1996

State of Utah v. John Tetmyer : Reply Brief

Utah Court of Appeals

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COPY

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee,	:	Case No. 960702-CA
vs.	:	Priority No. 2
JOHN TETMYER, Defendant/Appellant.	:	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE RULING OF THE SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR THE COUNTY OF SAN JUAN, STATE OF UTAH
THE HONORABLE LYLE R. ANDERSON, PRESIDING

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	*	
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Defendant/Appellant.	*	

INTRODUCTION

Defendant/Appellant, John Michael Tetmyer, relies on his opening brief and refers this Court to that brief for the statements of jurisdiction, issues, standards of review, cases and facts. Defendant/Appellant responds to the State's answer to his opening brief as follows.

STATEMENT OF ARGUMENT

Trooper Eldredge lacked the requisite reasonable suspicion to justify the stop of Mr. Tetmyer. The factors set forth by the trooper are not articulable facts nor are the inferences drawn from those facts, rational. In looking at the factors, innocent explanations must be taken into account. Finally, the open container argument should be rejected as hindsight reconstruction which also does not add anything to a reasonable suspicion analysis.

ARGUMENT

THE FACTORS SET FORTH BY THE TROOPER DO NOT RISE TO THE LEVEL OF REASONABLE SUSPICION.

Appellee takes the position that the stop of Mr. Tetmyer was justified based on the trooper's observations, namely, the obviously intoxicated passenger, Mr. Tetmyer's gait, the fact that both Mr. Tetmyer and the passenger made a beeline for the bathroom and Mr. Tetmyer's

failure to remove his sunglasses while he was in the convenience store (Appellee's Brief at p. 5). Appellee also asserts that Appellant's consideration of innocent behavior with respect to both parties making a beeline for the bathroom and Mr. Tetmyer's failure to remove his sunglasses is directly contrary to Utah precedent and the totality of the circumstances test (Appellee's Brief at p. 5).

It is not Appellant's position that if an innocent explanation exists, such an explanation will defeat a finding of reasonable suspicion. It is well established that reasonable suspicion may be based on seemingly innocent conduct: All that is required is that there be articulable facts and rational inferences drawn from those facts that the individual has been, is or is about to engage in criminal activity. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 65 L.Ed.2d 889 (1968); *State v. Lopez,* 873 P.2d 1127 (Utah 1994). Here, all that is set forth to justify the stop was Trooper Eldredge's observation of unrelated factors and subjective inferences drawn from those factors. An officer's hunch has been consistently and unequivocally held insufficient to justify an investigatory investigation. *Terry*, 392 U.S. at 27 ("inchoate and unparticularized suspicion or `hunch' is insufficient.")

The validity of an investigatory detention is a fact specific question. To hold otherwise, would mean that all that is required to justify a detention is a lengthy list of factors regardless of the merit of any one individual factor. In *State v. Patefield*, 927 P.2d 655, 661 (Utah Ct. App. 1996), this Court analyzed each factor individually before considering the factors collectively:

> Possession of a twelve-pack of beer in an automobile is a legal activity, apropos of nothing. Possession of a partially full twelve-pack of beer in

> an automobile is a legal activity which, by itself, does not suggest the presence of open containers in the vehicle, even though it may suggest on some prior occasion beers were consumed or moved to an ice chest. The discernable odor of beer on the driver's breath adds nothing because the beer Patefield admitted he consumed could just as easily have been drunk outside the vehicle, with the can discarded in a trash barrel. Considering the totality of the circumstances, we conclude that Eldredge's determination that Patefield's van contained open containers has no rational basis.

Accordingly, innocent explanations must be taken into account when determining whether the factors, collectively, rise to the level of reasonable suspicion.

The State's reliance on *Provo City Corp. v. Spotts*, 861 P.2d 437 (Utah Ct. App. 1993) is misplaced (Appellee's Brief at p. 12). There, the Court made it clear that in determining whether reasonable suspicion exists, innocent explanations will not defeat a finding if the same factors are "strongly indicative of criminal activity." Here, the factors are not strongly indicative of criminal activity. Rather, they "describe a very large category of presumably innocent travelers" and, therefore, cannot support a finding of reasonable suspicion. *Reid v. Georgia*, 488 U.S. 438, 100 S.Ct. 2752, 65 L.Ed.2d 890, 894 (1981). *See also State v. Robinson*, 797 P.2d 431, 436 (Utah Ct. App. 1990)

The State also relies on the "common sense" argument set forth in *State v. Smith,* 833 P.2d 371 (Utah Ct. App. 1992): "In developing reasonable articulable suspicion, law enforcement

officers are entitled to reach 'common sense conclusions about human behavior'."[1] (Appellee's Brief at p. 10). Appellant concedes that officers are entitled to rely on their common sense. This, however, does not transform a subjective inference into one that is objective. Here, Appellant contends that the passenger's intoxication and both individual's "quick trips to the bathroom," are facts that "'by reason of simple biology' support the reasonable suspicion of an alcohol related offense." (Appellee's Brief at p. 10).

Here, Mr. Tetmyer gassed up his vehicle while his passenger, who was intoxicated, went into the convenience store and used the restroom. Mr. Tetmyer then went into the convenience store, used the restroom, picked out merchandise and paid his bill. That his passenger only went to the restroom and Mr. Tetmyer used the facility prior to paying is a meaningless factor. To say that it is common sense to infer that they were drinking in the vehicle and had to use the bathroom

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[1]In *Smith, supra,* the Court did not elaborate on this "common sense conclusion about human behavior", other than reciting the facts that supported a finding of reasonable suspicion. There, a man had called the poaching hotline and reported that after hearing shots fired, he suspected that someone was deer hunting on Buckskin mountain. The caller identified himself and gave a description of the vehicle as well as the license number. The officer was aware that it was not hunting season and there were no permits within a forty mile radius of that mountain.

The caller and a companion met with the officer and gave him additional information: they had been on the mountain, heard shooting and saw a vehicle parked in the area. They returned to the same area the following day, saw the same truck parked in the same area. In addition, they saw two men, one with a spotting scope and one with a scope mounted on a rifle.

While talking to the officer, a truck approached. One of the men identified it by sound as the same one that they had been discussing.

Certainly, the facts in this case support a common sense conclusion that the men had been engaged in unlawful hunting.

as a result of this drinking is patently absurd.[2]

There were no additional factors supporting the hunch that there was drinking in the vehicle. Neither officer knew where the vehicle had been traveling from; Their only observation was that the vehicle pulled up to the gas pumps. The officers did not observe any containers nor did they smell the odor of alcohol on either occupant. There is simply no evidence that either occupant was drinking in the vehicle. That Mr. Tetmyer's passenger was intoxicated adds little to this analysis; It is disingenuous to suggest that the passenger got intoxicated in the vehicle when there is no evidence to suggest this.

The State's reliance on *State v. Davis*, 821 P.2d 9 (Utah Ct. App. 1991) is inapposite. There, objective, articulable factors were present which supported reasonable suspicion of an open container violation. There, the officer observed a can of beer on the vehicle, the passengers' door was open and one of the occupants was urinating by the vehicle. *Id.* at 12. Clearly, there was reasonable suspicion to believe that the defendant was drinking in the car. This is a far cry from the instant case where Mr. Tetmyer and his passenger used the facilities at a convenience store, where Mr. Tetmyer purchased some goods and gassed up his vehicle. *See also Utah v. Rochell*, 850 P.2d 480 (Utah Ct. App. 1993)(Probable cause to search the vehicle where Defendant was lawfully stopped for speeding and when he went to get documentation, he opened the door and a cup of alcohol fell to the ground. Both occupants smelled of alcohol and

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[2]Common sense and simple biology support a conclusion that drinking excessive amounts of liquid or a diuretic, such as any caffeinated beverage, would result in having to urinate after a one hour drive. The Trial Court took judicial notice that it was exactly fifty miles from restroom to restroom (R. 26).

Defendant admitted to drinking.)

With respect to Mr. Tetmyer's gait, the evidence is hardly articulable. Appellee asserts that according to Officer Eberling:

> [Mr. Tetmyer was] using the car as a balance point with his hand. And when he'd move away from it, you could see he was a little unsteady, and he'd put his hand back down on the car.

(Appellee's Brief at p. 4). This is wholly inaccurate and false. That testimony was about the passenger, not Mr. Tetmyer: The record reflects the following as Eberling was testifying.

> Q. [by Mr. Halls] "What did you observe?"
> A. "He used--the passenger at the time was using the car as a balance point with his hand. And when he'd move away from it, you could see that he was a little unsteady, and he'd put his hand back down on the car. Then when he entered the store, he was -- he was unsure of his footing. You could see that he was very deliberate with his walking, looking at the ground, making sure he watched his step."
> Q. "Okay. And then do you remember observing Mr. Tetmyer?"

(R. 18, emphasis added).

Appellee places heavy emphasis on the colloquy between the Trial Court and Trooper Eldredge (Appellee's Brief at p. 15). Appellee, however, ignores the reasoning and ultimate ruling with respect to Trooper Eldredge's testimony.

For instance, although the Trial Court watched Trooper Eldredge "mimic" Mr. Tetmyer's gait and said, at one point, "you kind of stumbled", no credit was given to Trooper Eldredge's claim that Mr. Tetmyer "stumbled, caught himself and almost fell down like the [passenger]."

(R. 16). The Court only focused on the claim that Mr. Tetmyer was not "walking straight," stressing that the problem with Mr. Tetmyer's gait was subtle:

> I think the officer has been fair in describing that this was not obvious. It's something that he may not have really paid attention to were it not for the obviously intoxicated condition of the passenger. But, I think there's an indicator there, and I -I believe the officer when he says that he was not walking in a straight line.

(R. 33-34, emphasis added).

The Court also relied on Officer Eberling's testimony that Mr. Tetmyer was using the vehicle as a balance point, in determining that Trooper Eldredge was accurate about the gait.

Officer Eberling's testimony was less clear. With respect to Mr. Tetmyer, Officer Eberling testified as follows:

> [Mr. Tetmyer] was out by his car. When he was out by his car, granted it was quite a distance, but he appeared to be doing -- he was on the opposite side to the car, on the east side of the car and we're on the west inside the store. It appeared that he was using the car, also, as a balance point making sure he kept one hand propped on it.

(R. 18-19).

The Court considered Officer Eberling's testimony:

> . . .simply as an indicator that Trooper Eldredge is probably telling the truth about that. Not that it's an independent item of information communicated and considered by Trooper Eldredge, but that it indicates that it was probably a correct observation.

(R. 34).

Eberling's testimony did not lend support to the conclusion that Mr. Tetmyer was impaired. His observation is dramatically different from his observations concerning the way that the passenger was handling himself. He simply concluded that Mr. Tetmyer was impaired based Mr. Tetmyer's hand being on the vehicle while he pumped gas. Equally disturbing is the Trial Court's statement that this testimony meant that Trooper Eldredge was "probably telling the truth."

Appellee's emphasis on Mr. Tetmyer's "very dark" sunglasses when he entered a "dark store" is inane (Appellee's Brief at 4). This stop took place at two o'clock in the afternoon (R. 13). That he failed to take off his glasses is a distinction without a difference. Even the Trial Court recognized that[3]:

> Well, I don't want officers stopping people who walk into Trailside or any other convenience store wearing sunglasses and not taking them on [sic] when they walk into the store. Because I wear sunglasses when I drive. They're prescription sunglasses, and I don't change them to these glasses I'm wearing today just `cause I walk inside the -- a convenience store.

(R. 33).

Finally, both the Trial Court and Appellee attempt to justify the stop on the grounds that there was reasonable suspicion to believe that there was an open container in the vehicle. The Trial Court stated:

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[3]The Trial Court did state that this was a factor or an indicator that can be added when someone is not walking straight. (R. 33).

> Now in the event that this is--this is examined by a higher court, I'm going to address the question of the open container argument. I didn't hear anything from Trooper Eldredge that he went through an analysis where he thought, "Gee, there's probably open container here." However, if he had considered that question, I think he would have been entitled to, probably on firmer ground, to stop the vehicle to determine if there were open containers.

(R. 34-35, *See also* Appellee's Brief at p. 8-9).

This argument should fail for two reasons. First, the open container argument is little more than hindsight reconstruction:

> Determining the constitutionality of intrusions by the prosecution's ability to justify them under some set of objective circumstances would undermine the Court's concern with limiting unreviewable discretion in the name of the objective test designed to safeguard that concern.

United States v. Guzman, 864 F.2d 1512, 1516 (10th Cir. 1988).

Here, it is undisputed that Eldredge did not initiate the stop because he believed there was an open container in the vehicle. It is not fair to allow the Trial Court or Appellee to now claim that the stop was justified on an entirely different basis.

Secondly, the factors set forth to justify a stop of open containers are insufficient. Again, the factors set forth in both *Davis* and *Rochelle* stands in sharp contrast to the instant case.

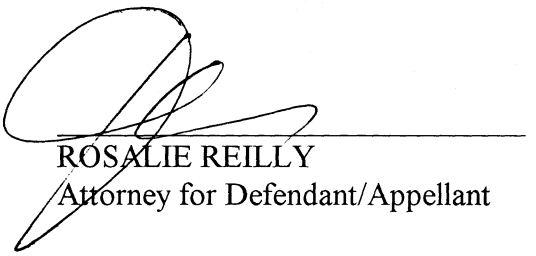
Finally, both the Trial Court and the Appellee make cursory reference to the designated driver policy. Appellee contends that there would be no "chilling effect" on the policy if law enforcement and the courts take into account the driver's "apparent sobriety and other relevant

circumstances." (Appellee's Brief at p. 10-11, fn. 2). The Trial Court, on the other hand, directly contradicts itself. First, it makes a general statement of concern about the designated driver policy. : "I don't want Troopers stopping everybody who has somebody drunk as a passenger in their car. Otherwise, what's the point of having a designated driver?" (R. 34). Then the Trial Court later states that having an intoxicated passenger rises to the level of probable cause to search the car for open containers: "[W]here you have a passenger --where you stop a vehicle and you have an intoxicated individual in the car, you can look for open containers." (R. 35). The Court's reasoning does violence to the designated driver policy and essentially undermines it.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the trial court's ruling on Defendant's Motion to Suppress be reversed.

DATED this 25th day of July, 1997.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the foregoing Reply Brief were mailed, postage prepaid, to Joanne Slotnick, Assistant Attorney General, P.O. Box 140854, Salt Lake City, UT 84114-0854, on this 31st day of July, 1997.

The undersigned further certifies that a true and correct copy of the foregoing Reply Brief was hand-delivered to the Office of the San Juan County Attorney, 297 South Main, Monticello, UT on this 31st day of July, 1997.