

1996

# Kaysville City v. Joseph Mulcahy III : Brief of Appellant

Utah Court of Appeals

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**UTAH COURT OF APPEALS  
BRIEF**

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IN THE UTAH COURT OF APPEALS

|                                                                                                               |                                                    |
|---------------------------------------------------------------------------------------------------------------|----------------------------------------------------|
| KAYSVILLE CITY,<br>Plaintiff-<br>Appellant,<br><br>-vs-<br><br>JOSEPH MULCAHY III,<br>Defendant-<br>Appellee. | Case No. 960468-CA<br><br>Argument Priority No. 10 |
|---------------------------------------------------------------------------------------------------------------|----------------------------------------------------|

**BRIEF OF THE APPELLANT**

**APPEAL FROM THE JUDGMENT OF  
THE SECOND JUDICIAL CIRCUIT COURT  
OF DAVIS COUNTY, LAYTON DEPARTMENT, STATE OF UTAH,  
HONORABLE ALFRED C. VAN WAGENEN, CIRCUIT COURT JUDGE**

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-vs-

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## STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction in this matter pursuant to §78-2A-3(2)(d), Utah Code Annotated, 1953.

## STATEMENT OF ISSUES AND STANDARD OF REVIEW

The issues presented on appeal are:

1. Did the Circuit Court err in concluding that the dispatcher did not have knowledge of any facts creating a reasonable suspicion that the Defendant had committed or was committing an offense?

The above-stated issue was the very focus of the hearing on the Defendant's Motion to Suppress and has therefore been properly preserved for appeal. [R-62-113]

In reviewing a trial court's determination that there was not adequate reasonable suspicion to support a traffic stop, the court normally applies two different standards of review, one for the trial court's factual findings and the other for the court's legal conclusions. State v. Case, 884 P.2d 1274 (Utah App. 1994). The Utah Court of Appeals explained the appropriate standard of review in such cases as follows:

The trial court's factual findings underlying its decision to grant or deny a motion to suppress evidence are examined for clear error. State v. Pena, 869 P.2d 932, 935-36 (Utah 1994). On the other hand, the standard to be applied to the conclusion of law, i.e., whether the facts as found give rise to reasonable suspicion, "is reviewable nondeferentially for correctness, as opposed to being a fact determination



reviewable for clear error." Pena, 869 P.2d at 939. Nevertheless, the nature of this particular determination of law allows the trial court "a measure of discretion ... when applying that standard to a given set of facts." State v. Case, 884 P.2d 1274, 1276 (Utah App. 1994)

The only conclusion of law for the Court to consider on appeal is whether the trial court erred in concluding that there were insufficient articulable facts to give rise to a reasonable suspicion of possible criminal activity. This conclusion of law should be reviewed nondeferentially for correctness.

2. Did the Circuit Court err in finding that the complainant, Mr. DeWayne Olsen had no more than a hunch that the man at Mr. Olsen's doorstep was the Defendant?

This second issue has also been properly preserved for appeal as there was substantial testimony from Mr. DeWayne Olsen on this point in the hearing on Defendant's motion to suppress. [R-66-92]

In State v. Case, 884 P.2d 1274 (Utah App. 1994), the Utah Court of Appeals stated that a "trial court's factual findings underlying its decision to grant or deny a motion to suppress evidence are examined for clear error." (citing State v. Pena, 869 P.2d 9332, 935-36 (Utah 1994)).

In addition, in order to overturn a trial court's findings of fact, the challenger "must marshal all the evidence in support of the findings and then demonstrate that the evidence is insufficient to support the findings in

question." Phillips v. Hatfield, 904 P.2d 1108, 1109 n.1 (Utah App. 1995).

### **DETERMINATIVE STATUTES**

Utah Code Annotated, §77-7-15 is set forth verbatim in the Argument section of this Brief.

### **STATEMENT OF THE CASE**

#### **A. NATURE OF THE CASE.**

The Defendant was originally charged with Driving Under the Influence of Alcohol, a class B misdemeanor. Defendant claimed that the arresting officer lacked reasonable suspicion of criminal activity to justify the stop of the Defendant's vehicle.

#### **B. COURSE OF PROCEEDINGS**

Defendant filed a Motion to Suppress Evidence seeking to suppress any and all evidence obtained after the stop of the Defendant's vehicle. The Plaintiff filed a Memorandum in Opposition to the Motion to Suppress. The Circuit Court held a hearing on the Defendant's Motion to Suppress Evidence and heard testimony and received other evidence and heard argument of Counsel.

#### **C. DISPOSITION OF TRIAL COURT**

The Circuit Court granted the Defendant's Motion to Suppress Evidence. The evidence which was suppressed included a breathalyzer test which was taken by the Defendant.

## **STATEMENT OF FACTS**

1. On April 7, 1996, at approximately 5:15 a.m., Mr. DeWayne Olsen received a telephone call which Mr. Olsen picked up. There was no response on the line so Mr. Olsen hung up and dialed a last call return mechanism and received an answering machine message that indicated that this was the Defendant Joseph Mulcahy's telephone number. [R-66,68, and 69.]

2. A few minutes later, Mr. Olsen received another hang-up call. Mr. Olsen again dialed a last call return mechanism which again connected Mr. Olsen to the telephone of the Defendant Joseph Mulcahy. Mr. Olsen left a message on the answering machine of the Defendant stating that Mr. Olsen did not want the Defendant calling or bothering him, especially at that time of the morning and that Mr. Olsen did not want the Defendant's telephone calls. [R-69-70]

3. Either between the two hang-up calls or after the second hang-up call, Mr. Olsen called Kaysville City to inquire about how to register a complaint about the harassing telephone calls. The person that Mr. Olsen spoke to asked Mr. Olsen if he wanted to pursue the complaint at that time and Mr. Olsen responded that he would wait until morning during regular business hours to pursue the complaint, if at all. [R-71]

4. At approximately 5:30 a.m. the Defendant called Mr. Olsen again and when Mr. Olsen answered the telephone, the

Defendant stated essentially "This is Joe. What's happening?" Mr. Olsen reiterated again that he did not want to deal with him, didn't want to talk with him, and didn't want him calling. Mr. Olsen hung up immediately after delivering this message to the Defendant. [R-72]

5. After Mr. Olsen hung up on the Defendant, the Defendant called back a second, third and maybe a fourth time. On each of these occasions, Mr. Olsen would hear who was trying to call and would hang up. Eventually Mr. Olsen took the telephone off the hook for a few minutes. [R-72]

6. Prior to the Defendant's calls to Mr. Olsen, Mr. Olsen had known the Defendant because the Defendant had associated with Mr. Olsen's daughter. On one occasion, Mr. Olsen had sat down in his living room with the Defendant and had talked to the Defendant for about an hour. [R-73]

7. When Mr. Olsen talked to the Defendant on the morning of April 7, 1996, Mr. Olsen noticed that the Defendant's speech sounded perhaps a little slow, a little slurred. The Defendant's speech was different than what Mr. Olsen had noticed on prior occasions when he had talked to the Defendant and Mr. Olsen believed the Defendant to be under the influence of alcohol or intoxicated. [R-73-74]

8. At approximately 6:00 A.M., Mr. Olsen heard a car drive up outside his house. When the car stopped, Mr. Olsen immediately got up and looked out his window. He saw a male about the Defendant's size exiting the car. Mr. Olsen

observed this individual heading towards Mr. Olsen's driveway which leads to his front door. [R-74-75]

9. Although it was somewhat dark outside and Mr. Olsen was unable to clearly distinguish the facial features of the individual, Mr. Olsen was at least reasonably sure that the individual coming to his door was the Defendant. [R-75, 87]

10. When the Defendant reached Mr. Olsen's doorstep he began ringing Mr. Olsen's doorbell a number of times. The Defendant remained on Mr. Olsen's doorstep for several minutes. [R-77, 90]

11. Mr. Olsen did not want to deal with the Defendant because Mr. Olsen believed that the Defendant was intoxicated and because Mr. Olsen did not know what the intention of the Defendant was and because it was not a reasonable hour of the day. [R-75, 90]

12. Mr. Olsen called 911 and told the dispatcher that he had a drunk individual on his doorstep ringing his doorbell. Mr. Olsen further stated that he did not know what this individual's intentions were but he wanted to have an officer over at the residence. The call to 911 was actually made at 5:58 a.m. [R-75, 77-78]

13. The dispatcher confirmed that Mr. Olsen's name was DeWayne Olsen and that he lived at 667 South 150 East, Kaysville, Utah. [R-78]

14. The dispatcher sent an officer in the direction of Mr. Olsen's residence. [R-78,98]

15. Some time later, Mr. Olsen informed the dispatcher that the individual was driving off in a white Toyota and was heading toward the "Main drag". He told the dispatcher that the vehicle was traveling east toward the mountain and that that would lead on to the main road that goes in front of Davis High School. [R-79-80]

16. Mr. Olsen informed the dispatcher that he had earlier called to get some information about what he could do about harassing telephone calls and informed the dispatcher that the name of the person at his door was "Joe" and Joe's telephone number was 774-9808. [R-81]

17. The dispatcher understood that Mr. Olsen had received a harassing telephone call and that Mr. Olsen believed that the person who made the harassing telephone call was the same person who was at his doorstep ringing his doorbell. [R-81]

18. At approximately 6:00 A.M. on April 7, 1996, Kaysville City Police Officer Darron Heslop heard a dispatch to any unit in the Kaysville area with regard to a "1047"-individual believed to be drunk and ringing the doorbell. 1047 is code for suspicious vehicle, person or incident. [R-94, 98, 100]

19. Officer Heslop left the office to go to the address given in the dispatch. While on route to that

residence, Officer Heslop was advised by the dispatcher that the suspect individual had left the residence in a white Toyota and was heading towards Davis High School. [R-94,98]

20. Officer Heslop traveled from the location of the Kaysville Police Department at 58 East 100 North in Kaysville toward Davis High School. Officer Heslop observed that there was no traffic flow on the road and that it was just beginning to get light outside. [R-95]

21. As Officer Heslop approached the area of Davis High School, Officer Heslop saw the headlights of a vehicle heading north on Main Street which vehicle passed Officer Heslop. Officer Heslop observed that the vehicle was white. Officer Heslop first observed the vehicle at Davis High School at the approximate location of the intersection of 200 South and Main Street in Kaysville, Utah. At this time there were no other cars moving on the roads. Officer Heslop believed that the white vehicle he observed could possibly be the suspect in this case. Officer Heslop identified the vehicle as a white Mazda. [R-95-96]

22. Officer Heslop stopped the vehicle at the location of 100 South Main Street in Kaysville, Utah. Officer Heslop identified the driver of the vehicle as the Defendant Joseph Mulcahy. [R-96-97]

### **SUMMARY OF THE ARGUMENT**

The Complainant DeWayne Olsen had a reasonable suspicion based on articulable facts that the man that

appeared at his doorstep at approximately 6:00 a.m. on April 7, 1996 was the Defendant Joseph Mulcahy. Mr. Olsen also had reason to believe that the Defendant Joseph Mulcahy was intoxicated at the time that the Defendant appeared on Mr. Olsen's front doorstep and began ringing his doorbell. The Defendant's numerous telephone calls to Mr. Olsen at an extremely inconvenient and unusual hour of the morning, and the slowed and slurred speech which Mr. Olsen detected in the Defendant's voice, reasonably led Mr. Olsen to believe that the Defendant was drunk.

After having told the Defendant that he did not want to talk with him or deal with him on the telephone, Mr. Olsen had reason to be concerned and alarmed when the Defendant showed up on Mr. Olsen's doorstep and began ringing his doorbell repeatedly. Mr. Olsen had reason to suspect possible criminal intent and/or criminal conduct on the part of the Defendant. Mr. Olsen's statement to the dispatcher that he had a drunk individual on his doorstep ringing his doorbell at 6:00 A.M. on a Sunday morning constituted sufficient articulable facts upon which the dispatcher based her reasonable suspicion that the Defendant had committed or may have been in the process of committing some criminal act. The subsequent stop of the Defendant's vehicle for questioning and investigation as to these suspicious circumstances was, therefore, justified and appropriate.



# A R G U M E N T

## POINT I

THE TRIAL COURT ERRED IN FINDING THAT THE  
COMPLAINANT DEWAYNE OLSEN HAD NO MORE  
THAN A HUNCH THAT THE PERSON AT MR.  
OLSEN'S DOORSTEP WAS THE DEFENDANT

In its order granting Defendant's motion to suppress, the trial court found that the complainant in this case, Mr. DeWayne Olsen, did not know the identity of the individual who was on Mr. Olsen's doorstep ringing his doorbell. The court found that "Mr. Olsen really just had a hunch that he was the defendant, with whom he had talked on the telephone within the preceding hour."

This finding of the trial court should be reversed because it is clearly erroneous. See State v. Case, 884 P.2d 1274 (Utah App. 1994). A trial court's findings of fact are clearly erroneous if they "are against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made." State v. Walker, 743 P.2d 191, 193 (Utah 1987); Accord State v. Menke, 787 P.2d 537 (Utah App. 1990). The evidence which was presented at the hearing on Defendant's motion to suppress is insufficient to support the trial court's finding stated above even considering all of the evidence which supports the trial court's finding.

The following constitutes all of the evidence which supports the finding of the trial court:

1. Mr. Olsen testified that after hearing a car stop in front of his house, he looked out the window and saw a male about the Defendant's size exiting the car. Mr. Olsen testified that he could not say for certain that it was him (the Defendant) because there was still some darkness there. Mr. Olsen further testified that he did not immediately recognize Joe (the Defendant). [R-74]

2. Mr. Olsen testified that he was reasonably certain that the individual that came up to his door was Joe but stated that he didn't have any absolute knowledge that it was Joe. [R-75] When asked by the dispatcher if he knew the individual at his door, Mr. Olsen replied "I can guess who he is, but I don't want to deal with him." [R-78]

3. Mr. Olsen testified that he could tell that the individual on his doorstep was a male and was about Joe's size but Mr. Olsen could not distinctly tell if it was Joe or not. [R-87]

4. Mr. Olsen did not see the individual stagger [R-86], and could not tell if the individual had a short haircut or light-colored hair or blue eyes. [R-87] Mr. Olsen did not give a description of the Defendant to the dispatcher. [R-87]

5. Mr. Olsen didn't open his door and did not smell any alcohol on the individual at his doorstep. [R-91] Mr. Olsen could not identify the individual as the Defendant although he was reasonably sure it was the Defendant. [R-91]

When Mr. Olsen told the dispatcher that the name of the individual was Joe, he was assuming it was Joe based on Mr. Olsen's earlier experiences and not based on any observations Mr. Olsen made on his front porch. [R91]

6. Mr. Olsen did not see the individual go back to his car. [R-88]

7. When describing the make and color of the Defendant's vehicle to the dispatcher, Mr. Olsen was unable to give a completely accurate description of the vehicle. Mr. Olsen described the vehicle as possibly a white Toyota Celica when in fact the vehicle was a white Mazda. [R-79, 96]

8. Mr. Olsen did not recognize the Defendant's vehicle and was unable to associate the vehicle with the Defendant. [R-92]

9. When Mr. Olsen told the dispatcher that he thought that the name of the individual was Joe, Mr. Olsen wasn't really sure of Joe's last name. [R-85]

The sum total of the evidence which supports the trial court's finding is that Mr. Olsen could not with certainty visually identify the Defendant because of the darkness and could not associate the suspect's car with the Defendant. Mr. Olsen also could not see the Defendant stagger and did not detect any odor of alcohol on the Defendant. This evidence is insufficient to support the trial court's finding that Mr. Olsen did not know or had only a hunch that the individual at his doorstep was the Defendant. Mr. Olsen did

not have an absolute knowledge that the suspect was the Defendant. However, he did know with a reasonable degree of certainty that the suspect was in fact the Defendant. At the very least, Mr. Olsen had a reasonable suspicion based on articulable facts that the suspect was the Defendant.

A "hunch" is essentially a belief or suspicion unsupported by any articulable facts, while a "reasonable suspicion" is a belief or suspicion which is supported by articulable facts. State v. Menke, 787 P.2d 537, 541 (Utah App. 1990). There is of course an important distinction between a hunch and a reasonable suspicion because the latter justifies an investigative stop of a defendant while the former does not.

The trial court's finding that Mr. Olsen didn't know the identity of the person at his doorstep or that at most Mr. Olsen had only a hunch that it was the Defendant, is the equivalent of finding that Mr. Olsen could not articulate any facts which supported Mr. Olsen's suspicion that the suspect was the Defendant. This finding is clearly erroneous because there were several articulable facts which led Mr. Olsen to strongly believe that the suspect was the Defendant. These articulable facts are discussed below.

First, Mr. Olsen had received numerous telephone calls from the Defendant beginning at approximately 5:15 a.m. that morning. On some of these calls the Defendant simply hung up before any conversation took place. On at least one

call, Mr. Olsen explicitly told the Defendant that he didn't want to talk to him and didn't want the Defendant calling. The Defendant continued to call back several more times and each time, when Mr. Olsen heard who was calling, Mr. Olsen would hang up. Eventually Mr. Olsen had to take the phone off the hook.

At approximately 6:00 a.m. Mr. Olsen heard the suspect vehicle pull up in front of his house. Mr. Olsen saw a male, about the Defendant's size exit the vehicle and come up to his doorstep. The individual began ringing Mr. Olsen's doorbell a number of times. Mr. Olsen had no reason to believe that the suspect was anyone other than the Defendant.

Mr. Olsen's belief that the suspect was the Defendant was not based on a mere hunch or guess. He had just experienced a pattern of numerous attempts by the Defendant to call him by telephone at an unreasonably early hour of the morning. When he refused to talk to the Defendant and took the phone off the hook he then had an individual come to his door a short time later at 6:00 a.m. while it was still dark out. This individual rang his doorbell a number of times. Having taken his phone off the hook and having thereby thwarted the Defendant's efforts to call him, it was reasonable for Mr. Olsen to believe that the Defendant had decided to attempt to communicate with Mr. Olsen in person. This suspicion was further confirmed by Mr. Olsen's ability to identify the individual as a male and about the Defendant's size.

Because Mr. Olsen's suspicion that the suspect was the Defendant was based on articulable facts, Mr. Olsen's level of knowledge was at least a reasonable suspicion. It was therefore clearly erroneous for the trial court to find that Mr. Olsen had only a hunch that the suspect was the Defendant.

## POINT II

### OFFICER HESLOP HAD REASONABLE SUSPICION TO STOP THE DEFENDANT'S VEHICLE

#### A. The Reasonable Suspicion Standard Defined.

The United States Supreme Court has held that police officers may stop and briefly detain an individual for investigative purposes when there is reasonable suspicion to believe that the person may be involved in criminal activity. United States v. Sokolow 490 U.S. 1, 7 (1989) (citing Terry v. Ohio, 392 U.S. 1 (1968)); See also State v. Roth, 827 P.2d 255 (Utah App. 1992). This requirement has been codified in Utah Code Annotated §77-7-15 as follows:

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 his name, address and an explanation of his actions.

Unfortunately, the concept of reasonable suspicion is not readily reduced to any firm set of legal rules. United States v. Sokolow 490 U.S. 1, 7 (1989). However, the level of suspicion required to justify an investigatory stop of a vehicle under the above standard is of a lesser degree than that required to support a finding of probable cause. United

States v. Sokolow 490 U.S. 1, 7 (1989) (noting that "probable cause means 'a fair probability that contraband or evidence of a crime will be found,' and the level of suspicion required for a Terry stop is obviously less demanding than that for probable cause.") In determining the existence or absence of reasonable suspicion in a particular situation the court must look to the totality of the circumstances. United States v. Sokolow, 490 U.S. 1, 8 (1989).

The reasonable suspicion standard does not require that a law enforcement officer have certain knowledge that a person committed a crime before effectuating a stop of that person. It is not even required that the conduct giving rise to the suspicion be illegal. Rather all that is required is that the officer be able to articulate objective facts which justify the officer's suspicion of illegal activity. As the Utah Court of Appeals noted in State v. Nguyen, 878 P.2d 1183 (Utah App. 1994):

".....the conduct observed and/or information relied upon need not be illegal or describe illegal activity in order to give a law enforcement officer reasonable suspicion of criminal activity, so long as the officer can articulate facts which form the basis for his or her suspicion."

Reasonable suspicion of criminal activity may exist even where the conduct relied upon in forming the suspicion is also consistent with innocent activity as long as the conduct is also "'strongly indicative' of criminal activity." Provo City Corp. v. Spotts 861 P.2d 437, 440 (Utah App. 1993).

Furthermore, reasonable suspicion may be supported by a series of facts taken together, even where any one of the facts standing alone would be insufficient to create a reasonable suspicion. Id.

**B. Officer Heslop Was Justified in Relying on the Dispatch Message in Stopping the Defendant's Vehicle.**

A police officer who makes a stop of a vehicle is not required to have first-hand knowledge of the facts which create a reasonable suspicion that a Defendant committed a criminal offense. Rather a police officer is entitled to rely upon a dispatch or bulletin issued by other police officers. In United States v. Hensley, 469 U.S. 221, 230-231, 83 L.Ed.2nd 604, 613 (1985) the Supreme Court held as follows:

We conclude that, if a flier or bulletin has been issued on the basis of articulable facts supporting a reasonable suspicion that the wanted person has committed an offense, then reliance on that flier or bulletin justifies a stop to check identification, to pose questions to the person, or to detain the person briefly while attempting to obtain further information. If the flier [or bulletin] has been issued in the absence of a reasonable suspicion, then a stop in the objective reliance upon it violates the Fourth Amendment.

\* \* \* \* \*

Assuming the police make a Terry stop in objective reliance on a flier or bulletin, we hold that the evidence uncovered in the course of the stop is admissible if the police who issued the flier or bulletin possessed a reasonable suspicion justifying a stop, and if the stop that in fact occurred was not significantly more intrusive than would have been permitted the issuing [officers].



Officer Heslop was justified in stopping the Defendant's vehicle based on the dispatch report indicating that the driver of a white Toyota in the area of Main Street and Davis High School in Kaysville may have committed a criminal offense as long as the Dispatcher who issued the transmission had knowledge of articulable facts which supported a reasonable suspicion that the Defendant had committed a criminal offense. As the Utah Court of Appeals noted in State v. Case, 884 P.2d 1274 (Utah App. 1994):

".....If the investigating officer cannot provide independent or corroborating information through his or her own observations, the legality of a stop based on information imparted by another will depend on the sufficiency of the articulable facts known to the individual *originating* the information or bulletin subsequently received and acted upon by the investigating officer."

The investigating officer need not be informed of the facts known to the originating source. Id. at 1277, n. 5 (stating that an officer who receives a radio dispatch may take it at face value and act on it forthwith but that the state must show that legally sufficient articulable suspicion prompted issuance of the dispatch in the first place.)

**C. The Davis County Dispatcher Had Knowledge Of Facts Creating A Reasonable Suspicion That The Defendant Had Committed Or Was Committing A Crime.**

The dispatcher who issued the radio bulletin in this case had reasonable suspicion to believe that the Defendant may have been involved in criminal activity. At approximately

5:58 a.m. on April 7, 1996 the dispatcher received a 911 call from Mr. DeWayne Olsen indicating that a drunk individual was present on his door step ringing the doorbell. The information conveyed to the dispatcher by Mr. Olsen would on its face raise a suspicion of several possible criminal offenses justifying the dispatcher in sending out police officers to more fully investigate the matter. At a minimum, the facts relayed by Mr. Olsen to the dispatcher raised a reasonable suspicion that the Defendant may have committed or was in the process of committing the offenses of intoxication, criminal trespass, driving under the influence of alcohol, and/or telephone harassment. A description of these four offenses and an analysis of why there was reasonable suspicion to believe that the Defendant had or was committing one or more of these offenses is provided below:

1. INTOXICATION, (Utah Code Annotated, 1953, §76-9-701) as follows:

"(1) A person is guilty of intoxication if he is under the influence of alcohol, a controlled substance, or any substance having the property of releasing toxic vapors, to a degree that the person may endanger himself or another, in a public place or in a private place where he unreasonably disturbs other persons." (Emphasis added).

The allegations of Mr. DeWayne Olsen regarding the individual at his doorstep would meet the elements of the above-described offense as Mr. Olsen alleged that the individual was drunk and was engaging in conduct which unreasonably disturbed Mr. Olsen.

2. CRIMINAL TRESPASS, (Utah Code Annotated, 1953, §76-6-206) as follows:

"(2) A person is guilty of criminal trespass if, under circumstances not amounting to burglary as defined in Section 76-6-202, 76-6-203, or 76-6-204:

(a) he enters or remains unlawfully on property and:

(i) Intends to cause annoyance or injury to any person or damage to any property, including the use of graffiti as defined in Section 76-6-107;

(ii) intends to commit any crime, other than theft or a felony; or

(iii) is reckless as to whether his presence will cause fear for the safety of another; or

(b) knowing his entry or presence is unlawful, he enters or remains on property as to which notice against entering is given by:

(i) personal communication to the actor by the owner or someone with apparent authority to act for the owner;

(ii) fencing or other enclosure obviously designed to exclude intruders;

(iii) posting of signs reasonably likely to come to the attention of intruders."

The complaint of Mr. Olsen regarding the behavior of the individual at his door step would immediately raise a suspicion of a possible trespass. The fact that Mr. Olsen was complaining about the individual's presence at his doorstep would indicate to the dispatcher that the person was not welcome on Mr. Olsen's property and was apparently causing annoyance and fear on the part of Mr. Olsen.

3. DRIVING UNDER THE INFLUENCE OF ALCOHOL,  
(Utah Code Annotated, 1953, §41-6-44) as follows:

"(2)(a) A person may not operate or be in actual physical control of a vehicle within this state if the person:

(i) has a blood or breath alcohol concentration of .08 grams of greater as shown by a chemical test given within two hours after the alleged operation or physical control; or

(ii) is under the influence of alcohol, any drug, or the combined influence of alcohol and any drug to a degree that renders the person incapable of safely operating a vehicle."

Mr. Olsen informed the dispatcher that the person at his doorstep was drunk and later informed the dispatcher that the individual was driving away in a white Toyota car on a public street. These allegations, if true, would meet the elements of the offense of driving while under the influence of alcohol and would give the dispatcher sufficient facts to form a reasonable suspicion that the Defendant was in the process of driving while under the influence of alcohol.

4. TELEPHONE HARASSMENT: (Utah Code Annotated, 1953, §76-9-201) as follows:

(1) A person is guilty of telephone harassment and subject to prosecution in the jurisdiction where the telephone call originated or was received if with intent to annoy, alarm another, intimidate, offend, abuse, threaten, harass, or frighten any person at the called number or recklessly creating a risk thereof, the person:

(b) makes repeated telephone calls, whether or not a conversation ensues, or after having been told not to call back, causes the telephone of another to ring repeatedly or continuously;

Mr. Olsen informed the dispatcher that the person at his doorstep was the same person who had been making harassing telephone calls to Mr. Olsen earlier that morning. Communication of this information to the dispatcher constituted sufficient articulable facts upon which the dispatcher could form a reasonable suspicion of a violation of the telephone harassment statute.

**D. The Davis County Dispatcher Was Justified In Relying On The Allegations Of A Known Citizen Informant.**

The allegations of Mr. Olsen to the dispatcher gave the dispatcher knowledge of sufficient facts upon which to form a suspicion that the Defendant had committed or was in the process of committing one or more criminal offenses. It was not necessary at this point that every allegation of Mr. Olsen be verified or proven before the officers could stop the Defendant to make further inquiry. A law enforcement officer is and should be entitled to rely on information received from a known citizen informant.

In State v. Miller, 740 P.2d 1363, 1366 (Utah App. 1987), the Utah Court of Appeals discussed the reliability of a citizen informant as follows:

The average neighbor witness is not the type of informant in need of independent proof of reliability or veracity. Rather, "[v]eracity is generally assumed when the information comes from an 'average citizen who is in a position to supply information by virtue of having been a crime victim or witness.'

Id. at 180 (quoting State v. Harris, 671 P.2d 175 (Utah 1983)).

The Oregon Court of Appeals also considered the inherent reliability of information provided to law enforcement officers by a known citizen informant in State v. Bybee, 884 P. 2d 906 (Or. App., 1994). In that case, an employee of a convenience store called a local police department and stated as follows:

"`[I] wanted to report a drunken driver. [I'm] working down here at Ninth Street 7-11. He came in just a minute ago. He's driving a blue, looked like a MG, an older little sports car convertible rag top."

The caller then gave a license number for the suspect vehicle and gave his name and telephone number to the dispatcher. Shortly thereafter, an officer spotted the car described by the informant and stopped the car based on the dispatch message. The driver of the car was subsequently arrested for a DUI. The Oregon Court of Appeals held that when a report is received from a citizen informant, there must be some indicia of reliability to the report.

The Oregon Court of Appeals considered three factors in determining whether a citizen report is reliable. The first factor was "whether the informant is exposed to possible criminal and civil prosecution if the report is false. That factor is satisfied if the informant gives his or her name to law enforcement authorities or if the informant delivers the information to the officer in person." State v. Bybee, 884 P. 2d 906, 908 (Or. App., 1994). The second factor is

"whether the report is based on the personal observations of the informant. An officer may

infer that the information is based on the informant's personal observations if the information contains sufficient detail that 'it [is] apparent that the informant had not been fabricating [the] report out of whole cloth...[and] the report [is] of the sort which in common experience may be recognized as having been obtained in a reliable way...'"

Id. (quoting Spinelli v. United States, 393 U.S. 410, 417-18, 89 S. Ct. 584, 590, 21 L. Ed. 2d 637 (1969)).

The third factor is "whether the officer's own observations corroborated the informant's information. The officer may corroborate the tip either by observing the illegal activity or by finding the person, the vehicle and the location substantially as described by the informant." Id.

The three indicia of reliability analyzed by the Oregon Court of Appeals are found in the present case. First, the dispatcher knew Mr. Olsen's name, address and telephone number and Mr. Olsen would potentially be exposed to possible criminal and civil prosecution if his report was fabricated. See Utah Code Annotated, 1953, §76-8-506. Second, the observations communicated to the dispatcher by Mr. Olsen were based on his personal observations. Mr. Olsen had previously talked with the Defendant that morning and had observed that his speech was slurred and slowed to the point that Mr. Olsen believed that the Defendant was intoxicated. Mr. Olsen observed an individual coming up to his doorstep at approximately 5:58 a.m. on a Sunday morning and observed the individual ring his doorbell a number of times. Mr. Olsen later observed the same individual whom he firmly believed to

be the Defendant, enter into his car and drive away in the direction of Davis High School. The information communicated to the dispatcher was, therefore, based on Mr. Olsen's personal observations. Third, the information provided by Mr. Olsen was corroborated by Officer Heslop as Officer Heslop located the Defendant's car in front of Davis High School which was where Mr. Olsen had informed the dispatcher that the Defendant's vehicle was heading. The Defendant's car was the only vehicle on the road at that early hour of the morning. Mr. Olsen had also described the car as a white Toyota and the Defendant's vehicle was, in fact, a white Mazda.

The report and allegations made by Mr. Olsen to the dispatcher were, therefore, reliable and constituted a sufficient basis upon which the dispatcher could form a reasonable suspicion that the Defendant had committed or was committing one or more criminal offenses.

#### C O N C L U S I O N

The Davis County dispatcher had knowledge of articulable facts which created a reasonable suspicion that the Defendant had committed or was committing one or more criminal offenses based on the information supplied by Mr. DeWayne Olsen. Officer Darron Heslop was entitled to rely on the dispatcher's transmission that a person driving a small white vehicle in the area of Davis High School and Main Street in Kaysville, had committed or was committing an offense. Officer Heslop's stop of the Defendant's vehicle was therefore



justified and the trial court erred in granting the Defendant's motion to suppress. This Court should therefore reverse the trial court's decision to grant the Defendant's motion to suppress.

Respectfully submitted this 12<sup>th</sup> day of December, 1996.

KING & KING

By: Steven C. Earl  
STEVEN C. EARL, Esquire  
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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of  
the foregoing BRIEF OF THE APPELLANT, postage prepaid, this  
13<sup>th</sup> day of December, 1996, to:

Sharon S. Sipes, Esquire  
GRIDLEY WARD HAVAS SHAW & THOMAS  
Attorneys at Law  
635 25th Street  
Ogden, Utah 84401

DATED this 13<sup>th</sup> day of December, 1996.

Steven C. Earl

Secretary

**ADDENDUM**

Order Granting Defendant's Motion to Suppress Evidence.

K:\Kays\Pros\Mulcahy.Abr

SECOND CIRCUIT COURT, STATE OF UTAH  
DAVIS COUNTY, LAYTON DEPARTMENT

RECEIVED

JUN 28 1996

ORG & KING

KAYSVILLE CITY,

Plaintiff,

vs.

JOSEPH MULCAHY III,

Defendant.

ORDER GRANTING DEFENDANT'S  
MOTION TO SUPPRESS EVIDENCE

Case No.: 965001762 TC

Judge: Alfred C. Van Wagenen

Defendant's Motion to Suppress Evidence came on regularly for hearing before the Court on June 18, 1996. Testimony and evidence was presented by the plaintiff and the defendant and then the matter was taken under advisement by the Court. The Court having carefully considered the evidence and the Memorandums of Law submitted by the plaintiff and the defendant now enters the following findings and order.

The Court finds that absent the radio dispatch, Officer Heslop would not have been authorized to stop the defendant, because he did not observe the defendant committing or attempting to commit a public offense. Officer Heslop, in response to the radio dispatch, could have legally stopped the defendant to further investigate the matter if the dispatch was issued based upon articulated facts supporting a reasonable suspicion that the defendant had committed an offense.

In this case, if the dispatcher received information or facts that would support reasonable suspicion that the defendant had or was committing an offense, it would all have to have been communicated to the dispatcher by DeWayne Olsen. An objective review of the testimony and evidence would show that DeWayne Olsen told the dispatcher: "I have a drunken individual on my doorstep, ringing my door bell." Based on this information alone, an officer was dispatched

toward the Olsen home. A few minutes later Mr. Olsen told the dispatcher: "He's getting into a white car in my driveway. Maybe a Toyota Celica;" and "he is driving off, now he is going east toward the mountain, then it will get into the main road that goes in front of Davis High School." Shortly thereafter Officer Heslop stopped the defendant as he observed the defendant in a white Mazda automobile driving in front of Davis High School.

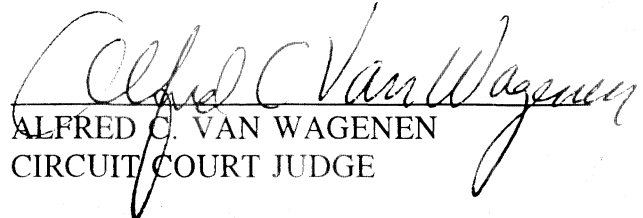
The Court finds that DeWayne Olsen did not articulate any facts to the dispatcher which would indicate a crime was being committed. He only said, "I have a drunken individual on my doorstep ringing my door bell." He told absolutely nothing to the dispatcher which would support his opinion that the individual was drunk. He didn't know who the individual was, did not talk to him, and made no observations as to poor balance or bad driving or the physical condition of the individual. Mr. Olsen really just had a hunch that he was the defendant, with whom he had talked on the telephone within the preceding hour. Mr Olsen testified that during that telephone conversation the defendant's speech was slowed and slurred and he was not using good judgment and he thought the defendant was intoxicated. But none of these facts from the telephone conversation were ever communicated to the dispatcher by Mr. Olsen.

The Court therefore finds that the dispatcher did not have knowledge of any facts creating a reasonable suspicion that the defendant had committed or was committing an offense. When Officer Heslop stopped and seized the defendant in response to the dispatch which had been issued in the absence of articulated facts setting forth reasonable suspicion, said stop constituted an unreasonable search and seizure in violation of the defendant's Fourth Amendment protections under the United States Constitution and under Article I Section 14 of the Utah Constitution. The

Court therefore orders that any evidence obtained as a result of said search and seizure be suppressed and not allowed to be introduced as evidence in this case.

Dated this 26 day of June, 1996.

BY ORDER OF THE COURT:

  
ALFRED C. VAN WAGENEN  
CIRCUIT COURT JUDGE

#### CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE, postage prepaid, to the following this 26 day of June, 1996:

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