

1992

Utah v. David Simmons and Patricia Kay Simmons : Brief of Appellee

Utah Court of Appeals

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DOCKET NO. 920800 ~~IN THE~~ UTAH COURT OF APPEALS

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| THE STATE OF UTAH, | : | |
| Plaintiff/Appellant, | : | |
| - vs - | : | Case No. 920800-CA |
| DAVID SIMMONS and | : | |
| PATRICIA KAY SIMMONS, | : | Priority No. 15 |
| Defendants/Appellees. | : | |

BRIEF OF APPELLEES


State's appeal from the grant of Defendants' Motion to Suppress Evidence in a prosecution for possession of a controlled substance with intent to distribute in violation of §58-37-8(1)(5), Utah Code Ann. (1953), in the First Judicial District Court for Box Elder County, Honorable Clint S. Judkins, presiding.

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FILED
Utah Court of Appeals

AUG 30 1993


Mary T. Noonan
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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| THE STATE OF UTAH, | : | |
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IN THE UTAH COURT OF APPEALS

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| THE STATE OF UTAH, | : | |
| Plaintiff/Appellant, | : | |
| - vs - | : | BRIEF OF APPELLEES |
| DAVID SIMMONS and | : | |
| PATRICIA KAY SIMMONS, | : | Case No. 920800-CA |
| Defendants/Appellees. | : | |
| | : | |

JURISDICTION

This Court has jurisdiction by virtue of Utah Code Ann. § 77-18a-1(2)(e) and § 78-2a-3(2)(e) (Supp. 1993).

ISSUES AND STANDARDS OF REVIEW

1. Whether the search warrant in this case was served "in the night" within the meaning of §77-23-5, Utah Code Ann. (1953). The trial court's factual finding on this question is reviewed by this Court under a clearly erroneous standard. State v. Bobo, 803 P.2d 1268 (Utah App. 1990).

2. Whether the failure of the search warrant affidavit to set forth specific facts justifying a nighttime search should result in the exclusion of evidence seized pursuant to the search warrant. This Court reviews a trial court's legal conclusions for correctness. Stewart v. State es rel. Deland, 830 P.2d 306 (Utah App. 1992).

CONSTITUTIONAL PROVISIONS AND STATUTES

CONSTITUTIONAL PROVISION

U.S. Const. Amendment IV [Unreasonable Searches and Seizures]: 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.

STATUTE

Utah Code Ann. §77-23-5. Time for Service - Officer may request assistance.

(1) The magistrate must insert a direction in the warrant that it be served in the daytime, unless the affidavits or oral testimony state a reasonable cause to believe a search is necessary in the night to seize the property prior to it being concealed, destroyed, damaged or altered, or for other good reason; in which case he may insert a direction that it may be served any time of the day or night. An officer may request other persons to assist him in conducting the search.

STATEMENT OF THE CASE

Nature of the Case

This is a criminal prosecution against the Defendant/Appellees for possession of a controlled substance with the intent to distribute within 1000 feet of a child care facility in violation of §58-37-8(1).

Course of Proceedings and Disposition in the Court Below

The Defendant/Appellees were charged with possession of a controlled substance, marijuana, with intent to distribute within

1000 feet of a child care facility or with a person younger than eighteen years. After a preliminary hearing both defendants were bound over for trial in the district court (R. 1). The defendants filed a pre-trial motion to suppress all evidence seized pursuant to the execution of a search warrant on their residence on January 20, 1992 (R. 40). After a hearing the motion to suppress was granted (R. 74). Proposed findings were submitted and objected to by the State (R. 67, 69), and a second hearing on the objections, and to consider the intervening Supreme Court decision in State v. Rowe, 196 Utah Adv. Rep. 14 (Utah 9/28/92), was held (R. 82). After the second hearing the trial court reaffirmed its initial decision to suppress the evidence (R. 82), and the State took this interlocutory appeal (R. 117).

Statement of Facts

On January 20, 1992, Roy City police officer Carl Merino applied to the Circuit Court for a search warrant to search the residence of Defendants (R. 38). The affidavit in support of the application contained no specific facts to support the application for night execution, but instead made only generalized statements applicable to all drug cases and based only on the affiant's general conclusions (R. 40). Nonetheless, nighttime authority was included in the resulting search warrant (R. 43), which was executed that same date at 6:30 p.m. (R. 83). The parties stipulated that the sun set at 5:29 p.m. on that day (R. 83). Upon executing the search warrant the officers found and seized the evidence upon which this prosecution was initiated.

SUMMARY OF ARGUMENTS

1. The trial court properly concluded that this search warrant was executed "in the night" within the statutory meaning. In the circumstances of this case, where the warrant was executed one hour after sunset in the winter, the trial judge's conclusion that night had fallen was not clearly erroneous.

2. The exclusionary rule was properly applied to the evidence seized as a result of the execution of the defective search warrant. The decision of the Utah Supreme Court in State v. Rowe, 196 Utah Adv. Rep. 14 (Utah 1992), relied upon the existence in that case of a valid arrest warrant which afforded an alternative lawful justification for the executing officers' presence in the place searched.

ARGUMENT

POINT I: THE FINDING BY THE TRIAL COURT THAT THIS WARRANT WAS EXECUTED "IN THE NIGHT" WAS NOT CLEARLY ERRONEOUS.

Unless the trial court's finding of fact that the search warrant in this case was executed "in the nighttime" was clearly erroneous, it should not be disturbed. State v. Bobo, 803 P.2d 1268 (Utah App. 1990) at 1271-2. The trial court's findings are "clearly erroneous" only if they are in conflict with the clear weight of the evidence, State v. Marshall, 791 P.2d 880 (Utah App. 1990), cert. den. 800 P.2d 1105 (Utah 1990), or if the appellate court has a "definite and firm conviction that a mistake has been made," State v. Walker, 743 P.2d 191 (Utah 1987).

The factual basis in this record for the trial court's finding of "nighttime" is the parties' stipulation that the search warrant was executed at 6:30 p.m. on a midwinter day when the sun had set an hour earlier at 5:29 p.m. Only these facts exist on the record, and it is clear that the trial judge reached the finding of "nighttime" in one or both of the following ways:

1. That common sense would dictate that darkness had descended an hour after sunset on a late January day, and that darkness was a sufficient basis to conclude that the warrant was served "in the night;" or
2. That the word "night" in the statute should be defined as the period between sunset and sunrise.

There are no Utah cases defining "nighttime" for the purpose of searches, State v. Purser, 828 P.2d 515 (Utah App. 1992), and the statute itself is silent on this point. There is, however, ample authority to support the trial court's conclusion that actual darkness constitutes "night." See, e.g., State v. Burnside, 741 P.2d 352 (Idaho 1987), holding that unless there is sufficient natural light to distinguish a person's features, it is "night." In State v. Holman, 424 N.W.2d 627 (Neb. 1988), where the daytime warrant was executed at 8:00 p.m. on a day (March 31) on which it was stipulated the sun had set at 6:47 p.m., the court, holding that "daytime" extends from dawn to darkness, reversed the trial court's denial of a motion to suppress. The darkness standard is also adopted in Kuenzel v. State, 577 So.2d 474 (Ala. Cr. App. 1990). Although the record in this case does not expressly describe darkness, the only logical inference that may be drawn from the stipulation is that it was in fact dark when this

warrant was executed, because on a midwinter day it will be dark long before an hour has passed since the sun has set.

The only other logical conclusion the trial judge could have reached, that "night" is the period between sunset and sunrise, is equally sound. It is a fundamental rule of construction that statutory terms which are not specifically defined are to be taken in the sense in which they are understood in common language. State v. Holman, supra, at 628. Virtually every reputable dictionary consulted gives as the preferred definition of "night," the "period between sunset and sunrise." Webster's New Universal Unabridged Dictionary (2d ed. 1979). This division of time between day and night on the basis of sunset and sunrise is a universally accepted and commonly understood concept.

The State urges this Court to define "night" in our statute by adopting Federal Rule of Criminal Procedure 41(h), which defines "daytime" as the period from 6:00 a.m. to 10:00 p.m. Such an arbitrary definition would effectively condone the execution of "daytime only" search warrants during the several hours each day of total darkness which fall within the specified hours during the winter. In light of the historical recognition that the search of a dwelling after darkness has fallen is even more invasive than one during daylight, State v. Rowe, 806 P.2d 730 (Utah App. 1991) at 738-39 and n. 10, 11 at 739, the adoption of such an arbitrary standard would therefore destroy the clear legislative intent to distinguish such searches.

POINT II: THE TRIAL COURT PROPERLY EXCLUDED THE EVIDENCE SEIZED
UPON THE EXECUTION OF THIS DEFECTIVE SEARCH WARRANT.

The State concedes that this search warrant was defective because the supporting affidavit lacked the requisite factual specificity to authorize nighttime entry. Brief of Appellant at 5 n. 2. This case is thus factually identical with State v. Rowe, 196 Utah Adv. Rep. 14 (Utah 1992), where the Supreme Court reversed a decision of this Court which had applied the exclusionary rule to evidence seized with a nighttime warrant which was defective in the same way as that in the present case. State v. Rowe, 806 P.2d 730 (Utah Ct. App. 1991), rev'd, 196 Utah Adv. Rep. 14 (Utah 1992).

The disposition of this appeal depends on the proper interpretation of the Supreme Court decision in Rowe II, where the Supreme Court said:

"We have previously held that suppression of evidence is an appropriate remedy for illegal police conduct only when that conduct implicates a fundamental violation of a defendant's rights. (citing State v. Fixel, 744 P.2d 1366 [Utah 1987]). . . .

Under the facts of this case, we conclude that the violation of section 77-23-5 did not implicate defendant's fundamental rights. . . .

It is of particular significance that in addition to the search warrant for Swickey's apartment, the officers carried a valid warrant for Swickey's arrest. . . The officers' entry into the apartment during nighttime hours and without notice, although not properly authorized by the search warrant, was properly authorized by the warrant for Swickey's arrest. . . Inasmuch as the officers made lawful entry onto the premises and had general authority to secure those premises plus a valid warrant to search the premises during the daylight, the improperly authorized execution

of that search during the nighttime constitutes a minimal intrusion on interests protected by the Fourth Amendment." 196 Utah Adv. Rep. at 15-16 (emphasis added).

Contrary to the assertion in the State's brief that Rowe II stands for the proposition that a violation of §77-23-5 is always procedural only, and never implicates a defendant's fundamental rights, the above language makes it clear that the particular facts of Rowe II compelled the conclusion in that case only. The Supreme Court carefully confined its holding to the facts of that case, and expressly tied its conclusion that the violation in that case did not involve a fundamental right to the existence of a valid arrest warrant for one of the occupants of the dwelling. The concurring opinion of Justice Durham (joined by Justice Zimmerman) emphasizes this point. Rowe II, supra, at 16.

It is Appellees' position that because the police in this case, unlike Rowe II, did not simultaneously possess a valid arrest warrant for an occupant of the residence, the violation of §77-23-5 involved a fundamental right under the Fourth Amendment, and the trial court therefore properly applied the exclusionary rule. Under this analysis, the showing of bad faith or prejudice which the State suggests becomes immaterial, since these factors come into play only if a violation does not "implicate a fundamental violation of a defendant's rights." The violation in this case involved a fundamental right; indeed, the particularized requirements for nighttime searches may even be a "constitutional imperative." Rowe I, supra, n. 11 at 739.

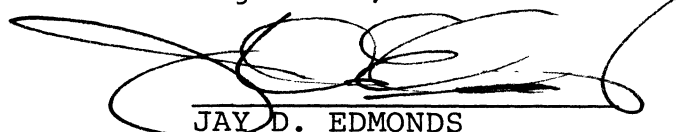
CONCLUSION

The trial court's finding that this search warrant was executed at "night" was based upon the parties' stipulation that the warrant was served at 6:30 p.m. on a winter day when the sun had set an hour earlier at 5:29 p.m. The lower court reached this conclusion either through a common sense deduction that darkness had fallen and that it was therefore "night," or that "night" includes the period from sunset to sunrise. The former proposition cannot be said to be "clearly erroneous" under the relevant test, and the latter legal conclusion, given the universally accepted definition of "night," is supported by rules of statutory construction and decisional law.

The Supreme Court decision in Rowe II does not hold that the violation of the nighttime requirements of §77-23-5 never implicates a fundamental right of a defendant; the Rowe II opinion carefully confines its holding to the specific facts in that case, where a valid arrest warrant provided an alternative lawful means of entry into the residence. No such alternative exists to justify the nighttime search in this case, and the exclusionary rule was therefore properly invoked by the trial court.

The trial court's suppression of the evidence should be affirmed.

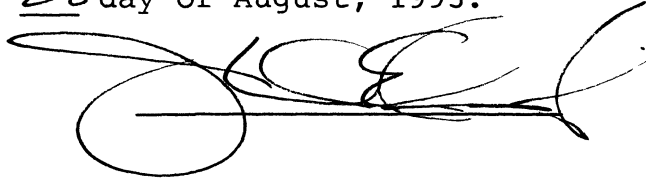
RESPECTFULLY SUBMITTED
August 28, 1993:



JAY D. EDMONDS
Attorney for Appellees

CERTIFICATE

I hereby certify that I mailed, postage prepaid, two copies of the foregoing Brief of Appellees to Kenneth A. Bronston, Assistant Attorney General, attorney for Appellant, 236 State Capitol Bldg., Salt Lake City, UT 84114, this 28 day of August, 1993.

A handwritten signature in black ink, consisting of a large, stylized 'C' followed by several loops and a horizontal line extending to the right.

ADDENDUM

TRIAL COURT FINDINGS AND ORDER ON DEFENDANTS' MOTION TO SUPPRESS

BRIGHAM DISTRICT

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OCT 30 12 21 PM '92

IN THE FIRST JUDICIAL DISTRICT COURT FOR BOX ELDER COUNTY

STATE OF UTAH

| | | |
|-----------------------|---|-------------------------------------|
| THE STATE OF UTAH, | : | |
| Plaintiff, | : | <u>FINDINGS AND ORDER ON DEFEN-</u> |
| - vs - | : | <u>DANTS' MOTION TO SUPPRESS</u> |
| DAVID SIMMONS and | : | Criminal Nos. 921000014 |
| PATRICIA KAY SIMMONS, | : | 921000015 |
| Defendants. | : | |
| | : | |

The Defendants' Motion to Suppress came before the Court for hearing on August 3, 1992, and for rehearing on October 19, 1992; defendants were each present with counsel and the State was represented by Jon J. Bunderson, Box Elder County Attorney. A written Motion to Suppress evidence in these cases was previously filed and supporting Memoranda were filed by both parties. The State filed a Supplemental Memorandum herein. The parties stipulated that the search warrant in these cases was executed at 6:30 p.m. on January 20, 1992 and that the sun set at 5:29 p.m. that day. The Court, having heard the arguments and representations of counsel and having considered the Memoranda in support of and opposition to the motion, and being otherwise fully advised herein, the Court now makes the following findings:

1. That the search warrant in these cases was executed in the nighttime.

2. That the affidavit in support of the search warrant

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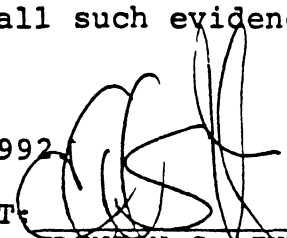
alleges no specific facts justifying a nighttime search as required by §77-23-5(1), Utah Code Ann., but rather alleges matters based upon the affiant's general knowledge and experience in drug cases.

3. Because there is no evidence before the Court that the officers who executed the search warrant in this case had in their possession a valid warrant for the arrest of any person within the premises searched, the procedural defect in failing to include sufficient grounds for nighttime entry, and the nighttime execution of this search warrant, amounted to a fundamental violation of the Defendants' rights requiring suppression of the evidence seized pursuant to the search warrant. State v. Fixel, 744 P.2d 1366 (Utah 1987); State v. Rowe, 196 Utah Adv. Rep. 14 (Utah 1992).

Based upon the foregoing findings, IT IS HEREBY ORDERED that all evidence seized pursuant to the execution of the search warrant in these cases, and the fruits of all such evidence, be, and the same are hereby suppressed.

DATED this 10 day of ^{Nov} ~~October~~, 1992.

BY THE COURT:


CLINTON S. JUDKINS
First District Judge

FORM AND CONTENT APPROVED
AND COPY RECEIVED:


JON J. BUNDERSON
Box Elder County Attorney