

1991

Utah v. Rowe : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :
Plaintiff/Petitioner, : Case No. 910165
v. : Priority No. 14
KEELEY L. ROWE, :
Defendant/Respondent.:

REPLY BRIEF OF PETITIONER

- - - - -

ON WRIT OF CERTIORARI
TO THE UTAH COURT OF APPEALS

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REPLY BRIEF OF PETITIONER

- - - - -

The following points are submitted in reply to the arguments presented in defendant's responsive brief.

REPLY TO STATEMENT OF THE CASE

In defendant's Statement of the Case (Br. of Respondent at 4), defendant alleges that she "was not granted the opportunity to be heard and either present a reply or evidence in opposition to the state's [sic] assertions" that defendant lacked a sufficient expectation of privacy in a third party's home to challenge a search warrant issued for the home.¹ This statement is not supported by the record.

Pretrial, defendant submitted a written motion to suppress the evidence seized pursuant to the search warrant and a memorandum in support of the motion (R. 28-41). Defendant did not request oral argument or schedule an evidentiary hearing on the matter. After the State submitted its response to the motion and consistent with rule 4-501.8, Utah Code of Judicial Administration,

¹ The same claim is repeated at other points in defendant's brief. See Br. of Respondent at 9-10.

which allows decisions without hearing, the court issued a written order denying the motion (R. 51-55, 60-61). Defendant did not object to the order or request pretrial reconsideration of the denial.

During trial, at the close of the State's case-in-chief, defendant again moved to suppress the evidence seized (T. 104). The State argued that defendant lacked "standing" to challenge the search warrant of the third party home (T. 105-6).² Defendant's counsel argued that she did (T. 105-108). The court again denied the motion to suppress (T. 108).

Based on the record, defendant was provided with full opportunities to present any issues regarding her motion to suppress.

REPLY TO DEFENDANT'S FAILURE TO ADDRESS THE
STATE'S ARGUMENT THAT THE COURT OF APPEALS
ERRONEOUSLY CONCLUDED THAT THE EXCLUSIONARY
RULE WAS APPLICABLE TO A PROCEDURAL VIOLATION
OF THE STATUTORY NIGHTTIME SEARCH WARRANT
PROVISION

The State in its opening brief extensively argued that the court of appeals erroneously concluded that the exclusionary rule was applicable to a procedural violation of the nighttime

² The term "standing" was used by the trial prosecutor (T. 105-06). Analytically, the correct inquiry is whether defendant had a sufficient "expectation of privacy" in the premises such that her personal constitutional rights were violated by the entry and authorized search of her host's home. See Petitioner's Opening Brief, Point II at 19 n.7, for distinctions between traditional procedural concepts of standing and modern substantive fourth amendment law. Accord United States v. Taketa, 923 F.2d 665, 669-70 (9th Cir. 1991) ("[f]ourth amendment standing is quite different, however, from 'case or controversy' determinations of article III standing").

search warrant provision, Utah Code Ann. § 77-23-5 (1990). See Petitioner's Opening Brief, Point I at 8-17. In his responsive brief, defendant failed to address this issue. Instead, defendant merely assumes that "[s]uppression is the only remedy available" for any violation of statutory provisions governing the execution of search warrants (Br. of Respondent at 10). Defendant then recites, without further legal analysis or support, the conclusions of the majority's opinion that suppression is mandated (Br. of Respondent at 18-21).

Such a conclusion is contrary to the majority view that a violation of a nighttime search provision does not generally rise to a constitutional level. See Petitioner's Opening Brief, Point I at 8-17. Cf. People v. Acevedo, 579 N.Y.S.2d 156, 157 (N.Y.App.Div. 1992) ("[a]lthough the failure to comply with the procedural requirements for obtaining a nighttime search warrant does not justify the suppression of the evidence where there exists a basis for the nighttime search, . . . where there does not exist any basis for the nighttime search, the search [is] invalid and must be suppressed").

REPLY TO POINT I OF RESPONDENT'S BRIEF
DISCUSSING WHETHER A SOCIAL GUEST HAS A
LEGITIMATE EXPECTATION OF PRIVACY IN A THIRD
PARTY'S HOME

Point I of Respondent's brief corresponds to Point II of Petitioner's Opening Brief in which the State argued that the court of appeals erroneously concluded that the status of being an invited social guest in a third party home vests the guest with a legitimate expectation of privacy in the residence such that the

guest has the right to challenge the validity of a search warrant for the home. In her brief, defendant asserts several points which require comment.

First, defendant argues that if this Court were to conclude that she lacked a constitutional expectation of privacy in the Swickey home that the case should be remanded to the trial court to allow defendant "an opportunity to be heard on that issue at an evidentiary hearing" (Br. of Respondent at 10). Presumptively, defendant predicates this request on her claim that the trial court improperly denied her an opportunity to present evidence in support of her motion to suppress. As discussed above, defendant was given ample opportunity to respond to the State's argument in the trial court (Petitioner's Reply Brief at 1-2). Accord State v. Rowe, 806 P.2d 730, 735 (Utah App. 1991) (copy attached to Petitioner's Opening Brief).

Second, defendant concedes that she is not arguing for a separate state constitutional analysis (Br. of Respondent at 11-12). This Court is limited, therefore, to consideration of defendant's federal constitutional rights. See Petitioner's Opening Brief, Point II at 22 n.9. Accord State v. Ramirez, 817 P.2d 774, 785 (Utah 1991) (appellate court will not consider separate state constitutional analysis if the parties have not argued for it).

Third, defendant's inference that she was acting as a hostess and "preparing (heating) drinks for all the guests" (Br. of Respondent at 13) is a factual allegation never argued to the trial

court or the court of appeals and contains no record cite in support. Instead, the majority of the court of appeals found that defendant was a merely a social guest at a party. Rowe, 806 P.2d at 735-36.

Fourth, defendant asserts that her legitimate expectation of privacy in her personal property, her purse, satisfies the issue of her right to challenge the entry into the home (Br. of Respondent at 14-15). This is incorrect.

The State has never claimed that defendant theoretically lacked an expectation of privacy in her personal property. Instead, the State's position has consistently been that defendant abandoned her personal constitutional interest by disclaiming ownership in the purse and leaving it in the home knowing that a search was about to commence (Petitioner's Opening Brief, Point III at 29-30). Whether a person has an interest in an item of personal property left in a third party's home, does not address the issue of that person's expectation of privacy in the home itself.

Defendant's failure to understand this distinction is exemplified by her assertion that Rawlings v. Kentucky, 448 U.S. 97 (1980), supports her claim of a legitimate expectation of privacy in the home (Br. of Respondent at 14-15). Just the opposite. Rawlings, decided the same day as United States v. Salvucci, 448 U.S. 83 (1980), made clear that after Rakas v. Illinois, 439 U.S. 128 (1978), a defendant challenging a search and seizure on fourth amendment grounds must establish that "he or she possessed a 'legitimate expectation of privacy' in the area searched."

Rawlings, 448 U.S. at 104. This substantive inquiry rejects "the notion that 'arcane' concepts of property law ought to control the ability to claim the protections of the Fourth Amendment." Id. at 105. Accord Salvucci, 448 U.S. at 91 ("[t]he person in legal possession of a good seized during an illegal search has not necessarily been subject to a Fourth Amendment deprivation"). Here, defendant has established nothing more than that she was legitimately on the premises when entry was made pursuant to an arrest warrant for the owner of the home and a contemporaneous search warrant. This is an insufficient basis to establish a constitutional expectation of privacy in the home. See Petitioner's Opening Brief, Point II at 21-29. Accord United States v. McNeal, 955 F.2d 1067, 1069-71 (6th Cir. 1992) (boyfriend who had key to his girlfriend's apartment but was only transient guest at the time of the search did not have constitutional expectation of privacy sufficient to challenge police entry into the apartment); Davasher v. State, 823 S.W.2d 863, 868 (Ark. 1992) (son lacked expectation of privacy in his mother's home in which he was an invited guest).

REPLY TO POINT II OF RESPONDENT'S BRIEF
DISCUSSING ABANDONMENT

Point II of respondent's brief corresponds with Point III of Petitioner's Opening Brief in which the State argued that the court of appeals erroneously concluded that evidence of abandonment must be established by clear and convincing evidence, and erroneously applied a subjective standard by requiring that "abandonment in the fourth amendment sense" could only be

established if the State proved that defendant did not abandon the property to "avoid self-incrimination" (Petitioner's Opening Brief, Point III at 29-33).

Defendant, while summarily quoting without attribution the majority opinion's erroneous comments concerning the subjective nature of abandonment, does expressly concede that "[t]he test is an objective one," focusing on the intent which may be reasonably inferred from the "words spoken, acts done, and other objective facts" (Br. of Respondent at 16 and 17, quoting United States v. Thomas, 864 F.2d 843, 846 (D.C. Cir. 1989)). This is consistent with the overwhelming majority view that "the test to be applied in determining whether a person has abandoned property is an objective one - the words used, the conduct exhibited, and other objective facts such as where and for what length of time the property is relinquished and the condition of the property." O'Shaughnessy v. State, 420 So. 2d 377, 379 (Fla. App. 1982). See also cases cited in Petitioner's Opening Brief at 31-32. Neither defendant nor the majority opinion have cited any legal support for the contention that this inquiry involves an evaluation of a defendant's *motive* in abandoning property to avoid self-incrimination.

Further, without any citation to the record, defendant contends that abandonment cannot be supported because she "did not intend to give up ownership of her purse and its contents to Mr. Swickey," claiming that "[i]t is more likely that under the stress of the situation and her haste to leave the stressful situation of a police search of a home, she merely forgot her purse" (Br. of

Respondent at 16). Not only do these allegations lack record support but they are contrary to the majority opinion's conclusion that defendant intentionally abandoned her purse to avoid self-incrimination. Rowe, 806 P.2d at 736-37.

CONCLUSION

Based on the arguments in the Petitioner's Opening Brief and the arguments presented here, the decision of the court of appeals should be reversed and defendant's conviction affirmed.

RESPECTFULLY SUBMITTED this 6th day of May, 1992.

R. PAUL VAN DAM
Attorney General



CHRISTINE F. SOLTIS
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CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing reply brief of petitioner was mailed, postage prepaid, to Sheldon R. Carter, Harris Carter & Harrison, attorney for defendant-respondent, Jamestown Square, Clocktower Bldg., Ste. 200, Provo, Utah 84604, this 6th day of May, 1992.


