1967

State of Utah v. Leon Marlowe Kent : Brief of Appellant

In the Supreme Court of the State of Utah

STATE OF UTAH,

Plaintiff-Respondent,

- vs -

LEON MARLOWE KENT,

Defendant-Appellant.

Case No. 10713

BRIEF OF APPELLANT

Appeal from the Judgment of the
Third Judicial District Court for Salt Lake County,
Honorable Marcellus K. Snow, Judge.

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STATEMENT OF NATURE OF THE CASE

The appellant, Leon Marlowe Kent, was charged with the crime of Unlawful Possession of a Narcotic Drug.

DISPOSITION IN LOWER COURT

The matter was tried before the Honorable Marcellus K. Snow, Judge of the Third Judicial District Court. On the 8th day of June, 1966, defendant's motion

to suppress evidence, seized in a search of his residence, was denied. On the 22nd of June, 1966, the matter was submitted for trial on stipulation of counsel that the testimony would be the same as at the hearing on the motion to suppress and, in addition, that the State chemist would testify that there were narcotics in the articles taken from appellant's residence. The motion to suppress was renewed and denied and the trial court found the appellant guilty. The appellant was placed on probation on condition he serve three months in the county jail.

RELIEF SOUGHT ON APPEAL

The appellant seeks reversal of the ruling on the motion to suppress and of the conviction.

STATEMENT OF FACTS

The appellant was charged with the unlawful possession of narcotic drugs which were seized by the Salt Lake City Police in the apartment where appellant resided. The facts surrounding the seizure of the key evidence were as follows:

An officer of the Salt Lake City Police Intelligence Unit approached the manager of the motel in which appellant's apartment was located and sought her cooperation in securing a position where the officer could

take the appellant's apartment under observation and note "the comings and goings of individuals they [Mr. and Mrs. Kent] may be associated with." (R-25) The manager did not have a unit available adjacent to appellant's apartment, but she showed the officer a utility crawl way over the appellant's apartment with access to a vent through which the officer could observe the entire bathroom area of appellant's apartment. (R-25-77) The vent was partially shielded to prevent an occupant of the bathroom from noticing the attic area above (R-27), and the light in the attic were kept off during the surveillance. (R-28) No observations of note were made through the vent on the first day, but the officer, by peering through the drapes of the bedroom window, observed Mrs. Kent folding what appeared to be white powder into tissue paper. (R-29)

The officer kept the bathroom under observation for two more days and on the third day solicited the help of two more officers. They formulated a plan whereby the first officer was to continue the observation through the bathroom vent "to try to obtain probable cause to make an observation either verbal or visual that would give us reason to arrest the parties inside" where upon he would radio the information to his partners who would go in and make the arrest. (R-31-34)

The officers sat patiently through the morning and part of the afternoon without observing anything which could be used as a basis for arrest. (R-31) However,

around 2:00 p.m. the officer observed the appellant come into the bathroom and prepare what appeared to be a narcotic solution and a homemade syringe. The officer radioed to his partner who immediately walked into the residence and placed Marlowe and Janice Kent under arrest on the strength of what he had been told by the officer with a view. (R. 32-35)

The officers then searched the apartment and found narcotics and paraphernalia. (R-35)

The officers had neither a search or an arrest warrant. (R-29, 35)

Prior to trial, appellant moved to suppress all testimony regarding what the officer saw and heard in the interior of appellant's residence, the physical evidence seized, and all statements made by appellant immediately following arrest. (No statements were put into evidence.) The motion was denied.

At trial before the court, sitting without a jury, the motion was renewed and denied. The matter was submitted upon stipulation of counsel that the testimony of the officers would be the same as at the preliminary hearing and that the State chemist would testify that the substances found in appellant's residence were narcotic drugs. The court found the appellant guilty.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS EVIDENCE SECURED BY AN INVASION OF APPELLANT'S PRIVACY IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The question presented by this case is simply: Is it lawful under our constitution for police officers, without any warrant, to surreptitiously spy and evesdrop on activities in the innermost sanctuary of a citizen's residence in the hopes of observing a crime? If not, the arrest in this case which, according to plan, was based entirely on observations so made was also illegal and the articles seized incident thereto inadmissible in evidence. *Beck v. Ohio*, 379 U.S. 89 (1964).

There cannot be any question that the activity of the police in this case constituted a violation of the privacy of appellant. It is difficult to conceive of a more gross infringement of privacy than the surrepticious observation of a person's bathroom for three days. The only issue is whether such activity constitutes a "search" within the meaning of the Fourth Amendment.

It is submitted that the recent cases, taking cognizance of the fundamental purpose of the Fourth Amendment to protect privacy, hold that such visual infringements are as illegal as physical trespasses. (Of course, an argument could be made in this case that the officer trespassed when he stuck his head into the vent since the vent was an integral part of the apartment rented by appellant.)

In *Brock v. United States,* 223 F.2d 681, 685 (5th Cir. 1955), in holding articles seized incident to an arrest based on audio and visual observations made through a bedroom window, the court said:

> Whatever quibbles there may be as to where the curtilage begins and ends, clear it is that standing on a man's premises and looking in his bedroom window is a violation of his "right to be let alone" as guaranteed by the Fifth Amendment.

Likewise, in *People v. Hurst,* 325 F.2d 891 (9th Cir. 1964), the court held that observations made through a bathroom window constituted an illegal search and that the arrest and search which followed were "fruit of the poisoned tree."

In *Bielicki v. Superior Court of Los Angeles County,* 371 P.2d 288 (Cal. 1962), the California Supreme Court held that observations made by an officer through a pipe

in the roof of a *public* toilet were inadmissable as being made in violation of the right to privacy. See also *People v. Regalado,* 36 Cal. Rptr. 795 (Dist. Ct. App. 1964), wherein narcotics seized following an observation made by an officer through a small hole in a hotel room door were held inadmissable.

The United States Supreme Court has ruled a search illegal in an analogous case. *Silverman v. United States,* 365 U.S. 505 (1961). In that case officers had attached a listening device to the heating duct outside of the defendant's apartment. In dismissing the government's argument that no trespass occurred since there was no entry, the Court said:

> In these circumstances we need not pause to consider whether or not there was a technical trespass under local property law relating to party walls. Inherent Fourth Amendment rights are not inevitably measurable in terms of ancient nicities of tort or real property law. 365 U.S. at 510.

In all of the above cases it is apparent that the courts are adopting an invasion of privacy concept. In the words of Mr. Justice Douglas, "Our sole concern should be with whether the privacy of the home was invaded." *Silverman, supra,* at 365 U.S. 513 (concurring opinion). The facts of the instant case present a far grosser invasion of privacy than in any of the above cases.

Both the above cases and the instant case can be distinguished from those cases where an officer, walking by or coming up on a front porch, sees something through an open door or undraped window. One does not expect privacy while standing by an open door; but one does while in his bathroom or bedroom with the drapes closed.

Appellant recognizes the fact that the police in the instant case discovered a crime that otherwise might never have come to light. What is unknown is how many bathrooms and bedrooms were watched for how many days without any results in crime detection. Presumably numerous crimes, especially those under the wide scope of our sexual offenses statutes, could be discovered by surrepticiously putting television cameras in all the bedrooms and bathrooms of the state, but few of us would wish to live in such a crime free society at such expense.

CONCLUSION

For the reasons stated above, it is submitted that the observations made by the officer in this case constituted a violation of the right to privacy guaranteed by the Fourth Amendment to the United States Constitution and therefore it was error for the trial court to deny the motion to suppress the evidence secured as a result of those observations and the conviction based on this evidence should therefore be reversed.

Respectfully submitted,

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