2008

Utah v. Morris : Brief of Appellant

Utah Court of Appeals

Elizabeth Hunt; Yengich, Rich & Xaiz; Counsel for Appellant.
Jeffrey S. Gray; Assistant Attorney General; Mark L. Shurtleff; Attorney General; Walter J. Bird; Counsel for Appellee.

IN THE UTAH COURT OF APPEALS

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

REPLY BRIEF OF APPELLANT

This is the reply 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.

JEFFREY S. GRAY
ASSISTANT ATTORNEY GENERAL
Attorney for State of Utah
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854

RONALD J. YENGICH, #3580
ELIZABETH HUNT, #5292
YENGICH, RICH & XAIZ
Attorneys for Appellant/Petitioner
175 East 400 South, Suite 400
Salt Lake City, Utah 84111
Telephone: (801) 355-0320
Fax: (801) 364-6026

IN THE UTAH COURT OF APPEALS

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

REPLY BRIEF OF APPELLANT

This is the reply 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.

JEFFREY GRAY
ASSISTANT ATTORNEY GENERAL
Attorney for State of Utah
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854

RONALD J. YENGICH, #3580
ELIZABETH HUNT, #5292
YENGICH, RICH & XAIZ
Attorneys for Appellant/Petitioner
175 East 400 South, Suite 400
Salt Lake City, Utah 84111
Telephone: (801) 355-0320
Fax: (801) 364-6026

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

OTHER AUTHORITIES

IN THE UTAH COURT OF APPEALS

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

ARGUMENTS

I. THE TRAFFIC STOP WAS UNLAWFUL IN ITS INCEPTION.

The State makes no effort to defend the trial court's erroneous ruling that the traffic stop was legally justified by the absence of illumination on, or visibility of, the temporary permit on Morris's SUV. Compare Morris's opening brief at 12-16 (discussing the legally erroneous nature of the ruling) with State's brief at 8-9 (attempting to justify the traffic stop without reference to the statutes on visibility, legibility and illumination of license plates or the trial court's ruling relying on those statutes). Nor does the State defend the trial court's ruling that the stop may have been justified by Morris's driving pattern. Compare Morris's opening brief at 16-21 (discussing the legality of Morris's driving pattern) with State's brief at 8-9 (attempting to justify the traffic stop without reference to the driving pattern or the trial court's ruling) and at 14 n.4 (recognizing the prosecutor's concession that the stop was not justified by the driving

pattern alone).

Rather, the State proposes an alternative basis for affirmance, arguing that the stop was justified because the trooper could not see the temporary permit until Morris pulled to the shoulder of the road. State's brief at 9. The State cites State v. Naisbitt, 827 P.2d 969, 971 (Utah App. 1992); Utah Code Ann. §§ 41-1a-1305(5) and 41-1a-211(1) in support of its argument. State's brief at 9. Section 41-1a-1305(5) requires those driving on the highways to have license plates securely attached to registered cars. See id. Section 41-1a-211(1) allows those whose cars are not yet registered to display temporary permits as one means of driving prior to registration and without a license plate. See id. Naisbitt stands for the proposition that an officer's inability to see a license plate or temporary registration on a car gives rise to a reasonable suspicion that the car is not properly registered, which justifies a traffic stop. Id.

The temporary permit on Morris's SUV was displayed and visible prior to Morris's pulling onto the shoulder of the road, as is demonstrated by reference to the DVD, which shows the permit on the back of SUV window in the trooper's spotlight while the trooper was still driving. See DVD at 21:34:25. Contrary to the State's argument, Morris's pulling over onto the shoulder of the road did nothing to improve the visibility of the permit. Because the trooper had no cause to suspect that the SUV was not properly registered with a visible temporary permit, there was no lawful basis for the stop. Compare State v. Naisbitt, 827 P.2d 969, 971 (Utah App. 1992); Utah Code Ann. §§ 41-

1a-1305(5) and 41-1a-211(1) with DVD.

Because there was no lawful basis for the inception of the stop and detention, suppression of all resultant evidence is in order. See, e.g., State v. Lopez, 873 P.2d 1127, 1131-32 (Utah 1994).

Particularly given the recent limitation of the federal exclusionary rule, see, Herring v. United States, 2009 WL 77886 (2009), Morris reasserts his right to exclusion under Article I § 14 of the Utah Constitution, which provides protection that is at least co-extensive with the federal counterpart's, in forbidding "sweeping, dragnet-type detentions of ordinary people engaged in peaceful, ordinary activities. Under the Utah Constitution, 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."). Because the traffic stop here violated Article I § 14, exclusion of evidence is a "necessary consequence." See, e.g., 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).[1]

II. THE COURT SHOULD CONTINUE TO REQUIRE A REASONABLE ARTICULABLE SUSPICION OF CRIME TO JUSTIFY ALL DETENTIONS.

The State asks this Court to hold that an officer who knows his reasonable articulable suspicion is baseless to nonetheless initiate[2] or extend a detention to explain his mistake to the detainee and then explore any reasonable suspicions that might arise in the course of the encounter. State's brief at 10-12. For instance, in this case, the State believes that after the trooper saw the proper registration on the SUV, it was appropriate for him to park, approach the SUV, take Morris's license and other paperwork, and have

---

[1]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).

[2]Given that the trooper's car was still moving when he spotlighted Morris's temporary permit, the trooper should have simply passed Morris and continued on down the road. A reasonable person in those circumstances would have felt free to leave and disregard the officer, and would not have been seized. See, e.g., State v. Hansen, 2002 UT 125, ¶¶ 34-36, 63 P.3d 650.

Morris exit his car to investigate whether he was the source of the slight whiff of alcohol the trooper detected. State's brief at 12-14.

The rule the State would have the Court adopt diverges from well-established cases from multiple panels of this Court and from the Utah Supreme Court and the United States Supreme Court interpreting the Fourth Amendment and/or Article I §14 of the Utah Constitution. The State's rule, permitting a detention to be initiated or continued so an officer can explain the baselessness of his mistaken reasonable suspicion, does not square with fundamental law that traffic stops and other detentions must be justified in their inception and in their scope by objectively based reasonable articulable suspicions of crime.[3] The State's proposed rule conflicts with well-established law that "it is unlawful to continue a detention once a reasonable suspicion is dispelled." State v. Chism, 2005 UT App 41, ¶ 12.

Principles of both horizontal and vertical *stare decisis* counsel against adopting the State's position. This Court is required by vertical *stare decisis* to "follow strictly the decisions rendered by a higher court." State v. Menzies, 889 P.2d 393, 399 n.3 (Utah 1994) (citations omitted). Horizontal *stare decisis* generally requires panels of this Court

[3]See, e.g., State v. DeBooy, 2000 UT 32, ¶ 13, 996 P.2d 546 (Utah 2000) (discussing both state and federal constitutional law to this effect and recognizing that Article I § 14 is interpreted independently to provide greater protection than the Fourth Amendment); State v. Lopez, 873 P.2d 1127, 1132 (Utah 1994)(discussing federal law to this effect); Florida v. Royer, 460 U.S. 491, 500 (1983)(same), Terry v. Ohio, 392 U.S. 1, 19-20 (1968)(same).

to follow the law set forth by the first panel of this Court to address a legal question, unless the Court is "clearly convinced that the rule was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent." Id. (citation omitted). Because Terry, Royer, DeBooy, Lopez, and Chism control, under the doctrine of *stare decisis,* this Court should reject the State's proposed rule.

In support of its argument that the police should be permitted to detain people in the recognized absence of a reasonable suspicion to explain their lack of reasonable suspicions, the State relies on *dictum* in United States v. McSwain, 29 F.3d 558, 561 (10th Cir. 1994),[4] and on a Second Circuit case, United States v. Jenkins, 452 F.3d 207, 213-14 (2nd Cir.), cert. denied, 549 U.S. 1008 (2006). State's brief at 10-12. Neither of these authorities is binding on this Court with regard to the Fourth Amendment or Article I § 14. Nor do they provide any authority or reasoned analysis for departing from the standard bulwark of Fourth Amendment or Article I § 14 detention and scope analysis discussed above.

Assuming *arguendo* that *stare decisis* were not of concern, but see, e.g., Menzies, *supra*, and assuming *arguendo* that federal cases controlled the interpretation of the Utah Constitution, but see, e.g., DeBooy, *supra*, the State's authorities are not persuasive. In

[4]The holding of McSwain was that the officer violated the scope of detention after recognizing that a temporary permit was valid, by approaching the car, requesting the driver's license and registration, and questioning him about his car and travel plans. See id., 29 F.3d at 561, 564.

the name of protecting mistakenly detained people from being curious about their baseless initial detentions, the McSwain *dicta* and Jenkins case purport to grant the police the authority to detain citizens in the recognized absence of any reasonable suspicion of crime so that the police may discuss why there is no basis for their detentions. Concerns about citizen curiosity are speculative, given that police are routinely dispatched to higher priority situations, and routinely signal people to pull over to make way for their pursuit of other people and responses to other dispatch calls. Police neither owe nor routinely provide explanations of their activities to citizens who are peripherally or even directly involved in their investigations.

Our courts have recognized that because detentions may begin for pretextual reasons, as long as they are objectively justified, it is critical for our courts to carefully enforce and maintain the body of law requiring stringent limitation of the scope of detention. As the Tenth Circuit explained in United States v. Botero-Ospina, 71 F.3d 783, 788 (10th Cir. 1995), in abandoning the pretext doctrine and adopting an objective analysis of traffic stops,

> It goes without saying that, by adopting the standard we do today, we do not abandon the traveling public to "the arbitrary exercise of discretionary police power." Our holding in this case properly focuses on the very narrow question of whether the initial stop of the vehicle is objectively justified. We leave intact the vast body of law which addresses the second prong of the *Terry* analysis-whether the police officer's actions are reasonably related in scope to the circumstances that justified the interference in the first place. Our well-developed case law clearly circumscribes the permissible scope of an investigative detention. Therefore, if an officer's initial traffic stop, though objectively justified by

> the officer's observation of a minor traffic violation, is motivated by a desire to engage in an investigation of more serious criminal activity, his investigation nevertheless will be circumscribed by *Terry*'s scope requirement.

Id. at 788 (citations omitted). Similarly, in State v. Lopez, 873 P.2d 1127, 1135-36 (Utah 1994), the court abandoned the pretext doctrine, which focused on an officer's subjective state of mind in assessing detentions. In doing so, the court reasoned that inquiry into the officer's subjective intent was not generally necessary if there was an objective basis for a detention, because the constitutional scope requirement that an officer's investigation be tailored precisely to a reasonable suspicion provides all necessary protection. Id. at 1135-36.

The Jenkins case illustrates the potential for police abuse which inheres in the State's proposed rule. Jenkins condones an extended detention that began after the officer recognized his mistake, and indicates that it was not necessary for there to be a factual finding reflecting that the officer's continued detention was intended to apprise the detainee of the officer's mistake. The court reasoned that because Fourth Amendment analysis turns on objective bases for police behaviors, it would have been objectively reasonable for the officer to explain his mistake, and thus, his continued detention was legitimate regardless of whether he intended to explain his mistake. See id, 452 F.3d at 214 n.8. Jenkins is flawed in failing to recognize that the detention itself was patently unsupported by an objective reasonable suspicion of crime.

The State's proposed rule, which allows an officer to detain citizens in the

recognized absence of any lawful basis, obviates the fundamental requirements of an objective basis for the inception and scope of a detention, and gives the police significant power to arbitrarily interfere with people's freedom, in contravention of fundamental Fourth Amendment and Article I § 14 standards. But see, e.g., State v. Abell, 2003 UT 20, ¶¶ 16-17, 70 P.3d 98 (discussing constitutional law protecting this freedom). The State's proposed rule in the hands of the wrong police officers could give them virtual *carte blanche* to detain virtually any motorist to explain mistaken impressions that the motorist was a wanted criminal or appeared to be drinking a can of beer instead of a Diet Coke. Such a rule would not be limited to traffic stops, but would seem to apply in many contexts wherein a police officer wanted an opportunity to detain someone without a reasonable suspicion of crime. Given that detentions can be justified on the theory that were objectively permitted, regardless if police intent or behavior squared with that objective justification (*i.e.* a stop might be objectively justified to provide an explanation of a mistake, regardless of whether the police intended to give any such explanation or did so[5]), adoption of the State's proposed rule would truly run counter to fundamental Fourth Amendment and Article I § 14 principles. See, e.g., DeBooy, *supra*.

Because there was no lawful basis for the inception of the stop and detention of Vance Morris, suppression of all resultant evidence is in order. See, e.g., State v. Lopez, 873 P.2d 1127, 1131-32 (Utah 1994).

---

[5]See Jenkins, *supra*, and State's brief at 12-13.

Particularly given the recent limitation of the federal exclusionary rule, see, Herring v. United States, 2009 WL 77886 (2009), Morris asserts his right to exclusion under Article I § 14 of the Utah Constitution, which provides protection that 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."). Because the traffic stop here violated Article I § 14, exclusion of evidence is a "necessary consequence." See, e.g., 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).[6]

---

[6]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

III. THE ODOR OF ALCOHOL DID NOT JUSTIFY AN EXTENDED DETENTION.

The State relies on cases from outside Utah in contending that the slight whiff of alcohol emanating from the SUV, combined with Morris's driving pattern, justifies a detention for a DUI investigation. State's brief at 13-15, citing Nickelson v. Kansas Dep't of Revenue, 102 P.3d 490, 496 (Kan. App. 2004), and In re Z.C.B., 669 N.W.2d 478, 482 (N.D. 2003).

As is fully detailed on pages four through five and sixteen through twenty-one of Morris's opening brief, Morris's driving pattern was reflective of safe and sober driving. The DVD 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 DVD 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.

---

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).

11:24). The DVD confirms that the road curves periodically, and is rutted and filled with seams where road repairs have been made. Morris's SUV did not cross the fog line or leave the lane despite the road conditions and his low rear tire (DVD 21:31:48 - 21:34:20).

A "slight whiff" of alcohol emanating from a car containing multiple occupants does not give rise to a reasonable suspicion of alcohol consumption by the driver, let alone alcohol consumption by the driver to an unlawful degree under Utah law. This is so because it is lawful for people who are not driving to have consumed alcohol before getting into cars, and for drivers to have consumed alcohol to drive, provided that their BAC is below the legal limit and that they are able to drive safely. See, e.g., Utah Code Ann. §41-6a-502. Morris drove safely throughout the lengthy period in which the trooper followed him, and upon being stopped was lucid, spoke clearly and did not clearly smell of alcohol. Thus, 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 to investigate a DUI. 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 *arguendo* that the stop and initial detention were lawful, and that the trooper's detection of a " slight whiff" of alcohol from someone or something in the SUV provided

a reasonable suspicion to justify a detention (DVD 21:36:38, R. 11:7), certainly after Morris exited his car and exhibited good balance, any concerns that he might be driving under the influence were negated. 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).[7]

Because the detention began and extended in the absence of a reasonable suspicion, all resulting evidence should be suppressed. See, e.g., State v. Lopez, 873 P.2d 1127, 1131-32 (Utah 1994).

Particularly given the recent limitation of the federal exclusionary rule, see, Herring v. United States, 2009 WL 77886 (2009), Morris asserts his right to exclusion under Article I § 14 of the Utah Constitution, which provides protection that 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

[7]In arguing probable cause for a DUI arrest, the State argues that Morris's portable breath test result was .108. State's brief at 16, citing R.11: 9, 26-28. The record reflects that the trooper could not recall the portable breath test result and did not record it in notes available at the time of the hearing (R. 11: 28).

Rights, consistent with the history of the founders of this State, are concerned with "all purpose criminal investigation without individualized suspicion."). Because the traffic stop here violated Article I § 14, exclusion of evidence is a "necessary consequence." See, e.g., 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).[8]

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

The State makes no effort to defend the trial court's ruling that a Terry frisk was justified by Morris' size, Morris' putting his hands in his pockets repeatedly, that the trooper was outnumbered, and the stop was fourteen miles outside of Moab "on a rural

[8]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).

highway." (R. 69-70). Compare Morris's opening brief at 25-27 with State's brief at 17-20.

The State contends in a footnote 5 that Terry v. Ohio, 392 U.S. 1 at 24, 30 (1968), authorizes police to search people for weapons, and that the trooper's weapons search of Morris was thus lawful and did not convert the detention into a *de facto* arrest. State's brief at 18 n.5.

To the extent it is arguing that the police have unbridled discretion to search people for weapons, the State is incorrect. 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 intrusions by proof of a reasonable belief that the citizen is armed. See, e.g., Terry 392 U.S. 1, 24; 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).

The State has done nothing to establish any reasonable suspicion that Morris was armed or involved in a weapons-related offense. Accordingly, no Terry frisk was legally warranted. See id.

The State's argument that a search for weapons is permitted by Terry, State's brief

at 18 n.5, is not accurate. A Terry frisk 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."). If the police ask people to identify the contents of their pockets, this goes beyond a proper Terry frisk and constitutes a search. E.g. State v. Lafond, 2003 UT App 101, ¶ 27 n.12, 68 P.2d 1043. To justify a warrantless search the State 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 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 Lafond, *supra*.

The State contends that Morris has not challenged the trial court's ruling that suppression would not be an appropriate remedy for an illegal frisk. State's brief at 18. The trial court's ruling was as follows:

> Moreover, the frisking did not lead to the discovery of evidence. It is substantially attenuated from the subsequent inventory discovery of illegal drugs.

(R. 70). Morris has never contended that any incriminating evidence was found in the search of Morris itself, because none was found in that search. But he has maintained that no detention was warranted, that the officer consistently violated the scope of detention, and that the unlawful search confirms that a lawless *de facto* arrest occurred. See Morris's opening brief at 21-28.[9] Morris has consistently maintained that all evidence flowing from the illegal detention and arrest should be suppressed. See, Opening brief at 10, 16, 21, 28.

The State argues that the frisk was not the "but for" cause of the discovery of the illegal evidence such as the breath test result and the methamphetamine and paraphernalia found in the SUV and Morris's wallet. State's brief at 19. Morris is not contending that the search of Morris was the "but for" cause of the discovery of the evidence. He is contending that the unlawful detention and baseless *de facto* arrest require

---

[9]On page 25 of the opening brief, counsel Elizabeth Hunt erroneously wrote that "there was no probable cause to justify anything more than an arrest" when she should have written "there was no probable cause to justify an arrest." It does not appear that the State was misled by the error, for which Hunt hereby apologizes.

suppression. In the absence of the unlawful detention and baseless *de facto* arrest, the trooper would have driven on down the road and left Morris behind without further adieu. But for the illegal detention and baseless *de facto* arrest, no searches would have occurred of the SUV or of Morris's wallet. Because the officer's violations of Article I § 14 and the Fourth Amendment were the "but for" cause of the discovery of the evidence, suppression is in order.

The State is not arguing independent source, inevitable discovery or any other type of attenuation analysis to avoid exclusion under the Fourth Amendment. Compare State's Brief, *passim*, with e.g., State v. Worwood, 2007 UT 47, 164 P.3d 397 (discussing inevitable discovery and independent source exceptions to the Fourth Amendment exclusionary rule). Nor could it, given that the evidence all resulted from the illegal detention and *de facto* arrest of Morris. See, e.g., Morris's Opening brief at 3-8.

The State argues in footnote 6 of its brief that Morris lifted his arms when the trooper asked permission to conduct a pat-down search and that this constituted consent which obviates the reasonable suspicion inquiry. State's brief at 20 n.6. To establish consent, the State bears a heavy burden of proof to establish not only that the consent was constitutionally voluntary, but also, that it was not tainted by, but was attenuated from, the preceding illegalities. See, e.g, State v. Hansen, 2002 UT 125, ¶¶ 51-70, 63 P.3d 650. The State must prove voluntariness by a preponderance of the evidence, and courts assessing this issue consider the totality of circumstances regarding the defendant and the

circumstances in which the consent was given, including whether the defendant was informed of the right to refuse consent and the timing of the officer's request. Id. at ¶¶ 56-59.

In the instant matter, the State's footnote does not prove that the consent was attenuated from the preceding and ongoing illegalities involved in the baseless inception of the stop, and the ensuing investigation exceeded any legitimate scope. Nor does the State's footnote prove voluntariness, given that Morris raised his arms in a situation wherein the officer had already made it clear that he, and not Morris, was in control, by requiring Morris to give him his license, registration and insurance, requiring Morris to get out of the car, telling him where to stand, and requiring him to perform field sobriety tests. The trooper never informed Morris he had the right to refuse the search or to refuse to answer the trooper's questions as he groped the contents of Morris's pockets. By watching the DVD, the Court can readily conclude that any purported consent was not voluntary or independent from the preceding and ongoing illegalities. See DVD beginning at 21:34:44 through 21:38:36.

Because the detention began and extended in the absence of a reasonable suspicion, all resulting evidence should be suppressed. See, e.g., State v. Lopez, 873 P.2d 1127, 1131-32 (Utah 1994).

Particularly given the recent limitation of the federal exclusionary rule, see, Herring v. United States, 2009 WL 77886 (2009), Morris asserts his right to exclusion

under Article I § 14 of the Utah Constitution, which provides protection that 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."). Because the traffic stop here violated Article I § 14, exclusion of evidence is a "necessary consequence." See, e.g., 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).[10]

---

[10]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

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 ____ day of January, 2008.

YENGICH, RICH & XAIZ
Attorneys for Appellant

By: _____
RONALD J. YENGICH
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 the Honorable Jeffrey S. Gray, 160 East 300 South, Sixth Floor, P.O. Box. 140854, this ____ day of _____, 2009.

_____

---

proceedings which are criminal in effect and wherein it is necessary to deter further illegal searches).