

1972

The State of Utah v. Paul Joe Martinez : Brief of Appellant

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IN THE SUPREME COURT
OF THE STATE OF UTAH

THE STATE OF UTAH,
Plaintiff and Respondent,

Vs.

PAUL JOE MARTINEZ,
Defendant and Appellant

BRIEF OF APPELLANT

APPEAL FROM JUDGMENT OF THE
JUDICIAL DISTRICT COURT IN
THE COUNTY OF WASHINGTON
STATE OF UTAH

Honorable Calvin Gould

FILED

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT
OF THE STATE OF UTAH

THE STATE OF UTAH,
Plaintiff and Respondent,

Case No.

Vs.

12785

PAUL JOE MARTINEZ,
Defendant and Appellant

BRIEF OF APPELLANT

APPEAL FROM JUDGMENT OF THE SECOND
JUDICIAL DISTRICT COURT IN AND FOR
THE COUNTY OF WEBER
STATE OF UTAH

Honorable Calvin Gould presiding

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IN THE SUPREME COURT
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THE STATE OF UTAH,
Plaintiff and Respondent,

Case No.

Vs.

12785

PAUL JOE MARTINEZ,
Defendant and Appellant

BRIEF OF APPELLANT

NATURE OF THE CASE

This is a criminal action charging the defendant with burglary in the second degree.

DISPOSITION IN LOWER COURT

The jury found defendant guilty of burglary in the second degree.

RELIEF SOUGHT ON APPEAL

Defendant seeks a reversal of the jury

verdict of guilty of burglary in the second degree as a matter of law and fact or that failing, a remand of the case to the District Court for a new trial.

STATEMENT OF FACTS

Approximately 11:00 p.m., May 7, 1971, an individual was observed about a late model pickup truck and camper located in a parking area near the corner of Willow and Stephens Streets in Ogden, Utah. That individual was further observed proceeding around the corner onto Willow in a generally easterly direction. (TR 4, lines 16 through 20, lines 26 through 27; TR 6, lines 7 through 9.)

Later, an individual appeared to be crouching in an alley off Willow, paralleling Stephens about one-half block east. (TR 23, lines 5 through 8.)

Still later, it was discovered that the aforementioned truck and camper had been

broken into and a tape deck and two tapes were missing. (TR 54, lines 1 through 4.)

Again later, an individual was noticed about a truck parked on Willow, across from the Hitching Post Lounge. (TR 25, lines 24 through 27.)

Shortly thereafter, Paul Joe Martinez was apprehended proceeding away from the truck on Willow and taken to the front of the Hitching Post Lounge, located on the corner of Willow and Wall Avenues. (TR 27, 5 through 12.)

Around midnight, Officer Donald R. Moore arrived at the Hitching Post Lounge to conduct an investigation. Officer Moore searched Paul Joe Martinez and discovered a set of Ford ignition keys. (TR 46, lines 9 through 16.) Officer Moore then summoned Officer Grant J. Price to the Hitching Post Lounge for the purpose of booking Mr. Martinez. (TR 68, lines 16 through 27)

Officer Price booked Mr. Martinez in the Weber County Jail and returned to the scene to aid Officer Moore in conducting the investigation. (TR 72, lines 8 through 12.)

During the investigation, a stereo tape deck and two tapes were discovered in "boot" area of a Ford convertible (TR 49, lines 8 through 13.) parked on Stephens, south of the Willow intersection, approximately one and one-half blocks from the Hitching Post Lounge, and one block from the burglarized truck. No search warrant was obtained (TR 63, lines 4 through 7), and the convertible could not be seen from the Hitching Post Lounge. (TR 50, lines 2 through 4.) The deck and tapes were discovered 30 to 60 minutes following defendant's arrest. (TR 63, lines 12 through 17), and the plexi-glass rear window of the convertible was zipped out (TR 63, lines 18 through 22), but the testimony of the investigating officers is in conflict with regard to other events

surrounding the discovery of the deck and tapes.

Officer Price testified twice that he and Officer Moore were looking for a Ford convertible (TR 217, line 6; TR 72, lines 3 and 4.) This information was supplied Officer Moore by his investigation and interrogation of Mr. Martinez at the Hitching Post Lounge (TR 46, lines 11, 12, 15, 16, 19, 20.) When Officer Price and Officer Moore found the vehicle, Officer Price, while checking the vehicle, picked up the plexiglass flap (TR 69, lines 26 and 27), discovered the deck and tapes and informed Officer Moore (TR 69, lines 21 and 22). Officer Price further testified that he didn't see the deck and tapes until he lifted the flap (TR 20, lines 20 and 21).

Officer Moore, on the other hand, testified that upon learning Paul Joe Martinez had driven to the area in a Ford automobile began to search for Paul Joe Martinez's car

(TR 46, lines 26 and 27). Upon discovering Paul Joe Martinez's car, Officer Moore testified he discovered the deck and tapes under the plexiglass window (TR 48, lines 4 through 7). Officer Moore further testified that the deck and tapes were visible through the plexiglass (TR 49, lines 14 through 16).

Over defendant's objection, the deck and the tapes were admitted on the ground that the actions of Officer Moore and Officer Price constituted a seizure without search as the items were in plain sight (TR 64, lines 4 through 10; TR 74, lines 1 through 6).

POINT I

THE EVIDENCE DOES NOT SUPPORT THE VERDICT OF GUILTY RENDERED BY THE JURY AGAINST DEFENDANT.

There is nothing contained in the transcript of proceedings which positively identifies Paul Joe Martinez as the individual seen near the burglarized truck (TR 17,

lines 9 through 12). None of the witnesses were able to identify Paul Joe Martinez until he was apprehended. The witnesses were able to identify only the man who was apprehended, Paul Joe Martinez.

Further, there is no testimony of any sort connecting the figure near the burglarized truck with the automobile belonging to Paul Joe Martinez. Nor is there a shred of evidence placing Paul Joe Martinez anywhere near the automobile from the time the truck was burglarized until Paul Joe Martinez was apprehended.

Yet, the jury must have chosen to believe that, somehow, Paul Joe Martinez, removed the deck and tapes from the truck and secreted them in his car. Yet the State, in an effort to somehow connect Paul Joe Martinez with the truck, attempted to raise an inference that Paul Joe Martinez was the man near the truck and was periodically observed until apprehended. The evidence

at no time places Paul Joe Martinez or anyone else anywhere near Paul Joe Martinez's automobile; but, on the contrary, would suggest Paul Joe Martinez was never anywhere near the automobile.

The jury should not have found Paul Joe Martinez was the man who burglarized the truck for failure of identification.

Further, the inconsistency in the states evidence in attempting to place Paul Joe Martinez in several places almost simultaneously should have been resolved in favor of Paul Joe Martinez.

POINT II

THE EVIDENCE OBTAINED BY A WARRANTLESS SEARCH OF DEFENDANT'S AUTOMOBILE SHOULD HAVE BEEN EXCLUDED BY THE TRIAL COURT.

The trial court held the deck and tapes discovered in Paul Joe Martinez's car were in plain sight; and, as such, were not discovered pursuant to a search subject to constitutional protection.

The evidence, however, does not support

this view. First, the Officers did not have any information with regard to the location of the defendant's automobile. A search was, in fact, conducted to locate the automobile. Secondly, the greatest weight of the evidence supports the proposition that a search of the automobile was conducted when the automobile was discovered. It should be remembered in this regard, that the search for and of the automobile took place in the middle of the night with the aid of flashlights in an area of little or no street lighting. Further, Officer Price testified that the plexiglass covering the evidence was opaque to a degree that it was necessary to lift it to observe the deck and tapes. State's exhibit "J", a photograph of the plexiglass in question is further evidence of the difficulty one would experience in discerning items thereunder in the light of day, let alone the

black of night.

While the "plain sight" "exception" to the seizure of evidence without a warrant is recognized in Utah; it is important to note that, in order for evidence to be admitted thereunder, the evidence must not be the objective of an ongoing search and must, indeed, be in plain sight. State vs. Criscola, 21 Utah 2d 272, 444 p.2d. 517 (1968); State vs. Richards, No. 12323, October 5, 1971; Harris vs. United States, 390 U. S. 234 (1968).

In the instant case, a search was underway before defendant's car was even discovered; and, while Officer Moore claimed he could observe the deck and tapes under opaque plexiglass in the middle of the night, the greater weight of the evidence supports the proposition that the search which was already underway continued with the discovery of defendant's automobile.

Thus, the car, deck and tapes were the object of an ongoing search; and, most certainly the deck and tapes were not in plain sight.

The State argued that the search and seizure were pursuant to a lawful arrest, but the search and seizure were contemporaneous neither in time nor place with the arrest as required by Preston vs. United States, 376 U. S. 364 (1964). The State also argued that the authorities were simply taking an inventory, but there was no routine administrative search in the instant case as was the case in State vs. Criscola, 21 Utah 2d 272, 444 p.2d. 517 (1968). Finally, the State argued that an automobile could be searched on an officer's probable cause rather than a magistrate's; but in the instant case, the vehicle was unoccupied, and authorities had custody of both Paul Joe Martinez and the ignition

keys abrogating the risks inherent in cases where a vehicle is occupied by alerted, armed suspects, as was the case in Chambers vs. Moroney 399 U. S. 42 (1970).

The Trial Court rejected the latter three theories of admissibility in finding the evidence was in plain sight.

The primary focus should involve an application of the standard adopted in State vs. Criscola, supra, and reaffirmed in State vs. Richards, supra:

"The question to be answered is whether under the circumstances the search or seizure is one which fair-minded persons, knowing the facts, and giving due consideration to the rights and interests of the public, as well as to those of the suspect, would judge to be an unreasonable or oppressive intrusion against the latter's rights"

When the "reasonableness test" is applied, it should become apparent that it would have been perfectly reasonable in the instant case to require investigating officers to obtain a warrant. Paul Joe Martinez was in jail when the search was

conducted as much as one (1) full hour after his arrest. Investigating officers knew he had driven to the scene and had possession of his ignition keys. There was no evidence he may have had an accomplice. At no time was there any danger the vehicle may be removed, especially after officers discovered the automobile.

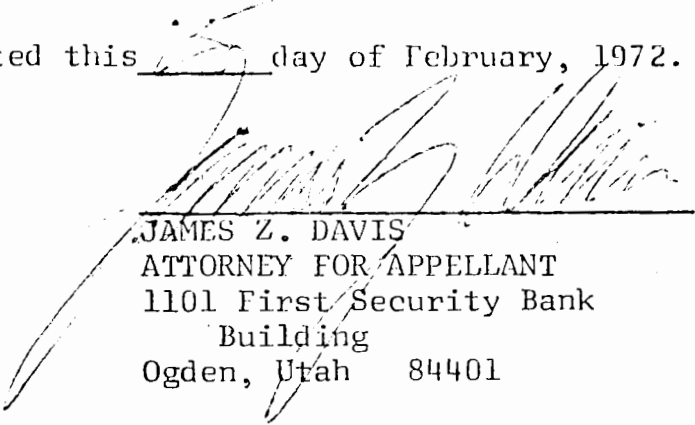
CONCLUSION

Paul Joe Martinez was never positively tied to the burglary, and the State would place him in more than one place at the same time.

Under the circumstances, a warrantless search of Paul Joe Martinez's automobile was unreasonable and evidence obtained thereby should have been excluded.

This case should be remanded to the District Court for dismissal or for a new trial.

Dated this 15 day of February, 1972.



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