAVIT DOES NOT CONTAIN ANY ALLEGATIONS TO ADEQUATELY SUPPORT A FINDING THAT THE AFFIANT'S INFORMATION WAS RELIABLE OR HIS INFORMATION COULD BE CREDITED.

C. THE AFFIDAVIT DOES NOT STATE WHEN MARIJUANA WAS OBSERVED IN THE ROOM TO BE SEARCHED AND THEREFORE DOES NOT SHOW PROBABLE CAUSE FOR A SEARCH AS OF THE TIME THE SEARCH WARRANT WAS ISSUED.

THE COURT BELOW THEREFORE ERRED IN NOT GRANTING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE OF MARIJUANA FOUND IN DEFENDANT'S MOTEL ROOM.

The renter of a motel room is protected under the Fourth and Fourteenth Amendments from unreasonable search and seizure and this protection is not waived where a search is made with the consent of a motel employee. *Stoner v. California*, 376 U.S. 483 (1964).

Article I, Section 14 of the Utah Constitution and the Fourth and Fourteenth Amendments to the United States Constitution requires that a search warrant issue only upon probable cause supported by oath or affirmation. Only the facts presented on the face of Officer Gillette's affidavit can be considered in determining the existance of probable cause. Sections 77-54-4 and 77-54-5 U.C.A. 1953; *State v. Jasso*, 21 Utah 2d 24, 439 P2d 844 (1968); *Aguilar v. Texas*, 378 U.S.108, 109 n.i (1964).

The major portion of Officer Gillette's affidavit merely makes conclusionary statements as to probable

cause to believe the facts alleged in the affidavit. Such statements do not provide adequate facts to support a finding of probable cause. *Allen v. Lindbeck*, 97 Utah 471; 93 P 2d 920 (1939); *Aguilar v. Texas*, supra. The mere statement that a surveillance had been conducted is likewise insufficient. *Spinelli v. United States*, 393 U.S. 410 (1969). There is nothing in the affidavit which supports the allegations that the car contained marijuana or the car or the room contained stimulant drugs, barbiturtes, syringes, needles, and other drug paraphernalia. In fact, the evidence presented at the motion to suppress and at trial indicates these allegations were inserted merely to bolster the impact of the affidavit. Neither Officer Gillette or anyone connected with the case ever had any evidence to support these allegations.

The affidavit must contain the facts showing grounds for the belief asserted in the affidavit. The issuing magistrate and not the affiant must be convinced there is probable cause. *Allen v. Lindbeck*, supra; *Agular v. Texas*, supra.

The only allegation that could arguably be considered in support of probable cause is the allegation that Lynn Poulsen observed marijuana in the room. The sufficiency of the affidavit must stand or fall on this one allegation. All other allegations amount to mere police suspicion and ". . . just as a simple assertion of police suspicion is not itself a sufficient basis for a magistrate's finding of probable cause . . . it may not be used to give additional weight to allegations that would otherwise be

insufficient." *Spinelli v. United States*, 393 U.S. 410 at 418-419.

For the reasons set forth below, the alleged observation of marijuana is insufficient to establish probable cause.

A. THE SEARCH WARRANT WAS ISSUED ON THE BASIS OF A HEARSAY ON TOP OF HEARSAY ALLEGATION AS TO AN OBSERVATION OF MARIJUANA.

The affidavit is not clear as to whether Lynn Poulsen told Officer Gillette he observed marijuana, or whether Officer Carter informed Officer Gillette of Poulsen's observation. At defendant's motion to suppress, Officer Gillette testified he had not talked to Poulsen until after the affidavit was prepared. (T. 24-25). This testimony makes it clear the magistrate issuing the search warrant relied on a hearsay on top of hearsay statement as to an observation of marijuana.

If evidence develops which discloses the affiant did not have a positive knowledge of the facts alleged in the affidavit, the affidavit should be held insufficient and the search warrant invalid. *Hice v. State*, 317 P 2d 294 (Okl. Cr., 1957).

Hice is a case factually in point with the instant case. The defendant was convicted of unlawful possession of liquor and brought a motion to suppress the evidence. At defendant's trial the facts developed that other

than what the affiant for the search warrant had been told by the County Attorney's Office, he had no knowledge defendant operated a place of public resort where whiskey was unlawfully sold. Based on this fact, the defendant renewed an earlier motion to suppress evidence, but the trial court overruled the motion.

On appeal, the Oklahoma court of criminal appeals reversed defendant's conviction on the grounds the trial court erred in not granting defendant's motion to suppress. In reaching this decision, the Court quoted from a prior decision:

> "We see no distinction in a case where the facts alleged in the affidavit are alleged as being based on information and belief and where the record as a whole discloses such is the case . . . [t]he evidence . . . makes it obvious that the affidavit is predicated upon information and belief, and not positive knowledge and therefore the same is void." 317 P2 at 296 (Quoting from *Lee v. State*, 297 P 2d 572 (Okl. Cr., 1956).

The Court noted that a defendant will not ordinarily be allowed "to go behind the affidavit and show the affiant did not have sufficient information upon which to base the charges contained in the search warrant." 317 P2 at 295-296. (Citing *Lee v. State*, 297 P 2d 572). But since the prosecution had not objected to defense counsel's inquiry until after proof of the invalidity of the affidavit, no presumption in favor of its validity existed and the trial court erred in not sustaining defendant's renewed motion to suppress.

The Supreme Court of Utah has held an affidavit alleging facts based on information or belief is insufficient to support a search warrant. *Allen v. Lindbeck*, supra.

Supreme Court decisions from other states have held a search warrant invalid where the part of the affidavit showing probable cause is based on hearsay. *Hice v. State*, supra; *Rohlfing v. State*, 88 N.E. 2d 148 (Ind. 1949). The rationale for disallowing hearsay allegations in an affidavit in support of a search warrant is that such allegations amount to mere information and belief and therefore do not support a finding of probable cause. This rationale is particularly appropriate in the instant case since the affidavit was based on hearsay on top of hearsay.

Because of the double hearsay nature of the facts alleged in Officer Gillette's affidavit, the affidavit amounts to allegations based on information and belief and should be held insufficient under the principle laid down by this Court in *Lindbeck* and the reasoning of the Oklahoma Court in *Hice*, supra.

Under federal law and the law of several states, an affidavit in support of a search warrant can be based on hearsay, but only if there is a substantial basis for crediting the hearsay. *Aguilar v. Texas*, 378 U.S. 108 (1964) outlines the requirements for testing the validity of an affidavit based on hearsay information.

Under *Aguilar*, the magistrate issuing the search warrant must be informed of both:

[1] underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and

[2] . . . underlying circumstances from which the officer concluded that the informant . . . was "credible" or his information "reliable." 378 U.S. at 114-115.

The affidavit in the instant case fails to meet either of these requirements. Since the affidavit does not state when the observation of marijuana was made there is an insufficient fact basis for a magistrate to conclude the marijuana is where it is alleged to be at the time the magistrate issues the warrant. (This argument is further developed in POINT I, C.)

Since the affidavit does not state any of the informant's qualifications for identifying marijuana or any past tip resulting in convictions, etc., there is an insufficient basis to conclude the informant is credible or reliable. (This argument is further developed in POINT I, B.)

The affidavit in the instant case is therefore defective even under the liberal federal standard which allows the use of hearsay.

B. THE AFFIDAVIT IS DEFECTIVE BECAUSE IT CONTAINS INSUFFICIENT FACTS TO SUPPORT A FINDING THAT BOTH THE INFORMANTS IN THE HEARSAY CHAIN OF INFORMATION WERE RELIABLE AND THEIR INFORMATION COULD BE CREDITED.

Officer Gillette's affidavit alleges that Lynn Poulsen is a former justice of the peace. This allegation may be of partial value in supporting the conclusion that Poulsen is an honest person, but it is insufficient to provide a basis to conclude his information is reliable or could be credited. There is no allegation as to Poulsen's qualifications or experience in identifying marijuana, and there is no allegation that either Carter or Poulsen had furnished reliable drug case tips in the past. The affidavit is therefore defective in that it does not allege any facts from which the magistrate issuing the search warrant could conclude both Carter and Poulsen were reliable informants and their information could be credited. In the absence of such a showing of fact, the search warrant must be held invalid. *Aguilar v. Texas*, supra.

People v .Parker, 245 N.E. 2d 487 (Ill., 1969) is a case in point. In *Parker*, the defendant was convicted of illegal possession of marijuana found pursuant to a search warrant. The affidavit in support of the search warrant contained the allegations:

> ". . . that the complainant, Kenneth Metcalf, a State narcotics inspector, "has been informed by an informant who has previously given information to said complainant which proved to be true" that Lawrence Parker had a quantity of marijuana stored in his desk at his place of employment and at his home which the informer had personally observed. They further recited that the informer had purchased samples of this marijuana from Lawrence Parker in recent months which had been turned over to the complainant, sub-

jected to analysis and proved to be marijuana." 245 N.E. 2d at 488-489.

The Supreme Court of Illinois reversed defendant's conviction on the sole basis that the affidavit did not provide adequate underlying circumstances from which the affiant concluded the informant was credible and his information reliable. In reaching this conclusion, the opinion of the Court stated:

> "Their sole allegation relating to the reliability of the informer is the general averment that he had "previously given information to said complainant which proved to be true." They do not reveal the character of this prior information or whether it led to arrests or convictions. Nor do they allege that the present information had been independently corroborated by the affiant or any other officers, other than the proof that the substances handed over were marijuana. Absent such factual allegations, or other grounds from which an issuing magistrate could reasonably credit the informer's accusation, the affidavits are defective and the warrants cannot stand." 245 N.E. 2d at 489.

In *State v. Parker*, 272 N.E. 2d 122 (Ohio, 1971), the defendant had been searched pursuant to a search warrant with a supporting affidavit which stated the affiant:

> "has good cause to believe and does believe that marijuana, amphetamines, barbiturate, LSD and other related materials are being kept in a certain building or room known as 42 Frambes Avenue and 44 Frambes Avenue, (double) in said city of Columbus, Ohio for the purpose, use and sale.

> "The facts upon which such belief is based are as follows: An informant who has purchased drugs at this address and has seen drugs used and sold at this address."

In reversing the defendant's conviction, the opinion of the Supreme Court of Ohio states:

> "The affidavit is defective. There are no underlying facts from which the affiant officer could have concluded that the informant was credible or the information reliable. Defendant's conviction was based solely upon evidence acquired under an invalid search warrant. The conviction is therefore void under authority of State v. Joseph (1971), 25 Ohio St2d 95, 267 N.E.2d 125."

C. THE AFFIDAVIT IS DEFECTIVE BECAUSE IT MAKES NO REFERENCE AS TO WHEN THE OBSERVATION OF MARIJUANA WAS MADE IN THE MOTEL ROOM.

Proof of probable cause must be made from facts so closely related to the time the warrant is issued as to justify a finding of probable cause at the time the magistrate issues the warrant. *Scro v. United States*, 287 U.S. 206, at 210 (1932); *Heredia v. State*, 468 S.W. 2d 833 (Tex Cr., 1971); *Williams v. Commonwealth*, 355 S.W. 2d 302 (Ky., 1962); *Dean v. State*, 242 So 2d 411 (Ala. Cr., 1970).

The alleged observation of marijuana fails to support a finding of probable cause because there is no allegation in the affidavit as to when the observation was

made. Without such an allegation there is no basis from which the issuing magistrate could find probable cause that marijuana existed in the motel room at the time he issued the search warrant.

In *Heredia v. State*, 468 S.W. 2d 833 (Tex Cr., 1971), the defendant appealed from a narcotics conviction on the grounds the affidavit in support of the search warrant was defective in its contents. The affidavit stated an informant who had furnished reliable information in the past had actually purchased heroin from the defendant in the motel room to be searched, but the court reversed the conviction because the affidavit did not state *when* the informant had made his purchase and therefore did not provide an adequate basis on which the magistrate could determine the motel room contained heroin at the time he issued the warrant.

A similar problem faced the Court in *Williams v. Commonwealth*, 355 S.W. 2d 302 (Ky., 1962). The defendant had been convicted of unlawfully possessing intoxicating liquor. In reversing the conviction, the opinion of the Court states:

> The affidavit supporting the warrant was based on information given to the affiant by another. It stated that the named informant told affiant that appellant "has in his possession at this time beer and whiskey in said dwelling . . ."
>
> * * * *
>
> [*It is*] *well settled that an affidavit based on information or belief is defective unless it discloses when the observation was made by the informant.*

[Citations] Hence the warrant in this case fails for lack of a sufficient supporting affidavit, and the evidence obtained through it was inadmissable.

It appears from the testimony that the informant . . . had bought liquor from the appellant at the latter's house earlier during the same evening in which the affidavit was made. It would have been no more burdensome to say so in the affidavit than it has been to say it here. (Emphasis added) 355 S.W. 2d at 302-303.

Dean v. State, 242 So. 2d 411 (Ala. Cr., 1970), is an appeal from a conviction for possession of marijuana. The State obtained its evidence by a search warrant issued pursuant to an affidavit which in part read:

". . . I have received information from a reliable informant that he knows that illegal drugs and Marihuana are being sold and kept in this apartment as he has seen it in there. He has also been to parties where these drugs and Marihuana were used. There is one instance where the police were called to this apartment to check on a woman screaming and the officer who investigated reported the woman to be on drugs. My informant has given me information in the last three months and it has been reliable." 242 So 2d at 411.

The Court reversed the conviction on the sole grounds that the affidavit did not state *when* the affiant's informer had seen illegal drugs in the defendant's apartment. In holding the trial judge had erred in admitting the evidence, the Court quoted from the recent opinion of the Alabama Supreme Court in *Davis v. State*, 237 So. 2d 640:

". . . the affidavit is deficient because it fails to show that the information received from the informant was fresh as opposed to being remote. No date is stated in the affidavit other than the date it was signed before the judge of the county court." 242 So 2d at 411.

POINT II

THE SEARCH WARRANT IS INVALID ON ITS FACE BECAUSE IT WAS MADE UNDER A NIGHT TIME SEARCH WARRANT ISSUED WITHOUT POSITIVE KNOWLEDGE THAT DRUGS WERE ON THE PREMISES TO BE SEARCHED.

Section 77-54-11 U.C.A. 1953 provides:

> The magistrate must insert a direction in the warrant that it be served in the daytime, unless the affidavits are positive that the property is on the person or in the place to be searched; in which case he may insert a direction that it be served at any time of the day or night.

The affidavit contained no statement that the affiant is positive the illegal property is in the place to be searched, and since affidavit is based on information received from another it is clear from the face of the affidavit the affiant had no such positive knowledge. The lack of positive knowledge is also demonstrated by the arguments set forth in POINT I.

It is clear from the face of Section 77-54-11, that a nighttime search warrant can only be issued on oath or

affirmation of positive knowledge. A motion to suppress should be granted where property is seized under a night time search warrant based on an affidavit which could properly support only a daytime search. *People v. Carminati,* 236 NYS 2d 921 (1962). Where a nighttime search warrant is issued under a statute that requires a nighttime search warrant issue only if the affiant is positive the property is in the place to be searched, the search warrant is invalid if the affiant has no such positive knowdedge. *United States v. Raide,* 250 F. Supp. 278 (N.D. Ohio, 1965).

Since Section 77-54-11 provides the magistrate *must* insert a direction in the warrant that it be served in the daytime unless the affiant is positive the property is in the place to be searched. The search warrant is therefore invalid on its face and the search was invalid.

CONCLUSION

The affidavit in support of the search warrant contains only one allegation which even remotely supports a finding of probable cause. This is the allegation that Lynn Poulsen observed marijuana in the motel room. The affiant made this allegation based on Officer Carter's statement to the affiant that a third person, Poulsen, had observed marijuana. There is no statement in the affidavit as to when the observation was made. The affidavit therefore does not provide a sufficient fact basis from which an independent magistrate could make a

finding of probable cause at the time he issued the warrant.

The naked fact that Poulsen is a former justice of the peace is not sufficient to establish his reliability in providing tips for drug cases, his information could be credited, or his qualifications to identify a substance as being marijuana.

The search warrant is therefore invalid because it was issued upon hearsay information without a substantial basis for crediting the hearsay and was issued upon insufficient information to support a finding of probable cause.

In addition, the warrant is defective on its face in that it is a nighttime warrant issued pursuant to an affidavit which clearly shows the affiant had no positive knowledge drugs were in the place to be searched.

The defendant's conviction should be reversed because it rests on the admission of illegally obtained evidence.

Respectfully submitted,

ROBERT VAN SCIVER
Attorney for Defendant-Appellant

321 South 6th East
Salt Lake City, Utah