

1996

West Valley City v. Randy Burton : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Benjamin A. Hamilton; Attorney for Appellee.

Elliot R. Lawrence; West Valley City Attorney's Office; Attorney for Appellant.

Recommended Citation

Brief of Appellee, *West Valley City v. Burton*, No. 960465 (Utah Court of Appeals, 1996).
https://digitalcommons.law.byu.edu/byu_ca2/353

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

WEST VALLEY CITY,)
)
 Plaintiff/Appellant,)
)
 vs.)
)
 Priority No. : 15
)
 RANDY BURTON,)
)
 Defendant/Appellee.

BRIEF OF APPELLEE

Appeal from the final judgment of the Third Circuit Court, State
of Utah, in and for Salt Lake County, West Valley Department.
The Honorable Carlos A. Esqueda

Benjamin A. Hamilton (#6238)
Attorney for Appellee
356 East 900 South
Salt Lake City, Utah 84111
Phone: (801) 322-3622
Facsimile: (801) 579-0606

Elliot R. Lawrence
Attorney for Appellant
West Valley City Attorney's Office
3600 South Constitution Blvd.
West Valley City, Utah 84119

IN THE UTAH COURT OF APPEALS

WEST VALLEY CITY,)	
Plaintiff/Appellant,)	Appellate Court No.: 960465 CA
)	
vs.)	Priority No. : 15
)	
RANDY BURTON,)	
Defendant/Appellee.)	

BRIEF OF APPELLEE

Appeal from the final judgment of the Third Circuit Court, State of Utah, in and for Salt Lake County, West Valley Department.
The Honorable Carlos A. Esqueda

Benjamin A. Hamilton (#6238)
Attorney for Appellee
356 East 900 South
Salt Lake City, Utah 84111
Phone: (801) 322-3622
Facsimile: (801) 579-0606

Elliot R. Lawrence
Attorney for Appellant
West Valley City Attorney's Office
3600 South Constitution Blvd.
West Valley City, Utah 84119

TABLE OF CONTENTS

STATEMENT OF JURISDICTION	1
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW	1
STANDARD OF REVIEW	2
CONSTITUTIONAL PROVISIONS AND STATUTES	2
STATEMENT OF FACTS	3
SUMMARY OF THE ARGUMENTS	6
I. THE TRIAL COURT SHOULD BE AFFIRMED ON APPEAL BECAUSE THE APPELLANT HAS FAILED TO MARSHAL THE EVIDENCE AND PROVIDE THIS COURT WITH AN ADEQUATE RECORD FOR REVIEW ON APPEAL.	6
II. THE OFFICER EXCEEDED THE SCOPE OF THE INVESTIGATION BY PERFORMING AN ILLEGAL SEARCH BY PUTTING HIS HEAD INTO THE APPELLEE'S VEHICLE FOR THE PURPOSE OF SMELLING THE APPELLEE'S BREATH.	6
III. THERE WAS INSUFFICIENT EVIDENCE PRIOR TO THE ILLEGAL SEARCH TO JUSTIFY THE OFFICER CHANGING THE SCOPE OF THE INVESTIGATION FROM THAT OF A HEADLIGHT VIOLATION TO THAT OF AN INVESTIGATION OF DRIVING UNDER THE INFLUENCE.	7
IV. THE INVESTIGATION OF DRIVING UNDER THE INFLUENCE OF ALCOHOL WHICH OCCURRED AFTER THE ILLEGAL SEARCH WAS NOT SUFFICIENTLY ATTENUATED FROM THE PRIOR ILLEGALITY TO JUSTIFY ITS ADMISSIBILITY	7
ARGUMENT	8
I. THE TRIAL COURT SHOULD BE AFFIRMED ON APPEAL BECAUSE THE APPELLANT HAS FAILED TO MARSHAL THE EVIDENCE AND PROVIDE THIS COURT WITH AN ADEQUATE RECORD FOR REVIEW ON APPEAL.	8
II. THE OFFICER EXCEEDED THE SCOPE OF THE INVESTIGATION BY PERFORMING AN ILLEGAL SEARCH BY PUTTING HIS HEAD INTO THE APPELLEE'S VEHICLE FOR THE PURPOSE OF SMELLING THE APPELLEE'S BREATH.	10

III.	THERE WAS INSUFFICIENT EVIDENCE PRIOR TO THE ILLEGAL SEARCH TO JUSTIFY THE OFFICER CHANGING THE SCOPE OF THE INVESTIGATION FROM THAT OF OF A HEADLIGHT VIOLATION TO THAT OF AN INVESTIGATION OF DRIVING UNDER THE INFLUENCE. .	15
IV.	THE INVESTIGATION OF DRIVING UNDER THE INFLUENCE OF ALCOHOL WHICH OCCURRED AFTER THE ILLEGAL SEARCH WAS NOT SUFFICIENTLY ATTENUATED FROM THE PRIOR ILLEGALITY TO JUSTIFY ITS ADMISSIBILITY	20
CONCLUSION		20

TABLE OF AUTHORITIES

CASES

<u>Arizona v. Hicks</u> , 480 U.S. 321, 325, 107 S.Ct. 1149, 1153, 94 L.Ed.2d 347 (1987)	14
<u>Commonwealth v. Podgurski</u> , 386 Mass. 385, 436 N.E.2d 150 (1982)	14
<u>Florida v. Royer</u> , 460 U.S. 491, 500 103 S.Ct. 1319, 1325, 75 Led.2d 229 (1983)	12
<u>Horton v. Gem State Mut. Of Utah</u> , 794 P.2d 847, 849 (Utah App. 1990)	9
<u>New York v. Class</u> , 475 U.S. 106, 114-115, 106 S.Ct. 960, 966-67,89 L.Ed.2d 81 (1986)	13
<u>Parks v. Zions First Nat's Bank</u> , 673 P.2d 590, 601 (Utah 1983)	9
<u>People v. Aquino</u> , 119 A.D.2d 464 500 N.Y.S.2d 677, 679 (1986)	14
<u>Sampson v. Richins</u> , 770 P.2d 998, 1002 (Utah App. 1989)	2, 6, 9
<u>State v. Arroyo</u> , 796 P.2d 684 (Utah 1990)	20
<u>State v. Elder</u> , 815 P.2d 1341, 1344 n. 4 (Utah App. 1991)	11
<u>State v. Gallegos</u> , 712 P.2d 207 (Utah 1985)	14
<u>State v. Genovesi</u> , 871 P.2d 547 (Utah App. 1994)	9
<u>State v. Lee</u> , 633 P.2d 48, 65 (Utah 1981)	18
<u>State v. Lopez</u> . 873 P.2d 1127 (Utah 1994)	10,11,15
<u>State v. Martinez</u> , 811 P.2d 205, 208 (Utah App. 1991)	2
<u>State v. Moreno</u> , 910 P.2d 1245, 1247 n. 1 (Utah App. 1996).	11

<u>State v. Potter</u> , 224 Utah Adv. Rep. 19, 21	
(Utah App. 1993)	15
<u>State v. Rawlings</u> , 829 P.2d 150, 152 (Utah App. 1992)	2, 8
<u>State v. Schlosser</u> , 774 P.2d 1132 (Utah 1989)	13,14
<u>State v. Steward</u> , 806 P.2d 213, 215 (Utah App. 1991)	15
<u>State v. Taylor</u> , 818 P.2d 561, 565 (Utah App. 1991)	2
<u>State v. Thurman</u> , 846 P.2d 1256 (Utah 1993)	20
<u>Terry v. Ohio</u> , 392 U.S. 1, 30, 88 S.Ct. 1868,	
20 L.Ed.2d 889 (1968)	15
<u>United States v. Sokolow</u> , 490 U.S. 1, 8, 109 S.Ct. 1581,	
1585 (1989)	15

STATUTES

Rule 11 of the Utah Rules of App. Pro.	6,7,8
Utah Code Annotated § 41-6-44 (1953 as amended)	2
Utah Code Annotated § 78-2a-3(2)(e) (Supp. 1996)	1

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment IV	2
--	---

IN THE UTAH COURT OF APPEALS

WEST VALLEY CITY,)	
Plaintiff/Appellant,)	Appellate Court No.: 960465 CA
)	
vs.)	Priority No. : 15
)	
RANDY BURTON,)	
Defendant/Appellee.)	

BRIEF OF APPELLEE

STATEMENT OF JURISDICTION

This is an appeal from a final judgment of a misdemeanor case. Therefore, this court has jurisdiction pursuant to Utah Code Annotated § 78-2a-3(2)(e) (Supp. 1996).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the trial court should be affirmed on appeal because the appellant has failed to marshal the evidence and provide this court with an adequate record for review on appeal.

II. Whether the officer exceeded the scope of the investigation by putting his head into the appellee's vehicle for the purpose of smelling the appellee's breath.

III. Whether there was sufficient evidence prior to the illegal search to justify the officer changing the scope of the investigation from that of a headlight violation to that of an investigation of driving under the influence of alcohol.

IV. Whether the investigation of driving under the influence of alcohol which occurred after the illegal search was sufficiently attenuated from the prior illegality to justify its admissibility.

STANDARD OF REVIEW

As to the argument that the appellant has failed to marshal the evidence this Court has stated that when the "record before us is incomplete, we are unable to review the evidence as a whole and must therefore presume that the verdict was supported by admissible and competent evidence." Sampson v. Richins, 770 P.2d 998, 1002 (Utah App. 1989). As to the substantive arguments on the motion to suppress this Court will not disturb a trial court's factual determinations unless such findings are deemed clearly erroneous. State v. Taylor, 818 P.2d 561, 565 (Utah App. 1991); State v. Martinez, 811 P.2d 205, 208 (Utah App. 1991). However, a trial court's conclusions of law which arise from its factual findings are reviewed for correctness and afforded no deference. State v. Rawlings, 829 P.2d 150, 152 (Utah App. 1992).

CONSTITUTIONAL PROVISIONS AND STATUTES

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment IV

STATUTES

Utah Code Annotated § 41-6-44 (1953 as amended)

STATEMENT OF FACTS

On February 15, 1996, at about 12:01 a.m., Officer Schmidt of the West Valley City Police Department saw the appellee's car traveling westbound on 3500 South without its headlights on. The officer was headed Eastbound on the same street. (Transcript at 7-8). Schmidt did a U-turn to stop the appellee and turned his top lights on. (Transcript at 8). Other than the headlight violation, there was no reason to stop the appellee.¹ Based on the fact that the appellee was driving without his headlights on, and nothing more, the officer formed a hunch that the appellee was driving under the influence. (Transcript at 26)

The officer approached the driver's window and requested the appellee's driver's license, registration and insurance. (Transcript at 11). The appellee responded "Yeah" to the officer's request. (Transcript at 17-18). The officer put his nose and face inside the window as soon as he finished asking for the appellee's license and registration. (Transcript at 18). The officer then pulled his head back and nodded in affirmation that he smelled alcohol to the ride-a-long passenger in his patrol car because he had discussed this previously with his passenger. (Transcript at 18-19). The officer put his nose inside the passenger compartment to see if he could smell the

¹ Officer Schmidt testified that the car drifted just a bit across the right line, however, he later testified that he did not recall if the car pulled right over as it went across the line and he also did not recall if the car went back onto the roadway after it had gone across the white line. (Transcript at 9).

odor of alcohol. (Transcript at 12). When the officer stuck his head inside the vehicle he could smell the odor of alcohol. (Transcript at 13). Prior to that time the officer did not notice any slurred speech from the appellee. (Transcript at 18). Other than the appellee traveling without his headlights on and the alleged odor of alcohol, there were no other factors indicating that the appellee had been drinking or that he was under the influence of alcohol.² The officer proceeded to put his head

² The trial court found that Officer Schmidt smelled the odor of alcohol when he had a conversation with Mr. Burton. (Transcript at 27). Officer Schmidt testified that he could smell the odor of alcohol when he went up to the car. (Transcript at 10) However, this testimony is highly suspect. First of all the officer testified that he did not recall if the window was up or down when he approached. (Transcript at 10). Secondly, the officer also testified that the appellee spoke with him several times and after speaking with him for a while, he could smell the odor of alcohol.

Q Okay, did you at any point stick your head a little closer to the window?

A Yes. I did.

Q When did you do that?

A After speaking with Mr. Burton for a brief moment, he was reaching for his driver's license, registration and insurance, I believe which was in his glove box.

Q Okay. You did have a chance to speak with him then?

A Oh, yeah.

Q And did he turn and speak with you while your head was still outside the vehicle?

A Yeah. He--he spoke to me several times.

Q Okay. Did you--when he turned and spoke to you, were you able to ascertain if it was coming from him or not?

A Yeah. That's--that's what made me believe that he had been drinking while driving--

Q Okay.

A --'cause I could smell the alcohol coming from his breath.

Q Okay. Now, you did at one time stick your head in the window a little bit?

A Could have been partially in there, yes.

Q Okay. When did you do that?

inside the passenger compartment of the vehicle three or four more times.

The appellant, at the close of the hearing, indicated that the record of the hearing was not going to be very clear with regards to the video tape and its contents. (Transcript at 40). The appellant went on to tell the trial court that if the appellant decided to appeal, that the attorney for the appellant would contact the attorney for the appellee and agree upon the facts as contained on the video and have those facts made part of the trial court's order. Id. The appellant never contacted the attorney for the appellee with regards to its intention of appealing this case or with regards to clarifying the record with a written order.

A After speaking with him for awhile, I could smell the odor of alcohol, I just wanted to make sure the odor of alcohol was coming from the car and not on the street or anything right by there, because it is a heavily traveled road, a lot of pedestrian traffic and sometimes--

(Transcript at 11-12). Based on the foregoing testimony, the officer was not sure if what he smelled was coming from within or without the vehicle. The officer went on to testify that before he put his head in the window he had told the appellee that he could smell alcohol and that in response to that the appellee told the officer he had been drinking. (Transcript at 15).

The only conversation between the appellee and the officer prior to the officer sticking his nose and then his head in the window was the officers's request for the appellee's driver's license, registration and insurance and the appellee's response of "Yeah." (Transcript at 17-18). The officer is basing his prior testimony of his smelling the odor of alcohol on a faulty recollection of the appellee speaking with him several times, which conversations never occurred.

SUMMARY OF THE ARGUMENTS

- I. THE TRIAL COURT SHOULD BE AFFIRMED ON APPEAL BECAUSE THE APPELLANT HAS FAILED TO MARSHAL THE EVIDENCE AND PROVIDE THIS COURT WITH AN ADEQUATE RECORD FOR REVIEW ON APPEAL.

The appellant has the duty to provide this court with all the evidence and papers necessary for review of the case. Rule 11 of the Utah Rules of App. Pro. The appellant has failed to marshal the evidence. The lower court did not make findings of fact nor conclusions of law, and the record is incomplete. Where the record before this Court is incomplete, this Court has held that it will presume the validity of the verdict. Sampson v. Richins, 770 P.2d 998 (Utah App. 1989).

- II. THE OFFICER EXCEEDED THE SCOPE OF THE INVESTIGATION BY PERFORMING AN ILLEGAL SEARCH BY PUTTING HIS HEAD INTO THE APPELLEE'S VEHICLE FOR THE PURPOSE OF SMELLING THE APPELLEE'S BREATH.

The appellee was legitimately stopped for driving without his headlights on. After the stop, the officer exceeded the scope of the stop for the headlight violation by putting his head inside the passenger compartment of the appellee's vehicle. The officer put his head inside the vehicle to search for the odor of alcohol. This search of the passenger compartment of the appellee's vehicle was not supported by probable cause and went beyond the scope of the initial detention.

III. THERE WAS INSUFFICIENT EVIDENCE PRIOR TO THE ILLEGAL SEARCH TO JUSTIFY THE OFFICER CHANGING THE SCOPE OF THE INVESTIGATION FROM THAT OF A HEADLIGHT VIOLATION TO THAT OF AN INVESTIGATION OF DRIVING UNDER THE INFLUENCE.

The only evidence that the officer had available to him prior to the search was the headlight violation. After the stop, the officer testified that the appellee turned and spoke to him several times and during that conversation with the appellee, the officer smelled the odor of alcohol. However, after reviewing the video, the officer admitted that the only conversation between him and the appellee before the search was the request by the officer for the appellee's driver license, registration and insurance information, and the appellee's single word response of "Yeah." The evidence available to the officer at the time that he conducted the search was insufficient to merit the intrusion.

IV. THE INVESTIGATION OF DRIVING UNDER THE INFLUENCE OF ALCOHOL WHICH OCCURRED AFTER THE ILLEGAL SEARCH WAS NOT SUFFICIENTLY ATTENUATED FROM THE PRIOR ILLEGALITY TO JUSTIFY ITS ADMISSIBILITY.

All the evidence acquired after the illegal search was the fruit of the illegal search and the appellant has failed to produce any evidence showing any attenuation between the illegal search and the subsequently discovered evidence.

ARGUMENT

- I. THE TRIAL COURT SHOULD BE AFFIRMED ON APPEAL BECAUSE THE APPELLANT HAS FAILED TO MARSHAL THE EVIDENCE AND PROVIDE THIS COURT WITH AN ADEQUATE RECORD FOR REVIEW ON APPEAL.

Rule 11 of the Utah Rules of Appellate Procedure requires that the appellant provide this Court with all evidence and papers necessary for appropriate review. This is the responsibility of the appealing party. See Rule 11 Utah Rules of Appellate Procedure. In this case the appellant agreed to sit down with counsel for the appellee and prepare some findings of facts with regards to the contents of a video shown at the hearing on the motion to suppress. (Transcript at 40). This was never done and the record currently before this Court is therefore confusing and incomplete.

Furthermore, the lower court did not make findings of facts and conclusions of law. The City, who wished to appeal, did not obtain from, nor prepare for the trial court, findings of fact and conclusions of law. These are necessary for appropriate review by this Court. The trial judge, Carlos Esqueda, was a Judge Pro Tem, and is no longer on the bench, thus further complicating this matter currently before this Court. The City's failure to marshal the evidence on this appeal should result in this Court ruling in the appellee's favor.

In State v. Rawlings, 829 P.2d 150 (Utah App. 1992), the Utah Court of Appeals ruled that because of the inadequate record provided by the appellant to the Appeals Court, the Court could

not address the issues raised and would therefore presume correctness of the disposition made by the trial court. In another case, Sampson v. Richins, 770 P.2d 998 (Utah App. 1989), this Court stated that "Rule 11 directs counsel to provide this court with all evidence relevant to the issues raised on appeal". Id. at 1002. The Court further went on to say "[w]here the record before us is incomplete, we are unable to review the evidence as a whole and must therefore presume that the verdict was supported by admissible and competent evidence." Id. Findings of fact are necessary to clearly indicate the mind of the court and resolve issues of material fact necessary to justify the conclusions of law and judgment entered thereon. See Parks v. Zions First Nat's Bank, 673 P.2d 590, 601 (Utah 1983). It is the appealing party's responsibility to marshal the papers necessary to proceed with an appeal.³ See Rule 11 Utah Rules of Appellate Procedure. In this case this was not done by the appellant and the Court should uphold the lower courts decision.

In State v. Genovesi, 871 P.2d 547 (Utah App. 1994), this Court held that a trial court must make detailed findings of fact and conclusions of law for adequate review on appeal. The result in Genovesi, was a remand⁴ for entry of findings of fact and

³ In Horton v. Gem State Mut. of Utah, the Court said that the appellant has the burden of providing the court with an adequate record to preserve its arguments for review. 794 P.2d 847, 849 (Utah App. 1990).

⁴ The appellee in this case is not requesting remand, instead, the Appellee is requesting that the court rule in its favor because the appellant failed to marshal the evidence, or

conclusions of law. Id. at 552. In this case the trial court judge made limited findings of fact and conclusions of law, supporting his decision.⁵ The problem is that the appellant was going to prepare additional findings of facts for the trial judge's signature. These findings were never prepared. Because of that failure by the appellant to adequately marshal the evidence the appellee requests that the Court affirm the lower court's decision.

II. THE OFFICER EXCEEDED THE SCOPE OF THE INVESTIGATION BY PERFORMING AN ILLEGAL SEARCH BY PUTTING HIS HEAD INTO THE APPELLEE'S VEHICLE FOR THE PURPOSE OF SMELLING THE APPELLEE'S BREATH.

The Appellant raises the scope issue by arguing the two prong approach in State v. Lopez. 873 P.2d 1127 (Utah 1994). The Appellant argues that the search of the interior of the appellee's vehicle for the odor of alcohol was justified under the second prong which states that a detention must be reasonably related in scope to the circumstances that justified the interference in the first place. The appellee does not contend that the stop of his vehicle was unlawful. The appellee was stopped for not having his headlights on at night after having

because after a review of the record and the transcript of the hearing on the motion to suppress, and the judges limited findings and conclusions, the court is convinced that the ruling is correct.

⁵ A remand in this case would create difficulties and unfairness to the appellee because, as previously discussed, the trial court judge is no longer on the bench.

been observed by Officer Schmidt of the West Valley City Police Department.

However, the search of the interior of the appellee's vehicle for the odor of alcohol went beyond the scope of a headlight violation.⁶ Lopez holds that "[i]nvestigative questioning that further detains the driver must be supported by reasonable suspicion of more serious criminal activity." Id. at 1132. If the **questioning** of a driver with regards to a crime outside the purpose of the initial detention must be supported by reasonable suspicion of more serious criminal activity, then a search of the interior of the vehicle must be supported by even more because it is a much greater intrusion.

The Appellant tries to justify this intrusion upon the appellee's right to privacy of what is contained within his automobile by using language that was written with the intent of minimizing the intrusive nature of investigatory stops. The Appellant correctly argues that an officer must "diligently [pursue] a means of investigation that [is] likely to confirm or dispel their suspicions quickly . . ." Appellant's brief at 8 quoting Lopez 873 P.2d at 1132. However, the Appellant tries to use that language to justify the fact that Officer Schmidt put his face into the appellee's vehicle to see if he could smell

⁶ Although the scope argument was not the ground relied on by the trial court, this Court may affirm the trial court's decision on **any** proper ground. State v. Elder, 815 P.2d 1341, 1344 n. 4 (Utah App. 1991); State v. Moreno, 910 P.2d 1245, 1247 n. 1 (Utah App. 1996).

alcohol by arguing that such an act is justified by the fact that it would quickly confirm the officer's suspicion that there was an odor of alcohol in the vehicle.⁷

Just because a desired result can be quickly acquired by a given course of conduct does not, by itself, justify that course of conduct. To hold otherwise would ratify all kinds of warrantless searches just because of the speed of the desired result. This type of "ends justifies the means" argument has never been the law under the Fourth Amendment.

In addition to the requirement of acting quickly, an officer also has a requirement in his investigation to use the "least intrusive means reasonably available to verify or dispel the officer's suspicion. . ." Florida v. Royer, 460 U.S. 491, 500 103 S.Ct. 1319, 1325, 75 Led.2d 229 (1983). The least intrusive means in this case would have been for the officer simply to inquire of Mr. Burton if he had been drinking.⁸ How much he had been drinking? And at what time he had his first and last drinks? Depending on the answers to those questions, the officer may have had sufficient reason to ask Mr. Burton to get out of

⁷ Actually, the Appellant argued that such an action quickly confirmed the suspicion that Burton was drunk. (Appellant's brief at 8). The odor of alcohol within a vehicle could not by itself confirm or dispel the suspicion that Mr. Burton was **drunk** but may confirm a hunch that he had been drinking.

⁸ The officer testified that based on what he could recall, he asked the appellee if he had been drinking. (Transcript at 15). However, a review of the record fails to show that any such question was made prior to the officer putting his face and head into the passenger compartment of the appellee's vehicle. (Transcript at 17-18).

the vehicle and then proceed with an investigation of driving under the influence.⁹

The officer put his face into the passenger compartment of the appellee's vehicle for the purpose of detecting the odor of alcohol. (Transcript at 12). The Utah Supreme Court in State v. Schlosser, held that the officer went beyond the scope of the initial traffic stop by opening the passenger door and scanning the interior of the cab of a truck. The Utah Supreme Court held that such action of the officer was a search and had to be supported by probable cause. 774 P.2d 1132 (Utah 1989). Schlosser cites to the United States Supreme Court case of New York v. Class, 475 U.S. 106, 114-115, 106 S.Ct. 960, 966-67, 89 L.Ed.2d 81 (1986), where the Court stated that "a car's interior as a whole is . . . subject to Fourth Amendment protection from unreasonable intrusions by the police." In Class, the Court held that an officer's opening of an automobile door to look at the vehicle identification number constituted a "search." 475 U.S. at 114, 119, 106 S.Ct. At 966, 969. An Officer putting his face and later his head into the passenger compartment of a vehicle

⁹ Appellant argues that one of the facts that support the officer's intrusion into the passenger compartment of the appellee's vehicle is that Mr. Burton volunteered that he was drunk. Such an argument has no foundation. Nowhere in the record does Mr. Burton volunteer that he was drunk. Appellant states this in his Relevant Facts but provides no cite as to where to find such an admission in the record. Later in the Appellant's Brief, the Appellant indicates that this admission is found on the video. However, no such admission is found in the record for review in this case. The Appellee, therefore, respectfully requests this court to ignore the ten or more references in the Appellant's Brief to such an alleged admission.

constitutes a search under the Fourth Amendment. "In Arizona v. Hicks, 480 U.S. 321, 325, 107 S.Ct. 1149, 1153, 94 L.Ed.2d 347 (1987), the Supreme Court held that even a small intrusion beyond the legitimate scope of an initially lawful search is unlawful under the Fourth Amendment." Schlosser, 774 P.2d 1132, 1135; See also State v. Gallegos, 712 P.2d 207 (Utah 1985). The Schlosser case cites to cases on point from other jurisdictions. 774 P.2d at 1136-37. One in particular is Commonwealth v. Podgurski, 386 Mass. 385, 436 N.E.2d 150 (1982), cert. Denied, 459 U.S. 1222, 103 S.Ct. 1167, 75 L.Ed.2d 464 (1983), where the Massachusetts court held that the officer's poking his head inside a slightly open sliding door required suppression of the evidence. Another case on point is People v. Aquino, 119 A.D.2d 464 500 N.Y.S.2d 677, 679 (1986), where the officer did not merely look into the vehicle from the outside but bent his head into the car to conduct a visual inspection of what would otherwise be hidden from plain view. Such conduct was improper. Id.

Assuming *arguendo* that the trial judge made a correct holding that an unverified odor of alcohol, that may have been coming from the street, (transcript at 12) constituted reasonable suspicion to believe that the appellee was driving under the influence, the officer still exceeded the scope of that purported belief by putting his face and head into the passenger compartment of the appellee's vehicle.

III. THERE WAS INSUFFICIENT EVIDENCE PRIOR TO THE ILLEGAL SEARCH TO JUSTIFY THE OFFICER CHANGING THE SCOPE OF THE INVESTIGATION FROM THAT OF A HEADLIGHT VIOLATION TO THAT OF AN INVESTIGATION OF DRIVING UNDER THE INFLUENCE OF ALCOHOL.

The officer did not have sufficient evidence, independent of the illegal search to justify an investigation of DUI. For an officer legally to detain an individual, the United States Supreme Court has held that the officer must have reasonable suspicion based on specific and articulable facts "that criminal activity is afoot." Terry v. Ohio, 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Here, the officer had reasonable suspicion based on articulable facts that the appellee had committed the crime of driving without headlights.

After making the stop in this case, the officer was limited to citing the appellee for driving without his headlights on and letting him go on his way. Lopez, 873 P.2d 1127 (Utah 1994). In order to be justified in investigating the crime of DUI, he must have had reasonable suspicion that the crime of DUI had occurred. Id. There is no bright line test for determining if reasonable suspicion exists. State v. Steward, 806 P.2d 213, 215 (Utah App. 1991). Rather, the courts must look at the totality of the circumstances. United States v. Sokolow, 490 U.S. 1, 8, 109 S.Ct. 1581, 1585 (1989).

The officer must be able to articulate some unlawful or suspicious behavior connecting the detainee to the alleged suspected criminal activity. State v. Potter, 224 Utah Adv. Rep. 19, 21 (Utah App. 1993). In the present case, the officer

approached the appellee's vehicle with a hunch that the appellee was driving under the influence and even discussed it with his ride-a-long passenger. When he approached, he had no evidence that the appellee was driving under the influence. There was no driving pattern to indicate otherwise and when he approached the appellee he had no other evidence. The officer requested the appellee's driver license, registration and insurance information, and immediately, upon making this request put his face into the passenger compartment of the vehicle.

The appellant argues that there was enough evidence available to the officer prior to the illegal search and bases that argument on two grounds. First, the appellant argues that the officer detected the odor of alcohol before he searched the interior of the appellee's vehicle. The trial judge erroneously found that the officer initially smelled the odor of alcohol and bases that finding on the fact that the officer nodded to the

passenger. (Transcript at 32).¹⁰ The trial court's finding is clearly erroneous based on the evidence available to the court.¹¹

The second ground for the Appellant's argument is that the appellee voluntarily admitted that he was drunk before the officer inserted his nose or any other portion of his body into the vehicle. (Appellant's brief at 10). As indicated earlier, the record does not support an allegation that the appellee ever made the statement that he was drunk. Furthermore, the record does show that the only statement made by the appellee prior to the officer sticking his head into the vehicle was the word "yeah" in response the officer requesting the appellee's driver

¹⁰ The trial court stated that "it is obvious on the tape, [that the officer] initially smells the odor of alcohol, just by the nod and what I previously said." (Transcript at 32). However, the nod to the passenger, in confirmation of what they had discussed, did not occur until after the officer had put his head inside the passenger compartment of the vehicle. (Transcript at 18-19). With regards to what the trial court had "previously said," a review of the transcript does not indicate why the trial court made any findings as to when the officer first detected the odor of alcohol. The closest statement made by the court is that "[the officer] goes and speaks to Mr. Burton. He smells the odor of alcohol . . ." (Transcript at 27). A review of the transcript shows that this finding by the court is also unsupported by the testimony. (See footnote 3).

¹¹ The Appellant argues that the trial court "**specifically** stated that the presence of the odor outside of the vehicle constituted a reasonable suspicion that Burton was drunk . . ." (Appellant's brief at 10). The Appellant cites to the transcript at 34 for that **specific** statement. With due respect to counsel for the Appellant, the trial court did not make such a statement. What the trial court stated is that the officer had "reasonable articulable suspicion to investigate but not to search, and by-- by sticking his head into the window, through the window into the compartment of the car, that's a search. And when you're searching the car, you need more." (Transcript at 34).

license, registration and proof of insurance. (Transcript at 17-18).

The Appellant argues that it would have obtained the evidence from the field sobriety tests if no misconduct had occurred. (Appellant brief at 11). The record does not support such an argument. "[A] search and seizure without a warrant is per se unreasonable and . . . the state has the burden to establish the legality of the search in such a case." State v. Lee, 633 P.2d 48, 65 (Utah 1981). What the Appellant proved at the hearing is that the officer could not remember what lead up to his placing his face inside the window the appellee's vehicle. The officer made inconsistent statements as to how much conversation took place before he allegedly smelled the odor of alcohol. The officer testified that the appellee spoke with him several times and during that conversation is when he smelled the odor of alcohol. (Transcript at 12).

In later testimony, after a review of the video tape, the officer testified that the only word spoken to him by the appellee was "yeah." (Transcript at 17-18). When the officer testifies that he smelled the odor of alcohol before he put his face in the window, he was not "sure the odor of alcohol was coming from the car and not on the street or anything right by there, because it is a heavily traveled road with a lot of pedestrian traffic and sometimes . . ." (Then the prosecutor interrupted him) (Transcript at 12). The officer approached the vehicle with nothing more than a hunch that the appellee was driving under the influence. The officer had discussed with his

ride-a-long passenger the officer's unsupported hunch that the defendant was driving under the influence. (Transcript at 19). The officer probably wanted to impress his ride-a-long passenger and to do this he would need to confirm that the appellee had been drinking. This subjective suspicion which was unrelated to the headlight violation, accompanied by his desire to look good in front of his ride-a-long passenger is further evidence that the officer did not smell anything prior searching the interior of the car for the odor of alcohol.

The Appellant did not establish that the officer would have obtained the evidence if no misconduct had occurred. The evidence acquired as a result of the illegal search was the odor of alcohol and all the evidence of the field sobriety tests and breath test which stemmed from that illegal search. The Appellant did not establish at the motion hearing evidence to have justified requiring the appellee to get out of his vehicle to submit to the field sobriety tests absent the illegal search. There was also no testimony that the officer would have had the appellee get out of the vehicle and submit to the field sobriety tests. Therefore, the Appellant's argument that police would have obtained the evidence even had no misconduct had taken place is without support in the record.

IV. THE INVESTIGATION OF DRIVING UNDER THE INFLUENCE OF ALCOHOL WHICH OCCURRED AFTER THE ILLEGAL SEARCH WAS NOT SUFFICIENTLY ATTENUATED FROM THE PRIOR ILLEGALITY TO JUSTIFY ITS ADMISSIBILITY.

The Appellant, in section III of its brief argues that the evidence of the field sobriety tests and the arrest of the appellee should not be suppressed because it was not obtained from the search. Such an argument ignores the law of the fruit of the poisonous tree doctrine and the doctrine of attenuation.

It is apparent from the record that the odor and all evidence acquired thereafter, stemmed from the illegal search of the appellee's vehicle. In addition, the Appellant had the burden of proving that the consent for the subsequent evidence was attenuated from the prior illegality. State v. Thurman, 846 P.2d 1256 (Utah 1993); State v. Arroyo, 796 P.2d 684 (Utah 1990). The Appellant presented no evidence that the subsequent field sobriety tests and acquisition of other evidence was in any way attenuated from the prior illegal search.

CONCLUSION

For the foregoing reasons, the appellee respectfully requests that the Court affirm the trial court's ruling granting the motion to suppress.

IV. THE INVESTIGATION OF DRIVING UNDER THE INFLUENCE OF ALCOHOL WHICH OCCURRED AFTER THE ILLEGAL SEARCH WAS NOT SUFFICIENTLY ATTENUATED FROM THE PRIOR ILLEGALITY TO JUSTIFY ITS ADMISSIBILITY.

The Appellant, in section III of its brief argues that the evidence of the field sobriety tests and the arrest of the appellee should not be suppressed because it was not obtained from the search. Such an argument ignores the law of the fruit of the poisonous tree doctrine and the doctrine of attenuation.

It is apparent from the record that the odor and all evidence acquired thereafter, stemmed from the illegal search of the appellee's vehicle. In addition, the Appellant had the burden of proving that the consent for the subsequent evidence was attenuated from the prior illegality. State v. Thurman, 846 P.2d 1256 (Utah 1993); State v. Arroyo, 796 P.2d 684 (Utah 1990). The Appellant presented no evidence that the subsequent field sobriety tests and acquisition of other evidence was in any way attenuated from the prior illegal search.

CONCLUSION

For the foregoing reasons, the appellee respectfully requests that the Court affirm the trial court's ruling granting the motion to suppress.

RESPECTFULLY SUBMITTED this 16th day of December, 1996.


BENJAMIN A. HAMILTON
Attorney for Appellee

Certificate of Mailing

This certifies that two copies of the foregoing Brief of Appellee were mailed to the following address:

Elliot R. Lawrence
West Valley City Attorney's Office
3600 South Constitution Blvd.
West Valley City, Utah 84119

DATED this 16th day of December, 1996.

A handwritten signature in cursive script, reading "Grace L. Taylor", written over a horizontal line.