

1998

# State of Utah v. Michael Cleve McBride : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	)	
	)	Case No. 980226-CA
Plaintiff / Appellee,	)	
	)	
v.	)	
	)	
MICHAEL CLEVE McBRIDE,	)	Priority No. 2
	)	
Defendant / Appellant.	)	ORAL ARGUMENT REQUESTED

REPLY BRIEF OF APPELLANT

Appeal from Judgment based upon a conditional plea of guilty, pursuant to *State v. Sery*, of the offense of Driving Under the Influence of Alcohol and/or Drugs, a class B misdemeanor, in violation of Utah Code Ann. § 41-6-44, in the Second Judicial District Court in and for Davis County, the Honorable Rodney S. Page presiding.

UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO. 980226-CA

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**FILED**  
Utah Court of Appeals  
MAR 05 1999  
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Clerk of the Court

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, )  
 )  
 Plaintiff / Appellee, ) Case No. 980226-CA  
 )  
 v. )  
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 MICHAEL CLEVE McBRIDE, ) Priority No. 2  
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None.

## ARGUMENT

- I. INASMUCH AS OFFICER SCOTT DID NOT ACT FORTHWITH UPON RECEIVING THE TIP PROVIDED TO POLICE DISPATCH BUT INSTEAD DELAYED HIS APPROACH PRIOR TO SEIZING DEFENDANT'S TRUCK AND BECAUSE OFFICER SCOTT EXPRESSLY BASED THE SEIZURE OF DEFENDANT'S TRUCK ON GROUNDS OTHER THAN THOSE PROVIDED BY THE INFORMANT, THE TRIAL COURT ERRED BY CONCLUDING THAT THERE WAS REASONABLE SUSPICION THAT DEFENDANT COMMITTED OR WAS ABOUT TO COMMIT A CRIME.

Giving short shrift to Officer Scott's deliberate delay in approaching Defendant's truck, the State, in its Brief, argues that Officer Scott, based on the informant's tip, had reasonable suspicion to stop Defendant's truck. See Appellee's Brief, pp. 8-11. For this reason, as well as those set forth in detail below, the State's analysis is fatally flawed.

Contrary to the State's argument, the record reveals that the case at bar is not a case where a police officer relied upon the information provided by an informant's tip to make an investigatory stop. See, e.g., *State v. Roth*, 827 P.2d 255 (Utah Ct. App. 1992). Instead, Officer Scott, after responding to the police dispatch report, deliberately delayed any action in terms of effectuating a stop or seizure of Defendant's truck based upon the information provided by way of the tip to police dispatch (R. 68, Transcript of Hearing, pp. 13-16). Rather than immediately approaching Defendant based on the information provided to police dispatch, Officer Scott disregarded the dispatch report and sat back in the patrol car

parked across the street from the restaurant, observing Defendant walk out of the restaurant towards his truck, enter his truck, back his truck out of the parking stall, and drive his truck out of the restaurant onto a public roadway (*Id.*). Only then did Officer Scott then pull out of the convenience store parking lot where he was stationed across the street from the restaurant and follow Defendant's truck to apparently observe Defendant's driving pattern (*Id.*). Moreover, only after a right-hand turn by Defendant onto 250 North, did Officer Scott initiate the investigatory stop of Defendant's truck (*Id.* at R. 68, p. 16, lines 10-13). Even if reasonable suspicion existed by way of the tip communicated by the informant to police dispatch, such reasonable suspicion dissipated upon Officer Scott's deliberate delay and failure to act forthwith upon the police dispatch information. See *State v. Case*, 884 P.2d 1274, 1277-78 (Utah Ct. App. 1994) (stating that a police officer in receipt of dispatched information "may take it at face value and act on it forthwith"). Officer Scott's total disregard of the tip, together with his subsequent actions in an effort to manufacture his own independent basis for reasonable suspicion, caused the information provided by the informant to vanish for purposes of the seizure of Defendant's truck.

The fact that Officer Scott's seizure of Defendant's truck was not premised upon the informant's tip provided to police dispatch

is further demonstrated by Officer Scott's own testimony at the suppression hearing. At the hearing, Officer Scott testified that the basis for stopping Defendant's truck was the alleged improper right-hand turn by Defendant (*Id.* at R. 68, pp. 16-17). The State fails to address Officer Scott's plain and clear testimony concerning the basis for the seizure of Defendant's truck in its Brief.

Notwithstanding the State's assertion that the facts in *City of St. George v. Carter*, 945 P.2d 165 (Utah Ct. App. 1997), are similar to those in the instant case, a close review, quite frankly, reveals otherwise. For example, the police officer in *Carter*, contrary to that in the instant case, took the information provided by the informant through police dispatch at face value and acted on it forthwith. *Id.* at 169.<sup>1</sup> In addition, the officer in *Carter*, unlike Officer Scott in this case, relied upon the information provided by the informant to police dispatch to

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<sup>1</sup>The fact that the police officer in *City of St. George v. Carter*, 945 P.2d 165 (Utah Ct. App. 1997), took the information provided by the informant at face value and acted forthwith is evinced by the facts of the case set forth in the Court's opinion, which indicate that the officer, upon receiving the relayed information, located and parked behind the defendant's vehicle and activated the overhead lights of the patrol car. *Id.* at 167. Further, the Court's opinion states that the information provided by the informant and relayed by police dispatch "was verified by Officer Whipple, who located the described location within minutes of receiving the information from dispatch." *Id.* at 169.



initiate the stop. *Id.* at 167, 169, and n.2. Finally, Officer Scott, unlike the officer in *Carter*, testified at the suppression hearing that the basis for the stop was something other than information provided by the informant.

**II. THE TOTALITY OF THE CIRCUMSTANCES IMMEDIATELY PRECEDING THE SEIZURE OF DEFENDANT'S TRUCK AS WELL AS THE TESTIMONY AND EVIDENCE PRESENTED AT THE SUPPRESSION HEARING DEMONSTRATE THAT OFFICER SCOTT DID NOT HAVE A REASONABLE SUSPICION THAT DEFENDANT HAD COMMITTED OR WAS IN THE ACT OF COMMITTING OR WAS ATTEMPTING TO COMMIT A PUBLIC OFFENSE.**

The State, in its Brief, failed to address the issue of whether the alleged improper right-hand turn provided Officer Scott with the requisite justification under the Fourth Amendment for stopping Defendant's truck. Moreover, the State essentially failed to respond to the assertion that Officer Scott, during the course of the suppression hearing, failed to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warranted the intrusion. See *State v. Menke*, 787 P.2d 537, 541 (Utah Ct. App. 1990) (quoting *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 1880 (1968)); See also *State v. Trujillo*, 739 P.2d 85, 88 (Utah Ct. App. 1987) (citing *Florida v. Royer*, 460 U.S. 491, 498, 103 S.Ct. 1319, 1324 (1983)); *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 1879 (1968); and *State v. Christensen*, 676 P.2d 408, 412 (Utah 1984)).

Notwithstanding Officer Scott's assertion that he based the stop of Defendant's truck on an alleged improper right-hand turn, Officer Scott's own testimony at the suppression hearing, among other things, established that Defendant in the course of making the right-hand turn did not cross over into any other lane of travel. The testimony elicited during the suppression hearing further established that Defendant's truck is a full-size, three-quarter ton truck with a camper shell on the back that is difficult to turn close to a curb or edge of the roadway (R. 68, Transcript of Hearing, pp. 23-24).<sup>2</sup> Indeed, the testimony at the suppression hearing established that by turning too close to the curb one might create an unreasonable risk to the public. *Id.* Accordingly, the size of Defendant's truck provides what could be considered an innocent explanation for the manner in which Defendant had to turn his truck in order to safely complete the turn. *State v. Tetmyer*, 947 P.2d 1157, 1160 (Utah Ct. App. 1997). Additionally, the manner in which Defendant initiated the turn could have been affected by Defendant's nervousness at the time he was being followed by Officer Scott in the marked patrol car.

As part of the totality of the circumstances to be considered in the instant case is the fact that Officer Scott did not observe

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<sup>2</sup>Utah Code Ann. § 41-6-66(1) provides that "both a right turn and an approach for a right turn shall be made as close as practical to the right-hand curb or edge of the roadway."

any unusual conduct on behalf of Defendant in the course of observing Defendant exit the restaurant and enter his truck (R. 68, Transcript of Hearing, pp. 14-15). Furthermore, Officer Scott, in the course of following Defendant, did not observe Defendant engage in any driving techniques or patterns indicative of an intoxicated driver. These circumstances should have operated to mitigate against any suspicions of intoxication. *Tetmyer*, 947 P.2d at 1161 n.1.

By virtue of the application of the search and seizure principles of law and authority to this case, the totality of the circumstances immediately preceding the stop of Defendant's truck does not support a reasonable suspicion that Defendant was involved in criminal conduct. Rather, the circumstances presented in this case "describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were [the Court] to conclude that as little foundation as there was in this case could justify a seizure." *Reid v. Georgia*, 448 U.S. 438, 441, 100 S.Ct. 2752, 2754 (1980). The record reveals that the conduct relied upon by Officer Scott to initiate the stop of Defendant's truck was not indicative enough of criminal activity to establish articulable reasonable suspicion. *Cf.*, e.g., *State v. Carpena*, 714 P.2d 674, 675 (Utah 1986) (per curiam); *State v. Sykes*, 840 P.2d 825, 828 (Utah Ct. App. 1992); and *Trujillo*, 739

P.2d 85, 89-90 (Utah Ct. App. 1987). Because Officer Scott did not articulate reasonable objective facts for suspecting Defendant had engaged in or was about to engage in criminal conduct, the balance between the public interest in crime prevention and constitutional right of Defendant to personal security and privacy tilts in favor of Defendant to protect him from the unreasonable police interference.

#### CONCLUSION

Based on the foregoing, as well as that previously submitted by way of Brief of Appellant, Defendant respectfully asks that this Court reverse the trial court's denial of Defendant's Motion to Suppress Evidence and remand the case for further proceedings consistent with this Court's opinion so that Defendant's constitutional right to be free from unreasonable searches and seizures might be effectuated.

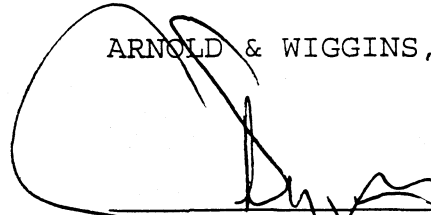
#### STATEMENT REGARDING ORAL ARGUMENT AND METHOD OF DISPOSITION

Defendant need not request oral argument inasmuch as oral argument is currently scheduled for March 22, 1999, at 9:30 a.m. Counsel for Defendant further requests that the method of disposition of the instant appeal be by opinion designated by the

Court "For Official Publication" for purposes of precedential value  
in future search and seizure cases.

RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of March, 1999.

ARNOLD & WIGGINS, P.C.



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Scott L Wiggins  
Attorneys for Appellant

CERTIFICATE OF MAILING

I, SCOTT L WIGGINS, hereby certify that I personally caused to be mailed two (2) true and correct copies of the foregoing Reply Brief of Appellant, postage prepaid, to the following, on this 5th day of March, 1999:

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Scott L. Wiggins

**ADDENDUM**

No Addendum is necessary pursuant to Utah Rule of Appellate Procedure 24(a)(11).