

2002

Utah v. Tyler John Zesiger : Brief of Appellee

Utah Court of Appeals

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STATE OF UTAH,
Plaintiff-Appellant,
-v-
TYLER JOHN ZESIGER,
Defendant-Appellee.

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BRIEF OF
DEFENDANT-APPELLEE
TYLER JOHN ZESIGER

Case No. 20020058-CA

AN INTERLOCUTORY APPEAL FROM AN ORDER SUPPRESSING
EVIDENCE SEIZED PURSUANT TO A SEARCH WARRANT IN THE
FIRST JUDICIAL DISTRICT COURT OF UTAH, CACHE COUNTY,
THE HONORABLE CLINT S. JUDKINS PRESIDING

Attorneys for Plaintiff-Appellant

Attorneys for Defendant-Appellee
Tyler John Zesiger

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, : BRIEF OF

Plaintiff-Appellant, : TYLER JOHN ZESIGER

-V- :

TYLER JOHN ZESIGER, :

Defendant-Appellee. :

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DEFENDANT-APPELLEE
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AN INTERLOCUTORY APPEAL FROM AN ORDER SUPPRESSING
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STATEMENT OF JURISDICTION

The State appeals from an interlocutory order suppressing evidence seized pursuant to a search warrant. This Court has jurisdiction pursuant to Utah Code Annotated § 78-2a-3(2)(d).

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

The State has adequately identified the statutes and constitutional provisions of central importance to this appeal.

STATEMENT OF THE ISSUE

Issue. Did the trial court correctly rule that the independent source doctrine did not apply because officers violated the knock-and-announce statute without justification, the evidence was seized by the State and there could never be a source for the evidence independent of the prior illegality?

Mr. Zesiger agrees with the preservation of the issue and standard of review set forth by the State. See State's Brief at 1.

STATEMENT OF THE CASE

In addition to the case history outlined by the State, this Court should be aware of the following:

As a result of the violation of the knock-and-announce statute during the service of the first search warrant, the trial court suppressed the computer equipment seized as well as written and oral statements made by Mr. Zesiger during the execution of the first search warrant. R. 167-78 (State's Addendum B). The only evidence at issue in the execution of the second search warrant

is the computer equipment that was momentarily returned to Mr. Zesiger and then immediately re-seized pursuant to the second search warrant. R. 255, ¶13 (State's Addendum D).

After the computer was seized pursuant to the first search warrant, its contents were searched, copied and examined by the State. R. 268:18-19.

The first search warrant was authorized by Judge Clint S. Judkins of the First District Court on December 10, 1999. R. 14-15. Judge Judkins was also the judge who granted the motion to suppress. R. 167-69. The affidavit in support of the second search warrant was presented to a different judge on November 30, 2001, Judge Jeffrey R. Burbank. R. 179; see *also* Findings, Second Motion to Suppress, R. 254 ¶ 11.

Finally, the trial court ruled that that the independent source doctrine did not apply in this case for two specific reasons. First, because "the illegal taint on the evidence was not removed by the subsequent service of the Second Search Warrant." Findings of Fact, Conclusions of Law and Order Granting Second Motion to Suppress, R. 255 ¶ 2. Second, the trial court also concluded that the independent source doctrine should not be applied to violations of the knock-and-announce statute. *Id.* at ¶ 3.

SUMMARY OF ARGUMENT

The State conceded to Mr. Zesiger's first Motion to Suppress before the trial court. The State specifically conceded that the computer equipment was seized and Mr. Zesiger's written and oral statements were obtained in violation of Utah's knock-and-announce statute. The State also conceded to exclusion of the evidence. The application of the exclusionary rule to the first search warrant has not been appealed and is not before this Court.

The execution of the second search warrant does not remedy the initial constitutional violation. The evidence seized by the State during the execution of the first search warrant is tainted by the prior illegality. The State seeks to expand the scope of the independent source doctrine in this case. However, the independent source doctrine requires that the State demonstrate that the later, lawful seizure be genuinely independent of the prior illegal seizure. The State cannot do so in this case because evidence was unlawfully seized, searched and retained. Momentarily returning the computer equipment to Mr. Zesiger and then immediately re-seizing the computer does attenuate the illegal taint on the evidence. The trial court correctly ruled that the independent source doctrine does not apply to this case.

ARGUMENT

I. THE TRIAL COURT CORRECTLY RULED THAT THE EXECUTION OF THE SECOND SEARCH WARRANT DOES NOT REMEDY THE TAIN ON THE EVIDENCE SEIZED FROM MR. ZESIGER IN VIOLATION OF UTAH'S KNOCK-AND-ANNOUNCE STATUTE.

A. The State has Not Challenged the Trial Court's First Suppression Order.

The State conceded before the trial court that the evidence seized during the execution of the first search warrant was obtained in violation of Utah's knock-and-announce statute. See State's Concession to Defendant's Motion to Suppress, R. 161-162 ¶ 4 (Addendum A). The State also conceded to suppression of the evidence seized as a result of the violation. *Id.* The Order granting Mr. Zesiger's Motion to Suppress regarding the execution of the first search warrant was not appealed by the State and is not before this Court.¹

B. The State Has Conceded that Officers Violated Utah's Knock-and-Announce Statute Without Justification When Executing the First Search Warrant.

When police officers execute a search warrant, they must ordinarily provide notice of their authority and purpose before entering the premises they intend to search. *State v. Buck*, 756 P.2d 700, 701 (Utah 1988). This rule is

¹ The State indicates in its Brief that "it appears that suppression in the first instance was inappropriate." State's Brief at 23. This ruling was not appealed

commonly referred to as the “knock-and-announce” requirement. This rule has longstanding history in the United States and has origins in England from almost four hundred years ago. *Id.* This rule serves to protect a number of interests, specifically, (1) the protection of the privacy of an individual in his or her home, (2) the prevention of violence that could result in an unannounced entry into a private home, (3) the prevention of damage to the physical structures that can occur with forced entry. *Id.* (citing *Payne v. United States*, 508 F.2d 1391, 1939-94 (5th Cir. 1975); other citations omitted).

The Utah Legislature has codified this longstanding requirement in Utah Code Ann. § 77-23-210. Utah’s knock-and-announce statute provides:

When a search warrant has been issued authorizing entry into any building, room, conveyance, compartment, or other enclosure, the officer executing the warrant may use such force as is reasonably necessary to enter:

- (1) If, after notice of his authority and purpose, there is no response or he is not admitted with reasonable promptness . . .

(emphasis added). Utah is one of thirty-three states that have adopted statutes that require that law enforcement provide notice prior to entry. See Mark Josephson, Note, *Fourth Amendment – Must Police Knock and Announce Themselves Before Kicking in the Door of a House?*, 86 J. Crim. L. & Criminology 1229, 1239 (1996) (citations omitted).

This Court addressed violation of Utah’s knock-and-announce statute in

by the State and is beyond the scope of this appeal.

State v. Ribe, 876 P.2d 403 (Utah Ct. App. 1994). In *Ribe*, officers were serving a knock-and-announce search warrant. When they approached the residence of the defendant, they observed the defendant outside his front door and saw him flee the scene. *Id.* at 404. While some officers pursued the defendant, another officer approached the residence, opened the closed storm door, yelled “police” and ran into the home. The officer did not knock on the door and wait for someone to answer the door. *Id.* This Court held that this unjustified violation of the knock-and-announce statute warranted suppression of the evidence that was seized. *Id.* at 415.2

In Mr. Zesiger’s case, officers obtained a knock-and-announce warrant. R. 14. Mr. Zesiger lived in a dorm apartment at Utah State University. The apartment contained three subapartments. Officers failed to knock and announce themselves at the door to subapartment 306(ef) occupied by Mr. Zesiger. R. 159 ¶¶ 6, 7, 11, 12. The State did not assert exigent circumstances to justify the violation. Ultimately, the State conceded that this conduct violated the knock-and-announce statute and conceded to suppression of the evidence in this matter. R. 161-62 (Addendum A). There was no justification for the violation of the knock-and-announce statute. The

² The Utah Supreme Court has held that when a knock-and-announce violation occurs when no one is at home, suppression of the evidence is not warranted. *State v. Buck*, 756 P.2d 700, 703 (Utah 1988). There is no dispute in the instant case that Mr. Zesiger was in his dorm room when the first search

trial court correctly excluded all evidence seized as a result of the violation.

C. The Independent Source Doctrine Does Not Apply to Violations of the Knock-and-Announce Statute When Law Enforcement has Seized Evidence During the Unlawful Search.

The independent source doctrine does not apply in situations where officers have unlawfully seized and searched evidence in violation of the knock-and-announce requirement and then a second search warrant is obtained and executed. The typical application of the independent source doctrine has been in situations where law enforcement has made an illegal entry, but *has not seized the evidence* that is ultimately seized with a valid search warrant. The cases cited by the State do not support the application of the independent source doctrine in this matter.

The exclusionary rule prohibits the government from introducing evidence that has been obtained as a result of an unlawful search. *Murray v. United States*, 487 U.S. 533, 537 (1988) (citing *Weeks v. United States*, 232 U.S. 383 (1914)). The rule also extends to evidence that is “the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search, up to the point at which the connection with the unlawful search becomes ‘so attenuated as to dissipate the taint.’” *Murray*, 487 U.S. at 537 (quoting *Nardone v. United States*, 308 U.S. 338, 341 (1939)); *see also*

warrant was executed. R. 269: 9-10.

Wong Sun v. United States, 371 U.S. 471, 484-85 (1963).

The independent source doctrine provides an exception to the exclusionary rule. The rule provides that the government will be permitted to introduce challenged evidence if the government can demonstrate that a subsequent lawful seizure is “genuinely independent” of a prior illegal search. *Murray v. United States*, 487 U.S. 533, 542 (1988). The United States Supreme Court has held that application of the doctrine is warranted when the government has made an unlawful entry, but has not seized evidence until a search warrant is obtained.

For example, in the case of *Murray v. United States*, 487 U.S. 533 (1988) officers had evidence that there was marijuana in a warehouse. The officers illegally entered the warehouse, observed marijuana, and then left to get a warrant. The officers did not include any information they obtained as a result of the illegal entry to get the search warrant. *Id.* 535-36. The search warrant was ultimately executed and the United States Supreme Court ruled that the evidence seized pursuant to the warrant was admissible because the subsequent search warrant relied upon independent evidence, not the evidence obtained as a result of the illegal entry. The officers **did not seize any evidence** during the illegal entry.

The United States Supreme Court makes specific mention of the potential problem when property is actually seized and kept in police custody:

So long as a later, lawful seizure is genuinely independent of an earlier, tainted one (*which may well be difficult to establish where the seized goods are kept in the police's possession*) there is no reason why the independent source doctrine should not apply.

Id. at 542 (emphasis added). See also *Segura v. United States*, 468 U.S. 796, 799-801 (1984) (after initial illegal entry, *no items were seized or searched*, agents waited in apartment until search warrant obtained, United States Supreme Court held that independent source doctrine applied to all items ultimately seized and searched pursuant to the valid warrant). The *dicta* contained in *Murray* is instructive in this case..

There is no mechanism by which the second seizure of the computer in this case can be “genuinely independent” of the first tainted search. The evidence was actually seized, search and taken into police custody as a result of the constitutional violation.

This Court addressed the independent source doctrine in *State v. Northrup*, 756 P.2d 1288 (Utah Ct. App. 1988). In *Northrup*, officers made an illegal entry into the Defendant's home. While in the home, they observed contraband in plain view. However, nothing was confiscated and the home was not searched until a search warrant arrived hours later. *Id.* at 1290. As in the United States Supreme Court cases, this Court emphasized that although there was an illegal entry, there was no seizure of any evidence:

[T]he evidence was not disturbed or confiscated until the warrant arrived. Even though the officers saw the evidence, *no meaningful interference with Northrup's property interest occurred until the evidence was confiscated after the arrival of the warrant.*

Id. at 1294 (emphasis added). The opinion states that evidence is seized “when ‘there is some meaningful interference with an individual’s possessory interest in that property.’” *Id.* (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)). Again, as in the United States Supreme Court cases, of central importance in the application of the independent source doctrine is the fact that officers do not actually seize the evidence until *after* a valid warrant is obtained.

When a knock-and-announce violation occurs in the execution of a warrant and evidence is seized as a result, as in Mr. Zesiger’s case, the taint from that illegality cannot be remedied by the State. By contrast, if a knock-and-announce violation occurs, and evidence is *not* seized, and an independent and lawful search takes place, the doctrine *may* apply.³ For example, in *State v. Shively*, 999 P.2d 259 (Kan. 2000), the Kansas Supreme Court addressed the issue of application of the independent source doctrine to

³ Other jurisdictions have explicitly rejected the application of the independent source doctrine in knock-and-announce violation cases involving one search. See e.g., *United States v. Marts*, 986 F.2d 1216 (8th Cir. 1993) (in a case involving one search in violation of the knock-and-announce rule, the court rejected the application of the independent source doctrine and stated it render the knock and announce rule “meaningless since an officer could obviate legal entry in every instance simply by looking to the information used to obtain the

knock-and-announce violations when evidence is *not* seized as a result of the violation. *Shivley* involves the service of two search warrants. In the execution of the first warrant, officers simply battered down two doors to the residence. *Id.* at 260-61. An officer was killed by the Defendant who testified that he thought someone was breaking into his home. The court held that the first search warrant was served in violation of the principle of announcement under the Fourth Amendment. *Id.* at 263.

As in *Murray* and *Northrup*, officers did not seize any items from the residence but sealed off the residence and then obtained a second search warrant. *Shivley*, 999 P.2d at 261. The Kansas Supreme Court held that:

the second search was held to be constitutionally sufficient *because no physical items were seized under the initial search warrant* and because the second search warrant was based in substantial part on the first affidavit and did not rely on any additional information obtained in the first raid as to Shively's drug activity.

Shively, 999 P.2d at 264 (emphasis added). Of central importance to the court in application of the independent source doctrine was the fact that no evidence was actually seized by the government until *after* the service of the second search warrant.⁴

warrant").

⁴ It should also be noted that in *Shively* the court noted that the "same judge who found probable cause to issue the first warrant to search for drug-related evidence issued the second search warrant as well." 999 P.2d at 264-65. In Mr. Zesiger's case, Judge Judkins issued the first search warrant (R. 14-15)

In all of the cases cited *supra*, whether the violation was a warrantless entry or a violation of the knock-and-announce rule, the government did not seize evidence until a valid warrant was in place. In such an instance, courts have held that the later, lawful search could be genuinely independent of the prior illegality. The same cannot be said in Mr. Zesiger's case. In this matter, the State conceded that the computer was illegally seized on December 13, 2001. R. 167-68. The computer equipment was seized, searched and retained by the State after the unlawful execution of the first search warrant. On November 30, 2002, the equipment was momentarily returned to Mr. Zesiger and then "re-seized" pursuant to the second search warrant. R. 254-55, ¶¶ 10-13. The State's actions do not alter the taint on the computer equipment evidence from the prior illegality.⁵ Once evidence is illegally seized, the independent source doctrine does not apply.

and ordered the suppression of evidence obtained as a result of the knock-and-announce violation. R. 167-69. The application for the second search warrant was presented to a different Judge, Judge Jeffrey R. Burbank. R. 179; see *also* Findings Re Second Motion to Suppress, R. 254, ¶ 11.

⁵ In the event that this Court were to apply the independent source doctrine to the computer evidence re-seized pursuant to the second search warrant, Mr. Zesiger asserts that his oral and written statements obtained during the unlawful execution of the first search warrant should remain excluded. There is no basis for the State to claim an independent source for the statements obtained from Mr. Zesiger during the execution of the first warrant.

CONCLUSION

The State conceded before the trial court that officers violated the knock-and-announce statute in executing the first search warrant. The trial court correctly concluded that simply serving a second search warrant and re-seizing the evidence unlawfully obtained does not remedy the previous constitutional violation. Once the computer equipment evidence was taken into State custody, there was no mechanism by which the State could attenuate the taint of the prior illegality. Mr. Zesiger respectfully urges this Court to affirm the trial court's Order suppressing the computer re-seized with the second search warrant.

ORAL ARGUMENT REQUESTED

The Defendant joins in the State's request for oral argument.

RESPECTFULLY SUBMITTED this 26th day of August, 2002.

BUGDEN & ISAACSON, L.L.C.



TARA L. ISAACSON

Attorneys for Tyler John Zesiger

CERTIFICATE OF SERVICE

I hereby certify that, on the 28th day of August, 2002, I caused to be served two true and correct copies of the foregoing BRIEF OF DEFENDANT-APPELLEE TYLER JOHN ZESIGER by the method indicated below, and addressed to the following:

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ADDENDUM A

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FIRST DISTRICT COURT
CACHE COUNTY

'01 SEP -5

STATE OF UTAH,

Plaintiff,

v.

TYLER JOHN ZESIGER,

Defendant.

STATE'S CONCESSION TO
DEFENDANT'S MOTION TO
SUPPRESS AND REQUEST FOR
JURY TRIAL SETTING

Case No. 991100886

Judge Clint S. Judkins

COMES NOW, the State of Utah, by and through Scott L Wyatt, the Cache County Attorney, and hereby concedes to the court granting the defendant's Motion to Suppress; requests a trial setting and in support of the same represents to the court as follows:

1. The Defendant filed a motion to suppress based on the investigators' failure to follow the state knock and announce statutory requirements. The state filed its response objecting to the motion.

2. The court set oral argument on the motion on June 27, 2001, and the parties appeared and presented their relative positions. During the argument the court indicated that it would rule in favor of the defendant unless the state could provide case law to the contrary. Both parties were invited to engage in further research and present further memoranda on the matter.

3. The defendant filed a Supplemental Memorandum of Law in Support of Motion to Suppress.

4. The state is still unable to find any case law on point to present to the court.

Based on the court's statements, made on June 27, 2001, referred to above in paragraph "2" the


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state submits this matter and concedes to the court's granting of the defendant's motion on grounds that the state's investigators failed to comply with the knock-and-announce statute.

5. With the motion to suppress resolved the state respectfully requests a trial setting so this matter may come to a final resolution.

DATED this 3rd day of September, 2001.

CACHE COUNTY ATTORNEY



Scott L Wyatt