

1969

## The State of Utah v. Fred A. Cunico : Defendant-Appellant's Brief

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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THE STATE OF UTAH,  
*Plaintiff and Respondent,*

vs.

Case No.  
11730

FRED A. CUNICO,  
*Defendant and Appellant*

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DEFENDANT—APPELLANT'S BRIEF

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Appeal from the Judgment of the Second District Court  
for Weber County  
Honorable John F. Wahlquist, Judge

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## Cases Cited

Aguilar v. Texas, 378 U.S. 108 (1964)

Spinelli v. United States (1969)

Utah v. Jasso, 439, P 2d 844 (1968)

## Constitutions Cited

Constitution of the United States, Amendment IV

Constitution of the United States, Amendment XIV

Constitution of the State of Utah, Article I,  
Section 14

## Statutes Cited

Utah Code Annotated, Section 77-35-12 (1953)

Utah Code Annotated, Section 77-35-13 (1953)

Utah Code Annotated, Section 77-54-13 (1953)

Utah Code Annotated, Section 77-54-16 (1953)

Utah Code Annotated, Section 77-55-5 (1953—

IN THE SUPREME COURT  
OF THE STATE OF UTAH

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THE STATE OF UTAH

*Plaintiff and Respondent,*

*vs.*

Case No.  
11730

FRED A. CUNICO,

*Defendant and Appellant*

---

DEFENDANT—APPELLANT'S BRIEF

---

STATEMENT OF KIND OF CASE

Appeal from a decision denying Appellant's motion to suppress evidence and his conviction on the charge of unlawful possession of marijuana.

DISPOSITION IN LOWER COURT

Appellant was tried and convicted of the crime of possession of marijuana. His trial and motion for suppression of evidence were heard before the Honorable John F. Wahlquist in the Second Judicial Court. From a judgment of guilty, Appellant appeals.

## RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the order denying his motion to suppress evidence and a reversal of his conviction.

### STATEMENT OF FACTS

In the morning hours of Friday, February 14, 1969, two Weber County Sheriff Deputies, Elias R. Rivera and William Dermody, searched the premises at 170 Ogden Canyon. (T 54). At that time evidence was obtained, which was later used to convict the Appellant for possession of marijuana. (T 63). The search was made pursuant to a Warrant signed by the Honorable Parley E. Norseth of the Second Judicial District Court. (Warrant). (T 53). It was issued in the name of William White who lived with Appellant at 170 Ogden Canyon. (Warrant).

The Search Warrant was issued pursuant to an Affidavit prepared by William Dermody, Deputy, Weber County Sheriff's Department. (T 38). The allegations contained in the Affidavit are as follows:

I received information from Mrs. Margaret Jorgensen, a nurse, employed in the Psychiatric Ward of the St. Benedicts Hospital. She stated to me that Mr. William White had not showed up for work for six days. Mr. White is employed as an orderly in the Psychiatric Ward of the St. Benedicts Hospital. She stated that she and other nurses became concerned over the situation and that she called Bill White at his residence at 170 Ogden Canyon.

Mrs. Jorgensen said that Bill White acted like a different person while speaking over the telephone. He told her that he had finally found himself and that he no longer was in need of the necessities of life such as food, shelter, and clothing. Mrs. Jorgensen also said that Bill White told her that he wanted to die and go to heaven as he had already been there.

Mrs. Jorgensen also stated that during her telephone conversation with Bill White he mentioned he was on a trip, but he gave her no indication as to what type Narcotic Drug he was using.

I received a telephone call 2-11-69 at 8:00 p.m., from a Rev. Glen M. Schrop, Pastor of St. Helens Catholic Church, Roosevelt, Utah. Father Schrop stated to me that he was a close friend of the White family (he didn't mention any certain member of the family) that William White who resides at 170 Ogden Canyon had been taking Narcotics and that he had some mental problems.

(Affidavit)

Reverend Schrop's phone call was initiated by Nurse Jorgensen. After talking to William White, and getting the impression that he might be taking narcotics, Nurse Jorgensen called Reverend Schrop and asked him to also call the police.

Neither person suggested narcotics were being used on the premises. (T. 39, 42) In fact, there was no mention of the Appellant at all. (Affidavit) Neither the credibility of the informants nor the reliability of their information was checked. Moreover, there were no substantiating facts shown to indicate the presence of marijuana at 170 Ogden Canyon. The informants phone calls constituted nothing more than a statement of concern for William White who they believed might be using narcotics. (T 53). On the basis of these allegations alone, the Search Warrant was issued. (T 65).

During the search, a plastic bottle of marijuana was seized by the Deputy Sheriffs. It was not receipted as required by statute. (T 40), nor was the Appellant given a copy of the return of Search Warrant which is also required by statute. (T 40). At the trial, Appellant moved to suppress the evidence so obtained and the motion was denied. (T 50).

The trial was conducted before a judge and jury. At its conclusion the judge instructed the jury on the amount of marijuana as follows: "the possession of a great amount or a small amount, though the amount possessed may be of concern to a judge in passing sentence, it would not be material to the guilt or innocence of the defendant." (Instruction 6) The instruction prejudiced the Appellant in that the jury was given the impression that since only a small amount of marijuana was found, the sentence would be light.

The Appellant was found guilty. (T 163). A presentence report was prepared by the Utah State Department of Adult Probation and Parole, and upon request, a copy was refused the Appellant. Allegations contained in the report were beyond the scope of the trial, and were of a hearsay nature. Much of the material had no relationship to evidence introduced at trial and the Appellant did not have an opportunity to be confronted by the allegations in open court. The report was used by the judge in determining the severity of the sentence which is in violation of 77-35-13 Utah Code Annotated (1953). Appellant was sentenced to eight months in the county jail after which he was to be placed on a strict probation term. He was denied a stay of execution upon motion and began serving his sentence immediately. Later he was released on the basis that he leave the State of Utah.

## **ARGUMENT**

### **POINT I**

**THE AFFIDAVIT FOR THE SEARCH WARRANT DID NOT STATE SUFFICIENT FACTS TO SHOW PROBABLE CAUSE, THEREFORE, THE SEARCH WARRANT WAS NOT LEGALLY ISSUED, AND THE SEARCH WAS UNLAWFUL.**

The United States Constitution, Fourth and Fourteenth Amendments, and the Utah Constitution, Article I, Section 14, forbid the issuance of a Search Warrant except on probable cause supported by an oath or affirmation. The applicable language is set out below:

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 warrant shall issue but upon probable cause supported by oath or affirmation particularly describing the place to be searched and the person or thing to be seized.

The facts and circumstances upon which probable cause is based must be found within the Affidavit itself before the Search Warrant may issue; Utah v. Jasso, 439, P 2d 844 (1968). There are two important recent United States Supreme Court decisions concerning the sufficiency of an Affidavit for a Search Warrant: Aguilar v. Texas, 378, U.S. 108 (1964), and Spinelli v. United States, (1969).

In Aguilar, the Search Warrant was issued upon an Affidavit by police officers who swore that they had received reliable information from a credible person and that the informer believed that narcotics were illegally stored on the described premises. The court held the Affidavit totally insufficient for the following reasons: (1) the application failed to set forth any of the underlying circumstances necessary to enable the magistrate independently to judge the validity of the informants conclusions and in particular that the narcotics were where he claimed them to be, (2) the affiant officer did not attempt to support his claim that the informant was credible or that his information was reliable. Neither of these criteria for a lawful search were met in the present case.

The Spinelli case, supra, involved an Affidavit which was held insufficient, because there were no facts given to the magistrate to support the informers reliability. Probable cause exists only when the facts and circumstances known to the affiant officer warrant the magistrate, acting as a prudent man, in believing that the offense has been committed. As stated before, those facts and circumstances must all be contained in the Affidavit since it must be judged on its face for sufficiency; Utah v. Jasso, supra.

In this case, there is nothing in the Affidavit to show that marijuana was located on the described premises. Compounding the problems raised by the insufficiency of the Affidavit is the fact that the Search Warrant itself was issued in the name of another, and that no part of the Affidavit referred to the Appellant. Moreover, there was no effort made to show the magistrate that the informants were credible people and that their information was reliable.

Thus, none of the requirements in Aguilar, Spinelli and Jasso cases were met and the search was unlawful.

## POINT II

EVIDENCE SEIZED BY THE DEPUTY SHERIFFS DURING THE SEARCH WAS NOT RECEIPTED AS REQUIRED BY STATUTE' NOR WAS APPELLANT GIVEN A RETURN OF THE SEARCH WARRANT AND THEREBY WAS NOT PUT ON NOTICE AS TO THE EVIDENCE TO BE USED AGAINST HIM.

Section 77-54-13, Utah Code Annotated, 1953, requires an officer who takes property under a warrant to give a receipt for the property taken specifying it in detail to the

person from whom it was taken. In the present case, the Deputy Sheriffs seized a plastic bottle of marijuana used in evidence against the Appellant, and no receipt was given. The same requirement is also found in 77-55-5, Utah Code Annotated, 1953, concerning receipt for property taken from a person who has been arrested.

Also, no copy of the inventory of the property taken was delivered to the Appellant as required by 77-54-16, Utah Code Annotated, 1953.

These omissions violate the Appellant's substantive due process rights as protected by the Fourteenth Amendment to the Constitution of the United States.

### POINT III

THE TRIAL JUDGE ERRORED IN INSTRUCTING THE JURY THAT THE AMOUNT OF MARIJUANA FOUND MAY BE USED BY HIM IN DETERMINING THE SENTENCE.

The instruction given to the jury stated:

[T]he law makes no distinction between the possession of a great amount or small amount though the amount possessed may be one of concern to a Judge in passing sentence ...

Since the amount of marijuana involved in the Appellant's case was minimal the instruction to the jury was prejudicial to the Appellant. The jurors were placed in the position of being able to find the Appellant guilty a little easier by thinking that his sentence or punishment would not be severe since a minor amount of marijuana was found.

## POINT IV

FACTS AND CIRCUMSTANCES USED IN DETERMINING THE SENTENCE GIVEN TO THE APPELLANT WERE BEYOND THE EVIDENTIARY FACTS PRESENTED IN OPEN COURT.

Section 77-35-12, Utah Code Annotated, 1953, provides that when discretion is conferred upon the court as to the extent of punishment, it may take into consideration any circumstances either in aggravation or in mitigation of the punishment which may be presented by either party. Section 77-35-13, Utah Code Annotated, 1953 requires that the circumstances must be presented by the testimony of witnesses examined in open court, and that no other Affidavit or testimony or representation of any kind, verbal or written, shall be offered or received. In this case, a presentence report was used by the Judge in determining the severity of the sentence. There were allegations made in the report which had no foundational basis in the trial nor were they presented in open court. The report was prejudicial to Appellant and violated his due process rights as protected by the Fourteenth Amendment of the United States Constitution, and the Utah Code provisions cited.

## CONCLUSION

The Affidavit for Search Warrant did not establish probable cause upon which a warrant could be lawfully issued and therefore the resulting search was illegal.

Evidence seized during the search was not receipted as required by statute, nor was the Appellant given a copy of the Search Warrant return, and thereby was not put on notice as to evidence which would be used against him.

The trial Judge instructed the jury to the prejudice of the Appellant by inferring to them that if the Appellant was found guilty of possession of marijuana the sentence might not be too severe since only a slight amount of marijuana was found.

The discretion of the trial Judge as to the extent of punishment was abused in that the circumstances considered by him in determining punishment was based on out of court materials to the prejudice of Appellant.

Respectfully submitted,

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