2004

The State of Utah v. Paul Anthony Armijo : Appellant's Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
PAUL ANTHONY ARMIJO	:	Case No. 20040965-CA
Defendant/Appellant.	:	

APPELLANT'S REPLY BRIEF

Appeal from a judgment of conviction for Illegal Possession/Use of Controlled Substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (2002), entered by the Honorable Dennis M. Fuchs, Third District Court, Salt Lake County, Utah. Appellant's sentence has been stayed pending the outcome of his appeal. Appellant is not incarcerated.

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ARGUMENT

POINT I. VIOLATIONS OF THE "KNOCK AND ANNOUNCE" RULE CONSTITUTE A FUNDAMENTAL VIOLATION OF THE FOURTH AMENDMENT.

The United States Supreme Court held that the "common law 'knock and announce' principle forms a part of the reasonableness inquiry under the Fourth Amendment." Wilson v. Arkansas, 514 U.S. 927, 929 (1995). This holding clarifies that violations of the "knock and announce" rule constitute a fundamental violation of the Fourth Amendment requiring suppression where factors do not make it reasonable, just as with other types of Fourth Amendment violations.

In State v. Ribe, this Court "decline[d] to adopt a per se rule" that the "knock and announce" statute requires suppression "in light of the Utah Supreme Court's dictates on the subject . . . in the context of police violations of 'rule[s] of criminal procedure.'" 876 P.2d 403, 410 (Utah Ct. App. 1994). However, in Wilson, the U.S. Supreme court made

clear that a violation of the "knock and announce" rule is more than a violation of a rule of criminal procedure but "a principle [that] is an element of the reasonableness inquiry under the Fourth Amendment." Wilson, 514 U.S. at 934.

Therefore, the question no longer is whether a violation of the "knock and announce" rule is fundamental just like other violations of the Fourth Amendment to which there are exceptions but, instead, whether the circumstances surrounding a violation of the "knock and announce" rule requires suppression under the totality of the circumstances. See United States v. Banks, 540 U.S. 31 (2003) (applying the totality of the circumstances to determine whether exceptions to the knock and announce rule justifies its violation); Richards v. Wisconsin, 520 U.S. 385 (1997) (holding that trial court must determine under the totality of the circumstances whether exceptions justified officers "no knock" entry); Wilson v. Arkansas, 514 U.S. at 936 (holding that "although a search and seizure of a dwelling might be constitutionally defective if police officers enter without prior announcement," under the totality of the circumstances officers entry may be reasonable under an exception to the rule); State v. Brown, 853 P.2d 851, 855 (Utah 1992) (listing recognized exceptions justifying warrantless searches where suppression not required).

In this case, the officers violated the "knock and announce" rule by forcing entry into the residence without waiting a reasonable time, and absent exigent circumstances. In doing so, they violated Mr. Armijo's fundamental right to be free from unreasonable

searches under the Fourth Amendment. This fundamental violation required the trial court to grant Mr. Armijo's motion to suppress the evidence.

POINT II. THE STATE'S INEVITABLE DISCOVERY AND UTAH CODE ANN. § 77-23-212 ARGUMENTS DO NOT REQUIRE REVERSAL BECAUSE THEY WERE NOT RAISED BELOW, ARE NOT APPARENT ON THE RECORD AND ARE NOT SUSTAINABLE BY THE FACTUAL FINDINGS OF THE TRIAL COURT.

The State argues (1) the officers would have inevitably discovered the drugs in Mr. Armijo's possession "regardless of the number of seconds the officers waited on the doorstep" and (2) suppression is not justified under Utah Code Ann. § 77-23-212. Appellee. Br. at 26-28, 32. However, the State's alternative grounds for affirmance are prohibited under State v. Topanotes, 2003 UT 30, 76 P.3d 1159, because they are not apparent on the trial court record and not sustainable by the court's factual findings. Id. at ¶9.

First, the State seems to be arguing that had the officers followed the law, then the drugs in Mr. Armijo's possession would have been discovered. However, the Supreme Court has already rejected such a rationale by the state in Topanotes, 2003 UT 30 at ¶19. In Topanotes, the Supreme Court criticized the state for its "if we hadn't done it wrong, we would have done it right" argument, as one that was "far from compelling." Id. The court reasoned that there must be something supporting the "inevitable discovery 'to prevent the inevitable discovery exception from swallowing the exclusionary rule.'" Id. Next, the state argues that even though "section 77-23-212 was not argued in the district

court" it is an alternative ground on which this court can affirm. However, the state does not offer any evidence that its theory "is sustainable on any legal ground or theory apparent on the record." Id. at ¶9.

If the inevitable discovery doctrine or alternative ground for affirmance theory was not raised before or relied on by the trial court, an appellate court can still apply it to affirm a trial court's decision to deny a defendant's motion to suppress. See id. at ¶9 (holding "appellate court may affirm the judgment appealed from 'if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the trial court to be the basis of its ruling or action" (citations omitted)). "However, not only must the alternative ground be apparent on the record, it must also be sustainable by the factual findings of the trial court." Id. "'[T]he court of appeals must then determine whether the facts as found by the trial court are sufficient to sustain the decision of the trial court on the alternate ground.'" Id. (citations omitted). In Topanotes, the Supreme Court determined that

> [There was no] authority for the proposition that the State, after having had one opportunity to establish the admissibility of evidence in the face of a Fourth Amendment challenge, is entitled to a remand to put on new evidence under a new theory of admissibility. In fact, we have previously held that when the State has the burden of proof and the record on appeal fails to sustain any theory of admissibility, the State "is not entitled to a remand to put on new evidence."

Id. at ¶11 (citations omitted)

The inevitable discovery doctrine "enables courts to look to the facts and

circumstances surrounding the discovery of the tainted evidence and asks whether the police would have discovered the evidence despite the illegality."[1] Id. at ¶14. However, it only applies "'[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means.'" Id. (quoting Nix v. Williams, 467 U.S. 431, 444 (1984)) (other citation omitted). "A crucial element of inevitable discovery is independence; there must be some 'independent basis for discovery,' [United States v. Boatwright, 822 F.2d 862, 865 (9th Cir. 1987)], and 'the investigation that inevitably would have led to the evidence [must] be independent of the constitutional violation, [United States v. Larsen, 127 F.3d 984, 987 (10th Cir. 1997)].'" Topanotes, 2003 UT 30 at ¶16 (second alteration in original). "Thus, 'the fact or likelihood that makes the discovery inevitable [must] arise from circumstances other than those disclosed by the illegal search itself.'" Id. (alteration in original) (quoting Boatwright, 822 F.2d at 864-65).

In this case, the trial court's order denying the motion to suppress should not be affirmed under the inevitable discovery doctrine or under the state's section 77-23-212 theory. The State did not argue either of these theories below and the trial court did not rely on either of them in its ruling. R. 121; 202; 203. Accordingly, the inevitable

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[1] The "independent source doctrine describes one method of satisfying the inevitable discovery exception, which is to demonstrate that the same evidence uncovered by illegal police activity would have been obtained by an entirely independent, prior investigation." State v. James, 2000 UT 80, ¶15, 13 P.3d 576.

discovery doctrine and the state's section 77-23-212 argument are only available as an alternative grounds of affirmance and must be sustainable by the factual findings of the trial court. See Topanotes, 2003 UT 30 at ¶9. However, in its ruling, the trial court made no findings that had the officers waited a reasonable time the drugs in Mr. Armijo's possession would have inevitably been discovered or that despite the officer's unlawful search it still cannot be suppressed because under section 77-23-212 the unlawful conduct was not substantial. R. 121-123.

Because the state failed to present evidence under either of these two theories, they are not alternative grounds for affirmance supported or sustained by the record or factual findings. Accordingly, this Court should reverse because the evidence should have been suppressed. See Topanotes, 2003 UT 30 at ¶11 (holding State's failure to meet preponderance of evidence requirement of inevitable discovery doctrine required reversal because when "State has the burden of proof and the record on appeal fails to sustain any theory of admissibility, the State 'is not entitled to a remand to put on new evidence'").

CONCLUSION

As set forth more fully in Appellant's opening brief, Mr. Armijo respectfully requests this Court to reverse the trial court's denial of his motion to suppress, and reverse his conviction.

SUBMITTED this 15 day of November, 2005.

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CERTIFICATE OF DELIVERY

I, DEBRA M. NELSON, hereby certify that I have caused to be hand-delivered the original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, P.O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 15 day of November, 2005.

DEBRA M. NELSON

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this ___ day of November, 2005.