

1996

## Utah v. Struhs : Brief of Appellant

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. 960416-CA
v.	)	
	)	
RANDOLPH PAUL STRUHS,	)	Priority No. 2
	)	
Defendant/Appellant.	)	ORAL ARGUMENT REQUESTED

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BRIEF OF APPELLANT

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Appeal from Judgment based upon a conditional plea of guilty, pursuant to *State v. Sery*, of the offense of Possession of a Controlled Substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i), in the Second Judicial District Court in and for Davis County, the Honorable Jon M. Memmott presiding.

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UTAH COURT OF APPEALS  
BRIEF

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COURT OF APPEALS

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#### COURT RULES CITED

None.

### STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over the instant appeal pursuant to Utah Code Ann. § 78-2a-3(2)(f).

### STATEMENT OF ISSUES / STANDARDS OF REVIEW

1. Whether the trial court erred in concluding that Defendant was not seized when Officer Knighton and her partner blocked Defendant's truck by parking nose-to-nose with the truck and then activated her "takedown lights" and high-beam lights upon Defendant's truck prior to questioning Defendant and the co-passengers of the truck. The trial court's ultimate determination of the level of stop is a legal conclusion that is afforded no deference on appeal and is reviewed for correctness. *State v. Bean*, 869 P.2d 984, 985 & n.2 (Utah App. 1994) (citing *United States v. Maragh*, 894 F.2d 415, 417 (D.C. Cir.), cert. denied, 498 U.S. 880, 111 S.Ct. 214 (1990)). This issue was preserved by way of trial counsel's motion to suppress together with the evidence and argument presented at the suppression hearing (R. 45-63, Transcript of Suppression Hearing; R. 23-26, Ruling on Defendant's Motion to Suppress).

2. Whether the trial court erred in concluding that Officer Knighton had reasonable suspicion that Defendant had either committed a crime, was in the act of committing a crime, or was attempting to commit a crime when Defendant merely parked his truck and no one at any time exited the truck prior to the seizure and investigative questioning. The "determination of whether a specific set of facts gives rise to reasonable suspicion is a determination of law and is

reviewable nondeferentially for correctness." *State v. Pena*, 869 P.2d 932, 939 (Utah 1994); see also *State v. Thurman*, 846 P.2d 1256, 1272 (Utah 1993); *State v. Bello*, 871 P.2d 584, 586 (Utah App.), cert. denied, 883 P.2d 1359 (Utah 1994). This issue was preserved by way of trial counsel's motion to suppress together with the evidence and argument presented at the suppression hearing (R. 45-63, Transcript of Suppression Hearing; R. 23-26, Ruling on Defendant's Motion to Suppress).

#### **DETERMINATIVE AUTHORITY**

Fourth Amendment to the United States Constitution.....13

The constitutional provisions, statutes, ordinances, rules, and regulations, whose interpretation is determinative, are set out verbatim, with the appropriate citation, in the body and arguments of the instant brief.

#### **STATEMENT OF THE CASE**

By way of Information filed on March 7, 1995, and amended on April 4, 1995, Defendant was charged with (1) Possession of a Controlled Substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i); (2) Driving While Under the Influence of Alcohol and/or Drugs, a class B misdemeanor, in violation of Utah Code Ann. § 58-37a-5; (3) and Possession of Drug Paraphernalia, a class B misdemeanor, in violation of Utah Code Ann. § 58-37a-5. On April 25, 1995, Defendant appeared with appointed counsel for Arraignment before the district court and pleaded not guilty.

Thereafter, on May 19, 1995, Defendant appeared with appointed counsel for a hearing on Defendant's Motion to Suppress, after which the district court took the matter under advisement. On June 6, 1995, the district court, by way of its Ruling on Defendant's Motion to Suppress, denied Defendant's Motion to Suppress. At the Pretrial Conference on September 12, 1995, Defendant entered a conditional plea of guilty to Possession of a Controlled Substance with the other two counts being dismissed. Notice of Appeal was filed on October 11, 1995. By way of Memorandum Decision, filed December 29, 1995, this Court summarily dismissed the appeal for lack of jurisdiction due to the lack of a final judgment. Pursuant to the Stipulation on the conditional plea of guilty, filed on April 23, 1996, the district court, signed the Judgment on May 23, 1996, which was entered on May 24, 1996, sentencing, *inter alia*, Defendant to an indeterminate term of zero to five years in the Utah State Prison, which was stayed pending determination of Defendant's appeal. Defendant filed Notice of Appeal on June 24, 1996.

#### **STATEMENT OF FACTS**

1. On March 3, 1995, at approximately 9:58 p.m., Officer Eileen Knighton, a Deputy Paramedic with the Davis County Sheriff's Office (R. 47, Transcript of Suppression Hearing), was patrolling westbound on Center Street in North Salt Lake (R. 8-11, Transcript of Suppression Hearing);

2. In the course of patrolling, Officer Knighton observed Defendant's truck traveling westbound on Center Street "half a mile



or so" ahead of Deputy Knighton's patrol vehicle (R. 48, lines 13-14, Transcript of Suppression Hearing);

3. The area being patrolled by Officer Knighton was an open field area with some construction taking place on a bridge where Center Street and the Jordan River intersect (R. 47-48, Transcript of Suppression Hearing);

4. As Defendant's truck approached the construction area, Officer Knighton "became curious to know where they were going down there" (R. 48, lines 13-17, Transcript of Suppression Hearing);

5. Officer Knighton observed Defendant's truck turn and back up towards the barricades or signs surrounding the construction area so that the truck faced east (R. 48, lines 17-19, R. 51, lines 21-22, Transcript of Suppression Hearing), after which Defendant stopped the truck and turned off the headlights (R. 48, lines 17-18, Transcript of Suppression Hearing). The construction vehicles and supplies located in the construction area were located approximately two hundred feet away from the area where Defendant stopped his truck (R. 51, lines 1-13, Transcript of Suppression Hearing);

6. At no time during the events in question did Defendant or any of his co-passengers ever exit Defendant's truck and go towards the construction area (R. 52, lines 14-19, Transcript of Suppression Hearing);

7. Officer Knighton and her partner proceeded to Defendant's location "to determine why the individual had stopped there" (R. 48, lines 22-23, Transcript of Suppression Hearing). As they proceeded,

Officer Knighton had a "suspicion" of criminal activity (R. 51-52, Transcript of Suppression Hearing), which, according to Officer Knighton's testimony, was based on the construction equipment located in the general vicinity, the lateness of the hour, i.e., 9:58 p.m., and that criminal activity often occurs in that area (R. 54, Transcript of Suppression Hearing);

8. In the course of proceeding to Defendant's location, Officer Knighton turned off all of the lights on the patrol vehicle (R. 48-49, Transcript of Suppression Hearing). Officer Knighton then approached Defendant's truck until her patrol vehicle was "nose to nose" with Defendant's truck, at which time she then activated her high-beam headlights and clear white "takedown lights" located in the light bar on top of the patrol vehicle (R. 49, lines 5-17, Transcript of Suppression Hearing);'

9. Upon activating her high-beam headlights and "takedown lights," to illuminate Defendant's area, Officer Knighton observed three individuals in the truck - two males and a female - who looked up towards the patrol vehicle (R. 49-50, Transcript of Suppression Hearing), at which time Officer Knighton stated that she "felt some movement, some secretive movement" (R. 49-50, Transcript of Suppression Hearing). Officer Knighton's vehicle was a marked patrol vehicle with law enforcement decals on the doors and the light bar on the top of the vehicle (R. 53, lines 3-7, Transcript of Suppression Hearing). In addition to the clear white "takedown lights," the light bar on the top of the patrol vehicle had the traditional red

and blue lights in addition to grill lights in the front grill of the patrol vehicle (R. 53-54, Transcript of Suppression Hearing);

10. Officer Knighton then approached the vehicle and conducted an "investigation," which resulted in the discovery of a controlled substance that served as the basis for Defendant's conviction;

11. By way of Information filed on March 7, 1995, and amended on April 4, 1995, Defendant was charged with (1) Possession of a Controlled Substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i); (2) Driving While Under the Influence of Alcohol and/or Drugs, a class B misdemeanor, in violation of Utah Code Ann. § 58-37a-5; (3) and Possession of Drug Paraphernalia, a class B misdemeanor, in violation of Utah Code Ann. § 58-37a-5 (R. 17-18, Amended Information);

12. On April 25, 1995, Defendant appeared with appointed counsel for Arraignment before the district court and pleaded not guilty (R. 19, Minute Entry);

13. Defendant subsequently appeared with appointed counsel on May 19, 1995, for a hearing on Defendant's Motion to Suppress, after which the district court took the matter under advisement (R. 61, lines 21-22, Transcript of Suppression Hearing; R. 22, Minute Entry);

14. On June 6, 1995, the district court, by way of its Ruling on Defendant's Motion to Suppress, denied Defendant's Motion to Suppress (R. 23-26, Ruling on Defendant's Motion to Suppress). In its Ruling, the district court concluded that no detention occurred at the moment Officer Knighton activated her high-beam and "takedown"

lights (R. 24, Rule on Defendant's Motion to Suppress). The district court further concluded that, assuming *arguendo* that a detention did occur, "Deputy Knighton had reasonable suspicion, based on articulable facts, that Defendant had either committed a crime, was in the act of committing a crime, or was attempting to commit a crime" (R. 24-25, Ruling on Defendant's Motion to Suppress);

15. At the Pretrial Conference on September 12, 1995, Defendant entered a conditional plea of guilty to Possession of a Controlled Substance with the other two counts being dismissed (R. 87, lines 2-9, and R. 93, lines 5-7, Transcript of Pretrial Conference);

16. Notice of Appeal was filed on October 11, 1995 (R. 35-37, Notice of Appeal);

17. By way of Memorandum Decision, filed December 29, 1995, the Utah Court of Appeals summarily dismissed the appeal for lack of jurisdiction due to the lack of a final judgment (R. 84 and 98, Memorandum Decision);

18. Pursuant to Stipulation on the conditional plea of guilty, filed on April 23, 1996 (R. 104, Stipulation on Plea), the district court, signed the Judgment on May 23, 1996, which was entered on May 24, 1996, sentencing Defendant, *inter alia*, to an indeterminate term of zero to five years in the Utah State Prison, which was stayed pending determination of Defendant's appeal (R. 105-06, Judgment);

19. Defendant filed Notice of Appeal on June 24, 1996 (R. 107-09, Notice of Appeal).

### SUMMARY OF ARGUMENTS

1. The trial court erred in determining that Defendant was not seized when Officer Knighton, with her partner, parked the patrol vehicle nose-to-nose with Defendant's truck, thereby blocking Defendant's truck, and then activated both the "takedown lights" and high beam headlights of the patrol vehicle prior to continuing investigation of Defendant and his co-passengers. In the course of its Fourth Amendment analysis, the trial court erred in its analysis of the level of stop by utilizing an inquiry that is too narrow and thereby failing to consider the totality of the circumstances. Based on the totality of the circumstances, Defendant's liberty was restrained and a seizure occurred at the point Officer Knighton and her partner covertly approached and parked the marked patrol vehicle nose-to-nose to Defendant's truck and turned on both her high-beam headlights and "takedown lights" to illuminate Defendant's truck. By so doing, Officer Knighton effectively blocked Defendant's truck and then utilized a show of authority to detain Defendant for the purpose of continuing the investigation of Defendant.

2. The trial court erred by concluding that Officer Knighton had a reasonable suspicion to believe Defendant committed or was about to commit a crime prior to seizing Defendant when Defendant merely parked his truck and no one exited the truck at any time prior to the seizure and investigative questioning by Officer Knighton. Notwithstanding Officer Knighton's testimony that the situation was suspicious, neither she nor her partner could point to specific

objective facts to support her hunch or suspicion. Rather, Officer Knighton was merely "curious" about where Defendant was going. Because Officer Knighton did not articulate reasonable objective facts for suspecting Struhs had engaged in or was about to engage in criminal conduct, the balance between the public interest in crime prevention and constitutional right of Struhs to personal security and privacy tilts in favor of Struhs to protect Struhs from the unreasonable police interference. The seizure by Office Knighton of Struhs was unreasonable within the meaning of the Fourth Amendment and the evidence obtained as a result of the seizure should be suppressed.

#### ARGUMENTS

1. THE TRIAL COURT ERRED IN DETERMINING THAT DEFENDANT WAS NOT SEIZED WHEN OFFICER KNIGHTON, ALONG WITH HER PARTNER, PARKED THE PATROL VEHICLE NOSE-TO-NOSE WITH DEFENDANT'S TRUCK, THEREBY BLOCKING THE TRUCK, AND THEN ACTIVATED BOTH THE "TAKEDOWN LIGHTS" AND HIGH-BEAM HEADLIGHTS OF THE PATROL VEHICLE PRIOR TO THE INVESTIGATIVE QUESTIONING OF DEFENDANT.

Because a Fourth Amendment<sup>1</sup> analysis of police officer conduct is fact sensitive, the facts are reviewed in detail. *State v. Jackson*, 805 P.2d 765, 766 (Utah App. 1990); *State v. Sierra*, 754 P.2d 972, 973 (Utah App. 1988). A trial court's determination of the level of stop is a legal conclusion that is afforded no deference on appeal and is reviewed for correctness. *State v. Bean*, 869 P.2d 984,

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<sup>1</sup>The Fourth Amendment to the United States Constitution states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

985 & n.2 (Utah App. 1994) (citing *United States v. Maragh*, 894 F.2d 415, 417 (D.C. Cir.), cert. denied, 498 U.S. 880, 111 S.Ct. 214 (1990)); see also *State v. Carter*, 812 P.2d 460, 465 n.3 (Utah App. 1991), cert. denied, 836 P.2d 1383 (Utah 1992).

The Fourth Amendment to the United States Constitution provides that people have the right to be secure in their persons and effects against unreasonable searches and seizures. Accordingly, the Fourth Amendment functions to "prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." *United States v. Mendenhall*, 446 U.S. 544, 553-54, 100 S.Ct. 1870, 1877 (1980) (citations omitted).

The search and seizures limitations of the Fourth Amendment apply to "investigatory stops" or "seizures" that fall short of official arrests. *Terry v. Ohio*, 392 U.S. 1, 22, 88 S.Ct. 1868, 1880 (1968). "A seizure within the meaning of the Fourth Amendment occurs only when the officer by means of physical force or show of authority has in some way restricted the liberty of a person." *State v. Trujillo*, 739 P.2d 85, 87 (Utah App. 1987) (citing *Mendenhall*, 446 U.S. at 553, 100 S.Ct. At 1876 (citing *Terry*, 392 U.S. at 19, n.16, 88 S.Ct. at 1879, n.16)). "When a reasonable person, based on the totality of the circumstances, remains, not in the spirit of cooperation with the officer's investigation, but because he believes he is not free to leave a seizure occurs." *Id.* (citing *Mendenhall*, 446 U.S. at 544, 555, 100 S.Ct. at 1870, 1877).

In *State v. Deitman*, 739 P.2d 616 (Utah 1987) (per curiam), the Utah Supreme Court acknowledged three levels of police encounters with the public that are constitutionally permissible:

(1) an officer may approach a citizen at anytime [sic] and pose questions so long as the citizen is not detained against his will; (2) an officer may seize a person if the officer has an "articulable suspicion" that the person has committed or is about to commit a crime; however, the "detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop"; (3) an officer may arrest a suspect if the officer has probable cause to believe an offense has been committed or is being committed.

*Id.* at 616-17 (quoting *United States v. Merritt*, 736 F.2d 223, 230 (5th Cir. 1984), *cert. denied sub nom.* 476 U.S. 1142, 106 S.Ct. 2250, (1986)). Because the above-mentioned demarcations are often difficult to apply, the appellate court "must not only balance the competing interests of the individual and the State but also carefully consider the facts and circumstances of each particular case." *State v. Menke*, 787 P.2d 537, 540 (Utah App. 1990). Further, characterization of the encounter between an officer and a defendant must be determined by examining the "totality of the circumstances." See *State v. Smith*, 781 P.2d 879, 881 (Utah App. 1989).

A level one stop "is a voluntary encounter where a citizen may respond to an officer's inquiries but is free to leave at any time." *State v. Jackson*, 805 P.2d 765, 767 (Utah App. 1990), *cert. denied*, 815 P.2d 241 (Utah 1991); accord *Carter*, 812 P.2d at 463. These consensual and voluntary discussions between citizens and police



officers are not seizures subject to Fourth Amendment protection. *State v. Bean*, 869 P.2d 984, 986 (Utah App. 1994); *Jackson*, 805 P.2d at 768.

In contrast to a level one stop, a level two stop, or a seizure within the meaning of the Fourth Amendment, occurs when the officer "by means of physical force or show of authority has in some way restrained the liberty" of a person. *Mendenhall*, 446 U.S. at 552, 100 S.Ct. at 1876 (quoting *Terry*, 392 U.S. at 19 n.16, 88 S.Ct. at 1899 n.16); accord *Trujillo*, 739 P.2d at 87. "The test for when the seizure occurred is objective and depends on when the person reasonably feels detained, not on when the police officer thinks the person is no longer free to leave." *State v. Ramirez*, 817 P.2d 774, 786 (Utah 1991); see also *Mendenhall*, 446 U.S. at 554, 100 S.Ct. at 1877; *Jackson*, 805 P.2d at 767.

In *State v. Smith*, 781 P.2d 879 (Utah App. 1989), this Court held that a seizure had occurred when the officer followed Smith into a parking lot and blocked Smith's car after Smith had made a turn without signaling. The totality of the circumstances underlying the Court's determination that Smith's liberty had been restrained and that a seizure had occurred were that the officer initiated the stop with either his overhead lights or spot light and blocked Smith's car, got out the marked police car to talk to Smith late at night, asked for Smith's license and registration, issued Smith a traffic citation, and required Smith to remain while he did a warrants check and called for a backup officer. *Id.* at 882. In *Smith*, the Court

noted that other jurisdictions have held that when an officer blocks a defendant's vehicle, a seizure within the meaning of the Fourth Amendment occurs "even though the original stop was not initiated by the officer." *Id* at 882 n.3; see *People v. Guy*, 329 N.W.2d 435, 440 (1982) (holding that although the initial stop of defendant's vehicle in a driveway was not the result of the officer's actions, his partial blockage of the driveway and subsequent visit to defendant's car clearly constituted a detention of the automobile and would be the equivalent of a police-initiated "stop"); *United States v. Kerr*, 817 F.2d 1384, 1386 (9th Cir. 1987) (holding that seizure occurred because it was not possible for defendant to drive around the officer's car and defendant stopped and exited his car primarily in response to the police officer's official appearance and conduct rather than of his own volition).

The trial court, in the instant case, concluded that the encounter between Officer Knighton and Struhs was a level one encounter. See R. 24, Ruling on Defendant's Motion to Suppress. In the course of so concluding, the trial court focused upon whether or not the use of the "takedown lights" as opposed to the other red and blue lights on the patrol vehicle light bar constituted a detention subject to Fourth Amendment protection.<sup>2</sup> *Id*. The trial court erred

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<sup>2</sup>In the course of focusing on the "takedown lights" issue, the trial court based its determination on the underlying facts or lack thereof pertaining to the use of overhead lights by the officer in *State v. Davis*, 821 P.2d 9 (Utah App. 1991). *Davis*, however, is distinguishable from the instant case because the police officer in *Davis* had not been detained, even momentarily, and "could have reasonably believed that he was free to drive away as the officer

in its analysis of the level of stop by utilizing an inquiry that is too narrow and thereby failing to consider the totality of the circumstances. See *Smith*, 781 P.2d at 881. While the utilization by Officer Knighton of her "takedown lights" as opposed to the other lights on the light bar of the patrol vehicle is relevant, it is not dispositive. Another consideration is whether Defendant "remain[ed], not in the spirit of cooperation with the officer's investigation, but because he believe[ed] he [was] not free to leave. . . ." *Trujillo*, 739 P.2d at 87 (emphasis added).

The instant case is not a case where the police officer pulls along side a defendant's car without the use of lights or sirens and merely asks for identification or explanation. See *Bountiful City v. Maestas*, 788 P.2d 1062 (Utah App. 1990). Moreover, this is not a case where the defendant, prior to having his vehicle blocked by the officer's patrol vehicle, exited his car and approached the officer of his own volition. See *Jackson*, 805 P.2d at 767-68.

Based on a review of the totality of the circumstances, Defendant's liberty was restrained and a seizure occurred at the point Officer Knighton and her partner covertly approached and parked the marked patrol vehicle nose-to-nose to Defendant's truck and

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pulled up in his vehicle." *Id.* at 12. Further, unlike the instant case, the police officer in *Davis*, as he pulled behind the defendant's car, observed a can of beer on the trunk of the car, an open passenger door, and a man urinating, which created a reasonable suspicion, based on objective facts, that a crime had been committed. *Id.* Finally, in contrast to the case at bar, nothing in the record in *Davis* suggested that formal investigation into possible criminal wrongdoing had begun when the officer first arrived. *Id.*

turned both her high-beam headlights and "takedown lights" on Defendant's truck. By so doing, Officer Knighton effectively blocked Defendant's truck and then utilized a show of authority to detain Defendant for the purpose of continuing the investigation of Defendant.

2. BECAUSE DEFENDANT MERELY PARKED HIS TRUCK AND NO ONE EXITED THE TRUCK AT ANY TIME PRIOR TO THE SEIZURE AND INVESTIGATIVE QUESTIONING BY OFFICER KNIGHTON, THE TRIAL COURT ERRED BY CONCLUDING THAT OFFICER KNIGHTON HAD REASONABLE SUSPICION THAT DEFENDANT COMMITTED OR WAS ABOUT TO COMMIT A CRIME.

In order to justify a seizure, like that in the instant case, the police officer must "point to specific, articulable facts which, together with rational inferences drawn from those facts, would lead a reasonable person to conclude Struhs had committed or was about to commit a crime." *State v. Trujillo*, 739 P.2d 85, 88 (Utah App. 1987) (citing *Florida v. Royer*, 460 U.S. 491, 498, 103 S.Ct. 1319, 1324 (1983); *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 1879 (1968); and *State v. Christensen*, 676 P.2d 408, 412 (Utah 1984)).

In *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 1879 (1968), the United States Supreme Court stated:

And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a [person] of reasonable caution in the belief" that the action taken was appropriate? Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has

consistently refused to sanction. And simple  
"good faith on the part of the arresting  
officer is not enough' . . . ."

*Id.* at 21-22, 88 S.Ct. at 1879-80 (citations omitted).

Utah codified this constitutionally mandated "reasonable suspicion" at Utah Code Ann. § 77-7-15, which states:

A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand a name, address and an explanation of his actions.

According to § 77-7-15, a "brief investigatory stop of an individual by police officers is permissible when the officers 'have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.'" *State v. Carpena*, 714 P.2d 674, 675 (Utah 1986) (quoting *State v. Swanigan*, 699 P.2d 718, 719 (Utah 1985)); *State v. Christensen*, 676 P.2d 408, 412 (Utah 1984).

In *State v. Carpena*, 714 P.2d 674 (Utah 1986) (per curiam), a police officer, who was patrolling a neighborhood in which a number of burglaries had recently occurred, observed, at 3:00 a.m., a slowly moving vehicle with Arizona plates. *Id.* at 675. The officer did not observe a traffic offense and had no report of a recent burglary. *Id.* The vehicle pulled into a driveway of a house where one of the occupants resided. *Id.* Because there were no objective facts on which to base a reasonable suspicion that the occupants of the car were involved in criminal activity, the Utah Supreme Court held the investigatory stop unconstitutional. *Id.*

As in *Carpena*, the Utah Supreme Court, in *State v. Swanigan*, 699 P.2d 718 (Utah 1985 (per curiam)), held the stop unconstitutional. *Id.* at 719. In that case, the police officer, at approximately 1:40 a.m., stopped two persons walking down a street. *Id.* The seizure was based on a description by a fellow police officer who had observed the two individuals walking along the street at a late hour in an area where a recent burglary had been reported. *Id.* In that case, the officer saw them neither at the scene of the crime nor did he see them engage in any criminal activity. *Id.*

Applying the aforementioned principles of law and authority, the totality of the circumstances preceding the seizure of Struhs does not support a reasonable suspicion that Struhs was involved in criminal conduct. Officer Knighton did not, at any time prior to the seizure, observe Defendant or his co-passengers engage in any type of criminal conduct. *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637 (1979); *Carpena*, 714 P.2d at 675; *Swanigan*, 699 P.2d at 719. Rather the initial decision to seize Struhs was based merely on the lateness of the hour, the construction zone in the area, and the alleged high-crime factor in the area. *Cf. Trujillo*, 739 P.2d at 89. There is nothing in the record indicating that it was unusual for people to be driving and parking in the manner that Officer Knighton observed on the night in question.

Notwithstanding Officer Knighton's testimony that the situation was suspicious, neither she nor her partner could point to specific objective facts to support her hunch or suspicion. Rather, Officer

Knighton was merely "curious" about where Defendant was going. In short, there is nothing distinguishing Struhs' activity from that of any other citizen driving in the area, especially since Struhs did not exit the vehicle when it came to a stop and since the construction area was approximately two hundred yards away.

Because Officer Knighton did not articulate reasonable objective facts for suspecting Struhs had engaged in or was about to engage in criminal conduct, the balance between the public interest in crime prevention and constitutional right of Struhs to personal security and privacy tilts in favor of Struhs to protect Struhs from the unreasonable police interference. The seizure by Office Knighton of Struhs was unreasonable within the meaning of the Fourth Amendment and the evidence obtained as a result of the seizure should be suppressed.

#### CONCLUSION

Based on the foregoing, Defendant respectfully asks that this Court reverse the trial court's denial of Defendant's Motion to Suppress and remand the case for further proceedings consistent with this Court's opinion so that Defendant's constitutional right to be free from unreasonable searches and seizures might be effectuated.

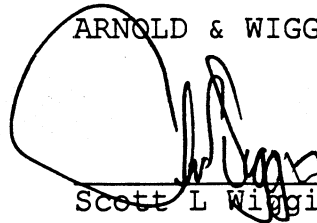
#### STATEMENT REGARDING ORAL ARGUMENT AND METHOD OF DISPOSITION

Defendant requests oral argument because oral argument will materially enhance the decisional process due to the significant

issues in the instant appeal dealing with the constitutional right to be free from unreasonable searches and seizures, which are matters of continuing public interest and which, based on the facts of the instant appeal, involve issues requiring further development in the area of criminal law case development for the benefit of bar and public. Counsel for Defendant further requests that the method of disposition of the instant appeal be by opinion designated by the Court "For Official Publication" for purposes of precedential value in future cases.

RESPECTFULLY SUBMITTED this 19th day of December, 1996.

ARNOLD & WIGGINS, L.C.

A handwritten signature in black ink, appearing to read "Scott L. Wiggins", is written over a horizontal line.

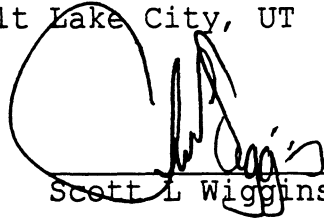
Scott L Wiggins  
Attorneys for Appellant



CERTIFICATE OF HAND-DELIVERY

I hereby certify that I personally caused to be HAND-DELIVERED, two (2) true and correct copies of the foregoing **BRIEF OF APPELLANT**, postage prepaid, to the following, on this 19th day of December, 1996.

JAN GRAHAM  
UTAH ATTORNEY GENERAL  
CRIMINAL APPEALS DIVISION  
P.O. Box 140854  
Salt Lake City, UT 84114-0854

  
\_\_\_\_\_  
Scott L Wiggins

## **ADDENDUM**

NONE .