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OF UTAH,

vs.

CUNICO,

BRIEF OF

AL FROM THE
DISTRICT COURT
ORABLE JOH

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Utah 84401
Attorneys for Appellant

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In The Supreme Court of the State of Utah

THE STATE OF UTAH,
Plaintiff-Respondent,

vs.

FRED A. CUNICO,
Defendant-Appellant.

Case No. 11730

BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

This appeal concerns the legality of evidence seized pursuant to a warrant and the subsequent conviction and sentence thereof.

DISPOSITION IN THE LOWER COURT

The defendant was tried and found guilty of the crime of possession of marijuana.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order in harmony with the decision below.

STATEMENT OF FACTS

William Dermody, a Deputy in the Weber County Sheriff's Office, was telephoned by a nurse who informed him that she had just spoken to a Mr. White and that White had not only acted and talked strangely, but also that he informed her that he was on a trip. The nurse informed the officer that her conclusion was that White was using some type of narcotic. This conclusion was thereafter substantiated when the peace officer was telephoned by a Catholic Father who stated that Mr. White had been taking narcotic drugs.

The officer then made an application for a search warrant and prepared a written affidavit stating his reasons and the names of his informers as to why the warrant should be granted.

This warrant was used by the Weber County Sheriff's Office and marijuana was found. A jury convicted White and the appellant, who was also living at the place searched.

ARGUMENT

POINT I

THE SEARCH WARRANT WAS PROPERLY ISSUED AND THE EVIDENCE THEREBY SEIZED WAS PROPERLY ADMITTED.

The search warrant is not only a helpful tool for law enforcement agencies but also an effective means of controlling crime. As long as constitu-

tional safeguards are met, search warrants may properly be issued. Point I of this brief thereby concerns itself with whether or not these constitutional safeguards have been met in the instant case.

Both the Fourth Amendment of the Constitution of the United States and the Utah State Constitution make the following statement:

> "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 and the person or thing to be seized." United States Constitution, Amendment IV; Utah Constitution, Article I, § 14.

Utah statutes specify the required steps one must take before a magistrate can properly issue a warrant. In order for a peace officer to obtain a search warrant the following outlined requirements must be met:

A. The complainant must be examined upon oath by the magistrate. Utah Code Ann. § 77-54-4 (1953).

B. The complainant must sign a written deposition (Utah Code Ann. § 77-54-4) setting forth facts or probable cause for believing that one of the following grounds exist (Utah Code Ann. § 77-54-5):

   1. Presence of stolen property;

2. Presence of property used in committing a felony; or

3. Presence of property which is intended to be used in committing a public offense. Utah Code Ann. § 77-54-2 (1953)

A. A MAGISTRATE'S DETERMINATION OF PROBABLE CAUSE IN ISSUING A SEARCH WARRANT MUST BE GIVEN GREAT DEFERENCE BY REVIEWING COURTS.

In the case of *Spinelli v. United States*, 89 S. Ct. 584 (1969) the defendant was convicted of interstate travel in aid of racketeering. A search warrant was issued upon the affiant's conclusion that the anonymous informer was reliable. In holding that the search warrant was improperly issued because of lack of information, the United States Supreme Court made the following significant statement:

> "The affidavit, then, falls short of the standards set forth in *Aquilar*, *Draper*, and our other decisions that give content to the notion of probable cause. In holding as we have done, we do not retreat from the established propositions that only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause . . . that affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial . . . that in judging probable cause issuing magistrates are not to be confined by nigardly limitations or by restrictions on the use of their common sense . . . and that their determination

> of probable cause should be paid great deference by reviewing courts . . ." *Id.*, 89 S. Ct. at 590-591.

B. THIS AFFIDAVIT FOR THE SEARCH WARRANT STATED SUFFICIENT FACTS TO SHOW PROBABLE CAUSE.

As stated by *Spinelli v. United States, supra,* this court should give great deference to the common sense of the issuing magistrate.

From the affidavit as set out in Appellant's Brief, pages 2 and 3, it is noted that both informers were named. This fact alone distinguishes the instant case from *Spinelli* and *Aquilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509 (1964), and the standards set up by those cases dealing with anonymous informers are thereby inapposite.

The appellant contends that the complainant did not support his claim that he had received credible, reliable information. This contention has no merit. The affidavit itself names not only the nurse who initially called the peace officer, but also the Rev. Glen M. Schrop, Pastor of St. Helens Catholic Church in Roosevelt, Utah. Common sense dictates that when a nurse calls a police officer informing him of one who is using narcotics, and the nurse's telephone call is substantiated later by a Catholic Father, who also states that this person had been using narcotics, credibility can hardly be an issue.

It would be easy for the magistrate to determine that there were narcotics being used at 170 Ogden

Canyon. The nurse (who would have more familiarity with drugs than either the peace officer or the magistrate) had stated that White told her that he was on a trip, although William White was at home when she called. Mrs. Jorgensen also stated that White acted differently and that he told her he wanted to die and return to heaven. From these facts, which were all stated in the affidavit, Nurse Jorgensen assumed Bill White was on some type of narcotic drug. From this testimony alone the magistrate could have determined that there was probable cause and could have issued a proper warrant. But in addition to the nurse's conclusion about narcotic use, Father Schrop had called the peace officer and told him that White had been taking narcotics. Common sense gave the magistrate no choice —he had to issue the warrant. Note the following statute:

> "If the magistrate is thereupon satisfied of the existence of the grounds of the application, or that there is probable cause to believe their existence, *he must issue a search warrant*, signed by him with his official title, to a peace officer in his county, commanding him forthwith to search the person or place named for the property specified and to bring it before the magistrate." Utah Code Ann. § 77-54-6 (1953) (Emphasis added.)

C. A SEARCH WARRANT NEED NOT NAME THE DEFENDANT IN ORDER TO USE THE SEIZED EVIDENCE AGAINST HIM.

In the instant case, probable cause was found to exist and a search warrant was properly issued.

The warrant named William White and stated the address at 170 Ogden Canyon. The police officers were not misled. They went to the named premises and found marijuana there. The Utah and United States Constitutional requirements were not violated. The reason why the person or property must be particularly described is to insure that the right premises and right person will be searched and not innocent neighbors.

A contention similar to appellant's was made in the case of *Miller v. Sigler*, 353 F.2d 424 (8th Cir. 1965). In that case the court sets out the following guideline:

> "Finally, petitioner objects to not being personally named in the warrant. This issue, however, does not appear ripe for review. It was not presented below in the petition and no reference was made to the point during the hearing. Therefore, this Court is not in a position to be able to make a substantive finding on the merits. It might be well taken by the parties, however, if the Court were to make one observation. The warrant appears to describe with particularity the place to be searched and the things to be seized. *This would seem to satisfy the constitutional requirements in this case, for the Fourth Amendment does not require the warrant to name the person who occupies the described premises.*" *Id.*, 353 F.2d at 428. (Emphasis added.)

This dicta would apply to our fact situation. The warrant described the place to be searched, and named the tenant. This satisfies the requirements.

There was probable cause for believing sufficient grounds. The informers were named, common sense demands credibility in this case, and the place to be searched was adequately described. Therefore, the search warrant was properly issued and the evidence thereby seized was properly admitted.

D. APPELLANT HAS BEEN DENIED NO SUBSTANTIVE DUE PROCESS RIGHTS.

The facts in this case are as follows. A receipt was made out for a pipe. Officer Dermody later added two other items to that receipt. The receipt was originally given to Fred Cunico. According to the transcript, both White and Cunico were present when the additional items were added. The policeman testified as follows:

> "I asked for the receipt back, I believe from Mr. Cunico and I added the other two items, and I am not sure which one I gave it back to." (R. at 40)

There is testimony by White that he did not receive the receipt. (R. at 45). Cunico would be the logical one to have received it. He never did deny receipt. The question was therefore properly submitted to the jury.

Once a magistrate receives the return of the warrant he also should receive a verified affidavit by the peace officer at the foot of the inventory. Utah Code Ann. § 77-54-15 (1953). Also note the following statute:

> "The magistrate must thereupon, *if required*, deliver a copy of the inventory to the person from whose possession the property was taken, and to the applicant for the warrant." Utah Code Ann. § 77-54-16 (1953). (Emphasis added.)

It is not mandatory for the magistrate to give a copy of the inventory to the property owner. The court is referred to *United States v. Greene*, 141 F. Supp. 856 (1956), wherein the court correctly points out that the weight of authority favors the idea that:

> ". . . . . [S]taturoy requirements as to the receipt and inventory are only ministerial, and that failure to comply therewith will not invalidate a valid warrant, or render inadmissible the articles seized." *Id.*, 141 F. Supp. at 858.

Substantial compliance with statutes governing the execution of search warrants is all that is required. *United States v. Freeman*, 144 F. Supp. 669 (1956).

POINT II

THE JURY INSTRUCTION PROPERLY STATED THE LAW, AND WAS NOT PREJUDICIAL.

The instruction given is quoted in part below:

> "You must find that State's exhibit C. (the pipe) and / or State's exhibit B. is marijuana prohibited under the Utah statutes from being in the possession of anyone. . . . To qualify the material must be leaves or stems. They need not be in any particular quantity because the law makes to (sic) distinction between the posses-

> sion, 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 except a person cannot be guilty without consciousness thereof." (R. at 17, Instruction No. 6).

The court is given discretion in certain types of punishments.

> "When discretion is conferred upon the court as to the extent of punishment, the court, at the time of pronouncing judgment, may take into consideration any circumstances, either in aggravation or mitigation of the punishment, which may then be presented to it by either party." Utah Code Ann. § 77-35-12 (1953).

According to this statute, the trial judge did not misstate the law.

The contention of the appellant is merely metaphysical. He argues that upon hearing this instruction the jurors would find appellant guilty knowing that punishment would be slight. The exact opposite could be as easily argued. The jurors could just as easily have decided that since the sentence would be light they would find not guilty and achieve the same result.

In view of the common knowledge the public has of the sentencing system of our courts, no prejudice could have resulted in this instruction. The public at large knows of the things that the judge takes into consideration when he sentences one convicted of a crime. By informing the jury of the stat

utory law, the judge merely showed the jury his knowledge of his own duties.

It should be pointed out that the challenged instruction includes a phrase which states that the amount of marijuana found is immaterial to the guilt or innocence of the defendant. This statement is found after the challenged clause.

Courts frequently find that no prejudicial error results from comments or instructions by the Judge informing the jury of the possibility of parole, when no death penalty was imposed. See *Cullens v. State*, 94 Ga. App. 894, 96 S.E.2d 540 (1957); *McKee v. State*, 159 Fla. 794, 33 So. 2d 50 (1947); *People v. Sukdol*, 322 Ill. 540, 153 N.E. 727 (1926); and *Goddart v. State*, 65 Okla. Crim. 472, 88 P.2d 911 (1939).

POINT III

WITHOUT A SHOWING THAT THE PRE-SENTENCE REPORT INJURED THIS APPELLANT, THE SUPREME COURT SHOULD CONTINUE TO REFUSE REVIEW OF THIS TYPE OF ISSUE.

In Utah it is common practice for the judge to examine pre-sentence reports in order to pass a fair sentence on the convicted felon. The preparation of this report is one of the duties of parole and probation officers.

With statutes very similar to ours, the Idaho Supreme Court has dealt with this problem several times .The most recent Idaho decision on this point finally places Idaho in the same judicial position as Utah has been for many years.

In *State v. Rolfe*, 92 Idaho 467, 444 P.2d 428 (1968), the Court was dealing with a person convicted of rape. A pre-sentence report was presented to the Court for examination. The Idaho Supreme Court looked at its previous decisions which seemed to indicate that the complete pre-sentence report had to be disclosed to both parties. The Court courageously made the following statement:

> "We now modify these rulings to comport with what this court deems the better rule, namely, that the trial judge has discretion as to whether the full contents of the pre-sentence report be disclosed to the defendant at the hearing on his application for probation. Where the trial judge chooses not to disclose the report, he is obligated, however, to give the defendant sufficient information concerning adverse matters contained therein so that the defendant may be in a position to offer intelligent refution." *Id.*, 444 P.2d at 433-434.

This decision makes good judicial sense. Persons may feel free giving information to a probation officer to be included in a pre-sentence report if they know that their identity will not be revealed. But if the full report were to be made public, the desired information would be small indeed.

The appellant does not allege that he asked the Judge what particular matters were taken into consideration in passing the sentence. He therefore does not fit into the better rule as laid down by the Idaho Court.

Many years ago, Utah passed on this question and came up with the same answer that Idaho reached last year. In the case of *State v. Martin*, 49 Utah 346, 164 P. 500 (1917), the Supreme Court of Utah was asked to consider a case where judge's preliminary remarks indicated that he was influenced in the sentence he gave by facts and circumstances of other encounters with that defendant. The court held that since the fairness of the trial was not questioned, the issue was not reviewable by the Supreme Court but should be presented to the board of pardons.

There is nothing in the record to show that Appellant was not adequately given opportunity to question or object to the sentencing process in this case. This question then, should *not* be a reviewable issue.

CONCLUSION

For the reasons submitted, the Respondent urges the Honorable Court to affirm the lower court's ruling.

Respectfully submitted,

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