1992

State of Utah v. Devon Boyd Potter : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff-Appellant,

v.

DEVON BOYD POTTER,

Defendant-Appellee.

: Case No. 920579-CA

: Priority No. 10

BRIEF OF APPELLEE

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DEFENDANT-APPELLEE'S RESPONSE TO PLAINTIFF'S INTERLOCUTORY APPEAL FROM AN ORDER SUPPRESSING EVIDENCE IN AN PROSECUTION FOR UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE, UTAH CODE ANN. SECTION 58-37-8(2)(a)(i) (Supp. 1992), AND POSSESSION OF DRUG PARAPHERNALIA, UTAH CODE ANN. SECTION 58-37a-5 (1990), BOTH CLASS B MISDEMEANORS, ENTERED BY THE SEVENTH DISTRICT COURT, IN AN FOR EMERY COUNTY, UTAH, THE HONORABLE BRYCE K. BRYNER, PRESIDING.

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

The Appellant's statement of the Jurisdiction and Nature of the Proceedings is sufficient.

ISSUES PRESENTED ON APPEAL
AND
STANDARDS OF APPELLATE REVIEW

1. Did the trial court correctly suppress evidence seized pursuant to a warrant when the warrant was obtained after police entered Defendant's home and the trial court found no exigent circumstances to enter the home. A trial court's "exigent circumstances" determination is reversed on appeal only if it is clearly erroneous. State v. Ashe, 745 P.2d 1255, 1258 (1987).

2. Should this court consider Appellant's argument that suppression was not proper because the evidence was allegedly seized independently from the illegal entry when this issue was not argued at the trial court. If this new issue is considered, it is reviewed as a question of law without deference to the

trial court. Segura v. United States, 468 U.S. 796, 799, 104 S.Ct. 3380, 3382 (1984).

3. Was there sufficient probable cause to issue the warrant. The Utah Court's have adopted the "totality of the circumstances" test in determining probable cause. Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317 (1983); State v. Anderson, 701 P.2d 1099 (Utah 1989). Deference is given to the magistrates finding. State v. Ayala, 762 P.2d 1109 (Utah App. 1988).

4. Did the affiant make statements in the Affidavit with reckless disregard for the truth, and should these statements be set aside and probable cause determined on the other facts in the Affidavit. Franks v. Delaware, 430 U.S. 154, 98 S.Ct. 2674 (1978).

5. Did the trial court correctly rule that the search warrant was invalid because it failed to describe the place to be searched with sufficient particularity when the address was incorrect, the location of Defendant's trailer house was incorrect, there was no city mentioned in the description, and there was only a minimal description of the home itself. This issue is subject to non-deferential review for legal error to ascertain whether by looking at the warrant, could the officer, with reasonable effort locate the correct premises to be searched. United States v. Burke, 784 F.2d 1090 (11th Cir. 1986).

6. Is the Leon "good faith" exception applicable when the officers did not act in an objectively reasonable manner by entering the home without exigent circumstances, by using information gathered after the warrantless entry in the affidavit, by making statements to the magistrate with reckless disregard for the truth, and by presenting to the magistrate a facially deficient warrant. Once the underlying facts are established, this is a question of law. United States v. Russell, 960 F.2d 421 (5th Cir.), cert. denied., ___ U.S. ___, 113 S.Ct. 407 (1992).

CONSTITUTIONAL PROVISION, STATUTES AND RULES

The Fourth Amendment to the United States Constitution reads:

> 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 Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, section 14 of the Utah Constitution reads essentially the same.

STATEMENT OF THE CASE

On February 15, 1991, an officer stopped a suspect for suspicion of DUI. After the stop, the obviously intoxicated suspect talked to the officer about leniency if he told the officer about a dope party going on. The suspect said that a

dope party was going on at the DeVon Potter residence, which was nearby, and that there were seven individuals at the residence, and they had a big bag of marijuana, and that they were smoking the marijuana.

Based on this information, and without a search warrant, the officers forcefully entered the Potter residence and secured the premises until a search warrant could be obtained. Upon entering the premises the officers noted there were only three individuals in the residence, there was no visual signs of illegal substances, the individuals did not appear to be under the influence of any illegal substances, and there was no odor of marijuana. Before the search warrant was obtained, DeVon Potter asked the offices to leave but they refused to do so.

While the officers were securing the residence, a pit bull terrier belonging to Brett Potter, one of the individuals in the residence, became agitated, and Brett asked if he could take the dog to his residence which was nearby. An officer accompanied Brett to his residence, and along the way Brett was attempting to restrain his dog, but the officer interpreted his actions as if he was attempting to dispose of something. A subsequent search of the area found no illegal substances.

About two to three hours later, a search warrant was obtained by Officer Tom Harrison. The incident involving the suspicious activity of Brett Potter was included in the Affidavit

in support of the warrant. After the search warrant was served, DeVon Potter gave to the Officers a small amount of marijuana that was located at his residence.

Defendant moved to suppress the evidence for the reason that it was obtained as the result of an illegal search and seizure in violation of the Fourth and Fourteenth Amendments to the United States Constitution, and Article I Section 14 of the Utah Constitution. this motion was based on at last four main reasons. First, there were no exigent circumstances warranting the initial entry into the home, and once the officers entered the home they should have immediately left because it was quite apparent that the statements made by the DUI suspect were incorrect. Second, there was insufficient probable cause to support the issuance of the warrant because the statements by the DUI suspect were suspect because of his intoxication, his self-interest in making the statements, and that the statements were apparently incorrect as the officers observed after entering the residence. Third, the affiant, Tom Harrison, made statements in his Affidavit with reckless disregard for the truth. In particular, the statements made by the DUI suspect. These should have been omitted because they were incorrect as the officers discovered as they entered the premises. And fourth, the search warrant was defective in that it did not "particularly" describe the place to be searched. The State responded to Defendant's

arguments, and also argued that the evidence should nevertheless be admitted under the Leon "good faith" exception.

The trial court granted Defendant's motion on the basis that there were no exigent circumstances to enter Defendant's home, and the warrant did not particularly describe the place to be searched. The Court did not specifically rule on Defendant's other two arguments or the State's good faith argument.

STATEMENT OF THE FACTS

(reference made the transcript of the preliminary hearing shall be denoted as "T", and references to the Record shall be denoted as "R")

1. DeVon Potter resides at 75 West 400 North, Huntington, Utah. He lives in a trailer home which is the third one heading West on 400 North. (See T. 65 lines 5-8; and p. 52 lines 11-15.)

2. On February 15, 1991, Emery County Deputy Sheriff Gayle Jensen stopped an individual for suspicion of DUI. The stop was made a short distance from DeVon Potter's residence. (See T. 23 lines 2 and 3; and p. 8 line 24 through p. 9 line 2.)

3. The DUI suspect was obviously intoxicated. Upon making contact with the officer, the DUI suspect began asking if he would get a break if he told the officer about a dope party nearby. (See T. 8 lines 10-14; and p. 10 lines 6 - 20.)

4. The DUI suspect told officer Jensen that a dope party was going on at Devon Potter's residence, and that they had a big bag of marijuana, and that there were seven individuals rolling and smoking marijuana joints. (See T. 8 line 24 through p. 9 line 2) There was no big pot party going on at Devon Potter's residence. (See T. 68 lines 19-25.)

5. As the officer was processing the DUI suspect, he noticed individuals peering out of a window at DeVon Potter's residence. (See T. 13 lines 11 - 13.)

6. Officer Jensen radioed for assistance, and one of the officers to respond was Tom Harrison of the Emery County Drug Task Force. (See T. 41 lines 5-7 and lines 15-25.)

7. The officers observed one car pull up to Devon Potter's residence, and then leave a short time later. (See T. 25 lines 5-8 and lines 18-21.)

8. Without a warrant, and without knocking, and without seeking independent corroboration of the DUI suspects' statements, and without checking the veracity of the DUI suspect, the officers forcefully entered Devon Potter's residence, and secured the premises until a warrant could be obtained. One of the officers to enter the residence was Tom Harrison. (See T. 13 lines 5-7; and lines 19 and 20; and p. 69 lines 9-18.)

9. Upon entering the residence the officers observed that there were only three individuals at the residence, there was no

odor of marijuana, there were no visual signs of illegal substances, and the individuals did not appear to be under the influence of any illegal substances. The officers were trained in detecting the odor of marijuana. (See T. 26 line 2 through p. 27 line 17.)

10. When the officers entered the residence, a pit bull terrier belonging to Brett Potter, one of the individuals in the residence, became agitated, and Brett asked if he could take the dog to his residence which was nearby. One of the officers granted permission to do so, and accompanied Brett to his trailer. Along the way Brett was attempting to restrain the dog, and the officer interpreted Brett's actions as trying to dispose of something along the path to Brett's residence. However, a search of the area by the officer revealed no illegal substances. (See T. 32 lines 6-14; and R. 15). This allegedly suspicious conduct was included in the Affidavit of Tom Harrison in an effort to obtain the warrant.

11. While the officers were at DeVon Potter's residence, and before any search warrant arrived, DeVon Potter asked them to leave, but they refused to do so. (See T. 74 lines 11-17.)

12. Officer Tom Harrison went to meet with the county attorney to prepare a search warrant. After this meeting, and before going to get a magistrates signatures, Officer Harrison intended to return to Devon Potter's residence. However, he

went to the wrong trailer home. (See T. 52 line 16 through p. 53 line 25.)

13. The Affidavit signed by Officer Harrison listed as information in support of the warrant the statements made by the DUI suspect. These are the facts that officer Harrison relied upon in obtaining the search warrant along with the incident with Brett Potter after the initial entry. (See T. 46 lines 6-16; and R. 12-15).

14. Under the reliability section of the Affidavit, Officer Harrison indicated that the informant volunteered the information which was against his own penal interest. Under the verification section of the Affidavit, Officer Harrison indicated that Jim Ward, one of the occupants of the trailer, was a convicted drug user, that he had been told by others in the drug trade that DeVon Potter was involved in drugs, that the occupants in the trailer were very nervous because they were peering out the window at the traffic stop, and he described the incident with Brett Potter. (See R. 13, 14).

15. Officer Harrison did not tell the magistrate that most of the DUI suspect's statements proved to be incorrect as the officers observed after entering the premises. Also, Officer Harrison did not inform the magistrate that the DUI suspect was obviously intoxicated, that he only volunteered the information

after asking the officer about leniency, and that nothing was found as a result of the Brett Potter incident. (See R. 12-15).

16. Magistrate Stan Truman signed the search warrant. The search warrant described the premises to be searched as "50 West 400 North, Black's Trailer Court, single wide trailer, second trailer headed West on 400 North on South side of road, belonging to DeVon Potter." There was no indication of the city where the trailer was located. (See R. 10).

17. About two to three hours after initial entry, the search warrant was served on DeVon Potter, and he was told by the police that if he had any controlled substances he had better turn it over to them or they wold tear the place apart searching for it. At this time, Devon Potter gave to the police a small amount of marijuana he had at the residence. A complete search was then conducted by the officers, and some drug paraphernalia was found. (See T. 57 lines 4-15.)

SUMMARY OF ARGUMENT

The initial warrantless entry constituted and violation of Defendant's Fourth Amendment rights, and his rights under the Utah Constitution, because there were no exigent circumstances justifying the entry. The trial court was correct in finding no exigent circumstances because there was no evidence presented which would indicate that the evidence might or would be imminently destroyed if the officers did not enter immediately

without a warrant. The "independent source" source doctrine is not applicable because the seizure was not so attenuated from the search so as to dissipate the illegal taint, the independent source cases cited by the State are distinguishable, and the Defendant challenged the warrant herein.

There was insufficient probable cause to issue the warrant, especially when you consider the warrant was issued based upon the uncorroborated and unverified statements of a drunk driver who was trying to get a deal on his case.

In addition, the affiant made statements in his Affidavit with reckless disregard for the truth in that he should have not included most if not all of the statements from the drunk driver because it was apparent upon entering the premises that much of what the drunk driver said was incorrect. The affiant did not relay these facts to the issuing magistrate. These statements should be omitted from the Affidavit, and probable cause determined on the remaining statements.

Furthermore, the search warrant itself is facially invalid because it failed to describe the premises to be searched with sufficient particularity. The address was incorrect, the physical location of the home was described incorrectly, the city was not listed, and there was only a minimal physical description of the home. Also, when the affiant went to the scene he went to

the wrong residence indicating that there needed to be a particular description of the premises in this case.

Finally, the Leon "good faith" exception is not applicable in this case because the officer did not act in an objectively reasonable manner by, among other things, not verifying the statements of the drunk driver, entering the premises without a warrant when exigent circumstances did not exist, by not immediately leaving Defendant's residence when it was apparent that much of what the drunk driver said was incorrect, by seeking a search warrant and including in his affidavit evidence that was obtained after the illegal entry, by not informing the magistrate of the discoveries upon entering the premises.

ARGUMENT

POINT I

THE INITIAL WARRANTLESS ENTRY INTO THE DEFENDANT'S RESIDENCE VIOLATED THE DEFENDANT'S CONSTITUTIONAL RIGHTS BECAUSE THERE WERE NO EXIGENT CIRCUMSTANCES JUSTIFYING SUCH AN ENTRY.

The Fourth Amendment to the United States Constitution, and Article I, section 14 of the Utah Constitution, prohibit "Unreasonable searches and seizures." Warrantless searches and seizures "are per se unreasonable under the Fourth Amendment--subject only to a few specifically established and well-delineated exceptions." See, Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 514 (1967) as cited in State v. Ashe, 745

P.2d 1255, 1258 (Utah 1987). Where a home is involved, the burden is particularly heavy on the state to show that one of the specific exceptions is applicable. In Payton v. New York, 445 U.S. 573, 585, 100 S.Ct. 1371, 1379, 1380 (1980), the United States Supreme Court stated that warrantless "entry into the home is the chief evil against which the Fourth Amendment is directed."

One of the specific exceptions to the warrant rule is if there are "exigent Circumstances" justifying a warrantless entry. See Coolidge v. New Hampshire, 403 U.S. 443, 455, 91 S.Ct. 2022, 2032 (1971). The state has the burden of showing that exigent circumstances warranted a warrantless entry. See United States v. Cvaron, 700 F.2d 582 (10th Cir. 1983). The state attempts to use State v. Ashe, 745 P.2d 1255 (Utah 1987), as a case "quite similar" to the present case in an attempt to show exigent circumstances. In Ashe, the Utah Supreme Court did hold there were exigent circumstances, but the facts of Ashe are quite distinguishable from this case.

In Ashe, a confidential informant was given instructions by the suspect to leave the suspect's residence, go to another residence, make a sell of contraband, and return with the proceeds in a few minutes. The informant then reported to the police. The police concluded that if they tried to obtain a search warrant at that time, it would take too long, and the

suspect would get suspicious as to why the informant had not returned within a few minutes, and the suspect would then figure something was up and would destroy the remaining contraband. Thus, without a warrant, the police entered the suspects dwelling and seized the contraband.

In the present case, there was no indication to the police that if they did not act immediately, the evidence, if any, would be destroyed. Prior to their entry into Defendant's residence, all the police knew is that a drunk driver, in an effort to get a good deal on his case, made some uncorroborated statements that a pot party was going on at the Defendant's residence. In addition, the police indicated that the occupants of Defendant's residence looked out the window, and during a period of about 45 minutes to an hour, one car came and left. The fact that the drunk driver was intoxicated and that he made the statements in an obvious effort to get a good deal on his case, should have made his statements suspect to the police, and they should have conducted further investigation to try to corroborate the statements, or they could have secured the premises outside while waiting for a warrant. See United States v. Ortega-Serrano, 788 F.2d 299 (5th Cir. 1986). Also, the fact that the occupants of Defendant's dwelling were looking out the window should not necessarily arouse the suspicion of the officers since it is only natural for someone to look out their window to see what is going

on when you have flashing police lights outside your house. The state asserts that in this case the Defendant, as in Ashe, had been alerted to a narcotics investigation. Presumably, this assertion is based on the mere fact that Defendant and others had looked out the window and saw the police talking to Sandstorm. This assumption would carry a lot more validity if Sandstorm was sent on a drug run as in Ashe. But such was not the case, and this is exactly the point the trial court made -- that there was no evidence presented to indicate that the Defendant would have any idea that Sandstorm would tell the police about the alleged pot party.

In addition, the fact of a car coming and leaving should not necessarily have aroused the officers suspicion as that can easily be explained by the coincidental visit of a friend or family member which in this case it was. It is also important to note that the mere fact that the offense involves narcotics is insufficient in and of itself to justify a warrantless entry. See United States v. Thomas, 893 F.2d 482 (2nd Cir. 1990).

Consequently, there were no exigent circumstances. The police made an illegal entry into defendant's residence, and then illegally detained Defendant while they waited for a warrant. What is especially offensive about this police conduct is that after they entered the premises it should have been apparent to them that the statements made by the drunk driver were not

truthful. The drunk driver stated there was a big dope party going on with lots of people (at least seven), smoking marijuana. However, when the police entered there were only three individuals in the home, there were no visual signs of controlled substances or drug paraphernalia, the Defendant and the other occupants did not appear to be under the influence of illegal substances, and most importantly, there was no odor of marijuana. Both of the officers admitted at the suppression hearing that they were trained to detect the odor of marijuana, and that they knew the odor of marijuana, but they did not detect any such odor after entering Defendant's home. If there was some big pot party going on, certainly, the odor of the marijuana would have lingered in the residence. In spite of the apparent inconsistencies in the drunk driver's story, the police detained the Defendant even after being asked to leave by the Defendant.

The state further argues that the marijuana "might quite literally go up in smoke" as further justification for the warrantless entry. This conclusion is not supported by the facts. Supposedly, Sandstrom told the police there was a bag of marijuana "three fingers deep." If this were true, it would have taken a long time to consume all of the marijuana giving the police sufficient time to obtain a warrant.

A. The Trial Court did not overstate the Degree of Proof of "Exigent Circumstances."

The State attempts to make an issue of the fact that the trial judge used the word "would" in determining exigent circumstances and thus used to stringent of a standard. The state asserts, quoting Ashe, that the proper legal standard is if the suspects "might" destroy the evidence. This merely is a matter of semantics. Several courts have used several different words is setting forth the exigent circumstances standard, and they all essentially mean the same thing. In fact, in some of the very cases that the Utah Supreme Court cited in Ashe (in footnote 10) in support of its exigent circumstances standard, different terms are used instead of "might." For example, in United States v. Kunkler, 679 F.2d 187 (9th Cir. 1982). The court stated the police could enter if from the totality of the circumstances they believed the contraband "will immediately be destroyed." (Emphasis added.) In addition, the term "eminent destruction" was used in United States v. Gardner, 553 F.2d 946, 948 (5th Cir. 1977), and in United States v. Shima, 545 P.2d 1026 (5th Cir. 1977), all of which were cited in Ashe. Even in United States v. Manfredi, 722 F.2d 519 (9th Cir. 1983), where the court used the work "might," the court actually held exigent circumstances was present if the officers believed there was "...a substantial risk the remaining cocaine might be destroyed..." 722 F.2d at 522, 523 (emphasis added).

In the present case, in viewing the totality of the

circumstances, there was no "substantial risk" that the alleged contraband "might" or "would" be "imminently destroyed." As mentioned, the main distinguishing fact between Ashe and this case which supports this conclusion is the fact that in Ashe a runner had been sent on a drug run, and the police were concerned about the runner not returning within the anticipated time. In fact, at least three of the cases cited in Ashe, and cited above, Manfredi, Cvaron, and Kunkler, all dealt with a suspect possibly being tipped off due to a drug runner not returning within the anticipated time.

B. The Argument that the Officers Entered the Premises just to Secure them does not Justify the Initial Entry.

The state also cites State v. Rocha, 600 p.2d 543 (Utah 1979), Mincey v. Arizona, 437 U.S. 385, 98 S. Ct. 2408; and State v. Pursifall, 751 P.2d 825 (Utah App. 1988), as examples of exigent circumstances justifying a warrantless entry to secure the premises until a warrant could be obtained. All of these cases can be factually distinguished. In Rocha, the police entered pursuant to an arrest. There was no arrest here either before or immediately after entry. And Mincey and Pursifall, dealt with a homicide or shooting on or near the residence, and the police were justified in entering the premises to apprehend a gunman or to discover other victims. The present care comes no where close to those types of exigent circumstances. The Utah Supreme Court in Pursifall held that the police could enter if

they "have a reasonable belief that a person within needs immediate assistance; or (2) promptly search the scene of a homicide for other victims or a killer on the premises. Pursifall, 751 P.2d at 827.

The state's next issue that the evidence was seized by authority that was independent from the pre-warrant entry, is raised for the first time on appeal, and should not be considered by this court. If this issue is considered, this court should still uphold the trial court's order of suppression.

C. The Independent Source Doctrine is not Applicable.

The Defendant submits that even though the evidence in question was obtained after the warrant was served, the evidence was still "Fruit of the Poisonous Tree" due to the prior illegal entry. In response to this the state has argued the "Independent Source" doctrine as articulated in Segura v. United States, 468 U.S. 796, 104 S. Ct. 3380 (1984), and subsequently adopted by the Utah Supreme Court in State v. Kelly, 718 P.2d 385 (Utah 1986), and State v. Northrup, 756 P.2d 1288 (Utah App. 1988). In response to the Independent source argument, Defendant sets forth the following arguments:

1. The seizure of the evidence was not so attenuated from the illegal entry so as to dissipate the taint.

First, the seizure of the evidence was not "so attenuated as to dissipate the taint". Segura, 468 U.S. at 805, 104 S. Ct. at 3385. In determining if there has been sufficient attenuation,

the United States Supreme Court, in a decision subsequent to Segura, held "The ultimate question therefore, is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here. This would not have been the case if the agents decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the magistrate and effected his decision to issue the warrant." Murray v. United States, 487 U.S. 533, 542, 108 S. Ct. 2529, 2536 (1988). In the present case, the affiant submitted an attachment with his affidavit, and by reference, made the attachment part of the affidavit. The attachment set forth an incident that happened after the illegal entry. In particular, the attachment described allegedly suspicious activities of the Defendant's brother while walking back to his trailer. Without question, the affiant submitted this information in an effort to persuade the magistrate, and presumably the magistrate considered the information in making his decision. Therefore, there was insufficient attenuation between the illegal entry and the subsequent warrant, and thus, no completely independent source. We simply cannot let the police gain illegal entry to a home, and then use information gathered after the illegal entry to support an affidavit for a search warrant.

2. There was no long period of time between the violation of Defendant's constitutional rights and service of the

warrant, and thus, no attenuation.

Second, there is insufficient attenuation also on the basis that the illegal physical entry constituted an invasion of Defendant's right of privacy which was exacerbated by the continued occupation of the premises. And that illegal invasion of Defendant's privacy continued right up until service of the warrant. Consequently, there was no long period of time between the prior illegality and the warrant search. "The Fourth Amendment to the Constitution protects people, not places," Segura, 468 U.S. at 799, 800, 104 S. Ct. at 3382, and Defendant's personal right of privacy is what needs protecting here. As a result of the illegal entry and detention, the police improperly inhibited the Defendant's right of privacy and his right to come and go as he pleases.

3. The State's "Independent Source" cases are distinguishable.

Third, the facts in Segura and Northrup are significantly distinguishable. In Segura, the Defendant was arrested immediately outside his apartment. The police then entered the apartment, and in the course of a security check, saw contraband in plain view. 468 U.S. at 799-801, 104 S. Ct. at 3382. 3383. In Northrup, the police actually observed drug buys at Defendant's residence. The police entered Defendant's residence and arrested all occupants, and observed contraband in plain view. In the present case, there were no arrests of Defendant or

any other occupant, and there was no contraband in plain view. The Defendant was simply held against his will for close to three hours in spite of the fact that there were no observable signs of illegal activity. In fact, this case is especially offensive because, as mentioned, when the police entered Defendant's residence it was obviously apparent that many of the drunk driver's statements were unfounded, especially since there was no lingering odor of marijuana. If there was some big pot party going on, there certainly would have been a lingering odor. However, in spite of this discovery, the police went ahead and illegally detained Defendant and his companions for close to three house and obtained a search warrant based on the suspect information.

4. The Independent Source Doctrine is not applicable if the warrant is challenged.

And fourth, and maybe most significantly, a main factor in both Segura and Northrup was that the Defendant did not challenge the warrant itself. In fact, in noting no challenge to the warrant, the Utah Supreme Court held in Northrup that, "Therefore we uphold the trial court's ruling that evidence seized pursuant to the warrant was admissible." 756 P.2d at 1288. In the present case, the Defendant has definitely challenged the warrant on the grounds of insufficient probable cause, the officers making reckless statements in support of the warrant, insufficiency of the description of the premises to be searched, and inclusion in

the affidavit of information obtained after the illegal entry. It is apparent that if there are challenges to the warrant, all of these challenges must be decided in favor of the state before this court can conclude that the independent source doctrine is applicable and the evidence in question is not fruit of the poisonous tree. For the foregoing reasons, and the subsequent arguments herein, this court should conclude that there is insufficient attenuation between the illegal entry and the warrant, and that the evidence is fruit of the poisonous tree.

POINT II

THERE WAS INSUFFICIENT PROBABLE CAUSE TO SUPPORT THE SEARCH WARRANT.

The Utah Courts have adopted the "totality of the circumstances" test in determining the sufficiency of probable cause to support a warrant. See State v. Brown, 798 P.2d 284, 285 (Utah App. 1990). This test was first adopted by the United States Supreme Court in the case of Illinois v. Gates, 462 U.S. 213, 230, 103 S.Ct. 2317, 2328 (1983). "Accordingly, the magistrate must consider all the circumstances set forth in the affidavit and make a 'practical, common-sense decision whether...there is a fair probability' that criminal evidence will be found in the described place." Brown, 798 P.2d at 286 citing Gates, 462 U.S. at 238, 103 S.Ct. at 2332.

The Court in Brown went on to state that "the United States Supreme Court has stated that the veracity, reliability and basis

of knowledge of an informant 'should be understood simply as closely intertwined issues that may usefully illuminate the common sense, practical question of whether there is probable cause to believe that contraband or evidence is located in a particular place.'" Brown 798 P.2d at 286 citing Gates, 462 U.S. at 230, 103 S.Ct. at 2328. In other words, the reliability and veracity of an informants statements are still important factors when considering the totality of the circumstances.

In this particular case we are dealing with a citizen informant, and "courts view the testimony of citizen informers with less rigid scrutiny than the testimony of police informers...because citizen informers, unlike police informers, volunteer information out of concern for the community and not for personal benefit." Brown, 798 P.2d at 286. The key distinction in the instant case is the informant in question--the drunk driver--was definitely not giving information out of concern for the community, but was giving it to try to save his own hide. Thus, his statements should have been suspect from the beginning by the police. However, instead of attempting to verify the statements, or seek independent corroboration (as the police did in Brown and Gates), the police simply took the statements completely at face value and mainly based their subsequent actions of making an illegal entry and obtaining a warrant on the drunk driver's statements.

Gates and Brown can easily be distinguished from the present case, because in each of those cases the police took their time to seek independent verification of citizen informants' statements. And the citizen informants in question were not even drunk or trying to obtain leniency. In Brown, "the officers went to the addresses identified and verified the details of the houses and greenhouse identified by the informant," and "The officers personally verified all of the information that could be verified by observation..." Brown, 798 P.2d at 287. In Gates, "police corroborated the name and address of one of the defendants and substantially corroborated the defendants' modus operandi by observing their activities." Gates, 462 U.S. at 226, 103 S.Ct. at 2325.

The significant point in this case is that not only should the drunk drivers' statements have been suspect from the beginning, but they should have been thoroughly discounted when it became apparent to the officers that the statements were incorrect after they entered the Defendant's home and discovered no evidence of a big pot party.

In light of the highly suspect nature of the drunk driver's statements, there should be no question that there was insufficient probable cause to issue a warrant. The only other factors set forth in the Affidavit are the incident with Brett Potter and the dog, uncorroborated statements by police

informants that the Defendant was in the drug trade, the occupants of the trailer peering out the window, and that one of the occupants of the trailer peering out the window, Jim Ward, had previously been convicted of drug use. It should be remembered that the police discovered no illegal substances as the result of the incident with Brett. Also, it is only natural for people to look out their windows to see what is going on when you have a police car with its lights flashing near your house. And furthermore, just because a person has been previously convicted of drug use, does that mean that everywhere he goes drugs are being used? In light of the totality of the circumstances as they really were, and as they should have been explained to the magistrate, there was insufficient probable cause to issue the search warrant.

POINT III

AFFIANT MADE STATEMENTS IN THE AFFIDAVIT WITH RECKLESS DISREGARD OF THE TRUTH, AND THOSE STATEMENTS SHOULD BE SET ASIDE AND PROBABLE CAUSE DETERMINED ON THE OTHER INFORMATION IN THE AFFIDAVIT.

"In Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674 (1978), the United States Supreme Court held that where a defendant shows by a preponderance of the evidence that affiant made a false statement, intentionally, knowingly, or with reckless disregard for the truth, the false material must be set to one side and probable cause determined by the affidavit's remaining contents." Brown, 798 P.2d at 288. "If the remaining content is

insufficient to establish probable cause, the warrant must be voided." Brown, 798 P.2d at 288.

In the present case, the affiant, officer Tom Harrison, made statements in the affidavit with reckless disregard for the truth in that he included the statements of the drunk driver, and this was after officer Harrison had personally observed no evidence of any pot party going on at the Defendant's residence. Defendant submits that it would have made a significant difference to the magistrate if he knew that there were only three individuals in the residence, there was no lingering odor of marijuana, there were no visual signs of controlled substances, and none of the individuals appeared to be under the influence of illegal substances. Officer Harrison did not make these facts known to the magistrate, and he did so with reckless disregard for the truth.

By excluding the statements of the drunk driver from the affidavit, there is no question that there is insufficient probable cause to issue a warrant. The only remaining factors are the incident with Brett Potter, the peering out the window, the uncorroborated statements of other police informants, and the fact that one of the occupants had previously been convicted of drug use. As set forth above, these facts do not constitute probable cause.

POINT IV

THE SEARCH WARRANT IS DEFECTIVE ON ITS FACE BECAUSE IT DID NOT PARTICULARLY DESCRIBE THE PLACE TO BE SEARCHED.

The Fourth Amendment to the United States Constitution, and Article I, section 14 of the Utah Constitution, require that "no warrants shall issue...without particularly describing the place to be searched..." The general rule is that "under the Fourth Amendment, a search warrant sufficiently describes the place to be searched if the officer with a search warrant can, with reasonable effort ascertain and identify the place to be searched." See United States v. Vaughn, 830 F.2d 1185, 1186 (D.C. Cir. 1987).

In the instant case the warrant did not describe the defendant's residence with particularity, and there is serious doubt whether an officer could have ascertained the place to be searched. The warrant described the place to be searched as "50 West 400 North, Blacks Trailer Court, Single wide trailer, second trailer headed West on 400 North on South side of road, belonging to DeVon Potter." First, the warrant did not set forth a city, only street coordinates. The street address could very well be in other towns such as Castle Dale, Orangeville, and Ferrin. Second, the street address itself is wrong. The Defendant lives at 75 West 400 North, and not 50 West 400 North. Third, the Defendant's trailer is the third one heading West on 400 North, not the second one. And fourth, there evidently was some mix up

as to which trailer belonged to the Defendant as evidenced by Officer Harrison initially going to the wrong trailer. Therefore, the requirement of particularity was not met, and the search warrant should be voided.

The cases cited by the state in support of its argument that there is sufficient particularity are easily distinguishable. In United States v. Burke, 784 F.2d 1090 (11th Cir. 1986), the warrant gave a detailed description of the apartment to be searched. It described the dwelling as "38 Throop St., is a two-story red brick building, trimmed in a reddish brown paint with a shingled roof and three adjacent apartments with apartment 840 being the far left apartment at the address looking at it from the front." 784 F.2d at 1091. Even though the street address was wrong, it is no wonder with that detailed of a description that the court held there was sufficient particularity. In the present case, there was no such detailed description. The only description of the residence itself was "single wide trailer." Defendant's trailer was in a trailer court and there was probably lots of single wide trailers. In State v. Anderson, 701 P.2d 1099, 1102-1103 (Utah 1985), there was also a detailed description of the enclosure by Defendant's home to be searched. Even so far as describing the material the fence was made of around the enclosure. And in State v. McIntire, 768 P.2d 970 (Utah App. 1989), this court looked to the affidavit for

clarification of the description. In the present case, there is no such clarification because the description in the warrant is exactly the same as in the affidavit.

One of the many deficiencies in the description is the city was not mentioned. It has been held that failure to allege the city is not fatal. See, State v. LeFort, 248 Kan. 332, 806 P.2d 986 (1991). However, this was because of the considerable "detail on the face of the warrant describing the place to be searched, including the street address, the type of construction and color of the house, the particular outbuildings described and ownership specified." 806 P.2d at 990. Here we don't have such a specific description to salvage the warrant. There is simply no way that an officer looking at this warrant could with reasonable effort ascertain the place that was intended to be searched. The state asserts that the reasonable effort analysis is satisfied because, "The officer knew, all along, the correct location of the home." (Appellant's brief p. 17.) This is not true as evidenced by the fact that the officer who was the affiant and who served the warrant admittedly went to the wrong trailer when he first went to the scene, and this happened in spite of the fact that the police supposedly had Defendant's house under constant surveillance.

POINT V

THE "GOOD FAITH" EXCEPTION OF LEON IS NOT APPLICABLE.

Finally, the state attempts to vindicate the violation of the Defendant's constitutional rights by citing the "good faith" exception set forth in United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405 (1984). The state has the burden of showing the necessary elements of this good faith exception. State v. Mendoza, 748 P.2d 181 (Utah 1987). The applicability of the good faith exception is conditional upon the officers acting "in an objectively reasonable manner." The officers did no act in an objectively reasonable manner in this case in that they did not take any measures to independently verify Sandstrom's specific statements before entering the trailer. In addition, they went ahead and based the affidavit primarily on Sandstrom's statements which they previously had some indication were not true because of the officers' observations when they entered the trailer. The officers admitted under oath that there were no observable signs that what Sandstrom had said was true. The exclusionary rule is designed to deter police misconduct." Leon, 468 U.S. at 916, 104 S.Ct. at 341. This deterrent purpose is not served when the police acted reasonably and the only mistake is some defect in the warrant such as an erroneous finding of probable cause by the magistrate which was the case in Leon. In United States v. Vasey, 834 F.2d 782 (9th Cir. 1987), the prosecution also raised

the good faith exception. In holding that the good faith exception was not applicable, the court distinguished its case from Leon in the following manner.

> The instant case differs. Officer Jensen conducted an illegal search and represented tainted evidence obtained in this search to a magistrate in an effort to obtain a search warrant. The search warrant was issued, at least in part, on the basis of this tainted evidence. The constitution error was made by the officer in this case, not by the magistrate as in Leon. The Leon court made it very clear that the exclusionary rule should apply (i.e. the good faith exception should not apply) if the exclusion of evidence would alter the behavior of individual law enforcement officers or the policies of their department. (Cases omitted) Officer Jensen's conducting an illegal warrantless search and including evidence found in this search in an affidavit in support of a warrant is an activity that the exclusionary rule was meant to deter. 834 F.2d at 789.

See also, United States v. Scales, 903 F.2d 765 (10th Cir. 1990), wherein the defendant's suit case was seized without a warrant and then held until a warrant could be obtained. The Tenth Circuit Court of Appeals held that Leon did not apply using the same rationale as in Vasey.

The present case is almost exactly like Vasey. We have prior police misconduct in the illegal entry and the inclusion in the affidavit of tainted evidence obtained after the illegal entry.

This is certainly a case where the officers acted unreasonably, and by suppressing the evidence in this case the Court can serve the purposes of the exclusionary rule and deter

future inappropriate conduct by indicating to the police that they simply cannot enter a person's home without a warrant unless there are substantial exigent circumstances, and that they cannot base a warrant simply on the unverified statements of a drunk driver, and that they cannot obtain a warrant after discovering that much of what the drunk driver has said is incorrect and then not relaying that information to the issuing magistrate. The Utah Supreme Court has expressly held that "exclusion of illegally obtained evidence is a necessary consequence of police violations of article I, section 14." State v. Lorocco, 135 Utah Adv. Rep. 16, 25 (Utah 1990). This is one of those cases in which exclusion of the evidence is a necessary consequence.

CONCLUSION

Based upon the fact that Defendant's constitutional rights were violated by the illegal entry, and because of the deficiencies in the warrant as set forth above, Defendant respectfully requests that this Court affirm the trial court's order of suppression.

Respectfully submitted this 2 day of February, 1993.

Mark T. Ethington
Attorney for Appellee

CERTIFICATE OF MAILING

I certify that I am employed by the office of Day & Barney and that I mailed a true and correct copy of the foregoing Brief of Appellee, postage pre-paid, to the following:

Jan C. Graham
Attorney General
J. Kevin Murphy
Assistant Attorney General
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on this 2 day of February, 1993.