1971

State of Utah v. Paul D. Tapp : Brief of Defendant-Appellant

IN THE SUPREME COURT
of the
STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,

vs.

PAUL D. TAPP,
Defendant-Appellant.

Case No.
12214

BRIEF OF DEFENDANT-APPELLANT
Appeal from the verdict and judgment
of the District Court of Weber County, State of Utah
The Honorable Calvin Gould, Judge

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NATURE OF THE CASE

This is an appeal from a verdict of guilty to a charge of possession of marijuana in the District Court of Weber County, State of Utah, and the sentence to the Utah State Prison from zero to five years imposed by Judge Calvin Gould on June 22, 1970.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the verdict and judgment.

DISPOSITION IN THE LOWER COURT

The case was tried to the Honorable Calvin Gould, sitting without a jury. The court found the defendant guilty and sentenced the defendant to an indeterminate term in the Utah State Prison from zero to five years.

STATEMENT OF FACTS

On January 17, 1969, during the late evening hours, Sgt. Hal Adair of the Ogden City Police Department obtained a search warrant from the Honorable John F. Wahlquist, which provided for search of the "James Tapp residence at 3068 Van Buren Avenue, Ogden, Utah . . . the last house on the east side of Van Buren, which dead ends just south of the residence; basement only but all spaces there." The warrant was obtained by presenting an affidavit to Judge Wahlquist which recited that Sgt. Adair believed that marijuana could be found at that location since a "reliable subject" had purchased marijuana at that location from the defendant and turned it over to Sgt. Adair "in recent time." There was no allegation in the affidavit that marijuana was present at the location to be searched at the time of the affidavit or at the time of the warrant and no specific dates of sales or possession at the basement location were given in the affidavit in support of the search warrant. There were no facts set forth in the affidavit upon which Judge Wahlquist could judge the reliability of the "subject" or determine that marijuana was located in the basement apartment on January 17, 1969.

The search warrant was issued and the following morning, January 18, 1969, at 7:55 a.m., the warrant was served and various quantities of marijuana were found at the location. The defendant was charged with the possession of marijuana, among other crimes. However, problems of proof prevented any charges but the possession of marijuana from going to trial.

Defendant was tried before the Honorable Calvin Gould on May 26, 1970, found guilty, and on June 22, 1970, defendant was sentenced to an indeterminate term in the Utah State Prison from zero to five years for possession of marijuana.

ARGUMENT

POINT I

THE STATUTE IN EFFECT AT THE TIME OF THE DEFENDANT'S TRIAL AND SENTENCING PROVIDED A MISDEMEANOR PENALTY FOR THE POSSESSION OF MARIJUANA AND IT WAS ERROR FOR THE DISTRICT COURT TO SENTENCE THE DEFENDANT TO THE UTAH STATE PRISON.

The defendant was charged in an Information filed January 31, 1969, with the crime of possession of cannabis and LSD 25. That Information was later amended to delete the words "and LSD 25" for the purpose of charging the defendant only with the crime of possession of marijuana, on August 25, 1969.

After several preliminary motions, the case was set for trial and tried on the date set forth in the Statement of Facts above. The 1969 Legislature of the State of Utah enacted 58-13a-44(a), Utah Code Annotated (1953), which provides for a sentence of six months in the County Jail for possession of marijuana. That statute went into effect by its terms on May 13, 1969, and was thereafter applicable to all new charges filed under the statute and to all judgments of sentence pronounced after May 13, 1969. The District Court, apparently believing that this case was controlled by the

case of *State of Utah vs. John R. M. Miller*, 24 U.2d 1, 464 P.2d 884 (1970), sentenced the defendant herein to the Utah State Prison rather than to the Weber County Jail. The court failed to note that in the *Miller* case, judgment had already been pronounced and that the statute went into effect during the time the conviction was on appeal.

Appellant contends that the recent case of *Belt vs. Turner*, filed January 20, 1971, Case No. 11936, is controlling here. In the *Belt* case, the court held that the statute in force at the time of pronouncement of the judgment of sentence is the controlling statute and that the new policy adopted by the Legislature concerning the punishment for the offense should be followed by the courts of the State of Utah. Based upon the *Belt* case, appellant respectfully requests that should the court determine the issue in Point II against the appellant, the matter be remanded to the lower court for resentencing.

POINT II

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE TAKEN PURSUANT TO THE SEARCH WARRANT ISSUED JANUARY 17, 1969.

On several occasions prior to the defendant's trial, motions to suppress were made and argued before the Honorable F. W. Keller and the Honorable Calvin Gould, District Judges for Weber County. The motion to suppress was again argued before Judge Gould at the trial, and the court, after receiving memoranda from the parties, denied appellant's motion to suppress. The basis for the appellant's motion rests on the

lack of probable cause and the insufficiency of the affidavit in support of the search warrant.

It is well settled that this court has the power to examine an affidavit in support of a search warrant to make an independent determination of the existence of or lack of probable cause to support a warrant. See *Allen vs. Lindbeck,* 93 P.2d 120 (1940). The judicial policy surrounding the reexamination of an affidavit in support of a search warrant seems to be based upon a practical realization that a magistrate issuing a search warrant may be placed in a situation by law enforcement officers where the seeming pressure of an emergency requires hasty action of an ex parte nature, which is not always condusive to a full examination of the facts underlying the affidavit. The affidavit before the court in this case is a relatively simple, one-page document setting forth the address of the premises to be searched and a general description of the items for which the search is to be conducted. The material portion of the affidavit, aside from the many "typographical" errors, provides:

> "that a reliable subject has purchased various amounts of marijuana from Paul Tapp at various times and turned it over to Sgt. Adair in recent time. These sales were made in Paul Tapp's apartment located in the basement of 3068 Van Buren Avenue. (In February of 1968 a search warrant was executed at this same apartment, at which time marijuana was located there.)"

A careful reading of that paragraph will show that there are no facts set forth to support the allegation of the officer's belief that his informant or his "subject" was reliable or that Paul Tapp, the subject of the investigation,

was residing at the address at the time of the warrant. In addition, there is no allegation that the officer had information that the illicit drug was in possession of Paul Tapp at the apartment *at the time of the execution of the affidavit* and warrant.

There is an attempt in the affidavit to establish probable cause by setting forth the fact that a search warrant was executed almost one year prior to the execution of the warrant in this case. The affidavit fails to set forth the dates on which the alleged illicit sales were made, and therefore, it is difficult to see how probable cause could be established by an affidavit which fails to set forth dates close enough to the date of the warrant to raise an inference that Marijuana could be located on the premises at the time of the warrant. Further, there appears to be, from the language of the affidavit, a gap in time between the purchase of the marijuana and the delivery of the marijuana to the police officers. The affidavit recites that various amounts of marijuana were purchased at various times and that these amounts were delivered to the police "in recent time". The use of the phrase "in recent time" does not support an inference that the unlawful possession existed at the time of the execution of the affidavit and warrant since the specific facts or dates of the delivery to the police are not set forth in the affidavit.

Assuming that a purchase had been made the week before and that the delivery to the police had been accomplished within several days of the purchase, a strong inference would be raised. However, it is the appellant's contention that even then it would be difficult to infer unlawful possession at the time of the affidavit and warrant.

The affidavit apparently attempts to set up an inference based on a course of conduct of the appellant. However, in light of the failure of the affidavit to set forth specific dates of purchase and delivery, no facts are present in the affidavit which could support an inference of such magnitude as to constitute probable cause for a search warrant.

In addition, it is clear that the affidavit does not allege that Paul Tapp was residing at the address at the time of the affidavit. Since the determination of probable cause is largely a factual matter and since the affidavit fails to allege two of the primary elements tending to establish probable cause, that is, that the suspect can be located at the premises and that the officer has revealed facts to the magistrate demonstrating that an illicit drug is on the premises, the affidavit is clearly insufficient to support the issuance of a search warrant.

In *Spinelli vs. United States*, 393 U.S. 410 (1969), the United States Supreme Court reviewed an affidavit in support of a search warrant and found that the constitutional requirement of corroboration for an informant was not present. That element is also absent in the instant case.

In *Allen vs. Lindbeck, supra*, this court reviewed a similar affidavit and warrant and found the affidavit to be wanting in that it did not set forth the underlying facts supporting the belief of the officer tending to show probable cause for the issuance of a warrant. Appellant contends that it was clear error for the lower court to deny appellant's motion to suppress the evidence obtained through the use of the warrant and that this court should reverse the conviction

of the appellant, order the suppression of the evidence obtained in the warrant, and remand the case to the District Court of Weber County for further proceedings.

CONCLUSION

In conclusion, since it is clear that the affidavit fails to adequately support the warrant, it was error for the lower court to receive the evidence over the objection of the appellant and that since the Utah Legislature prescribed a lesser penalty for the offense prior to the trial and sentence of the appellant, it was error for the court to impose a felony sentence upon the appellant.

Respectfully submitted,

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