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Utah Supreme Court

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UTAH SUPREME COURT
BRIEF

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IN THE SUPREME COURT

OF THE STATE OF UTAH

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

BRIEF OF RESPONDENT

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
SEP 9 1976
Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE

STATE OF UTAH

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

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with burglary, a violation of Utah Code Annotated § 76-6-202 (1975), and theft, a violation of Utah Code Annotated, § 76-7-404 (1975).

DISPOSITION IN THE LOWER COURT

Appellant was convicted by a jury of the crimes of Burglary and Theft on October 2, 1975, before Honorable Peter F. Leary, in the Third District Court, in and for Salt Lake County, State of Utah. Appellant was sentenced to serve one to fifteen years and zero to one years

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as provided by the law. The sentences are to run concurrently with each other and with others he is presently serving.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the conviction of appellant.

STATEMENT OF FACTS

On the afternoon of July 21, 1975, Deputy Shefiff Mike Hanks was holding surveillance on an apartment in Salt Lake City, Utah. From his position he observed appellant and Robert Davis leave the apartment. Hanks then lost sight of the two when they went around a building (T-37). Hanks then got in his patrol car hoping to relocate the pair. About ten to twelve minutes later he again observed the two in a volkswagon van, driven by appellant, in the driveway of another apartment building (T-37). Hanks drove past the driveway and waved to Davis who he knew. Davis waved back (T-7). Hanks then pulled over to allow the van to pass but instead it pulled up behind his patrol car (T-38).

Davis jumped out of the van and walked quickly towards the patrol car as Hanks got out (Suppression 7, 8). During a brief conversation Davis stated he had been visiting a friend in the apartment (T-8). Hanks asked appellant for his driver's license and he

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removed it from his shoe (Supp. hearing p. 9). Hanks determined that the license was valid and then asked appellant if he had recently been arrested in Price, knowing already that he had been (Supp. hearing p. 10). Walker initially denied the arrest but then admitted it when he found that Hanks already knew (Supp. hearing p. 11). About this time Deputy Hanks observed stereo equipment in the back of the van (T-39). When Davis noticed that Hanks saw the equipment, he stated that he didn't know anything about any stereo equipement (T-37,60). This was a totally unsolicited remark by Davis. Deputy Hanks then went to his car and radioed for an additional officer.[1] When Officer Crockett arrived Hanks told him to watch the two while he checked the nearby apartments where the pair had come from (T-40). Deputy Hanks very shortly discovered an apartment with a door open. Splinters of wood were laying about and pry marks were visible on the door (T-42). On looking inside the apartment, Hanks observed pictures

---

[1]In all fairness to appellant, it should be noted that at the suppression hearing Officer Hanks testified that he called for additional help prior to the time when he noticed the stereo equipment. This point was not developed through cross-examination by Davis. Of course, during the suppression hearing Officer Hanks may have become confused since he testified of two separate calls over his radio, the first for validation of Walker's driver's license and the second for another officer to come.

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and lamps lying about as if the place had been ransacked (T-42).

Deputy Hanks then returned to the van and placed appellant and Davis under arrest (T-63). After obtaining a search warrant for the van, Hanks recovered stereo equipment, a piggy bank, and other items from the burgalized apartment (T-43). Still later, pursuant to another search warrant, Hanks obtained two 1972 Eisenhower Silver Dollars from Davis' personal effects at the jail. The dollars were from the apartment.

ARGUMENT

The issues raised in Thayne Larry Walker's appeal have already been considered and disposed of by this Court. Walker's co-defendant, Robert Charles Davis unsuccessfully litigated these points in State v. Robert Charles Davis, Utah Supreme Court No. 14313, August 24, 1976. It is Respondent's position that the Davis case is dispositive of appellant Walker's appeal. However, a respondent's brief is being submitted in the event this Court chooses to reconsider the points raised by the appellant.

POINT I

OFFICER HANKS' INVESTIGATION OF APPELLANT WAS ENTIRELY REASONABLE AND CONSTITUTIONALLY PERMISSIBLE.

Appellant was convicted of burglary and theft for breaking into an apartment in Salt Lake City, Utah (T-212). Appellant does not allege on appeal that a burglary was not committed or that the evidence at trial was insufficient as to him being the perpetrator. Instead, he seeks reversal

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of his conviction solely on the basis that it resulted from the use of evidence which was allegedly obtained during an illegal detention by a police officer.

Respondent submits that the Officer's brief detention of appellant was reasonable and permissible under the circumstances.

Before examining the facts it is important to note that this same issue was raised at a suppression hearing. The Honorable Peter Leary determined, after examining all evidence, that the peace officer acted properly. It is well established in Utah that the findings of the trial court are presumed to be correct and that the ruling will not be disturbed unless it clearly appears that there was error. State v. Criscola, 21 Utah 2d 272, 444 P.2d 517 (1968), reaffirmed in State v. Torres, 29 Utah 2d 269, 508 P.2d 534, 536 (1973). Respondent submits that there was no error at all, let alone a "clear" error.

There are three basic areas of interaction between private citizens and the police. These may be referred to as (a) casual interaction, (b) stops or momentary detentions and (c) formal or complete arrest. It is important to note the differences of the three areas in two aspects, (1) the amount of force exerted by the police, and (2) the circumstances which authorize that use of force.

a. Casual interaction

Casual interaction is a situation where no force is exerted by the officer. The citizen is free to end

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the encounter at all times. Since no rights are infringed the officer need not show any basis at all for the interaction. Examples include situations in which officers meet acquaintances on the street and make small talk, or where an officer asks a person, "have you heard. . . .", "do you know anything about. . . .", or "What is going on." In Terry v. Ohio, 392 U.S. 1 20 L.Ed2d 889, 88 S.Ct. 1868 (1968), the Supreme Court of the United States recognized this type of interaction:

> "Obviously, not all personal intercourse between police and citizens involves 'seizures of persons.' Only when the officer, by 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 occured." 20 L.ed2d at 905, fn. 16.

Obviously, this type of interaction can be initiated by either the police or the citizen such as when a man comes up to a policeman and voluntarily begins a conversation.

b. Stops or Momentary Detentions

This involves the typical "stop" or "stop and frisk" situation where an officer briefly stops an individual to get information from him concerning his actions. Here the individual is not free to leave. In other words, physical force or a show of authority is involved. Because of this, such a situation is impermissible unless the officer has a reasonable and

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good faith belief, based upon articulable facts, that his actions are warranted. See Terry v. Ohio, supra. Thus, Utah Code Annotated § 77-13-33 (1975), 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.

Likewise, the United States Supreme Court holds:

> "A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. Adams v. Williams, 407 U.S. 143, 32 L.ed2d 612 92 S.Ct. 1921 (1972).

See also State v. Torres, Utah, supra. Obviously, in the "stop" situation the officer need not have the extensive probable cause required to make an arrest. Rather, the brief detention is an "intermediate response" so that "a policeman who lacks. . . probable cause to arrest [need not] shrug his shoulders and allow a crime to occur or a criminal to escape." Adams v. Williams, supra.

c. Complete arrest.

In this situation, the officer uses sufficient force to entirely curtail the liberty of the person

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arrested. This greater use of authority must be based on stronger or more incriminating circumstances than would authorize the "stop" or brief detention. The term generally used for the authorization to arrest is "probable cause"; derived from the Fourth Amendment of the Constitution. Henry v. United States, 361 U.S. 98, 4 L.Ed2d 134, 80 S.Ct. 168 (1959). However, other terms have been used to connote the same thing. Thus, some statutes and judicial decisions use such terms as "reasonable cause," "reasonable ground," "reasonable belief", or "sufficient cause." All such terms are ordinarily intended to mean "probable cause" within the meaning of the Fourth Amendment. Draper v. United States, 358 U.S. 307, 3 L.Ed2d 327, 79 S.Ct. 329 (1959).[2]

In describing the three major types of police-citizen interaction it should be noted that they are

---

[2] Appellant would have this court engage in a dispute based on semantics. He points out that the Utah statute authorizing a stop and frisk, section 77-13-33, requires "probable cause" while the arrest statute, section 77-13-3, requests only "reasonable cause." Appellant suggests that the legislature intended a detention to be prohibited except on more highly incriminating circumstances than required for an arrest. Respondent submits that appellant's position is entirely illogical and contrary to the best interests of the public. Furthermore, the intent of the legislature in enacting the detention statute is made manifest by the very title of the act: "An act providing a peace officer with authority to detain a suspect temporarily for questioning and search him for dangerous weapons where good cause appears." See Laws of Utah 1967, Chap. 203, p. 559.

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all part of a sliding scale. That is, all detentions and arrests involve varying degrees of force - the amount of force dependant on the circumstances. For this reason, the United States Supreme Court has fashioned the rule that in justifying any intrusion, the officer must point to facts which, taken together with rational inferences, reasonably warrant _that particular_ intrusion, _Terry v. Ohio, supra_.

Obviously, one incident between an officer and an individual may involve all three of the above catagories. For example, an officer may initiate a conversation and the individual begins to act suspiciously. The officer may then detain the individual forcefully to get further information. If that information is incriminating, the officer may then effect an arrest.

Respondent submits that the present case is an example of just such a situation. The interaction between Officer Hanks and appellant began with absolutely no force involved on the officer's part and complete liberty to leave on appellant's part. However, appellant acted suspiciously and gave the officer cause to detain him briefly while more information was gathered. Finally, with full probable

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cause, appellant was arrested for the crime of which he now stands convicted.

The record indicates that the officer had appellant under surveillance and lost sight of him for a few minutes. Thereafter, Officer Hanks saw appellant in the driveway of an apartment complex (T-37). Officer Hanks had previously arrested Davis, a passenger in the van appellant was driving, for the exact same crime, i.e. stealing stereo equipment from an apartment (Supp. hearing p. 14). Officer Hanks pulled over to the side of the road and appellant, voluntarily pulled up behind him (T-38). There was absolutely no force or authority involved. There was no siren, flashing lights, or even a motion by the officer to pull over. The action was completely voluntary on the part of appellant. After pulling over, co-defendant, Davis, approached the police car walking rapidly as if he didn't want the officer to walk back to the van (Supp. hearing p. 8); again, instead of waiting in his van to see what the officer wanted, voluntarily initiating further interaction. After some conversation the officer asked the co-defendant what they were doing; he replied that he had been visiting a friend. Appellant did not know that the officer had had them under surveillance for quite a while. However, the officer knew that either

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they were telling the truth and it had been a very short visit, or else appellant and the co-defendant had been doing something else at those apartments that takes only a very short time. The officer then asked appellant for some identification and he pulled his driver's license out of his sock (Supp. hearing p. 9). The officer then asked appellant whether he had recently been arrested in Price, knowing already that he had been. Appellant lied and said he had not, but thereafter admitted the arrest when he realized he had been caught in a lie (Supp. hearing p. 11). Finally, while talking with the co-defendant, the Officer noticed stereo equipment in the back of the van. The co-defendant, realizing that the officer had observed the stereo components, immediately volunteered the remark that he didn't know anything about anything in the van (T-37,60). This was not in answer to any question but was totally unsolicited.

In light of all of these circumstances and the additional fact that Officer Hanks was a highly experienced police officer, he clearly had good cause to have back up officers detain appellant for another brief moment while he made a quick check on the nearby apartment from which appellant had just come. Using the words of the Utah State Supreme Court, Officer Hanks was maintaining the status quo momen-

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tarily while obtaining more information. Respondent submits that the Officer's actions were constitutionally permissible and highly reasonable in light of the facts in his possession. As the United State Supreme Court said:

> "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, Terry recognizes that it may be the essence of good police work to adopt an intermediate response . . . ." Adams v. Williams, supra.

Respondent further submits that this case is controlled by the case of State v. Torres, supra. In that case, a police officer stopped a car with two men in it for no other reason that it was in the vicinity of a crime scene. The crime had only been committed by one man. Nevertheless, the conviction of one of the men in the car was upheld. The police officer in the Torres case had much less reason to stop Torres, than Officer Hanks to detain appellant. The Utah Supreme Court held:

> ". . . it is essential that a reasonable degree of tolerance be indulged as to the judgment of police officers, so long as they are acting in good faith and within the standards of decent and decorous behavior." 508 P.2d at 536.

Furthermore:

> ". . . justifiable suspicion of a police officer affords a

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proper constitutional basis for stopping a person and momentarily restraining the person's freedom . . . ." Id.

Respondent submits that appellant's conviction should be affirmed.

POINT II

OFFICER HANKS HAD AMPLE PROBABLE CAUSE TO ARREST THE DEFENDANT AS REQUIRED BY THE UNITED STATES CONSTITUION AND THE CONSTITUTION OF THE STATE OF UTAH.

The Fourth Amendment protections of the United States Constitution originated to guard against highhanded and ruthless intrusions against persons, homes and property by officials of an oppressive government. Article I, Section 14 of the Constitution of the State of Utah is nearly identical to the Fourth Amendment of the United States Constitution in its language protecting against unreasonable searches and seizures: both require probable cause as discussed, supra, in Point I.

The United States Supreme Court defined probable cause in Carroll v. United States, 267 U.S. 132, 69 L.Ed.2d 543, 45 S.Ct. 280 (1925):

> "This is to say that the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient

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in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched." 267 U.S. at 162.

The problem suggested by Carroll is that at some point in the factual chain, mere suspicion evolves into probable cause, and it is at that point that an arrest can be made legally.[3] The Court discussed at length how to determine when probable cause exists:

> "That line necessarily must be drawn by an act of judgment formed in the light of the particular situation and with account take of all circumstances. 338 U.S. at 176. In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved." 338 U.S. at 175.

The Court in Brinegar recognized that the proof of probable cause is not proof beyond a reasonable doubt, because so strict a standard would render much law enforcement ineffective.

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[3] In Brinegar v. United States, 338 U.S. 160 93 L.Ed.2d 1879, 69 S.Ct. 1302 (1949).

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The United States Supreme Court reaffirmed this standard in Gerstein v. Pugh, 420 U.S. 103, 43 L.Ed.2d 54, 95 S.Ct. 854, on remand 511 F.2d 528:

> "The standard for arrest is probable cause, defined in terms of facts and circumstances 'sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.' . . . This standard, like those for searches and seizures, represents a necessary accomodation between the individual's right to liberty and the State's duty to control crime. Gerstein v. Pugh, 420 U.S. at 111, 112.

Utah is also sensitive to the balancing interests of Fourth Amendment protections and reasonable effective law enforcement:

> "No right-thinking person would desire to minimize or disparage the protections thus assured. But it is equally important that such protections be applied in circumstances they were intended to cover and that they do not become so extended beyond their reasons for being that even where there is no danger or liklihood of any such abuse, they provide a cloak of protection by which those engaged in criminal activities may escape detection and punishment. The essential thing is to keep within the reasonable middle ground, between the protecting of the lawabiding citizenry from high-handed and officious intrusions into their private affairs; and the imposing of undue restrictions upon conscientious officers doing their duty in the investigation of crime," State v. Criscola, 21 Utah 2d 272, 274, 275, 444 P.2d 517, 518, 519 (1968).

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As a practical matter, Deputy Hanks' ten years of experience as deputy sheriff should be taken into consideration in determining the existence of probable cause. Not only did he have ten years of experience on the force; but at the time of the arrest he was a detective in the special tactical division (T-36); and he has estimated he was involved in about 100 arrests and investigations of this of this kind (T-52). Such experience made him sensitive to observable suspicious activity. Terry v. Ohio, supra, includes the officer's experience to aid in determining whether his search was reasonable.

Although Deputy Hanks did not have probable cause to arrest the appellant and Walker while at the van as discussed supra, in Point I, he did have probable cause to detain them briefly. At that point Hanks went to the nearby apartment complex to investigate. There he discovered a door to an apartment open about a footand a half, splintered and broken wood about the door, and the door exhibited pry marks on it about a half inch wide. He looked inside and observed a lamp overtruned and the apartment in apparent disarray. With this information and in light of the facts he already knew:

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(1) co-defendant had a previous arrest and conviction of burglary of an apartment;

(2) appellant had a previous arrest;

(3) appellant and co-defendant had been out of his view for about twelve minutes;

(4) the van had pulled out of an apartment complex;

(5) appellant had pulled the van over to the curb without being ordered to do so;

(6) co-defendant got out of the van and walked quickly to Hanks' car;

(7) appellant pulled his driver's license out of his sock;

(8) there was stereo equipment in the back of the van; and

(9) after Hanks saw the equipment, co-defendant stated he knew nothing about it - an unsolicited statement.

Deputy Hanks had more than sufficient probable cause to arrest and his actions were proper and in accordance with Utah Code Annotated § 77-13-3 (Supp. 1971):

> "A peace officer may make an arrest in obedience to a warrant delivered to him; or may, without a warrant, arrest a person:
>
> (4) When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it."

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In fact, Deputy Hanks had more facts before him than did the police in State v. Eastmond, 28 Utah 2d 124, 499 P.2d 276 (1972). In that case a Nephi police officer observed car lights flash on and a car drive away from a medical clinic parking lot at 3:00 a.m. He stopped the car and questioned its occupants - three teenage boys - none of whom he apparently knew personally or knew had any police record, then allowed them to proceed. The officer then went to the clinic; while investigating, he discovered a broken window and an unlocked door. He radioed to other units to have the auto stopped and the occupants arrested. In Eastmond, this Court held there was probable cause for the arrest.

It is important to note that prior to their actual arrest the Nephi officer did not have any more evidence that a crime actually had been committed than did Deputy Hanks. Also, Eastmond goes further than the case at bar because in Eastmond prior to the request to arrest the defendants the Nephi officer had not seen any suspicious items in the car, as did Deputy Hanks. In Eastmond it was only after the occupants were arrested that the "doctor's bag" and items items were observed.

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Appellant cites People v. Miller, 7 Ca. 3d 219, 496 P.2d 1228, 101 Cal. Rptr. 860 (1972) in support of his position, claiming that electronic equipment seen in the back of Miller's automobile was not, in itself sufficient to support an inference that it was contraband. The police suspected a burglary when they saw the electronic equipment in his back seat, and they wanted to take custody of it. Defendant refused and the police took it anyway. They later discovered marijuana. The holding in Miller was that the police may not use a refusal to waive Fourth Amendment rights into a "suspicious" activity evidencing criminal conduct. In Miller the officers only knew that the defendant was asleep in his car at a late hour, that he had equipment in the back of his car and that he had an outstanding traffic warrant. Unlike the case at bar, the police had no evidence whatsoever of any offense even tenuously related to Miller to suspect him of burglary, there was not any evidence of a criminal background of burglary by Miller and no suspicious behavior by Miller to avoid detection of possible criminal conduct.

Appellant also cites Remers v. Superior Court of Alameda County, 2 Cal. 3d 659, 470 P.2d 11, 87 Cal. Rptr. 202 (1970). The distinguishing factor in Remers was that the arresting officer had no knowledge

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of the defendant's previous criminal record either reliably or first-hand. The Court in Remers was primarily concerned with protecting against the manufacture of criminal records to help get probable cause. This is not the case with the appellant's arrest; here Deputy Hanks himself had previously arrested the appellant on a burglary charge, so this plus all of the other surrounding circumstances clearly gave Hanks probable cause to arrest the appellant.

There is no question that an arrest requires probable cause, but just what constitutes probable cause is subject to interpretation. The United States Supreme Court in Henry v. United States, supra, held that the arresting officer did not have probable cause to arrest the defendant where they:

(1) did not know defendant;

(2) did not have more than mere suspicion regarding defendant's companion;

(3) defendant had no previous criminal record; and

(4) observed defendant engaging in totally outwardly innocent activities (i.e. riding in a car, stopping in an alley, picking up packages, and driving away).

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In this case, Deputy Hanks knew of the appellant's previous criminal activity, plus he observed suspicious conduct by the two suspects, plus he had reasonable grounds for believing an apartment had been broken into, plus he observed the stereo equipment in the van, plus he received the unsolicited statement from the appellant disclaiming knowledge about the stereo. Taking the surrounding circumstances as a whole, Carroll v. United States, supra, Deputy Hanks clearly had probable cause for arresting the appellant and Walker.

POINT III

IN LIGHT OF THE LAWFUL ARREST OF THE APPELLANT THE EVIDENCE OBTAINED THROUGH THE TWO SEARCH WARRANTS WAS PROPERLY ADMITTED INTO EVIDENCE.

Respondent concedes the validity of the "fruit of the poisonous tree" doctrine but contends that it does not apply in this case. The appellant's arrest was lawful; therefore his Point III has no application. Further, appellant does not question the structural validity of the two search warrants, and since they were issued properly and with probable cause, the requirements of valid warrants have been met.

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It is only to Deputy Hanks' credit that he obtained these warrants at all, because the searches and seizure of the van would have been valid even without warrants. In Chambers v. Maroney, 399 U.S. 42, 26 L.Ed.2d 419, 90 S.Ct. 1975, rehearing denied 400 U.S. 856, 27 L.Ed.2d 94, 91 S.Ct. 23 (1970), a warrantless search of an automobile after it was taken to a police station was held constitutional where (1) there was probable cause to arrest the occupants of the automobile and to search the automobile for weapons and contraband, (2) an immediate search of the automobile at the time and place of the arrest would have been constitutionally permissible, and (3) it was not unreasonable to take the automobile to the police station before making the search, and probable cause for the search still existed after the automobile was taken to the police station. Chambers v. Maroney, supra.

CONCLUSION

The investigation conducted by Deputy Hanks was entirely reasonable and based on the requisite sufficient cause; and he had probable cause to arrest the appellant after discovering the burglarized apartment. The eivdence obtained was based on a

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clearly legal arrest and was properly admitted into evidence at trial. The conviction of the appellant should be affirmed.

Respectfully submitted,

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