

2004

State of Utah v. Bernadette Duran : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
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 Plaintiff Appellant, : Appellate No. 20040421-CA
 :
 vs. :
 : Criminal No. 031700152
 Bernadette Duran , :
 :
 :
 Defendant Appellee, :
 :
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REPLY BRIEF OF APPELLANT

APPEAL FROM CONVICTIONS ENTERED UPON A CONDITIONAL PLEA
IN THE SEVENTH JUDICIAL DISTRICT COURT
THE HONORABLE BRYCE K. BRYNER, DISTRICT JUDGE

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Defendant Appellant is presently incarcerated in the Utah State
Prison.

A PUBLISHED DECISION IS REQUESTED BY APPELLANT

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ARGUMENT

I. Whether a showing of common authority requires more than a showing of a landlord's ownership of a tenant's residence.

In its brief, Appellee fails to address this argument. Appellant resubmits it for consideration and requests that the Appellate Court reverse the Trial Court's ruling.

II. Exigent Circumstances

a. Whether Appellee's argument is factually supported by the record.

The State asserts in its brief that there is an adequate record of the fact that marijuana was being destroyed at the time of the officers' no-warrant search and entry of the residence. *Brief of the Appellee*, at 8-9. This assertion is incorrect. There was no evidence presented at the hearing that indicated that marijuana was being smoked at the time of the officers' arrival, approach, entrance, or search of the residence.¹ In *South*, as in this case, there was an odor of marijuana smoke emanating from the home.² *State v. South*,

¹ Officer Barnes's testimony that Eddie Horvath had told the officers that Eddie had witnessed people smoking dope in the residence, did not indicate when Eddie had witnessed this activity. *Hearing Transcript*, at 18. Officer Barnes testified that he could smell burnt marijuana not marijuana burning. *Id.* at 19-20.

² Officer Barnes testified that the odor leaking out of the cracks of the trailer was faint. *Hearing Transcript*, at 19. Contrary to the Appellee's assertion, none of the officers testified to having

885 P.2d 795, 797 (Utah App. Ct. 1994). However whether that odor was from stale or fresh smoke was not established in either case. It would be improper to affirm on alternative grounds based upon these inadequacies in the court's record.

b. Whether the odor of marijuana smoke can be considered as an "exigent circumstance."

The Utah Court of Appeals held in *South* that, "the fact that the marijuana may be removed, hidden, or destroyed is not, in and of itself, an exigent circumstance." *Id.* at 800.³ The Court further held that, "if we were to hold that the mere possibility that evidence

"observed" the odor. Brief of the Appellee at 14.

³ In *South*, the officers search the defendants' residence with out a search warrant after smelling the odor of burnt marijuana emanating for the defendant's person and residence. *Stave v. South* 885 P.2d 795, 797 (Utah Ct. App. 1994). The Appellant is unable to find on page 799 or anywhere in the Utah Court of Appeal's decision in *South*, as cited Brief of the Appellee, where the court distinguished stale smoke from fresh smoke. *Brief of the Appellee* at footnote 4. Appellant is furthermore unable to find anywhere in the opinion where the officers involved in the *South* case referred to the odor of marijuana as being stale. *Id.*

may be destroyed constitutes an exigent circumstance, we would essentially undermine the exigent circumstance requirement since it is possible that most forms of evidence can be destroyed before officers return with a warrant." *Id.*

In an effort to distinguish the facts in the instant case from those in *South*, the State argues, citing non-binding authority, that the smell of people smoking marijuana should constitute an exigent circumstance and justify the warrantless entry and search by the police of another's residence. *Brief of the Appellee*, at 12. As applied to the facts in this case, this argument fails for several reasons.

First, the State, at the suppression hearing, offered no direct evidence that would support this assertion. Furthermore as it was established in *State v. Rodriguez*, questions of, "time and exigency" were not adequately found by the trial court.⁴ *State v. Rodriguez*,

⁴ At least 41 minutes had past, from the time officers received the information of illegal drug activity from Eddie and Sue Horvath, until they arrived at the Horvath residence. *Hearing Transcript*, at 17-18. It is very likely that the marijuana that Eddie Horvath witnessed the unidentified persons' in the home smoking had already been "smoked up" before the officers arrival or entry into the home.

It is also relevant to note that upon entering the home none of those people in the home were smoking marijuana and the Defendant

93 P3d 854, 859 (Utah Ct. App. 2004). There was no testimony to establish when, Eddie Horvath witnessed, the people in the trailer smoking marijuana; how much marijuana the people in the home where in possession of; or how fast they were smoking it.

Second, as applied to the facts in this case, the State's argument is undistinguishable from the state's prior argument in *South. South*, at 800. The *South* court held that the possibility that evidence could be destroyed during the time that it would take officers to obtain a warrant does not constitute exigent circumstances. *Id.* The facts in this case fall within the scope of the *South* ruling.

Third, in the alternative, there were less restrictive means that the officers could have employed to protect themselves and the evidence without violating the Defendant's constitutional right to be free from unreasonable search and seizure. At least 41 minutes had past, from the time officers received the information of illegal drug activity from Eddie and Sue Horvath, until they arrived at the Horvath residence. *Hearing Transcript*, at 17-18. The officers could have at least attempted to obtain a warrant in the time it took them to arrive at the home. Another possibility is that they could have split up and secured the area until a search warrant was obtained.

The Appellee argues that, "the exigencies in this case were also increased by the possibility that Lance would return while a

was asleep. *Id.* at 23-24.

warrant was being sought and that he would carry through on his prior threats to use his guns against police officers." *Brief of Appellee*, at 15. This theoretical threat could have been easily minimized by securing the home while another officer sought to obtain a warrant.

CONCLUSION

The officers in this case were simply exercising their preference to search without a warrant and hoping that no one in the residence would have the standing to assert the violation of the 4th amendment's protections.

Ms. Bernadette Duran respectfully requests that the Trial Court's ruling denying her motion to suppress be reversed.

DATED this 29 day of November, 2004.



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This Brief requires no addendum.

* * * * *

CERTIFICATE OF SERVICE

I hereby certify that seven (7) copies and one original of the foregoing were mailed by U.S. First Class Mail, postage prepaid, to the Court of Appeals and that two (2) copies of the forgoing were mailed by U.S. First Class Mail, postage prepaid, to Office of the Utah Attorney General, Appellate Division at the addresses listed below on this 29 day of November, 2004.



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