

1965

State of Utah v. Arden E. Tuttle : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

THE STATE OF UTAH,
Plaintiff-Respondent,

— vs —

ARDEN E. TUTTLE,
Defendant-Appellant.

Case No. 10205

BRIEF OF RESPONDENT

Appeal from the Judgment of the
7th District Court for Sanpete County
Honorable Henry Ruggeri, Judge.

UNIVERSITY OF UTAH

OCT 7 1966

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,
Plaintiff-Respondent,

— vs —

ARDEN E. TUTTLE,
Defendant-Appellant.

} Case No. 10205

BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

The appellant Arden E. Tuttle appeals from his conviction of grand larceny in violation of 76-38-1 and 4, Utah Code Annotated 1953.

DISPOSITION IN LOWER COURT

The appellant was charged with the crime of grand larceny in the District Court of Sanpete County, State of Utah, and upon jury trial was convicted and placed on probation.

RELIEF SOUGHT ON APPEAL

The respondent submits the conviction of the appellant in the trial court should be affirmed.

STATEMENT OF FACTS

The respondent submits the following statement of facts as being in accordance with the rule of law that the facts on appeal will be reviewed in a light most favorable to the trial court's decision.

Milton S. Harmon is a co-owner of a hardware store in Manti, Utah (Tr. 38, 39). On the 18th day of November, 1961, the appellant purchased coal at Mr. Harmon's store and was the last customer to leave (Tr. 39 through 41). Mr. Harmon closed the store, left \$11 in the till and at the time of closing, there were eight or nine guns on the premises (Tr. 50). The next day Mr. Harmon had occasion to go to the store and noticed that five of the guns that had been in the store were missing, as was the money from the till (Tr. 49, 50). The guns taken were a Winchester Automatic Shotgun, a Remington Pump, a .464 Magnum, a .22 Pump, and a .22 Single Shot. In addition, a telescope sight was missing (Tr. 52), recoil pads, 30.06 shells, .22 caliber shells and .22 caliber bird shot (Tr. 54). In addition, ten or twelve boxes of 4/10 shotgun shells and boxes of Magnum shells were also missing, as well as a shotgun cleaning kit. Not all these items were discovered to be missing on the same day that the larceny was discovered but they were determined to be missing after their presence was missed a short time later. An examination of the premises disclosed that one of the windows in the store had been pried from the outside (Tr. 57 and 93). The appellant was questioned concerning the larceny and denied any involvement.

Subsequently, on November 9, 1963, Richard Harmon, the grandson of Milton Harmon, while hunting near the Gunnison Reservoir, discovered four guns and the barrel of a .22 caliber rifle (Tr. 37, 38). The guns which were

found (Exhibit 10 through 14) matched the description of the guns taken from the larceny of Harmon's store. The serial numbers on the guns that could be identified matched the serial numbers of the guns that had been taken from the store (Tr. 59 through 61).

On or about November 29, 1962, approximately a year after the incident and a year prior to the time the guns were found, Calvin D. Nielson, Manti City Marshal, went with Leonard Harmon, co-owner of the store to the residence of Mr. and Mrs. Edgar Tuttle, the appellant's father and mother. At the time the appellant was in the Air Force (Tr. 286) and Mr. Edgar Tuttle was in the Veterans Hospital being treated for a psychiatric disorder (Tr. 264). According to Marshal Nielson, he requested permission of Mrs. Tuttle to search the premises, including Arden's room. uc The marshal testified that Mrs. Tuttle consented to the search. He testified that she asked if he had a search warrant and he replied "no." He denied saying that he could get one (Tr. 112 to 114). A search of the room and rafters in the room was made and nothing found. Thereafter, in examining an old phonograph, they discovered some 30.06 shells, some 4/10 shotgun shells and a telescopic sight (Tr. 96). They also found the recoil pads and some empty and some full boxes of .22 caliber shells, and the Magnum shells (Tr. 98 to 103). Marshal Nielson said that he did not pry anything open nor force any padlock, although Mr. Harmon had apparently unscrewed a tin box and a wooden box to obtain the contents of these boxes, although their exact contents does not appear of record.¹

Subsequently Marshal Nielson saw the appellant in Manti on December 23, 1962, when he was in the service

¹ Leonard Harmon was never called as a witness, and when this box was opened, either then or later is not clear from the record.

(Tr. 103). The appellant admitted taking the property and the rifles and indicated that he would pay for the items taken (Tr. 104, 105). The appellant told the marshal that if he disclosed who was with him when the property was taken, he would still have to shield someone (Tr. 132). The appellant's father definitely stated in the presence of the marshal and the county sheriff that the guns that had been stolen could not be returned (Tr. 20). The appellant's mother at one time turned over to Richard Harmon some pennies and other items (Tr. 164). Sixty pennies had been taken in the larceny. Milton Harmon testified that Mrs. Tuttle opened the padlocked box and tin box with a screw-driver and that she had called Mr. Harmon, subsequent to the search when the items were found in the Gramophone, and told him to come and get some more stuff (Tr. 164). NC

At the time of trial, Exhibits 2 through 8, constituting the property obtained during the search of Arden Tuttle's room and being the items found in the Gramophone, were marked in the presence of the jury as exhibits, and the witnesses testified concerning these exhibits, all without objection (Tr. 98 through 103, 51 through 56, 181 through 202). An objection was made concerning the receipt of Exhibits 2 through 8 at the time they were offered. That was the first time in the trial that it was urged that the exhibits had been obtained by an illegal search and seizure (Tr. 211). No pretrial motion to suppress Exhibits 2 through 8 was made either at the time of the preliminary hearing or before the District Court. The trial court received Exhibits 2 through 8 into evidence as well as Exhibits 10 through 15, being the guns (Tr. 211). Subsequent to the receipt of the exhibits, the appellant Arden Tuttle testified that he purchased the exhibits from the Harmon's store (Tr. 280, 285) and that some of the property belonged to his father (Tr.

286). The appellant denied admitting guilt but did admit the offer to pay for the guns and other items (Tr. 288). He explained that he offered to pay to avoid prosecution and to avoid difficulty with the Air Force, since he claimed the authorities had threatened him with a dishonorable discharge (Tr. 288). This latter accusation was denied by persons present (Tr. 307).

Based upon the above evidence, the jury returned a verdict of guilty.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT COMMIT ERROR IN RECEIVING INTO EVIDENCE EXHIBITS 2 THROUGH 8 SINCE

- (a) THE APPELLANT MADE NO PRETRIAL MOTION TO SUPPRESS THE EVIDENCE;
- (b) THE APPELLANT FAILED TO OBJECT TO THE EVIDENCE BEING DISCLOSED TO THE JURY AND THE JURY HAD FULL VIEW OF THE EVIDENCE WITHOUT OBJECTION PRIOR TO ITS RECEIPT AND, AS A CONSEQUENCE, THE APPELLANT WAIVED HIS RIGHT TO OBJECT;
- (c) THE APPELLANT WAIVED HIS RIGHT TO OBJECT BY OFFERING AFFIRMATIVE EVIDENCE AS TO EXHIBITS 2 THROUGH 8; AND
- (d) THE EVIDENCE IS CONFLICTING BUT SUPPORTS A FINDING THAT THE SEARCH LEADING TO THE DISCOVERY OF EXHIBITS 2 THROUGH 8 WAS CONDUCTED UPON PROPER CONSENT.

(a) It is submitted that the appellant is precluded from claiming any error on the theory of an illegal search and seizure, since no pretrial motion to suppress evidence was made. It should be noted that the search in question was conducted on November 29, 1962. Subsequently, on December 23rd, the appellant was confronted with the allegation that he stole the guns and other property from Harmon's store. It is clear from the record that appellant and counsel were well aware of the search and the claims

against its legality long before the trial. It is clear there was adequate opportunity for a pretrial motion. None was made. Under these circumstances, it is submitted that this was fatal to any claim of error as to the admissibility of the evidence. Because of the failure to make a pretrial motion, the very evidence sought to be excluded was placed before the jury, and referred to often, prior to the time it was offered as evidence. This had the effect of letting the jury hear everything that, if the claim of illegal search had been valid, they should not have heard. In order to avoid this very problem, the great majority of courts have required that a pretrial motion be made to suppress evidence claimed to have been obtained as the result of an illegal search and seizure and they have held that where the defendant had knowledge prior to trial of the facts, supposedly making out the illegal search, the failure to make a pretrial motion precludes the claim being urged at trial or raised on appeal.

The federal courts have generally required that a motion to suppress be made prior to trial and have ruled that a motion made at the time of trial is untimely. In *United States v. Sansone*, 231 F.2d 887 (2nd Cir. 1956), a claim of error on appeal was denied where a motion to suppress was not made until the time of trial where the search had been made five months prior. See also *Zachary v. United States*, 275 F.2d 793 (6th Cir. 1960); *Karp v. United States*, 277 F.2d 843 (8th Cir. 1960); *United States v. Romero*, 249 F.2d 371 (2nd Cir. 1957); *United States v. Volkell*, 251 F.2d 333 (2nd Cir. 1958), cert. den. 356 U.S. 962; *United States v. Nicholas*, 319 F.2d 697 (2nd Cir. 1963), cert. den. 375 U.S. 933; *United States v. Milnovich*, 303 F.2d 626 (4th Cir. 1962), cert. den. 371 U.S. 876; Rule 41 (e), F. R. C. P.

In *Moore v. United States*, 56 F.2d 794 (10th Cir. 1932), it was stated:

“A notebook was introduced, which had been found in the car, for the purpose of proving ownership of the car. It was admitted and counsel contends this was error, because it was obtained by an illegal search and seizure. It was not error to admit such notebook for two reasons. Moore had knowledge of the seizure at the time it was made and raised no objection until it was offered in evidence. His objection therefore came too late.”

See also *Butler v. United States*, 153 F.2d 993 (10th Cir. 1946).

The majority of state courts also support this rule. In Varon, *Searches, Seizures and Immunities*, Vol. 2, page 661 (1961):

“When an aggrieved person believes incriminatory evidence has been unlawfully taken from his possession, and is intended to be used against him in a criminal prosecution, it is incumbent upon that person to make timely objection to the introduction of such evidence. The failure of a defendant to make such timely motion to suppress, could well foreclose his right to object to the admissibility of evidence wrongfully obtained. When such right is lost to an accused for that reason, the prohibition persists in all future and subsequent proceedings as it has been held that a failure to make timely motion to suppress evidence constitutes a waiver of such right.”

In 50 A.L.R.2d 583, it is stated:

“Assuming that evidence obtained by an unlawful search and seizure is inadmissible, it is necessary for the accused who desires such evidence to be excluded at his trial to make a timely objection to its introduc-

tion; otherwise the right to object is lost. Where no timely motion to suppress the evidence is made, evidence obtained by an unlawful search and seizure is admissible not only in the proceeding in which the constitutional guaranty is waived, but in any and all subsequent proceedings in which it may be material.

* * *

“In most jurisdictions in which evidence obtained by an unlawful search and seizure is inadmissible, the rule prevails that, as a general proposition subject to certain limitations, an objection to evidence as obtained by an unlawful search and seizure comes too late where it has been made the first time at the trial, and not by a pretrial motion to return the property or suppress the evidence. * * *”

In *State v. Conner*, 59 Ida. 695, 89 P.2d 197 (1939), the Idaho Supreme Court expressed the requirement that a pretrial motion to suppress was necessary before illegally obtained evidence could be challenged. The court gave the reasons for the rule:

“* * * It must be borne in mind that a proceeding to suppress evidence, because procured in violation of a defendant’s constitutional rights, is not a part of his trial. It is separate and apart from the trial, and the reason for the rule is that where the defendant has had an opportunity to petition for the suppression of the evidence before the trial he must do so or will be held to have waived it for, to permit inquiry as to the admissibility of the evidence, during the trial, would certainly result in expensive delay and might result in confusion. In view of the purpose of the rule, requiring that the application to suppress be made before trial, it must be and is held to require that it be made early enough, when possible, to cause no interference with the progress of the trial. This cannot be accom-

plished by making the application after the jury has been examined and accepted and before it is sworn."

See also *State v. Spencer*, 74 Ida. 173, 258 P.2d 147 (1953). The following cases have supported that position: *Potman v. State*, 259 Wisc. 234, 47 N.W.2d 884 (1951); *Chicago v. Lord*, 3 Ill. App. 2d 410, 122 N.E.2d 439 (1954); and *State v. McDaniels*, 75 Mont. 61, 243 P. 810 (1925). Cases from courts adopting the exclusionary rule as a result of *Mapp v. Ohio*, 367 U.S. 643 (1961), have also required that a pre-trial motion to suppress be made. *State v. Bailey*, 23 Conn. Supp. 405, 184 A.2d 61; *State v. Pokini*, 367 P.2d 499 (Hawaii 1961); *Veales v. State*, 374 P.2d 792 (Okla. Crim. 1962); Colorado Rules of Criminal Procedure, 41(e); Hawaii Rules of Criminal Procedure, 41(e). See also *Commonwealth v. Lewis*, 191 N.E.2d 753 (Mass. 1964).

It is submitted, therefore, that by the great weight of authority, a pretrial motion to suppress the evidence, which is claimed to have been obtained as a result of a unconstitutional search and seizure, should have been made. It seems absurd to attempt to try the question of an illegal search, which is principally a question of law for the trial court, before the jury and then advise the jury to disregard what they have seen and thus connected to the accused. It is submitted that the trial court correctly ruled the evidence admissible in this case since the appellant did not make a timely pretrial motion to suppress.

(b) At the time of trial, the prosecutor had marked for identification Exhibits 2 through 8 without objection from the appellant (Tr. 98 to 100).

The testimony of City Marshal Nielson, relating to the recovery of the items from the home of the parents of appellant was also admitted into evidence without objec-

W. Quinn

tion (Tr. 95, 96). Marshal Nielson was cross-examined by the appellant's counsel concerning Exhibits 2 through 8 and the nature of the search conducted at the home of appellant's parents (Tr. 115 to 120). The exhibits were in open court and could be seen by the jury and had been referred to by witnesses. It would appear that undoubtedly reference was made to these exhibits at the time of opening argument and no objection was voiced. The only objection came at the time they were offered, although there had been substantial reference to the exhibits and the jury was clearly apprized of the circumstances of their discovery and their connection with the case. Under these circumstances, it is submitted that appellant waived any basis for objection to the evidence.

In *McDonald v. United States*, 307 F.2d 272 (10th Cir. 1962), the appellant was tried and convicted of transportation in interstate commerce of stolen property. A pretrial motion on behalf of the appellant to suppress the seized evidence was heard before the case going to the jury. The court took the matter under advisement. Counsel for the appellant, while the matter was under advisement, advised the jury of the nature of the search and the fact that the appellant had the property in his possession. On appeal the court ruled that by bringing the evidence before the jury without objection, the appellant could not complain of the admission of the evidence. The court stated:

"Any question that may have existed concerning the admission of the seized property into evidence was disposed of by the opening statement of defense counsel. There, in effect, he admitted defendant's possession of the property, advised the jury of the defendant's explanation of how he came into possession of it and limited the issue in the case to the question of the de-

defendant's knowledge the property had been stolen. The jury was thus advised of the existence and defendant's possession of the very evidence which he sought to have suppressed and kept from the jury's consideration. No legal reason then remained for the suppression of the evidence. Moreover, no necessity then existed for the government to offer such property into evidence nor could any prejudice result to the defendant by its admission, if offered."

In *United States v. Peckham*, 105 Fed. Supp. 775 (D.C. D.C.), defendant was charged with the crime of abortion. The trial court prior to trial had granted a motion to suppress certain evidence. Subsequently, the defendant used the suppressed evidence to refresh his memory, thus in effect bringing the matter before the jury. On motion for new trial, Judge Holtzoff ruled that defendant, by allowing the evidence to come before the jury, had waived the previous benefits given by the suppression order. He stated:

"* * * The defendant waived the benefits by himself producing copies of those cards and using them to refresh his own recollection on the witness stand."

It is submitted that since the appellant allowed the prosecution to place Exhibits 2 through 8 before the jury and allowed witnesses to discuss the recovery of those exhibits so that the jury was fully apprized of their connection to the defendant, the appellant's objection came too late and any claim of illegality has been waived.

(c) Subsequent to the testimony of Marshal Nielson and other witnesses concerning Exhibits 2 through 8, all without objection on the basis of illegal search and seizure, appellant's counsel cross-examined concerning these exhibits and subsequently placed the appellant on the stand, and the appellant testified that he purchased the exhibits. It is

submitted that on the basis of the authorities cited above, the affirmative action by the appellant in presenting evidence to the jury constitutes a waiver of any claim of illegality on appeal.

(d) It is submitted that the trial court properly received into evidence Exhibits 2 through 8. The appellant in his brief confuses the evidence consisting of Exhibits 2 through 8, recovered on November 29th, 1962, with evidence recovered by a private person, Milton Harmon, on or about December 7th (compare Tr. 95 with Tr. 165). On November 29, 1962, the day the evidence consisting of Exhibits 2 through 8 was recovered, City Marshal Nielson in company with Leonard Harmon went to the home of appellant's parents (Tr. 95). Appellant was away in the Air Force and according to Marshal Nielson, they asked Mrs. Tuttle if they could search the whole house and she approved. She asked if they had a search warrant and they told her no. It was asked upon cross-examination of Marshal Nielson if he did not in fact say that they could get one. Marshal Nielson denied making such a statement (Tr. 112 to 115). He further denied making any threats. Leonard Harmon was never called as a witness by either side. Contrary to the assertions made in appellant's brief, the situation in which the padlocked box was unscrewed and items removed is not the same situation as when Exhibits 2 through 8 were recovered from the phonograph (see Exhibits 27 and 28 which are the items allegedly unscrewed which did not contain Exhibits 2 through 8). Therefore, at the time the court received into evidence Exhibits 2 through 8, there was no testimony but the testimony of Marshal Nielson relating to the time he and Leonard Harmon searched the premises with the consent of appellant's mother.

The incident involving the two boxes which were allegedly, unscrewed and the contents recovered occurred thereafter and involved only Milton Harmon, a private person (Tr. 164 and 181). Although there is some evidence in Marshal Nielson's testimony that Leonard Harmon unscrewed a box, it does not appear that this was the phonograph where the items were received but rather it appears to be defendant's Exhibit 28 (Tr. 116). The trial court, therefore, had no evidence contradicting Marshal Nielson at the time Exhibits 2 through 8 were offered. The posture of the evidence at that time clearly indicated that the search was with the consent of the appellant's mother and Exhibits 2 through 8 were found in an old Gramophone. The search had not been over Mrs. Tuttle's protest or a mere acquiescence in police authority. Although subsequently, appellant's mother testified that force had been used to cause her to consent to the search, this evidence came long after the trial court's ruling. It is apparent, therefore, that the conflict in testimony presented an issue of fact for the trial court to rule upon. The trial court saw fit to believe Marshal Nielson and to reject the testimony of Mrs. Tuttle. This being so, there is ample evidence to sustain the trial court's admission. Many basis exist for denying appellant's contentions on appeal.

First, since the appellant did not offer evidence as to any circumstances which would support the lack of consent prior to the court's ruling, consent was demonstrated at the time the trial court received the evidence. Therefore, the receipt was proper.

Second, it appears that at the time the boxes were unscrewed, Mrs. Tuttle might have opened the boxes or, in any event, ~~Milton~~ Milton Harmon, both of whom are private persons. The actions of private persons are not within the

Leonard.

No

No

if private person - then cannot did not go to Milton Harmon

prohibitions of the exclusionary rule against receiving evidence illegally seized. *Burdeau v. McDowell*, 256 U.S. 465 (1921) ; *Search and Seizure Since Mapp*, 36 University of Colorado Law Review 391, 398 (1964) ; *The Federal Law of Search and Seizure*, F.B.I., page 7 (1962).

Third, even if Leonard Harmon, who accompanied Marshal Nielson on the 29th, did unscrew a box, there is no showing that Exhibits 2 through 8 were in that box. The evidence is clearly to the effect that they were found in the Gramophone.

In *State v. Bryan*, 16 U.2d —, 395 P.2d 534 (1964), this court observed that where a party consents to a search, the search is rendered constitutionally unobjectionable. In *Smuk v. People*, 72 Colo. 97, 209 P. 636 (1922), it was recognized that it is permissible for a person who controls the premises to consent to a search being made. In the instant case, it was clear that Arden Tuttle, the appellant, did not own the home where Exhibits 2 through 8 were kept. It does not appear from the record that he was renting or was otherwise in control of any particular area, but was away in the Air Force. A parent may consent to the search of premises he owns which are used by his child. *United States v. Roberts*, 179 F. Supp. (1959) ; *United States v. Rees*, 193 F. Supp. 849 (Md. 1961). In the latter case the facts are almost identical to the facts in the instant case. The home was owned by Mr. and Mrs. Rees, Sr. The court indicated that Mr. and Mrs. Rees had the right to authorize a search of the entire house. The premises were in no way rented to the son. The defendant's mother and father gave the F.B.I. consent to search their home. During the search of the defendant's room, a search was made of a crawl space in the room. Agents found a suitcase tagged

with the name of a third party. The defendant's father gave permission to open the suitcase. A revolver was found linking the defendant with a murder and a kidnapping. The court upheld the search on the grounds that the father, having complete control over the dwelling of the child, and having granted no specific area of exclusive control to the child, the search was proper. This is a substantially different situation from the case of a hotel roomer or a paid roomer having some degree of exclusivity over the premises. The appellant has called the court's attention to the case of *Holzhey v. United States*, 223 F.2d 823 (5th Cir. 1955). That case is entirely different from the instant case since the items were found in a locked cabinet, whereas the items here were found in a Gramophone. In this case there was no evidence to indicate that the son owned the Gramophone or that the parents did not retain control or possession of that item. The search authorized in the *Holzhey* case was authorized by the daughter and son-in-law, who did not necessarily have permission to allow search of the cabinet. When the police approached the cabinet, the daughter and son-in-law made statements to the effect that the cabinet did not belong to them and that they were not authorized to allow the search. Thus, the facts are entirely different than those in the instant case. Here, according to Marshal Nielson, the appellant's mother authorized the search of the whole house. The items found were found in a Gramophone which was not locked and which apparently did not belong to the appellant. This case, therefore, falls within the doctrine of the *Rees* case approving the search upon consent.

fully!

not so!

The appellant has also indicated that the discussion concerning a search warrant indicates that the consent was involuntary. To the contrary, according to the Marshal he

advised the appellant's mother that he had no warrant and did not tell her that he could get one. Thus, Mrs. Tuttle was fully appraised that the officer's authority was limited, thereby establishing limits on his own authority, which supports the inference that the search was the result of consent. See 113 *Pennsylvania Law Review* 260–268 (1964).

In *People v. Torres*, 158 Cal. App. 2d 213, 322 P.2d 300 (1958), the court noted the following facts:

“The facts bearing upon this narrow issue may be stated briefly. At approximately 6:00 p.m. on March 19, 1957, Officer King of the Narcotics Division of the Los Angeles Police Department was informed by Sergeant Bitterhoff of the Robbery Division that a man named Tony residing at 136 West 69th Street was selling narcotics. At approximately 9:45 p.m. on March 19, 1957, Officer King was standing in front of the residence at the given address when appellant (whose nickname was Tony) opened the door and came out. The officers identified themselves as police officers and stated to appellant that they had information that he was using and dealing in narcotics. He denied the accusatory statement. The officers then asked him whether ‘it would be all right if we’d look in the house.’ Appellant answered, ‘yes, go ahead.’ ”

Based thereon, the court ruled the search voluntary, commenting:

“A search of a house with the express, free and voluntary consent of a householder suspected of possessing narcotics is neither unreasonable nor unlawful. It follows that contraband found and seized in the course of such a search may lawfully and properly be received in evidence against the accused. *People v. Burke*, 47 Cal.2d 45, 301 P.2d 241; *People v. Michael*, 45 Cal.2d 751, 290 P.2d 852; *People v. Hood*, 149 Cal. App.2d 836, 309 P.2d 135. It is true as pointed out in

People v. Michael, supra, that one need not forcibly resist an officer's assertion of authority to search, but if he freely consents to a search, then neither the search nor the seizure of evidence found in the course thereof is unreasonable. As the court there stated (45 Cal.2d at page 753, 290 P.2d at page 854), 'Whether in a particular case an apparent consent was in fact voluntarily given or was in submission to an express or implied assertion of authority, is a question of fact to be determined in the light of all the circumstances.' To the same effect are *People v. Lujan*, 141 Cal. App.2d 143, 296 P.2d 93, and *People v. Gorg*, 45 Cal.2d 776, 291 P.2d 469. Since the question is one of fact primarily for the trial court's determination, the finding of that court, supported by substantial evidence, is binding upon an appellate court. *People v. Hood*, supra, 149 Cal. App.2d 836, 838, 309 P.2d 135; *People v. Allen*, 142 Cal. App.2d 267, 281, 298 P.2d 714; *People v. Smith*, 141 Cal. App.2d 399, 402, 296 P.2d 913."

See also *People v. Burke*, 47 Cal. 2d 45, 301 P.2d 241 (1956), where the California Supreme Court found similar facts sufficient to show consent.

In *State v. Bryan*, supra, and *State v. Loudon*, 15 U.2d 64, 387 P.2d 240, 242 (1963), this court observed:

"* * * Whether the evidence was lawfully obtained and was admissible in the case was primarily for the trial court to determine."

The trial court in the instant case, at the time the evidence was received, had the testimony of Marshal Nielson which clearly evidenced that the search was with consent. Evidence indicating lack of consent offered after the evidence was received comes too late. Even so, the trial court was not compelled to believe Mrs. Tuttle's statement in support of her son, since indeed she had motive for bias.

This being so, it was apparent that the search was conducted under circumstances showing consent. *Honig v. United States*, 208 F.2d 916 (8th Cir. 1953); *State v. Bryan*, *supra*.

CONCLUSION

The facts of the instant case disclose a situation where the appellant was clearly guilty of the crime charged. The only question raised on appeal is that relative to search and seizure. Although the law of search and seizure may have been Mapped, as expressed in appellant's brief, it is apparent from the arguments made and the way the case was tried that this was a classic on how not to raise the issue of search and seizure. The law has been Mapped but the appellant is a very poor cartographer.

This case should be affirmed.

Respectfully submitted,

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