2008

State of Utah v. Bradford Dale Gettling : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff / Appellee	:	
vs.	:	Case No. 20080037-CA
BRADFORD DALE GETTLING,	:	
Defendant / Appellant	:	

BRIEF OF APPELLANT

APPEAL FROM THE FOURTH DISTRICT COURT, UTAH COUNTY,
STATE OF UTAH, FROM A CONVICTION OF A CONTROLLED SUBSTANCE
VIOLATION, BEFORE THE HONORABLE JAMES R. TAYLOR

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STATEMENT OF JURISDICTION

This Court has appellate jurisdiction in this matter pursuant to the provisions of Utah Code Annotated § 78-2a-3(2)(e).

ISSUES PRESENTED AND STANDARDS OF REVIEW

Whether the trial court erred in denying Gettling's motion to suppress evidence obtained as a result of an illegal search and seizure. This issue presents a question of law reviewed for correctness. *State v. Brake*, 2004 UT 95, ¶ 15, 103 P.3d 699. This issue was preserved in a motion to suppress (R. 42-35).

CONTROLLING STATUTORY PROVISIONS

The text of all relevant statutory and constitutional provisions is set forth in the Addenda.

STATEMENT OF THE CASE

A. Nature of the Case

Bradford Gettling appeals from the judgment and sentence of the Honorable James R. Taylor, Fourth District Court, after the denial of his motion to suppress and his conviction of possession of a controlled substance, a third degree felony, by a Sery guilty plea.

B. Trial Court Proceedings and Disposition

Bradford Dale Gettling was charged by criminal information filed on January 9, 2006 in Fourth District Court with possession or use a controlled substance in a drug free zone, a second degree felony, and possession of drug paraphernalia in a drug free zone, a Class A misdemeanor, in violation of Utah Code Annotated §§ 58-37-8(2)(a)(i) and 58-37a-5a respectively (R. 04-03). Bail was set at $10,000 cash on January 3, 2006 (R. 02-01). On January 9, the Court appointed counsel for Gettling, advised Gettling of the charges and penalties, and set a waiver hearing for January 11, 2006 (R. 11-09).

On January 11, the Court reset bail at $5,000 and at the request of counsel, set a preliminary hearing for February 15, 2006 (R. 19-17). On January 23, 2006, Gettling posted bail and signed a promise to appear at the preliminary hearing on February 15 (R. 21-20). At the preliminary hearing, the Court found probable cause and the charges were bound over for trial (R. 24-22). The entry of plea was scheduled for March 15, 2006 (R. 22). On March 15, the Court granted a continuance at the request of defense counsel, and the entry of plea was rescheduled for April 5, 2006 (R. 28-26). On April 5, defense counsel requested time to file a motion, and the matter was continued to April 26, 2006

(R. 31-29), at which time, the Court gave defense counsel two weeks to file a motion to suppress, and scheduled oral arguments for June 7, 2006, (R. 34-32). The parties later stipulated to a continuance to July 5, 2006 (R. 46-44).

Defense counsel filed the motion to suppress with its supporting memorandum on May 24, 2006 (R. 42-35). Counsel argued that the Level 2 detention of Gettling was not supported by reasonable suspicion of criminal activity, and that the evidence against Gettling seized as a result of the encounter should therefore be suppressed (R. 41-36). In its response, filed June 30, 2006, the State argued that Gettling did not have standing to contest the search of the vehicle, and even if he did, the search of the vehicle was incident to the arrest of the driver (R. 54-50). The State also argued that Gettling's detention was only a Level 1 encounter because a traffic stop's Level 2 status only applies to the driver, and not the passengers (R. 50-48). Defense counsel's reply, filed July 13, 2006, argued that Gettling asserted his standing by arguing that his personal belongings were unlawfully searched (R. 68-67). Counsel also argued that Gettling was detained, and not free to leave, thus making his detention a Level 2 encounter (R. 64-63).

On July 5, defense counsel requested a continuance, and it was granted, with oral arguments on the motion to suppress rescheduled for August 2, 2006 (R. 59-57). The arguments were moved to August 9, on which day, the matter was set for further proceeding on September 6, 2006 (R. 71-69).

On September 5, 2006, the Court denied Gettling's motion to suppress, holding that, although Gettling had standing to challenge the search of his glasses case, he had no standing to challenge the canine search of the vehicle (R. 75). The Court also held that

Gettling's furtive movements, coupled with the canine's interest in Gettling's glasses case that remained in the car after Gettling exited, provided the officer with probable cause to search Gettling's glasses case (R. 74). The next day, the case was set for trial on November 1, 2006, with a final pretrial conference on October 26 (R. 85-83). On October 26, the State requested a continuance of the trial due to the unavailability of a witness, and the trial was rescheduled for February 28, 2007 (R. 94-92). Counsel was also instructed to submit jury instructions, any motions in limine and voir dire one month before trial (R. 94). On February 15, 2007, defense counsel filed a motion in limine to prevent Deputy Radmall from testifying that Gettling invoked his right to remain silent when he said, "Don't make me say it" (R. 98-95). The State's opposing memorandum, filed May 1, 2007, argued that Gettling did not invoke his right to remain silent, and that his words, taken in context, actually amounted to a confession (R. 188-13).

Defense counsel informed the Court on February 21 that he had been unable to contact Gettling regarding his trial (R. 99). The Court struck the jury trial, (R. 99), and a bench warrant was issued for Gettling's arrest on February 28, 2007, (R. 104-100). On March 8, 2007, Gettling appeared in court, bail was set at $1,000 cash, bond or surety, and a scheduling conference was scheduled for April 12, 2007 (R. 107-05). Gettling posted bail on March 9 and signed a promise to appear (R. 109-08).

On April 12, a hearing on the motion in limine was scheduled for May 3, 2007 (R. 112-10). On May 3, the Court found that Gettling's comments should be suppressed (R. 121-19). On May 24, Gettling again requested a jury trial, and it was rescheduled for October 9, 2007 (R. 124-22). On August 30, 2007, the State filed a Request to Submit for

Decision on Motion in Limine, asking the Court to rule on Gettling's motion in limine (R. 132-31).

On October 9, 2007, Gettling waived his right to a jury trial, and pled guilty to a third degree felony, possession of a controlled substance, for which the State agreed to drop the misdemeanor paraphernalia charge (R. 175-73). The guilty plea was a Sery plea that allows Gettling to appeal the Court's denial of his motion to suppress the evidence against him (R. 197: 6). Sentencing was then scheduled for December 6, 2007 (R. 174). Gettling was given a suspended sentence of up to five years in prison, placed on probation for 36 months, and ordered to pay $9,275 fine, plus surcharge and interest (R. 179-76).

On December 7, Gettling was ordered to meet with a representative from UDCSA for an assessment and orientation, and he signed a promise to appear for December 14, 2007 (R. 183-81). On December 14, Gettling was denied entry into drug court, and a review on the regular criminal calendar was scheduled for December 20, 2007 (R. 186-84). On December 20, the matter was referred to Adult Probation and Parole for an updated report and an alternative recommendation for the Court, and sentencing was scheduled for January 31, 2008 (R. 189-87). On January 7, 2008, a Notice of Appeal was filed with the Court (R. 193-92).

STATEMENT OF RELEVANT FACTS

Preliminary Hearing: February 15, 2006

On January 2, 2005, Deputy Shawn Radmall stopped a vehicle after observing the vehicle making lane violations (R. 194: 5-6). Gettling was seated directly behind the

driver, Steven Canals (R. 194: 6). After arresting Canals for outstanding warrants and a suspended license, and placing Canals in the cruiser, Radmall informed the other occupants of the vehicle that he was going to run his dog around the vehicle (R. 194: 6-7, 12). At that point, Radmall "noticed a little bit of furtive movement from" Gettling, (R. 194: 7), but had not located any drugs or suspected any of the vehicle's occupants of using drugs, (R. 194: 12). Radmall later testified that he witnessed Gettling "doing something along the seat," and that "his arms were down and he was leaning over towards the passenger side" (R. 194:21-22). Radmall testified that he was concerned that "there may be a weapon or something in the vehicle" (R. 194: 24). Because Radmall noticed Gettling "doing some kind of movement" in the back seat, Radmall asked Gettling and the other passenger, Amber Childs, to exit the vehicle and stand with the female UVSC officer backing him up (R. 194: 7, 14, 26). At that point, Radmall said, Gettling and Childs were not free to leave, and that he would have kept them there had they tried to leave (R. 194: 14, 17).

After removing Gettling and Childs from the vehicle, Radmall ran his dog around it (R. 194: 7, 13). The dog indicated in two areas: the top of the driver's window and the door handle of the back passenger side door (R. 194: 7). At that point, Radmall told the front passenger of the vehicle—who also owned the vehicle—that he was going to put the dog in the car (R. 194: 7). The owner consented, noting that there should not be anything in the car (R. 194: 8). The dog indicated under some luggage in the back seat, at which point Radmall moved the luggage and found a glasses case containing methamphetamine

in a small plastic baggy and paraphernalia inside of it (R. 194: 8-9). The substance tested positive for methamphetamine at the State Crime Lab (R. 194: 9).

Canals and Childs both indicated that the glasses case did not belong to them, and Gettling only said, "Don't make me tell you. Don't make me say it." (R. 194: 10). Gettling indicated that the luggage belonged to him, but only by asking to remove some items from it (R. 194: 10, 19). Radmall arrested Gettling and did not read him his Miranda rights (R. 194: 18). Radmall said the stop occurred within 1,000 feet of UVSC (R. 194: 11).

SUMMARY OF THE ARGUMENT

This Court should reverse the denial of Gettling's motion to suppress and vacate his conditional guilty plea because the evidence against him was obtained through an unreasonable search and seizure of his personal property.

Gettling was unreasonably seized within the meaning of the Fourth Amendment because he was detained and not free to leave, even before probable cause or reasonable suspicion of criminal activity on Gettling's part arose. Gettling was detained as a result of his furtive movements, made in the back seat of the car after the driver of the car had been arrested on outstanding warrants and a suspended license. However, the Utah Supreme Court has held that mere furtive movements do not give rise to reasonable suspicion that a crime has been committed. Furthermore, Gettling's detention was an unlawful extension of the scope of the initial traffic stop, which was fulfilled and completed once the driver who committed the traffic offense had been arrested.

Accordingly, all evidence discovered after that unlawful detention must be excluded as fruit of the poisonous tree.

ARGUMENT

I. GETTLING WAS ILLEGALLY DETAINED, AND THE SUBSEQUENT SEARCH OF HIS PERSONAL PROPERTY WAS ILLEGAL

The trial court erred in denying Gettling's motion to suppress because Gettling was illegally detained and his personal possessions illegally searched. Passengers in a stopped vehicle may not have standing to contest a subsequent search of the vehicle when they have no legitimate expectation of privacy in the area searched. *State v. DeAlo*, 748 P.2d 194, 197 (Ut. App. 1987). However, passengers have a reasonable expectation of privacy in their personal possessions, and can therefore challenge the legality of searches of their possessions that occur without their consent. *See State v. Bissegger*, 2003 UT App 256, ¶ 20, 76 P.3d 178. Additionally, police must have an articulable, reasonable suspicion of criminal activity to detain someone, and the detention can only be long enough to investigate the specific suspicion, while reasonably related to the scope of the stop. *See State v. Lopez*, 873 P.2d 1127, 1131-32 (Utah 1994).

Deputy Radmall had no reasonable, articulable suspicion that Gettling was engaged, or was about to engage in any criminal activity, including the use or possession of drugs (R. 194: 12). Absent other incriminating circumstances, the furtive movements cited by Radmall as the reason for removing Gettling from the car do not give rise to reasonable suspicion of criminal activity. *State v. Schlosser*, 774 P.2d 1132, 1137 (Utah 1989). Radmall should have allowed Gettling to leave with all of his possessions, rather

than detain him prior to the free air canine sniff of the vehicle because the purpose of the stop was to investigate the driver, and nothing further pointed to Gettling being engaged in criminal activity.

The exclusionary rule of the Fourth Amendment, applied to the states through the Fourteenth Amendment, dictates that evidence seized by and through an illegal search and seizure must be suppressed and not admitted for the court's consideration. *Mapp v. Ohio*, 367 U.S. 643 (1961). Accordingly, the seizure of Gettling violated his Fourth Amendment rights, and the evidence seized as a result of the illegal search and seizure should be suppressed. Gettling respectfully requests this Court to reverse the denial of his motion to suppress and vacate his conditional guilty plea.

A. Police lacked the required reasonable suspicion to escalate the encounter with Gettling to a level two encounter.

Gettling's detention was a level two encounter with police, and it was and illegal seizure because Deputy Radmall lacked the requisite probable cause or reasonable suspicion that Gettling was engaged in any criminal activity. A level two encounter is an "investigative detention" that may be initiated by an officer "when specific and articulable facts and rational inferences . . . give rise to a reasonable suspicion a person has or is committing a crime." *State v. Hansen*, 2002 UT 125, ¶ 35, 63 P.3d 650 (internal quotes omitted). Furthermore, "[i]f a reasonable person would not believe he or she is free to leave . . . the encounter remains an investigatory detention," or level two encounter. *Id.* at ¶ 39.

In *Hansen*, police pulled over a driver for traffic violations, but, without suspecting any further illegal activity, questioned the driver about the presence of drugs, alcohol or weapons in the vehicle, and asked to search the vehicle. *Id.* at ¶ 32. The Court held that it was reasonable under the circumstances for the driver to believe that he was not free to leave. *Id.* at ¶ 45. The Court also noted the "threatening presence of more than one officer" as another indication that the driver was not free to leave. *Id.* at ¶ 44.

Here, Deputy Radmall testified that he had no reason to believe that the driver or anyone else in the vehicle was using drugs (R. 194: 12). Thus, Gettling should have been free to leave. However, before running his dog around the vehicle, Radmall had Gettling get out of the vehicle and stay with another officer who was backing up Radmall, and Radmall never told Gettling he was free to leave (R. 194: 13-14). Radmall also testified that, although he had not told Gettling he had to stay, he "considered he was detained" (R. 194: 17).

Just like *Hansen*, when Gettling was asked to exit the vehicle and stand in the "threatening presence" of another officer, it would have been unreasonable for him to believe he was free to leave. In fact, Radmall testified that he "probably" would have kept Gettling there if he tried to walk away (R. 194: 17). Clearly, Gettling was detained and not free to leave before any reasonable suspicion of criminal activity arose.

The trial court denied Gettling's motion to suppress because, in its view, the dog's indication on Gettling's personal property, coupled with Gettling's furtive movements, gave Radmall "the requisite probable cause to search the glasses case" (R. 74). However, the "requisite probable cause" found by the trial court clearly did not arise until after

Gettling was detained, before the dog sniffed around the outside vehicle (R. 194: 7, 13). Police had no reasonable suspicion or probable cause to detain Gettling in the first place.

This Court has previously reversed a denial of a motion to suppress in nearly identical circumstances as the present case because "the desire to check the vehicle for controlled substances did not require the presence of the passengers." *State v. Baker*, 2008 UT App. 115, ¶ 13, 182 P.3d 935. In *Baker*, this Court held that the "continued detention" of a passenger was "impermissible" while a K-9 unit arrived and searched the vehicle in which he was riding because "the officers needed some reasonable articulable suspicion to lawfully detain Baker and the other passengers while awaiting the K-9 unit's arrival." *Id.*

In the present case, the Court could easily substitute Gettling's name for Baker's in the quotes immediately preceding this sentence. Gettling's continued detention was impermissible while the K-9 unit ran around the vehicle because police needed "some reasonable articulable suspicion" to detain Gettling. However, police offered no reasonable, articulable suspicion that Gettling had or was about to commit a crime. Therefore, Gettling was impermissibly detained.

B. Gettling's furtive movements do not give rise to a reasonable suspicion of criminal activity, thereby making Gettling's detention an illegal seizure.

Gettling's furtive movements in the back of the vehicle do not create a reasonable suspicion of criminal wrongdoing, thus negating police's stated reason for removing Gettling from the car and detaining him. The Utah Supreme Court has held that "[m]ere

furtive gestures of an occupant of an automobile do not give rise to an articulable suspicion suggesting criminal activity." *Schlosser*, 774 P.2d at 1137.

In *Schlosser*, police observed "a passenger in the vehicle, bending forward, acting fidgety, turning to the left and to the right, and turning back to look at the officer." *Id.* at 1133. The Court held that, without more, the passenger's movements did not "show a reasonable possibility that criminal conduct had occurred or was about to occur." *Id.* at 1138. The Court said that the passenger

> may have been attempting to locate a driver's license. He could have been preparing for conversation with the officer by turning down the volume on the radio or extinguishing a cigarette. He may also have been putting away food and beverages, changing a baby's diaper, putting on the parking brake or doing a host of other innocuous things. When confronted with a traffic stop, it is not uncommon for drivers and passengers alike to be nervous and excited and to turn to look at an approaching police officer.

Id.

Radmall testified that after he had arrested the driver and told Gettling and the other passenger that he was going to run his dog around the vehicle, he "noticed a little bit of furtive movement from . . . Gettling" (R. 194: 7). He said that Gettling's "arms were down and he was leaning over towards the passenger side (R. 194: 22). Like *Schlosser*, Gettling could have been doing a "host of other innocuous things" when he leaned over toward the passenger side of the vehicle. Radmall testified that it was "due to the furtive movement" that he had Gettling get out of the vehicle and stand with the other officer on scene (R. 194: 22). Thus, Gettling was detained and not free to leave, merely because of his furtive movements in the vehicle—furtive movements that by law do not "give rise to an articulable suspicion suggesting criminal activity." Because a person

cannot be detained without that reasonable or articulable suspicion of criminal activity, *Hansen*, 63 P.3d at 661, Gettling's detention was an unreasonable and illegal seizure.

C. The seizure of Gettling and the subsequent search of his personal property was not reasonably related to the scope of the traffic stop.

As Gettling was seized after the driver of the vehicle in which he was riding was pulled over for traffic violations and subsequently arrested on outstanding warrants, and before any reasonable suspicion of criminal activity on his part arose, the seizure was not reasonably related to the scope of the initial traffic stop. Therefore, Gettling was illegally detained and the evidence against him should have been and should now be suppressed.

The Utah Supreme Court adopted a two-part test to determine the Constitutional reasonableness of a search or seizure: "(1) Was the police officer's action justified at its inception? and (2) Was the resulting detention reasonably related in scope to the circumstances that justified the interference in the first place?" *Lopez*, 873 P.2d at 1131-32.

In *Bissegger*, this Court held that the initial traffic stop of a vehicle with expired license plates was justified because driving with expired registration was a traffic offense committed in the presence of an officer. 2003 UT App 256 at ¶ 17. Once the officer verified the driver's license and registration and checked for warrants, "the purpose for the initial traffic stop was concluded." *Id.* at ¶ 18. However, this Court held that extending the driver's detention for purposes of a field sobriety test was proper because the odor of alcohol gave rise to a reasonable suspicion of criminal activity. *Id.* But when the driver passed the field sobriety test, "any further detention was unlawful." *Id.* at ¶ 20.

Furthermore, the search of the car that yielded contraband in the passenger's closed lip balm container exceeded the scope of the initial traffic stop, and this Court reversed the denial of the passenger's motion to suppress. *Id.* at ¶ 21.

Like *Bissegger*, the initial stop of the vehicle in which Gettling was a passenger was proper. The warrants check on the driver was also proper because "running a warrants check during the course of a routine traffic stop does not violate the Fourth Amendment, so long as it does not significantly extend the period of detention beyond that reasonably necessary to request a driver's license and valid registration and to issue a citation." *Lopez*, 873 P.2d at 1133. However, like *Bissegger*, the scope of the traffic stop was fulfilled once the driver—who committed the traffic violation—was arrested, especially because Radmall had no reason to believe that anyone in the vehicle was using drugs. Just as the evidence seized from the passenger's lip balm container was suppressed in *Bissegger* because it was seized as a result of a search that improperly extended the scope of the initial detention, so too was Gettling's glasses case searched improperly. The scope of the traffic stop was fulfilled and its purpose concluded once the driver of the vehicle in which Gettling was riding was arrested. Accordingly, Gettling's continued detention was an improper and unreasonable extension of the scope of the initial traffic stop because police never had a reasonable suspicion that Gettling had or was about to commit a crime, before or during the traffic stop. Therefore, all evidence obtained as a result of this illegal detention and search should be suppressed.

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, the defendant respectfully requests this court to reverse the denial of his motion to suppress and vacate his conditional Sery plea, and remand this case to the Fourth District Court for further proceedings.

RESPECTFULLY SUBMITTED this 11th day of August, 2008.

_____

Margaret P. Lindsay
Counsel for Appellant

CERTIFICATE OF MAILING

I hereby certify that I delivered four (4) true and correct copies of the foregoing Brief of Appellant to the Appeals Division, Utah Attorney General, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 11th day of August, 2008.

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Margaret P. Lindsay
Counsel for Appellant

ADDENDA

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. BRADFORD DALE GETTLING, Defendant.	**RULING & ORDER ON DEFENDANT'S MOTION TO SUPPRESS** Case No. 061400084 Judge Lynn W. Davis

This matter comes before the Court on Defendant's Motion to Suppress. The Court having carefully considered and reviewed the file in this matter, the memoranda submitted by the parties, having heard oral arguments, reviewed the submitted memoranda, and good cause appearing therefore, the Court enters the following Ruling.

I

FINDINGS OF FACT & PROCEDURAL HISTORY

1. On January 2, 2006, Deputy Shawn Radmall of the Utah County Sheriff's Office was on patrol on Geneva Road in Provo when he observed a vehicle crossing left of center. The

Officer suspected a possible DUI and followed the vehicle along Geneva Road into Orem and onto 1300 South.

2. Deputy Radmall observed several violations before performing a traffic stop. The driver of the vehicle was a Mr. Steven Canals. The officer observed two passengers in the car. The passenger in the front passenger seat, Amber Childs ("Miss Childs"), was the owner of the vehicle. The passenger seated directly behind the driver was the Defendant, Bradford Dale Gettling ("Mr. Gettling").

3. Deputy Radmall ran a license and warrant check on the driver. After discovering that the driver had outstanding warrants and a suspended license, Deputy Radmall arrested Mr. Canals.

4. Deputy Radmall then questioned the two passengers of the stopped vehicle to determine if either had a valid driver license. Both responded that they did not.

5. Deputy Radmall informed the passengers that he was going to perform a canine search of the vehicle incident to the driver's arrest. According to the officer, the backseat passenger, Mr. Gettling appeared to be nervous at this statement.

6. As Deputy Radmall placed the driver in the deputy's police vehicle, he observed what he believed were furtive movements by Mr. Gettling in the backseat of the stopped vehicle.

7. Deputy Radmall informed Mr. Gettling and Ms. Childs that he intended to run his dog

around the vehicle in order to perform a free air search of the vehicle. Ms. Childs advised him that she was fine with the exterior search of the vehicle. Deputy Radmall asked Mr. Gettling and Ms. Childs to exit the vehicle while he performed a canine search of the exterior of the vehicle. After performing a brief Terry Frisk, he asked them to stand by a backup officer from Utah Valley State College ("UVSC"). Deputy Radmall subjectively believed, but did not express his belief to the two passengers that they were not free to leave.

8. During the canine search, Deputy Radmall's canine indicated positive for the presence of narcotics in the vehicle on the passenger's side rear door handle.

9. Deputy Radmall informed the front seat passenger and owner of the car, Amber Childs of the dog's positive indications. Ms. Childs agreed to his request that the dog search the interior of the vehicle. Ms. Childs stated that she did not believe that any drugs were in her car.

10. Once inside the car, the dog indicated positive for the presence of narcotics somewhere in the backseat of the car. Deputy Radmall removed luggage from the backseat to expose a hard glasses case that was underneath the luggage. Upon opening the case, Deputy Radmall discovered drug paraphernalia (a spoon, some straws, a glass pipe) and methamphetamine inside.

11. Deputy Radmall informed the three occupants of the vehicle of his findings. Ms. Childs and Mr. Canals both denied owning the drugs and related paraphernalia.

12. After Ms. Childs' denied ownership, Mr. Gettling looked at Deputy Radmall, nodded his head and said: "Don't make me tell you. Don't make me say it."

13. Mr. Gettling requested that Deputy Radmall retrieve several items from the luggage and give them to Ms. Childs. Mr. Gettilng advised the officer that he was transient and "that was all of his stuff."

14. Mr. Gettling filed his Motion to Suppress on May 24, 2006.

15. The State filed its Response on June 30, 2006.

16. The Defendant filed his Reply Memorandum in Support of Motion to Suppress on July 13, 2006.

17. The Court heard arguments on the matter on August 9, 2006.

II

ANALYSIS & RULING

The issues before the Court are: (1) does a passenger in a vehicle have standing to assert a claim that his Fourth Amendment right against search and seizure has been violated; (2) if a passenger does have standing, is he unlawfully detained during the search; and (3) will evidence discovered during the search be suppressed. The Defendant asks the Court to suppress the

evidence of Methamphetamines and Drug Paraphernalia on the basis that Deputy Radmall unlawfully extended the scope of the Defendant's detention. Specifically, the Defendant argues that Deputy Radmall had completed his traffic stop, arrested the driver of the vehicle on a warrants check, returned to the vehicle without suspicion of criminal activity, and asked Defendant, a passenger in the vehicle, to exit the vehicle while Deputy Radmall improperly ran a canine unit around the vehicle. The Defendant argues that any evidence obtained from the canine search is a result of an illegal detention of Defendant and should be suppressed.

A. Standing

The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. AMEND. IV. Before asserting a violation of Fourth Amendment rights, a defendant must first establish that he has standing in item of place searched. State v. Bisseger, 76 P.3d 178, 181 (Utah Ct. App. 2003)(overruled on other grounds). It is important to note that the rights guaranteed by the Fourth Amendment "are personal in nature and may not be vicariously asserted." Rakas v. Illinois, 439 U.S. 128, 133-34 (1978); Bisseger, 76 P.3d at 181; State v. Scott, 860 P.2d 1006 (1993). A defendant challenging the validity of a search must establish that he possessed a reasonable "legitimate expectation of privacy in the invaded space." Bisseger, 76 P.3d at 181

(internal citations omitted). A defendant bears the burden of proving his standing. Scott, 860 P.2d at 1007.

In determining whether a defendant has a legitimate expectation of privacy in the area and belongings searched, the Court employs a two-part test. Bisseger, 76 P.3d at 181. First, the defendant must show that he had "a subjective expectation of privacy in the searched area." Id.; State v. Sepulveda, 842 P.2d 913, 915 (Utah Ct. App. 1992); Scott, 860 P.2d at 1007. Next, the Court must "determine whether the defendant's expectation was objectively reasonable . . . [and] whether society is willing to recognize the individual's expectation of privacy as legitimate." Id. (internal citations and quotations omitted). Generally, a passenger in the vehicle does not having standing to assert a Fourth Amendment claim unless the passenger has an ownership interest in the vehicle. Rakas, 439 U.S. at 148-49; Bisseger, 76 P.3d at 181-82. Scott, 860 P.2d at 1007. A passenger, however, who has an ownership interest in personal property seized from the car, such as a closed item similar to a purse or luggage, may have standing in that individual item. *See* Bisseger, 76 P.3d at 182.

In Bisseger, the driver consented to the search of the vehicle. 76 P.3d at 180. The officer asked the passenger, who had no ownership interest in the vehicle, to get out of the car. Id. She did so, but left some of her personal belongings in the car including a small opaque lip-balm container. Id. As the officer searched the car, he discovered the

lip-balm container. Id. at 180-81. The officer knew that the container belonged to the passenger and had no individualized probable cause as to the container. Id. Nevertheless, the officer opened the container without first obtaining permission from the passenger and found methamphetamine inside. Id. In reviewing the passenger's motion to suppress, the Court of Appeals analogized the lip-balm container to a purse, shoulder bag, jacket, or shopping bag and determined that such items are "closed container[s] that keep[] the owner's personal things hidden from public view" and "[b]ecause [the defendant] placed private things in a closed opaque container, [the defendant] had a legitimate expectation of privacy in the contents of the container." Id. at 182. Therefore, while passengers in a vehicle do not have standing to object to a search of the vehicle itself, the passengers will have standing to challenge the search and seizure of their personal property found within the vehicle. Id. A passenger will not have standing if it can be shown that they abandoned the property. State v. Rynhart, 125 P.3d 938 (Utah 2005).

Applying Bisseger to the instant case, the Court finds that the Defendant has standing as to the search of the hard glasses case found as a result of the canine search of the vehicle. The officer discovered the glasses case underneath luggage on the backseat of the vehicle next to where the Defendant was sitting. Officer Radmall opened the case and searched it prior to determining ownership of the case. Similar to the lip-balm

container found in Bisseger, the glasses case was a personal container, it was closed and opaque. At the point of discovery, the officer could not ascertain who owned the glasses case and made no attempt to determine ownership prior to opening it. This Court finds that similar to a purse, jacket, or lip-balm, a glasses case is a personal item in which a person would have a legitimate expectation of privacy.

Although the Defendant has standing as to contest the search of the glasses case, the Defendant does not have standing as to the canine searches of the vehicle. The Defendant did not have or claim any ownership interest in the vehicle. Without any such interest, the Defendant has no standing to contest the vehicle's search. Further, the search was valid as incident to the arrest of the driver and the permission the officer obtained from the other passenger, Amber Childs, who was also the owner of the vehicle.

B. Search & Seizure

As standing has been established, the Court now analyzes the claims forwarded by Defendant in his Motion to Suppress. The Defendant asserts that evidence obtained in the search of the glasses case should be suppressed because (1) the vehicle he was a passenger in was unlawfully searched, (2) the officer improperly required Defendant to

vacate the vehicle, and (3) that the subsequent detainment of the Defendant was unlawfully extended due to the unlawful search of the vehicle.

As noted above, the Court has found that Defendant does not have standing to contest the search of the vehicle. Therefore, any argument that evidence should be suppressed because of an unlawful search of the vehicle is inapplicable to the instant case. Consequently, because the search of the vehicle is not in question, any evidence obtained as a result of the vehicle's search will not be suppressed unless there are other independent grounds requiring their suppression.

As to the search of the glasses case, the Court finds that Deputy Radmall had the requisite probable cause to search the glasses case. When a canine search is performed, a positive indication by a drug-sniffing canine provides the requisite probable cause to search a container. State v. Maycock, 947 P.2d 695 (Utah Ct. App. 1997). Deputy Radmall's canine clearly indicated on the glasses case. This indication, along with the Deputy's previous observations of Defendant's furtive actions when the Defendant was still in the backseat of the car, provided the Deputy with the requisite probable cause to search the glasses case.

A claim of an unlawfully extended detainment of the Defendant, a passenger, has no bearing on the lawfulness of the search of the car and the subsequent search of the glasses case. In State v. Shepard, the Utah Court of Appeals pointed out that "[t]he

United States Supreme Court . . . held that a trooper's asking a passenger to exit the car was not illegal." State v. Shepard, 955 P.2d 352, 356 (Utah Ct. App. 1998); Maryland v. Wilson, 519 U.S. 408 (1997). An officer does not need to observe any threatening behavior from the vehicle's passengers before directing a passenger out of the car. Id.

The Court notes that Mr. Gettling was a passenger in the vehicle. He did not have a driver license on his person, was not the owner of the vehicle, and had no legal ability to move the vehicle from the scene. The Court finds that the officer's request that the Defendant leave the vehicle in order to facilitate a canine search on the car was lawful and proper, particularly in light of Ms. Child's grant of permission. Mr. Gettling was not unlawfully detained as a result of the search of the vehicle. Further, at the time the Deputy searched the glasses case, the Defendant was not in possession of the case and had not claimed ownership to the case. Mr. Gettling cannot claim he was unlawfully detained as a result of an unlawful search of either the vehicle or the glasses case. The Court denies Defendant's Motion to Suppress.

Because the status of the Defendant during the search of the vehicle and glasses case is not relevant, the court does not make a finding as to whether the Defendant was unlawfully detained.

III

ORDER

On the grounds and for the reasons set forth therein, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. Defendant's Motion to Suppress is denied.

Signed this 5th day of September, 2006.

LYNN W. DAVIS, JUDGE

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