2008

State of Utah v. Lloyd Franklin VIT : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
vs.	:	District Court No. 081901837
LLOYD FRANKLIN VIT,	:	Appellate Court No. 20100710
Defendant/Appellant.	:	

BRIEF OF APPELLANT

THIS APPEAL IS FROM A CONVICTION AND SUBSEQUENT SENTENCING TO POSSESSION OF A DANGEROUS WEAPON BY A RESTRICTED PERSON, A THIRD DEGREE FELONY; AND POSSESSION OF A CONTROLLED SUBSTANCE, A THIRD DEGREE FELONY, AND WAS SENTENCED TO SERVE TWO TERMS OF ZERO TO FIVE YEARS AT THE UTAH STATE PRISON; IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR WEBER COUNTY, STATE OF UTAH, THE HONORABLE SCOTT M. HADLEY PRESIDING.

THE DEFENDANT/APPELLANT IS CURRENTLY INCARCERATED AT THE UTAH STATE PRISON.

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BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDINGS

The Appellant is appealing from a Judgment, Sentence and Commitment of the Second District Court for Weber County, Utah, dated November 12, 2010. The Defendant was convicted of Possession of a Dangerous Weapon by a Restricted Person, a third-degree felony in violation of U.C.A. §76-10-503; and Possession of a Controlled Substance, a third-degree felony in violation of U.C.A. §58-37-8. He was sentenced by the Honorable Scott Hadley to two terms of zero to five years in the Utah State Prison. Jurisdiction for the Appeal is conferred upon the Utah Court of Appeals pursuant to U.C.A. §78A-4-103(2)(j).

POINT I

WAS THE DEFENDANT DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF

THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE 1, SECTIONS SEVEN AND TWELVE OF THE UTAH CONSTITUTION WHEN HIS ATTORNEY FAILED MAKE A MOTION TO SUPPRESS THE EVIDENCE OBTAINED AFTER AN ILLEGAL SEARCH AND SEIZURE OF THE DEFENDANT'S PROPERTY?

STANDARD OF REVIEW: The Appellate Court must determine as a matter of fact and law whether the Defendant was denied his right to effective assistance of counsel. In *Strickland v. Washington*, 466 U.S 668, 80 L.Ed.2d 674 (1984), the United States Supreme Court articulated a two part test, which was adopted in *State v. Templin*, 805 P.2d 182 (Utah 1990), to determine whether counsel was ineffective. The Court held that;

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Id.* at 466 U.S. at 687, 80 L.Ed. 2d at 693.

POINT II

DID THE TRIAL COURT COMMIT PLAIN ERROR IN FAILING TO RECOGNIZE THAT THE DEFENDANT'S PROPERTY HAD BEEN ILLEGALLY SEARCHED BY THE POLICE?

STANDARD OF REVIEW: This issue was not properly preserved for appeal; therefore, the plain error standard applies. "To establish plain error, a

defendant must show: (1) an error did in fact occur, (2) the error should have been obvious to the trial court, and (3) the error is harmful." *State v. Bradley*, 2002 UT App 348 (See also *State v. Ellifritz*, 835 P.2d 170, 174 (Utah Ct.App. 1992) and *State v. Olsen*, 860 P.2d 332, 334 (Utah 1993).)

POINT III

WAS THE EVIDENCE OBTAINED AFTER THE DEFENDANT'S PROPERTY WAS ILLEGALLY SEARCHED AND SEIZED FRUIT OF THE POISONOUS TREE AND THEREFORE SHOULD IT HAVE BEEN SUPPRESSED?

STANDARD OF REVIEW: This issue was not fully and properly preserved for appeal, and therefore the plain error standard applies. "To establish plain error, a defendant must show: (1) an error did in fact occur, (2) the error should have been obvious to the trial court, and (3) the error is harmful. *State v. Bradley*, 2002 UT App 348 (See also *State v. Ellifritz*, 835 P.2d 170, 174 (Utah Ct.App. 1992) and *State v. Olsen*, 860 P.2d 332, 334 (Utah 1993).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

UNITED STATES CONSTITUTION

Fourth Amendment

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.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defen(s)e.

Fourteenth Amendment
Section 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 CONSTITUTION

Article 1, Section 7

No person shall be deprived of life, liberty or property, without due process of law.

Article 1, Section 12

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases.

Article 1 Section 14: [Unreasonable searches forbidden -- Issuance of warrant.]

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.

UTAH CODE ANNOTATED

§58-37A-5. Unlawful acts.

(1) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body in violation of this chapter. Any person who violates this subsection is guilty of a class B misdemeanor

§58-37-8(2)(a)(i) Possession of a Controlled Substance Prohibited acts -- Penalties.

It is unlawful: for any person knowingly and intentionally to possess or use a controlled substance analog or a controlled substance, unless it was obtained under a valid prescription or order, directly from a practitioner while acting in the course of his professional practice, or as otherwise authorized by this chapter;

§76-6-408. Receiving stolen property -- Duties of pawnbrokers, secondhand businesses, and coin dealers.

(1) A person commits theft if he receives, retains, or disposes of the property of another knowing that it has been stolen, or believing that it probably has been stolen, or who conceals, sells, withholds or aids in concealing, selling, or withholding the property from the owner, knowing the property to be stolen, intending to deprive the owner of it.
(2) The knowledge or belief required for Subsection (1) is presumed in the case of an actor who:
(a) is found in possession or control of other property stolen on a separate occasion;
(b) has received other stolen property within the year preceding the receiving offense charged;
(c) is a pawnbroker or person who has or operates a business dealing in or collecting used or secondhand merchandise or personal property, or an agent,

employee, or representative of a pawnbroker or person who buys, receives, or obtains property and fails to require the seller or person delivering the property to:
(i) certify, in writing, that he has the legal rights to sell the property;
(ii) provide a legible print, preferably the right thumb, at the bottom of the certificate next to his signature; and
(iii) provide at least one positive form of identification; or
(d) is a coin dealer or an employee of the coin dealer as defined in Section 13-32a-102 who does not comply with the requirements of Section 13-32a-104.5.
(3) Every pawnbroker or person who has or operates a business dealing in or collecting used or secondhand merchandise or personal property, and every agent, employee, or representative of a pawnbroker or person who fails to comply with the requirements of Subsection (2)(c) is presumed to have bought, received, or obtained the property knowing it to have been stolen or unlawfully obtained. This presumption may be rebutted by proof.
(4) When, in a prosecution under this section, it appears from the evidence that the defendant was a pawnbroker or a person who has or operates a business dealing in or collecting used or secondhand merchandise or personal property, or was an agent, employee, or representative of a pawnbroker or person, that the defendant bought, received, concealed, or withheld the property without obtaining the information required in Subsection (2)(c) or (2)(d), then the burden shall be upon the defendant to show that the property bought, received, or obtained was not stolen.
(5) Subsections (2)(c), (3), and (4) do not apply to scrap metal processors as defined in Section 76-10-901.
(6) As used in this section:
(a) "Dealer" means a person in the business of buying or selling goods.
(b) "Pawnbroker" means a person who:
(i) loans money on deposit of personal property, or deals in the purchase, exchange, or possession of personal property on condition of selling the same property back again to the pledge or depositor;
(ii) loans or advances money on personal property by taking chattel mortgage security on the property and takes or receives the personal property into his possession and who sells the unredeemed pledges; or
(iii) receives personal property in exchange for money or in trade for other personal property.
(c) "Receives" means acquiring possession, control, or title or lending on the security of the property.

§76-10-503 Possession of a Dangerous Weapon by a Restricted Person.

(1) For purposes of this section:

(b) A Category II restricted person is a person who:

(iii) is an unlawful user of a controlled substance as defined in Section 58-37-2;

(iv) is in possession of a dangerous weapon and is knowingly and intentionally in unlawful possession of a Schedule I or II controlled substance as defined in Section 58-37-2;

(3) A Category II restricted person who purchases, transfers, possesses, uses, or has under his custody or control:

(a) any firearm is guilty of a third degree felony; or

(b) any dangerous weapon other than a firearm is guilty of a class A misdemeanor.

§78A-4-103(2)(j). Court of Appeals Jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(j) cases transferred to the Court of Appeals from the Supreme Court.

UTAH RULES OF EVIDENCE

RULE 402. RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or the Constitution of the state of Utah, statute, or by these rules, or by other rules applicable in courts of this state. Evidence which is not relevant is not admissible.

RULE 403. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

Defendant was initially charged in an information dated August 30, 2005, with Possession of a Dangerous Weapon by a Restricted Person, a third-degree felony in violation of U.C.A. §76-10-503, Illegal Possession of a Controlled Substance, a third-degree felony in violation of U.C.A. §58-37-8, and Possession of Drug Paraphernalia, a class B Misdemeanor in violation of U.C.A. §58-37A-5. All three charges were later dismissed without prejudice on October 31, 2005. The State moved forward on a related charge (all events took place on the same date of August 29, 2005) of Theft by Receiving Stolen Property, a second-degree Felony in violation of U.C.A. §76-6-408, filed in an information dated September 29, 2005. Defendant's private attorney filed a motion to suppress the evidence; and prior to the oral arguments, the State reduced the charge to a class A misdemeanor and no motion was argued. Defendant was sentenced on that charge on November 28, 2006. The State then refilled an information on August 27, 2008, that charged Defendant with the current charges of Possession of a Dangerous Weapon by a Restricted Person, in violation of U.C.A. §76-10-503 and Possession of a Controlled Substance, in violation of U.C.A. §58-37-8 both third-degree felonies that arose from the same August 29, 2005, incident.

On December 4, 2008, Defendant made an initial appearance to the court. The case was continued until Defendant retained attorney Gary Gale. Defendant

and his attorney were proceeding until Mr. Gale passed away in the fall of 2009. The case was then transferred to multiple attorneys, private and public defenders, until January 26, 2010, in which his current public defender was assigned. The public defender moved the case forward from the pre-trial stage and set the matter for trial. No motions were ever filed.

Defendant and his Defense Counsel held a jury trial on July 29, 2010 in which Defendant was convicted of both charges. Defendant was sentenced to two terms of zero to five years in the Utah State Prison. Defendant is currently in the Utah State Prison.

This judgment and conviction was entered on November 1, 2010, and Defendant timely filed his notice of appeal on November 12, 2010.

STATEMENT OF THE FACTS

On August 29, 2005, Officer Thomas from the Ogden City Police Department was called by an employee of Staker Parsons (a local construction company) stating they believed they saw a backhoe which had been stolen. (R. 149/104-105) The employee took Officer Thomas to the location where the backhoe could be seen from the freeway, and Officer Thomas began to drive to where this property was located in Marriot/Slaterville. (R. 149/105) When Officer Thomas arrived to the property, there was a gate to the property which was locked. (R. 149/105) Officer Thomas was able to speak with an individual who informed

him that the parcel of property which the backhoe was on belonged to Defendant. (R. 149/105)

Officer Thomas went back onto that property, past the locked gate, and was still unable to make any contact with the owner. (R. 149/106, 113) Officer Thomas then went to within 15-20 feet of the backhoe, and obtained the V.I.N. number on the backhoe. He was kept back the 15-20 feet from the backhoe due to a watchdog that was on a chain. (R. 149/106) No one gave Officer Thomas permission to enter Defendant's property at that time. (R. 149/112) Officer Thomas ran the V.I.N. number on the N.C.I.C. and found the backhoe was listed as stolen. (R. 149/107) Officer Thomas then left a detective on the premise and went to the station to write a search warrant. (R. 149/107) Officer Thomas never completed the search warrant and returned to the premise, without a warrant, based upon information that Defendant had returned home. (R. 149/107) Officer Thomas spoke with Defendant and asked if he had consent to go look at the backhoe on his property. Officer Thomas stated Defendant consented. (R. 149/108)

Officer Thomas continued to speak with Defendant and asked if they could go into his trailer to talk. Defendant allowed the officers (Thomas, Grogan and Haney) to go into his trailer. (R. 149/109) After speaking with Defendant, Agent Haney went to obtain a search warrant, as he was currently investigating Defendant in regards to drug use and firearm possession. (R. 149/111,175) Upon obtaining a

search warrant, officers searched the trailer. (R. 149/126, 128) Firearms and drug paraphernalia were found in the trailer as a result of the search. (R. 149/131)

SUMMARY OF ARGUMENTS

This case stems from a citizen complaint of a possibility of a stolen backhoe on some private property. As a result of the complaint, the officer went onto Defendant's private property and illegally entered the property to retrieve identifying information from the backhoe. As a result, the officers then questioned Defendant about his trailer; and upon a subsequent search of Defendant's trailer, a firearm and a small amount of drugs were located. Defendant had retained private counsel who was able to file a suppression motion based upon the officer's illegal search of the property and reduce a second-degree felony charge to a misdemeanor. Based upon the considerable reduction, it is clear that the suppression motion had significant merit.

As Defendant's present cases are resulting from the same illegal search of the property progressed, defense counsel failed to file a suppression motion on the issue although a motion was already prepared. Defendant and defense counsel continued to trial; and at trial, defense counsel made statements that the issue was important and questioned officers regarding their actions. Any evidence obtained after the illegal search constitutes fruit of the poisonous tree and should be excluded from evidence. However, due to trial counsel's failings, his attempt to

raise the illegal search at the time of trial was late and barred by the trial court. Based upon these failings, the Defendant was deprived of his constitutional right to effective assistance of counsel. Effective counsel would have timely researched, drafted, and filed appropriate suppression motions which would have resulted in an entirely different outcome of the case.

A careful examination of the facts reveals that there was no reasonable suspicion or exigent circumstances that were present in this case. The officer had secured the scene, traveled back to the station to write the appropriate paperwork to obtain a magistrate issued search warrant, but then unilaterally changed his mind and decided to become the judge and simply search the premises without a warrant. Based upon defense counsel's failure to raise such issues at the appropriate level, Defendant's Utah and U.S. Constitutional right to unreasonable searches and seizures was violated, along with his constitutional right to effective assistance of counsel.

ARGUMENT

POINT I

THE DEFENDANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE 1, SECTIONS SEVEN AND TWELVE OF THE UTAH CONSTITUTION WHEN HIS ATTORNEY FAILED TO MOVE THE COURT TO SUPPRESS EVIDENCE OBTAINED AFTER

AN ILLEGAL SEARCH AND SEIZURE OF THE DEFENDANT'S PROPERTY.

The United States Supreme Court has recognized that "the right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington,* 466 U.S. 668, 686, 80 L.Ed.2d 674, 692 (1984). In *Strickland,* the Supreme Court established a two-part test to determine whether counsel's assistance was ineffective. "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington,* 466 U.S. at 687, 80 L.Ed.2d at 693. Not objecting to constitutional violations rise to one of the greatest deficiencies of ineffective counsel.

Similarly, this Court has required a two-step determination of ineffective assistance of counsel as set forth in the case of *State v. King,* 2010 UT App 396. ¶ 30, 248 P.3d 984, where the court required an inquiry into both "(1) whether counsel's performance was deficient in that it 'fell below an objective standard of reasonableness'; and (2) whether counsel's performance was prejudicial in that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" (Citations omitted). Furthermore, in the case of *State v. Mecham,* 2000 UT App 247, ¶ 22, 9 P.3d 777, the Court further defined the first prong of the ineffective assistance of counsel test

by requiring that, "[b]efore we will reverse [a defendant's] conviction based on ineffective assistance of counsel, he must prove there was a 'lack of any conceivable tactical basis' for counsel's actions."

In the case of *Kimmelman v. Morrrison*, 477 U.S. 365 (1986), the Court was presented with a case almost identical to the case at bar where defense counsel, due to a failure to conduct proper discovery, did not timely file a motion to suppress evidence under the Fourth Amendment. The Court of Appeals reversed his conviction under an ineffective assistance of counsel claim. The Supreme Court affirmed that reversal. In that affirmation of reversal the Court stated:

> Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice. (*Kimmelman v. Morrrison*, 477 U.S. 365, 375 (1986))

In making the determination that trial counsel's conduct failed to comport with constitutional requirements the Court held:

> In this case, however, we deal with a total failure to conduct pretrial discovery, and one as to which counsel offered only implausible explanations. Counsel's performance at trial, while generally creditable enough, suggests no better explanation for this apparent and pervasive failure to "make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." [citation omitted] Under these circumstances, although the failure of the District Court and the Court of Appeals to examine counsel's overall performance was inadvisable, we think this omission did not affect the soundness of the conclusion both

> courts reached — that counsel's performance fell below the level of reasonable professional assistance in the respects alleged. (*Kimmelman v. Morrrison*, 477 U.S. 365, 386 (1986))

Quite similarly, in the instant case, the Defendant's trial counsel also neglected to file any motions to suppress evidence derived from the illegal search and seizure of the property. Further, defense counsel had access to a suppression motion filed by Defendant's private counsel, which clearly had merit based upon the State agreeing to reduce a charge from a second-degree felony to a class A misdemeanor. Defense counsel further recognized the issue was important during the trial when, upon cross-examination, defense counsel questioned Officer Thomas regarding the entrance of the property. (R. 149/112) Defense counsel questioned as follows:

> Defense Counsel Q: Now, you've testified that nobody was on the property where this backhoe was sitting, that you checked with the neighbors, you came back and then you were able to get close enough to look at the backhoe, you entered onto Mr. Vit's property; is that correct?
>
> Officer John Thomas A: That's correct.
>
> Q. And who gave you permission to do that?
>
> A. No one.
>
> Q. So you just helped yourself?
>
> Prosecutor: Your Honor, I'm going to object. I don't know what the relevance of this is.

Court: Mr. Marshall?

Defense counsel: Well, it's the beginning of a whole long process of searching, this is where it began. This was the probable cause from them to do everything that started from that point forward.

Prosecutor: But the problem is, if this is an argument as to his ability to be out at the premises, I mean, that's a motion and an argument that should have been brought a long time ago, not during trial.
(R. 149/112-113)

Although defense counsel was permitted to continue with the line of questioning, it is clear that both the State and defense counsel recognized the issue was pertinent as to the probable cause for the rest of the search (R. 149/113), yet the legal argument was not brought forth in a motion by defense counsel.

Further, upon questioning of Officer Haney, Officer Haney stated that he had been investigating Defendant for narcotics activity. (R. 149/175) Officer Haney further stated, "This had been a year-long investigation for me, I was waiting for something, you know, to happen. I'd been building up probable cause to eventually gain the possibility of a search warrant or some type of access on his property to try and close this case out. When I heard that there was officers out there, I decided to go out and see what was going on." (R. 149/176) Clearly Officer Haney had been investigating and had been trying to reach the level of probable cause to get a warrant for Defendant's property. However, Officer Haney was unable to do so based upon the information he had himself. Had Officer Thomas not illegally entered the property to see the VIN number of the backhoe, no

probable cause would have existed in this case according to both Officer Haney's and Officer Thomas' testimony.

Counsel failed to object to the admission of the methamphetamine and firearms as fruit of the poisonous tree. Counsel's performance may have been 'creditable enough' during the trial, but the overall performance from pretrial discovery to the end of the jury trial was utterly deficient, and his failure ought to have been recognized by the trial court. Trial counsel's performance rises to the level of ineffective assistance of counsel which was discussed in *Kimmelman v. Morrison*, 477 U.S. 365 (1986).

In the case of *State v. King,* 2010 UT App 396, ¶30, 248 P.3d 984, this Court reversed the conviction of a defendant whose trial counsel allowed the prosecutor in closing arguments to mischaracterize critical evidence. Furthermore defense counsel, for no explainable reason thereafter embraced the mischaracterization, effectively admitting to the jury the defendant had committed the offense charged.

In a case almost identical to the present case, the Court in *State v. Gallegos*, 967 P.2d 973 (Utah Ct. App. 1998), found that the failure of trial counsel to object to a Fourth Amendment violation constituted error, as well as established reversible ineffective assistance of counsel. In that case, the Court applied the *Strickland* test to a situation where defense counsel had, in a pretrial motion, moved to suppress evidence on the basis of an illegal search. The trial court denied

that motion based upon evidence at a preliminary hearing. During trial the officer altered his testimony establishing the lack of plain view, yet trial counsel did not re-raise the motion to suppress. The Court held that, "where a defendant can show that there was no conceivable legitimate tactical basis for counsel's deficient actions, the first prong of *Strickland* is satisfied." (Id. at 976, quoting *State v. Snyder,* 860 P.2d 351, 359 (Utah Ct. App. 1993).)

Defense counsel's error in the present case was glaringly obvious to any observer. His failure to object to and have a hearing on the seizure of the Defendant's property clearly showed a deficiency. In *Kimmelman v. Morrison infra.,* the Court found reversible error in a case where trial counsel realized a Fourth Amendment issue, but brought it to the courts attention in an untimely manner. That untimely motion alone constituted reversible error. In *State v. Gallegos infra.*, the Court found error in trial counsel's failure to renew a previously denied motion to suppress. In the present case, counsel, as in *Kimmelman,* failed to make a timely motion to suppress a Fourth Amendment violation, even though counsel had access to the suppression motion.

Furthermore, "Counsel's performance at trial . . . suggests no better explanation for this apparent and pervasive failure." (*Kimmelman*) To the contrary, there is absolutely no conceivable reason for defense counsel not to make a pre-trial motion to suppress this evidence. Defense counsel was aware of the

significance of the issue and could have moved for a continuance to file and argue the motion. However, trial counsel's lack of reading the file resulted in a highly prejudicial error to Defendant. Since this motion should have been brought prior to trial, even the possible fear of somehow prejudicing the jury would be non-existent.

The second prong of the two-part test articulated in *Strickland* is "the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington,* 466 U.S. at 687, 80 L.Ed. 2d at 693.

In *Strickland,* the Court held that "[t]he purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." In *State v. Templin*, 805 P.2d 182 (Utah 1990), the Utah Supreme Court held that to meet the second part of the *Strickland* test a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 187(quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). In making the determination that counsel was ineffective the appellate court should "consider the totality of the evidence, taking into account

such factors as whether the errors affect the entire evidentiary picture or have an isolated effect and how strongly the verdict is supported by the record." Id.

Likewise, in *State v. Gallegos*, 967 P.2d 973, 981 (Utah Ct. App. 1998), the court found prejudicial error in failing to object to the admission of a tin canister that contained drugs, which was found during an illegal search. In that case the court held: "Because the evidence found in the tin was essential to the State's case on [drug possession] charges, admission of that evidence was obviously prejudicial to defendant." *Id.*

In the present case, the error by defense counsel encompasses the "entire evidentiary picture." If trial counsel had raised the illegal search issue, and if the trial court had correctly ruled on that issue, all of the evidence obtained after such violation would have been suppressed. In this case, that means the entirety of the evidence that supported Defendant's conviction. These claims will be more fully argued and supported in points II and III below.

When the totality of the circumstances is considered it is clear that the Defendant did not receive the type of assistance necessary to justify confidence in the outcome of the trial.

POINT II

THE TRIAL COURT COMMITTED PLAIN ERROR IN FAILING TO RECOGNIZE THAT THE DEFENDANT'S PROPERTY HAD BEEN ILLEGALLY SEARCHED AND SEIZED BY THE POLICE.

"To establish plain error, a defendant must show: (1) an error did in fact occur, (2) the error should have been obvious to the trial court, and (3) the error is harmful. *State v. Bradley*, 2002 UT App 348 (See also *State v. Ellifritz*, 835 P.2d 170, 174 (Utah Ct.App. 1992)) In the case of *State v. Olsen,* 869 P.2d 1004, 1010 (Utah App. 1994)[1] this Court held "Under [the plain error] standard, we will not reverse unless we determine that an error existed, and that the error was both obvious and harmful." The Court further ruled "An error is harmful if the likelihood of a different result is 'sufficiently high to undermine confidence in the verdict.'" (*Id* at 1010)

The first prong of the plain error test is showing that an error occurred. In the case of *Kaupp v. Texas* 538 U.S. 626 (U.S. 2003) the Supreme Court reiterated its long-standing position that the Fourth Amendment prohibits seizures of a person from a home. In *Kaupp,* the Court was presented with a situation where an officer who was investigating a murder went to the defendant's home at night; and after identifying himself, said "we need to go and talk". The defendant then said "OK," and the officer took him to the station for Mirandized questioning.

The Court, in reversing the defendant's conviction stated:

> A seizure of the person within the meaning of the Fourth and Fourteenth Amendments occurs when "taking into account all the circumstances surrounding the encounter, the police conduct would

[1] Abrogated on other grounds by *State v. Doporto*, 935 P.2d 484, (Utah 1997)

> 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business'." (*Florida v. Bostick*, 501 U.S. 429, 437 (1991) (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988))

This Court in *State v. Beavers,* 859 P.2d 9, 17 (Utah App. 1993), further explained the rights individuals have on their property if they are not home and no warrant has been obtained. The Court explained that if a search is unrelated to the person, *Terry*[2] is inapplicable. *Id.* The *Beavers* court went on to say that warrantless entries to property are justified with *probable cause* and exigent circumstances because in such circumstances, the delay to obtain a search warrant would risk "physical harm to the officers or other persons, the destruction of relevant evidence, [or] the escape of the suspect." *United States v. Lindsey,* 877 F.2d 777, 780 (9th Cir. 1989) (quoting *United States v. McConney,* 728 F.2d 1195, 1199 (9th Cir. 1984)). In contrasting it with the *Terry* Doctrine, which allows for searches of the person if an officer believes criminal activity may be afoot, the *Beavers* Court stated, "That risk is diminished in the residential setting because the person police wish to question is located in a dwelling that can generally be staked out until the person emerges, if a polite knock at the door fails to produce a suspect willing to voluntarily answer police inquiries." *State v. Beavers,* 859 P.2d 9. The *Beavers* court went on to state, "Accordingly, we reject the State's argument that police can enter a dwelling without a warrant on the basis of reasonable suspicion.

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[2] *Terry v. Ohio,* 392 U.S. 1, 88 S.C. 1868 (U.S. Ohio 1968)

An extension of the *Terry* doctrine to warrantless entries of private premises is contrary to Fourth Amendment principles." State v. Beavers 859 P.2d 9, 17 (Utah App. 1993)

In the present case, there was no reasonable suspicion present. Further, Officer Thomas could have (and in fact did) stake out the premises until Defendant returned home before he went onto the property. There was no risk that the items would be destroyed or that any exigent circumstance occurred. Certainly an object is large is a backhoe would be impossible to destroy and difficult and time-consuming to remove. Additionally, if the Defendant came in and tried to move the backhoe off the property, the officer could then arrest for driving a non-licensed vehicle on the street. Instead, Officer Thomas violated Defendant's Fourth Amendment rights when he unlawfully went through the gate on Defendant's property to access the backhoe.

The protection of the Fourth Amendment of the Constitution has long been upheld in all areas. The Utah Court of Appeals, in the case of *State v. Burningham*, 2000 UT App. 229, reversed the conviction of a defendant who was seized and searched at a friend's cabin by a police officer acting without a warrant. This reversal was in spite of the fact that the defendant was on probation, and the officer was following up on a tip that the defendant possessed illegal drugs. The Court held: "Thus, the search – supported only by reasonable suspicion – violated the

appellant's Fourth Amendment rights." (Id at 357) See also *State v. Valenzuela,* 2001 UT App 332. The Court reversed a defendant's conviction where he was stopped in a public bank based upon a tip from an unknown informant that the defendant had committed a forgery. The defendant was arrested (level III), and a search revealed a controlled substance. The Court determined that a reasonable officer under the circumstances could not have had reasonable suspicion to believe that the defendant had committed an offense; therefore, the seizure was unconstitutional.

In the U.S. Supreme Court case of *Katz v. United States,* 389 U.S. 347(1967), the Court stated that, pursuant to a two-pronged inquiry, the determination of Fourth Amendment protections hinges on "a twofold nature requirement, first, that a person had exhibited an actual (subjective) expectation of privacy and second, that the expectation be one that society is prepared to recognize as reasonable." *Id.*

In the case at bar, Defendant's person was not initially seized, rather his property was searched and seized in an illegal manner without Defendant present nor was reasonable suspicion or exigent circumstances present. Officer Thomas admitted he was not given permission to enter into Defendant's property where the backhoe was located; rather Officer Thomas disregarded his training and the constitution and unlawfully went onto Defendant's property. (R. 149/112)

Defendant's property was protected by a gate, which is the type of privacy the *Katz* court spoke about. It is not unreasonable for individuals to have an expectation of privacy in their home and their land which is protected by a gate. Officer Thomas' actions were needless, as he could have staked out the residence and waited for Defendant to return home, as discussed in *State v. Beavers,* 859 P.2d 9. The first prong of the plain error test has been met as Officer Thomas' actions did violate Defendant's Fourth Amendment constitutional rights.

What is probably most troubling is the fact that Officer Haney testified that he had been watching the Defendant for some time yet did not have sufficient evidence to justify approaching a magistrate for a warrant. What is even more troubling, however, is that Officer Thomas, after trespassing on Defendant's property and illegally obtaining the VIN number from the backhoe, went back to his office to draft up the requisite documents for a warrant and then decided that he would disregard the Constitution and unilaterally declare himself judge and proceed to go back to the property to search the premises without even attempting to obtain a warrant. It is these types of violations that have troubled appellate courts in the past, and have resulted in the adoption of an exclusionary rule. (See *Mapp v. Ohio* 367 U.S. 643, 81 S.Ct. 1684 (U.S. 1961), where the United States Supreme Court applied the previously instituted exclusionary rule to the States based upon a factual scenario very similar to the case at hand.)

It is an officer's blatant disregarded the Constitution, where he enters upon private property and takes upon himself a decision to search the defendant's home without obtaining a warrant, simply because he is an officer, has a gun, and he can do it, that has troubled Appellate Courts in prior cases. It is this type of disregard of the sacrosanct provisions of the Constitution that have necessitated the institution of exclusionary rule in the past, and continue to demonstrate the beneficial effect of exclusionary rule can have to bridle officers who trample on the Constitution.

The final prong of the plain error test is harm. The Court has held that, "An error is harmful if the likelihood of a different result is 'sufficiently high to undermine confidence in the verdict.'" (*State v. Olsen,* 869 P.2d 1004, 1010 (Utah App. 1994).) In the present case, the error by defense counsel encompasses the "entire evidentiary picture". (*Strickland v. Washington, infra.)* If trial counsel had raised the illegal seizure issue, and if the trial court had correctly ruled on that issue, all of the evidence obtained after such violation would have been suppressed. In this case, that means the entirety of the evidence that supported Defendant's conviction. Officer Haney stated he had been waiting for additional evidence, which was needed for a search warrant. (R. 149/176) There was no other evidence which would have allowed for a warrant or for a search of the premise; therefore, harm was a result of defense counsel's failure to raise the issue.

The harm in the present case is very similar to that set forth by this Court in the case of *State v. Gallegos*, 967 P.2d 973, 981 (Utah Ct. App. 1998), where the Court found prejudicial error in failing to object to the admission of a tin canister that contained drugs, which was found during an illegal search. In that case the court held: "Because the evidence found in the tin was essential to the State's case on [drug possession] charges, admission of that evidence was obviously prejudicial to defendant." Likewise, in the present case, if the Court determines that defense counsel should have filed a suppression motion, and the evidence would support the trial court's granting of that motion, the prejudice to the Defendant is staggering and obvious. If the suppression motion was successful, the prosecution would be unable to go forward on the case, and the prejudice to the Defendant is therefore unquestioned.

POINT III

THE EVIDENCE OBTAINED AFTER THE DEFENDANT'S PROPERTY WAS ILLEGALLY SEARCHED AND SEIZED CONSTITUTES FRUIT OF THE POISONOUS TREE AND THEREFORE SHOULD HAVE BEEN SUPPRESSED.

Once this Court has established that there was a constitutionally impermissible seizure of the Defendant, the next issue is to what extent does this constitutional violation effect the subsequent evidence. In the case of *Wong Sun v. United States*, 371 U.S. 471, 485 (1963), the U.S. Supreme Court stated, "The exclusionary rule has traditionally barred from trial physical, tangible materials

obtained either during or as a direct result of an unlawful invasion." The Court further reinforced the gravity of Fourth Amendment protections of the person by stating:

> In order to make effective the fundamental constitutional guarantees of sanctity of the home and inviolability of the person, *Boyd v. United States,* 116 U.S. 616, this Court held nearly half a century ago that evidence seized during an unlawful search could not constitute proof against the victim of the search. *Weeks v. United States,* 232 U.S. 383. The exclusionary prohibition extends as well to the indirect as the direct products of such invasions. (*Wong Sun v. United States*, at 484)

The Utah Courts have likewise followed the fruit of the poisonous tree doctrine. In the case of *State v. Deherrera,* 965 P.2d 501, 505 (Utah App. 1998) this Court held:

> Absent an exception to the exclusionary rule, *Mapp* requires us to exclude "all evidence obtained by searches and seizures in violation of the Constitution." *Mapp,* 367 U.S. at 655, 81 S.Ct. at 1691. There is no dispute that the stop of defendant at the Tibble Fork Canyon traffic checkpoint was unconstitutional. Nor is there any dispute that, absent the good faith exception, all evidence obtained subsequent to defendant's stop should be suppressed as "fruit of the poisonous tree." *Wong Sun v. United States,* 371 U. S. 471, 487-88, 83 S.Ct. 407, 417, 9 L.Ed.2d 441 (1963).

All of the evidence gathered against the Defendant in the present case stems from the initial illegal seizure and subsequent search of the Defendant's property. The Defendant's property should not have been entered without a search warrant. The officers in the present case had no warrant, and their entry upon the property violated Defendant's protections against unreasonable searches. Had the illegal

entry onto Defendant's premise never occurred, the subsequent encounters and search of his trailer would not have occurred and no evidence of drugs or firearms would have been discovered. There was no reasonable suspicion, and any evidence gathered against the Defendant after an unconstitutional search ought to be entirely suppressed.

CONCLUSION

Based upon the foregoing, the Defendant respectfully requests this court reverse the Defendant's conviction and remand for a new trial.

DATED this 15th day of July 2011.

RANDALL W. RICHARDS
Attorney for Appellant

CERTIFICATE OF MAILING

I certify that I mailed two copies of the foregoing Brief of Appellant together with a CD of the same, to Office of the Attorney General, Attorney for the Plaintiff, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0180, postage prepaid this 15th day of July 2011.

RANDALL W. RICHARDS
Attorney at Law

ADDENDUM A

SECOND DISTRICT COURT - OGDEN
WEBER COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff,	:	MINUTES
	:	APP SENTENCING
	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 081901837 FS
LLOYD FRANKLIN VIT, Defendant.	:	Judge: SCOTT M HADLEY
	:	Date: November 1, 2010

PRESENT
Clerk: lauries
Prosecutor: LYON, NATHAN D
Defendant
Defendant's Attorney(s): RANDALL L MARSHALL, PD
Agency: Adult Probation & Parole

DEFENDANT INFORMATION
Date of birth: March 15, 1953
Audio
Tape Number: 3D110110 Tape Count: 3:31-3:42

CHARGES
1. PURCH/POSS DANGEROUS WEAPON - 3rd Degree Felony
Plea: Guilty - Disposition: 07/29/2010 Guilty
2. POSSESSION OF A CONTROLLED SUBSTANCE - 3rd Degree Felony
Plea: Guilty - Disposition: 07/29/2010 Guilty

HEARING

This is the time set for Adult Probation and Parole sentencing. The defendant is present and is represented by Randall Marshall. Respective counsel and the defendant address the Court. The Court finds no legal reason why sentence should not be imposed.

SENTENCE PRISON

Based on the defendant's conviction of PURCH/POSS DANGEROUS WEAPON a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.
The prison term is suspended.

Based on the defendant's conviction of POSSESSION OF A CONTROLLED SUBSTANCE a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.
The prison term is suspended.

ALSO KNOWN AS (AKA) NOTE

VITT

SENTENCE JAIL
Based on the defendant's conviction of PURCH/POSS DANGEROUS WEAPON a 3rd Degree Felony, the defendant is sentenced to a term of 120 day(s)

Credit is granted for time served.
Credit is granted for 5 day(s) previously served.

SENTENCE JAIL SERVICE NOTE

Sentence may be served in the jail's work release/restitution program.

SENTENCE JAIL CONCURRENT/CONSECUTIVE NOTE

Sentences to run concurrent with each other and concurrent with any other sentences.

SENTENCE FINE

Charge # 1	Fine:	$5000.00
	Suspended:	$4445.00
	Surcharge:	$268.51
	Due:	$555.00
Charge # 2	Fine:	$5000.00
	Suspended:	$5000.00
	Surcharge:	$
	Total Fine:	$10000.00
	Total Suspended:	$9445.00
	Total Surcharge:	$268.51
	Total Principal Due:	$555.00
		Plus Interest

Attorney Fees Amount: $500.00 Plus Interest
Pay in behalf of: WEBER COUNTY TREASURER

ORDER OF PROBATION

The defendant is placed on probation for 36 month(s).
Probation is to be supervised by Adult Probation & Parole.
Defendant to serve 120 day(s) jail.

Defendant is to pay a fine of 555.00 which includes the surcharge.
Interest may increase the final amount due.

PROBATION CONDITIONS

The defendant shall enter into an agreement with the Utah State Department of Adult Probation & Parole and comply strictly with its terms and conditions.
The defendant shall report to the Department of Corrections and to the court whenever required.
The defendant shall violate no law, either federal, state or municipal.
The defendant shall successfully complete a substance abuse evaluation and any treatment deemed necessary by Adult Probation & Parole, paying all costs.
The defendant shall obtain and maintain lawful, full-time, verifiable employment.
The defendant shall successfully complete a theft counseling program under the direction of Adult Probation & Parole, paying all costs.
The defendant shall successfully complete the Thinking for a Change program through Adult Probation & Parole or some other type of cognitive restructuring program, paying all costs.
The defendant shall provide a DNA sample, to be obtained by Adult Probation & Parole, and pay all costs.
The defendant shall abide by a 7:00 p.m. to 6:00 a.m. curfew for the first 90 days after release from jail, which may be modified by the probation agent.
The defendant shall submit to warrantless search, seizure and chemical testing.
The defendant shall not use or possess controlled substances or be in the presence of those who use, possess, manufacture or distribute controlled substances.
The defendant shall pay the following financial obligations through Adult Probation and Parole:

a) $555 fine
b) $500 public defender fee

Date: 11-8-10

Scott M. Hadley
SCOTT M HADLEY
District Court Judge