

1998

State of Utah v. Marco C. Fanari : Petition for Rehearing

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,
v.
MARCO C. FANARI,
Defendant/Appellant.

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PETITION FOR REHEARING
Case No. 980108-CA

Petition for Rehearing from an Affirmance
on Appeal from the Judgment and Conviction for
Illegal Possession of a Controlled Substance, a
Second Degree Felony, in the Sixth Judicial
District Court, Sevier County, State of Utah,
the Honorable David L. Mower, Presiding.

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Clerk of the Court

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Introduction

Appellant Marco Fanari, by and through his lawyers D. Gilbert Athay and Michael R. Sikora, and pursuant to Rule 35 of the Utah Rules of Appellate Procedure, petitions this Court for rehearing in the above-captioned appeal. Fanari raised two issues on appeal. First, he argued that the arresting officer did not have grounds to conduct a traffic stop for "weaving" in the lane. Second, Fanari argued that the arresting officer did not have reasonable suspicion to extend the scope of the detention to a narcotics investigation.

On December 3, 1998, this Court released an unpublished decision, affirming the district court's denial of Fanari's motion to suppress. For the reasons outlined in this petition, Fanari requests this Court to grant the petition for rehearing in order to revisit his claims for relief under the Fourth Amendment to the United States Constitution.

Argument

1. The facts surrounding the traffic stop were not fully addressed by this Court, and such facts did not justify the initial seizure.

In the memorandum decision [hereinafter "the decision"], this Court first addressed whether Fanari's driving pattern justified the traffic stop. The decision notes that under State v. Bello, 871 P.2d 584, 587 (Utah Ct. App.), cert. denied, 883 P.2d 1359 (Utah 1994), "a 'single instance of weaving . . . cannot serve as the constitutional basis for stopping' a driver for suspicion of

driving while impaired, nor for violating Utah Code Ann. § 41-6-61(1) (1993), which requires drivers to operate their vehicles 'as nearly as practical' within a single lane. The decision then pointed out that the analysis may turn on mitigating circumstances, and that in Bello the driving pattern could have easily been caused by extreme wind and the camper shell on the back of the pickup truck.

However, in the analysis of the facts on appeal, the Court failed to address the mitigating circumstances in Fanari's case. First, the arresting officer admitted that Fanari was traveling directly behind a semi-truck. (Preliminary Hearing Transcript at 8, 11) [Hereinafter "Trans."] Second, the officer also conceded that this occurred a windy day, and in fact that it is almost always windy on that stretch of highway. (Trans. at 11)

The decision failed to analyze to what extent these factors mitigated the driving pattern observed by the arresting officer. Moreover, the officer's description of the driving pattern was anything but concrete. For example, on cross-examination he admitted that in his police report he stated that Fanari's car "was weaving from the fog line to the center line." (Trans. at 9, 10) The officer also testified that upon approaching Fanari he told Fanari that the car was going from the fog line to the center line. (Trans. at 12) Moreover, this occurred within about twenty to thirty *seconds*. (Trans. at 8). The officer did not observe a protracted driving pattern, but rather he saw the car move

laterally within its lane over, from fog line to center line, over a very short stretch of highway. This happened on a windy day and Fanari was travelling directly behind a semi truck. Fanari's lane travel was "practical" under then-existing traffic and wind conditions, especially since the record is at best sketchy about what the testifying officer actually saw. Fanari requests a rehearing to more thoroughly flush out the facts relating to the driving pattern since those facts do not demonstrate that Fanari violated § 41-6-61(1). See also United States v. Gregory, 79 F.3d 973 (10th Cir. 1996); United States v. Lyons, 7 F.3d 973 (10th Cir. 1993) (both cases analyzed in Appellant's Brief).

2. The factors relied upon by this Court do not support a basis to conclude that the officer had reasonable suspicion to extend the detention.

First, the decision states that reasonable suspicion was based at least in part on "peculiar account of the trunk's contents." In fact the contents of the trunk was not known until long after the officer extended the scope of the detention because Fanari did not provide the officers with his consent to search the trunk. (Trans. at 24-25) Such a finding, then is not supported by the record and should not have been included in the Court's analysis.

Second, without support in the record the decision states that Fanari exhibited "extreme nervousness." In fact, not even the State has characterized it that way. In its Brief on Appeal, the

State asserted that Fanari was "unusually nervous" during the stop, and for support cites to pages 14-16 of the preliminary hearing transcript. Reviewing those pages of the transcript, the officer did not describe the quality of nervousness as either "extreme" or "unusual." It is inappropriate to characterize a record fact in terms not supported by the testimony or other evidence, and then base a legal conclusion in whole or in part on that characterization. Fanari's nervousness was of no consequence and should not have been considered in the reasonable suspicion calculus.

Third, Fanari's travel plans and the officer's conclusion regarding the so-called lack of convergence test are also of no significance, and were not adequately analyzed in the decision. Most troubling of all with respect to the rental agreement, travel plans, and suspicion of DUI is that the investigating officers did absolutely nothing to confirm or dispel their suspicion. Accordingly, Trooper Avery did not even raise the issue of the alleged suspicious itinerary with Fanari. A fair inference is that Avery wanted to continue the detention, and asking specific questions may well have resulted in reasonable answers. Reasonable answers cannot justify reasonable suspicion. The message is clear: and officer is well advised to refrain from making inquiries because lack of information will provide the officer with the requisite fact. Sometimes, the fewer facts available the better it is for law enforcement.

The decision also rests on the conclusion that the officers had reasonable suspicion that Fanari was driving while impaired or under the influence. Again, as in the preceding paragraph, the officers had no real interest in making further investigations. After the eye convergence test, nothing else was done to determine if Fanari was impaired. No other field sobriety tests were given, even though there was plenty of time to do so. Fanari was never cited for DUI. This is about the integrity of the system. The record supports a conclusion that the detention was simply a pretext to search for drugs, and that the factors relied upon, if closely and thoroughly analyzed, did not justify the detention.

Conclusion

Based upon the foregoing facts and argument, Fanari requests this Court to rehear his appeal and to closely scrutinize all of the facts relevant to the issues presented.

DATED this 18 day of December 1998.

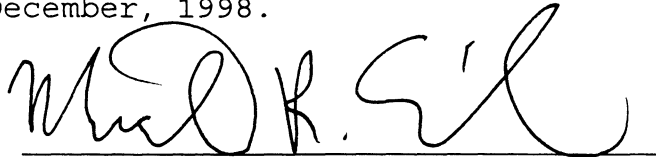
A handwritten signature in black ink, appearing to read "Michael R. Sikora", written over a horizontal line.

D. GILBERT ATHAY
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Lawyers for Defendant

Certification

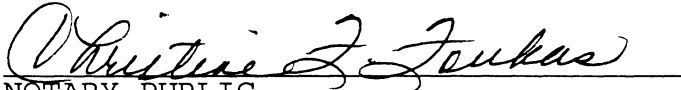
Pursuant to Rule 35(a) of the Utah Rules of Appellate Procedure, I HEREBY CERTIFY that this Petition for Rehearing is presented in good faith and not for the purpose of delay.

DATED this 18 day of December, 1998.

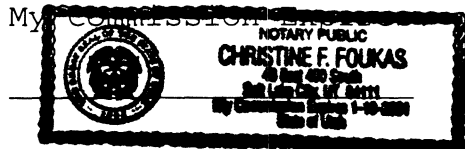


MICHAEL R. SIKORA
Lawyer for Appellant

SUBSCRIBED AND SWORN to before me this 18 day of December, 1998.



NOTARY PUBLIC
Residing at:



Certificate of Service

I certify that a true and correct copy of the foregoing Petition for Rehearing was mailed or hand-delivered on the 18 day of December, 1998, to:

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