

1995

## State of Utah v. Penny Jo Wallace : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS  
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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,  
Plaintiff-Appellee,

Case No. 950772-CA

v.

PENNY JO WALLACE,  
Defendant-Appellant.

Priority No. 2

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REPLY BRIEF OF APPELLANT

THIS IS AN APPEAL FROM A CONVICTION OF UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE, MARIJUANA, WITH INTENT TO DISTRIBUTE IN VIOLATION OF UTAH CODE ANNOTATED SECTION 58-37-8 (1994), A THIRD DEGREE FELONY, UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE, METHAMPHETAMINE, WITH INTENT TO DISTRIBUTE, IN VIOLATION OF UTAH CODE ANN. SECTION 58-37-8 (1994), A SECOND DEGREE FELONY, AND POSSESSION OF DRUG PARAPHERNALIA IN VIOLATION OF UTAH CODE ANN. SECTION 58-37a-5(1) 1994, A CLASS B MISDEMEANOR, IN AND FOR CACHE COUNTY, STATE OF UTAH, THE HONORABLE GORDON J. LOW, PRESIDING.

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ARGUMENT

- I. DEFENDANT DID NOT AFFIRMATIVELY WAIVE HER ARGUMENT REGARDING THE INVALIDITY OF THE INVENTORY SEARCH AS SHE RAISED THE ISSUE IN HER MOTION TO SUPPRESS, HER ORAL ARGUMENT AND HER APPELLATE COURT BRIEF
  
- II. THE INVENTORY SEARCH OF DEFENDANT'S VEHICLE WAS UNLAWFUL BECAUSE THERE WAS NO STATUTORY BASIS FOR AN IMPOUND AND SURROUNDING CIRCUMSTANCES DID NOT JUSTIFY A WARRANTLESS SEARCH OF DEFENDANT'S VEHICLE
  
- III. EXIGENT CIRCUMSTANCES, JUSTIFYING A WARRANTLESS SEARCH OF DEFENDANT'S VEHICLE, DID NOT EXIST BECAUSE THE VEHICLE HAD NO DRIVER

## TABLE OF AUTHORITIES

- State v. Anderson, 910 P.2d 1229 (Utah 1996)  
State v. Gray, 851 P.2d 803 (Utah App. 1993)  
State v. Hygh, 711 P.2d 264 (Utha 1985)  
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State v. Rice, 717 P.2d 695 (Utah 1986)  
State v. Sterger, 808 P.2d 122 (Utah App. 1991)

ARGUMENT

Defendant did not waive her right to argue the constitutionality of the inventory search in this case. Defendant asserted the unconstitutionality of the search in her written Motion to Suppress. Defendant reasserted the argument in the hearing on the Motion to Suppress. Specifically on pages 28-30 of the transcript of the hearing, counsel for defendant makes the following statements:

COURT: Ms. Lachmar, anything further?

MS. LACHMAR: I just want to point out that as I was writing this memorandum I was searching for a statutory basis for the inventory. In other words, some kind of statutory authority given to police officers to remove this vehicle. It seems to me there ought to be something on the books that says something about traffic accidents, that says if a car has been in an accident, is disabled, and the driver is removed, that there ought to be something in writing that they need to remove those vehicles, but I could find nothing. (T. 28)

. . . .

"What I wanted to point out was that as I was searching for something in writing to show that the police officers in this instance were required to remove the vehicle, I had difficulty finding anything. As I laid out everything that I could think of, as you know, the officers justified the search as pursuant to a DUI arrest. And as I pointed out, that couldn't have been the basis.

Then I looked in other places, statutory and otherwise, to find a basis for the inventory and was unable to come up with anything, except for the possible exception of their own regulations, which say you can remove it in an emergency situation to protect the vehicle, I believe. But that had no statutory support for it.

So I think in this case, what the Supreme Court has said in other instances, particularly in State vs. Hygh and so forth, that if there is no statutory basis for the inventory, you then need to look at the circumstances and say was it justified based on the circumstances that existed here. So that's what we're looking at. Just on the circumstances, were they justified in inventorying the vehicle? That's what the court needs to look at.

As I pointed out, I think that what Hygh says, and I'm not sure that Lopez undoes this, is that you can't conduct an inventory search for purely investigatory reasons. If you're doing an inventory search you have to have a legitimate basis for it. that's what I was having trouble finding is what was their legitimate basis for the inventory search statutorily. I couldn't find anything. So I guess that court would have to find that there was a justification for it under the circumstances in order to hold for the State in this case." (T. 30) pages 30-31.

At the close of the hearing, defense counsel discusses the issue of the inventory search, stating again that she could find no legitimate statutory basis for the search and indicating that the Court would have to find a circumstantial basis for upholding the search. Defendant did not knowingly, intelligently and affirmatively waive the defense by making an equivocal statement at one point in her oral argument. She re-asserted the claim in the oral argument, as well as in her written motion to suppress and her appellate court brief.

THE INVENTORY SEARCH WAS UNLAWFUL BECAUSE  
THERE WAS NO STATUTORY BASIS FOR AN IMPOUND AND  
SURROUNDING CIRCUMSTANCES DID NOT JUSTIFY  
A WARRANTLESS SEARCH OF DEFENDANT'S  
VEHICLE

The State cites State V. Sterger, 808 P.2d 122 (Utah App. 1991) as providing a precedence for the inventory search in this case. However, in Sterger, the vehicle was impounded and remained in police custody for the following reasons:

"Defendant's car was partially blocking the road in a remote area where the accident occurred. The front windshield was shattered and the car inoperable. All of the occupants had been taken for medical attention and Draper had no opportunity to ask defendant what he wanted done with the car. '(T)he existence or

absence of justification for the impoundment of an automobile may be determined from the surrounding circumstances." State v. Johnson, 745 P.2d 452, 454 (Utah 1987)'" In the instant case, defendant told the officers what she wanted done with her vehicle. She indicated that she wanted it turned over to her father or to her friend who owned a towing service in Honeyville. The vehicle was completely off of the roadway in a barrow pit. There is no indication that the vehicle was inoperable. The officer in this case did not impound the vehicle until after searching its contents. He did not impound the vehicle, because no facts existed at that point in time which would have justified an impound.

"In order to support a finding that a valid inventory search has taken place, the court must first determine whether there was reasonable and proper justification for the impoundment of the vehicle." State v. Rice 717 P.2d 695, 696 (Utah 1986). "Absent a statutory basis justifying impoundment, we look to the totality of the surrounding circumstances to determine the reasonableness of the seizure of the vehicle." Rice at 696. In holding for the defendant in Rice at 696 the Court stated as follows:

"Cache County has no written standards or procedures for police impoundment of motor vehicles. It is undisputed that defendant's truck was safely locked and parked in a parking lot behind a law office. There is no evidence that there the vehicle posed any danger to the officers or the public. Defendant was not permitted to have someone pick up his locked truck from the parking lot or to arrange other disposition. Defendant was neither advised of the search in advance nor allowed an opportunity to be present."

Likewise in the instant case, defendant was not advised of the search in advance nor allowed an opportunity to be present. Defendant's vehicle was in a barrow pit, adjacent to a county road

and did not pose any danger to the officers or the public. Defendant was attempting to make arrangements for disposition of the vehicle as she was being taken away by ambulance. She wanted the car turned over to her father or a friend of hers who operated a towing service in Honeyville. She had no idea the officers intended to search her car or that requesting a tow truck, effectively constituted a consent to search.

Further, there was no emergency requiring removal of the vehicle. It was not obstructing traffic and it could have been locked in order to secure its contents. An inventory search may only be conducted "...if the officers conduct an inventory search of a properly impounded vehicle, in good faith, following reasonable, standardized police procedures." State v. Gray 851 P.2d (Utah App 1993) As stated in a footnote to Gray, court's do not wish to encourage officer's to take the path of least resistance with respect to searches:

"Moreover, to rule otherwise would penalize the over-cautious officer for his or her attempts to secure a warrant and would encourage officers to use the path of least resistance, that is, to conduct an inventory search in every case without attempting to first secure a search warrant. Such result would be clearly contrary to our justice system's preference for warrants." Id. at 1221.

The officers in this case had possession of defendant's vehicle and keys because an automobile accident had occurred. Because there was no statutory basis for an impound at that point in time and because there was particularized suspicion of criminal activity, the officers should not have taken the "path of least resistance", but should have obtained a warrant.

EXIGENT CIRCUMSTANCES, JUSTIFYING  
A WARRANTLESS SEARCH OF DEFENDANT'S VEHICLE  
DID NOT EXIST, AS THE VEHICLE HAD NO DRIVER

Exigent circumstances, justifying a warrantless search of defendant's vehicle did not exist, because the vehicle had no driver. As indicated earlier in appellant's brief, the Supreme Court in State v. Larocco, 794 P.2d 460, 469 (Utah 1990) favors warrants under these circumstances:

"As Justice Zimmerman explained in Hygh: "Once the threat that the suspect will injure the officers with concealed weapons or will destroy evidence is gone, there is no persuasive reason why the officers cannot take the time to secure a warrant. Such a requirement would present little impediment to police investigations, especially in light of the ease with which warrants can be obtained under Utah's telephonic warrant statute, U.C.A., 1953, Section 7-23-4(2)."

This approach was affirmed in State v. Anderson, 910 P.2d 1229 (Utah 1996).

The police could have secured the vehicle and obtained a telephonic warrant. They did not need to summon the tow truck until after they had obtained a warrant and searched the vehicle. Therefore, no emergency existed. There was no danger that the evidence was going to be lost. The police simply failed to observe the basic constitutional mandate to obtain a warrant before searching private property.

CONCLUSION

The trial court's denial of defendant's motion to suppress should be overturned, because the inventory search was not authorized by statute and was not justified under the facts and circumstances of this case. Law enforcement officers should have obtained a warrant as probable cause existed and there were no exigent circumstances to justify a warrantless search.

RESPECTFULLY SUBMITTED THIS 30<sup>th</sup> day of January, 1997.

  
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