

2006

Utah v. Raymond Charles Marquez : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
	:	
Plaintiff Appellant,	:	Appellate No. 20060710
	:	
vs.	:	
	:	Criminal No. 051700158
Raymond Charles Marquez,	:	
	:	
	:	
Defendant Appellee,	:	
	:	
	:	
	:	

REPLY BRIEF OF APPELLANT

APPEAL FROM SUPPRESSION RULING
IN THE SEVENTH JUDICIAL DISTRICT COURT
THE HONORABLE SCOTT JOHANSEN PRESIDING.

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Counsel for Appellee

Defendant Appellant is presently incarcerated in the Utah State Prison.

A PUBLISHED DECISION IS REQUESTED BY APPELLANT

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UTAH APPELLATE C

FEB 09 2007

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OBJECTION TO THE STATE'S STATEMENT OF FACTS

Defendant objects to the State's Statement of Facts and requests that the information contained therein be stricken as follows:

1. Appellee's Statement of Facts does not comply with the requirements of Rule 24(a)(7) of the Rules of Appellate Procedure. Ut. R. App. P. 24(a)(7);(e) (West 2006). Five sentences¹ in the State's Statement of Facts contain statements of facts that fail to cite the record below as required by that rule. *Brief of Appellee*, at 4.
2. Contrary to Rule 24(e) of the Utah rule of Appellate Procedure, footnote three of the Appellee's brief contains a citation to a document not found in the record index prepared in accordance to Rule 11(b) of the Rules of Appellate Procedure. *Brief of Appellee* at 4, fn. 3; Ut. R. App. P. 11(b);24(e) (West 2006).
3. Appellee sets forth in its Statement of Facts the following assertions of fact, that are not found in the record.
 - a. The fourth sentence in the Statement of Facts asserts that Raymond Gerrish *decided* to go to Shawn Cloward's home. *Id.* Although the record indicates that Raymond Gerrish was at the home of Shawn Cloward, there is nothing in the record cited by the State that supports

¹ Sentences numbers 1,3,7,8, and 13 of the State's Statement of Facts, do not contain a record citation to support the facts contained therein.

this argument that it was Gerrish's decision to go to or to be present at the home of Shawn Cloward. R.73.

- b. The sixth sentence asserts that Raymond Gerrish trusted others who were on Shawn Cloward's property to act as lookouts. *Brief of Appellee*, at 3. There is nothing in the record to suggest that the "lookouts" that Officer Anderson refers to in his Search Warrant Affidavit, were present at the residence, were trusted by the defendant, that they were going to warn him, or that they had been assigned to lookout for the "wrong person". *Id.*; R.73.²
- c. Sentence number ten asserts that the confidential informant, referred to in the Search Warrant Affidavit, realized that Raymond Garrish was hiding from the police. *Brief of Appellee*, at 3. The record does not indicate how the informant obtained his information or what his subjective realizations were. R.73.
- d. Sentence number eleven of the Statement of Facts indicates that the confidential informant immediately contacted police. *Brief of Appellee*, at 3. The record indicates that the confidential informant saw Raymond

² The State in its brief improperly uses a *Cf.* cite when citing to the record. *Brief of Appellee* at 3. The fact that there are people on the property of another acting as lookouts is not sufficiently analogous to assume that a person who is not the owner of the property trusts the lookouts; that the person has asked those people to lookout for him; or that they are reporting to the person what they see. The BLUEBOOK, a Uniform System of Citation, 23. (17th ed. 2000).

Gerrish at Shawn Cloward's home on the same day that the warrant was issued. R.73. However, there is nothing in the record that indicates how soon the confidential informant contacted the police after he saw Raymond Gerrish at the home of Shawn Cloward. *Id.*; R.73.

- e. Sentence number eleven asserts that when the confidential informant reported his information to the police, they immediately secured a search warrant for Shawn Cloward's home and property. *Brief of Appellee*, at 3. The record indicates that the law enforcement officers requested a search warrant sometime during the same day that they received the information from the confidential informant. R.73. There is nothing in the record that indicates when the search warrant was secured.
- f. Sentence number fourteen asserts that for the concealment and the safety of the officers, judicial permission was given to search the property at night. *Brief of Appellee*, at 4. The Justice of the Peace who issued the search warrant does not indicate that the reasons for allowing a night search were for officers' safety. R.73.
- g. Sentence twenty-six asserts that Officer Wood suspected that the Defendant was Gerrish or Gerrish's accomplice. *Brief of Appellee*, at 5. Nothing in the record cited by

the State, supports this assertion. *Id.* Officer Wood did not testify that he suspected the Defendant was Gerrish. R.68:27-28,31. He testified that he didn't know, "what the situation was in the house," and that he didn't know the identity of the Defendant or the identity of Gerrish. *Id.* Officer Wood did not testify that he was concerned that the Defendant was an accomplice. *Id.*

- h. Sentence thirty-three asserts that Officer Wood asked the Defendant who he was because he suspected that the Defendant was an accomplice. *Brief of Appellee* at 5. Nothing in the record cited by the State, supports this assertion. *Id.*; R.68:27,31-32. Officer Wood did not testify that he suspected that the Defendant was the fugitive's accomplice. R.68:27. The officer only testified that he did not know "what the situation was inside the house." *Id.* He did not testify why he asked the Defendant for his name. R.68:31.
- i. Sentence forty-one asserts that when Officer Anderson entered the home of Shawn Cloward, that Sylvia Marquez was screaming and yelling. *Brief of Appellee*, at 6. The record cited by the State does not support this assertion. *Id.*; R.68:17,19-20. Officer Anderson does not indicate when Mrs. Marquez began yelling. R.

68:17,19-20.

- j. Sentence forty-three asserts that Officer Anderson ordered both Raymond Gerrish and his mother to the ground and that Mrs. Marquez did not comply with that order. *Brief of Appellee*, at 6. The record cite provided by the State does not support this assertion. *Id.*; R.68:19-20. Officer Anderson testified that he ordered Gerrish to get on the ground. R.68:19. Officer Anderson did not testify that he ordered both Raymond Marquez and his mother Silvia to get on the ground. *Id.*
- k. Sentence fifty-four asserts that upon entry into the home, a marijuana bong was in plain view. *Brief of Appellee*, at 7. The record cite provided by the State does not support this assertion. *Id.* The officers at the suppression hearing, and the officer who signed the second Search Warrant Affidavit, did not indicate that they saw a bong. *Id.*; R.68:6,7,14,15,20,21,23,31,32; R.74.

ARGUMENT

I. Defendant was not required to Marshal the evidence.

The majority of the State's brief is spent arguing that the Defendant failed to adequately marshal the evidence. *Brief of Appellee* at 7-13,15. It argues, relying on *State v. Brake*, and *Chen v. Stewart*, that because a suppression hearing ruling is highly fact dependent, that the Defendant is required to marshal the evidence. *Id.* at 9. The State's reliance upon those cases is improper and outside the scope of law contemplated by those rulings.

In *Chen v. Stewart*, the Utah Supreme Court granted the defendants' petition for relief from interlocutory orders that arose out of a lawsuit alleging corporate waste. *Chen v. Stewart*, 100 P.3d 1177,1181 (Utah 2004). *Chen* involved twenty-seven individually named parties, ten unidentified John Doe defendants, and two-hundred pages of findings of fact and conclusions of law. *Id.* at 1177. Discussing the standard of review, the court held, "even where the defendants purport to challenge only the legal ruling, as here if a determination of the correctness of a court's application of a legal standard is extremely fact-sensitive, the defendants also have a duty to marshal the evidence." *Id.* at 1184,1185. (Emphasis added).

State v. Brake is a criminal case where the defendant challenged the rulings denying the suppression of evidence. *State*

v. Brake, 103 P.3d 699, 701 (Utah 2004). The court in *Brake* explained, "the legal analysis of search and seizure cases is highly fact dependent. We therefore begin with a full narration of the facts." *Id.* The legal differences between these two cases are numerous. One important distinction is the level of discretion the reviewing court gives to the trial court's different types of findings of fact. *Chen*, at 1184,fn 5. In a criminal case that involves a search and seizure challenge, a reviewing court gives little discretion to the trial court's findings of fact. *State v. Warren*, 78 P.3d 590 (Utah 2003). Whereas in cases like *Chen*, a broad amount of discretion is afforded the trial court's findings. *Chen* at 1184,fn 4.

The State makes no attempt to justify the cross application of these two very different cases, areas of law, facts, and legal standards. *Brief of Appellee* at 8-13. Defendant objects to the State's argument and requests it be stricken from the State's brief. The requirement to marshal the evidence has never been demanded of a defendant challenging the legal conclusions of suppression ruling.

II. Officer Wood's search of the Defendant's body after he had been detained and handcuffed was unjustifiable.

The State in its response cites no controlling precedent for its proposition that, when executing a search warrant, "police may lawfully detain, handcuff, and question those found on the premises." *Brief of Appellee* at 13. Article I Section 14 of the Utah Constitution frequently affords more protections to its citizens than afforded under the U.S. Constitution. *Am. Bush v. City of S. Salt Lake*, 140 P.3d 1235, 1266 (Utah 2006); *State v. Thompson*, 810 P.2d 415, 417-18, 420 (Utah 1991); U.S. Constitution. Amend. IV (West 2006); UT. Const. art. I § 14 (West 2006).³

The crucial question upon which this appeal rests, is what level of suspicion a reasonable officer must have to first, detain and handcuff, and then second, search the body of a

³ Furthermore, the authority cited by the State is not relevant to the primary issue in this case. *Summers* and *Muehler* do not support the proposition that when executing a search warrant, in addition to cuffing, detaining, questioning, handcuffing, a compliant visitor's body may also be searched. *Muehler v. Mena*, 544 U.S. 93 (2005); *Michigan v. Summers*, 452 U.S. 692 (1981). Allowing an officer to frisk as well as handcuff detain and question a visitor of a home for which a search warrant has been issued violates the protections described by *Ybarra*, and exceed the facts explained in *Muehler* and *Summers*. *Ybarra v. Illinios*, 444 U.S. 85 (1979); *Id.*

The State does not cite any controlling authority that supports its proposition that "the officer's subjective motivation is irrelevant." To the complete contrary the Utah Supreme Court recently re-affirmed its holding that an officer's subjective belief is a factor, to be considered in a reasonable suspicion analysis. *State v. Alvarez*, 2006 Utah 61, P15.

compliant visitor of a home that is being search pursuant to a warrant. First, Utah law allows law enforcement officers to temporarily detain and question those persons about whom there is a reasonable suspicion of criminal activity. *State v. Alvarez*, 2006 Utah 61 P.14. That detention is limited in scope to the type of criminal activity and it must be brief and non-intrusive. *Id.* at P10.

Second, Law enforcement officers are rightly allowed to, without a warrant, briefly search the bodies of those persons who they reasonably suspect pose a risk to their safety. *State v. Warren*, 78 P.3d 590 (Utah 2003). They are also allowed to search the body of a person when exigent circumstances permit that search. *Alvarez*, at P21.

In this case there are no facts which reasonably justify Officer Wood's search of the Defendant's person; this especially after he had already been detained and handcuffed. R. 68:26-31. The Defendant was completely compliant. R.68:23-29. He was lying face down on the floor with his hands handcuffed behind his back. R.68:26. Officer Wood testified he did not see anything that caused him to feel concerned for officers safety. R.68:28. There were at least five officers in a home that contained four occupants. R.68:6,9-10,13. The subject of the warrant, Gerrish, was handcuffed, detained, and arrested, within the first twenty to thirty seconds of the officers' entry into the home. R.68:19-

20.

The State argues that a concern for the safety of the officers was justified by unidentified information of possible lookouts, the officers' failure to recognize Gerrish, their not knowing the situation inside the home before entering, the paraphernalia inside the home, and Silvia Marquez's hysterical conduct. *Brief of Appellee* at 13-18. Prior to and after entering the home there is no evidence in this case to suggest that the Defendant or the occupants of the home were dangerous, aggressive, or violent.⁴ There is nothing in the facts of this case to justify a reasonable concern for officers safety⁵ or exigent circumstances.

Officer Wood's failure to recognize the Gerrish does not

⁴ The State in its response argues that Sylvia Marquez's emotional behavior, and her and her son's backpedaling at seeing the entry of at least five armed law enforcement officers force their way into the home justifies Officer Wood's search of Defendant's body. *Brief of Appellee*, at 11. The State's argument is simply not reasonable. Officer Anderson testified Mrs. Marquez was emotional and was yelling why are you here. R.68:19-20. He also testified that she was in another room.

He did not testify that she was behaving violently or that he thought she would. R.68:19-21. However even if she did, the State fails to explain why her behavior would justify a reasonable belief that the Defendant, who was handcuffed, lying face down on the floor, in another room, posed a reasonable risk to the officers.

The fact that Gerrish and Sylvia Marquez began to backpedal, as the armed officers forced their entry without more does not justify the Defendant's search for officers safety. R.68:6-7, 26-28.

⁵ Officer Wood testified the needle in the Defendant's pocket could have been used as a weapon. R.68:27,28. The needle was only found as a result of the illegal search.

justify a reasonable concern that the Defendant posed an officers safety risk. *State v Warren*, 37 P.3d 270, 273 (Utah Ct. App. 2001). There is no evidence that Gerrish was violent. He was wanted for his failure to comply with his probation conditions and possession of a small amount of drugs. R.73. Neither of these crimes are inherently violent. *Warren*, at 273. Even if the Defendant had been Gerrish, a concern for officers safety without more, reliance upon his arrest warrant, would not have justified his search.

The presence of drugs and drug paraphernalia throughout the home, absent the area of the home that Defendant occupied, does not justify a search of the defendant's person. Even if the drugs and paraphernalia which were in plain view were the Defendant's, possession of a small amount of drugs does not pose a risk to officer's safety. *State v. Warren*, at 270. More importantly the U.S. Supreme Court held in *Ybarra*,

a person's mere propinquity to others independently suspected of criminal activity does not, without more give rise to ... search that person

...

The initial frisk of *Ybarra* was simply not supported by a reasonable belief that he was armed and presently dangerous, a belief which this Court has invariably held must form the predicate to a patdown of a person for weapons.

Ybarra v. Illinois, 444 U.S. 85,91,92,93 (1979).

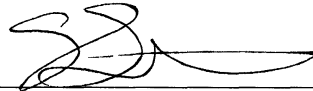
The facts in *Ybarra* are in many ways similar to the instant

case.⁶ *Id.* at 93. In this case as in *Ybarra* the Defenant was unjustifiably searched simply for the reason he was in present when a search warrant for the home he was visiting was executed. *Id.*

CONCLUSION

Defendant respectfully requests that the Trial Court's denial of his motion to suppress be reversed.

DATED this 8 day of February, 2007.



Samuel S. Bailey
Attorney for the Defendant

⁶ The facts of *Yabarra* as described by the high court are as follows:

When the police entered the Aurora Tap Tavern on March 1 1976, the lighting was sufficient for them to observe the customers. Upon seeing *Ybarra*, they neither recognized him as a person with a criminal history nor had any particular reason to believe that he might be inclined to assault them. Moreover, as Police Agent Johnson later testified, *Ybarra*, whose hands were empty, gave no indication of possessing a weapon, made no gestures or other action indicative of an intent to commit an assault, and acted generally in a manner that was not threatening. . . . In short the State is unable to articulate any specific fact that would have justified a police officer at the scene in even suspecting that *Ybarra* was armed and dangerous.

Ybarra at 93.

* * * * *

CERTIFICATE OF SERVICE

I hereby certify that eight (8) copies and one original of the foregoing were Mailed by U.S. First Class Mail, postage prepaid, to the Court of Appeals and that two (2) copies of the foregoing were Mailed by U.S. First Class Mail, postage prepaid, to Office of the Utah Attorney General, Appellate Division at the addresses listed below on this 8th day of February, 2007.

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