1967

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

In The Supreme Court of the State of Utah

STATE OF UTAH,

Plaintiff-Respondent,

v.

LEON MARLOWE KENT,

Defendant-Appellant.

BRIEF OF RESPONDE

Appeal from the Judgment of the Third
Court for Salt Lake Co
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TABLE OF CONTENTS

Cases Cited

TABLE OF CONTENTS—(Continued)

In The Supreme Court of the State of Utah

STATE OF UTAH,

Plaintiff-Respondent,

v.

LEON MARLOWE KENT,

Defendant-Appellant.

Case No. 10713

BRIEF OF RESPONDENT

STATEMENT OF NATURE OF CASE

The appellant, Leon Marlowe Kent, was convicted of the crime of unlawful possession of narcotic drugs.

DISPOSITION IN LOWER COURT

The appellant was charged with unlawful possession of narcotic drugs. Prior to trial a motion to suppress certain evidence was made on the basis of an allegedly illegal search and seizure. The trial court denied the motion to suppress. On a trial before the court sitting without a jury, appellant was found guilty of the charge of unlawful possession of narcotics.

RELIEF SOUGHT ON APPEAL

Respondent submits that the conviction and the denial of appellant's motion to suppress certain evidence should be affirmed.

STATEMENT OF FACTS

Respondent submits the following statement of facts. The allegedly illegal search and seizure occurred as follows:

In pursuit of an investigation (R. 25), Officer H. W. Patrick, of the Salt Lake City Police Department, proceeded to the Tower Motel, Salt Lake City, Utah, for the purpose of undertaking a surveillance of the activities of the appellant (R. 25). Officer Patrick contacted the manager of the Tower Motel and asked for an adjoining unit so that "We could probably see associates coming and going to their residence" (R. 25). The manager informed Officer Patrick that the only feasible adjoining unit was occupied, "But that she [the manager] had an area that she felt would be adequate in providing the purpose that we needed. She took me to an overhead area, which is where all the heating and air conditioning ducts, all the wires and the access to the boiler room was, above the unit area. It encompasses the whole upstairs story of the unit or of the motel" (R. 25). From this area, the officer had access to an open vent to the bathroom of appellant's unit from which it was felt that visual and verbal observations could be made (R. 26). The vent was of such a nature that a

person standing in the bathroom of the appellant's motel unit could look up and see someone looking down the vent (R. 27):

On the third day of observation, Officer Patrick observed appellant enter the bathroom and prepare to "shoot up" (R. 33). Officer Patrick radioed to his companion on the street and the arrest was effectuated.

ARGUMENT

POINT I

THE ACTIONS AND OBSERVATIONS BY THE POLICE OFFICERS DID NOT CONSTITUTE A SEARCH AND SEIZURE WITHIN THE CONSTITUTIONAL SENSE.

A. NO EVIDENCE AGAINST THE APPELLANT WAS OBTAINED BY MEANS OF A TRESPASS OR UNLAWFUL ENTRY.

The record is unequivocable that Officer Patrick approached the manager of the Tower Motel for the purpose of obtaining a unit adjacent to appellant's unit for the purpose of surveillance. The manager informed the officer that there was not an available unit but suggested and escorted the officer to an area overhead of the appellant's unit (R. 25). Appellant has not nor does he now claim a right or interest in the overhead area to which the officer was escorted.

It is submitted that there must be a physical intrusion into an area over which one has dominion

and control before there is a search of that area by another. **Goldman v. United States,** 316 U.S. 129 (1940). In **On Lee v. United States,** 343 U.S. 747 (1952), the United States Supreme Court was asked to consider a problem allegedly left unanswered in **Goldman v. United States, supra.** That problem was the affect on a search and seizure question of a trespass. The court stated at 753:

> **Only in the case of physical entry, either by force . . . by unwilling submission to authority . . . or without any express or implied consent . . . would the problem left undecided in the Goldman case be before the court.**

The Court then concluded that because there had not been a physical entry so as to constitute a trespass, the problem would remain unanswered. In the instant case, it cannot be said that Officer Patrick violated an area over which the appellant exercised complete dominion and control. Rather, the officer's physical presence was in an area suggested and designated by the manager of the motel and over which the manager had exclusive control and dominion. Appellants cite **Stoner v. California,** 376 U.S. 483 (1964), and **Chapman v. United States,** 365 U.S. 610 (1961), for the proposition that the consent of the owner of the motel was without effect (R. 8). However, the **Stoner** case was involved with an actual entry by the police officers into the petitioner's motel room and the **Chapman** case involved a physical entry into the petitioner's rented home. Here, there was no physical entry of appellant's room by the police officer. The area from which

Officer Patrick made the assailed observations was an area over which the appellant could claim no valid right or interest. No citation of authority is necessary for the proposition that a land owner or another vested with the complete control and dominion over an area may allow persons thereon and that such presence is not subject to complaint by one with no interest or right in the area.

Appellant's reference to **Silverman v. United States,** 365 U.S. 505 (1961), as being an analogous case, is incorrect. In that case, the court was keenly aware of the actual physical intrusion effected by the police with the result that the petitioners entire heating system was converted into a conductor of sound. As stated at 509, ". . . the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by the petitioners."

B. THE OBSERVATIONS BY THE POLICE OFFICERS DID NOT CONSTITUTE A SEARCH.

From the area occupied by Officer Patrick, observation into the unit occupied by the appellant was readily available (R. 27). The officer did not have to take any affirmative action, such as removing a cover from the vent (R. 27), but rather, merely observed that which was open to observation by anyone in the area which the officer occupied.

This court has recognized the principle that mere observation of that which is readily open to view does not constitute a search. In **State v. Allred,**

16 Utah 2d 41, 44, 395 P.2d 535, 537 (1964), it was stated:

> **No search was necessary for the officer to find these articles, they being fully disclosed to his view when he approached the car. Under such circumstances, where no search is required the constitutional guarantee is not applicable.**

In **Chapman v. United States,** 346 F.2d 383, 387 (9th Cir. 1965), it was stated:

> **It is not a search for an officer to observe (once lawfully near or on and within premises) that which is clearly and plainly to be seen, even if he uses search lights or field glasses.**

An officer of the peace does not have to ignore that which his senses reveal. **Burks v. United States,** 287 F.2d 117 (9th Cir. 1961); **Martin v. United States,** 155 F.2d 503 (5th Cir. 1946). Officer Patrick did no more than observe that which was open to observation by anyone occupying the area. It may also here be noted that Officer Patrick testified that it would be possible for someone in the bathroom of appellant's unit to readily ascertain that he was being observed through the vent (R. 27).

In **State v. Smith,** 37 N.J. 481, 181 A.2d 761 (1962), **cert. denied,** 374 U.S. 835 (1963), the Supreme Court of New Jersey considered a challenge that there was an illegal search and seizure where police officers observed the commission of a crime through a crack in the door or the keyhole. The court stated, 37 N.J. at 495, 181 A.2d at 768:

> Here the officers saw the offense. That they saw it through a crack in the door or the keyhole does not affect the direct character of the knowledge gained or the conclusion that the offense occurred in their 'presence' within the meaning of that word. Rather it raises at best a different question, whether thus to peer into private property through an aperture constitutes a search, with the result that the arrest depended upon the product of the search, rather than the search upon the arrest.

The court concluded, 37 N.J. at 496, 181 A.2d at 769:

> This leaves the fact that officers looked through an opening to view what was going on within the apartment. Peering through a window or a crack in a door or a keyhole is not, in the abstract, genteel behavior, but the Fourth Amendment does not protect against all conduct unworthy of a good neighbor. Even surveillance of a house to see who enters and leaves is something less than good manners would permit. But it is the duty of a policeman to investigate, and we cannot say that in striking a balance between the rights of the individual and the needs of law enforcement, the Fourth Amendment itself draws the blinds the occupant could have drawn but did not. **In the absence of a physical entry into premises secured by the amendment, there is no unreasonable search.** In such circumstances it has been held that the guaranteed right of privacy is not violated when a police officer, by use of his senses, detects a criminal event occurring in an area protected by the amendment. [Emphasis added.]

Appellant's brief, page 7, states:

> 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 inadmissible.

However, appellant's brief fails to clarify the fact that the court was primarily concerned with the knowledge of the arresting officers in two respects. The court stated, 36 Cal. Rptr. at 797:

> The only reason they [the officers] had for believing a crime was being committed what was Walsh saw when he peeked through the hole in the door.
>
> . . . .
>
> The officers knew, from their familiarity with the methods of the police in the district, that the hole was one of many which the police had bored for use in spying upon the inmates of rented rooms. The holes were maintained for the use of any and all officers while on spying missions.

In the instant case, Officer Patrick testified that contact with the manager of the Tower Motel was effectuated in pursuit of an investigation (R. 25). It is also conceded that Officer Patrick took no action other than to observe that which was open to view.

CONCLUSION

It is submitted that the conviction of the appellant and the denial of appellant's motion to suppress certain evidence should be affirmed on the ground that there was no physical trespass or unlawful entry into the premises occupied by the appellant. Rather, the officer was merely observing that which was open to view from an area suggested and re-

vealed to the officer by the person having complete control and dominion over the area.

Respectfully submitted,

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