1998

State of Utah v. Frederick P. Padgett : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	**Case No. 981286-CA**
vs.	:	
FREDERICK P. PADGETT,	:	**Priority No. 2**
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM CONVICTION OF TWO COUNTS OF POSSESSION OF A CONTROLLED SUBSTANCE AND ONE COUNT OF POSSESSION OF DRUG PARAPHERNALIA IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR WASHINGTON COUNTY, UTAH, HONORABLE JUDGE JAMES L. SHUMATE PRESIDING

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF THE CASE

Defendant appeals his convictions for two counts of possession of a controlled substance and one count of possession of drug paraphernalia in the Fifth Judicial District Court in and for Washington County, Utah, Honorable Judge James L. Shumate presiding. This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3 (2) (1996).

ISSUE PRESENTED ON APPEAL AND STANDARD OF REVIEW

1. **Did the trial court properly deny defendant's motion to suppress evidence obtained as a result of a warrantless search based on its finding that defendant voluntarily stopped to talk to officers and consented to the search?**

"We review the trial court's denial of defendant's motion to suppress in a bifurcated manner, reviewing its subsidiary and factual determinations under a clearly erroneous standard and reviewing its legal conclusions for correctness." State v. Ribe,

876 P.2d 403, 405 (Utah App. 1994); see also State v. Pena, 869 P.2d 932, 935-40 (Utah 1994); State v. Thurman, 846 P.2d 1256, 1271 (Utah 1993). "The trial court's ultimate determination of the level of a police stop is a legal conclusion which we review for correctness." State v. Bean, 869 P.2d 984, 985 (Utah App. 1994).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

> 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.

U.S. Const. Amend. IV.

STATEMENT OF THE CASE

Defendant was charged on December 15, 1997 with one count of possession of a controlled substance (methamphetamine), a third-degree felony under Utah Code Ann. § 58-37-8 (2)(a)(i)(e) (1998); one count of possession of a controlled substance (marijuana), a Class-B misdemeanor under Utah Code Ann. § 58-37-8 (2)(a)(i)(e) (1998); and one count of possession of drug paraphernalia, a Class-B misdemeanor under Utah Code Ann. § 58-37a-5 (1998) (R.1-2). He filed a Motion to Suppress evidence found during a warrantless search of his person (R. 23-25). Following a hearing on April 27, 1998, the trial court denied the motion (R. 37, 66 at 36).

Defendant entered conditional guilty pleas on all three counts (R. 38-47). The trial court imposed a zero-to-five-year prison sentence on the felony conviction, but stayed

imposition of sentence on the misdemeanors (R. 46, 67 at 15). The court ordered that defendant's prison term run concurrently with another sentence not at issue in this appeal (id.).

Defendant filed a timely notice of appeal (R. 48).

STATEMENT OF FACTS

Officers Gordon McCracken and Ron Isaacson were on bicycle patrol of shopping areas in St. George during the Christmas season of 1997 (R. 66 at 5). They were patrolling a strip of shops in the K-Mart plaza on December 12 when they saw defendant by a planter in front of Albertson's (R. 66 at 5-6). Defendant, who had apparently been sitting on the planter, had just gotten on his bicycle to ride off (R. 66 at 6).

McCracken thought he recognized defendant as an individual who had been arrested by other officers two or three weeks earlier for shoplifting at Lynn's Marketplace (id.). During a search incident to that arrest, officers found defendant in possession of "a lot of drugs and a knife" (id.), or "drugs, paraphernalia, and a couple of knives" (R.66 at 9). McCracken pointed defendant out to Isaacson and told Isaacson he believed that defendant was the individual arrested at Lynn's (R. 66 at 6, 23). As McCracken later explained, "I had the prior knowledge of his criminal background. He was by another supermarket. I decided to initiate a Level 1 contact[1] to see how he was doing and if he

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[1]Utah's appellate courts recognize three levels of police-citizen encounters:
(1) An officer may approach a citizen at any time and pose

had any warrants from the earlier arrest" (R. 66 at 10). Although the officer later acknowledged that he did not have reasonable suspicion, "I don't think I needed reasonable suspicions to make a Level 1 contact (R. 66 at 10-11, 13

McCracken said to Isaacson, "Let's go talk with him" (R. 66 at 6, 23-24).

Isaacson pedaled up alongside defendant, and said "Hi, how are you doing?" (R. 66 at 6, 8, 21-22, 24). Defendant and Isaacson brought their bikes to a halt (R. 66 at 8, 12, 22). Isaacson stopped to the right side and ahead of defendant, but not directly in front of him (R. 66 at 14, 22).

Defendant replied, "Fine" (R. 66 at 25).

"Where are you headed?" asked Isaacson (id.).

Defendant said he was heading toward the Santa Clara / Ivins area (id.).

"Gosh, isn't it cold to ride a bike that far?" asked Isaacson (id.).

"Yeah, it is pretty cold," defendant said. He began to explain that he rode that

---

> questions so long as the citizen is not detained against his 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 had been committed or is being committed.

State v. Johnson, 805 P.2d 761, 763 (Utah 1991).

distance all the time (id.).

By that point, McCracken had joined his partner and defendant, having arrived two to five seconds after Isaacson initiated contact (R. 66 at 6). McCracken stood behind defendant on defendant's left side (R. 66 at 14, 22). Defendant's direction of travel was not impeded (R. 66 at 14, 22).

McCracken asked defendant's name "because I wanted to put all my ducks in a row and make sure that I was not getting him confused with another subject that was described as he was on a bicycle" (R. 66 at 9). Defendant replied "Frederick Padgett" (id.). McCracken put defendant's name and date of birth into his computer "to check and see if he had any warrants or anything like that for his arrest" (id.). McCracken then asked defendant if he was the same individual arrested for shoplifting at Lynn's Marketplace (id.). Defendant admitted that he was (id.).

McCracken asked if defendant was in possession of any drugs, and defendant said he was not (id.). McCracken asked him "if he would mind if I checked for myself, and he said that he did not mind and granted consent . . . ." (R. 66 at 10).

"Right off the bat in his right front jacket pocket," McCracken found a disposable lighter that had been modified to store drugs (R. 66 at 11). The lighter contained marijuana wrapped in cellophane (id.). Defendant was placed under arrest (id.).

Defendant subsequently moved to suppress the contraband found during the search (R. 23). The trial judge denied the motion, finding that defendant stopped to talk to the

officers voluntarily:

> Mr. Padgett has the same right that you or I would have had under the same circumstances to continue on. He has no obligation to talk to the officers. Common courtesy would at least have elicited a response from Mr. Padgett, but the law does not demand common courtesy. Mr. Padgett could have kept on going and continued on.
>
> And the officers, if they had stopped him, commanded him to do so at that point without any other facts or circumstances, probably would have tainted everything that happened. But that's not what happened here. Mr. Padgett voluntarily stopped, and the officers engaged him in conversation, and he engaged them in conversation. He could have remained absolutely silent, did not have to respond to any request for search or anything else, but he did.
>
> And I see no illegality on the part of the officers' conduct. Their contact with him was a Level 1 stop specifically directed at finding out if this person was the same man who had been reported to Officer McCracken as Frederick Padgett who had been arrested at Lynn's some three weeks before.
>
> Mr. Padgett did not have to respond or stop or anything else, but he did. And I find that he did so voluntarily. I do not see any coercive action on the part of these officers there at that scene that would indicate to me that they acted with excessive use of their authority under the circumstances.

(R. 66 at 35-36, Addendum A). In its Findings of Fact, Conclusions of Law and Order issued May 29, 1998, the court found that defendant consented to the search, and concluded that "the stop and search were permissible because of the Defendant's consent" (R. 50, Addendum B).

SUMMARY OF ARGUMENT

The trial court correctly determined that defendant voluntarily stopped to talk to the officers. Therefore, defendant was not detained against his will, and no seizure

occurred. The Fourth Amendment allows officers to approach individuals and ask them questions, and does not require that officers have reasonable suspicion or any other justification for doing so. Additionally, as the trial court found, the officers did not engage in any show of authority either to force defendant to remain or to gain defendant's consent to the search. The brief encounter occurred in a public place, all parties were on bicycles, defendant stopped without being requested to do so, and the officers engaged defendant in polite conversation prior to asking him his identity and whether he would mind if they searched him. Under the totality of the circumstances, a reasonable person would have understood that he was free to either leave or to decline the officers' requests.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY FOUND THAT DEFENDANT WAS NOT SEIZED SIMPLY BECAUSE OFFICERS APPROACHED HIM, ENGAGED HIM IN CASUAL CONVERSATION, AND THEN RECEIVED HIS CONSENT TO SEARCH HIS PERSON

Defendant asserts that the trial court erred in finding that defendant was not seized when the officers approached him and engaged him in conversation. Appellant's Brief at 4-10. Defendant correctly acknowledges that not every encounter between law enforcement and private individuals amounts to a seizure. Appellant's Brief at 4; see also Florida v. Bostick, 501 U.S. 429, 437 (1991). However, he asserts that here a seizure took place because a reasonable person in his circumstances would not have felt free to

leave. Appellant's Brief at 8.

"A person is seized under the Fourth Amendment when, considering the totality of the circumstances, the police conduct would have communicated to a reasonable person that the person was not free to decline the officer's requests or otherwise terminate the encounter and go about his or her business." State v. Higgins, 884 P.2d 1242, 1244 (Utah 1994) (citing United States v. Mendenhall, 446 U.S. 544, 554 (1980)). "[A] seizure occurs where an officer by show of authority or physical force in some way restricts the liberty of an individual." State v. Carter, 812 P.2d 460, 463 (Utah App. 1991) (citing State v. Trujillo, 739 P.2d 85, 87 (Utah App. 1987)), cert. denied, 836 P.2d 1383 (Utah 1992). "[I]nterrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure. . . . Unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment." I.N.S. v. Delgado, 466 U.S. 210, 216 (1984). See State v. Deitman, 739 P.2d 616, 618 (Utah 1987) (level one encounter where, at officer's request, defendant crossed street to officer's vehicle and provided identification); Salt Lake City v. Smoot, 921 P.2d 1003, 1005-06 (Utah App.) (consensual encounter occurred where defendant left nightclub to talk to officers, provided identification, and answered officer's questions), cert. denied, 925 P.2d 963 (Utah 1996).

Contrary to defendant's assertions, police officers do not require reasonable suspicion or other justification to approach citizens and engage in consensual questioning of them. Appellant's Brief at 4, 7. "We have stated that even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual, ask to examine the individual's identification, and request consent to search his or her luggage -- as long as the police do not convey a message that compliance is required." Florida v. Bostick, 501 U.S. at 434-35. "[T]he proposition that police officers can approach individuals as to whom they have no reasonable suspicion and ask them potentially incriminating questions . . . has been endorsed by the Court any number of times." Id. at 439. Accord State v. Bean, 869 P.2d 984, 985, 987 (Utah App. 1994) (level one encounter where officer approached the defendant, asked defendant what he was doing, and requested defendant's identification).

The police enjoy the same right as any other citizens to address questions to other persons, so long as the circumstances do not indicate that compliance is required. Mendenhall, 446 U.S. at 553 (citation omitted). Indeed, the United States Supreme Court has acknowledged that the effectiveness of law enforcement agents would be hampered if officers were not free to question citizens. "[C]haracterizing every street encounter between a citizen and the police as a 'seizure,' while not enhancing any interest secured by the Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices. The Court has . . . referred to the

acknowledged need for police questioning as a tool in the effective enforcement of the criminal laws." Mendenhall, 446 U.S. at 554. Defendant incorrectly suggests that the officers' subjective intentions are relevant to the determination of whether defendant was seized during the officers' questioning of him, implying that the officers had more in mind than – as the trial court found – simply confirming his identity (R. 66 at 26-27, 36). Appellant's Brief at 7, 8. Defendant asserts that in deciding whether an unlawful detention took place, this Court should take into account the fact that defendant "had just been released from jail when yet another set of officers in uniform and armed approached him and asked him questions concerning his identity and his prior case." Appellant's Brief at 8. However, the reasonable person standard articulated in Mendenhall, Bostick, Higgins, Carter, Trujillo, and other cases is an objective standard whose application does not vary with either the subjective intentions of the officers or the individual perspective or sensitivities of the subject involved. See, e.g., Whren v. United States, 517 U.S. 806, 813 (1996) ("the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, whatever the subjective intent"); Florida v. Bostick, 501 U.S. at 438 ("the 'reasonable person' test presupposes an *innocent* person. . . . The fact that respondent knew the search was likely to turn up contraband is of course irrelevant; the potential intrusiveness of the officers' conduct must be judged from the viewpoint of an innocent person in [respondent's] position.") (emphasis in original, citations and internal quotation marks itted); Michigan v. Chesternut, 486 U.S. 567, 574

(1988) (reasonable person standard "ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached"); U.S. v. Mendenhall, 446 U.S. at 554 n. 6 (1980) ("the subjective intention [of the officer] is irrelevant except insofar as that may have been conveyed to the respondent"). Therefore, in determining whether a reasonable person would have believed he was seized under the circumstances, neither the officers' subjective intentions nor defendant's individual mental state is relevant.

"Examples of circumstances that might indicate a seizure . . . would be [1] the threatening presence of several uniformed officers; [2] the display of a weapon by an officer; [3] some physical touching of the person of the citizen; or [4] the use of language or tone of voice indicating that compliance with the officer's request might be compelled."[2] Mendenhall, 446 U.S. 554-555, see also State v. Patefield, 927 P.2d 655, 658 (Utah App. 1996); State v. Carter, 812 P.2d at 463. "In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person." Mendenhall, 446 U.S. at 555.

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[2]"Other courts have looked to additional factors in evaluating the nature of an encounter. These factors include the length of an interview, blocking an individual's path, retaining an individual's travel ticket, the removal of the defendant to a private area, statements by police that an investigation has focused on the individual, or searching the defendant's belongings or person." State v. Carter, 812 P.2d at 463 (citation omitted). None of these factors is present here except that the officers subsequently searched defendant. However, the search was pursuant to defendant's voluntary consent.

None of the factors articulated in Mendenhall was present during the officers' encounter with defendant. Although the officers were both in uniform, nothing in the record indicates that the two officers on bicycle patrol would have been perceived as threatening to a reasonable person. The record demonstrates that the officers did not draw or otherwise "display" any weapons, and did not touch defendant or speak threateningly to him. On the contrary, Officer Isaacson engaged defendant in cycling-related chitchat prior to Officer McCracken's questions about his identity and request to search. The questions posed to defendant were phrased not as demands, but as polite requests. Defendant was not asked to stop his bicycle, but stopped of his own volition after Officer Isaacson rode up. In short, the record amply supports the trial court's findings that the officers did nothing to coerce defendant's cooperation, and that his participation in the encounter was voluntary (R.50, 66 at 36-37). The officers did not engage in any show of authority, and the circumstances would not have intimidated a reasonable person. Accord Chesternut, 486 U.S. at 575-76 (no seizure where police accelerated patrol car to catch up with fleeing suspect and drove alongside him, but did not activate siren, command suspect to halt, display weapons, or block suspect's course; police conduct "not 'so intimidating' that respondent could reasonably have believed that he was not free to disregard the police presence and go about his business").

Defendant admits that the officers did not block his path, but states that because the officers positioned themselves for officer safety reasons on either side of defendant,

with one officer to the front of defendant and the other to the rear, a reasonable person would not have felt free to leave. Appellant's Brief at 8. Although the officers were motivated by safety concerns in positioning themselves (R. 14),[3] the record does not indicate that the officers assumed any aggressive or defensive postures that would have intimidated or restricted a reasonable person. Since the officers' subjective concerns were not communicated to defendant, a reasonable person in defendant's shoes would not have attached any significance to the officers' positions. See Mendenhall, 446 U.S. at 555 n. 6 (D.E.A. agent's subjective intentions irrelevant except insofar as they may have been conveyed to defendant).

Defendant's contention that the warrants check was an intrusion on defendant's liberty is similarly void of record support. Appellant's Brief at 6. As argued above, defendant was not detained during the warrants check. In addition, the record does not reflect that the warrants check added any time at all to the conversation.[4] Cf. State v. Chapman, 921 P.2d 446, 452-52 (Utah 1995) (officer's conducting a warrants check during lawful detention does not violate the Fourth Amendment, so long as it does not significantly extend the period of detention) (citing State v. Lopez, 873 P.2d 1127,

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[3]The officers knew that defendant was found to be in possession of a knife following his prior arrest for shoplifting (R. 66 at 6,9).

[4]It appears that the officer typed defendant's name into his computer during the parties' conversation, and there is no indication that the warrant check was even completed prior to defendant consenting to the search.

1133(Utah 1994)).

Defendant cites State v. Carter , 812 P.2d 460 (Utah App. 1991), cert. denied, 836 P.2d 1383 (Utah 1992), as support for his contention that he was seized "at least at the time the officers requested that he allow a search of his person." Appellant's Brief at 10, 12. However, the facts in this case are quite different from the facts in Carter. In Carter, the defendant was putting his luggage into a taxi at the airport when an officer came up to him, identified himself as an officer, and asked if defendant would talk with him. 812 P. 2d at 461-62. Carter consented, removed his bag from the taxi and accompanied the officer to a location outside the terminal about 20 feet away. Id. at 462. The officer asked to see Carter's plane ticket, and inspected it. Id. A second officer arrived as the first officer requested identification. Id. As Carter searched his bag for identification, the second officer noticed a line under his shirt. Id. The second officer identified himself as a narcotics officer and asked to search Carter's bag. Id. Carter agreed. Id. As the officer began to search the bag, the first officer asked Carter if he could search Carter's person. Id. This Court held that a seizure occurred "at least at the point where [the first officer] asked to conduct a pat-down search of defendant." Id. at 470.

Carter involved much stronger indications of detention than this case. First, the officers in this case did not approach defendant and ask to speak to him, curtail his departure, or take him to another location for questioning. Second, the officers in this case did not ask to examine any identification or other documents. Third, neither officer

in this case announced that he was working narcotics, or made any other statements that could have been interpreted by a reasonable person as indicating that an investigative net was tightening around him. Fourth, the encounter in this case was distinctly casual, involving Officer Isaacson and defendant engaging in innocuous small talk in a public place. Fifth, although the exact length of the encounter in this case is not specified in the record, its duration was obviously much shorter than the encounter in Carter.

This Court did not hold in Carter, as defendant seems to argue, that a mere request to search, by itself, transforms a consensual police-citizen encounter into a level two detention requiring reasonable suspicion. Instead, the Court simply recognized that by the point at which a pat-down search was requested of Carter, a reasonable person, in the face of focused, persistent, and escalating investigation, would not have felt free to disregard the officer's questions and go about his business. In this case, by contrast, a reasonable person would have.

In summary, the evidence supports the trial court's conclusion that the encounter between the officers and defendant was consensual, and did not amount to a level two seizure (R. 50, 66 at 36). Therefore, defendant's Fourth Amendment rights were not implicated. This Court should accordingly affirm the trial court's denial of defendant's motion to suppress.

A. Defendant's Claim that his Consent to the Officers' Search was "Not Lawfully Obtained" Was Neither Preserved Below nor Adequately Briefed on Appeal.

"While the tests for evaluating the voluntariness of consent to search and the nature of an encounter are similar and may overlap, they are not identical and merit separate consideration." State v. Carter, 812 P.2d at 465. Defendant has not maintained either at the trial level or on appeal that his consent to the officers' search was not voluntary. However, he claims that his consent was not lawfully obtained. Appellant's Brief at 12. He devotes two sentences to this claim, the second of which merely states that "[f]or the consent to be lawfully obtained the consent must be voluntary and the consent must not be obtained by police exploitation of the prior illegality." Id.

Defendant has waived any opportunity to contest the validity of his consent on appeal. A claim of error must be presented to the trial court in a timely and specific manner in order to preserve an issue for appeal. State v. Winward, 941 P.2d 627, 633 (Utah App. 1997); State v. Beltran-Felix, 922 P.2d 30, 33 (Utah App. 1996). "It is a well-established rule that a defendant who fails to bring an issue before the trail court is generally barred from raising it for the first time on appeal." State v. Irwin, 924 P.2d 5, 7 (Utah App. 1996), cert. denied 931 P.2d 186 (Utah 1997). Defendant has failed to present any grounds justifying departure from the usual rule that an issue not timely and specifically raised is waived on appeal.

Additionally, defendant has failed to adequately brief any claims that his consent was involuntary or that police exploited a prior illegality in obtaining it. Under rule 24(a)(9), Utah Rules of Appellate Procedure, a party to an appeal must provide an argument containing the "contentions and reasons of the [party] with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on." When a party fails to comply with this rule, Utah's appellate courts decline to address the issue raised because "a reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research." State v. Bishop, 753 P.2d 439, 450 (Utah 1988) (quoting Williamson v. Opsahl, 416 N.E.2d 783, 784 (1981)); see also Burns v. Summerhays, 927 P.2d 197, 199 (Utah App. 1996). "Utah courts routinely decline to consider inadequately briefed arguments." State v. Bryant, 965 P.2d 539, 549 (Utah App. 1998); see also State v. Wareham, 772 P.2d 960, 966 (Utah 1989) (declining to address argument on the ground that defendant's brief "wholly lacks legal analysis and authority to support his argument").

Although defendant's claim that his consent was unlawfully obtained was both waived and inadequately briefed, even if this Court were to reach the merits, the claim would fail. To determine the voluntariness of consent,

(1) There must be clear and positive testimony that the consent was

> "unequivocal and specific" and "freely and intelligently given"; (2) the government must prove consent was given without duress or coercion, express or implied; and (3) the courts indulge every reasonable presumption against the waiver of fundamental constitutional rights and there must be convincing evidence that such rights were waived.

State v. Ham, 910 P.2d 433, 439 (Utah App. 1996) (quoting State v. Carter, 812 P.2d at 467). As to the first factor, there is no evidence that defendant's consent was equivocal or vague, and in fact Officer McCracken testified that defendant stated unequivocally that "he did not mind" if the officer searched him (R. 66 at 10). As to the second factor, this Court, in determining whether consent was given without duress or coercion, considers

> (1) the absence of a claim of authority to search by the officers; 2) the absence of an exhibition of force by the officers; 3) a mere request to search; 4) cooperation by the [defendant]; and 5) the absence of deception or trick on the part of the officer.

State v. Carter, 812 P.2d at 467 (quoting State v. Whittenback, 621 P.2d 103, 106 (Utah 1980). All five factors are present in this case (R. 66 at 10-11), demonstrating that the trial court properly found that no coercion occurred (R. 66 at 36).

In short, under Carter and Ham, the trial court's conclusion that defendant's voluntarily consented to the search was correct (R. 35-36). And, although defendant states without analysis or argument that a consent to search must not be obtained by police exploitation of a prior illegality, there was no prior illegality in this case. Since no seizure (lawful or otherwise) occurred, defendant's consent to the search was not tainted by any prior illegality.

CONCLUSION

This Court should affirm defendant's convictions.

RESPECTFULLY SUBMITTED this 8th day of July, 1999.

JAN GRAHAM
ATTORNEY GENERAL

Catherine M. Johnson
CATHERINE M. JOHNSON
ASSISTANT ATTORNEY GENERAL

MAILING CERTIFICATE

I hereby certify that on this 8th day of July, 1999, I mailed, postage prepaid, two accurate copies of the foregoing Appellee's Brief to Kenneth L. Combs. Sherri Palmer & Associates, 285 W. Tabernacle, Suite 306, St. George, Utah 84770.

Catherine M. Johnson

ADDENDA

Addendum A

Q. Officer Isaacson, you said, "Hi," something to that effect.

What did you say before Officer McCracken came up?

A. I said, "Hi, how are you doing?"

He said, "Fine."

I said, "Where are you headed?"

And he said he was heading towards the Santa Clara/Ivins area.

And I remember it being cold, and I said, "Gosh, isn't it cold to ride a bike that far?"

And he said, "Yeah, it is pretty cold." And he began to tell me how he rides that distance all the time.

Q. Okay. And at this point Officer McCracken is still coming up?

A. He was there by the side, and he said, "Aren't you Fred Padgett?"

And he said, "Yes, I am."

MR. SHAUM: Thank you. No further questions.

THE COURT: Anything more?

MR. COMBS: No.

THE COURT: All right. Thank you, Mr. Isaacson. You can have a seat here in the courtroom.

Well, counsel, I can give you some findings

of fact at this point and then let you argue the law from there.

The facts, as the court sees them now, is that on the date in question, which is December 12 of 1997, Officer McCracken and Isaacson on bike patrol at the commercial center shopping area in St. George saw Mr. Padgett and his bicycle.

At that time, seeing Mr. Padgett and believing that Mr. Padgett was, in fact, Mr. Padgett who had been arrested some weeks before at the Lynn's store, Officer McCracken expressed a desire to contact Mr. Padgett and make sure this was the same person and to engage him in conversation.

The officers went in Mr. Padgett's direction. Officer Isaacson greeted him saying something along the lines of, "Hello," or, "Hi," or, "How are you doing?" or something like that.

And at that point Mr. Padgett brought his bicycle to a stop, Officer Isaacson brought his bicycle to a stop, and Officer McCracken arrived at that scene on the other side of Mr. Padgett at that location so that Mr. Padgett was between the two officers and their bicycles, Mr. Padgett and his bicycle.

At that location Mr. McCracken asked Mr. Padgett what his name was and if he was the same fellow

who had been arrested at Albertson's -- or at Lynn's market some weeks before.

Now, I think those are the facts that are pertinent to this inquiry. Everything that comes thereafter is a logical sequence of that initial encounter there where all three are stopped with their bicycles near the -- oh, shucks, I'm a Judge. I can call it -- it's the north door of Albertson's.

And Officer McCracken and I will go off in the country some day and discuss it.

But prior to that time that's where it took place, and I think that's what happened.

Now, legally where do we stand with the reasonable inquiry of the officer? Can it be made at that point, Mr. Combs? I guess you're arguing there is no reason to even engage in a Level 1 encounter with Mr. Padgett at all with the officer's intent to go talk with him. Constitutionally, they're not allowed to do so, certainly not allowed to go over and stop him, ask him to stop.

MR. COMBS: Yes, Your Honor.

THE COURT: Okay.

MR. COMBS: This is more of a Terry situation, if you ask me. And even Terry says that if a person is basically on foot, the officer needs

are bike patrol. They are on their bicycles. The same difference. They didn't have flashers. It wasn't Level 2 or anything else (inaudible).

I think the totality of the circumstances, a reasonable person, what they would believe, whether or not they were free to go -- and the officers, obviously, they thought he had drugs on him. And they kept on and kept on until they got a search of Mr. Padgett, and they found those drugs, and they arrested him. It wasn't a chance meeting.

Your Honor, I believe the stop and search was an illegal and the seizure was illegal.

THE COURT: Thank you, counsel.

Counsel, I find that Mr. Padgett's stop for the officers was voluntary. Mr. Padgett has the same right that you or I would have had under the same circumstances to continue on. He has no obligation to talk to the officers. Common courtesy would at least have elicited a response from Mr. Padgett, but the law does not demand common courtesy. Mr. Padgett could have kept on going and continued on.

And the officers, if they had stopped him, commanded him to do so at that point without any other facts or circumstances, probably would have tainted everything that happened. But that's not what happened

here. Mr. Padgett voluntarily stopped, and the officers engaged him in conversation, and he engaged them in conversation. He could have remained absolutely silent, did not have to respond to any request for search or anything else, but he did.

And I see no illegality on the part of the officers' conduct. Their contact with him was a Level 1 stop specifically directed at finding out if this person was the same man who had been reported to Officer McCracken as Frederick Padgett who had been arrested at Lynn's some three weeks before.

Mr. Padgett did not have to respond or stop or anything else, but he did. And I find that he did so voluntarily. I do not see any coercive action on the part of these officers there at that scene that would indicate to me that they acted with excessive use of their authority under the circumstances.

So the motion to suppress is overruled and denied, and the matter will be set for trial as quickly as we can.

Now, what should we do with Mr. Padgett's other case, the '1309 case, counsel? We have not had sentencing on that matter.

MR. SHAUM: Your Honor, the state is ready to proceed with that, if you want to do it today.

THE COURT: Mr. Combs, are you ready to proceed with sentencing on '1309?

MR. COMBS: May I have just a moment, your Honor?

THE COURT: Certainly, counsel.

MR. COMBS: Your Honor, I don't know if I have complete papers on the case we just heard. My client is inclined to do a conditional plea on the case we just heard, and I think the state's recommendation would be to run it concurrent with the other case.

THE COURT: Gentlemen, why don't we go ahead and continue both of these until 1:30 tomorrow afternoon and get that together? Let's get it done so that Mr. Padgett can get on with his life rather than hang around with us all the time and get this plea entered and take it up on appeal, if you need to, because the law is pretty unclear. Maybe we'll make some law, but let's learn about it. And we will put both on at 1:30 tomorrow afternoon.

MR. COMBS: Thank you, Judge.

THE COURT: All right. Thank you.

We're adjourned for the day.

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REPORTER'S CERTIFICATE

STATE OF UTAH)
: SS.
COUNTY OF UTAH)

I, Mel Power, do certify that I am a Certified Shorthand Reporter and Official Court Reporter in and for the State of Utah.

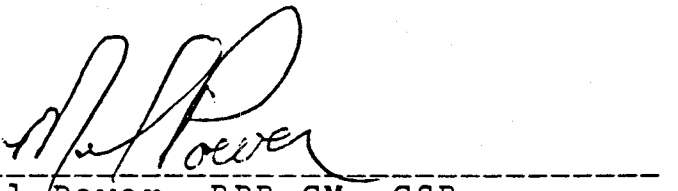
That as such reporter, I transcribed the videotape record of the proceedings of the above-entitled matter at the aforesaid time and place.

That the proceeding was transcribed by me in stenotype using computer-aided transcription consisting of pages 1 through 37 inclusive;

That the same constitutes a true and correct transcription of the said proceedings;

That I am not of kin or otherwise associated with any of the parties herein or their counsel, and that I am not interested in the events thereof.

WITNESS my hand at Provo, Utah, this 8th day of January, 1999.



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Addendum B

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IN THE FIFTH JUDICIAL DISTRICT COURT

WASHINGTON COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, v. FREDRICK POWELL PADGETT, Defendant.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Criminal No. 971501416 HONORABLE JAMES L. SHUMATE

FINDINGS OF FACT

This case came before the Court for a Hearing on the Defendant's Motion to Suppress, on April 27, 1998, the State was represented by Ryan J. Shaum, Deputy Washington County Attorney. The Defendant was present, and was represented by his attorney, Kenneth L. Combs. The Court, after hearing the testimony of the witnesses and the arguments of counsel, enters the following:

1. On December 12, 1997, in Washington County, Utah, St. George Police Officers observed the Defendant riding a bicycle at the K-Mart shopping center, in front of Albertsons Grocery, and Tom Tom Record Store.

2. Officers thought they recognized the Defendant from another incident involving the Defendant which had taken place a couple of weeks prior.

3. Officers were on bike patrol in the area, and approaching the Defendant they extended a greeting, as did the Defendant.

4. The Officer's intent was to initiate a level one voluntary contact. However, the Defendant stopped without being asked to do so.

5. Officer McCracken had prior knowledge that Defendant had been involved in illegal drug activity in the recent past.

6. Officer McCracken asked if he could search the Defendant, and the Defendant consented to the search.

7. Subsequently, marijuana, methamphetamine and paraphernalia were found on the Defendant's person.

CONCLUSIONS OF LAW

1. The Defendant has no standing to contest Officer McCracken's search of the Defendant. The stop was reasonable for a level one inquiry by Police Officers.

2. Even if the Defendant has standing, the stop and search were permissible because of the Defendant's consent.

3. Officers were acting within the scope of their authority.

ORDER

The Defendant's Motion to Suppress is over ruled and denied.

Dated the 29 of May, 1998.

HONORABLE JAMES L. SHUMATE
DISTRICT COURT JUDGE