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UTAH SUPREME COURT
BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, Plaintiff-Respondent vs. THAYNE LARRY WALKER, Defendant-Appellant	:	Case No. 14322

BRIEF OF APPELLANT

Appeal from a jury verdict of guilty rendered in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Peter F. Leary, Judge, presiding.

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FILED

AUG 10 1976

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, Plaintiff-Respondent vs. THAYNE LARRY WALKER Defendant-Appellant	:	Case No. 14322

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a conviction of Burglary, a felony of the second degree, and Theft, a Class A misdemeanor, rendered by jury, in the Third District Court for the State of Utah.

DISPOSITION IN THE LOWER COURT

The appellant, Thayne Larry Walker, was convicted by a jury of the crimes of Burglary and Theft on October 2, 1975, in the court of the Honorable Peter F. Leary, and was sentenced to serve the indeterminate term provided by law in the Utah State Prison, namely 1-15 years and one year concurrently.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the judgment of guilt entered against him and a new trial in this matter.

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STATEMENT OF THE FACTS

At approximately 2:25 p.m. on July 21, 1975, Salt Lake County Sheriff's Deputy Mike Hanks was holding surveillance on an apartment complex located at 1840 West 6th North in Salt Lake City. From his position in a vacant house, he observed Defendants Thayne Walker and Robert Davis at the complex, but he lost sight of them when they went around in front of a building. (T.37) Hanks then entered his patrol car and proceeded to 6th North, hoping to relocate the defendants. Unable to relocate them, he returned to the apartment complex and held surveillance for another ten minutes. Hanks then proceeded to 4th North and was driving east toward Redwood Road when he saw the defendants in a Volkswagen van driven by Defendant Walker, in a driveway to an apartment complex at 1740 West 4th North. The van remained in the driveway while Hanks' vehicle passed. Deputy Hanks waved to the defendants, and Defendant Davis, who knew Hanks, waved back. Deputy Hanks then pulled his vehicle off to the side of the road to allow the defendants to pass, but they instead pulled over and parked behind his patrol car.

Deputy Hanks and Defendant Davis, the passenger, exited their respective vehicles and engaged in light conversation, with Davis stating that he had been visiting a friend in the apartment complex. (T.38) At this point Deputy Hanks instructed Davis to return to the Volkswagen and then asked Defendant Walker for his driver's license. Walker exited the van and produced a license. Hanks instructed him to remain in the van while he went back to the patrol car to check the license for revocations. Upon checking with the dispatcher, Deputy Hanks

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determined there were no revocations and the license was valid. (T.39) Deputy Hanks then returned to the van and engaged in conversation with Defendant Walker. Hanks then returned to his patrol car and "radioed the city to send a city officer for assistance." (Transcript of Suppression Hearing, p. 11). Deputy Hanks testified that he made that request because he "wanted to check the apartment complex to see if there was a possible burglary there." (Id.) He also expressly stated that at this time he had not observed anything unusual about the van. (Id.) Hanks then returned to the van and asked Davis to step out. Davis did so and at this point Deputy Hanks observed some stereo equipment in the back of the van. At this time Defendant Davis remarked that "he didn't know anything about it (the stereo equipment) . . . " (T.39)

The two continued to engage in small talk about Davis' girl friend until Hanks instructed Davis to return to the van. He then went to the patrol car and contacted the dispatcher to determine if the city officers were enroute when Officer Crokett and another Salt Lake City officer arrived. Hanks instructed them to watch the two defendants while he check the apartment complex from which the defendants had just come.

He went to the apartment complex, went upstairs, and knocked on a door. Hanks asked the resident if he had seen two men in the apartment complex. The resident replied in the negative. (T. 41) Hanks then went downstairs and observed a partially opened door. The

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door was approximately a foot and a half open and appeared to have been forced because the wood frame appeared to have been splintered. Looking inside, Hanks saw a lamp turned over and the interior of the apartment in disarray. (T. 42)

Deputy Hanks returned upstairs and questioned the resident, with whom he had previously talked, concerning the occupants of the apartment below. He was informed that it belonged to the Talayumptuewas and that Mrs. Talayumptuewa worked at the Sears' warehouse. Hanks then returned to the location of the vehicles and placed the defendants under arrest for the crime of burglary. He then requested the dispatcher to contact Mrs. Talayumptuewa and have her come to her apartment to determine if there were any missing items.

Deputy Hanks then impounded the defendants' vehicle by calling a commercial towing firm which transported the van to a secured location. When Mrs. Talayumptuewa arrived at her apartment, an inventory of the missing items was prepared. Deputy Hanks then went to the County Attorney's Office where a search warrant affidavit was prepared. A warrant to search the vehicle for the missing items was issued by a Salt Lake City Judge.

Defendants Walker and Davis had been simultaneously taken to the county jail and were incarcerated on charges of burglary and theft.

Prior to executing the warrant for the search of the vehicle, Hanks contacted Mr. Talayumptuewa by telephone from the towing company's office. The vehicle was then searched and items of stereo equipment listed in the warrant were recovered from inside the van. In response

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to the phone call, Hanks went to the apartment complex again and was given the broken tip of a screwdriver.(T. 44)

At the trial the defendants moved to suppress introduction of the evidence (stereo equipment, tools, a piggy bank, and silver dollars) on the grounds that (1) it was fruit of an illegal arrest and (2) that the prosecution had introduced no search warrants to justify the searches that were made. These motions were denied and the evidence was admitted. The jury returned verdicts of guilty against both defendants and they were sentenced to imprisonment in the Utah State Prison.

ARGUMENT

POINT I

THE ACTIONS OF OFFICER HANKS CONSTITUTED A SEIZURE OF THE PERSON OF THE DEFENDANT WALKER AND SUCH ACTIONS COME WITHIN THE PROTECTION OF FEDERAL AND STATE CONSTITUTIONAL PROVISIONS PROHIBITING UNREASONABLE SEIZURES.

A. THE DETENTION OF THE DEFENDANT WAS A SEIZURE OF HIS PERSON, AND THEREFORE SUBJECT TO SCRUTINY UNDER THE FOURTH AMENDMENT.

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized;

The Constitution of the State of Utah has an almost identical provision in Article I, Section 14. Inherent in these two documents imposing

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limitations upon government power is the concept of the right of the citizenry to be free from unwarranted governmental intrusion.

The State in the proceedings below has seemed to use the terms "arrest" and "detain" almost interchangeably, or at least in such a manner as to blur any distinction between the two. Perhaps this is proper, in light of the constitutional implications involved in both terms. However, it is necessary to lay a foundation, in order to make a distinction.

In Terry v. Ohio, 392 U.S. 20, L.Ed. 2d 889, 88 S. Ct. 1868 (1968) the Supreme Court of the United States had an opportunity to examine a situation involving the detention of a suspect. That court stated:

> We, therefore, reject the notion that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a "technical arrest" or "full blown search." 392 U.S. at 19.

In State v. Bradshaw, 541 P.2d 800 (Utah 1975) this Court recognized that provisions of both the State and Federal Constitutions are invoked in situations involving detentions. The Utah Court, favorably citing Terry, supra, as holding that arrests without a warrant may only be made upon probable cause, quoted from the Terry opinion:

> It is quite plain that the Fourth Amendment covers 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime -- 'arrests' in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person.
> 541 P. 2d at 801.

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The Utah Supreme Court has not been presented with any cases arising under the present "detention" statute, Utah Code Ann. §77-13-33 (1953); nevertheless, the almost exact similarity of the language of the Constitutional provisions involved and the fundamental policy reasons underlying such an interpretation should be reason enough to enable this court to hold, as in Terry, that "detentions" come within the scope of Constitutional protection.

B. THE DETENTION OF THE DEFENDANT BY DEPUTY HANKS EXCEEDED THE LIMITATIONS IMPOSED BY STATUTE AND WAS THEREFORE AN ARREST.

Utah Code Ann. §77-13-33 (1953), as amended, entitled "Authority of peace officer to stop and question suspect -- Grounds", provides:

> A peace officer may stop any person in a public place whom he has probable cause to believe:
> (1) is in the act of committing a crime;
> (2) has committed a crime; or
> (3) is attempting to commit a crime;
> and may demand of him his name, address and an explanation of his actions.

This section enacted in 1967 is a legislative act providing a peace officer "with authoirty to detain a suspect temporarily for questioning and search him for dangerous weapons." Section 77-13-34, which comprises the second section of the Act, grants the officer authority to conduct a search of the person for dangerous weapons if he reasonably believes he or any other person is in danger of life or limb. The defendant submits that this statute was enacted merely to grant the officer authority to make a limited detention of a person in a public place. It was designed for situations like that in Terry, supra, where an experienced officer had grounds to believe a crime was about to occur. In Terry the officer perceived very suspicious activity and made a limited detention for the purpose of determining the identity of the suspects. The search of the

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person, conducted for the officer's personal safety, was merely incident to that detention even though it produced the weapon, the carrying of which was a crime for which the suspect was later prosecuted. Had the officer been given a satisfactory explanation as to the suspect's activities so as to dispel his suspicions about them, and had the officer found no weapons during his limited search, he would have been obliged to release the individuals and allow them to proceed on their way.

The intent of the Utah Statute is analogous. It allows the officer to "stop" and "demand" of an individual his name, address and an explanation of his actions, if he has a basis for any of the three statutory grounds. Upon receiving such, he is obliged to release the person at that time unless he has other grounds to hold him. It appears that the statute requires a higher standard, (i.e. "probable cause"), than is required by Terry, supra.

Concerning this lesser standard, the Terry opinion stated:

> We thus decide nothing today concerning the constitutional propriety of an investigative "seizure" upon less than probable cause for purposes of "detention" and/or interrogation. Obviously, not all personal intercourse between policemen and citizens involve "seizures" of persons. Only when the officer, by some means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred. 392 U.S. at 20.

The first sentence of that paragraph would seem to indicate the U.S. Supreme Court is of the opinion that a "detention" may be based upon a showing of less than probable cause. That is certainly not the issue here because: (1) the relevant Utah statute authorizing detention specifically requires probable cause; (2) the State did not attempt to

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justify the detention as flowing from a non-statutory authority to detain on less than probable cause; and (3) such a concept is clearly contradictory to the remainder of the language in the Terry opinion, as well as contradictory to provisions in both the U. S. and Utah constitutions requiring probable cause for seizures.

As applied to the facts in this case, Deputy Hanks' actions certainly constituted a "seizure" of the defendants. He had gone well beyond the scope of the detention authorized by Section 77-13-33. After he had obtained the defendants' names, addresses and an explanation of their actions he was obliged to release them. He was not authorized to request a back-up unit. He was not authorized to have Davis exit the van a second time. These actions constituted an arrest. As per the Terry opinion, it certainly was a "seizure" of the person because he had, by show of authority, restrained their liberty. The defendants knew that Deputy Hanks was conducting some kind of official investigation of them based upon his actions: checking the driver's license of Walker, calling for the back-up unit, (T. 62) and having Davis exit the vehicle. Certainly a reasonable person in this situation, upon observing the arrival of a second police unit and hearing Deputy Hanks' instruction to the others to "watch these guys", would perceive he was not free to leave. If he were, there would be no need to instruct the city officers to "watch" the defendants. This cannot be construed to mean "follow them a see where they go"; it means (implicit with Deputy Hanks' actions),

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"I think these guys did something and I'm going to investigate." A reasonable person would have believed he was in official custody at that time. There was even testimony that such detention by Deputy Hanks had occurred twice prior to this incident. (T. 134). Such previous detentions by Officer Hanks, although clearly improper, were not the subject of any assertion of right to privacy or to be free from such an unreasonable search because at those instances such "detentions" produced no criminal charges.

At the trial, the prosecution attempted to rely on Utah Code Ann. §77-13-33 (1953), as amended, to authorize the arrest of the defendants. However, that section was specifically enacted to allow police officers some authority to stop and detain suspected persons long enough to allow the officer to make inquiry into the person's activities. The section cannot be construed to allow an unlimited detention so long as necessary for the officer to conduct an investigation of the area for possible criminal activities. Defendants in the present case gave a reasonable explanation for their presence at the complex; they had been visiting a friend. The time of day was not unusual. Their conduct was not unusual. There was no possible reason for the officer to continue to hold them any longer than was necessary to determine the reasons for their being in the area. Once he received their answer, which, on its fact, is satisfactory in light of all the circumstances involved, the detention should have ceased.

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Likewise inapplicable is any reliance the State may place upon the officer's authority to stop the vehicle under provision of Utah Code Ann. §41-1-17(c) (1953), as amended. Deputy Hanks, although he did check the driver's license of Walker, did not stop the vehicle for any operational violations. Moreover, Defendant Walker's license was in order, and free from any warrants or holds.

C. THE DEFENDANT WALKER WAS PLACED UNDER ARREST AT THE TIME OF DEPUTY HANKS' RETURN FROM THE APARTMENT COMPLEX AND AT THAT TIME FOURTH AMENDMENT PROTECTIONS ATTACHED.

There was testimony by Deputy Hanks (T.42) that he placed the two defendants under arrest upon his return from the apartment complex. On cross-examination, Deputy Hanks explained his actions as that of searching the individuals, handcuffing them, and indicating to them they were under arrest for burglary. (T.63) Clearly, the State must concede that a seizure had occurred at that point. Such a seizure comes within the scope of the United States and State Constitutions (Terry, supra, p.6) and this court must determine whether the officer had probable cause for such arrest.

POINT II.

THE ARREST AND SEIZURE OF THE DEFENDANT WAS WITHOUT PROBABLE CAUSE AND THEREFORE VIOLATED HIS RIGHTS UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE PROVISIONS OF UTAH CODE ANN. §77-13-33 (1953), as amended.

As previously noted, both the United States Constitution and the Utah Constitution require "probable cause" for the issuance of a warrant

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to search or to seize. Although there is a judicial preference for the issuance of a warrant, the courts have realized that a warrant is not, per se, required for a seizure. However, if the intent of these Constitutional provisions is to be followed, the standard of probable cause ought to be the same for seizures which do not have judicial approval through a warrant. The concept of probable cause involves more than just suspicion. There must be evidence which would "warrant a man of reasonable caution in the belief" that a crime has been committed. Carroll v. United States, 267 U.S. 132 at 162. A relaxation of this standard for probable cause would "leave law-abiding citizens at the mercy of the officer's whim or caprice." Eringer v. United States, 338 U.S. 160 (1948) at 176.

Utah Code Ann. §77-13-33 (1953), as amended, discussed previously, provides authorization for an officer to stop a person in a public place and demand of him his name, address, and an explanation of his actions when the officer "has reasonable cause to believe" he:

(1) is in the act of committing a crime;
(2) has committed a crime; or
(3) is attempting to commit a crime.

Utah Code Ann. §77-13-3 (1953), as amended, lists six grounds upon which an officer may make an arrest without a warrant:

(1) For a public offense committed in his presence.

This is obviously not involved in this case.

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(2) When the person arrested has committed a felony, although not in his presence.

Again, a situation which is not involved in the case at bar.

(3) When he has reasonable cause for believing the person to have committed a public offense, although not in his presence.

This subsection would appear to be the one the State uses to justify the arrest in this case. A discussion of this point follows this summary of the statute.

(4) When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.

This subsection cannot reasonably apply to this situation where the officer did not know the equipment in the van was stolen at all, let alone that it came from an apparently burglarized apartment. Furthermore, the officer had determined only that an apartment had been broken into, not that a theft had been committed, a fact essential to make the crime of burglary. Utah Code Ann. §76-6-206 (1953), as amended, makes a person who unlawfully enters a building guilty of the crime of criminal trespass, a Class B misdemeanor. Therefore, this subsection is not applicable without the officer's knowledge that a theft had been committed.

(5) On a charge, made upon reasonable cause, of the commission of a felony by the person arrested.

This subsection is not applicable because no other person made such a charge.

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(6) At night, when there is reasonable cause to believe he has committed a felony.

Since this was a daytime occurrence (2:30 p.m.) this subsection is clearly not applicable.

This indicates an anomaly in the Utah statutes. The legislature has given officers authority to "detain" if they have probable cause but would permit the officer to arrest (77-13-3) upon what would appear to be the lower standard of "reasonable cause". There may be no legal distinction between these two terms; but if there is, then it would seem that probable cause is the higher standard. Thus, the State may not rely on the authority of the detention statute to authorize a detention upon a lesser showing than that of probable cause. If any other interpretation is given to this statute, Defendant submits that enactment of Section 77-13-33, as it is presently written, would have been totally unnecessary because given the three statutory requirements for stopping the person and asking his name, etc., the officer could execute a "technical arrest" of the person. Surely he should need no authority to make a lesser intrusion upon the person's privacy and security if he merely desired to obtain his name, address, and an explanation of his actions. The statute (77-13-34) granting authority to search for weapons would likewise be unnecessary because a search for weapons could be made as incident to an arrest, but may be necessary for situations wherein the person is not arrested.

At the time Deputy Hanks formulated the intent to detain the the defendants and took action to accomplish that end (i.e. requesting the dispatcher to send a city officer to his location to detain the defendants while he looked for a "possible burglary") he knew the

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following facts:

1. Defendant Walker and his companion had been in another part of town approximately ten minutes earlier;

2. Defendant Davis was known to Deputy Hanks, but the driver of the vehicle, Defendant Walker, was unknown;

3. Both defendants had a prior arrest;

4. The vehicle had pulled out of an apartment complex;

5. Defendant Davis waved to him in response to his wave;

6. Defendant Walker pulled the bus to the curb behind the police car and Davis exited the vehicle and approached Deputy Hanks;

7. The driver of the vehicle (Walker) had a valid drivers license;

Surely these facts alone are insufficient to constitute "probable cause" for detention under Section 77-13-33. Even at the time Officer Crockett and his partner arrived at the scene and were instructed to "watch" the defendants while Hanks left and went looking for a "possible burglary," only four additional facts were known:

1. Davis told him they had been visiting a friend in the apartment complex;

2. There was stereo equipment in the back of the van;

3. The van was not registered to Defendant Davis;

4. Davis, a passenger, made an unsolicited statement about his lack of knowledge concerning the stereo equipment in the van.

These facts, in essence, constituted the total quantum of Deputy Hanks' knowledge concerning the defendants and their relationship to the stereo equipment, the van, and the apartment complex. Surely these

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marginal facts cannot be construed to constitute "probable cause" (required for detention under 77-13-33) or "reasonable cause" (required for arrest under 77-13-3(3). The most apparent reason for the non-existence of probable cause is that the officer had no knowledge a crime had been committed, much less that it had been committed by the defendant. Reliance by the State upon Draper v. United States, 358 U.S. 307, 79 S. Ct. 329 (1959) allowing detention if the officer can articulate "specific facts", is misapplied in this case because here all the specific facts are "outwardly innocent"; Henry v. U.S., 361 U.S. 98 at 103 (1959); in Draper the acts were certainly suspicious.

In State v. Lopez, 22 Utah 2d 257, 451 P.2d 772 (1969), this Court defined the requirement for probable cause for a warrantless arrest in accordance with Section 77-13-3(3) by saying:

> The requirement, as in so many areas of law, is one of reason, that it may be shown under the facts and circumstances known to the officer, a reasonable and prudent man in his position would be justified in believing the suspect had committed the offense.
> 451 P.2d at 775.

The quoted sentence has a footnote referring to the early United States Supreme Court case of Stacey v. Emery, 97 U.S. 642 (1878), where the concept of probable cause was considered. The Stacey opinion contains two definitions from earlier cases as to what constitutes probable cause. The first is by Mr. Justice Washington:

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> (a) reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense of which he is charged. 97 U.S. at 645.

Even when the seizure ("full blown arrest") occurred upon Hanks' return to the place where the defendants were waiting, the officer only knew two additional facts:

1. That an apartment was apparently benn broken into; and

2. That the resident upstairs did not see or hear anything.

It is significant to point out what Officer Hanks did not know at that time. He did not know if any stereo equipment had been stolen. Thus, the remark made by Davis about such equipment and its actual physical presence inside the van could have no basis for probable cause to seize (arrest) the defendant for theft of stereo equipment. Davis was merely a passenger in a vehicle being driven by another. Such lack of knowledge on his part is entirely logical and thus the remark cannot be construed to constitute probable cause.

The State relied upon the case of State v. Eastmond, 28 Utah 2d 124, 499 P.2d 276 (1972) in an attempt to justify the arrest in the case at bar. In that case, a Nephi policeman had seen car lights flash on in the Nebo Medical Center parking lot at 3 a.m. He then saw the car leaving the parking lot. He stopped the car and after he had made a brief investigation as to the occupants' identities, he allowed the car to proceed. The officer then returned to the clinic and upon investigation, observed a broken window and a door open at the clinic.

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e radioed ahead to other units to have the auto stopped and the ccupants arrested. In Eastmond, this court found that the officer had robable cause. However, Defendant submits that the case is ufficiently different from the case at bar in several key issues elevant to a finding of probable cause:

1. The lateness of the hour (3a.m.);

2. The location, which would not normally have teen-age lsitors at that late hour;

3. The officer saw the lights "flash on" and the car drive way from the clinic, meaning the lights were "off" before he bserved the car, most likely to avoid detection;

4. The officer observed, in plain view, items inherently uspicious: a small "doctor's bag" and some small bottles of alcohol. iese facts, taken together, may have been enough at that point to onstitute probable cause to arrest, but the officer did not detain the idividuals any longer; after being told their "explanation" of their :tions he allowed the vehicle to proceed. Only after he had determined iat an offense (a burglary) had apparently been committed did he idio ahead and effect the arrest of the occupants.

That action should be contrasted with the present case where:

1. There was a lawful, and not unreasonable or unusual, :planation as to the defendants' presence in the apartment complex irking lot;

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2. A not unusual hour (2:30 in the afternoon) was involved;

3. The officer saw no items of identifiable contraband or even items which might arouse a suspicion that it was contraband. Certainly many more young men carry stereo equipment in their automobiles than carry "doctor's bags". Deputy Hanks was unaware of any offense being committed; yet he (unlike the officer in the Eastmond case) seized the defendants and then went looking for probable cause.

The plain view doctrine cannot be relied upon to justify the seizure of the stereo equipment because that doctrine is only applicable to items which the officer has probable cause to believe are contraband of some nature.

People v. Miller, 7 Ca. 3d 219, 496 P.2d 1228, 101 Cal. Rptr. 860 (1972), involved an arrest for an outstanding traffic warrant. At the time of the arrest (3 a.m.) the police noticed electronic musical equipment in the back of the defendant's van. On appeal for a conviction of possession of marijuana the state attempted to show there were sufficient grounds to arrest the defendant for burglary, thereby allowing a more extensive search of the defendant and his vehicle than could otherwise be made. The Supreme Court of California responded to this assertion as follows:

> . . . the additional fact that he happened to be carrying electronic equipment at that time, would not, in itself, support an inference that the equipment had been stolen, particularly since the police had not received any report of the theft of such material. (Emphasis added) 496 P.2d at 1232.

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uch analysis is especially relevant to the present case where the olice (Deputy Hanks) had received no report of any burglary at the ime of the initial seizure and, even later, when he suspected a burglary ad taken place, he still did not know there had been a theft of stereo quipment. In fact, at the time he initially decided to detain the efendants, Hanks did not even know they were carrying the stereo quipment. He only knew they were exiting the parking lot of an partment complex.

In Remers v. Superior Court of Alameda County, 2 Cal. 3d 9, 470 P.2d 11, 87 Cal. Rptr. 202, (1970), the California Supreme urt granted a defendant's petition for a Writ of Mandamus to compel uppression of evidence. The court there held that the officers did t have probable cause to arrest the defendant when they saw her reach to her purse and withdraw a tinfoil wrapped packet which she ansferred to another person, who then passed to her what appeared to money. The court felt that such activity was by itself innocent d would not constitute probable cause to arrest the individuals r drug trafficking. Likewise, it cannot be said that merely carrying ereo equipment in the back of a van constitutes probable cause. rtainly more people carry items in trucks than pass small packages tin-foil in exchange for money. All such people should not be subject arrest because the property in such vans might be stolen. The mers court continued:

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> Where the events are as consistent with innocent activity as with the criminal activity, a detention based on those events is unlawful (cases cited); a fortiori, an arrest and search based on these events is unlawful.
> 470 P.2d at 13.

The State attempts to elevate Deputy Hanks' simple suspicion to the level of probable cause by relying on the knowledge of Officer Hanks that Defendant Davis had a criminal record. Such a basis for probable cause is not listed in the statutory grounds for arrest.

In Remers, supra, the California court stated:

> We have held that a prior related conviction, when known by the arresting officers, has "at best only a slight tendency" to establish a present violation of the law . . . 470 P.2d at 16.

Applied to the facts of the present case, it is apparent Deputy Hanks had no probable cause to detain or arrest the defendant. All he knew of was the defendant's previous arrest record. Such knowledge cannot be elevated to the level of probable cause, for to do so would be to relegate an arrested person to the status of second class citizen. Specifically, the Defendant Davis would never in his life be allowed to transport in a vehicle any item which might be stolen, because any officer who knew he had the prior burglary arrest would be allowed to arrest him. Any item he would have might be stolen, thus he is precluded from carrying any sizeable personal property, so as to avoid arrest. And it doesn't matter that the officer does not know if a theft has been committed; he can merely "hold" the suspect (that is, "have him watched") while he goes out looking for an apparent burglary and theft; and if he determines there might have been a theft or a burglary in the area, then he can arrest that person, even when he doesn't know what was taken. The defendant submits that this situation

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s the very evil the framers of the United States and State Constitutions
›resaw and sought to prevent. Moreover, the defendant Walker was
›t even known to the officer. Certainly the mere fact of a prior
ıowledge of the defendant Davis' background could not add to
:obable cause for the detention and arrest of Walker.

Remers was followed in People v. Ware, 484 P.2d 103 (Colo. 1971).
ıe defendant had voluntarily appeared at the police station to assist
friend under arrest for theft. An Officer Bates learned from a
puty Schaefer that the defendant had been involved with narcotics,
id information originating from a confidential informant. Bates
ticed in the defendant's pocket an aluminum foil package, and a
arch presuming a relationship to narcotics was upheld by the trial
urt. On appeal, the higher court cited Remers, and held that since
ny legal substances were wrapped in aluminum foil, probable cause
s not established because the conduct was as likely innocent as
ilty. (Id. at 105).

In Henry v. United States, 361 U.S. 98 (1959), federal officers
served one Pierotti, about whom they had received information concerning
eft from interstate shipments, removing cartons from a residence and
ading them into his car. The agents took him into custody and seized
e cartons. It was not until two hours later, after the suspect
i been arrested and taken to the federal offices, that the agents
ırned the cartons contained stolen radios, not liquors as they had

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suspected. In Henry the prosecution had conceded that the arrest occurr when the officers stopped the automobile. The United States Supreme Court said:

> When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete. It is, therefore, necessary to determine whether at or before that time they had reasonable cause to believe that a crime had been committed. The fact that afterwards contraband was discovered is not enough. An arrest is not justified by what the subsequent search discloses. (Emphasis added). 361 U.S. at 103.

Concerning the issue of probable cause for the arrest, the Court continued:

> On the record there was far from enough evidence against him to justify a magistrate in issuing a warrant . . . Riding in the car, stopping in an alley, peicking up packages, driving away --- these acts were all acts that were outwardly innocent. 361 U.S. at 103.

Certainly it must be conceded that Defendant Walker's activity in leaving the apartment complex with the stereo equipment in the van at 2:30 in the afternoon was "outwardly innocent" and thus is not sufficient to constitute probable cause.

The Court in Henry, supra, at 104, stated that "(t)he police must have reasonable grounds to believe the stereo equipment in the van was contraband." Since he had received no report of any stereo equipment stolen in that area, Deputy Hanks' conclusion was merely conjecture. As in Henry, the police did not determine the stereo equipm was stolen until some hours later, when the Talayuemptuewas had inventor ied their loss and the van had been serached all subsequent to the arrest and incarceration of the defendants.

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The Henry opinion continues:

> The fact that the suspects were in an automobile is not enough. Carroll v. United States, supra, liberalized the rule governing searches when a moving vehicle is involved. But that decision merely relaxed the requirement for a warrant on the grounds of practicality. It did not dispense with the need for probable cause. 361 U.S. at 104.

Mr. Justice Douglas summed up the entire impact of the court's

)lding in Henry:

> To repeat, an arrest is not justified by what the subsequent search discloses. Under our system, suspicion is not enough for an officer to lay hands on a citizen. It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than the citizens be subject to easy arrest. 361 U.S. at 104.

Finally, this court has enhanced the principle that "fishing

peditions" are not justified by the results. In State v. Criscola

Utah 2d 272, 444 P.2d 517 (1968), this court upheld a conviction

ere the defendant was stopped driving a stolen car without a valid

ivers license. The court, having grounds for finding probable

use in the case, did state:

> . . . we acknowledge our agreement generally with the proposition that a peace officer may not, without justifiable excuse, stop a citizen and conduct a fishing expedition search of the automobile for evidence of crime. Id. at 519.

Like the Criscola situation, defendant Walker was violating no traffic

vs, and an impound search incident to a traffic arrest was not

volved.

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POINT III

ANY EVIDENCE OBTAINED FROM THE VEHICLE PURSUANT TO A SEARCH WARRANT MUST BE SUPPRESSED BECAUSE THAT SEARCH WARRANT WAS TAINTED BY THE UNLAWFUL ARREST.

Deputy Hanks testified that after arresting the defendants he caused their vehicle to be impounded. He then obtained a search warrant to search the vehicle for the items listed by Mrs. Talayumpteuwa as being missing from her apartment. Over objections of the Defendant Davis and Defendant Walker, these items were introduced into evidence at trial. The defendant contends that such admission was improper because the items were "fruit of the poisonous tree".

The "fruit of the poisonous tree" doctrine is an established principle of criminal and constitutional law. In Wong Sun v. United States, 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963), the United States Supreme Court suppressed narcotics evidence obtained as the result of an illegal arrest and subsequent confession. The standard enunciated was that the evidence would not have come to light but for the illegal actions of the police. This principle has been followed by the Utah Supreme Court. See State v. Richards, 26 Utah 2d 318, 489 P.2d 422 (1971).

The exception to the fruit of the poisonous tree doctrine is where the obtaining of the evidence is so remote from the illegality that it has become attenuated and the taint is no longer present. The defendant contends such is not the present case. The evidence was obtained directly as a result of the unlawful arrest, albeit pursuant to a search warrant. The search warrant was not produced at the trial,

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In spite of defendants "poisonous tree fruit" objections to the introduction of the evidence. Thus, there was no finding that the warrant had overcome the "poisonous taint" of the primary illegality of the initial unlawful arrest.

CONCLUSION

This court is herein presented with an excellent issue for defining a "fishing expedition" search and arrest. The overreaching of Deputy Hanks in the detention and search of defendants would prove successfull in only a small number of cases. In all others the rights of private citizens would prove to be forfeit.

The improper introduction of evidence against the defendant substantially prejudiced his right to receive a fair trial and thus he should be entitled to reversal of his conviction and another trial at which the unlawfully obtained evidence is excluded.

Respectfully submitted,

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