

1996

West Valley City v. Randy Burton : Reply Brief

Utah Court of Appeals

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BRIEF

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IN THE UTAH COURT OF APPEALS

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DOCKET NO. 960465-02

WEST VALLEY CITY,
Appellant,

vs.

RANDY BURTON,
Appellee.

Appellate Court No.: 960465 CA

Priority No. 02

~~Priority no.: 15~~

REPLY BRIEF OF APPELLANT

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.

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COURT OF APPEALS

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IN THE UTAH COURT OF APPEALS

WEST VALLEY CITY,
Appellant,

Appellate Court No.: 960465 CA

vs.

Priority no.: 15

RANDY BURTON,
Appellee.

REPLY BRIEF OF APPELLANT

INTRODUCTION

Pursuant to Rule 24(c) of the Utah Rules of Appellate Procedure, Appellant respectfully submits this Reply Brief, in order to answer new matters raised by Appellee, Randy Burton. In his brief, Burton demands a ruling in his favor because the trial court did not prepare findings of fact and conclusions of law. Although findings of fact were not prepared, Burton's request is inappropriate. In the first place, there is an adequate record of the proceedings upon which this Court could base a ruling. Secondly, the proper remedy is remand for preparation of findings of fact and conclusions of law.

Additionally, Burton misinterprets the existing body of law by concluding that the alleged "search" of Burton's vehicle required a warrant. This conclusion has no justification in the cases cited by Burton. The warrantless "search" was justified because there was probable cause to conduct the "search." The trial judge specifically held that the officer detected the odor of alcohol

before he inserted his head in the vehicle window. In addition, the videotape as well as the officer's testimony shows that Burton voluntarily admitted that he was drunk. Therefore, the officer had probable cause that Burton had committed an offense, which justified further investigation that would quickly dispel or confirm the suspicion that had developed. The facts of the case indicate that the officer's actions were justifiable and reasonable.

Contrary to Burton's argument, the officer had a reasonable articulable suspicion that Burton was drunk independent of any alleged "search" of the vehicle. Again, the trial judge specifically held that the officer detected the odor of alcohol before he inserted his head into the vehicle window. The trial judge also ruled that this gave the officer a reasonable articulable suspicion that Burton was drunk, prior to allegedly "searching" the vehicle. Therefore, even if the subsequent "search" was improper, the officer could have asked Burton to step from the car and perform field sobriety tests. In addition, the videotape of the stop shows that Burton voluntarily admitted he was drunk. This alone justified the field sobriety tests.

In short, the evidence does not support the judge's conclusion to suppress the field sobriety tests. The police officer detected the odor of alcohol before he inserted his head into the vehicle. Second, Burton voluntarily admitted he was drunk. The officer had a reasonable articulable suspicion that Burton had violated the

law. Therefore, despite the alleged "search," the officer was justified in conducting the field sobriety tests. For these reasons, and for the reasons stated in Appellant's Brief, the decision of the trial court should be overruled, and the case remanded for prosecution.

ARGUMENT

I. DISMISSAL IS INAPPROPRIATE BECAUSE THERE IS AN ADEQUATE RECORD OF THE PROCEEDINGS, AND, IN THE ALTERNATIVE, THE CASE COULD BE REMANDED SO THAT FINDINGS OF FACT COULD BE PREPARED.

Because there is an adequate record of the proceedings, and also because findings of fact can be easily obtained, Burton's demand for a ruling in his favor is inappropriate. Rule 11(e)(2) of the Utah Rules of Appellate Procedure states: "If the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion." UTAH R. APP. P. 11(e)(2). A transcript of the hearing has been prepared and submitted to the Court for review. In addition, the videotape of the stop, which was introduced as evidence at the hearing, is also available. Thus, all evidence relevant to the trial court's conclusion is available for the Court.

Since all evidence is available for review, the record is not incomplete. The record must contain the evidence the trial court used to reach its decision. "Rule 11 directs counsel to provide

this court with all evidence relevant to the issues raised on appeal." Sampson v. Richins, 770 P.2d 998, 1002 (Utah App. 1989). The transcript of the proceedings and the videotape constitute all of the evidence relevant to the issue raised in this appeal. Even if findings of fact and conclusions of law were formally prepared and entered, this Court would still review the transcript and videotape.

Burton's demand for a ruling in his favor violates the established case law in Utah. Failure to prepare an adequate record of findings is not grounds for winning an appeal. "It is well settled that the trial court should make findings on all material issues tried by the parties, and a failure to do so is generally considered a reversible error and requires a remand." Kinkella v. Baugh, 660 P.2d 233, 236 (Utah 1983).¹ In other words, if a trial court fails to prepare findings of fact or conclusions of law, the appeal should be remanded back so the court could prepare adequate findings.

Burton cites State v. Genovesi to support his demand for a ruling in his favor. However, the trial court's record in Genovesi consisted of three brief statements and an order. There was no other record of the court's findings. State v. Genovesi, 871 P.2d

¹ See also Parks v. Zions First Nat'l Bank, 673 P.2d 590, 601 (Utah 1983); Anderson v. Utah County Bd. of Comm'rs., 589 P.2d 1214, 1216 (Utah 1979). It should also be noted that in Kinkella, the court concluded that the record was adequate, even though the trial court had not prepared specific findings. Kinkella, 660 P.2d at 236.

547, 550 (Utah App. 1994). The Court of Appeals did not rule on the case, but remanded the case for rehearing so that the trial court could enter more detailed findings of fact. *Id.* This decision was consistent with the established case law, and proper under the circumstances.

Burton claims that remand would be "difficult and unfair," because the trial judge, Carlos Esqueda, is no longer on the bench. (Brief of Appellee, *West Valley City v. Randy Burton*, at 10 n.5 (hereafter "Burton's Brief")). Burton, however, fails to explain the difficulty or unfairness. The transcript of the hearing and the videotape provide all of the evidence of the hearing, so any judge could ascertain findings of fact from the record. Furthermore, Mr. Esqueda still practices law in Salt Lake City, and so is certainly available to prepare findings if so ordered by this Court. In short, there is no difficulty or unfairness, because there is an adequate record of the proceedings and the evidence available.

To conclude, Burton's demand for a ruling in his favor because there were no findings prepared is inappropriate and unsupported. In the first place, there is an adequate record available. A transcript of the hearing has been prepared, and the videotape of Burton's arrest, introduced as evidence, is available. Thus, all evidence is available for review. Second, the proper remedy is remand so the trial court could prepare findings of fact. Since the record is sufficient, any judge could prepare findings, or

arrangements could be made with Carlos Esqueda to prepare appropriate findings.

Although contending that the record is sufficient as it is now constituted, Appellant agrees that findings of fact and conclusions of law would be beneficial in this case. Therefore, Appellant has no objection to remand, provided the remand is limited only to preparation of findings of fact and conclusions of law based upon the transcript of the hearing and the videotape of Burton's arrest, and not a retrial of the facts.

II. THE OFFICER DID NOT EXCEED THE SCOPE OF HIS INVESTIGATION, BECAUSE HE HAD A REASONABLE ARTICULABLE SUSPICION THAT BURTON WAS DRUNK, AND BECAUSE THE OFFICER DILIGENTLY PURSUED MEANS TO QUICKLY CONFIRM THE EXTENT OF BURTON'S INTOXICATION.

A. *The Officer did not Exceed the Legitimate Scope of the Investigation.*

The officer did not exceed the scope of his investigation, because he had a reasonable articulable suspicion that Burton was drunk. The trial judge specifically ruled that the officer had a reasonable articulable suspicion that Burton was intoxicated, based on the odor of alcohol from outside of the vehicle. (Transcript of Hearing on Defendant's Motion to Suppress, *West Valley City v. Randy Burton* at 32-33 (hereafter "Transcript")). Thus, further investigation, the trial judge concluded, was justified. "I've already ruled that I don't think the officer went beyond the scope of the detention, because he initially — and it's obvious on the tape, he initially smells the odor of alcohol . . . So under case

law, under *Lopez*, this is a legitimate stop and it does not go beyond the scope" (*Id.* at 32). The reasonable articulable suspicion also justified field sobriety tests, regardless of any alleged "search" of Burton's vehicle.

Burton argues that the officer did not have a reasonable articulable suspicion, and thus the officer exceeded the scope of the original stop. This however, contradicts the facts and the judge's specific ruling. The judge found that the officer detected the odor of alcohol prior to any alleged "search" of the vehicle. (*Id.* at 32-34). Furthermore, the evidence in the videotape shows that Burton voluntarily admitted he was drunk. (*Id.* at 15, Videotape). Thus, the officer could articulate specific facts connecting Burton to criminal activity.² Since the officer had a reasonable articulable suspicion that Burton was drunk, the scope of his investigation expanded so that the officer could confirm the extent of Burton's intoxication.³

² Burton appears obsessed with the fact that the officer "nodded" to the passenger in the police car, arguing that the nod indicates that the officer had no cause to investigate further. The judge dismissed this argument as meaningless. "There's nothing wrong with a hunch if he can back it up" (Transcript at 32); see also Whren v. United States, 116 S.Ct. 1769 (1996) (holding that a legitimate traffic stop does not become illegitimate even though it was motivated by an officer's "hunch" that a more serious crime was being committed.) Even if the officer had a "hunch" prior to approaching Burton, there is ample evidence supporting the officer's reasonable articulable suspicion that Burton was drunk. (Transcript at 32-34).

³ Burton's Counsel argues that the Counsel for Appellant offers no support for the judge's ruling that the officer had a reasonable articulable suspicion that Burton was drunk. (Burton's

Burton reargues the testimony given by the officer to support his version of the facts. This is in error, as this Court will not disturb the factual findings of the trial court unless they are clearly erroneous. See State v. Naisbitt, 827 P.2d 969, 971 (Utah App. 1992). The trial judge found, as been repeatedly stated, that the officer detected the odor of alcohol prior to any alleged search. (Transcript at 33). Furthermore, the testimony supports the record of the videotape that Burton voluntarily admitted he was drunk. (*Id.* at 15). Thus, the officer could articulate specific facts that Burton was intoxicated, and therefore expand his investigation. Burton may dislike the judge's findings, but he cannot argue that the officer exceeded the legitimate scope of the investigation.

B. The "Search" of the Vehicle was Proper, Because the Officer Pursued a Means of Investigation to Quickly Confirm the Extent of Burton's Intoxication.

The officer's investigation was reasonable because it quickly confirmed that Burton had been drinking heavily, and was a threat to other drivers. As was explained in Appellant's Brief, "[i]f reasonable suspicion of more serious criminal activity does arise, the scope of the [traffic] stop is still limited. The officers must 'diligently [pursue] a means of investigation that [is] likely to confirm or dispel their suspicions quickly'" State v. Lopez, 873 P.2d 1127, 1132 (Utah 1994); see also Appellant's Brief,

Brief at 17 n. 11). However, even though Burton dislikes the finding, the judge specifically held that the officer detected the odor of alcohol prior to any alleged search. (Transcript at 32-34).

West Valley City v. Randy Burton at 8 (other citations omitted).

Recapitulating the relevant facts, the officer had observed Burton's driving pattern, (Transcript at 26) had detected the odor of alcohol from outside Burton's vehicle, (*Id.* at 32-33) and Burton had volunteered that he was drunk, (Videotape; *see also* Transcript at 15) all prior to inserting his head into Burton's vehicle. At that point the officer had probable cause that Burton had committed an offense. The officer was therefore duty-bound to investigate the extent of Burton's intoxication, to ensure the public's safety.

The officer explained that he quickly confirmed Burton's drunken state by sniffing the air near Burton. (*Id.* at 12). This confirmation required that the officer place his head near Burton, which required a slight insertion into the open window of the vehicle.⁴ This insertion is justified under *Lopez* because it quickly confirmed that Burton was drunk, without requiring any effort on Burton's part. The intrusion was minimal, and Burton was not required to perform any act. In addition, the officer gained no more "evidence" via the intrusion than he already had prior to the alleged "illegal search." Burton had admitted he was drunk, (*Id.* at 15; videotape), and the officer had detected the odor of alcohol prior to inserting his head. (*Id.* at 33-34). The officer

⁴ In addition, the officer stated that he had difficulty hearing Burton, and so placed his head near the window. (Transcript at 21). Listening to Burton's statements is part of the investigation.

obtained no additional evidence because of his alleged "search."

Burton relies heavily on the fact that the officer could not remember asking if Burton had been drinking. (Burton's Brief at 12). The transcript does not reveal the explanation, but the videotape does.⁵ The officer did not need to ask if Burton had been drinking, because Burton volunteered the information himself. Burton's statement, which came prior to and independent of any alleged "search," also justified further investigation, including field sobriety tests.

Burton mistakenly cites State v. Schlosser, 774 P.2d 1132 (Utah 1989), to support his contention that any warrantless search of a vehicle is illegal. However, Schlosser clearly states that a warrantless search of a vehicle is justified "if there is probable cause for the search" Schlosser, 774 P.2d at 1135; see also United States v. Ross, 456 U.S. 798, 825 (1982). Contrary to Burton's argument, Schlosser does not prohibit all warrantless vehicle searches, it requires probable cause before a vehicle may be searched.

In this case, the officer had probable cause that Burton was drunk. In order to quickly and efficiently confirm this, the officer merely placed his head closer to Burton and sniffed the

⁵ Burton insists that this Court "ignore . . . the references . . ." to the admissions made on the videotape. (Burton's Brief at 13 n. 9). However, the videotape was introduced as evidence, and is thus part of the record. (Transcript at 17-18). Furthermore, the officer testified that Burton volunteered that he had been drinking. (*Id.* at 15). Since Burton's admission is clearly established in the record, the Court is obligated to consider it.

air. This quickly confirmed the extent of Burton's intoxication. The search was justified under *Lopez* and *Schlosser*.⁶

To conclude, the trial judge's ruling to suppress the field sobriety tests was not supported by the evidence. The officer detected the odor of alcohol prior to inserting his head and allegedly "searching" Burton's vehicle. (Transcript at 33-34). Furthermore, Burton admitted that he was drunk. (*Id.* at 15, Videotape). The officer had probable cause before any alleged "search," and was justified in conducting an investigation to quickly confirm that Burton was drunk. Sniffing the air near Burton quickly confirmed that Burton was very intoxicated and posed a threat to other drivers. No new evidence was obtained from the alleged "search," and Burton was not inconvenienced. Thus, the officer's action was appropriate under *Lopez*. Finally, Burton completely misapplies *Schlosser*. The officer had probable cause, so the "search," being limited to confirmation of alcohol on Burton's breath, was appropriate and justified.

III. EVEN IF THE SEARCH IS IMPROPER, THE FIELD SOBRIETY TESTS ARE ADMISSIBLE, BECAUSE THERE IS AN INDEPENDENT SOURCE FOR THAT EVIDENCE.

Even if the alleged "search" was improper, the field sobriety tests are still admissible, because there is an independent source for them. As stated in Appellant's Brief, "evidence which would be

⁶ As is argued below, the "search" yielded no new evidence. The officer had already detected the odor of alcohol from outside the vehicle prior to the "search."

subject to the exclusionary rule may be admissible if the police had an 'independent source' for discovery of the evidence." (Appellant's Brief at 10; see also State v. Northrup, 756 P.2d 1288, 1293 (Utah App. 1988)). The field sobriety tests are admissible despite the alleged "improper search," because the officer had developed a reasonable articulable suspicion prior to the alleged "search."

As has been discussed, the judge specifically held that the officer detected the odor of alcohol prior to inserting his head into the vehicle. (Transcript at 32-34). In addition, the videotape shows, and the officer's testimony confirms that Burton admitted he was drunk. (*Id.* at 15, Videotape). All of this evidence was obtained prior to the alleged "search." This evidence, as has been stated, gave the officer probable cause to conduct the field sobriety tests.

To conclude, even if the "search" is removed from the picture altogether, the officer still had ample evidence to require Burton to perform field sobriety tests, and the judge's ruling was improper. Suppression of evidence should not put the government in a worse position if the police would have obtained the evidence if no misconduct had taken place. The facts show that field sobriety tests were justified, even if the "search" was improper.

IV. THE FIELD SOBRIETY TESTS ARE ADMISSIBLE
BECAUSE THEY WERE NOT OBTAINED AS A RESULT OF
THE "SEARCH."

Even if the "search" is improper, the field sobriety tests are

admissible because they were not obtained as a result of the "search." The exclusionary rule only suppresses "evidence obtained by searches and seizures in violation of the Constitution." Mapp v. Ohio, 367 U.S. 643, 655 (1961); see also State v. Shoulderblade, 905 P.2d 289, 292 (Utah 1995). Thus, if the "search" was improper, only the evidence that was obtained as a result of that search should be excluded.

No evidence should be excluded, because no new evidence was obtained that led to the field sobriety tests. The alleged "search" only confirmed that Burton had the odor of alcohol on his breath, which the officer had already detected prior to the "search." (Transcript at 32-34). Therefore, even if the "search" was improper, it had no effect on the admissibility of the field sobriety tests, because no new evidence was obtained that led to those tests.

Appellant weakly contends that the record does not support the "independent source" for the field sobriety tests.⁷ However, the judge's rulings and the videotape establish that the officer had probable cause to request the field sobriety tests despite any "search." Since the "search" yielded no evidence, and since the field sobriety tests are admissible even if the "search" had never

⁷ Burton also argues that the sobriety tests are not "attenuated" from the alleged "search." "It is apparent from the record that the odor . . . stemmed from the illegal search" (Burton's Brief at 20 and 20). This is wrong. What is apparent from the record is that the officer detected the odor of alcohol prior to any alleged "search," (Transcript at 32-34), and that Burton voluntarily admitted he was drunk. (*Id.* at 15, Videotape.)

occurred, the trial judge's ruling must be reversed, and the field sobriety tests must be admitted.

CONCLUSION

Suppression of evidence should not place the government in a worse position if the evidence would have been obtained in the absence of any improper conduct. That summarizes Appellant's argument. Even if the "search" was improper, the record shows that the field sobriety tests were justified without the "search." In the alternative, appellant argues that the "search" was not an improper intrusion, but was justified under *State v. Lopez*. Either way, the trial judge's ruling was wrong, and it should be reversed.

The record of the hearing to suppress is complete and available for this Court's review. The transcript contains all of the proceedings, all documents are available for review, and the videotape of Burton's arrest for drunken driving, (which was introduced as evidence at the hearing) is also available for the Court. Burton now expects a ruling in his favor because the trial judge failed to make findings of fact and conclusions of law. However, the record is complete enough to review. Even if those findings were deemed necessary, the proper remedy is remand to obtain them. Appellant has no objection to remand, because it agrees that findings of fact based on the proceedings of the trial court would be beneficial.

The alleged "search" was actually part of the officer's proper investigation of a potential crime. Despite Burton's contention to

the contrary, the trial judge held that the officer detected the odor of alcohol prior to any alleged search. Furthermore, the videotape and the officer's testimony reveal that Burton admitted he was drunk. As the trial judge held, this information gave the officer a reasonable articulable suspicion that Burton had committed a crime, and thus the scope of his investigation expanded. (Transcript at 32-34; see also State v. Lopez, 873 P.2d 1127 (Utah 1994)).

The permissible scope of the officer's investigation allowed him to diligently pursue a means of investigation that would quickly confirm or dispel the suspicion of criminal activity. The officer testified that he confirmed not the presence of alcohol on Burton's breath, but the extent of his intoxication. (As has been stated, the officer detected the odor of alcohol prior to the alleged "search.") The officer confirmed the degree of Burton's impairment by placing his head closer to Burton, so he could sniff the air. This quickly and efficiently confirmed the extent of Burton's intoxication only, as the odor of alcohol had already been detected. In addition, the officer testified that he had trouble hearing Burton, so he placed his head closer in order to communicate better. Listening to the statements of a defendant is part of an officer's investigation. Finally, Burton was not inconvenienced by the alleged "search," because it quickly and efficiently confirmed the extent of his intoxication. Which is more rapid and convenient: Sniffing the air briefly or performing field sobriety tests? The officer's actions were thus acceptable

and justified, and the trial judge should be reversed.

In the alternative, even if the "search" was improper, the field sobriety tests are admissible based on the evidence obtained independent of the "search." Independently-obtained evidence is admissible despite improper conduct. State v. Northrup, 756 P.2d 1288 (Utah App. 1988). The trial court specifically held that the officer detected the odor of alcohol prior to any alleged "search." This gave the officer a reasonable articulable suspicion that Burton was drunk, and justified field sobriety tests. Furthermore, the record and the videotape show that Burton voluntarily admitted he was drunk, which also justified the field sobriety tests. Even if the alleged improper conduct had never taken place, the field sobriety tests would be admissible.

In a related vein, the "search" produced no new evidence, and did not result in the field sobriety tests. The exclusionary rule only requires the suppression of evidence obtained as a result of improper conduct. Mapp v. Ohio, 367 U.S. 643, 655 (1961); State v. Shoulderblade, 905 P.2d 289, 292 (Utah 1995). The facts of this case show that the alleged "search" did not yield any evidence leading to the field sobriety tests. The officer detected the odor of alcohol prior to the alleged "search," and Burton voluntarily admitted he was drunk. At most, the "search" merely confirmed the extent of Burton's intoxication, but did not yield new evidence that led to the field sobriety tests. Since no evidence was obtained, none can be suppressed. The trial judge's ruling must therefore be reversed.

To conclude, the trial judge's decision to suppress the field sobriety tests was wrong. The tests are admissible based on evidence obtained independently of any impropriety. The alleged "search" was proper under as a reasonable investigation of criminal activity, based on the officer's reasonable articulable suspicion obtained prior to any "search." Either way, the field sobriety tests are admissible, and the trial judge's decision to suppress them must be reversed.

For these reasons, Appellant respectfully requests that this Court reverse the order of the Third Circuit Court suppressing evidence in this case.

RESPECTFULLY SUBMITTED this 16th day of January, 1997.

A handwritten signature in cursive script, reading "Elliot R. Lawrence", written over a horizontal line.

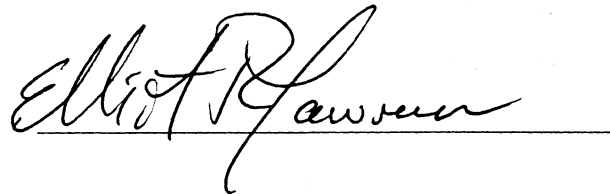
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CERTIFICATE OF MAILING

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

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DATED this 16th day of January, 1997.

A handwritten signature in cursive script, reading "Elliot R. Lawman", is written over a horizontal line.