1998

Ogden City v. Neal C. Krogh : Brief of Appellee

Utah Court of Appeals

Brett G. Berkley; Michael S. Junk; Attorney for Appellee.
Ted K. Godfrey; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS

OGDEN CITY, a Municipal Corporation,	:	
	:	
Plaintiff/Appellee,	:	
	:	
vs.	:	Appeals Case No. 980231-CA
	:	
NEAL C. KROGH,	:	
	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

Appeal from the Second District Court

State of Utah, Weber County

Honorable Judge Roger S. Dutson

PRIORITY RULE 29(b)(2)

DEFENDANT/APPELLANT IS

NOT INCARCERATED

ORAL ARGUMENT IS NOT REQUESTED

TED K. GODFREY
Attorney for
Defendant/Appellant
2668 Grant Avenue
Ogden, Utah 84401
(801) 621-7443

BRENT G. BERKLEY
MICHAEL S. JUNK
Attorneys for
Plaintiff/Appellee
2525 Grant Avenue
Ogden, Utah 84401
(801) 395-1230

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STATEMENT OF JURISDICTION

Appellee concurs with Appellant's assertion of jurisdiction in this Court pursuant to Utah Code Ann. §78-2a-3(2)(e), as amended.

STATEMENT OF THE ISSUES

The issue before this Court on appeal is whether the trial court erred in denying Defendant/Appellant's motion to suppress. Appellee respectfully requests that this Court uphold the lower court's ruling that Defendant's Fourth Amendment right to be free from unreasonable searches and seizures was not violated. Appellee concurs in Appellant's statement of the standard of review for this matter on Appeal as follows:

1. An appellant court reviews the lower court's decisions of fact for "clear error". State vs. Case, 884 P.2d 1274 (Utah App. 1994).

2. An appellant court reviews the lower court's rulings of law as to whether the court made the correct ruling, with a certain measure of discretion allowed to the trial court based on the facts of the case. Id., at 1276.

STATEMENT OF THE CASE

Plaintiff/Appellee filed a formal information in the Second District Court charging Defendant/Appellant with Driving Under the Influence of Alcohol or Drugs in violation of Utah Code Ann. §41-6-44, *et. seq.* on September 25, 1997. Appellant pled "not guilty" to this charge and was appointed a public defender. Appellant filed a Motion to Suppress all evidence gained during the traffic stop alleging that the stop violated his Fourth Amendment right to be free from unreasonable searches and seizures. The matter

came before the honorable Roger S. Dutson for evidentiary hearing on November 21, 1997.

The following facts were undisputed at the evidentiary hearing and no dispute to these facts was raised in Appellant's brief:

1. On or about September 24, 1997 at 2:20 a.m., Appellant was driving westbound at approximately 800 26th Street in Ogden City, Utah.

2. Appellant's vehicle was traveling at a slow rate of speed, approximately 15 mpg. The vehicle's hazard lights were activated.

3. Ogden City Police Officer Lane Olson was patrolling the area and observed Appellant's vehicle from approximately 1000 26th Street.

4. When Officer Olson's vehicle approached Appellant's vehicle from behind, Appellant pulled over to the right curb, facing west.

5. At no time did Officer Olson activate his overhead emergency lights.

6. Officer Olson called in to dispatch that he would be out of his vehicle on a "motor assist". This is a common practice among law enforcement officers and is considered part of their assigned duties when on patrol.

7. Officer Olson approached Appellant's vehicle and requested that Appellant roll down the window. Appellant complied.

8. Officer Olson asked Appellant if he was having car trouble.

9. Appellant replied that "yes", he was having car trouble.

10. Officer Olson asked Appellant if there was someone he could call to give Appellant a ride home or to assist.

11. Appellant replied that "no", there was no one that Officer Olson could call.

12. Officer Olson testified that as soon as Appellant first spoke with Olson, that he could smell a strong odor of alcohol on Appellant's breath.

13. Officer Olson requested identification from the Appellant.

14. Appellant produced a State of Utah identification card.

15. Officer Olson requested a drivers license from Appellant, but Appellant refused to comply with the request and became uncooperative and belligerent.

16. Officer Olson, with assistance from other officers eventually arrested Appellant and administered a breathalyser test to Appellant. Appellant blew a .140 blood alcohol content on the test.

SUMMARY OF THE ARGUMENT

The initial encounter between Appellant and Officer Olson was not a "seizure" subject to Fourth Amendment protection. Even if the initial encounter/stop is held to be a "seizure" within the meaning of Terry vs. Ohio 392 U.S.1 (1968), it was justified under the circumstances. Officer Olson's action subsequent to the "stop" were reasonable and within the scope of the initial stop.

ARGUMENT

I. The initial encounter between Appellant and Officer Olson was not a "seizure" subject to Fourth Amendment protection.

The Utah Supreme Court has recognized three levels of police encounters with the public that are constitutionally permissible:

> (1) an officer may **approach** a citizen at any time and pose **questions** so long as the citizen is not detained against his [or her] will; (2) an officer may **seize** a

> person if the officer has an "articulable suspicion" that the person has committed or is about to commit a crime; however, the "detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop"; (3) an officer may **arrest** a suspect if the officer has probable cause to believe an offense has been committed or is committed.

State vs. Deitman, 739 P.2d 616 (Utah 1987).

The Utah appellant courts have held that several cases with facts nearly identical to the instant case were "level one" stops and therefore *not a seizure subject to Fourth Amendment Protection.* In Bountiful city vs. Maestas, 788 P.2d 1062 (Utah App. 1990), the Court of Appeals found that a level one stop existed when an officer, acting on a citizen's complaint of an intoxicated person purchasing alcohol, "made the initial contact while defendant was sitting behind the wheel of a pick-up truck in the liquor store parking lot. The driver identified himself with a Utah driver's license." *Id.*. At 1964. During the ensuing conversation, the officer smelled alcohol on the driver's breath, requested that the driver perform field sobriety tests, and subsequently arrested the driver.

Further in State vs. Jackson, 805 P.2d 765 (Utah App. 1990), the Court of Appeals held that,

> a seizure did not occur when a police officer stopped his patrol car behind the defendant's parked car, thus ***blocking it***, after the defendant had exited. The defendant walked to the officer's vehicle, where the officer asked him for identification. The court concluded that it was a level one encounter, because under the circumstances a reasonable person would have believed that he or she was free to leave.

Id., at 768, as outlined in State vs. Bean, 869 P.2d 984 (Utah 1994).

In the instant case, Officer Olson was neither blocking vehicle, nor was he in any way restricting the freedom of Defendant. Consequently, the Court should hold that this

encounter between Defendant and officer Olson was a level one stop that was a "voluntary encounter where a citizen may respond to an officer's inquiries but is free to leave at any time". Jackson, at 767.

II. Even if the initial stop is held to be a "seizure" within the meaning of Terry, it was justified under the circumstances.

Police officers are charged, within the scope of their official duties, with providing public service and assistance. This includes assisting motorists who, in the officer's opinion, require assistance. These duties are often referred to as "community caretaking functions". Cady vs. Dombrowski, 413 U.s. 441 (1973).

The reasonableness of a non-criminal, non-investigatory stop depends upon a balancing of the competing interests involved in light of all surrounding facts and circumstances. South Dakota vs. Opperman, 428 U.S. 364 (1976). A citizen's right to continue driving undisturbed by police must be balanced against the public's interest in having a police officer perform his duties of public service and assistance. Several courts have held that a police officer may stop a vehicle in order to warn the driver of a possible hazardous condition or to offer assistance. See State vs. Chisolm, 696 P.2d 41 (Wash. Ct. App. 1985), Russell vs. Municipality of Anchorage, 706 P.2d 687 (Alaska Ct. App. 1985).

In the instant case, Officer Olson acted appropriately, and within the scope of his official duties, in offering to assist Appellant if he was experiencing car problems.

III. Officer Olson's actions subsequent to the "stop" were reasonable and within the scope of the initial stop.

The contact between Officer Olson and Appellant was within the scope of the

initial stop or encounter. Officer Olson testified, and no evidence was offered to the contrary, that he asked only two questions of Appellant: 1) "Are you having problems?", and 2) "Is there someone I can call?". Officer testified that these questions are essentially the same questions he asks of every motorist when he is offering assistance. In no way do either of these questions exceed the scope of a motorist assist "stop".

PRE-ARREST DETENTION

Immediately upon Appellant's response to Officer Olson's questions, the officer smelled a strong odor of alcohol on Appellant's breath. Officer Olson then began to question Appellant regarding Appellant's consumption of alcohol. Appellant argues that this activity constituted a seizure subject to Terry's Fourth Amendment protection. The question raised at this juncture is whether this "detention" was supported by reasonable suspicion. See State vs. Carter, 812 P.2d 460 (Utah App. 1991).

Utah appellate courts have held on several occasions that "smelling alcohol on the breath of a defendant is an articulable fact supporting a finding of reasonable suspicion". Bean, at 989. See also State vs. Rochell, 850 P.2d 480 (Utah App. 1993), and Maestas, at 1064. In the instant case, Officer Olson testified that he smell alcohol on Appellant's breath at the time of their first exchange of words. This is sufficient reasonable suspicion to continue with pre-arrest detention and investigation relevant to a potential Driving Under the Influence arrest and charge.

CONCLUSION

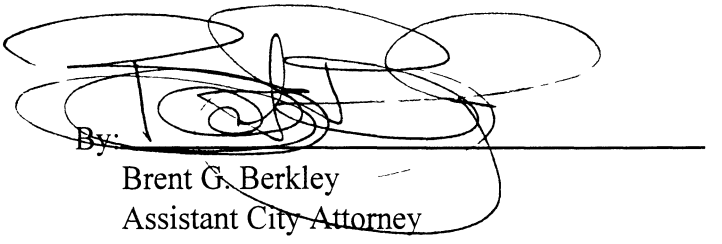
Based upon the foregoing facts and argument, Appellee respectfully requests that the District Courts denial of Defendant/Appellant's Motion to Suppress be **AFFIRMED.**

STATEMENT REGARDING ORAL ARGUMENT

Appellant **does not** believe that this matter requires oral argument.

DATED this 17th day of July, 1998.

OGDEN CITY ATTORNEY'S OFFICE



By: _____
Brent G. Berkley
Assistant City Attorney

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of July, 1998, a true and correct copy of the above and foregoing document was mailed, first-class, postage pre-paid to the following:

Ted K. Godfrey, Esq.
Attorney for Defendant/Appellant
2668 Grant Avenue, #104
Ogden, Utah 84401