1972

State of Utah v. David Kaae, Keith Wayne Ewer, & Michael Horne : Brief of Appellants

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	
POINT 1	3
THE COURT BELOW ERRED IN ADMITTING EVIDENCE THAT WAS THE RESULT OF AN ILLEGAL SEARCH IN THAT THE SEARCH WAS MADE WITHOUT A WARRANT AND THE SEARCH DID NOT FALL WITHIN THE SCOPE OF THE RECOGNIZED EXCEPTIONS TO THE WARRANT REQUIREMENT.	
POINT 2	9
ASSUMING THAT THE SEARCH AND ARREST WERE ILLEGAL THE COURT BELOW ERRED IN ADMITTING INTO EVIDENCE APPELLANTS CONFESSIONS.	
CONCLUSION	15

STATUTES CITED

76-9-3 Utah Code Ann., (1953) .....

76-38-1 Utah Code Ann., (1953) .....

OTHER AUTHORITIES CITED

American Law Institute, Proposed Model Code of Pre-Arraignment Procedure (tentative Draft No. 1,1966) .....

CASES CITED

	Page
WOLF v COLORADO 338 U.S. 25, 27-28 93 L. Ed 1782 (1948)	4
COOLIDGE v NEW HAMPSHIRE 29 1 Ed 2d 564 403 U.S. 443 (1971)	4
KATZ v UNITED STATES 389 U.S. 347 357 19 L Ed 2d 576 83 S. Ct. 507 (1965)	5
JONES v UNITED STATES 335, U.S. 451, 456 93 L Ed U.S. 153 (1968)	5
UNITED STATES v JEFFERS 342 U.S. 48, 51, 96 L Ed 59, 72 S. Ct. 93 (1951)	5
COOLIDGE v NEW HAMPSHIRE, Supa.,	6
TRUPIANO v UNITED STATES 334, U.S. (699) 92 L Ed 1663 (1948) at page 707-708	6
JOHNSON v UNITED STATES 333 U.S. 10 P. 13 92 L Ed. 486 (1948)	7
WONG SUN v UNITED STATES 371 U.S. 471 83 S. Ct. 407, 9 L Ed. 2d 441 (1963)	9
STATE v RIOJAS, 14 Utah 2d 79, 377 p. 2d 640 (1963)	11
HOLLINGSWORTH v UNITED STATES 321 F 2d 342 (10th Cir. 1963)	14

IN THE SUPREME COURT

OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent.

- vs -

DAVID KAAE, DEITH WAYNE EWER, & MICHAEL HORNE

Defendants-Appeallants.

BRIEF OF APPELLANTS

STATEMENT OF THE CASE

This is an appeal from a conviction for violation of Section 76-9-3 and Section 76-38-1 and 3 Utah Code Annotated (1953).

DISPOSITION IN LOWER COURT

The appellants were tried in the District Court in and for Cache County, the Honorable VeNoy Christoffersen presiding, and found guilt of Second Degree Burglary and Grand Larceny.

RELIEF SOUGHT ON APPEAL

Appeallants prays that the judgment of the lower Court be reversed and the case remanded for a new trial.

STATEMENT OF FACTS

On the 31st day of August, 1971, Keith Plowman awoke to find that during the night or early morning hours, person or persons unknown had entered his store, Kieth's Market through the front door and there was missing therefrom merchandise of a value in excess of $50.00. Subsequently, on the 3rd of September, 1971, two officers of the Logan City Police Department, Leon Wursten and Richard Wright, acting on an informants tip came to the apartment rented by one David Kaae located at 970 North 7th East, Logan, Utah. The Officers entered the apartment and located merchandise later identified as part of that that had been taken from Kieth's Market. The manner by which entry was gained and the merchandise found is much in doubt and the evidence is hopelessly conflicting but is clear that

no warrant was issued authorizing the search and seizure. The defendants were arrested and taken to the Logan City Police Department and signed confessions implicating themselves, each other, and others not joining in this appeal. The evidence of the siezed merchandise and of the subsequent confessions was adduced at preliminary hearing and after arraignment defendants brought a motion to surpress the admission of the siezed merchandise and of the confessions as evidence. This motion was denied and the defendants were subsequently tried on a stipulated set of facts as adduced at the preliminary hearing and at the hearing on the motion to surpress. Based on those facts, a judgment of guilty was rendered by the Court, defendants excepting from the admission of the evidence they had sought to have surpressed.

ARGUMENT

POINT I

THE COURT BELOW ERRED IN ADMITTING EVIDENCE THAT WAS THE RESULT OF AN ILLEGAL SEARCH IN THAT THE

SEARCH WAS MADE WITHOUT A WARRANT AND THE SEARCH DID NOT FALL WITHIN THE SCOPE OF THE RECOGNIZED EXCEPTIONS TO THE WARRANT REQUIREMENT.

While it is clear that in certain instances a search without a warrant is a legal and justified act, it becomes incumbent on the State to bring themselves within the exception relied on. As stated in WOLF v. COLORADO, 338 U.S. 25,27-28; 93 L ED 1782 (1948).

> The security of ones privacy against arbitrary intrusion by the Police - - - which is the core of the Fourth Ammendment Is basic to a free society. It is therefore implicit in "the concept of ordered liberty" and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of the law but soley on the authority of the police, did not need the commentary of recent history to be condemned - - -

One of the more recent pronouncements in this area by the Supreme Court of the United States is found in COOLIDGE vs NEW HAMPSHIRE, 29 L ED. 2d 564 403 U.S. 443 (1971). In which Justice Stewart held:

> Thus the most basic constitutional rule

> in this area is that "searchs conducted outside the judicial process, without prior approval of judge or magistrate, are per se unreasonable under the Fourth Ammendment- - - subject only to a few specifically established and well-delineate exceptions."[5]
> The exceptions are "jealously and carefull drawn,"[6] and there must be a "showing by those who seek exemption - - - that the exigencies of the situation made that cou imperative."[7] "The burden is on those see the exemption to show the need for it."[8]

This statement is probably the mose recent and cogent summary of the law pertaining to warrantl searches and cites the cases of KATZ v. UNITED STATES, 389 U.S.347; 357 19 L ED 2d 576,83 S Ct. 507 (1965); JONES v. UNITED STATES, 335, U.S. 451, 456 93 L ED U.S. 153 (1968); UNITED STATES v. JEFFERS, 342 U.S. 48, 51, 96 L. ED 59, 72 S. Ct. 93 (1951)

In the instant case, the State seeks to bring itself within the exceptions to the warra requirement. It was contended by the States throughout the proceedings that first, the offi were there by invitation or permission and that therefore the evidence obtained was a result of

a consensual search, and as a corollary to that proposition, that the evidence was in "plain view" and as such, there was actually no search or that at least no warrant was required.

If the evidence is taken in the light most favorable to the state, which it shouldn't be as is made clear above, Logan City Police officers knocked on the door and were admitted by appellant Kieth Wayne Ewer and there came upon suspected contraband from a recent burglary. It is also clear that the police went to the residence to investigate that same burglary relying on a tip from an unidentified informant (pages 4,8,20,38). It seems that what we have here is a planned warrantless search (p. 32,38) as is disapproved in COOLIDGE v NEW HAMPSHIRE, Supa., at footnote 27 and citing TRUPIANO v. UNITED STATES, 334 U.S. (699) 92 L Ed 1663 (1948) at pages 707-708.

As is made clear in the cases cited above, the state must support its position with evidence of the strongest character. It seems to beg the

question to say that the officers testimony as t
permission was clear and convincing particularly
in light of the admitted knowledge of the office
as to the probable involvment of the petitioners
in the crime. The court below appears to have tak
position that the appellants must assert their
right to be free from warrantless search in a cle
and convincing manner (p. 172 & 173). The Court
further took the position that the officer must
demand to search the place in order to gain some
of an unwilling acquiescence to his presence. (p.
neither of the above propositions of the Court fai
state the law as to consent to search. As pointed
out in JOHNSON v. UNITED STATES 333 U.S. 10, P. 1
92 L. ed 486 (1948) in holding that certain eviden
by surpressed, it is enough that entry was gained
under color of the office and that it was granted
in submission to authority rather than through an
understanding and intentional Waiver of a constitu
tional right. In the JOHNSON vs UNITED STATES Supr
the facts were that the officers suspecting that th

appellant was smoking opium in violation of Federal law. The officers knocked and a voice asked who was there to which the reply was "Lieutenant Belland". After some delay the defendant opened the door and the officer said, "I want to talk to you a little bit". at this point the appellant " stepped back acquiesently and admitted us." the Officer then said, "I want to talk to you about this opium smell in the room here." After a denial by the appellant she was placed under arrest and the room was searched, turning up incriminating evidence. The Johnson case seems to fairly support appellants position here. As stated by the Court below this was not the case of exigent circumstances but one of consent. The testimony of the officers who entered the apartment construed together with the testimony of the occupants point to a situation of acquiesence to authority. Certainly no one stepped forward with any knowing and understanding waiver of the constitutional right to be free from unreasonable search and seizure as required by the cases cited above. The evidence

indicated that there were various inquiries by the occupants of the room as to the officers right to be there, that there were demands that the officers produce a warrant and a general passive confussion which seems obviously to be an acquiescence and/or submission to the authority presented by the officer. The major problem presented by this case is the unanswered question as to why the officers did not wait for someone that they knew had the authority and make their purpose in being there manifest before entering the home.

POINT 2

ASSUMING THAT THE SEARCH AND ARREST WERE ILLEGAL, THE COURT BELOW ERRED IN ADMITTING INTO EVIDENCE, APPELLANTS CONFESSIONS.

The general rule as to the admisability of confessions obtained after an illegal search is stated in WONG SUN v UNITED STATES 371 U.S. 471, 83 S. Ct. 407, 9L Ed. 2nd 441, (1963)

> The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of unlawful invasion. It follows from our holding in SILVERMAN v UNITED STATES, 365 U,S. 505 81

S. CT. 679, 5 L. Ed. 2nd 734 (1961), that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of "papers and effects." Similarly, testimony as to matters observed during an unlawful invasion has been excluded in order to enforce the basic constitutional policies . . . thus, verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as to the officers action in the present case is no less the "fruit" of official illegality than the more common tangible fruits of the unwarranted invasion. 9 L Ed. 2nd. at 545.

The Court also said, 9 L. Ed. 2d at 454, that

> the policies underlying the exclusionary rule invite (no) logical distinction between physical and verbal evidence. Either in terms of deferring lawless conduct by federal officers . . . or of closing the doors of the federal courts to any use of evidence unconstitutionally obtained. . . the danger in relaxing the exclusionary rule in the case of verbal evidence would seem too great to warrant introducing such a distinction.

However, the Court then said later that:

> we need not hold that all evidence is 'fruit of the poisonous tree simply because it would not have come to light for the illegal actions of the police. Rather, the more apt question in such a case is whether, grating establishment of the primary illegality, the evidence to which instant objection is made has been come at by the exploitation of that illegality of instead by means sufficiently distinguishable to be purged of that primary taint.

The Supreme Court of the State of Utah seems

to employ the "Causation-Voluntariness approach" in interpreting the language above. See STATE vs. RIOJAS, 14 Utah 2nd 79, 377 P. 2d 640 (1963). Other States who adopted what has been called the deterrence approach, in which the language in WONG SUN pointing to the need to deter such lawless conduct on the part of the officers is adopted. Basically there is no difference in the two approaches as they still rely on the standard of voluntariness in determining whether the evidence of a confession is admissable. It would seem however, that the Court must adopt some objective standard in order that the law officer may guide their conduct accordingly in situations such as the instant one. For that reason the appellants contend that the rule proposed by the American Law Institute in the Proposed Model Code of Pre-arraignment Procedure (tentative draft number 11) be adopted. This rule, while removing the officers conduct from a subjective standard does not impose on officers and ipso facto surpression regardless of the voluntariness of the confession. This rule is set

forth in the A.L.I. Code § 902:

> If a law enforcement officer, acting without a warrant, arrests a person without reasonable cause. . . and the Court determines that such arrest was made without a fair bases for the belief that such cause existed, no statement made by such person after such arrest and prior to his release, unless it is made in the presence of or upon concultation with counsel, shall be admitted in evidence against such a person in a criminal proceeding in which he is the defendant.

The notes to this Section, A.L.I. Code, P. 65, state that the rule is to halt "investigative arrests: the rule, as proposed, states that if the officer arrests "without a warrant" the rule is to be invoked. However, in the instant case we have the officers entering the promises without a warrant and based on information gained from a nameless informant, of unknown creditability, under circumstances that the Court has been asked to rule on in Point I. Under the formula as prescribed by the A.L.I. code § 902, the Court must certainly, upon a finding of no probable cause and of no exigent circumstances rule that the confessions are inadmissable.

If the Court applies the "Causation-Voluntariness"

rule it is contended by the appellants that the State may still not avail itself of the confessio From an examination of the transcript (page 15 et it can be seen that a confession was obtained fro the Defendant Kaae the same evening as the search was made. The Defendants were taken directly fro the apartment that was searched to the police sta and detained there until such time as a confessio was given. There is a good deal of testimony as to whether inducements were made in the form of allowing the accused to go home or incarcerating in the jail, depending on whether or not a confes was given, and whether the officers stated that it would "go easier on them" if a confession was giv but even under the"voluntariness causation" appro the confession of Defendant Kaae must fall. As t the confessions of Ewer and Horne it can only be that Ewer and Horne did not present themselves an make voluntary confessions but rather that they w brought into the police station at a later date a confronted with either the other confessions or b representations that other confessions implicati

them had been obtained. It is urged by the appellants that this a coersive factor which is a direct result of the illegal search and the tainted confession obtained incident thereto. It seems that there were special coercive circumstances surrounding the confession of each of the Defendants. In the case of the appellant Ewer, he had been subjected to the ordeal of the search and the knowledge of confessions obtained incident thereto. As to Horne, he was taken from his home on Sunday night to the police station and held until a confession was signed. In summarizing the position of the Courts that endorse the "Causation-Voluntariness" test, Our federal circuit Court in HOLLINGSWORTH vs UNITED STATES 321 F. 2d. 342 (10th Cir. 1963) the Court said at page 350:

> The fact that a confession was obtained from him during his custody under an unlawful arrest does not ipso facto make it involuntary and inadmissible, but the fact that a confession was obtained during such custody and the attendant circumstances should be considered in determining whether the confession was voluntary, but voluntariness still remains the test of admissability.

CONCLUSION

In conclusion, the appellant did not receive a fair trial consistent with his rights in that the Court admitted evidence which was a fruit of an illegal search and siezure and confessions which were the fruit of an illegal search and surrounding course of circumstances. Appellant therefore urges that he be granted a new trial.

Respectfully submitted,

A. W. Lauritzen
Attorney at Law
52 North 1st East
Logan, Utah 84321