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Utah v. Morris : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, v. VANCE MORRIS, Defendant/Appellant.	Case No. 20080497-CA

OPENING BRIEF OF APPELLANT

This is the opening brief of appellant on appeal from a final judgment, sentence and commitment for possession of a controlled substance with intent to distribute, a second degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(iii), and for possession of paraphernalia, a class B misdemeanor, in violation of Utah Code Ann. § 58-37a-5(1), entered in the Seventh District Court for San Juan County, State of Utah, the Honorable Lyle R. Anderson, Judge, presiding.

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JURISDICTION

Utah Code Ann. § 78A-4-103(2)(e) provides this Court's jurisdiction over this appeal in a criminal case involving convictions less than first degree felonies from a court of record.

STATEMENT OF ISSUE, STANDARDS OF REVIEW AND PRESERVATION

Did the trial court err as a matter of law in denying Morris' motion to suppress?

The factual findings underlying a trial court's denial of a defendant's motion to suppress are viewed under a clearly erroneous standard and the trial court's conclusions of law based on such facts are reviewed under a correctness standard, with no deference to the trial court's legal conclusions. Salt Lake City v. Davidson, 2000 UT App 12, ¶ 8, 994 P.2d 1283; State v. Gray, 851 P.2d 1217, 1220 (Utah Ct. App. 1993).

This issue was raised and ruled on in the trial court (e.g., R. 24-47, 59-66, 67-71).

CONTROLLING CONSTITUTIONAL PROVISIONS AND STATUTES

The controlling constitutional provisions and statutes are copied in the addendum to this brief.

STATEMENT OF THE CASE

NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION

The State charged Morris by information with possession of a controlled substance with intent to distribute, driving under the influence, possession of paraphernalia, and open container (R. 1-3). Following the preliminary hearing, Magistrate Lyle R. Anderson ordered Morris bound over as charged (R. 16).

Morris moved to suppress evidence resulting from the illegal traffic stop and Morris' detention and arrest (R. 24-47, 59-66). Judge Anderson denied the motion to suppress (R. 67-70).

Morris entered conditional guilty pleas to possession of a controlled substance with intent to distribute and possession of paraphernalia (R. 72-79), expressly preserving his right to appeal from the trial court's denial of the motion to suppress (R. 76; R.87: 10).

Judge Anderson sentenced Morris to concurrent suspended terms of one to fifteen years in prison and six months in jail (R. 108-111). The court issued a certificate of probable cause, staying the probationary jail sentence pending resolution of the appeal from the denial of the motion to suppress (R. 105-06, 114).

Morris filed a timely notice of appeal (R. 101).

STATEMENT OF FACTS RELEVANT TO APPEAL

THE STOP, DETENTION AND *DE FACTO ARREST*

Trooper Williams testified that on June 12, 2007, at about 9:40 to 9:45 p.m., he initiated a stop on a black, Mazda Navajo SUV (R. 11:6, 14). Vance Morris was the driver and Brenda Balsley was the passenger (R. 11:6, 7). Morris's mother, Lola Mucky, was the registered owner of the SUV (R. 11:30).

Trooper Williams testified that he made the stop for lack of a license plate, and after observing the SUV "swerving within its lane," "constantly bumping the fog line and the center line," and "cross[ing] the fog line a couple of times" but not by much (R. 11:6, 16).

The concern about lack of a plate was dispelled before Trooper Williams got out of his own car to speak with the occupants of the SUV. He testified that as he walked up to the SUV, he noticed there was a temporary sticker in the upper left hand corner of the back window that was previously not visible because of the angle of the trooper's headlights did not reach the tag on the tall SUV, which had tint on the window. (R. 11:7, 18-19). The videotape actually demonstrates that it was after he initiated the stop, but before the trooper ever stopped driving that he spotlighted the registration tag in the upper

rear window on the back of the SUV (Video: 21:34:25).[1]

Examination of the evidence confirms that Morris's driving was likewise lawful. Trooper Williams turned on his car camera to record the driving pattern before he activated his emergency lights (R. 11:17). He testified that he had watched the video and that it shows the SUV "bumping or crossing the fog line." (R. 11:17-18). Counsel requests that the Court watch the video because it shows that Morris's SUV did not cross the fog line (Video 21:31:48 - 21:34:20). Instead, it shows Morris's tall SUV with something tied on the top of it driving within the allotted area between the center and fog lines for over two minutes while trooper was driving behind him. When cars came in the opposite direction, Morris pulled over toward but not across the fog line – a maneuver safe drivers would make to avoid head-on collisions at night on this dark, narrow, rutted, curving, two lane highway, where cars travel at a high rate of speed in opposite directions in directly adjacent lanes. See Video at 21:31:48-21:34:20. Trooper Williams acknowledged that the road Mr. Morris was traveling on "has some curves in it and there are some straight points as well." (R. 11:24). The videotape confirms that the road curves periodically, and is rutted and filled with seams where road repairs have been made.

The trooper did not write in his narrative report, in his DUI report form or in any report that the SUV crossed the fog line (R. 11:15-16). Trooper Williams testified that he

[1]A CD of the traffic stop is in the pleadings file, attached to R. 41.

told Morris that he "had seen him swerving back and forth in the lane" (R. 11:18-19) or that he stopped him for swerving, "bumping the line" and crossing it a couple of times (PH 26). By reviewing the videotape, the Court may confirm that Williams did not tell Morris that he had crossed the fog line. Rather, he told him that he had been bumping it, especially when other cars were passing (Video at 21:34:44). Morris responded to the effect that the road was rutted and that one of his rear tires was low, and the trooper accepted this explanation without any dispute or investigation, answering "Okay." (Video at 21:35:13).

The citation he issued does not charge improper lane travel or lack of a visible plate, but only charged DUI (R. 11: 9, R, 27).

The DUI report form indicates that Morris' speech was slurred. The videotape is important to review in this regard, because it captures Morris' clear enunciation, and rational and respectful conversation and course of conduct with the trooper. He pulled over when signaled to do so, immediately offered to produce his license and registration, and was fully compliant throughout the entire prolonged encounter. See videotape.

In the DUI report form, the trooper indicated that Morris's eyes were "glassy," a condition or eye color which is often alleged by Utah police officers in DUI cases,[2] but

[2]See, e.g., Layton City v. Aragon, 813 P.2d 1213, 1214 (Utah App. 1991)(officer described bloodshot, glassy eyes of DUI suspect); Salt Lake City v. Garcia, 912 P.2d 997, 999 (Utah App.) (officer testified DUI suspect's eyes were a "bloodshot, glassy color"), cert. denied, 919 P.2d 1208 (Utah 1996).

which is not recognized in the NHTSA training manual as a symptom of alcohol use (R. 43-45).

Williams testified that when he approached Morris in his car, he smelled the odor of alcohol (R. 11:7). He asked Morris if he had been drinking, to which Morris answered no (R. 11:7). Trooper Williams then asked Morris to step out of the SUV and directed him to the rear of the car, where they talked and the officer testified he could still smell alcohol (R. 11:7). Apparently because the Trooper could not tell if the "slight whiff" of alcohol was coming from Morris's breath, Trooper Williams asked Morris to blow into his hand (Video 21:36:38, R. 11:7). He testified that he smelled a "very strong" odor of alcohol (R. 11:7). The Court should again refer to the videotape, which shows the officer holding his palm to Morris's mouth, having Morris blow on his open hand, and then turning his hand through the air to smell his palm – a series of actions very unlikely to capture, preserve or convey the smell of any odor on Morris' breath. See video at 21:36:53.

Morris's balance was fine, as the trooper noted on the DUI report form, and as the videotape confirms (R. 28, videotape *passim*).

The trooper asked Morris to perform field sobriety tests, but before he did so, he searched him by requiring Morris to identify the contents of his pockets as the officer prodded them, and requiring him to remove a pocket knife and give it to the officer during the tests (Video at 21:38:12-36).

Trooper Williams then had Morris perform the Horizontal Gaze Nystagmus test, the Walk-and-Turn, the One-Leg Stand, and complete two portable breath tests (R. 11:8).

Morris passed the one leg stand test (PH 9). This appears to contrast with the "No Warrant Arrest Fact Sheet" sworn to under oath by the officer, which indicates that Morris failed the field sobriety tests (R. 29).

The trooper felt that Morris "failed" the HGN test (PH 8), but as the NHTSA manual indicates, that test indicates many conditions and substances in addition to alcohol consumption.

The trooper felt that Morris failed the walk and turn because he stepped off line during the instructional phase, did not count out loud as he walked, raised his arms more than six inches, took one too many steps and spun on the turn, rather than pivoting (PH 8). By reviewing the videotape, the Court may confirm that the test was performed where there was no line for Morris to stand on or walk, and that the trooper's instructions did not clearly inform Morris that he was expected to keep his arms within six inches of his legs, or that he was supposed to count out loud (Video 21:41-10-17). The portion of the test wherein Morris supposedly took an extra step and turned improperly is not on film (Video 21:40:53).

On the PBT test, Trooper Williams made Mr. Morris complete it twice because during the first attempt, there was not a sufficient air sample (R. 11:26). The second test was positive for alcohol (R. 11:9, 28). Before the second test, the trooper questioned

Morris about where he lived and how long he had been there in between the PBTs, extending the detention approximately 45 seconds. See video: 21:47:05.

The trooper testified at the preliminary hearing that Morris asked repeatedly or a couple of times why the trooper stopped him and was conducting field sobriety tests (PH 9), implying that Morris was not tracking mentally. By reviewing the videotape, the Court may confirm that Morris indicated one time during the field sobriety tests that he did not really understand why the trooper had stopped him (video 21:43:17).

Trooper Williams placed Morris under arrest for driving under the influence of alcohol (R. 11:9). After the arrest, the police found methamphetamine and open containers of alcohol in the SUV, and later found a dollar bill bearing traces of methamphetamine in Morris's wallet (R. 11:12, 33, 35, 44).

THE TRIAL COURT'S RULING

In its ruling, the trial court ruled that it was debatable whether Morris' driving pattern justified a traffic stop, but that the stop was justified because Morris' temporary permit did not meet the requirements of visibility, legibility, and illumination for license plates (R. 67-68). The trial court relied on Utah Code Ann. § 41-1a-404 (3) (requiring license plates to be securely fastened, clearly visible, and clearly legible) and Utah Code Ann. § 41-6a-1604 (2)(c) (requiring license plates to be illuminated with a tail lamp or separate lamp) in ruling that Morris' temporary tag did not comport with the law because

Trooper Williams had to walk by the vehicle and spotlight the rear window in order to see the temporary tag (R. 67-69). The court also ruled that under United States v. McSwain, Trooper Williams was allowed to make contact with Morris, explain the basis for the stop, and release him (R. 69). The trial court found that the brief initial encounter generated reasonable suspicion that Morris was driving under the influence because Trooper Williams's first contact with Morris generated a whiff of an alcoholic beverage, which eventually led to a DUI investigation and arrest (R. 69). The court did not address whether Trooper Williams' request for Morris' license and registration exceeded the scope of the stop.

Without a discussion of the governing law, the trial court classified the search of Morris' pockets as a frisk and found it was justified by Morris's size, because the trooper was outnumbered by Morris and his female passenger, because Morris put his hands in his pockets repeatedly, and because the stop occurred 14 miles from Moab on a rural highway (R. 69-70). The trial court did not address whether the frisk was actually a search which elevated the detention into a de facto arrest.

SUMMARY OF ARGUMENTS

The traffic stop was not justified in its inception. The temporary permit on the back of the SUV was proper, as was Morris' driving pattern. The trial court's ruling affirming the stop on the theory that the temporary permit should have been illuminated,

visible, and legible, was legally erroneous because the statutes the court relied on apply specifically to license plates. The temporary permit was in full compliance with the specific statute applicable to temporary permits. Because the stop was unlawful in its inception, all resultant evidence is subject to suppression.

Assuming *arguendo* that the stop were initially justified by the trooper's initial inability to see the temporary permit, he spotlighted the permit before he got out of his car. Thus, there was no lawful basis for an extended detention. All evidence stemming from the unlawful detention must be suppressed.

Assuming that there were a lawful basis for the stop and the extended detention, in searching Morris prior to the DUI investigation, the trooper transformed the detention into a *de facto* arrest, which was lacking in probable cause. Accordingly, the trial court erred in denying the motion to suppress.

This Court should reverse the trial court's ruling on the motion to suppress and remand this matter to the trial court for withdrawal of Morris' conditional pleas.

ARGUMENTS

I. THE TRAFFIC STOP WAS UNLAWFUL IN ITS INCEPTION.

While Fourth Amendment analysis seems adequate to resolve the issues before this Court in the instant case, Morris also relies on Article I § 14 of the Utah Constitution, which provides protection which is at least co-extensive with the federal counterpart, in

forbidding "sweeping, dragnet-type detentions of ordinary people engaged in peaceful, ordinary activities. Under both constitutions, the general rule is that 'specific and articulable facts... taken together with rational inferences from those facts, [must] reasonably warrant' the particular intrusion.'" State v. DeBooy, 996 P.2d 546, 549 (Utah 2000)(citations omitted); see also id., 996 P.2d at 552 (recognizing that Article I § 14 and numerous provisions of the Utah Declaration of Rights, consistent with the history of the founders of this State, are concerned with "all purpose criminal investigation without individualized suspicion.").

"The Fourth and Fourteenth Amendments protect the 'right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures.'" United States v. Stone, 866 F.2d 359, 362 (10th Cir. 1989).

A traffic stop constitutes a seizure that is subject to judicial scrutiny under the Fourth Amendment. See United States v. Walker, 933 F.2d 812, 815 (10th Cir. 1991). The government has the burden to justify the traffic stop, both in its inception and in its scope. See, e.g., State v. Lopez, 873 P.2d 1127, 1131-32 (Utah 1994).

A. THE TEMPORARY PERMIT WAS PROPER AND DID NOT JUSTIFY THE STOP.

"[A]n officer is constitutionally justified in stopping a vehicle if the stop is incident to a traffic violation committed in the officer's presence." Lopez, *supra* (internal quotations and citations omitted). The lack of registration on Morris' SUV is also not a

basis for the stop, for, as Trooper Williams testified, as he was walking to Morris's car, he saw a temporary sticker in the upper left hand corner of the back window that was previously not visible (PH at 7, 19). The videotape actually demonstrates that it was before the trooper ever stopped driving that he spotlighted the registration tag in the upper rear window on the back of the SUV (Video: 21:34:25). He did not cite Morris for any impropriety with the plate.

As soon as the officer saw the proper registration, the basis for the detention ended, and the detention should have ended as well. See, e.g., United States v. McSwain, 29 F.3d 558, 561 (10th Cir. 1994)(suppressing fruits of traffic stop prompted by concern that temporary registration was invalid, which concern was dispelled immediately after stop began, when trooper saw that temporary registration was proper).

The trial court's alternative basis for approving of the stop was that the temporary permit was out of compliance with two statutes: Utah Code Ann. §§ 41-1a-404(3)(a)(iii) and (b)(ii) and 41-6a-1604(2)(c) (R. 68). By reviewing the two statutes, this Court may confirm that they apply to license plates. Section 41-1a-404 provides, relevant part:

> (3) Every license plate shall at all times be:
>
> (a) securely fastened:
>
> ....
>
> (iii) in a place and position to be clearly visible; and
>
> (b) maintained:
>
> ....
>
> (ii) in a condition to be clearly legible.
>
> ...

Section 41-6a-1604 provides, in relevant part:

> ....
> (2)
>
> ....
>
> (c) Either a tail lamp or a separate lamp shall be so constructed and placed as to illuminate with a white light the rear registration plate.

Both of the foregoing statutes expressly refer to "license plates." Temporary permits such as was affixed to Morris' mother's SUV, are distinguished from license plates by out legislature and governed by separate statutes. For instance, in contrast to the license plate statutes relied on by the trial court, Utah Code Ann. § 41-1a-211 only requires that temporary permits be displayed. It provides:

> (1)(a) The division may grant a temporary permit to operate a vehicle for which:
>
> (i) application for registration has been made, or, in the case of a newly purchased vehicle, will be made;
>
> (ii) evidence of ownership is provided; and
>
> (iii) the proper fees have been paid.
>
> (b) The temporary permit allows the vehicle to be operated pending complete registration by <u>displaying:</u>
>
> <u>(i) the temporary permit</u>; or
>
> (ii) other evidence of the application under rules made by the commission.

> (2) If a vehicle is operated on a temporary permit issued under this section or Section 41-3-302,[3] that vehicle is subject to all other statutes, rules, and regulations intended to control the use and operation of vehicles on the highways.

Under the structure of the Utah Constitution, it is the exclusive function of the legislature to draft and enact laws, not the courts'. See Constitution of Utah, Article VI § 1 and Article V § 1. The constitutional doctrine of separation of powers logically requires the Court's fealty to the plain language enacted by the legislature.

> The preference for literalism in determining the effect of a statute is based on the constitutional doctrine of separation of powers. The courts owe fidelity to the will of the legislature. What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.

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[3]Section 41-3-302 provides:

(1)(a)(i) A dealer or the division may issue a temporary permit.

(ii) In accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, the administrator shall makes rules for the issuance of a temporary permit under Subsection (1)(a)(i).

(iii) The division shall furnish the forms for temporary permits issued by dealers under Subsection (1)(a)(i).

(b) A dealer may issue a temporary permit to a bona fide purchaser of a motor vehicle for a period not to exceed 45 days on a motor vehicle sold to the purchaser by the dealer.

(c) The dealer is responsible and liable for the registration fee of each motor vehicle for which the permit is issued.

(d) All issued temporary permits that are outstanding after 45 days from the date they are issued are delinquent and a penalty equal to the registration fee shall be collected from the issuing dealer.

(2) If a temporary permit is issued by a dealer under this section and the sale of the motor vehicle is subsequently rescinded, the temporary permit may be voided and the issuing dealer is not liable for the registration fee or penalty.

Sutherland, Statutory Construction, § 46.03.

The goal of statutory interpretation is to determine and give effect to the intent of the legislature. The primary tools for the determination of the intent of the legislature are reading and giving effect to the plain language enacted by the legislature. "The doctrine is fundamental…that in arriving at the intention of the Legislature the courts must give effect to the plain meaning of the language used to express the intention…. The plain and obvious meaning of the language must be adopted; anything else would be an unwarranted assumption of legislative authority." State v. Davis 184 P. 161, 165 (Utah 1919).

The fact that the legislature did not mention temporary permits in the license plate statutes relied on by the trial court, but instead mentioned the specific phrase "temporary permit" in other statutes and required only that the permits be displayed, e.g., § 41-1a-211, demonstrates that the legislature did not intend for the temporary permits to be required to meet the same placement and illumination requirements as licenses plates. See, e.g., Field v. Boyer Co., L.C., 952 P.2d 1078 (Utah 1998) (recognizing the maxim of statutory construction, *expressio unius est exclusio alterius*," which means the expression of one thing implies the exclusion of another); Hansen v. Wilkinson, 658 P.2d 1216, 1217 (Utah 1983) ("It probably is not wholly inaccurate to suppose that ordinarily when people say one thing they do not mean something else.") (quoting 2a C. Sands, *Sutherland Statutory Construction,* § 47.01 (4th ed. 1973)).

Accordingly, the trial court erred as a matter of law in finding that the traffic stop was justified on the theory that the temporary permit failed to comport with the license plate statutes. Because there was no lawful basis for the inception of the stop and detention, suppression of all resultant evidence is in order. See Lopez, 831 P.2d at 1043, supra.

B. THE LAWFUL DRIVING PATTERN DID NOT JUSTIFY THE STOP.

"[A]n officer is constitutionally justified in stopping a vehicle if the stop is incident to a traffic violation committed in the officer's presence." Id. (internal quotations and citations omitted). Utah Code Ann. § 41-6a-710 only requires drivers to operate their vehicles "as nearly as practical" within a single lane. State v. Bello, 871 P.2d 584 (Utah Ct. App.), cert. denied, 883 P.2d 1359 (Utah 1994).[4] If following a "perfect vector" within one's lane were required by the law, "a substantial portion of the public would be subject each day to an invasion of their privacy." State v. Fanari, No. 981108-CA, 1998 WL 1758329 (Utah Ct. App. Dec.9, 1998) (quoting United States v.

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[4] Utah Code Ann. § 41-6-61 was renumbered as Utah Code Ann. §41-6a-710. Utah Code Ann. § 41-6a-710(1) provides:

(1) A person operating a vehicle:

(a) shall keep the vehicle as nearly as practical entirely within a single lane; and

(b) may not move the vehicle from the lane until the operator has determined the movement can be made safely.

Lyons, 7 F.3d 973, 976 (10th Cir. 1993). Further, in order for an officer to have probable cause to stop a driver for driving under the influence, the driver must weave beyond his lane more than once. Bello, 871 P.2d at 587 (holding that driver's crossing the center line one time did not give rise to reasonable suspicion of DUI); stating that "a single instance of weaving...cannot serve as the constitutional basis for stopping" a driver for suspicion of criminal activity); see Utah Code Ann. § 41-6-502; see Lopez, 831 P.2d at 1043 (stating that a traffic stop is lawful if it is based on "probable cause or reasonable suspicion that the driver is committing a traffic offense, such as driving under the influence of alcohol...").

The Utah statute, § 41-6a-710(1), requires both that the driver operate the car as nearly as practical within a single lane of traffic *and* that the driver not move the vehicle from the lane until the operator has determined that the movement can be made safely. The plain text of this statutory language requires proof of two elements – failing to stay within a lane and unsafe movement by the driver. See n.2, supra. This statute does not create two separate offenses, but rather only one: moving out of a marked lane when it is not safe to do so. See Rowe v. State, 769 A.2d at 879, 886-87 (Md. 2001) (interpreting parallel Maryland statute); Hernandez v. State, 983 S.W.2d 867, 871 (Tex. App. 1998) (interpreting parallel Texas statute).

In the instant matter, Morris stayed within his lane, despite the fact that he was driving a tall SUV with a low rear tire and materials strapped on top, on a curvy rutted

road. He properly pulled away from oncoming traffic, but stayed within the lane markers, and endangered no one. See Videotape and Statement of Facts, *supra*.

This Court may confirm the absence of a lawful basis for the officer's stop of Morris by reviewing United States v. Gregory, 79 F.3d 973 (10th Cir. 1996), which held that a driver's passing over into the emergency lane and then back into traffic did not establish a violation of 41-6a-710 (1). The court explained as follows:

> [T]he statute requires only that the vehicle remain entirely in a single lane "as nearly as practical." *Id.* The road was winding, the terrain mountainous and the weather condition was windy. Under these conditions any vehicle could be subject to an isolated incident of moving into the right shoulder of the roadway, without giving rise to a suspicion of criminal activity. The driver may have decided to pull over to check his vehicle and then have a sudden change of mind and pulled back into the traffic lane. Since the movement of the vehicle occurred toward the right shoulder, other traffic was in no danger of collision. These facts lead us to conclude that the single occurrence of moving to the right shoulder of the roadway which was observed by Officer Barney could not constitute a violation of Utah law and therefore does not warrant the invasion of Fourth Amendment.

Gregory, 79 F.3d at 978. In concluding that there was no violation of the traffic statute, the Gregory court cited State v. Bello, 871 P.2d 584 (Utah App.), cert. denied, 883 P.2d. 1359 (1994), wherein this Court likewise emphasized the statutory language requiring drivers to keep their cars within the lane markers "as nearly as practical" to find that a driver's one instance of weaving did not justify a traffic stop under the same statute as is at issue here (albeit it was numbered differently at that time). Because it was windy, the driver had a shell on his camper that was catching the wind, and the officer followed that

driver without noticing any other driving violations for some two miles, the court of appeals found that the stop violated the Fourth Amendment. Id. at 587.

Bello and Gregory are consistent with decisions from around the country wherein the courts have rebuffed law enforcement efforts to justify traffic stops on the basis of driving patterns wherein drivers briefly cross white or yellow lines. See United States v. Freeman, 209 F.3d 464 (6th Cir. 2000) (an isolated incident of car's temporarily crossing the white line separating the emergency lane from the right-hand traffic lane was not a violation of law); United States v. Ochoa, 4 F.Supp.2d 1007 (D.Kan. 1998) (an incident wherein car crossed lane marker onto shoulder one time did not constitute a violation of the law); United States v. Gastellum, 927 F.Supp. 1386 (D. Colo. 1996) (car's weaving one to three feet over right-hand shoulder white line was not a violation of the law); Hernandez v. State, 983 S.W.2d 867 (Tex. App. 1998) (car's briefly driving into adjacent traffic lane and back was not a violation of the law); State v. Lafferty, 967 P.2d 363 (Mont. 1998) (car's crossing fog line twice and driving on the fog line not a violation of the law); State v. Tarvin, 972 S.W.2d 910 (Tex. App. 1998) (car's drifting over solid white line on right hand side of road two or three times was not a violation of the law); Crooks v. State, 710 So.2d 1041 (Fla. App. 1998) (car's driving over the right-hand line on the edge of the road was not a violation of the law).

Other federal courts have found a violation of the statute under much different circumstances than the ones presented in Morris' case. See United States v. Alvarado, 430 F.3d 1305 (10th Cir. 2005) (vehicle crossed one foot over fog line absent of any weather conditions, road features, or other circumstances that could have interfered with operation of vehicle); United States v. Ivey, 313 F.Supp.2d 1242 (D.Utah 2004) (officer saw defendant's vehicle swerve and weave and cross center line approximately five times); United States v. Parker, 72 F.3d 1444 (10th Cir. 1995) (officer observed defendants' car drift twice out of their lane of travel and into emergency lane for approximately 200 feet); United States v. Botero-Ospina, 71 F.3d 783 (10th Cir. 1995) (vehicle was being driven well below posted speed limit and straddling the lane).

Here, Trooper Williams' stop of the SUV was not "justified at its inception." Lopez, 831 P.2d at 1043. Morris did not commit a traffic offense prior to being stopped. While his car did not follow a "perfect vector," the law does not require him to do so. Bello, 871 P.2d at 587. He remained in the single lane "as nearly as practical," given the road conditions. His driving pattern endangered no one, and in driving toward the fog line when oncoming traffic approached, Morris took the safe and appropriate course of action. On these facts, Mr. Morris did not violate the law, and the traffic stop was not justified in its inception. See, e.g., Bello and Rowe, supra.

Because the trooper's action of stopping Morris was not justified in its inception,

all evidence surrounding the traffic stop must be suppressed under basic Fourth Amendment law. See Wong Sun v. United States, 371 U.S. 471, 484-488 (1963). Suppression is also a necessary consequence of the violation of Article I § 14. See State v. Larocco, 794 P.2d 460, 465-71 (Utah 1990) (*plurality*) (recognizing privacy interest in interior of car and adopting exclusionary rule as a necessary consequence of Article I § 14 and noting that there are no recognized exceptions to this exclusionary rule).[5]

II. THE EXTENDED DETENTION WAS UNJUSTIFIED AND CONSTITUTED A *DE FACTO* ARREST, WHICH WAS UNSUPPORTED BY PROBABLE CAUSE.

In evaluating the treatment of Morris, this Court may wish to review basic elements of search and seizure analysis, wherein there are three levels of police-citizen encounters: a level one encounter, which is wholly consensual, and wherein the citizen feels free to leave or disregard the officer; a level two detention, which occurs when a

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[5]The Larocco *plurality* opinion is often cited as controlling law in other opinions which likewise recognize the mandatory nature of the Utah exclusionary rule. See, e.g., State v. Thompson, 810 P.2d 415, 416-20 (Utah 1991) (majority of the court recognized privacy interest in bank records under Article I § 14, held in accordance with Larocco that exclusion is a necessary consequence of a violation of Article I § 14, and that no exceptions had been recognized to the Utah exclusionary rule); State v. DeBooy, 996 P.2d 546, 554 (Utah 2000) (finding exclusion of illegal checkpoint stop to be a necessary consequence of Article I § 14). See also State v. Ziegelman, 905 P.2d 883, 887 (Utah App. 1995) (finding that violation of Fourth Amendment during traffic stop required suppression under Larocco); Sims v. Collection Div. of Utah State Tax Div., 841 P.2d 6, 11-13 (Utah 1992)(*plurality*)(exclusionary rule of Article I § 14 applies in civil proceedings which are criminal in effect and wherein it is necessary to deter further illegal searches).

reasonable person in the citizen's circumstances would not feel free to leave or to disregard the officer's questions, and which requires a reasonable, articulable suspicion of crime by the police; and a level three arrest, which involves intrusive questioning or arrest, and requires probable cause. See, e.g., State v. Hansen, 2002 UT 125, ¶¶ 34-36, 63 P.3d 650.

Level two seizures must be limited in their scope; an encounter involving more that a brief stop, interrogation, and, under limited circumstances a brief check for weapons, constitutes a de facto arrest, requiring probable cause. See, e.g., Dunaway v. New York, 442 U.S. 200 (1979). Officers conducting a lawful seizure must employ the least intrusive means; when a reasonable person in the suspect's place would believe himself to be under arrest, a level two seizure has become a level three arrest, requiring probable cause. See, e.g., Florida v. Royer, 460 U.S. 491, 502 (1973) (*plurality*). Probable cause is established if the facts known to the officer and the fair inferences from those facts would lead a reasonable and prudent person to believe that the suspect had committed a crime. State v Cole, 674 P.2d 119, 125 (Utah 1983).

A. NO DETENTION WAS JUSTIFIED.

As explained above, the detention was illegal from the outset, because there was no reasonable suspicion that Morris had committed any offense at the time of the stop. The trial court ruled that despite the trooper's realizing that the temporary permit was in

order prior to approaching Morris, it was still appropriate for the trooper to contact Morris, explain the basis for the stop, and then let Morris go (R. 69). In so ruling, the trial court relied in *dictum* in United States v. McSwain, 29 F.3d 558, 561 (10th Cir. 1994), a case wherein a trooper stopped a car to check the temporary registration, found that it was in order before approaching the driver, but nonetheless approached the driver, took his registration and questioned him. The Tenth Circuit held that in so doing, the trooper exceeded the scope of detention. Id. at 561. In *dictum*, the court mentioned that it would be acceptable for an officer who had initiated a traffic stop and found it to be baseless before speaking to the driver to approach the driver, explain why he made the stop, and then release the driver before requesting documentation or questioning. Id. at 561.

This *dictum* should not be adopted by this Court, because it does not square with fundamental Fourth Amendment and Article I § 14 jurisprudence requiring the police to end seizures immediately after the legal basis for them dissipates. Under both constitutions, the general rule is that 'specific and articulable facts... taken together with rational inferences from those facts, [must] reasonably warrant' the particular intrusion.'" State v. DeBooy, 996 P.2d 546, 549 (Utah 2000)(citations omitted).

The video of the stop does not depict the trooper apologizing for his baseless stop, but instead depicts him telling Morris that he stopped him for the temporary plate, which the trooper was no longer concerned about, and Morris' driving pattern. The trooper did

not apologize or send him on his way, and when Morris asked him if he wanted his license and registration, the trooper responded, "Yeah. All that." (Video: 21:35:11). Thus, the facts of this case are distinguishable from the *dictum* in McSwain in any event.

The trial court found that the trooper's "first contact with Morris generated a 'whiff' of an alcoholic beverage, which eventually led to an arrest for DUI." (R. 69). The videotape and trooper testimony demonstrate that the trooper could not tell if the odor of alcohol was emanating from Morris at least until after he required Morris to get out of the SUV and blow into the trooper's hand. Williams testified that when he approached Morris in his car, he smelled the odor of alcohol (R. 11:7). He asked Morris if he had been drinking, to which Morris answered no (R. 11:7). Trooper Williams then asked Morris to step out of the SUV and directed him to the rear of the car, where they talked and the officer testified he could still smell alcohol (R. 11:7). Apparently because the Trooper could not tell if the "slight whiff" of alcohol was coming from Morris's breath, Trooper Williams asked Morris to blow into his hand (Video 21:36:38, R. 11:7).

Given that Morris was lucid, spoke clearly and did not clearly smell of alcohol, there was no reason to believe that he might be driving under the influence, to justify ordering him out of his car for an extended detention for a DUI investigation. Compare State v. Worwood, 2007 UT 47, ¶¶ 2-3, 26, 164 P.3d 397 (officer had a reasonable suspicion, but not probable cause of DUI, when he found the defendant with slurred, slow

speech and bloodshot eyes, standing by his truck which smelled of alcohol, near a crushed beer can, a recently emptied cooler, and a large wet spot in the road).

Assuming that the stop and initial detention were lawful, and that the trooper's detection of a " slight whiff" of alcohol provided a reasonable suspicion to justify an extended detention (Video 21:36:38, R. 11:7), certainly after Morris exited his car and exhibited good balance, there was no probable cause to justify anything more than an arrest. See Worwood at ¶ 35 (finding that the facts giving rise to reasonable suspicion did not give rise to probable cause absent evidence that the defendant was unsteady in his walking).

B. THE UNLAWFUL SEARCH CONFIRMS THAT THE *DE FACTO* ARREST REQUIRES SUPPRESSION.

Assuming that a DUI investigation were in order, the Trooper did not proceed with a DUI investigation, but instead began inquiring into whether Morris had anything in his pockets that the trooper should know about, groping the contents of Morris' pockets from outside the fabric, requiring Morris to identify the contents of his pockets, and requiring Morris to surrender his pocket knife until the field sobriety tests were complete (Video at 21:38:12-36). As is established herein, this course of conduct exceeded the permissible scope of detention and converted the encounter between the trooper and Morris into a *de facto* arrest.

Our law has long recognized that when an officer questions whether a citizen is armed, or conducts a Terry pat-down frisk for weapons, the government must justify these Fourth Amendment intrusions by proof of a reasonable belief that the citizen is armed. See, e.g., State v. Despain, 2003 UT App 266, ¶ 8, 74 P.3d 1176, cert. denied, 84 P.3d 239 (Utah 2004). Two factual bases may satisfy the government's burden to justify a Terry frisk: facts giving rise to a reasonable inference that a particular suspect is armed, or the involvement of a crime which inherently implies the use of weapons. See, e.g., State v. Lafond, 2003 UT App. 101, ¶ 19, 68 P.3d 1043, cert. denied, 72 P.3d 685 (Utah 2003).

A Terry frisk is not a search for evidence, but must be limited in scope to a patdown for weapons. See Terry v. Ohio, 392 U.S. 1, 29 (1968) ("The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer."); State v. Warren, 2003 UT 36, ¶ 13, 78 P.3d 590 (if Terry frisk goes beyond detection of weapons, all fruits must be suppressed). To justify a warrantless search, the government must establish both probable cause and an exception to the warrant requirement. E.g., State v. Menke, 787 P.2d 537, 543 (Utah App. 1990).

The trial court characterized the trooper's conduct as "frisking," (R. 69-70), despite the fact that the conduct legally amounted to a search. See, e.g., Warren, *supra*.

The trooper had no reason to believe that Morris posed a danger to him, and there was no crime under investigation which implicitly might have involved weapons. Nonetheless, the trooper asked Morris if he had anything in his pockets to be concerned about, groped and prodded at the contents of the pockets through the fabric, required Morris to identify the contents of his pockets, and required him to produce and temporarily surrender a pocket knife (Video at 21:38:12-36). The trooper had no basis to inquire about or frisk for weapons, and certainly had no probable cause or other lawful basis to conduct the search he conducted on Morris. See, e.g., Terry and Warren, *supra*.

The trial court did not recognize that the "frisking" was actually a search, and made no probable cause findings. Rather, he reasoned that the "frisking" was justified by Morris' size, Morris' putting his hands in his pockets repeatedly, and the facts that the trooper was outnumbered and the stop was fourteen miles outside of Moab "on a rural highway." (R. 69-70). The factors relied on by the trial court did not establish probable cause that anything would be found in the search, see Menke, *supra*, and did not establish a reasonable inference that Morris or Balsley was armed, or had been involved in a crime which inherently implies the use of weapons, see, e.g., State v. Lafond, 2003 UT App. 101, ¶ 19, 68 P.3d 1043, cert. denied, 72 P.3d 685 (Utah 2003).

The trooper's search of Morris converted the detention into a *de facto* arrest which was lacking in probable cause. Compare, State v. Worwood, 2007 UT 47, ¶¶ 27-33, 164 P.3d 397 (finding that officer with reasonable suspicion to detain for a DUI investigation

conducted an unjustified *de facto* arrest in requiring the suspect to drive in the officer's car to a different location for field sobriety tests). See also Dunnaway and Royer, *supra*.

All resultant evidence should be suppressed. See Wong Sun, Worwood, DeBooy, and Larocco, *supra*.

All evidence flowing from the trooper's constitutional violations must be suppressed. See, e.g., Larocco, Wong Sun, *supra*.

CONCLUSION

This Court should suppress all evidence seized in violation of the Fourth Amendment and Article I § 14 of the Utah Constitution.

Respectfully submitted this 29th day of September, 2008.

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By: _____
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ELIZABETH HUNT

CERTIFICATE OF DELIVERY

I hereby certify that I caused to be hand-delivered two true and correct copies of the foregoing, first class postage pre-paid, to Utah Attorney General Mark Shurtleff, 160 East 300 South, Sixth Floor, P.O. Box. 140854, this _____ day of _____, 2008.

_____

ADDENDUM

TRIAL COURT'S RULING DENYING
MOTION TO SUPPRESS

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution of Utah, Article I § 14

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

Constitution of Utah, Article V § 1

The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

Constitution of Utah, Article VI § 1

(1) The Legislative power of the State shall be vested in:

(a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and

(b) the people of the State of Utah as provided in Subsection (2).

(2)(a)(i) The legal voters of the State of Utah, in the numbers, under the conditions, in the manner, and within the time provided by statute, may:

(A) initiate any desired legislation and cause it to be submitted to the people for adoption upon a majority vote of those voting on the legislation, as provided by statute; or

(B) require any law passed by the Legislature, except those laws passed by a two-thirds vote of the members elected to each house of the Legislature, to be submitted to the voters of the State, as provided by statute, before the law may take effect.

(ii) Notwithstanding Subsection (2)(a)(i)(A), legislation initiated to allow, limit, or prohibit the taking of wildlife or the season for or method of taking wildlife shall be adopted upon approval of two-thirds of those voting.

(b) The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may:

(i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or

(ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.

United States Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Utah Code Ann. § 41-1a-211

(1)(a) The division may grant a temporary permit to operate a vehicle for which:

(i) application for registration has been made, or, in the case of a newly purchased vehicle, will be made;

(ii) evidence of ownership is provided; and

(iii) the proper fees have been paid.

(b) The temporary permit allows the vehicle to be operated pending complete registration by displaying:

(i) the temporary permit; or

(ii) other evidence of the application under rules made by the commission.

(2) If a vehicle is operated on a temporary permit issued under this section or Section 41-3-302, that vehicle is subject to all other statutes, rules, and regulations intended to control the use and operation of vehicles on the highways.

Utah Code Ann. § 41-1a-404

(1) License plates issued for a vehicle other than a motorcycle, trailer, or semitrailer shall be attached to the vehicle, one in the front and the other in the rear.

(2) The license plate issued for a motorcycle, trailer, or semitrailer shall be attached to the rear of the motorcycle, trailer, or semitrailer.

(3) Every license plate shall at all times be:

(a) securely fastened:

(i) in a horizontal position to the vehicle for which it is issued to prevent the plate from swinging;

(ii) at a height of not less than 12 inches from the ground, measuring from the bottom of the plate; and

(iii) in a place and position to be clearly visible; and

(b) maintained:

(i) free from foreign materials; and

(ii) in a condition to be clearly legible.

(4) Enforcement by a state or local law enforcement officer of the requirement under Subsection (1) to attach a license plate to the front of a vehicle shall be only as a secondary action when the vehicle has been detained for a suspected violation by any person in the vehicle of Title 41, Motor Vehicles, other than the requirement under Subsection (1) to attach a license plate to the front of the vehicle, or for another offense.

Utah Code Ann. § 41-3-302
(1)(a)(i) A dealer or the division may issue a temporary permit.

(ii) In accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, the administrator shall makes rules for the issuance of a temporary permit under Subsection (1)(a)(i).

(iii) The division shall furnish the forms for temporary permits issued by dealers under Subsection (1)(a)(i).

(b) A dealer may issue a temporary permit to a bona fide purchaser of a motor vehicle for a period not to exceed 45 days on a motor vehicle sold to the purchaser by the dealer.

(c) The dealer is responsible and liable for the registration fee of each motor vehicle for which the permit is issued.

(d) All issued temporary permits that are outstanding after 45 days from the date they are issued are delinquent and a penalty equal to the registration fee shall be collected from the issuing dealer.

(2) If a temporary permit is issued by a dealer under this section and the sale of the motor vehicle is subsequently rescinded, the temporary permit may be voided and the issuing dealer is not liable for the registration fee or penalty.

Utah Code Ann. § 41-6a-710

On a roadway divided into two or more clearly marked lanes for traffic the following provisions apply:

(1) A person operating a vehicle:

(a) shall keep the vehicle as nearly as practical entirely within a single lane; and

(b) may not move the vehicle from the lane until the operator has determined the movement can be made safely.

(2) On a roadway divided into three or more lanes and providing for two-way movement of traffic, a person operating a vehicle may not drive in the center lane except:

(a) when overtaking and passing another vehicle traveling in the same direction, and when the center lane is:

(i) clear of traffic within a safe distance; and

(ii) not a two-way left turn lane;

(b) in preparation of making or completing a left turn in compliance with Section 41-6a-801; or

(c) where the center lane is allocated exclusively to traffic moving in the same direction that the vehicle is proceeding as indicated by traffic-control devices.

(3)(a) A highway authority may erect traffic-control devices directing specified traffic to use a designated lane or designating those lanes to be used by traffic moving in a particular direction regardless of the center of the roadway.

(b) An operator of a vehicle shall obey the directions of a traffic-control device erected under Subsection (3)(a).

Utah Code Ann. § 41-6a-1604

(1) A motor vehicle shall be equipped with at least two head lamps with at least one on each side of the front of the motor vehicle.

(2)(a) A motor vehicle, trailer, semitrailer, pole trailer, and any other vehicle which is being drawn at the end of a combination of vehicles, shall be equipped with at least two tail lamps and two or more red reflectors mounted on the rear.

(b)(i) Except as provided under Subsections (2)(b)(ii), (2)(c), and Section 41-6a-1612, all stop lamps or other lamps and reflectors mounted on the rear of a vehicle shall display or reflect a red color.

(ii) A turn signal or hazard warning light may be red or yellow.

(c) Either a tail lamp or a separate lamp shall be so constructed and placed as to illuminate with a white light the rear registration plate.

(3)(a) A motor vehicle, trailer, semitrailer, and pole trailer shall be equipped with two or more stop lamps and flashing turn signals.

(b) A supplemental stop lamp may be mounted on the rear of a vehicle, if the supplemental stop lamp:

(i) emits a red light;

(ii) is mounted:

(A) and constructed so that no light emitted from the device, either direct or reflected, is visible to the driver;

(B) not lower than 15 inches above the roadway; and

(C) on the vertical center line of the vehicle; and

(iii) is the size, design, and candle power that conforms to federal standards regulating stop lamps.

(4)(a) Each head lamp, tail lamp, supplemental stop lamp, flashing turn lamp, other lamp, or reflector required under this part shall comply with the requirements and limitations established under Section 41-6a-1601.

(b) The department, by rules made under Section 41-6a-1601, may require trucks, buses, motor homes, motor vehicles with truck-campers, trailers, semitrailers, and pole trailers to have additional lamps and reflectors.

(5) The department, by rules made under Section 41-6a-1601, may allow:

(a) one tail lamp on any vehicle equipped with only one when it was made;

(b) one stop lamp on any vehicle equipped with only one when it was made; and

(c) passenger cars and trucks with a width less than 80 inches and manufactured or assembled prior to January 1, 1953, need not be equipped with electric turn signal lamps.