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Utah v. Mitchell Worwood : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

vs.

MITCHELL WORWOOD,

Defendant/Appellant.

Case No. 20040701-CA

BRIEF OF APPELLANT

**APPEAL FROM AN ORDER DENYING A MOTION TO SUPPRESS EVIDENCE
IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR JUAB COUNTY,
UTAH, THE HONORABLE DONALD EYRE PRESIDING.**

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PUBLISHED OPINION AND ORAL ARGUMENT REQUESTED **FILED**
UTAH APPELLATE COURTS
JUN 16 2005

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PUBLISHED OPINION AND ORAL ARGUMENT REQUESTED

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

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Defendant/Appellant.

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REPLY BRIEF OF APPELLANT

SUMMARY OF ARGUMENT

Cory Wright lacked reasonable suspicion to detain Mr. Worwood in this case as bloodshot eyes, slurred speech, a wet spot and a partially crushed beer can laying on a road do not constitute reasonable articulable facts that a crime has been or is about to be committed. There are many reasons unrelated to criminal conduct why a person might have bloodshot eyes and slurred speech. Further, there were no objective facts to suggest that Mr. Worwood was impaired, such as the smell of alcohol, body sway or an impaired driving pattern. Therefore, based on the totality of these circumstances, Officer Wright lacked reasonable suspicion to detain Mr. Worwood.

Even assuming *arguendo* that there was reasonable suspicion to justify the level two stop, Mr. Worwood was then unlawfully arrested without probable cause. The facts of this case constitute an arrest under both federal and state law. Because there was no

probable cause to arrest, the level three detention was unlawful and all evidence obtained thereby must be suppressed.

The detention of Mr. Worwood in this case was also unlawful because the officer's decision to take Mr. Worwood into custody and transport him to another location so as not to "mess up" the officer's night, was not a diligent means of investigation likely to confirm or dispel the officer's suspicions of impairment quickly. Moreover, it was not necessary to effectuate the purpose of the stop, as the officer testified that he could have conducted field sobriety tests at the scene but he chose not to.

The evidence in this case, particularly the field sobriety and intoxilizer test results, were obtained as a direct result of the unlawful arrest. Therefore, that evidence so obtained should be suppressed as a matter of law.

ARGUMENT

I. THE DETENTION IN THIS CASE WAS NOT SUPPORTED BY A REASONABLE ARTICULABLE SUSPICION.

It is undisputed in this case that Mr. Worwood was not free to leave once Cory Wright noticed his bloodshot eyes and slurred speech (R92:13-15). However, Cory Wright lacked reasonable suspicion to detain Mr. Worwood. "While reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop." *Illinois v. Wardlow*, 528 U.S. 119 (2000). An officer's reasonable suspicion must be based on "unusual conduct"

strongly suggestive of criminal activity. *State v Rodriguez-Lopi*, 954 P.2d 1290, 1293 (Utah App. 1998). Finally, whether there are objective facts sufficient to create a reasonable suspicion depends on the totality of the circumstances. *Provo City v Warden*, 844 P.2d 360, 362 (Utah App. 1992), *aff'd*, 875 P.2d 557 (Utah 1994).

As applied here, a wet spot on a road is not evidence of intoxication. It also cannot be concluded from one or even several beer cans that a person possessing them is intoxicated. *See, State v Lovegren*, 829 P.2d 155, 158 (Utah App. 1992) (explaining that a car cluttered with beer cans and defendants' bloodshot eyes did not indicate criminal activity). In this case, a partially crushed beer can laying on a public road cannot even be tied to Mr. Worwood. Further, it is well settled in Utah that bloodshot eyes are insufficient to support a reasonable suspicion that a person is intoxicated. *Id.* ("And while bloodshot eyes can indicate the presence of drugs or alcohol, they are equally indicative of dust in one's eyes or lack of sleep."). It is also not uncommon for slurred speech to be a person's normal speech pattern (*see, Beck v Cox*, 597 P.2d 1335, 1343 (Utah 1979), or to be the result of an involuntary medical condition unrelated to intoxication (*see, Elton v Bankers Life & Casualty Co*, 30 Utah 2d 213, 215 (Utah 1973)).

Cory testified that he stopped initially because there was a "big wet spot on the road and then there was a beer can" (R92:5). Cory suspected that Mr. Worwood had been

dumping water out of a cooler because of the size of the wet spot (R92:6).¹ Further, and contrary to the State's representation of the facts, Cory did not detect any odor of alcohol until after he took Mr. Worwood into custody and placed him into Cory's truck. As Cory testified, it was at that point that he first detected the odor of alcohol and "I know it wasn't coming from my vehicle . . ." (R92:9). In short, Cory determined solely from Mr. Worwood's speech and the appearance of his eyes either that Mr. Worwood had been drinking "or there was something wrong" (R92:13). By his own testimony, there were no other facts that Cory relied upon when he determined Mr. Worwood was not allowed to drive and that he would transport Mr. Worwood to Cory's personal residence, where another officer would be summoned to perform field sobriety tests (R92:14). There were no facts to suggest Mr. Worwood was impaired.

Although Mr. Worwood entered his vehicle and drove it a short distance to move it off the road, Cory Wright noticed no body sway or driving pattern to suggest Mr. Worwood was intoxicated, nor did Cory detect the odor of alcohol until after he took Mr. Worwood into custody (R92:9). Cory decided to detain Mr. Worwood for further investigation based solely upon his purported slurred speech, bloodshot eyes, a wet spot on the road, and a partially crushed beer can laying nearby on the road (R92:12, 13).

¹Both the trial court and the State incorrectly assume there was an empty cooler. There is nothing in the record to support this assumption. Although Mr. Worwood's vehicle was never inventoried, Cory testified that he later found a cooler filled with ice and some alcohol (R92:6, 13).

Further, Cory determined that Mr. Worwood had been drinking solely from his speech and the appearance of his eyes (R92:13).

Based on the totality of these circumstances and the law cited above, these facts are insufficient to create a reasonable suspicion and to justify the detaining of Mr. Worwood in this case.

II. THE DETENTION IN THIS CASE EXCEEDED A LEVEL TWO STOP AS MR. WORWOOD WAS ARRESTED WITHOUT PROBABLE CAUSE.

The dispositive issue in this case is whether Mr. Worwood was arrested without probable cause, and therefore, whether all evidence seized as a result of that unlawful arrest should be suppressed. The State does not directly argue the fact that Cory lacked probable cause to arrest Mr. Worwood when he was placed in Cory's vehicle.² The State merely argues that this was a level two encounter and an appropriate investigative detention rather than an arrest. The State is wrong, as the law herein will demonstrate.

The test as to whether a seizure occurs is objective. A seizure occurs if "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United State's v. Mendenhall*, 446 U.S. 544, 554 (1980); *State v. Ramirez*, 817 P.2d 774, 786 (Utah 1991). The objective of the inquiry is

²The State does suggest in a footnote that there might have been probable cause to arrest Mr. Worwood on the basis of slurred speech, bloodshot eyes, and the odor of alcohol. However, as noted herein, Mr. Worwood was taken into custody before the officer detected any odor of alcohol. Accordingly, the precedent relied upon by the State does not apply here.

to deduce whether the defendant remained in the spirit of cooperation with the officer's investigation or believed that he was not free to go. *State v Trujillo*, 739 P.2d 85, 87 (Utah App. 1987).

The facts in this case constitute an arrest under federal law. A *de facto* arrest occurs when the events that occur during a detention are indistinguishable from an arrest. *See, Dunaway v. New York*, 442 U.S. 200, 212 (1979) (explaining that the taking of a murder suspect to the police station for investigative purposes, where he confessed after one hour of interrogation, was not merely an investigative detention, but was an arrest, as these events were indistinguishable from an arrest). This case is similar to those in *Dunaway*, as the officer's refusing to let Mr. Worwood drive, placing him in the officer's personal vehicle, and transporting him to the officer's personal residence are circumstances indistinguishable from an arrest.

The facts in this case also constitute an arrest under State law. As previously noted in Mr. Worwood's opening brief, "an arrest is an actual restraint of the person arrested or submission to custody." UTAH CODE ANN. §77-7-1. Under this controlling statute, Mr. Worwood was undisputably arrested. He was placed in the officer's personal vehicle without resistance – he was both restrained and submitted himself to custody.

The taking of Mr. Worwood into custody, not allowing him to drive his truck, and transporting him to another location, was highly intrusive and clearly constitutes a level 3 encounter, or in other words, an arrest, under Utah Code Ann. §77-7-1 and *State v.*

Hansen, 837 P.2d 987 (Utah App. 1992).³ Mr. Worwood was told he could not drive until another trooper looked at him, and he was not free to leave (R92:13-15). Further, the events of this encounter were indistinguishable from an arrest. As this Court explained, a level two encounter is brief and nonintrusive, where a level three encounter “involves an arrest, which has been characterized as a highly intrusive *or* lengthy detention that requires probable cause. A level three encounter is also a Fourth Amendment seizure.” *Id.* at 661 (emphasis added). This fact is dispositive to Mr. Worwood’s appeal, as all evidence seized as a result of the unlawful arrest must be suppressed.

III. OFFICER WRIGHT DID NOT PURSUE A MEANS OF INVESTIGATION LIKELY TO CONFIRM OR DISPEL HIS SUSPICIONS QUICKLY.

Contrary to the State’s brief, there is nothing in the facts to suggest that the scene of the stop in this case was an unsuitable location to perform field sobriety tests. Also, notwithstanding the fact that the taking of Mr. Worwood into custody without probable cause constituted an unlawful arrest, Cory Wright’s actions further exceeded the

³The State cites multiple cases where courts have held that moving the defendant to a separate location did not constitute an arrest. BRIEF OF APPELLEE (“Br. Appe.”) at 18-20. There are two obvious problems with the State’s use of these cases which the State does not address. First, inapposite to the facts here, not one case cited by the State suggests that the transporting of the defendant was done for officer convenience rather than necessity. Second, under the plain language of the controlling Utah statutory provision, Mr. Worwood was arrested, as he had at least submitted himself to custody. UTAH CODE ANN. §77-7-1.

scope of a level two stop because he did not diligently pursue a means of investigation likely to confirm or dispel his suspicions quickly. *United States v. Sharpe*, 470 U.S. 675, 686 (1985) (“we have emphasized the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes.” *Id.* at 685 (citing *United States v. Hensley*, 469 U.S. 221 (1985))).⁴

This fact is illuminated by Cory’s own testimony that he pursued a means of investigation that catered to his personal whims and convenience, and that would not require him to make an arrest when he was off-duty and thereby “mess up” his night.

Therefore, assuming *arguendo* that the officer involved had a reasonable suspicion that Mr. Worwood was impaired and a level two stop was justified, the next question is what course of action was then reasonable and likely to confirm or dispel the officer’s suspicions quickly. This is a question of necessity, not of convenience. *Florida v. Royer*, 460 U.S. 491, 500 (1983) (explaining that the detention “must be temporary and *last no longer than is necessary* to effectuate the purpose of the stop.”) (emphasis added).

In this case, this mandate translates into a conclusion that the officer should have taken the 2-3 minutes to perform field sobriety tests at the scene. It was simply not necessary to take Mr. Worwood into custody and transport him to a different location to perform field sobriety tests, as Cory admitted during his testimony (R92:11,14,15).

⁴Thus, the central query is not the length of the detention, as the State seems to suggest, but the diligence of the officer in pursuing a means of investigation likely to confirm or dispel his suspicions quickly.

Therefore, what the State is really asking this Court to do here is to expand the bases of an investigative detention from what is necessary to what is convenient.⁵ Moreover, the State is asking this Court to justify a level three encounter, i.e., an arrest, to avoid having an officer's night "messed up" by the inconvenience of performing field sobriety tests when he is off duty.

The State's position effectively supports a holding that a person may be taken into custody without probable cause. If an officer is qualified, but is not inclined to conduct field sobriety tests for reasons of mere personal convenience as established by the record in this case (R92:11, 14, 15),⁶ the State takes the position that the officer's convenience takes precedence over the large volume of Fourth Amendment jurisprudence

⁵The State speculates that Cory Wright did not have his side-arm, handcuffs, etc. because he was off-duty. Not only is there no evidence to support this speculation, but it is directly contrary to Cory's testimony that he chose not to follow through with the investigation and possible subsequent arrest because it would have "messed up" his night (R92:11). Moreover, an officer is not required to have handcuffs, a sidearm, or his patrol vehicle in order to conduct an arrest.

⁶Q. – did you perform any field sobriety tests at that point?

A. No, no. I've got my experience and training – because I was off duty I didn't – I didn't want to – you know it would have messed up my night so I wanted another officer to come and do those because such I did not, so –

Q. And prior to taking him into cust – or prior to taking him in your truck into custody you could have performed field sobriety tests, correct?

A. Well, yeah, I guess I could but –

that requires law enforcement to diligently pursue a means of investigation that does not exceed the scope of necessity. Therefore, the element of “reasonableness” may turn on officer preference. As demonstrated herein, this is not the law.

Based upon the foregoing facts and law, it is clear that Mr. Worwood was arrested without probable cause, and the officer did not pursue a means of investigation necessary and likely to confirm or dispel his suspicions of impairment quickly.

Accordingly, all evidence seized as a result of that unlawful *de facto* arrest, including but not necessarily limited to field sobriety and intoxilizer test results, should be suppressed.

**IV. THE EVIDENCE OBTAINED AS A RESULT OF THE
UNLAWFUL ARREST IN THIS CASE MUST BE SUPPRESSED
AS “FRUIT OF THE POISONOUS TREE.”**

In light of Fourth Amendment jurisprudence directly on point, it seems disingenuous for the State to argue that no evidence was obtained via the unlawful arrest of Mr. Worwood. *See*, Br. Appe. at 22. The contrary should be obvious. “Evidence obtained as a direct result of an unconstitutional search or seizure is plainly subject to exclusion. The question to be resolved when it is claimed that evidence subsequently obtained is ‘tainted’ or is ‘fruit’ of a prior illegality is whether the challenged evidence was ‘come at by exploitation of [the initial] illegality or instead by means sufficiently distinguishable to be purged of the primary taint.’ *Segura v. United States*, 468 U.S. 796, 804 (1984) (quoting *Wong Sun v. United States*, 371 U.S. 471, 484 (1963)).

In this case, the evidence against Mr. Worwood was obtained as a direct result of

the unconstitutional seizure discussed herein. The State cites *United States v. Ibarra-Sanchez*, 203 F.3d 356 (5th Cir. 2000) (per curiam) as helpful to its position that the test results in this case were not obtained via the unlawful seizure of Mr. Worwood. However, the facts in *Ibarra-Sanchez* are distinguishable from this case.

The issue in *Ibarra-Sanchez* revolved around the search of a van after its occupants were purportedly unlawfully arrested without probable cause. The van was legally stopped on the basis of reasonable suspicion. The defendants were then removed from the van, handcuffed and placed in a police vehicle, during which contact the police detected the odor of marijuana in the van. The defendants sought to have the marijuana subsequently found in the van suppressed.

The court determined the officers had probable cause to search the van irrespective of the unlawful seizure of its occupants because they smelled marijuana in the van. As the court concluded, the officers would have discovered the marijuana pursuant to a lawful search whether the defendants were still in the vehicle, standing on the road, or handcuffed in police vehicle. *Id.* In short, the van was lawfully searched because the odor of marijuana gave the officers probable cause. However, the result in *Ibarra-Sanchez* would have been different had the officers found evidence as a direct result of the unlawful arrests, as in this case.⁷ *Wong Sun v. United States*, 371 U.S. at 484.

⁷For example, had the officers searched the defendants' persons incident to arrest and found contraband, or had contraband been discovered on the defendants' persons pursuant to a more thorough search at booking, that evidence would clearly have been

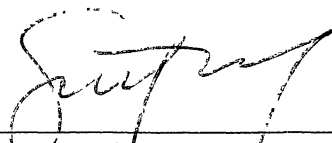
The facts in this case are not similar in any way to those in *Ibarra-Sanchez*. Here, the issue is whether the officer exploited the unlawful arrest and thereby obtained evidence, i.e. the results of the field sobriety and intoxilizer tests. This evidence was directly obtained as a result of Mr. Worwood being taken into custody and transported to Cory Wright's home. This scenario is no different from a case where a defendant is arrested without probable cause and drugs are found on his person pursuant to a search incident to arrest. Clearly, this evidence is fruit of the prior illegality of the unlawful arrest, and as such, it must be suppressed.

CONCLUSION

Appellant, Mitchell Worwood, respectfully requests this Court to hold that the trial court erred in denying his motion to suppress, and thereby vacate his conviction in this case.

Respectfully submitted this 16 day of June, 2005.

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suppressed under the Fourth Amendment as “fruit of the poisonous tree.” *Id.*

MAILING CERTIFICATE

I hereby certify that on this 12th day of June, 2005, I caused to be mailed by United States mail, postage prepaid, a true and correct copy of the foregoing **REPLY BRIEF OF APPELLANT** to the following:

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