

1998

# State of Utah v. Rogelio Mora Virgen : Brief of Appellee

Utah Court of Appeals

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Robert L Brooker; Christopher T Beck; Booker and Associates; Attorneys for Appellant.  
Kenneth A Bronston; Assistant Attorney General; Jan Graham; Attorney General; Colin R. Winchester; Eric Petersen; Attorneys for Appellee.

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UTAH COURT OF APPEALS  
BRIEF

UTAH  
IN THE UTAH COURT OF APPEALS  
K F U

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DOCKET NO. 981071

STATE OF UTAH, :

Plaintiff/Appellee :

Case No. 981071-CA

v. :

ROGELIO MORA VIRGEN :

Priority No. 2

Defendant/Appellant :

BRIEF OF APPELLEE

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APPEAL FROM A CONVICTION FOR POSSESSION OF A  
CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE, A  
THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN.  
§ 58-37-8 (1998), IN THE SIXTH JUDICIAL DISTRICT COURT IN  
AND FOR KANE COUNTY, STATE OF UTAH, THE HONORABLE  
DAVID L. MOWER, PRESIDING

ROBERT L. BOOKER  
CHRISTOPHER T. BECK  
BOOKER & ASSOCIATES  
New England Plaza, Suite 550  
349 South Second East  
Salt Lake City, Utah 84111

Attorneys for Appellant

KENNETH A. BRONSTON (4470)  
Assistant Attorney General  
JAN GRAHAM (1231)  
Attorney General  
Heber M. Wells Building  
160 East 300 South, 6th Fl.  
Salt Lake City, Utah 84114  
Telephone: (801) 366-1080

COLIN R. WINCHESTER  
Kane County Attorney  
ERIC D. PETERSEN  
Deputy Kane County Attorney  
76 North Main Street  
Kanab, Utah 84741

Attorneys for Appellee

**FILED**  
Utah Court of Appeals

MAR 3 1 1999

Julia D'Alessandro

IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :  
Plaintiff/Appellee : Case No. 981071-CA  
v. :  
ROGELIO MORA VIRGEN : Priority No. 2  
Defendant/Appellant :

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New England Plaza, Suite 550  
349 South Second East  
Salt Lake City, Utah 84111

Attorneys for Appellant

KENNETH A. BRONSTON (4470)  
Assistant Attorney General  
JAN GRAHAM (1231)  
Attorney General  
Heber M. Wells Building  
160 East 300 South, 6th Fl.  
Salt Lake City, Utah 84114  
Telephone: (801) 366-1080

COLIN R. WINCHESTER  
Kane County Attorney  
ERIC D. PETERSEN  
Deputy Kane County Attorney  
76 North Main Street  
Kanab, Utah 84741

Attorneys for Appellee

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :  
Plaintiff/Appellee : Case No. 981071-CA  
v. :  
ROGELIO MORA VIRGEN : Priority No. 2  
Defendant/Appellant :

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**BRIEF OF APPELLEE**  
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**JURISDICTION AND NATURE OF PROCEEDINGS**

This is an appeal from a conviction for possession of a controlled substance with intent to distribute, a third degree felony, in violation of Utah Code Ann. § 58-37-8 (1998), in the Sixth Judicial District Court in and for Kane County, State of Utah, the Honorable David L. Mower, presiding. This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(e) (1997).

**STATEMENT OF THE ISSUES ON APPEAL AND  
STANDARDS OF APPELLATE REVIEW**

1. Should this Court summarily dismiss an appeal which fails to challenge the legal basis of the trial court's ruling? State v. Rodriguez, 841 P.2d 1228, 1229 (Utah App. 1992) (failure to challenge a trial court's ruling on appeal establishes the court's ruling as the law of the case, precluding further judicial review of the matter).

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The following determinative statutes and rules are set out in Addendum A:

Utah Code Ann. § 41-1a-1303 (Supp. 1998);

Utah Code Ann. § 41-3-105 (Supp. 1998).

### STATEMENT OF THE CASE

Defendant, Rogelio Mora Virgen, was charged with possession of a controlled substance (marijuana) with intent to distribute (Count I), operating a motor vehicle without owner's or operator's security (Count II), no vehicle registration (Count III), and exceeding the maximum speed limit (Count IV) (R. 5-7). Prior to trial, defendant moved to suppress evidence seized from his car (R. 22). Following an evidentiary hearing, the trial court denied the motion (R. 46-47, Order Denying Motion to Suppress, R. 50-51, attached at Addendum B). Thereafter, defendant entered a conditional plea of guilty on Count I, a third degree felony, reserving his right to appeal the trial court's denial of his motion to suppress, and the trial court dismissed the other counts (R. 73-78). The trial court sentenced defendant to a statutory zero-to-five term in the Utah State Prison, suspending the term but ordering defendant serve twelve months in the Kane County Jail (R. 91-92).<sup>1</sup>

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<sup>1</sup> Following its acceptance of defendant's conditional plea, the trial court, on January 6, 1998, released defendant on bail and held sentencing in abeyance until a ruling issued on defendant's earlier-filed request for interlocutory appeal (R. 70). Defendant did not proceed with an interlocutory appeal (R. 81). Instead, defendant filed a timely notice of appeal, and thereafter his opening brief, all before he was sentenced. This Court granted the State's motion to stay filing of the State's responsive

## STATEMENT OF FACTS

On May 5, 1996, Utah Highway Patrol Trooper Russell Whitaker observed defendant driving a pickup truck eastward on State Highway 89, east of Kanab, and pulled defendant's pickup and another vehicle over for driving at 69 miles per hour in a 55 mile per hour zone (R. 85:4, 9-10, 14). Defendant exited the car and met Trooper Whitaker near the rear of the pickup truck, where he gave the trooper his license and the vehicle registration papers (R. 85:14; Video Tape, "VT." at 18:04:55).

At the trooper's request, defendant got into the patrol car (VT. 18:08:38). In response to the trooper's questioning, defendant stated that he had moved to Flagstaff, Arizona about six months before, and was driving towards Salt Lake to visit his family for about a week for his sister's wedding (VT. 18:08:49-09:06, 09:45). While Trooper Whitaker examined defendant's papers, defendant stated he was in the auto body business and that, as with the truck he was then driving, he would buy, repair, and then sell vehicles (VT. 18:10:00-11:14). Defendant claimed that he had owned the truck for about a month, but the title papers indicated that the original owner had transferred title the previous November (VT. 18:10:20, 11:02-10, 12:25-51). Defendant then stated that he assumed he had not purchased the pickup from the original owner (VT. 18:11:10-14). When questioned again about the timing of the sale, defendant again

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brief until defendant was sentenced. Defendant was sentenced on March 5, 1999 (R. 91-92).

insisted that he had the pickup only for about a month, but now stated that the owner had repossessed the pickup from another purchaser and then sold it to him (VT. 18:12:55-13:30).

At this point in the interview, Trooper Whitaker learned through dispatch that defendant had a valid license, but that the pickup was currently registered to Aden Sandoval of Buckeye, Arizona (R. 85:14; VT. 18:13:30-59). Trooper Whitaker then asked defendant to retrieve insurance information from the pickup while he went to attend to the other vehicle that he had pulled over (VT. 18:14:35-15:45). The insurance papers showed that the pickup was also not insured in defendant's name (VT. 18:15:42-16:01). Defendant asserted that the car was not stolen (VT. 18:15:56). A moment later dispatch informed Trooper Whitaker that there was no listing for the registered owner's name or address and that defendant had been arrested in 1990 for robbery and attempted robbery (VT. 18:16:50-17:30). Defendant denied the arrest, stating that it had been a mistake and that he had been released (VT. 17:30-18:20).

In response to Trooper Whitaker's further questioning, defendant provided his address, but did not know the zip code of his Arizona residence (VT. 18:19:00-20:20). As defendant searched for his zip code, Trooper Whitaker audibly observed that defendant was nervous, shaking, tapping the dashboard, rocking back and forth in the seat, and sweating (R. 85:15; VT. 18:20:20-21:37). Defendant claimed that although having a residence for six months, he did not have a home telephone (VT. 18:21:26-

36). In response to further inquiry, defendant gave the trooper the name and telephone number of his employer, F and F Machine and Engine (VT. 18:21:40-58). Dispatch was unable to locate a listing for that business in Flagstaff, Arizona (VT. 18:22:45-25:10). Defendant also acknowledged that no one would likely answer the phone if a car were made at that time (VT. 18:25:30-59). In response to further inquiry, defendant claimed that there were no drugs, alcohol or guns in the pickup (VT. 18:26:18-25). When Trooper Whitaker asked if he could look in the pickup, defendant refused (VT. 18:26:25-30). Trooper Whitaker then explained that there were a number of things that were not adding up, to wit: defendant was allegedly traveling from Flagstaff to attend a family wedding near Salt Lake City during which time defendant might be away for a week, but there was no luggage in the pickup, that the pickup neither belonged nor was registered to defendant, that defendant started sweating when asked simple questions about his zip code and telephone numbers, that defendant was giving him shady answers, that defendant was even sweating more at that very moment, and therefore, Trooper Whitaker believed there were drugs in the pickup (VT. 18:26:30-27:20).<sup>2</sup> Acknowledging that defendant was denying him permission to look in the car, Trooper Whitaker radioed for assistance, informed defendant that he was

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<sup>2</sup> At the suppression hearing, Trooper Whitaker also indicated additional bases for his suspicions were defendant's northbound travel along Highway 89, a known drug route, and that defendant had neither any luggage or personal hygiene accessories for a trip that might last a week (R. 85:15-16).

holding him, and read him his Miranda rights, which defendant acknowledged he understood (VT. 18:27:20-28:27). Asked if he would waive his Miranda rights, defendant responded that it would depend on the question (VT. 18:28:28-35).

Approximately ten minutes later Sergeant Roger Cutler arrived on the scene (R. 85:17; VT. 18:38:14). Sergeant Cutler explained to defendant that because registration for the pickup was not in his name and they were unable to locate the registered owner, they were concerned that the car might be stolen and would have to be impounded. When defendant responded that he had title to the car, Sergeant Cutler explained to defendant that the title was also defective (VT. 18:43:45-46:00).

Under the direction of Sergeant Cutler, Trooper Whitaker called for an impound wrecker and retrieved an inventory form (VT. 18:46:45-47:40). Sergeant Cutler, with defendant listening, then directed Trooper Whitaker to arrest defendant for no valid insurance security or registration, to have defendant post a \$300.00 bond to cover the fine for the invalid registration, and to proceed with the inventory (VT. 18:48:57-49:38). Trooper Whitaker then handcuffed defendant, informing him of the basis for the arrest (VT. 18:49:33-59). Sergeant Cutler approached defendant and further explained to defendant that he was being arrested because he had no proof (1) that he owned the pickup, (2) that he had been authorized to drive the pickup, and (3) that there was any insurance on the pickup. In light of these circumstances, the troopers explained that they could not let defendant go (VT. 18:50:04-52:10). At about this

time, Trooper Whitaker discovered a title certificate to another vehicle which defendant claimed to own which was similarly signed without notarization or a date (VT. 18:51:30-40). Sergeant Cutler then restated to defendant what correctly completed title documents would contain and indicated that anyone could steal a vehicle but be in possession of documents such as defendant presented, all of which compelled the troopers to get to the bottom of the matter (VT. 18:51:45-52:10).

Upon the arrival of Deputy Dan Watson of the Kane County Sheriff's Department, Sergeant Cutler directed an immediate inventory (R. 85:17; VT. 18:52:51-53:07). Defendant again refused the troopers' permission to search the pickup, but Sergeant Cutler reminded defendant that his permission was unnecessary since he was now under arrest (VT. 18:53:36-40). When Sergeant Cutler asked defendant if there was anything of value in the pickup, defendant began to walk away, and Trooper Whitaker then strapped defendant into his patrol car (VT. 18:53:54-54:15). Trooper Whitaker then began a search of the car while Sergeant Cutler recorded the findings on the inventory report form (VT. 18:54:32). A few minutes of into the inventory, Trooper Whitaker found behind the passenger seat twenty-eight pounds of marijuana, packaged in approximately eight separately plastic-wrapped parcels, and informed defendant that he was additionally charged with possession of marijuana with intent to distribute (R. 85:4; VT. 18:54:32-19:04:30).

## SUMMARY OF ARGUMENT

**POINT I** - On appeal, defendant challenges the inventory search as a pretext for an investigatory search for controlled substances. However, the basis for the trial court's denial of defendant's motion to suppress was that the discovery of twenty-eight pounds of marijuana in defendant's pickup truck was the result of a legal search incident to arrest for lack of proper vehicle registration. Because defendant has not challenged the basis of the trial court's ruling, the ruling stands as the law of the case not subject to further challenge, and defendant's appeal should therefore be summarily dismissed.

## ARGUMENT

### POINT I

#### **BECAUSE DEFENDANT HAS FAILED TO CHALLENGE THE BASIS OF THE TRIAL COURT'S RULING, THIS COURT SHOULD SUMMARILY DISMISS THE APPEAL.**

It is well established that Utah appellate courts will not generally consider a claim that has not been briefed on appeal. State v. Sterger, 808 P.2d 122, 124 (Utah App. 1991) (declining to address a state constitutional challenge to a search where defendant had failed had failed to brief or argue state constitutional guarantees at either the pretrial hearing or on appeal). Further, failure to challenge a trial court's ruling on appeal establishes the court's ruling as the law of the case, precluding further judicial review of the matter. State v. Rodriguez, 841 P.2d 1228, 1229 (Utah App. 1992) (citing Tracy v. University of Utah Hosp., 619 P.2d 340, 341 (Utah App. 1980))

("Where . . . any other final ruling or order of the trial court, goes unchallenged by appeal, such becomes the law of the case, and is not thereafter subject to later challenge."). See also State v. Ellis, 356 Utah Adv. Rep. 9, 9-10 (Utah App. 1998) (appellate court bound by earlier decision under law of the case doctrine).

Defendant attacks the trial court's denial of his suppression motion on the grounds that Trooper Whitaker's inventory search was actually a pretext for an investigatory search to uncover controlled substances. Br. of App. at 5-14. However, the stated grounds of the trial court's ruling is that the search was incident to a lawful arrest for lack of valid registration (Findings of Fact and Conclusions of Law, "Findings," R. 54, attached at Addendum B). Further, defendant's trial counsel conceded at the suppression hearing that defendant was lawfully arrested for lack of proper registration (R. 85:22-23, 25) and approved the findings as to form (R. 53).<sup>3</sup> At

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<sup>3</sup> On appeal, defendant again does not dispute the legality of the arrest for lack of valid registration, which was fully justified by the motor vehicle code. Defendant was cited for, among other reasons, lack of valid registration (R. 6), pursuant to Utah Code Ann. § 41-1a-1303 (Supp. 1998), which provides in pertinent part:

- (1) [I]t is a class C misdemeanor for a person to drive or move, or for an owner knowingly to permit to be driven or moved upon any highway any vehicle of a type required to be registered in this state:
  - (a) that is not registered or for which a certificate of title has not been issued or applied for; or
  - (b) for which the required fee has not been paid.

There is no dispute that, based on defendant's assertion of ownership and possession of defective title and registration in the name of another individual, that citation under this section was proper. Based on these facts, defendant's arrest was required pursuant to Utah Code Ann. § 41-3-105(8)(a) (Supp. 1998) ("[P]eace officers *shall make arrests* upon view and without warrant for any violation committed in their presence of any of

no point in his brief does defendant claim that the court's findings are erroneous or that its conclusion that "Trooper Whitaker and his fellow officers validly searched the defendant's vehicle as a search incident to a lawful arrest" (R. 54), was incorrect. Therefore, because defendant's failure to brief any claim of error in the trial court's ruling constitutes an abandonment of that claim, the trial court's ruling stands as the law of this case, entitled where unchallenged to a presumption of correctness, and defendant's appeal should be summarily dismissed.<sup>4</sup>

### CONCLUSION

Based on the foregoing discussion, the State respectfully requests that defendant's conviction be affirmed.

RESPECTFULLY SUBMITTED this 31<sup>st</sup> day of March, 1999.

JAN GRAHAM  
Attorney General



KENNETH A. BRONSTON  
Assistant Attorney General

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the provisions of this chapter, or *Title 41, Chapter 1a, Motor Vehicle Act*) (emphasis added).

<sup>4</sup> At Point II of his brief, defendant claims that Trooper Whitaker lacked probable cause to search his pickup truck for controlled substances. Br. of App. at 15-19. However, because defendant has failed to challenge the trial court's ruling that the search was justified as incident to defendant's arrest for lack of valid registration, defendant's assertion of lack of probable cause to search is irrelevant to the outcome of this appeal.

**CERTIFICATE OF MAILING**

I hereby certify that two true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to Robert L. Booker and Christopher T. Beck, Booker and Associates, attorneys for defendant, New England Plaza, Suite 550, 349 South Second East, Salt Lake City, Utah 84111, this 31<sup>st</sup> day of March, 1999.

Kenneth A. Benton

## ADDENDA

## ADDENDUM A

**41-1a-1303. Driving without registration or certificate of title — Class B or C misdemeanor.**

(1) Except as provided in Subsection (3) or Section 41-1a-211, it is a class C misdemeanor for a person to drive or move, or for an owner knowingly to permit to be driven or moved upon any highway any vehicle of a type required to be registered in this state:

(a) that is not registered or for which a certificate of title has not been issued or applied for; or

(b) for which the required fee has not been paid.

(2) (a) Until September 30, 1997, and except as provided in Subsection (2)(b), a violation of Subsection 41-1a-202(3), related to registration of vehicles after establishing residency, has a minimum fine of \$200.

(b) A court may not dismiss an action brought for a violation of Subsection 41-1a-202(3) merely because the defendant has obtained the appropriate registration subsequent to violating the section. Until September 30, 1997, the court may, however, reduce the fine to \$50 if the violator presents evidence of current registration at the time of his hearing.

(3) (a) Beginning October 1, 1997, a violation of Subsection 41-1a-202(3), related to registration of vehicles after establishing residency, is a class B misdemeanor and except as provided in Subsection (3)(b), has a minimum fine of \$1000.

(b) A court may not dismiss an action brought for a violation of Subsection 41-1a-202(3) merely because the defendant has obtained the appropriate registration subsequent to violating the section. Beginning October 1, 1997, the court may, however, reduce the fine to \$200 if the violator presents evidence at the time of his hearing that:

(i) the vehicle is currently registered properly; and

(ii) the violation has not existed for more than one year.

**41-3-105. Administrator's powers and duties — Administrator and investigators to be law enforcement officers.**

(1) The administrator may make rules to carry out the purposes of this chapter and Sections 41-1a-1001 through 41-1a-1007 according to the procedures and requirements of Title 63, Chapter 46a, Utah Administrative Rulemaking Act.

(2) (a) The administrator may employ clerks, deputies, and assistants necessary to discharge the duties under this chapter and may designate the duties of those clerks, deputies, and assistants.

(b) The administrator, assistant administrator, and all investigators shall be law enforcement officers certified by peace officer standards and training as required by Section 53-13-103.

(3) (a) The administrator may investigate any suspected or alleged violation of:

(i) this chapter;

(ii) Title 41, Chapter 1a, Motor Vehicle Act;

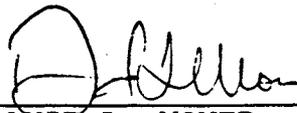
- (iii) any law concerning motor vehicle fraud; or
  - (iv) any rule made by the administrator.
- (b) The administrator may bring an action in the name of the state against any person to enjoin a violation found under Subsection (3)(a).
- (4) (a) The administrator may prescribe forms to be used for applications for licenses.
  - (b) The administrator may require information from the applicant concerning the applicant's fitness to be licensed.
  - (c) Each application for a license shall contain:
    - (i) if the applicant is an individual, the name and residence address of the applicant and the trade name, if any, under which he intends to conduct business;
    - (ii) if the applicant is a partnership, the name and residence address of each partner, whether limited or general, and the name under which the partnership business will be conducted;
    - (iii) if the applicant is a corporation, the name of the corporation, and the name and residence address of each of its principal officers and directors;
    - (iv) a complete description of the principal place of business, including:
      - (A) the municipality, with the street and number, if any;
      - (B) if located outside of any municipality, a general description so that the location can be determined; and
      - (C) any other places of business operated and maintained by the applicant in conjunction with the principal place of business; and
    - (v) if the application is for a new motor vehicle dealer's license, the name of each motor vehicle the applicant has been enfranchised to sell or exchange, the name and address of the manufacturer or distributor who has enfranchised the applicant, and the names and addresses of the individuals who will act as salespersons under authority of the license.
- (5) The administrator may adopt a seal with the words "Motor Vehicle Enforcement Administrator, State of Utah", to authenticate the acts of his office.
- (6) (a) The administrator may require that the licensee erect or post signs or devices on his principal place of business and any other sites, equipment, or locations operated and maintained by the licensee in conjunction with his business.
  - (b) The signs or devices shall state the licensee's name, principal place of business, type and number of licenses, and any other information that the administrator considers necessary to identify the licensee.
  - (c) The administrator may make rules in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, determining allowable size and shape of signs or devices, their lettering and other details, and their location.
- (7) (a) The administrator shall provide for quarterly meetings of the advisory board and may call special meetings.
  - (b) Notices of all meetings shall be mailed to each member at his last-known address not fewer than five days prior to the meeting.
- (8) The administrator, the officers and inspectors of the division designated by the commission, and peace officers shall:
  - (a) make arrests upon view and without warrant for any violation committed in their presence of any of the provisions of this chapter, or Title 41, Chapter 1a, Motor Vehicle Act;
  - (b) when on duty, upon reasonable belief that a motor vehicle, trailer, or semitrailer is being operated in violation of any provision of Title 41, Chapter 1a, Motor Vehicle Act, require the driver of the vehicle to stop, exhibit his driver's license and the registration card issued for the vehicle and submit to an inspection of the vehicle, the license plates, and registration card;
  - (c) serve all warrants relating to the enforcement of the laws regulating the operation of motor vehicles, trailers, and semitrailers;
  - (d) investigate traffic accidents and secure testimony of witnesses or persons involved; and
  - (e) investigate reported thefts of motor vehicles, trailers, and semitrail-

ADDENDUM B

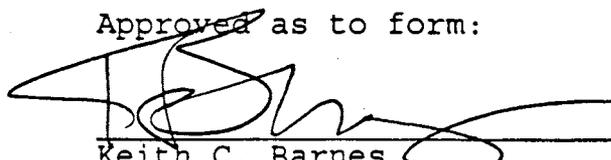


DECREED that Defendant's Motion to Suppress is denied.

DATED this 16 day of <sup>MAY</sup>~~April~~, 1997.

  
\_\_\_\_\_  
DAVID L. MOWER  
District Court Judge

Approved as to form:

  
\_\_\_\_\_  
Keith C. Barnes  
Counsel for Defendant

CERTIFICATE OF SERVICE

I certify that on the 19<sup>th</sup> day of May, 1997, I served a true and correct signed copy of the foregoing ORDER DENYING MOTION TO SUPPRESS to each person or entity listed below:

Keith C. Barnes  
THE PARK FIRM  
P.O. Box 765  
Cedar City, UT 84720

(via first class mail)

Maril P. Budd



### FINDINGS OF FACT

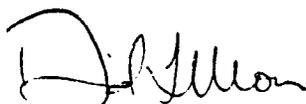
1. Trooper Russell K. Whitaker was a certified peace officer with the Utah Highway Patrol, patrolling on U.S. 89, on May 5, 1996, in Kane County, State of Utah.
2. Trooper Whitaker had certified radar equipment in his patrol vehicle, and he was certified to operate that radar equipment.
3. Defendant was the driver of a vehicle traveling on U.S. 89, on May 5, 1996, in Kane County, State of Utah.
4. Trooper Whitaker had his radar equipment activated on Defendant's vehicle. The radar equipment indicated that Defendant's vehicle was traveling at a speed of 69 miles per hour in a 55 mile per hour zone.
5. Trooper Whitaker stopped Defendant's vehicle at milepost 57. The Trooper approached the vehicle and asked Defendant for his driver license and registration.
6. Trooper Whitaker transmitted Defendant's license and registration information to the Kane County Sheriff's Office dispatch.
7. Information came back to Trooper Whitaker from dispatch that the vehicle driven by Defendant was not registered, insured or titled in Defendant's name.
8. Defendant gave unverifiable answers to Trooper Whitaker regarding Defendant's place of employment and phone number.

9. Trooper Whitaker arrested Defendant for no registration, no insurance, and speeding.
10. Trooper Whitaker searched the interior of Defendant's vehicle.
11. Trooper Whitaker was joined in the search by Detective Dan Watson of the Kane County Sheriff's Office, and Roger Cutler, Utah Highway Patrol Sergeant.
12. In the course of the search, officers found 28.37 pounds of marijuana located behind the passenger seat.

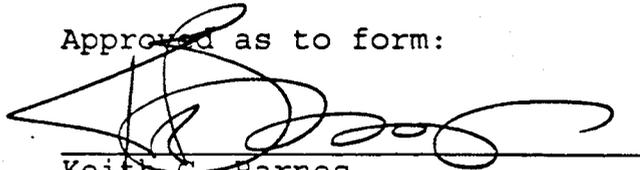
CONCLUSIONS OF LAW

1. The initial stop of Defendant's vehicle for speeding, 69 miles per hour in a 55 mile per hour zone, was valid.
2. The arrest of the Defendant for driving a vehicle that was neither registered in Defendant's name nor insured was also valid.
3. Trooper Whitaker and his fellow officers validly searched the defendant's vehicle as a search incident to lawful arrest.

DATED this 16 day of <sup>MAY</sup>~~April~~, 1997.

  
\_\_\_\_\_  
DAVID L. MOWER  
District Court Judge

Approved as to form:

A handwritten signature in black ink, appearing to read 'Keith C. Barnes', written over a horizontal line.

Keith C. Barnes  
Counsel for Defendant

CERTIFICATE OF SERVICE

I certify that on the 19<sup>th</sup> day of May, 1997, I served a true and correct signed copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW to each person or entity listed below:

Keith C. Barnes  
THE PARK FIRM  
P.O. Box 765  
Cedar City, UT 84720

(via first class mail)

Maribel P. Sudd