1992

State of Utah v. Jeffrey C. Scott : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Appellee,	:	Case No. 920601-CA
v.	:	
JEFF SCOTT, a/k/a JEFFERY C. SCOTT,	:	Priority No. 2
Defendant-Appellant.	:	

BRIEF OF APPELLEE

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APPEAL BY DEFENDANT OF CONVICTION FOR THEFT, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. §§ 76-6-404, -412(1)(b)(i) (1990), ENTERED IN THE FIRST JUDICIAL DISTRICT COURT, IN AND FOR BOX ELDER COUNTY, UTAH, THE HONORABLE CLINT S. JUDKINS, PRESIDING.

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

Defendant Jeff Scott, a/k/a Jeffery C. Scott, appeals his conviction for theft, a third degree felony, in violation of Utah Code Ann. §§ 76-6-404, -412(1)(b)(i) (1990), entered pursuant to a jury verdict in the First Judicial District Court, in and for Box Elder County, Utah, the Honorable Clint S. Judkins, presiding. This Court has appellate jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1992).

ISSUES PRESENTED ON APPEAL AND STANDARDS OF APPELLATE REVIEW

For reasons set forth in the body of this brief, the State answers the issues presented by defendant, but leads with an alternative ground for affirmance of the trial court's denial of his motion to suppress evidence. So framed, the issues are:

1. **Can this Court Affirm the Trial Court's Denial of Defendant's Motion to Suppress Evidence, on the Alternative Ground that the Inventory Search of the Automobile in Which Defendant was a Passenger was Constitutionally Proper?** The advisability of affirming a trial court's ruling on a proper

alternative ground is, by nature, considered de novo on appeal. On the merits, to prevail on this issue, the State must persuade this Court that the trial court erroneously ruled that the inventory search was improper. While the standard of review is open to question, the State will demonstrate error even under the deferential, "clear error" standard of review. Cf. State v. Hygh, 711 P.2d 264, 268 (Utah 1985) (describing inventory search validity as a "finding," suggesting deferential review).

2. **Did the Trial Court Correctly Deny Defendant's Motion to Suppress Evidence, Seized Pursuant to the Inventory Search, on the Basis that Defendant, as a Passenger, Had No Reasonable Expectation of Privacy in the Searched Area of the Automobile?** Because the underlying facts are largely undisputed, this question, often referred to as one of "standing," can be approached as a matter of law, according no particular deference to the trial court. See United States v. Padilla, ___ U.S. ___, 113 S. Ct. 1936 (1993) (per curiam), and Rakas v. Illinois, 439 U.S. 128, 99 S. Ct. 421 (1978) (both treating this question as one of federal law).

3. **Was Defendant's Conviction for Theft, Entered Upon a Jury Verdict, Supported by Sufficient Evidence, such that the Trial Court Properly Denied Defendant's Post-Verdict Motion to Arrest Judgment?** (Consolidating issues 2 and 3 in Br. of Appellant.) Appellate review of a jury verdict is highly deferential: "so long as some evidence and reasonable inferences support the jury's findings, we will not disturb them." State v.

Moore, 802 P.2d 732, 738 (Utah App. 1990). See also State v. Workman, 212 Utah Adv. Rep. 3, 4 (Utah 1993) (motions to arrest judgment under Utah R. Crim. P. 23, asserting evidentiary insufficiency, also entail high deference to jury).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The fourth amendment to the United States Constitution and article I, section 14 of the Utah Constitution are practically identical in their language. The former provision 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.

Any other constitutional provisions, statutes, or rules pertinent to the resolution of the issue on appeal will be set forth in the body of this brief.

STATEMENT OF THE CASE

As set forth by defendant (Br. of Appellant at 3-5), this appeal arises from a conviction for theft of money. Defendant's pretrial motion to suppress evidence was denied, as was his post-trial motion, founded on a claim of evidentiary insufficiency, to arrest judgment on the jury's guilty verdict.

He appeals, asserting that these rulings (reproduced in the appendix to this brief) were erroneous.[1]

STATEMENT OF FACTS

The evidence supporting defendant's guilt is recited in the light favorable to the jury's verdict. State v. Workman, 212 Utah Adv. Rep. 3, 4 (Utah 1993). The facts supporting the trial court's denial of defendant's motion to suppress are recited in detail. State v. Atwood, 831 P.2d 1056, 1057 (Utah App. 1992).

Money Theft in Brigham City

At about 11:00 a.m. on February 13, 1992, employee Shari Oiler carried 428 dollars cash into Drewes Floral Shop in Brigham City, Utah. The cash, withdrawn from the First Security Bank branch in Brigham City, was to be used in the course of the store's busy, Valentine's Day Eve business (R. 729-30, 732-33, 976).

The store manager directed Ms. Oiler to lock the cash in a desk drawer, in the store's office (R. 730, 736). As she headed toward the office, Ms. Oiler encountered defendant's companion, Reynolds, near a store display. Still holding the cash, in a money bag so "stuffed" it could not be closed, she answered Reynolds's inquiry about flowers (R. 735, 737, 740-41). As she proceeded to the office, which was not used as a flower display area, defendant emerged from it (R. 736-37, 739). Defendant inquired about a job application; after locking the

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[1]The main record is R. 1-210; transcripts are sequentially paginated R. 211-1080. Parenthetical record and transcript references in this brief are therefore all designated "R."

cash in the desk drawer, Ms. Oiler helped find an application for him (R. 740-41).

The store manager also noticed defendant and Reynolds (R. 857, 862-63).[2] According to the manager, both men received job applications (R. 861-62). The pair then spent another ten to twenty minutes in the store (R. 743-44, 865). Apparently during this time, a third store employee answered Reynolds's inquiries about flowers, but did not see defendant. While assisting Reynolds, who made no purchase, this employee could not see into the store office (R. 881-84).

At about 2:00 p.m., Ms. Oiler re-entered the office. She discovered that the desk drawer had been forced open, and the cash was missing (R. 745-46).

Money Recovery in Salt Lake City

Several hours after they were observed in Drewes Floral Shop, police officers detained defendant and Reynolds near a thrift store at 3606 South State Street in Salt Lake City, where a purse snatching incident had been reported (R. 455, 756-57, 775-76). The victim identified Reynolds as the culprit, but was not deemed sufficiently certain about defendant's possible involvement. Therefore, Reynolds was arrested, and defendant was allowed to leave (R. 455-57, 776-77, 785).

Before leaving, defendant told the officers that he and Reynolds had driven to the thrift store in a Lincoln automobile,

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[2]On appeal, defendant does not contest the store employees' identification of him and Reynolds as the persons they encountered in the store during the events in question (Br. of Appellant at 3).

driven by Reynolds and parked nearby (R. 457-58). The vehicle was owned by Reynolds's father or grandfather. The officers tried to contact the owner, but were unsuccessful (R. 481-82).[3] Defendant had no driver's license; thereby unauthorized to drive the Lincoln away, he departed on foot (R. 458, 762). The officers impounded the Lincoln (R. 458). Obtaining its keys from Reynolds, they performed an inventory search (R. 460-61, 766).

In the Lincoln's locked glovebox, the officers discovered about 376 dollars in cash, including some rolled coins (R. 460-61, 760-61, 770, 957-58). A bundle of one-dollar bills among this cash was bound with a paper band that, in turn, bore printed identification from the Brigham City branch of First Security Bank (R. 461-62, 762, 811). Reynolds first claimed that the cash belonged to his grandfather. He then changed his story and told the officers that he had won it in a craps game (R. 794, 816-17).

It does not appear that defendant was asked about the money at the time of Reynolds's arrest (R. 815). Nor does the record reflect that he ever asked permission to retrieve any personal property from the Lincoln, although he had apparently left some audiotapes and a tape player in the vehicle (R. 482).

The identification band on the cash prompted contact between Salt Lake and Brigham City police (R. 825-26). The

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[3]It appears that the Lincoln's owner lived in Brigham City (R. 786), about fifty miles away from the site of Reynolds's arrest.

ensuing investigation led to defendant's arrest; he and Reynolds were jointly charged with the Drewes Floral Shop theft (R. 2-3).

Motion to Suppress and Trial

The trial court granted Reynolds's motion to suppress the cash seized from the Lincoln's glovebox, ruling that the vehicle had been improperly impounded, and therefore, the cash improperly seized during the ensuing inventory search. This ruling turned on the trial court's belief that impoundment of the Lincoln required some "nexus," found to be lacking, between the vehicle and the purse snatching incident for which Reynolds was arrested (R. 510). The court also ruled that defendant had not shown that he had a reasonable expectation of privacy in the Lincoln or, more precisely, the Lincoln's glovebox. Therefore, the suppression order did not extend to defendant (R. 507-11).

Defendant's trial was severed from the proceedings involving Reynolds. At trial, the wrapping of the bills and coins found in Reynolds's Lincoln was shown to resemble that of the cash issued to Shari Oiler by the Brigham City First Security Bank on the morning of the Drewes Floral Shop theft (R. 957-58, 976-83). Presented with this and the circumstantial evidence already recited, the jury found defendant guilty of the theft (R. 170). His motion to arrest judgment was denied, and he was sentenced to a term of zero to five years at the Utah State Prison (R. 178-80).

SUMMARY OF ARGUMENT

This Court need not reach defendant's state constitution-based argument for expansive "standing" to invoke the exclusionary rule against improperly seized evidence. Instead, this Court can affirm the denial of defendant's motion to suppress on the alternative ground that the challenged automobile inventory search was proper; the trial court's ruling to the contrary was erroneous. That ruling turned on the court's legally incorrect view that some connection between Reynolds's Lincoln and the offense for which Reynolds was arrested was required in order to impound the vehicle. No such connection is needed. Proper analysis looks to the police need to properly caretake a motor vehicle when no other responsible person is available to do so. That analysis was satisfied here, and the Lincoln was properly impounded.

Under settled fourth amendment law, the trial court correctly held that defendant had no reasonable expectation of privacy in the Lincoln's glovebox. Although placed on notice to do so, defendant failed to provide any evidence, beyond his status as a passenger in the vehicle, to show that he had any expectation of privacy in it or in its glovebox. Defendant's argument for expanded "standing" to assert search and seizure violations under the Utah Constitution also fails. He does not show that fourth amendment standing limitations are flawed, a necessary predicate to departure from federal search and seizure law. The federal limitations balance the truth-subverting costs

of the exclusionary rule against its deterrent benefit. That balance ought not be disturbed under the state constitution.

The evidence adequately supported the trial verdict. No unusual circumstances, such as "physical impossibility," compel this court to reweigh the evidence. The reasonable inferences gleaned from that evidence amply support the jury's finding of guilt. Every element of theft, taking into account the accomplice liability instruction given to the jury, could be found to exist beyond a reasonable doubt, and not merely as a matter of remote possibilities. The same analysis was correctly applied by the trial court, leading to its proper denial of defendant's post-trial motion to arrest judgment.

ARGUMENT

POINT ONE

THE VEHICLE IN WHICH DEFENDANT WAS A PASSENGER WAS PROPERLY IMPOUNDED; ON THIS ALTERNATIVE BASIS, THE DENIAL OF DEFENDANT'S MOTION TO SUPPRESS CAN BE AFFIRMED.

A. This Court May Prudently Avoid the Sweeping Constitutional Issue Posed by Defendant.

As a part of his first point on appeal, defendant urges this Court, under article I, section 14 of the Utah Constitution, to depart from the federal rule of limited "standing" to challenge searches and seizures, and expand the class of persons who may invoke the exclusionary rule. See Rakas v. Illinois, 439 U.S. 128, 99 S. Ct. 421 (1978) (mere passengers in automobile, with no possessory interest in it or its contents, lacked standing to contest alleged illegal search thereof). Under the

rule he proposes, defendant, like Reynolds, would be entitled to suppression of the cash seized from the Lincoln's glovebox, under the trial court's ruling that the Lincoln was unconstitutionally impounded and inventoried.

Defendant's proposed rule would constitute a dramatic break from settled federal law. States can make such departures under their own constitutions. E.g., California v. Greenwood, 486 U.S. 35, 43, 108 S. Ct. 1625, 1630 (1988); State v. Larocco, 794 P.2d 460, 465-71 (Utah 1990) (plurality opinion). However, such departures burden law enforcement, defense attorneys, prosecutors, and courts with the necessity of learning new search and seizure law, parallel to yet substantively different from federal principles. That burden ought not be lightly imposed.

The prudent course is for a court to avoid making sweeping new constitutional rules if it need not do so in order to decide the case before it. See State v. Thurman, 203 Utah Adv. Rep. 18, 21 (Utah 1993). That course is available here, for an appellate court can affirm a trial court's ruling on any proper ground, even one not identified by the trial court. State v. Bryan, 709 P.2d 257, 260 (Utah 1985); State v. Harrison, 805 P.2d 769, 782 (Utah App.), cert. denied, 817 P.2d 327 (Utah 1991). Such a course is available even if it entails reversal of a ruling actually made by the trial court. Wallis v. Thomas, 632 P.2d 39, 43 (Utah 1981); accord Soldal v. Cook County, ___ U.S. ___, 113 S. Ct. 538, 543 n.6 (1992).

Settled law permits this Court to reverse the trial court's ruling that Reynolds's vehicle was improperly impounded. As follows, such reversal also allows this Court to correct the trial court's erroneous legal view of inventory search law, and provide clear guidance for similar future cases.

B. Under the Relevant Circumstances, the Vehicle was Properly Impounded.

It is unclear whether trial court rulings on the appropriateness of vehicle impoundments are reviewed on appeal for clear error, or under the nondeferential "correction of [legal] error" standard. Compare State v. Hygh, 711 P.2d 264, 268 (Utah 1985) (describing such ruling as a "finding," suggesting deferential review), with State v. Strickling, 844 P.2d 979, 986 (Utah App. 1992) (stating that "this [appellate] court must determine" propriety of impoundment, suggesting nondeferential review). In this case, the trial court's ruling that Reynolds's Lincoln was improperly impounded fails even under the "clear error" standard, because that ruling was induced by a specific, incorrect view of the law. See State v. Walker, 743 P.2d 191, 193 (Utah 1987) (trial court factual findings are clearly erroneous if against the clear weight of the evidence or "induced by an erroneous view of the law").

The trial court's specific error lay in its acceptance of defendant's assertion that some kind of "nexus" between Reynolds's Lincoln--actually owned by his father or grandfather, and the purse snatching crime for which Reynolds was arrested, was required in order to justify the Lincoln's impoundment. By

"nexus," the trial court evidently meant that the vehicle had to be used in furtherance of the purse snatching (R. 510, copied in appendix to this brief). The Lincoln was not so used.

But no such "nexus" is required. Defendant advanced no legal support for his "nexus" argument (R. 471), and no such support can be gleaned from case law. In Hygh, Utah's leading automobile impoundment case, the Utah Supreme Court mentioned no "nexus" requirement. Instead, an impoundment need only be "reasonable," that is, either authorized by statute or necessary, "under the circumstances surrounding the initial stop," to protect the vehicle and its contents, 711 P.2d at 268. The impoundment and ensuing inventory search must also be conducted pursuant to standardized police policy. Id. Accord Strickling, 844 P.2d at 985-86.

In this case, the trial court found that police impounded Reynolds's Lincoln pursuant to standardized policy. The policy provided for impoundment "[w]hen the person driving or in control of such vehicle is arrested" (R. 495; acknowledged by trial court at R. 509-10).[4] The trial court also found that the failure of the impounding officers to include the name of the off-scene, impoundment-authorizing officer on their "impound

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[4]Although the written impound policy in issue here has not been transmitted to the State with the record on appeal, it was admitted as an exhibit at the hearing on defendant's motion to suppress, along with the "impound report" and a listing of the items found during the inventory search (R. 464-66). The quoted portions in this brief were read aloud during the hearing on the motion to suppress.

report" was a technical error that did not defeat the legitimacy of the inventory search (R. 508). These findings were proper.

The trial court further found that no other arrangements for safekeeping of the Lincoln and its contents were reasonably available. That finding was proper under the trial court's observation that the arrestee Reynolds, in charge of the vehicle, could not reasonably arrange for its care (R. 509-10). Defendant, although not arrested, had no driver's license and could not drive the Lincoln (R. 458). Further, the police had attempted to call the Lincoln's actual owner, and had received no answer (R. 481-82). This met their policy requirement that "[i]n cases of driver arrest . . ., deputies will attempt to locate a responsible party who can assume custody of the vehicle within a reasonable period of time, with the permission of the owner or driver" (R. 477-78).[5] See Hygh, 711 P.2d at 264 (approving similar impound policy provision). Thus, as required by Hygh and Strickling, the Lincoln's impoundment was reasonable under the circumstances, even though not explicitly authorized by statute.

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[5]In the trial court, defendant argued that he should have been given custody of the Lincoln (R. 478). The trial court properly disregarded this argument which, if accepted, would defeat the caretaking and police liability considerations that underpin the inventory search exception to the warrant requirement, outlined in Hygh, 711 P.2d at 267. Unable to reach the actual owner--Reynolds's father or grandfather, the police would have invited liability for property damage or loss, had they released the vehicle to defendant. Mr. Reynolds, Senior, could have been justifiably displeased to learn that his vehicle had been turned over, by police and without his permission, to defendant, a non-family member, unlicensed to drive.

The trial court went awry by engrafting a "nexus" rule on to the foregoing, settled impoundment and inventory search principles. Such a rule would effectively require that whenever an automobile driver is arrested, police must leave the vehicle wherever it is stopped or found, even when nobody else can be located to take charge of it, unless the vehicle is an instrumentality of the crime that prompted the arrest. This undercuts the caretaking and liability-avoidance functions that automobile impoundment and inventory rules are intended to permit, under Hygh, 711 P.2d at 267, as a matter of both state and federal constitutional law. If anything, those functions are especially important in a case such as this one, where the vehicle in question belongs not to the driver, but to an absent owner who cannot be contacted to reclaim it.

Therefore, the "nexus" rule, advanced by defendant in the trial court, is both legally unsupported and ill-advised. Because the trial court erroneously adopted that rule, it committed clear error in ruling that the Lincoln was unreasonably impounded. Under the correct legal standards, the Lincoln was reasonably impounded, properly inventoried pursuant to the impoundment, and the cash was properly seized from its glovebox.

This Court should therefore reverse the trial court's ruling that the cash was suppressible under federal or state constitutional exclusionary rules. Such reversal cannot change the outcome (whatever it was) of Reynolds's prosecution for the Drewes Floral Shop theft, because the State did not appeal from

the suppression ruling granted in Reynolds's favor. It does, however, provide a solid alternative ground for denying the suppression motion advanced by this defendant.

POINT TWO

DEFENDANT HAD NO REASONABLE EXPECTATION OF PRIVACY, BASED SOLELY ON HIS PASSENGER STATUS, IN THE SEARCHED AREAS OF THE AUTOMOBILE.

A. Defendant had No Reasonable Expectation of Privacy Under the Fourth Amendment.

Fourth amendment "standing," that is, the extent of federally-defined "reasonable expectations of privacy," is an issue of substantive federal law that states are not at liberty to alter. Rakas v. Illinois, 439 U.S. 128, 138-40, 99 S. Ct. 421, 428-29 (1978); California v. Greenwood, 486 U.S. 35, 44, 108 S. Ct. 1625, 1631 (1988) ("Respondent's argument is no less than a suggestion that concepts of privacy under the laws of each State are to determine the reach of the Fourth Amendment. We do not accept this submission"); State v. Schlosser, 774 P.2d 1132, 1138 (Utah 1989). Under the fourth amendment, defendant had no reasonable expectation of privacy in Reynolds's Lincoln, and particularly not in its locked glovebox.

In Rakas, the Supreme Court held that passengers in a searched vehicle, who claimed no possessory interest in the vehicle or in items kept in it, lacked standing to complain that items kept beneath the vehicle's seat and in its glovebox were improperly seized under the fourth amendment. 439 U.S. at 148-49, 99 S. Ct. at 433. The Court observed that just as a casual

house guest cannot claim a personal privacy expectation in the host's entire home, neither can a mere passenger claim a personal privacy interest in the under-seat and glovebox areas of an automobile. 439 U.S. at 142, 143-44, 99 S. Ct. at 430, 433.

Because defendant's claim of an expectation of privacy turns upon nothing more than his status as Reynolds's passenger, his standing to assert a fourth amendment violation in the search of the Lincoln's glovebox fails under the controlling law set forth in Rakas. Even if that search was unconstitutional, then, the cash seized from the glovebox was admissible into evidence against defendant.

On appeal, defendant attempts to circumvent Rakas by raising the "possibility" that he had a possessory interest in the seized cash. The act of leaving his tape player in the vehicle's passenger compartment, he asserts, is also "some evidence" of his expectation of privacy. Without asserting that he asked Reynolds to lock the Lincoln and its glovebox, defendant urges this Court to find a privacy expectation, held by him, because "many passengers in vehicles" do make such requests (Br. of Appellant at 8-9).

Defendant's attempts to prove fourth amendment standing on appeal should be summarily rejected. His standing was squarely challenged by the State in the trial court (R. 88, 470). At that point, defendant was obliged to establish his standing, through proof of supporting facts. State v. Atwood, 831 P.2d

1056, 1057-58 (Utah App. 1992).[6] He put on no such proof, and cannot now, upon mere "possibilities," ask this Court to find the needed facts for him.

Defendant complains that he was unfairly disadvantaged because, in order to prove his expectation of privacy, he may have been obliged to claim a possessory interest in the seized cash. Such obligation, he complains, puts him in the untenable position of implicitly admitting that he stole the cash (Br. of Appellant at 10). However, the offense of theft, for which defendant was charged and convicted, contains no "possession" element, beyond some brief "unauthorized control" over the stolen property. Utah Code Ann. § 76-6-404 (1990) (jury instructions at R. 151, 153). Further, under the alternative accomplice liability theory alleged by the State (R. 123, 154), defendant could be found guilty of theft even had he never personally "controlled" the cash. Utah Code Ann. § 76-2-202 (1990).

While unexplained possession of recently stolen property is "prima facie evidence" that the possessor is the thief under Utah Code Ann. § 76-6-402 (1990), trial courts cannot

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[6]The "reasonable expectation of privacy" analysis, derived from Justice Harlan's concurring opinion in Katz v. United States, 389 U.S. 347, 88 S. Ct. 507 (1967), actually has two parts. First, the proponent must prove that he or she actually subjectively expected that the searched area was private as to him or her. Second, the proponent must prove that the expectation was legitimate in the view of society. 389 U.S. at 361, 88 S. Ct. at 516 (Harlan, J., concurring). As to the first part, defendant not only failed to allege a subjective privacy expectation, his actions actually belied such expectation: when released following Reynolds's arrest, he did not tarry to claim any items in the Lincoln, but literally ran from the scene (R. 762). Rakas disposes of the second part of the Katz analysis.

so instruct the jury. State v. Turner, 736 P.2d 1043, 1045 (Utah 1987). The jury was not so instructed in this case; nor was defendant's own possession of the cash particularly important, given that defendant need only have acted as Reynolds's accomplice in the theft. Therefore, for purposes of proving that he had an expectation of privacy against the glovebox search, defendant could have asserted a possessory interest in the cash contained therein, without unduly compromising his defense to the theft charge. His failure to do so defeats his "standing" argument under the fourth amendment.

B. Defendant Makes No Persuasive Case for Expanding his Privacy Expectations under Article I, Section 14 of the Utah Constitution.

Having failed to carry his burden to prove fourth amendment standing, defendant asks this Court to substantially lighten that burden, under article I, section 14 of the Utah Constitution. The rule he proposes would confer standing, to challenge searches, upon persons who are no more than passengers in searched automobiles. Thus defendant's mere "legitimate presence" in Reynolds's Lincoln, he argues, gave him, no less than Reynolds, a reasonable expectation of privacy against improper police intrusion into the vehicle.

Defendant filed a supplemental memorandum in the trial court, arguing for expanded search and seizure standing along the foregoing lines, under article I, section 14 (R. 113-18). Though filed after his motion to suppress had been denied, the trial court received defendant's memorandum and rejected his arguments

on their merits (R. 704). Accordingly, his state constitutional argument has been preserved for appellate review.

On appeal, however, defendant advances his argument in only cursory, conclusory fashion. In but three paragraphs (Br. of Appellant at 10-11), he asks this Court to adopt the "legitimate presence" view of standing espoused by the dissenters in Rakas, 439 U.S. at 156-69, 99 S. Ct. at 437-44 (1978) (White, J., dissenting, joined by Brennan, Marshall, and Stevens, JJ.).

Defendant does not brief his state constitutional argument in the manner prescribed in State v. Bobo, 803 P.2d 1268, 1272 n.5 (Utah App. 1990). He does not argue that the Rakas majority rule of limited federal search and seizure "standing" is inappropriate or unworkable, and cites no scholarly criticism of the federal rule.[7] Under State v. Thompson, 810 P.2d 415, 417-18 (Utah 1991), and State v. Larocco, 794 P.2d 460, 466-70 (Utah 1990) (plurality opinion), such analysis appears to be the key requirement for the development of more expansive state constitutional search and seizure rules by Utah courts.

This Court may therefore disregard defendant's expansive, state constitution-based "standing" argument on appeal, for lack of adequate briefing. See State v. Yates, 834 P.2d 599, 602 (Utah App. 1992) (declining to address inadequate appellate argument under Utah R. App. P. 24(a)(9), and citing

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[7]The Rakas majority's rule is now firmly established. See United States v. Padilla, 113 S. Ct. 1936 (1993) (per curiam opinion overruling, without dissent, the Ninth Circuit Federal Court of Appeals's "coconspirator exception" to the Rakas limited "standing" rule).

supporting precedent); accord State v. Bishop, 753 P.2d 439, 450 (Utah 1988) (approving principle that appealing party may not "dump the burden of argument and research" in the appellate court). The issue can simply await another day.

If this Court does consider defendant's state constitutional argument on its merits, it should reject it. The Rakas dissent, relied upon by defendant, was directly rebutted in the majority opinion. 439 U.S. at 144-48, 99 S. Ct. at 431-33 (rejecting "legitimate presence" theory as "a phrase which at most has superficial clarity and which conceals beneath that thin veneer all of the problems of line drawing which must be faced in any conscientious effort to apply the Fourth Amendment").

Besides overruling the "legitimate presence" theory suggested in Jones v. United States, 362 U.S. 257, 80 S. Ct. 725 (1960), and now advanced by defendant to support his argument under the Utah Constitution (Br. of Appellant at 10), the Rakas majority also distinguished that case. The defendant in Jones was not only "legitimately present" in the searched place, an apartment: he had been given the apartment keys, kept some clothing there, and, at the time of the challenged search, was occupying it alone, in the lessee's absence. Rakas, 439 U.S. at 141, 99 S. Ct. at 429. In this case, defendant had no similarly full access to or control over Reynolds's Lincoln: his argument for "standing" to contest the vehicle's search is therefore very weak, compared to that of the defendant-petitioner in Jones.

Besides having been rejected in Rakas, 439 U.S. at 134-35, 99 S. Ct. at 426, the "target" theory also advanced by defendant would not help him. Defendant was not the "target" of the inventory search of Reynolds's Lincoln. Although detained at the purse snatching scene with Reynolds, defendant was released when the officers concluded that they did not have probable cause to arrest him (R. 789-90). The discovery of the cash, even if made before defendant left the scene, did not prompt officers to detain him further.[8] Only later did he again become an investigatory target, when the identification markings on the cash led officers to the floral shop theft in Brigham City.

Finally, the Rakas majority identified valid policy reasons for limited standing to assert search and seizure violations. The Rakas limit strikes a balance between the exclusionary rule's purpose of deterring police misconduct, and the societal goals of truthseeking and deterring crime. 439 U.S. at 137, 99 S. Ct. at 427; accord 439 U.S. at 152 & n.1, 99 S. Ct. at 435 & n.1 (Powell, J., concurring, joined by Burger, C.J.). It does this by limiting the class of persons who may invoke the exclusionary rule, to those who clearly persuade reviewing courts that their own reasonable expectations of privacy, not those of others, were violated by the police.

Particularly in a state like Utah, that originally opposed the exclusionary rule in any prosecution, see State v.

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[8]It appears that the cash was not discovered until after defendant left, for he was apparently not questioned about the cash (R. 793).

Aime, 62 Utah 476, 484-85, 220 P. 704, 708 (1923), the Rakas balance ought not be disturbed under the state constitution. As a matter of policy, those who wish to invoke the exclusionary rule, and avoid prosecution for reasons wholly independent of their guilt or innocence, can properly be required to show more than mere "legitimate presence" in a searched area. In this case, defendant made no such showing, and therefore cannot claim the truth-subverting exclusionary rule remedy for his benefit.

POINT THREE

THE EVIDENCE WAS SUFFICIENT TO SUPPORT DEFENDANT'S CONVICTION OF THEFT.

In his second and third points on appeal, defendant challenges the sufficiency of the evidence to support his theft conviction. This Court and the trial court, considering defendant's motion to arrest judgment that raised the same challenge, both review jury verdicts with great deference: "[W]e review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury." State v. Singer, 815 P.2d 1303, 1306 (Utah App. 1991) (quoting State v. Petree, 659 P.2d 443, 444 (Utah 1983)).

In State v. Workman, 212 Utah Adv. Rep. 3 (Utah 1993), the Utah Supreme Court elaborated on the foregoing standard of review, in the context of a motion to arrest judgment. Given some supporting evidence, the reviewing court asks

> whether the inferences that can be drawn from that evidence have a reasonable basis in logic and reasonable human experience sufficient to prove each legal element of the offense beyond a reasonable doubt. A guilty verdict is not legally

> valid if it is based solely on inferences that give rise to only remote or speculative possibilities of guilt.

212 Utah Adv. Rep. at 4. Reaching this explanation, the court also approved a statement that a conviction may be set aside if the supporting evidence is "clearly contrary to some immutable law of physics or is hopelessly in conflict with one or more established and uncontroverted physical facts." Id. (quoting Siruta v. Hesston Corp., 659 P.2d 799, 806 (Kan. 1983)).

Defendant has forthrightly marshalled most of the evidence that supports his conviction (Br. of Appellant at 3-4, 12-13), as required in State v. Moore, 802 P.2d 732, 738 (Utah App. 1990). He admits his presence, with Reynolds, in Drewes Floral Shop in Brigham City. He admits his and Reynolds's ability to see the cash, carried by Ms. Oiler into the store office. He admits that he was in that office, moments before encountering Ms. Oiler. Defendant admits that he and Reynolds remained in the store for some time after speaking to Ms. Oiler, and that at some point during this time, he was not seen, while Reynolds spoke to an employee in the display area.

Defendant also admits his presence near the Salt Lake City thrift store, still in Reynolds's company, several hours after the pair was seen in Drewes Floral Shop: this was ample time to drive from Brigham City to Salt Lake City on Interstate Highway 15, a distance of fifty to sixty miles. The only noteworthy item missing from defendant's evidence recitation is the fact that the purse snatching victim in the thrift store

observed both Reynolds and defendant in or near the thrift store at about the moment of that crime. While identifying Reynolds as the purse snatcher, the victim told investigating officers that defendant appeared to be acting as Reynolds's lookout (R. 784-85, elicited on defense cross examination). Finally, defendant admits that the cash found in Reynolds's Lincoln "appear[ed] to be the stolen money" from Drewes Floral.[9]

This circumstantial evidence provided the necessary "reasonable basis in logic" for the jury's guilty verdict. From it, the jury could reasonably infer that defendant and Reynolds were acting cooperatively in Drewes Floral, one "covering" for the other, who entered the store office, inferentially not an area frequented by customers, in order to seek--eventually successfully--something to steal. That inference was bolstered by later observations, at a Salt Lake City crime scene, of defendant and Reynolds behaving in evidently similar, cooperative fashion. See State v. O'Neil, 206 Utah Adv. Rep. 14, 16-17 (Utah App. 1993) (other acts, under Utah R. Evid. 404(b), are relevant to prove intent, preparation, plan to commit charged crime).

Reynolds's possession of cash, resembling that stolen from Drewes Floral, at the scene of the later Salt Lake City crime, completed the evidentiary picture upon which the jury could reasonably infer that defendant was guilty of theft. Again, it was not necessary for defendant to ever personally

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[9]This is a proper admission, given Reynolds's inconsistent account to police, heard by the trial jury, about how he had come into possession of the cash (R. 794, 816-17).

possess that money, so long as he could be found to have intentionally aided Reynolds in stealing it, under the accomplice liability theory, Utah Code Ann. § 76-2-202 (1990) (R. 123, 154).

The evidence permitted the jury to rule out the possibility that defendant's presence, with Reynolds, at the two crime scenes, was mere coincidence, and to find, beyond reasonable doubt, that defendant intentionally participated in the Drewes Floral Shop theft. Under the terminology of Workman, none of the evidence "hopelessly conflicts" with "immutable" physical laws or, for that matter, with other evidence presented at trial. It supports a likelihood of guilt that is not "remote or speculative," but realistic.

Accordingly, the trial court correctly rejected defendant's motion to arrest judgment, against his claim of evidentiary insufficiency. This Court should affirm that ruling, and, with it, the jury's guilty verdict.

CONCLUSION

Upon properly received, competent, sufficient evidence, defendant was found guilty of theft. Accordingly, his conviction for that crime should be affirmed.

RESPECTFULLY SUBMITTED this 22 day of June, 1993.

JAN GRAHAM
Attorney General

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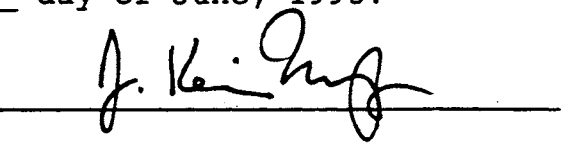
CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing brief of appellee was mailed, postage prepaid, to JACK H. MOLGARD, attorney for defendant-appellant, 102 South 100 West, Brigham City, Utah 84302, this 22 day of June, 1993.



APPENDIX

Trial Court Rulings on Motion to Suppress Evidence

and

Motion to Arrest Judgment

reiterate what I said earlier. I don't know that there's anything new on that point.

THE COURT: In ruling on this, gentlemen, I find this to be a rather interesting case and interesting in a couple of different ways.

First of all, I'll address the standing issue. The facts before this court are that defendant Scott was a passenger in the vehicle; that he arrived at the location of where the vehicle was impounded as a passenger; and that he left certain items of personal property in the vehicle. I think that in and of itself, and it is the defendant's burden to show that he has standing, is not sufficient to shoulder that burden and I find that this defendant does not have standing to raise the issue.

The reason for that is, I think, to clarify it, this court needs to know his circumstances as a passenger. If he was a hitchhiker going down the road and the driver of the vehicle got out and advised him that, okay, I'll see you later and he left those things inadvertantly in the vehicle, that might be one thing. If he was a passenger who had traveled a great distance with the driver, if they had a mutual agreement as to where they were going and under what circumstances, that would give rise to facts that

would give standing. But because of the facts before this court, I find that defendant Scott does not have standing.

Now, as relates to the search pertaining to defendant Reynolds, I think Mr. Bunderson is correct when he indicates that this is a search and seizure, not a question of policy. The policy is an integral part of that, but this court must determine whether or not the supression of the evidence in this particular case is justified because of constitutional guarantees, Fourth Amendment guarantees. From the facts stipulated to in this case, and of course the court can make a finding of fact in this case because those facts are stipulated, this court finds that that was an inventory search pursuant to an impoundment.

Then the question of the policy comes into effect and that policy must be reasonable. This court wouldn't -- in other words, because it is a policy it doesn't give rise to the same type of credence which a statute or an ordinance would give rise to. Nevertheless, the court, in examining the policy, finds that the policy, although vague in certain areas, the policy is reasonable.

Now, let's address the particular arguments Mr. Molgard made. I find that there are

certain reasons why it has supervisory approval. Those reasons are evident, I feel, on why a supervisor must approve this. However, when the supervisor has given certain police officers blanket approval to impound under certain circumstances, I feel that that is in compliance with the policy. The reason for that is that the supervisor may know those individuals who he's given that blanket authority to and knows their capability, their competency, and so he allows them to do that. I find that the technicality of not putting the supervisor's name on the report is just that, a technicality, and wouldn't strike it for that reason.

However, the policy of an inventory search has to be examined very closely because of its ability to circumvent Fourth Amendment guarantees. As I examine the policies here, I think, again, they're reasonable. The two which apply are the policies that when the person or persons in charge of such vehicle are unable to provide for its custody or removal, or when the person driving or in control of such vehicle is arrested for an alleged offense for which the officer is required by law to take the person arrested before a magistrate without unnecessary delay.

Now, what these policies seem to contemplate to this court is that when a person

driving or in control cannot find somebody to provide for the custody or removal of that vehicle under reasonable circumstances, then possibly that could take effect. But I have extreme trouble with the, for lack of a better term, and I'm not sure that this falls within the case law on this, but I like Mr. Oliver's term nexus, the lack of nexus between the offense and the vehicle in this case. There has to be a reasonable basis to impound that vehicle. It can't be used as a sham to get to the items which are in the vehicle. If there had been any report in this case, from the facts and circumstances, that that vehicle was involved in this, I think the nexus would have been arrived at.

Mr. Molgard raised the example of a shoflifter in a store, do they go out and impound his vehicle as being ludicrous. Yet the facts and circumstances of this case are very similar to that. The alleged offense was in the store and the vehicle was out in the parking lot. Because of that, this court finds no nexus, and I'll use that term, I suppose, Mr. Oliver, I like it so I'll use it, I find no nexus between the offense and the vehicle and therefore would order that those items in the glove box be suppressed as relates to defendant Reynolds.

Because defendant Scott has no standing, that order does not apply to him.

Gentlemen, with that, it does appear to be an appropriate time to take a lunch break. I'm not sure, in view of the court's ruling on that particular issue, what can be -- as far as defendant Reynolds is concerned, how he would be involved in further hearings on the additional motions that have been made.

Let's reconvene at -- can we make that 1:30, a 45 minute lunch, or do you want to go to two o'clock on lunch?

MR. BUNDERSON: Whatever is a appropriate, Your Honor. Whatever you are comfortable with. I can do it in 45 minutes.

MR. OLIVER: I guess Mr. Molgard is going to be leaving, but for my own -- if I have any input, I'd like it as short as possible. If we could continue through, I have no problem, but I have no problem in talking a lunch.

THE COURT: Well, my support staff likes to eat occasionally. Let's go to 1:30. We'll reconvene at 1:30.

(Lunch recess.)

affected Mr. Scott's right, or Mr. Scott's ability, to have a fair and impartial trial, based upon the fact that then the jury begins to look at me and discredit my arguments and discredit my presentation of the evidence, be it on cross-examination or direct, based upon the fact that Mr. Bunderson has now attacked me personally and emphasized two cases wherein I was looking at something that I was either not going to pursue or could not pursue.

THE COURT: Counsel, as it relates to the two arguments that you've raised on misconduct of the prosecutor in this case, I'll rule that it is not properly before the court by way of motion.

MR. OLIVER: I understand.

THE COURT: I'll leave that open. I'm not going to rule on that. I will rule that it is not properly before the court now, so I won't accept your comments as argument. It should be submitted to the court in proper form and allow Mr. Bunderson an opportunity to respond.

Let's limit the argument here today, prior to the sentencing, to the motion to arrest the judgment as set before the court by way of pleading. Is there anything else that you have on that?

MR. OLIVER: No, Your Honor. I would just go on

further and indicate, and this is not the thrust, but indicate my contact with the juror, and I'll provide the court with the juror's name if I didn't in the motion. As a matter of fact, I've never called a juror in another case. This is the first time I've ever called a juror to find out what happened. I was really surprised when I spoke with this gentleman, and I don't recall his name but I have it in the file. He just indicated that it was based on coincidences. I think that that's quite profound. It's not -- I'm not attacking that, I'm only indicating to the court that that makes it an iffy situation.

But I would also indicate to the court that thereafter, after the trial, I had a conversation with two police officers who sat through the entire trial, beginning to end, and they, prior to the jury verdict, felt that Mr. Scott was innocent. They were quite emphatic on that.

I was thoroughly amazed at the jury verdict and I don't believe that there was evidence sufficient to show, beyond a reasonable doubt, that Mr. Scott was involved in any criminal activity in Brigham City. Absolutely nothing was presented in that context. Being in Drewes Floral's office, if Mr. Bunderson felt so inclined, perhaps a burglary charge

might be appropriate, but certainly there's no nexus to any theft and there was no evidence of any theft. I don't see it, Your Honor.

THE COURT: Mr. Bunderson.

MR. BUNDERSON: I filed a response to this, Your Honor. I think the thrust of my response and the thrust of my argument here today would be that the defendant chose to try this to a jury. He doesn't like the result, obviously.

The court is not empowered to simply substitute your own judgment for that of the jury. I don't have a copy of the statute in front of me dealing with arrested judgments, but I think it would require something more than the court merely disagreeing with the jury. I'm not saying you do disagree with them, I don't know about that, but nonetheless you wouldn't be in a possession to simply substitute your judgment for their's, so long as there was any evidence upon which a reasonable jury could find a conviction, and clearly there was. There was ample evidence upon which a reasonable jury could base a conviction.

THE COURT: Rebuttal argument.

MR. OLIVER: Briefly. I think Mr. Bunderson ought to read the rule. At any time prior to the

imposition of sentence the court, upon its own initiative --

THE COURT: Tell me where the rule is.

MR. OLIVER: Rule 23 of the Utah Rules of Criminal Procedure.

THE COURT: Very well.

MR. OLIVER: "At any time prior to the imposition of sentence the court, upon its own initiative, may, or upon the motion of defendant, arrest judgment if the facts proved or admitted do not constitute a public offense; or if the defendant is mentally ill," and we're not alleging that," or there is other good cause for the arrest of judgment.

"Upon arresting judgment the court may, unless a judgment of acquittal of the offense charged is entered or jeopardy has attached, order a commitment until the defendant is charged anew or retried, or may enter any other order as may be just and proper under the circumstances." This is exactly an appropriate motion and the rules provide for the court to supply its own judgment in place of the jury. It's a very specific thing. It may be upon the court's own motion or upon the defendant's motion.

The situation is, Your Honor, as I've indicated, and I'm not going to go through it again, I

just wanted to address the rule. The facts presented do not constitute a public offense. There was no evidence of theft. There was no -- there was evidence that something had happened. When and who we don't know. There was absolutely no evidence that Mr. Scott in any way, shape or form was connected with that.

Even assuming the money found in Mr. Reynolds' car was that of Drewes Floral, Mr. Reynolds claimed ownership of it and the glove box was locked and Mr. Scott had no access to it. The money was also still intact. All of those factors indicate that there was no public offense committed and the evidence didn't constitute a public offense.

We would ask this court to arrest the judgment and to indeed take appropriate action. We would ask for an acquittal, because I believe that's what the evidence presented shows. At minimum we'd ask for a new trial. Would ask for an acquittal and that's the primary thrust of our motion.

THE COURT: Thank you. In ruling on your motion, Rule 23 does set forth that the court, upon its own motion or upon motion of the defendant, shall arrest judgment if the facts proved or admitted do not constitute a public offense. In this particular case I feel the standard is whether or not there was

sufficient evidence that was submitted or introduced that may lead the jury to determine that all of the elements were proven beyond a reasonable doubt. Now, if there wasn't sufficient evidence that was submitted, then this court has to determine that and then the court would arrest judgment.

In this particular case, the court finds that there was evidence submitted to support each of the elements. I'm not saying whether that is beyond a reasonable doubt or not. That's up to the jury. My job in determining this is as to whether or not there was evidence submitted which would support their verdict. I find that there was. Therefore, your motion to arrest judgment is denied, counsel.

MR. OLIVER: May I just address that for one brief second?

THE COURT: For what purpose?

MR. OLIVER: Well, because I don't believe the rule anticipates --

THE COURT: If you have anything you want to place on the record for appeal you may do that, but I'm not going to argue with you. I've made my ruling.

MR. OLIVER: I wouldn't argue with the court.

THE COURT: Is there anything else that needs to be placed on the record for appeal?