1986

State of Utah v. Adolpho Diaz Mendoza and Alberto Ruiz Mendieta : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

1986 20922

STATE OF UTAH, :

Plaintiff-Appellant, :

-v- : Case No. 20922

ADOLPHO DIAZ MENDOZA and ALBERTO RUIZ MENDIETA, :

Defendants-Respondents. :

BRIEF OF APPELLANT

INTERLOCUTORY APPEAL FROM AN ORDER GRANTING DEFENDANTS' MOTIONS TO SUPPRESS EVIDENCE, IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR WASHINGTON COUNTY, STATE OF UTAH, THE HONORABLE J. HARLAN BURNS, JUDGE, PRESIDING.

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IN THE SUPREME COURT OF THE STATE OF UTAH

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ADOLPHO DIAZ MENDOZA and ALBERTO RUIZ MENDIETA,	:	
Defendants-Respondents.	:	

STATEMENT OF ISSUES PRESENTED ON APPEAL

The following issues are presented in this appeal:

1. Did the trial court fail to follow the requirements of Utah R. Crim. P. 12(g) in granting defendants' motions to suppress?

2. Did the trial court apply an incorrect standard of law in determining that the stop of defendants' vehicle was unlawful?

3. Did the trial court incorrectly rule that defendants had standing to challenge the search of the vehicle they were driving?

STATEMENT OF THE CASE

Defendants, Adolfo Diaz Mendoza and Alberto Ruiz Mendieta, were charged by information with possession of a controlled substance with intent to distribute for value, a third degree felony, under UTAH CODE ANN. § 58-37-8(1)(a)(ii) (Supp.

1985) (RARM. 8; RADM. 9).[1] After a preliminary hearing in the Ninth Circuit Court, St. George Department, on April 1, 1985, both were bound over to stand trial in the Fifth District Court in Washington County (RARM. 3; RADM. 3). In district court, defendants filed separate motions to suppress evidence (namely a substantial amount of marijuana seized from the trunk of the car they were driving) on the ground that the evidence was seized in violation of the Fourth Amendment to the United States Constitution (RARM. 27-28; RADM. 14-15). After a hearing on July 12, 1985, the district court granted defendants' motions (RARM. 89-90; RADM. 52-3; Appendix A). Because the State could not proceed without the suppressed evidence, it petitioned for and received an interlocutory appeal of the district court's order in this Court. After the district court set a trial date for defendants, this Court ordered the trial stayed until resolution of the State's interlocutory appeal.

STATEMENT OF FACTS

At the hearing on defendants' motions to suppress in district court, the following evidence was presented.

At approximately 4:45 a.m. on March 16, 1985, two U.S. Immigration Service border patrol officers were in a marked patrol vehicle parked in the median between the northbound and southbound lanes of I-15 near St. George, Utah. They observed a black Ford Mustang automobile traveling north which bore California license plates and contained persons who appeared to

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[1] References to "RARM." are to the record in the Mendieta case; references to "RADM." are to the record in the Mendoza case.

be Mexican. The officers pulled onto the freeway behind the Mustang, accelerated to a high speed, and eventually caught up with the vehicle as it drove in the passing lane. They remained several feet behind the Mustang for a short time before it pulled over into the right-hand lane and decelerated rapidly (S.H. 49, 52-4).[2]

The officers twice pulled alongside the Mustang to observe its occupants. The driver and the passenger, who like the driver looked Mexican, appeared to be extremely nervous. They studiously shunned eye contact with the officers and exhibited a rigid response to their presence which, according to one officer, was not "typical behavior" (S.H. 57-60). The other officer testified that the driver had a "white-knuckle kind of look" which suggested that he was not at all relaxed (S.H. 116).

After making these observations with the assistance of lights in a rest area, the officers turned on the red lights of their patrol car and stopped the Mustang to determine whether it contained illegal aliens. Short conversations with the driver and passenger, who were defendants, revealed that neither possessed any documents to show that he was legally in the United States. Defendant Mendoza, who wore a Mexican poncho, admitted that he was an illegal alien. The officers arrested both defendants and then opened the Mustang's trunk, which was large enough to hold a person, to ascertain whether it contained any illegal aliens. In the trunk the officers discovered numerous

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[2] References to "S.H." are to the transcript of the suppression hearing.

plastic bags filled with marijuana (S.H. 58, 61-7, 119, 126A, 129).

Both officers, who had eight and seven years of in-field experience with the border patrol, testified that there were essentially seven factors upon which they relied in stopping defendants' vehicle: (1) defendants' Mexican physical features; (2) the route of travel (i.e., I-15 is commonly used by illegal aliens from Mexico traveling north from the border between the United States and Mexico); (3) the time of day that defendants were traveling (i.e., early morning when it was still dark); (4) the time of year (the month of March is a peak period of illegal alien traffic from Mexico with the end of winter and the beginning of planting season); (5) the California plates on the vehicle (California being a state that shares a border with Mexico); (6) the erratic manner in which the car was driven; and (7) the extreme nervousness of defendants (S.H. 47, 51-60, 100, 118). One officer further testified that with similar facts presented to him in previous situations, particularly the extreme nervousness of the vehicle's occupants, he had never stopped such a vehicle and had the occupants turn out to be anything but illegal aliens (S.H. 89).

Defendant Mendoza testified to the following facts. The day before he was arrested near St. George, Mendoza borrowed a black Mustang from a friend in Los Angeles and drove to Las Vegas that evening to do some gambling. That same evening while still in Las Vegas, Mendoza attempted to call his friend in Los Angeles to ask for permission to drive defendant Mendieta, a

friend of Mendoza's who was in Las Vegas, to Colorado. The purpose of the trip to Colorado, according to Mendoza, was to pick up Mendieta's gravely ill mother and either bring her back to Las Vegas or leave her at Mendieta's sister's house. Mendieta had offered Mendoza $100 to pay for gas (S.H. 13-16).

Mendoza reached the owner of the Mustang by telephone at Mendoza's home in Los Angeles. Although Mendoza spoke with the owner, the owner was drunk and could not be understood. However, Mendoza spoke with his own brother who told him that the owner said it was all right to take the car to Colorado, so long as Mendoza returned to Los Angeles two days later. Mendoza, who was driving at the time defendants were stopped, admitted that neither he nor his passenger, Mendieta, owned the Mustang (S.H. 18-30).

After considering the evidence before it and the State's arguments concerning standing, the district court granted defendants' motions to suppress, ruling that both defendants had standing to challenge the stop of and subsequent search of the vehicle they were driving, that "there were no articulable facts as a basis or probable cause for [the] officers to make the initial stop of the [d]efendants[,] and that the stop was conducted in an unreasonable manner" (Transcript of Court's Ruling on Motion to Suppress at 3-5; RARM. 89-90; RADM. 52-3; Appendix A). The court denied the State's motion for reconsideration and clarification of the order granting the motions to suppress (Transcript of Court Proceedings on Sept. 18, 1985 at 3). The State appeals to this Court from the district court's suppression order.

SUMMARY OF ARGUMENTS

In granting defendants' motions to suppress, the trial court failed to comply with the requirements of Utah R. Crim. P. 12(g). Because that rule embodies a desirable and constitutional modification of the exclusionary rule, the court's failure to make the necessary findings under it before suppressing the challenged evidence should result in a reversal of its suppression order.

The trial court applied an incorrect standard of law in ruling that the stop of defendants' vehicle was unlawful. Under the applicable "reasonable suspicion" test, the stop was constitutional. Alternatively, if the stop was not legal, evidence seized pursuant to it should not have been suppressed because the officers' actions did not constitute a "substantial" violation of defendants' constitutional rights; nor was the violation committed in bad faith. Under Rule 12(g), the evidence would therefore be admissible.

Finally, the trial court's ruling on standing is contrary to this Court's recent decision in State v. Valdez, 689 P.2d 1334 (Utah 1984). Because neither defendant owned the car they were driving or demonstrated a legitimate expectation of privacy in that car, they lack standing to challenge the search of the car.

ARGUMENT

POINT I

IN GRANTING DEFENDANTS' MOTIONS TO SUPPRESS, THE TRIAL COURT FAILED TO MAKE THE FINDINGS REQUIRED UNDER UTAH R. CRIM. P. 12(g); THEREFORE, ITS ORDER SHOULD BE REVERSED.

Utah R. Crim. P. 12(g)(1) (UTAH CODE ANN. § 77-35-12(g)(1)) provides:

> In any motion concerning the admissibility of evidence or the suppression of evidence pursuant to this section or at trial, upon grounds of unlawful search and seizure, the suppression of evidence shall not be granted unless the court finds the violation upon which it is based to be both a substantial violation and not committed in good faith. The court shall set forth its reasons for such finding.

See also UTAH CODE ANN. § 77-23-12 (1982) and UTAH CODE ANN. §§ 78-16-1 and -5 (Supp. 1985). In its order granting defendants' motions to suppress (Appendix A) the trial court did not make the findings regarding "a substantial violation" and "good faith" that are required under Rule 12(g)(1). It ruled only "that there were no articulable facts as a basis or probable cause for [the] officers to make the initial stop of the [d]efendants and that the stop was conducted in an unreasonable manner." The court subsequently refused to modify that order even though the State asked it to make and set forth the reasons for the findings required under Rule 12(g)(1). See State's Motion For Reconsideration and Clarification (RARM. 65-8; RADM. 44-7).

There can be little dispute that the trial court effectively ignored the specific requirements of Rule 12(g)(1) when it suppressed the challenged evidence. The obvious purpose of that rule is to avoid the operation of the exclusionary rule where the unlawful search or seizure was neither substantial nor committed in bad faith. Therefore, a court must only suppress evidence in accordance with the policy expressly embodied in Rule

12(g). See also §§ 77-23-12, 78-16-1 and -5; Utah R. Evid. 402 (Supp. 1985). Because the trial court here completely failed to do that, this Court should reverse its order granting defendants' suppression motions and enter the findings argued for by the State in Points II or III, infra. Although the discussion on this question could end here, the State, recognizing that this Court has never specifically ruled upon the constitutionality of Utah's statutory "good faith" exception to the exclusionary rule, see State v. Anderson, 701 P.2d 1099, 1103 (Utah 1985), will address that issue below.

A. The Federal Constitution

The Fourth Amendment to the United States Constitution states:

> 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.

Nearly identical language appears in article I, section 14 of the Utah Constitution. Recently, in United States v. Leon, ___ U.S. ___, 104 S.Ct. 3405 (1984), the United States Supreme Court fashioned an objective good faith exception to the exclusionary rule. Recognizing that the exclusionary rule "operates as 'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect [on police misconduct], rather than a personal constitutional right of the person aggrieved,'" 104 S.Ct. at 3412, quoting United States v. Calandra, 414 U.S. 338, 348 (1974), the Court held that the

prosecution may use in its case-in-chief evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause. In so holding, the Court concluded that "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." 104 S.Ct. at 3421. The Court cited with approval the following language from various cases:

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official conduct was pursued in complete good faith, however, the deterrence rationale loses much of its force."

104 S.Ct. at 3419, citing Michigan v. Tucker, 417 U.S. 433, 447 (1974); United States v. Peltier, 422 U.S. 531, 539 (1975).

> "If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."

104 S.Ct. at 3419-20, citing Peltier, 422 U.S. at 542.

> In short, where the officer's conduct is objectively reasonable,
>
> > "excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is

> acting as a reasonable officer would and should act under the circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty."

104 S.Ct. at 3420, citing Stone v. Powell, 428 U.S. 465, 539-40 (1976) (White, J., dissenting).

Although Leon, and its companion case, Massachusetts v. Sheppard, ___ U.S. ___, 104 S.Ct. 3424 (1984), were decided in the context of reasonable reliance by police officers on a warrant approved by a magistrate, there is nothing in either of those decisions to indicate that the good faith exception could not also properly apply in warrantless situations. See I.N.S. v. Lopez-Mendoza, ___ U.S. ___, 104 S.Ct. 3479, 3493 (1984) (White, J., dissenting). In fact, the Court's general discussion about the propriety of a good faith exception strongly suggests that such an extension of Leon would be acceptable and desirable. For instance, in Leon the Court at one point states:

> [E]ven assuming that the rule effectively deters some police misconduct and provides incentives for the law enforcement profession as a whole to conduct itself in accord with the Fourth Amendment, it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity.

104 S.Ct. at 3419.

Significantly, a number of courts have adopted a form of good faith exception to the exclusionary rule in a warrantless search or seizure context. See, e.g., United States v. Owens, 607 F. Supp. 140, 144-6 (D.C. Okla. 1983); United States v. Wyler, 502 F.Supp. 969, 973-4 (S.D.N.Y. 1980). The leading case

appears to be United States v. Williams, 622 F.2d 830 (5th Cir. 1980) (en banc), cert. denied, 449 U.S. 1127 (1981), where the Fifth Circuit Court of Appeals held that evidence seized from the defendant incident to a warrantless arrest, which was ultimately determined to have been unlawful, should not be excluded because "evidence is not to be suppressed under the exclusionary rule where it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken, belief that they are authorized." 622 F.2d at 840. The court analyzed the appropriateness of a good faith exception in much the same way that the Supreme Court did in Leon, emphasizing that the deterrent purpose of the exclusionary rule is not furthered if the rule is applied to situations where police officers have acted in the good faith belief that their conduct is lawful. 622 F.2d at 842. Numerous courts have cited Williams with approval. E.g. United States v. Cotton, 751 F.2d 1146 (10th Cir. 1985); Donovan v. Federal Clearing Die Casting Co., 695 F.2d 1020 (7th Cir. 1982); United States v. Nolan, 530 F.Supp. 386 (W.D. Pa. 1981), aff'd, 718 F.2d 589 (3d Cir. 1983); State v. Verkuylen, 120 Wis.2d 59, 352 N.W.2d 668 (Wis. App. 1982); State v. Glass, 9 Ohio Misc.2d 10, 458 N.E.2d 1302 (Ohio Com. Pl. 1983). In short, the Williams opinion embodies the logical extension of Leon into the area of warrantless searches and seizures. It is difficult to conceive of any compelling reason why the Supreme Court would not apply the Leon rule in a case where an officer's warrantless conduct, subsequently determined to be in violation of the fourth amendment, was objectively reasonable under the circumstances.

See Bloom, United States v. Leon And Its Ramifications, 56 U. Colo. L. Rev. 247, 259-61 (1985); but see People v. Ciraolo, 161 Cal.App.3d 1081, 208 Cal. Rptr. 93, 95 (Cal. App. 1984) (stating that Leon has no application to warrantless searches), cert. granted, 105 S.Ct. 2672 (1985).

Upon examining Leon and Williams, it logically follows that Utah R. Crim. P. 12(g), which appears to be little more than a codification of the good faith exceptions to the exclusionary rule fashioned in Leon and Williams, is not unconstitutional under the federal constitution. See People v. Deitchman, 695 P.2d 1146, 1153 (Colo. 1985) (Erickson, C.J., concurring) (observing that Colorado's statutory "good faith" exception to the exclusionary rule is consistent with fourth amendment precedent and does not violate federal constitutional standards). So long as Rule 12(g) is applied in a manner consistent with the objective standard of reasonableness adopted by the Supreme Court, Leon, 104 S.Ct. at 3420 n. 20, Utah's statutory good faith exception is not contrary to federal law.

B. The Utah Constitution

The further question of whether Rule 12(g) is contrary to article I, section 14 of the Utah Constitution remains. Historically, this Court has decided search and seizure issues by applying federal precedents developed under the fourth amendment. See, e.g., State v. Gallegos, 23 Utah Adv. Rep. 23 (1985); State v. Harris, 671 P.2d 175 (Utah 1983); State v. Romero, 660 P.2d 715 (Utah 1983). The federal version of the exclusionary rule has consistently been applied as the sole remedy for a violation

of an individual's constitutional right to be free from unreasonable searches and seizures. See State v. Hygh, 16 Utah Adv. Rep. 10, 16 (1985) (Zimmerman, J., concurring separately). However, as noted by Justice Zimmerman in his concurring opinion in Hygh, "[s]ound arguments . . . can be made against acceptance of the federal version of the exclusionary rule as the sole remedy for unlawful searches and seizures," and "[t]he federal law as it currently exists is certainly not the only permissible interpretation of the search and seizure protections contained in the Utah Constitution." 16 Utah Adv. Rep. at 16. Justice Zimmerman further observed that "this Court has never considered the appropriateness of possible exceptions to the exclusionary rule or the availability of alternative or supplemental remedies, such as the imposition of civil liability on police officers." Ibid.[3]

Significantly, Utah is one of but a handful of states that have enacted a statutory "good faith" exception to the exclusionary rule. §§ 77-35-12(g) and 78-16-5 (Supp. 1985). See also ARIZ. REV. STAT. § 13-3925 (Supp. 1985); COLO. REV. STAT. § 16-3-308 (Supp. 1985); CAL. CONST. art. I, § 28(d) (which appears to eliminate the exclusionary rule for all "relevant" evidence); S. 237 (a bill now pending in Congress--see also S. 1764, 98th Cong., 2d Sess., 130 CONG. REC. S1066 (daily ed. Feb. 7, 1984), an identical bill which passed the full Senate in 1984 by a vote

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[3] The wisdom of the exclusionary rule has frequently been the subject of debate among commentators. See State v. Bolt, 142 Ariz. 260, 689 P.2d 519, 528 n. 1 (1984) (Cameron, Justice, specially concurring).

of 63-24).[4] Admittedly, the statutes in other states have not been free from criticism. See, e.g., Stross, The Colorado Statutory Good-Faith Exception To The Exclusionary Rule: A Step Too Far?, 53 U. Colo. L. Rev. 809 (1982). However, commentary on Utah's Fourth Amendment Enforcement Act of 1982, 1982 Utah Laws, Chap. 10, §§ 1-16, which added, inter alia, § 77-35-12(g) and §§ 78-16-1 through -11, has generally been favorable. See Comment, 1984 Utah L. Rev. 115, 138-46; Comment, 9 J. Contemp. L. 171 (1983). What distinguishes the Utah scheme from those in the other states noted is that it provides both an appropriate modification of the exclusionary rule and a civil remedy for the defendant whose constitutional rights have been violated. An excellent outline of the Act's provisions appears in 9 J. Contemp. L. at 184-5:

> The Utah Act waives the statutory immunity from suit that governmental entities are able to invoke for injuries "proximately caused or arising out of a violation of protected fourth amendment rights." It provides a cause of action for damages to injured parties against the peace officer who violates their fourth amendment rights and/or the officer's employing agency.
>
> Under the Act, the offending officer and the officer's employing agency are jointly and severally liable for damages if the violation is negligent. The officer alone is liable for damages "[i]f the violation [is] substantial, grossly negligent, willful, or malicious . . . unless the violation [is] the result of a general order of the agency. When the search or seizure is committed intentionally but in good faith, the employing agency alone is liable for damages.
>
> The Act provides that an injured party

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[4] Appendix B contains the text of each of the state provisions and the proposed federal law.

> may sue to recover nominal damages in the amount of $100 plus any costs and attorneys' fees. In addition, the victim of an illegal search or seizure may recover "actual damages, including but not limited to injury to person, property, or reputation." If the violation is "substantial, grossly negligent, willful, or malicious," the Act provides that recovery may include, in addition to nominal and actual damages, exemplary or punitive damages. The Act specifically excludes recovery of damages for injuries "resulting from a conviction and judgment . . . including incarceration, fines, or restitution." The Act provides for a cause of action and the recovery of damages in lieu of the exclusion of otherwise admissible evidence in criminal cases.
>
> The statutory cause of action and the ability to recover nominal, actual, and punitive damages is provided in lieu of the exclusion of otherwise admissible evidence in most circumstances. However, the exclusionary rule may still be applied under the Utah Act when a fourth amendment violation is both "substantial" and not committed in "good faith." Evidence gained in this manner can be suppressed at any stage of the criminal proceeding. An individual whose rights are violated substantially and in bad faith, may elect either to exclude the evidence or to sue for damages. When the individual chooses to have the evidence suppressed, however, the Act precludes any additional monetary recovery.
>
> The Act . . . also allows the employing agency to take administrative or disciplinary action against an errant officer.
>
> Finally, the Act provides that when there is a victim of a crime, and the convicted criminal is awarded damages based on a fourth amendment violation, the victim of the original crime is entitled to a lien against the convicted criminal's award as restitution. [Footnote citations to relevant statutes omitted.]

Unlike the laws in other states, Utah's Act more closely resembles the legislative substitute for the exclusionary rule suggested by Chief Justice Burger in his dissent in Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971).

There, he outlined the following requirements:

> (a) a waiver of sovereign immunity as to the illegal acts of law enforcement officials committed in the performance of assigned duties;
>
> (b) the creation of a cause of action for damages sustained by any person aggrieved by conduct of governmental agents in violation of the Fourth Amendment or statutes regulating official conduct;
>
> (c) the creation of a tribunal, quasi-judicial in nature or perhaps patterned after the United States Court of Claims, to adjudicate all claims under the statute:
>
> (d) a provision that this statutory remedy is in lieu of the exclusion of evidence secured for use in criminal cases in violation of the Fourth Amendment; and
>
> (e) a provision directing that no evidence, otherwise admissible, shall be excluded from any criminal proceeding because of violation of the Fourth Amendment.

403 U.S. at 422-3 (Burger, C.J., dissenting). Beyond its substantial compliance with the requirements of the Bivens dissent, the Utah Act appears to be the kind of modification of the exclusionary rule that the concurring justices in Hygh would find acceptable. In short, it strikes a reasonable balance between competing interests by applying the exclusionary rule in a criminal case only when that rule is most likely to have its desired deterrent effect and awarding civil damages to those whose rights have been violated. Two important societal interests are protected: valid and trustworthy evidence that will lead a factfinder to the truth is not excluded in criminal trials, and one deprived of an important constitutional right is compensated for that wrong.

The legislature of this state, which presumably enacts only that legislation it believes to be constitutional under both the federal and state constitutions, has spoken on the issue of

modifying the exclusionary rule in criminal cases by enacting the Fourth Amendment Enforcement Act of 1982. This Court implicitly adopted Rule 12(g) when, in In Re: Rules of Procedure, 18 Utah Adv. Rep. 3 (1985), it adopted all existing statutory rules of procedure not inconsistent with procedural rules previously adopted by the Court. See Hygh, 16 Utah Adv. Rep. at 16 (Zimmerman, J., concurring specially) ("I have found no case in which this Court has decided to adopt the exclusionary rule after independently analyzing the question of what remedy is available for unlawful search or seizure under our state constitution"). Moreover, rules of procedure are not solely the province of the judiciary in this state; the Utah Constitution allows the legislature to modify procedural rules promulgated by this Court. UTAH CONST. art. VIII, § 4. Given the compelling policy arguments supporting the application of Rule 12(g), which operates in conjunction with §§ 78-16-1 through -11, this Court should not interpret the Utah Constitution so as to invalidate that rule. Although in other instances it may be appropriate, there is no good reason here to construe article I, section 14 more narrowly than the federal courts have the fourth amendment. See State v. Westlung, 705 P.2d 208, 216-7 (Or. App. 1985) (Van Hoomissen, J., concurring in part; dissenting in part). By recognizing that Rule 12(g) is applicable in criminal cases and constitutional under the state constitution, the Court will not effectively gut the protections provided in article 1, section 14--the scope of which may or may not be congruent with the scope of fourth amendment protections. What will constitute a

"substantial" violation under Rule 12(g) necessarily depends on what course the Court decides to take in developing future search and seizure law in Utah. The Court could develop a jurisprudence of state constitutional law to replace the sometimes confusing federal precedents in this area. Hygh, 16 Utah Adv. Rep. at 15-16 (Zimmerman, J., concurring specially). "Clear-cut rules" that guide, rather than befuddle, government officials could be fashioned by interpreting the search and seizure provisions in Utah's constitution differently than the United States Supreme Court has interpreted the fourth amendment, if this Court thinks it necessary in order to avoid "imperil[ing] both the rights of individuals and the integrity and effectiveness of law enforcement." Ibid. Thus, recognition of Rule 12(g) as both a desirable and constitutional component of Utah law is the first step toward a more sensible approach to enforcement of the criminal laws without compromising an individual's rights under the fourth amendment and article I, section 14.

In conclusion, the Court should hold that Rule 12(g) is not only constitutional, but also the controlling rule in all criminal cases when the question of suppression of evidence for an allegedly unlawful search or seizure is presented.

POINT II

THE TRIAL COURT APPLIED AN INCORRECT STANDARD OF LAW IN DETERMINING THAT THE STOP OF DEFENDANTS' VEHICLE WAS UNLAWFUL. UNDER THE PROPER STANDARD, THE OFFICERS' STOP OF THE VEHICLE WAS LEGAL. ALTERNATIVELY, THE STOP WAS NEITHER A SUBSTANTIAL VIOLATION OF DEFENDANTS' CONSTITUTIONAL RIGHTS NOR A VIOLATION COMMITTED IN BAD FAITH.

In holding that the stop of defendants' vehicle was unlawful, which provided the sole basis for suppressing the challenged evidence, the trial court applied an incorrect standard of law. It ruled that "there were no articulable facts as a basis or probable cause for [the] officers to make the initial stop of [d]efendants" (emphasis added). When determining whether an investigatory stop of an automobile, like that at issue here, is lawful, the court must ask whether the police officers acted upon "reasonable suspicion," not "probable cause." United States v. Cortez, 449 U.S. 411 (1981); Delaware v. Prouse, 440 U.S. 648 (1979); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); State v. Swanigan, 699 P.2d 718 (Utah 1985); State v. Gibson, 665 P.2d 1302 (Utah 1983). Clearly, this was not the standard applied by the trial court when it suppressed the evidence seized pursuant to the stop. Therefore, two questions are presented: (1) under the "reasonable suspicion" test was the stop of defendants' vehicle legal? and (2) if the stop was illegal, was the evidence seized pursuant to it still admissible under Utah R. Crim P. 12(g)?[5]

In United States v. Brignoni-Ponce, the Supreme Court held that the fourth amendment "forbids stopping or detaining persons for questioning about their citizenship on less than a

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[5] For purposes of addressing these questions, the State will assume, arguendo, that defendants have standing to challenge the search of the vehicle they were driving, whether or not the initial stop was lawful. In Point III, infra, the State argues that defendants do not have standing to challenge the search of the car; however, that argument presumes the legality of the initial stop. Thus, the State addresses the issue regarding the legality of the stop prior to the standing issue.

reasonable suspicion that they may be aliens." 422 U.S. at 884. "Officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." Ibid.; see also United States v. Cortez, 449 U.S. at 417-18; State v. Swanigan, 699 P.2d at 719; State v. Gibson, 665 P.2d at 1304. A number of factors may be taken into account in forming a reasonable suspicion:

> Officers may consider the characteristics of the area in which they encounter a vehicle. Its proximity to the border, the usual patterns of traffic on the particular road, and previous experience with alien traffic are all relevant. See Carroll v. United States, 267 U.S. 132, 159-161 (1925); United States v. Jaime-Barrios, 494 F.2d 455 (CA9), cert. denied, 417 U.S. 972 (1974). They also may consider information about recent illegal border crossing in the area. The driver's behavior may be relevant, as erratic driving or obvious attempts to evade officers can support a reasonable suspicion. See United States v. Larios-Montes, 500 F.2d 941 (CA9 1974); Duprez v. United States, 435 F.2d 1276 (CA9 1970). Aspects of the vehicle itself may justify suspicion. For instance, officers say that certain station wagons, with large compartments for fold-down seats or spare tires, are frequently used for transporting concealed aliens. See United States v. Burgarin-Casas, 484 F.2d 853 (CA9 1973), cert, denied, 414 U.S. 1136 (1974); United States v. Wright, 476 F.2d 1027 (CA5 1973). The vehicle may appear to be heavily loaded, it may have an extraordinary number of passengers, or the officers may observe persons trying to hide. See United States v. Larios-Montes, supra. The Government also points out that trained officers can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut. Reply Brief for United States 12-13, in United States v. Ortiz, post, p. 891. In all

> situations the officer is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling. Terry v. Ohio, 392 U.S., at 27.

422 U.S. at 884-5.

Although the courts have not always been in agreement as to what articulable facts are sufficient to support a reasonable suspicion in this context, see, e.g., United States v. Varela-Andujo, 746 F.2d 1046 (5th Cir. 1984) (sufficient articulable facts to justify stop); United States v. Melendez-Gonzalez, 727 F.2d 407 (5th Cir. 1984) (fact that car riding low and travelling 50 yards behind truck on sparsely travelled road 60 miles from border not enough); United States v. Saenz, 578 F.2d 643 (5th Cir. 1978), cert. denied, 439 U.S. 1075 (stop upheld where vehicles travelled in tandem fashion for about an hour and driver appeared nervous); United States v. Lamas, 608 F.2d 547 (5th Cir. 1979) (fact that occupants of car avoided eye contact "cannot weigh in the balance in any way") (compare United States v. Barnard, 553 F.2d 389 (5th Cir. 1977) (stop upheld, one factor being that driver glanced repeatedly and nervously at border patrol officer and then drove erratically)),[6] the articulable facts available to the officers in the instant case amounted to a reasonable suspicion to justify the stop of defendants to inquire about their citizenship. When the seven factors relied upon by the officers in making the stop (which are

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[6] For further discussion of and authority for what constitutes reasonable suspicion in this context, see Comment, 10 Am. J. Crim. L. 245 (1982); LAFAVE, SEARCH and SEIZURE § 10.5 (1978 and Supp. 1985).

noted in this brief's statement of facts, supra at 4) are taken together and considered in light of those officers' extensive experience with the border patrol, see Cortez; Brierley v. Schoenfeld, ___ F.2d ___, Case No. 85-1332, slip op. at 8 (10th Cir. 1986), one should conclude that the stop was lawful under the "reasonable suspicion" test. Accordingly, this Court should rule that the trial court not only applied an incorrect legal standard, but also erred in concluding that the stop was unconstitutional and that the evidence seized pursuant to the stop must be suppressed.

Even if the Court were to find that the stop was not supported by a reasonable suspicion, the evidence seized pursuant to the stop was still admissible under Rule 12(g). At the very least, this case presents a close question on whether a reasonable suspicion existed. Given the sometimes irreconcilable differences in court decisions in this area, and the absence of any Utah case law specifically dealing with a similar factual situation, the officers' act of stopping defendants under the circumstances presented certainly would not constitute a "substantial" violation of defendants' rights under the fourth amendment and article I, section 14. See Rule 12(g)(2). To the contrary, their actions constituted only a minor violation reflecting reasonable law enforcement activity that should not result in the exclusion of substantial, reliable evidence. See United States v. Leon, ___ U.S. ___, 104 S.Ct. 3405 (1984); United States v. Williams, 622 F.2d 830 (5th Cir. 1980) (en banc), cert. denied, 449 U.S. 1127 (1981); cf. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (holding that, in civil

rights actions, government officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known"). There being no evidence of bad faith on the part of the officers, see Rule 12(g)(3), if this Court finds the stop was invalid, it should rule that the suppressed evidence was, nevertheless, admissible under Rule 12(g).

POINT III

THE TRIAL COURT'S RULING THAT DEFENDANTS HAD STANDING TO CHALLENGE THE LEGALITY OF THE SEARCH OF THE VEHICLE THEY WERE DRIVING IS CONTRARY TO STATE V. VALDEZ, 689 P.2d 1334 (UTAH 1984).

In granting defendants' motions to suppress, the trial court ruled that both defendants "had standing to raise the issue of the constitutionality and legality of the stop, search and seizure in that the evidence was unrebutted that the owner of said vehicle had given his permission to Defendant Mendoza to be in and use said vehicle up to and including the time said vehicle was stopped and seized and that Defendant Mendieta had standing in the use of the purpose [sic] of the trip and that the defendants were lawfully and legally in possession of said automobile against all but the owner thereof and that they had a valid and lawful expectation of privacy while therein" (Appendix A). The court based its finding of standing solely on defendants' possession of and presence in the vehicle they were driving, even though neither owned that vehicle.

This case, on the facts presented to the trial court, is indistinguishable from State v. Valdez, 689 P.2d 1334 (Utah 1984). There, a unanimous Court held that the defendant, who did not own the car which he was driving and which was the object of the search complained of, lacked standing to complain of the search which followed a stop made by police officers. It is clear from Valdez that mere possession of property, or presence therein or thereon, without some showing of a legitimate expectation of privacy in the effects searched is not enough to gain standing to challenge the search. Therefore, defendants who, like Valdez, did not own the car they were driving (but had simply borrowed it) and did not show any legitimate expectation of privacy in that car (mere possession not being sufficient), lack standing to challenge the search of the car and ultimate seizure of the marijuana, at least not on the basis found by the trial court.[7] Valdez, 689 P.2d at 1335, citing State v. Purcell, 586 P.2d 441 (Utah 1978); Rakas v. Illinois, 439 U.S. 128 (1978).

CONCLUSION

Based upon the foregoing arguments, this Court should reverse the trial court's order suppressing the challenged evidence and remand the case to the district court with an order to allow admission of that evidence.

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[7] Although there is some support for the argument that defendants do not have standing even to object to the allegedly illegal stop of their car, e.g. Kayes v. State, 409 So.2d 1075 (Fla. App. 1981) (passenger without standing to object to illegal stop of vehicle); State v. Cowen, 104 Idaho 649, 662 P.2d 230 (1983) (Rakas v. Illinois, 439 U.S. 128 (1978) interpreted as barring passenger from questioning stop of car), the State does not advance that argument here.

RESPECTFULLY submitted this 29th day of January, 1986.

DAVID L. WILKINSON
Attorney General

David B. Thompson
DAVID B. THOMPSON
Assistant Attorney General

MAILING CERTIFICATE

I hereby certify that I mailed four true and exact copies of the foregoing Brief, postage prepaid, to John E. Meyers, Attorney for Defendant Mendieta, The Bradbury Building, 304 South Broadway, Suite 432, Los Angeles, California, and J. MacArthur Wright, Attorney for Defendant Mendoza, WRIGHT & MILES P.O. Box 339, St. George, Utah 84770, this 29th day of January, 1986.

David B. Thompson

APPENDICES

APPENDIX A

WRIGHT & MILES
By J. MacArthur Wright
John L. Miles
Attorneys for Defendants
60 North 300 East
P.O. Box 339
St. George, UT 84770
Phone: 628-2612

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF WASHINGTON, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. ALBERTO RUIZ MENDIETA, and ADOLFO DIAZ MENDOZA, Defendants.	ORDER GRANTING MOTION TO SUPPRESS Criminal No. 1312 1311 ✓

Defendants, ADOLFO DIAZ MENDOZA and ALBERTO RUIZ MENDIETA, having filed their Motions to Suppress all items of evidence, including contraband seized from a Mustang automobile which Defendant, Mendoza, was driving and in which Defendant, Mendieta, was riding, and any statements of either party given to Border Patrol officers, members of the Washington County Sheriff's Department or any other law enforcement agency subsequent to the stop, arrest and search of said Defendants and automobile respectively, and hearing having been held before the Court on July 12, 1985, and evidence and testimoney having been introduced and parties having submitted points and authorities, and the Court having considered the evidence and testimony and reviewed the authorities submitted by counsel and reviewed the file and for other good cause appearing, having taken the matter under advisement, now makes its ruling:

IT IS HEREBY ORDERED, adjudged and decreed that the evidence seized by the Washington County Sheriff's officers or any other law enforcement officers, including but not limited to

suppressed, and any statments made by the Defendants above-named subsequent to the stop, search, seizure and arrest of Defendants on or about March 16, 1985, be suppressed for the reason that the Immigration Officers who made said stop, search and arrest were engaged in a roving patrol, that there were no articuable facts as a basis or probable cause for said officers to make the initial stop of the Defendants and that the stop was conducted in an unreasonable manner.

IT IS FURTHER found that the Defendants, each and both, had standing to raise the issue of the constitutionality and legality of the stop, search and seizure in that the evidence was unrebutted that the owner of said vehicle had given his permission to Defendant, Mendoza, to be in and use said vehicle up to and including the time said vehicle was stopped and seized and that Defendant Mendieta had standing in the use of the purpose of the trip and that the defendants were lawfully and legally in possession of said automobile and had exclusive use and possession of said automobile against all but the owner thereof and that they had a valid and lawful expectation of privacy while therein.

DATED this 17 day of September, 1985.

District Judge

MAILING CERTIFICATE

I do hereby certify that I mailed a true and correct copy of the above and foregoing ORDER GRANTING MOTION TO SUPPRESS to Brent Rowe, County Attorneys Office, 220 North 200 East, St. George, UT, and also to John E. Meyers, Attorney At Law, at The Bradbury Building, 304 South Broadway, Suite 432, Los Angeles, CA on this 16th day of September, 1985

Secretary for
Wright & Miles

APPENDIX B

Arizona

and C–419848 v. State (1983) 136 Ariz. 175, 665 P.2d 57.

1.5. Burden of proof

If person from whom property was taken challenges seizure of items not named in search warrant, state must establish legality of seizure of such items by preponderance of evidence, and may do so by showing that property is unlawful to possess, that property is stolen, or by showing some other reason why property is subject to seizure. Search Warrants C–419847 and C–419848 v. State (1983) 136 Ariz. 175, 665 P.2d 57.

State has burden to prove that property seized without warrant was nevertheless lawfully seized under some exception to warrant requirement; if, however, warrant has been issued, there is presumption that warrant is valid, requisite probable cause having been shown, and it is then individual's burden to prove invalidity of search and seizure. Search Warrants C–419847 and C–419848 v. State (1983) 136 Ariz. 175, 665 P.2d 57.

Unlike challenge to grounds for issuing search warrant where individual bears burden of proof state must bear burden once individual establishes that item seized from him is not described in search warrant. Search Warrants C–419847 and C–419848 v. State (1983) 136 Ariz. 175, 665 P.2d 57.

3. Review

Motion for restoration of seized property, controverting grounds upon which warrants were issued, was civil in nature, notwithstanding that pertinent statute, this section, is found in criminal code; order denying motion which disposed of cause on merits and left no question remaining for judicial determination was civil judgment appealable as of right to the Court of Appeals Greehling v. State (1982) 135 Ariz. 498, 662 P.2d 1005.

4. Jurisdiction

Court of appeals has jurisdiction to review request for relief under this section. Mehrens v. State (App.1983) 138 Ariz. 458, 675 P.2d 718, certiorari denied 105 S.Ct. 219, 83 L.Ed.2d 149.

§ 13–3925. Admissibility of evidence obtained as a result of unlawful search or seizure; definitions

A. If a party in a criminal proceeding seeks to exclude evidence from the trier of fact because of the conduct of a peace officer in obtaining the evidence, the proponent of the evidence may urge that the peace officer's conduct was taken in a reasonable, good faith belief that the conduct was proper and that the evidence discovered should not be kept from the trier of fact if otherwise admissible.

B. The trial court shall not suppress evidence which is otherwise admissible in a criminal proceeding if the court determines that the evidence was seized by a peace officer as a result of a good faith mistake or technical violation.

C. In this section:

1. "Good faith mistake" means a reasonable judgmental error concerning the existence of facts which if true would be sufficient to constitute probable cause.

2. "Technical violation" means a reasonable good faith reliance upon:

(a) A statute which is subsequently ruled unconstitutional.

(b) A warrant which is later invalidated due to a good faith mistake.

(c) A controlling court precedent which is later overruled, unless the court overruling the precedent orders the new precedent to be applied retroactively.

D. This section shall not be construed to limit the enforcement of any appropriate civil remedy or criminal sanction in actions pursuant to other provisions of law against any individual or government entity found to have conducted an unreasonable search or seizure.

E. This section does not apply to unlawful electronic eavesdropping or wiretapping.

Added by Laws 1982, Ch. 161, § 1.

1982 Reviser's Note:

Pursuant to authority of § 41–1304.02, "; definitions" was added to the heading of this section.

Library References

Criminal Law ⇐394.4(1).
C.J.S. Criminal Law § 657(2) et seq.

Cross References

Issuance of warrant, probable cause, see § 13–3913.

Notes of Decisions

In general 1

Harmless error 3
Impeachment 4
Probable cause 2
Retroactive effect 1.5

1. In general

Probable cause validates warrantle where there is information sufficient belief by a reasonable man that an being or has been committed. State (App.1982) 131 Ariz. 563, 643 P.2d 8.

Warrantless search of defendant's b and opening of closet door in bunk which illegal alien was hidden was where officer had received tip that had chained illegal alien to a tree, o observed a large chain around tree bunkhouse which went through fron bunkhouse, and defendant consented t entry into the bunkhouse to see what of the chain, in that from position of actions of defendant, and information an illegal alien had been chained on th a reasonable person could conclude t alien was still somewhere inside the b Id.

1.5. Retroactive effect

"Good faith" exception in provisi section governing admissibility of ev tained as result of unlawful search which provision became effective Jul with no expressed declaration of re

ARTICLE 9

§ 13–3931. Search of accused b

Law Review Commentaries

Administrative dormitory inspectio university. 19 Ariz.L.Rev. 560 (1977)

English criminal justice: Is it b ours? 26 Ariz.L.Rev. 507 (1984).

Cross References

Bail bond agents,
Bond, see § 20–320.
Place of business and main records, see § 20–319.

§ 13–3961. Offenses not bailab

A. A person in custody shall presumption great that he is gu offense.

B. A person in custody shall felony offense and the state cert matter that there is clear and substantial danger to another pe

California

(c) Right to Safe Schools. All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful.

(d) Right to Truth-in-Evidence. Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press.

(e) Public Safety Bail. A person may be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great. Excessive bail may not be required. In setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. Public safety shall be the primary consideration.

A person may be released on his or her own recognizance in the court's discretion, subject to the same factors considered in setting bail. However, no person charged with the commission of any serious felony shall be released on his or her own recognizance.

Before any person arrested for a serious felony may be released on bail, a hearing may be held before the magistrate or judge, and the prosecuting attorney shall be given notice and reasonable opportunity to be heard on the matter.

When a judge or magistrate grants or denies bail or release on a person's own recognizance, the reasons for that decision shall be stated in the record and included in the court's minutes.

(f) Use of Prior Convictions. Any prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding. When a prior felony conviction is an element of any felony offense, it shall be proven to the trier of fact in open court.

(g) Serious felony. As used in this article, the term "serious felony" is any crime defined in Penal Code, Section 1192.7(c).

(Added by Initiative Measure, approved by the people, June 8, 1982.)

Amendment of Const. Art. 1, § 12 by Assembly Const. Amend. No. 14 (1982) was approved by a higher affirmative vote at the primary election held June 8, 1982 than Initiative Measure which repealed Const. Art. 1 § 12, and added this section which included a new provision on "Public Safety Bail". If provisions of 2 or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail, see Const. Art. 2, § 10; Art. 18, § 4.

Colorado

actions generally, see § 13-17-102.

IZURES

rounds. (2) (g) Which is kept, nsed, or possessed in violation es involving a serious threat to

f the whereabouts of or in the irrest warrant is outstanding. :r this section to search for any itstanding.

ded, L. 85, p. 615, § § 1, 2.

nd seizure other than the provisions of ire, see § 7 of article II of the Colorado the "Colorado Children's Code", see

on dealing with searches, see 61 Den. 31 (1984).
lied in People v. Stoppel, 637 P.2d 384 1981).

lavit need not be attached to warrant There is nothing which requires that a given a warrant must receive a copy of derlying affidavit or that a copy thereof e attached to the copy of the warrant is served at the time of the search. v. Papez, 652 P.2d 619 (Colo. App.

documents attached to and incorporated ffidavit by reference need not be sworn rately and may thus fall within the four of the affidavit. People v. Campbell, d 1035 (Colo. App. 1983).

d faith basis required to challenge t affidavits. As conditions to a veracity testing the truth of averments con- in a warrant affidavit, a motion to sup- must be supported by one or more ts reflecting a good faith basis for the ge and contain a specification of the statements challenged. People v. 639 P.2d 1068 (Colo. 1982).
ed in People v. Conwell, 649 P.2d 1099 1982).

II. CONTENT AND SUFFICIENCY OF AFFIDAVIT.

Judge must look within the four corners, etc. In accord with original. See People v. Lindholm, 197 Colo. 270, 591 P.2d 1032 (1979).

Affidavit interpreted with common sense. In interpreting an affidavit for a search warrant and the execution of the warrant, a common sense interpretation must be applied. People v. Del Alamo, 624 P.2d 1304 (Colo. 1981).

Affidavit must supply underlying fact. In accord with original See People v. Lindholm, 197 Colo. 270, 591 P.2d 1032 (1979); People v. Dailey, 639 P.2d 1068 (Colo. 1982).

Identification of wrong street not dispositive of affidavits efficacy. Fact that the affidavit identified the wrong street, which was less than one block away from the actual location of the truck to be searched, was not dispositive of an affidavit's efficacy. People v. Del Alamo, 624 P.2d 1304 (Colo. 1981).

For evidence constituting probable cause. See People v. Lindholm, 197 Colo. 270, 591 P.2d 1032 (1979).

Deletion of inaccuracies not fatal, etc. The fact that some portions of an affidavit must be stricken because they are erroneous, or that a portion of the evidence relied on for a finding of probable cause is not properly recorded and may not be considered does not require the issuing magistrate to ignore the other information supplied by the affidavit. People v. Gable, 647 P.2d 246 (Colo. App. 1982).

A search warrant may be based on hearsay, etc. In accord with original. See People v. Lindholm, 197 Colo. 270, 591 P.2d 1032 (1979).

16-3-304. Search warrants - contents.

I. General Consideration.
III. Description of Property.

I. GENERAL CONSIDERATION.

Annotator's note. For further annotations concerning search and seizure, see section 7 of article II of the Colorado Constitution and Colorado Rule of Criminal Procedure 41.

III. DESCRIPTION OF PROPERTY.

Search warrant reasonably specific under circumstances. See People v. Lindholm, 197 Colo. 270, 591 P.2d 1032 (1979).

In determining whether warrant is too general, the nature of the property to be seized must be considered. People v. Lindholm, 197 Colo. 270, 591 P.2d 1032 (1979); People v. Ball, 639 P.2d 1078 (Colo. 1982); People v. Hill, 690 P.2d 856 (Colo. 1984).

16-3-305. Search warrants - direction - execution and return.

Annotator's note. For further annotations concerning search and seizure, see section 7 of article II of the Colorado Constitution and Colorado Rule of Criminal Procedure 41.

Evidence seized in violation of a statutory provision may be suppressed only if the unauthorized search and seizure violated constitutional restraints on unreasonable searches and seizures. People v. Hamer, 689 P.2d 1147 (Colo. App. 1984).

16-3-308. Evidence - admissibility - declaration of purpose. (1) Evidence which is otherwise admissible in a criminal proceeding shall not be suppressed by the trial court if the court determines that the evidence was seized by a peace officer, as defined in section 18-1-901 (3) (l), C.R.S., as a result of a good faith mistake or of a technical violation.

(2) As used in subsection (1) of this section:

(a) "Good faith mistake" means a reasonable judgmental error concerning the existence of facts or law which if true would be sufficient to constitute probable cause.

(b) "Technical violation" means a reasonable good faith reliance upon a statute which is later ruled unconstitutional, a warrant which is later invalidated due to a good faith mistake, or a court precedent which is later overruled.

(3) Evidence which is otherwise admissible in a criminal proceeding and which is obtained as a result of a confession voluntarily made in a noncustodial setting shall not be suppressed by the trial court.

(4) (a) It is hereby declared to be the public policy of the state of Colorado that, when evidence is sought to be excluded from the trier of fact in a criminal proceeding because of the conduct of a peace officer leading to its discovery, it will be open to the proponent of the evidence to urge that the conduct in question was taken in a reasonable, good faith belief that it was proper, and in such instances the evidence so discovered should not be kept from the trier of fact if otherwise admissible. This section is necessary to identify the characteristics of evidence which will be admissible in a court of law. This section does not address or attempt to prescribe court procedure.

(b) It shall be prima facie evidence that the conduct of the peace officer was performed in the reasonable good faith belief that it was proper if there is a showing that the evidence was obtained pursuant to and within the scope of a warrant, unless the warrant was obtained through intentional and material misrepresentation.

Source: Added, L. 81, p. 922, § 1; (2)(a) and (4) amended, L. 85, p. 615, § 3, 4.

Cross reference: For the admissibility of evidence in proceedings under the "Colorado Children's Code", see § 19-2-107

Editor's note: Section 14 of chapter 135, Session Laws of Colorado 1985, provides that sections 3 and 4 of the act set out in that chapter amending subsections (2)(a) and (4) is effective July 1, 1985, and applies to evidence obtained on or after said date

Annotator's note. For annotations concerning the exclusionary rule, see section 7 of article II of the Colorado Constitution and Colorado Rules of Criminal Procedure 26 and

Law reviews. For article, "Colorado's Good-Faith Exception to the Exclusionary Rule", 11 Colo Law 410 (1982) For article, "Good-Faith Exception to the Exclusionary Rule The Fourth Amendment is Not a Technicality", see 11 Colo Law. 704 (1982) For article, "Attacking the Seizure — Over-coming Good Faith", see 11 Colo Law 2395 (1982) For note, "The Colorado Statutory Good-Faith Exception to the Exclusionary Rule A Step Too Far?" see 53 U. Colo L Rev 809 (1982) For comment, "Privacy Rights v. Law Enforcement Difficulties The clash of Competing Interests in New York v. Belton", see 53 U Den L.J 793 (1982) For article, "Warrant Requirement — The Burger Court Approach", see 53 U Colo L Rev 691 (1982) For article, "Search Warrants, Hearsay and Probable Cause — The Supreme Court Rewrites the Rules", see 12 Colo Law 1250 (1983) For article, "Criminal Procedure Issues which discusses a recent Tenth Circuit decision dealing with the exclusionary rule, see 61 Den. L.J 291 (1984) For comment, "The Good Faith Exception The Seventh Circuit Limits the Exclusionary Rule in the Administrative Context", see 61 Den L J 597 (1984)

Section inapplicable to mistaken judgment of law. A mistaken judgment of law, such as the mistaken judgment by an officer that the facts known to him are sufficient to warrant a full custodial arrest of the defendant, is insufficient to cause the application of this statute People v. Quintero, 657 P 2d 948 (Colo 1983), cert granted, 463 U S 1206, 77 L Ed 2d 1386 104 S Ct. 62, cert dismissed, 463 U S 1206 104 S Ct 543, 78 L Ed 2d 719 (1983) (decided under subsection (2)(a) prior to 1985 amendment)

Search by police of tenant's premises based on consent by landlord is mistake of law since it is well settled that a landlord cannot give such consent People v Brewer, 690 P 2d 860 (Colo 1984)

Section does not apply to an arrest based on a warrant void from its inception due to the absence of any cause whatever for its issuance People v Mitchell, 678 P 2d 990 (Colo 1984)

No technical violation where court precedent relied on was based on different facts. Technical violation was not found for good faith reliance on prior court decision where such precedent

16-3-309. Admissibility of laboratory seized in so small a quantity or unstable testing will not leave a sufficient quanti analysis by the defendant's expert and performance of his duties. can reasonab be favorable to the defendant, the t prosecution's evidence if the court deter in good faith and in accordance with reg the evidence which might have been fav

(2) The trial court shall consider the f pursuant to subsection (1) of this section, wh to preserve the evidence:

(a) Whether or not a suspect has be whether or not the suspect has retained c for him at the time of testing;

(b) Whether the state should have t likely to preserve the results of seized ev

(c) Whether, when the test results are tion, the state should have photographe results as evidence;

(d) Whether the state should have pre

(e) Whether it was necessary for the analysis of the evidence,

(f) Whether there is sufficient sample for analysis and the suspect or defendan serve such sample,

(g) If paragraph (f) of this subsection of the small amount of evidence, or wh evidence would otherwise be enhanced state to have contacted the defendant t to be present during the testing

(3) With regard to testing performed which form the basis for a conclusion t arises, it is hereby declared to be the p that when the prosecution's evidence of from the trier of fact in a criminal proc evidence which might have been favor to the proponent of the evidence to u performed in good faith and in accordar to preserve the evidence which might and, in such instances, the evidence so the trier of fact if otherwise admissible.

(4) For all other types of blood analy sis and for laboratory testing, such as se ing, and gunpowder pattern testing, it policy of the state of Colorado that, wh results is sought to be excluded from the because of the destruction of evidence

Senate Bill

II

99TH CONGRESS
1ST SESSION

S. 237

To amend title 18 to limit the application of the exclusionary rule.

IN THE SENATE OF THE UNITED STATES

JANUARY 22 (legislative day, JANUARY 21), 1985

Mr. THURMOND (for himself, Mr. LAXALT, Mr. HATCH, Mr. ABDNOR, Mr. CHILES, Mr. DOMENICI, Mr. LONG, Mr. ZORINSKY, Mr. DENTON, Mr. JOHNSTON, Mr. TRIBLE, Mr. D'AMATO, Mr. EAST, Mr. HELMS, and Mr. BOREN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend title 18 to limit the application of the exclusionary rule.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Exclusionary Rule Limitation Act of 1985".

SEC. 2. (a) Chapter 223 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 3505. Limitation of the fourth amendment exclusionary rule

"Except as specifically provided by statute, evidence which is obtained as a result of a search or seizure and which is otherwise admissible shall not be exclused in a proceeding in a court of the United States if the search or seizure was undertaken in a reasonable, good faith belief that it was in conformity with the fourth amendment to the Constitution of the United States. A showing that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of such a reasonable good faith belief, unless the warrant was obtained through intentional and material misrepresentation."

(b) The table of sections of such chapter is amended by adding at the end thereof the following item:

"3505. Limitation of the fourth amendment exclusionary rule.".