

1998

# Utah v. Marvin Newell Green : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :  
Plaintiff/Appellant, : Priority No. 2  
v. :  
MARVIN NEWELL GREEN, : Case No. 981332-CA  
Defendant/Appellee. :

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*BRIEF OF APPELLANT*

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APPEAL FROM AN ORDER DISMISSING COUNTS  
OF POSSESSION OF COCAINE IN A DRUG FREE  
ZONE, AN ENHANCED SECOND DEGREE FELONY,  
AND POSSESSION OF PARAPHERNALIA IN A DRUG  
FREE ZONE, AN ENHANCED CLASS A  
MISDEMEANOR, IN THE FOURTH JUDICIAL  
DISTRICT, THE HONORABLE RAY M. HARDING,  
PRESIDING

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**FILED**  
Utah Court of Appeals

OCT 13 1998

Julia D'Alessandro  
Clerk of the Court

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### *BRIEF OF APPELLANT*

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#### JURISDICTION AND NATURE OF PROCEEDINGS

The State appeals a final order of dismissal in a prosecution for possession of cocaine in a drug free zone, an enhanced second degree felony, in violation of Utah Code Ann. §§ 58-37-8(2)(a)(i) and 58-37-8(5)(vi) (1996); and possession of paraphernalia in a drug free zone, an enhanced class A misdemeanor, in violation of Utah Code Ann. §§ 58-37a-5 and 58-37-8(5)(vi) (1996).

These counts were dismissed with prejudice pursuant to the trial court's order suppressing evidence which rendered the State unable to proceed. *See State v. Troyer*, 866 P.2d 528 (Utah 1993). The State's appeal is proper under Utah Code Ann. § 77-18a-1(2)(a) (1995 & Supp. 1998). This Court has jurisdiction of the appeal under Utah Code Ann. § 78-2a-3(2)(e) (1996).

## **ISSUES PRESENTED AND PRESERVED ON APPEAL, AND STANDARD OF REVIEW**

**1(a). Did the trial court err as a matter of law in finding that a level one, voluntary police-citizen contact was transformed into a level two seizure by the officer's requests to see defendant's identification and to run a warrants check?**

**(b). If not, did the trial court err as a matter of law in finding that the seizure was unsupported by reasonable suspicion of criminality?**

A "bifurcated" review standard applies to these issues. Underlying fact findings are reviewed deferentially, and reversed only for "clear error." The court's conclusions of law, however, are reviewed for correctness, allowing some "measure of discretion" as regards the application of legal standards to the facts. *See State v. Pena*, 869 P.2d 932, 935-40 (Utah 1994).

These issues were preserved below (R. 15-12), add. A; (R.38: 36-40); (R. 27-24), add. B.

## **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 with possession of cocaine in a drug free zone, an enhanced second degree felony, in violation of Utah Code Ann. §§ 58-37-8(2)(a)(i) and 58-37-8(5)(vi) (1996), possession of paraphernalia in a drug free zone, an enhanced class A misdemeanor, in violation of Utah Code Ann. §§ 58-37a-5(a) and 58-37-8(5)(vi) (1996) (R. 2-1).<sup>1</sup> Defendant moved to suppress evidence seized from his person and vehicle pursuant to a warrantless search incident to his arrest on outstanding warrants (R. 15-10) (copies of the motion and supporting memorandum are contained in addendum A). Following an evidentiary hearing (R. 38) (a copy of the transcript of the hearing held 2 April 1998, is attached as addendum B), the trial court granted defendant's motion (R. 27-24) (a copy of the Memorandum Decision is contained in addendum C). Because the State was unable to proceed without the suppressed evidence, the trial court dismissed with prejudice the above charges (R. 32-29). The State filed a timely notice of appeal (R. 34-33).

## **STATEMENT OF THE FACTS**

### **Investigation of Broken Window**

At approximately 10:30 p.m. on 3 January 1998, Officer Robert Edwards of the Springville Police Department investigated a broken window in Springville, Utah (R.

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<sup>1</sup>The record is numbered in reverse chronological order.

38:9), add. B.<sup>2</sup> Two blocks from the site of the recently shattered window, the officer saw defendant sitting alone in an older model Chevy which was parked in a church parking lot (R. 3: 3), add. B. The Chevy was parked approximately 100 yards from the church building "partway in the drive-through and partway [] into a stall[,] and approximately ten feet from the stall curb (R. 38: 5-7). No other cars were in the lot (R. 38: 5), add. B.

### **Voluntary Encounter**

Officer Edwards pulled to the right side of defendant's Chevy, leaving an approximate 20 to 25 foot distance between the two vehicles (R. 38: 7-8), add. B. In so doing, the officer did not activate his emergency or spot lights (*id.*). As Officer Edwards walked toward the Chevy he saw that the license plates had expired two years earlier (R. 38: 8-9, 19), add. B. He also noticed that defendant was "moving around a lot[:] He wasn't like sitting in one place. He would lean to one side or to the other. You could see his arms were moving" (*id.*).

Officer Edwards tapped on defendant's window which defendant slowly rolled down and the officer asked if he was okay (R. 38:9-10), add. B. Defendant did not respond for 45 to 60 seconds and then asked the officer if he was doing anything wrong (*id.*). Officer Edwards assured defendant that he was not, and that he was just checking to

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<sup>2</sup>A hearing on defendant's motion to suppress was held on 2 April 1998. The cover page of the suppression hearing transcript is numbered "38." The subsequent pages retain their original numbering. Therefore, pages of that transcript will be numbered in this brief as "R. 38: [internal page number]."

see if defendant was okay (*id.*). The officer also asked defendant if he had seen anyone come through the parking lot in the last few minutes (*id.*). Defendant delayed in answering and then replied that he was just listening to his radio (*id.*).<sup>3</sup>

**Defendant Consents to Officer's Requests for Identification  
and for Permission to Run a Warrants Check**

The officer also asked defendant if he had any identification (R. 38: 12), add. B. Defendant hesitated before answering "Yes," and then slowly reached for his wallet (*id.*). The officer observed that defendant had trouble retrieving his driver's license from the wallet and that once it was retrieved defendant had trouble "keeping hold of it" (*id.*). When defendant handed the license to Officer Edwards, the officer had to reach down into the car to take the license from him (*id.*). Officer Edwards asked defendant if he "minded" if the officer took defendant's license back to the patrol car "to check on a few things" (R. 38: 13), add. B. Defendant said, "Okay" (*id.*). A warrants and license check revealed two outstanding warrants for defendant, that the Chevy was registered to someone else, and also confirmed that the Chevy's registration had expired in 1995 (R. 38: 14, 20), add. B. Up until Officer Edwards discovered the outstanding warrants, defendant was free to walk away from the encounter and he was never told otherwise;

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<sup>3</sup>The record indicates that following defendant's non-responsive answer Officer Edwards repeated his question, but defendant's answer, if any, is not provided (*id.*).

however, if defendant had attempted to drive the Chevy away, Officer Edwards would have stopped him for the expired registration violation (R. 38: 29), add. B.

### **Search Incident-to-Arrest on Outstanding Warrants**

Defendant was arrested on the outstanding warrants and a search of his person and the Chevy incident to the arrest revealed controlled substances and paraphernalia (*id.*).

### **Reasonable Suspicion of Expired Registration and DUI**

Defendant's behavior throughout the voluntary encounter caused Officer Edwards to be concerned that he was impaired (*id.*). The officer did not consider defendant's responses to be "normal," because they were slow, non-responsive, and because defendant also failed to make eye contact (R. 38: 11, 28), add. B. Defendant looked in the car and at his feet, even when the officer asked him for his identification (R. 38: 12), add. B. Ultimately, Officer Edwards did not call for a drug recognition expert (DRE) because he arrested defendant on the outstanding warrants, and because another officer later arriving at the scene informed him that defendant lived in a community center for mentally disabled people, to which fact Officer Edwards then attributed defendant's abnormal behavior (R. 38: 30-32), add. B.

### **Motion to Suppress**

Defendant moved to suppress the evidence seized on two grounds. First, defendant claimed that he was unreasonably seized by the facts that the officer's patrol car allegedly "block[ed]" him in the church parking lot, the patrol car's headlights shined

on the Chevy, Officer Edwards was armed and in uniform, and finally, because the officer "interrogated" him (R. 13), add. A. Alternatively, defendant argued that even if the manner in which Officer Edwards approached him did not constitute a seizure, he was seized as a matter of law "the moment that Officer Edwards seized [his] identification and returned to his patrol vehicle to run a warrants check" (*id.*).

### **Ruling**

The trial court rejected defendant's first argument, disagreeing that defendant was seized at any time during the officer's initial approach and questioning (R. 26), add. C. Specifically, the trial court found that Officer Edwards's initial approach and inquiries clearly constituted a voluntary or level one encounter, that "defendant responded to the officer's questions voluntarily," and that there was "no indication that [d]efendant wasn't (sic) free to leave" (*id.*).<sup>4</sup>

However, the trial court accepted defendant's alternative argument, agreeing that defendant was seized as a matter of law when Officer Edwards "took possession" of defendant's license "and returned to his patrol car to run a warrants check" (R. 25), add. C. Even though defendant's behavior "raised some suspicion that defendant was under the influence of drugs or alcohol," the trial court found that the seizure was unsupported by reasonable suspicion because Officer Edwards "failed to administer a sobriety test or

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<sup>4</sup>*See State v. Deitman*, 739 P.2d 616 (Utah 1987).

take any other action to determine whether the abnormal responses were the result of drugs or alcohol use, or something else" (*id.*).

## **INTRODUCTION AND SUMMARY OF THE ARGUMENT**

The State does not dispute the trial court's findings and conclusions that the initial contact between Officer Edwards and defendant constituted a level one or a voluntary encounter which requires no Fourth Amendment justification.

Rather, at issue here is the trial court's conclusion that the voluntary and consensual encounter was somehow transformed into a level two detention or seizure when Officer Edwards's obtained defendant's identification and ran a warrants check. The trial court's conclusion is incorrect as a matter of law. In reaching this conclusion the trial court wholly failed to review the totality of the circumstances including the uncontradicted evidence of an on-going consensual encounter. As a consequence, the trial court's ruling is inconsistent with its sketchy findings, the undisputed testimony of Officer Edwards, and controlling authority from the United States Supreme Court, the Utah Supreme Court and this Court.

Even if Officer Edwards's requests for identification and for permission to run a warrants check transformed the consensual encounter into a seizure, the State further challenges the trial court's ruling that the seizure was unsupported by reasonable suspicion. At the time the officer obtained defendant's identification and ran the warrants

check he reasonably suspected defendant had been driving a vehicle with expired registration and might also be physically impaired.

Assuming the State prevails on either of the above grounds, defendant did not dispute below that the evidence against him was otherwise properly seized during a search incident to his arrest on the outstanding warrants. The Court should therefore reverse the trial court's order suppressing evidence and remand this case for trial.

## **ARGUMENT**

### **THE TRIAL COURT ERRED AS A MATTER OF LAW IN CONCLUDING THAT DEFENDANT WAS SEIZED FOR FOURTH AMENDMENT PURPOSES WHEN OFFICER EDWARDS REQUESTED HIS IDENTIFICATION AND PERMISSION TO RUN A WARRANTS CHECK**

#### **A. Consensual Encounter**

The critical issue in this case is whether the trial court erred as a matter of law in concluding defendant was seized for Fourth Amendment purposes when Officer Edwards obtained his identification and ran a warrants check (*see* R. 25), add. C. The trial court's erroneous conclusion is partially driven by its incomplete factual findings regarding the voluntariness of the police-citizen contact. While the trial court's factual findings are correct as far as they go, they overlook defendant's continuing consent to the officer's requests for identification and for permission to run the warrants check. The trial court's erroneous conclusion of seizure is further driven by its failure to consider the totality of the circumstances regarding the encounter, including the complete absence of any show

of authority or use of physical force on the part of Officer Edwards. As a consequence the trial court's determination of a seizure is inconsistent with, and unsupported by its sketchy factual findings, the uncontradicted evidence below, and controlling case authority. It therefore "exceeds established legal boundaries" and merits no measure of discretion. See *State v. Strausberg*, 895 P.2d 831, 835 n. 5 (Utah App. 1995); *State v. Teuscher*, 883 P.2d 922, 929 (Utah App. 1994) (both evaluating custody determinations and observing that such "fact sensitive" determinations by a trial court are accorded a "measure of discretion," unless the determination "exceeds established legal boundaries").

### **1. Seizure Standard**

"Not every encounter between a police officer and a citizen is a seizure" requiring justification under the Fourth Amendment. *State v. Higgins*, 884 P.2d 1242, 1244 (Utah 1994) (citing *Florida v. Bostick*, 501 U.S. 429, 437 (1991)). Indeed, Utah's appellate courts recognize three different levels of police-citizen contacts. *State v. Deitman*, 739 P.2d 616, 617 (Utah 1987); *State v. Bean*, 869 P.2d 984, 986 (Utah App. 1994). The first level is a voluntary encounter which requires no Fourth Amendment justification. *Bostick*, 501 U.S. at 437. A voluntary encounter occurs when an officer approaches and questions a suspect. *Deitman*, 739 P.2d at 617; *Bean*, 869 P.2d at 986. This questioning may even be incriminating and may also include a request for identification and for consent to search. *Bostick*, 501 U.S. at 435, 439. An officer may stop and so question an individual at any time so long as a "reasonable person would feel free 'to disregard the



police and go about his business.'" *Bostick*, 501 U.S. at 434 (quoting *California v. Hodari D.*, 499 U.S. 621, 628 (1991)). Such a voluntary "encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature." *Bostick*, 501 U.S. at 434.

The second level of police-citizen encounter is a temporary seizure which does require Fourth Amendment justification. *Deitman*, 739 P.2d at 617; *Bean*, 869 P.2d at 986. In order to legally effect a temporary seizure, the officer must have a reasonable suspicion that the suspect has committed or is about to commit a crime, and the detention must be limited in scope. *Id.*<sup>5</sup> "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." *Higgins*, 884 P.2d at 1244. *Accord Bostick*, 501 U.S. at 436. Relevant factors include an officer's use of physical force or show of authority for purposes of restraining in some way the liberty of the individual. *State v. Bean*, 869 P.2d 984, 986 (Utah App. 1994).

An objective assessment of this case shows that the trial court misapplied and/or ignored the above criteria in entering its factual findings and in concluding that defendant was seized any time prior to his arrest on the outstanding warrants.

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<sup>5</sup>The third level of police citizen encounter, arrest, must be supported by probable cause, *see Deitman*, 739 P.2d at 617-618, but is not at issue here.

## **2. Incomplete Factual Findings Drive Erroneous Determination of Seizure**

Here, the trial court found that "Officer Edwards asked [d]efendant for identification, and [d]efendant produced a driver's license" (R. 27), add. C. The trial court also found that the officer asked defendant for "permission to return to his patrol car to run a warrant check" (R. 25), add. C. As far as they go, these findings are correct, but they are also incomplete.

As set out in greater detail in the Statement of the Facts, defendant responded affirmatively to both the officer's requests for identification *and* for permission to "check on a few things" (*see* R. 38: 12-13), add. B. Additionally, Officer Edwards employed no physical force or other show of authority that would have conveyed the message to defendant that his compliance was required (*id.*). Indeed, to the extent defendant claimed otherwise with reference to the officer's initial approach and inquiries, the trial court rejected his argument (R. 26-25), add. C. In failing thereafter to acknowledge the officer's non-reliance on physical force or authority, and defendant's consensual behavior, the trial court's findings misrepresent the totality of Officer Edwards's uncontradicted testimony (*id.*). The trial court clearly accepted the officer's testimony, having entered no contrary finding (R. 27-24), add. C.

### 3. Seizure Determination Contrary to Controlling Authority

Not only is the trial court's seizure determination inconsistent with the undisputed facts of the continuing consensual nature of the encounter, it is unsupported by controlling authority. As emphasized in *Bostick*, a voluntary encounter does not "trigger" Fourth Amendment protections unless or until it loses its consensual nature. 501 U.S. at 434. As demonstrated above, the instant encounter never lost its consensual nature. In ruling otherwise, the trial court mistakenly relied upon *State v. Johnson*, 805 P.2d 761 (Utah 1991) and *State v. Godina-Luna*, 826 P.2d 652 (Utah App. 1992).

Both *Johnson* and *Godina-Luna* are immediately distinguishable from the instant facts on the ground that they involve traffic-stop scenarios. Therefore the police-citizen encounters in these cases began as level two detentions requiring Fourth Amendment justification from their inception. *Johnson*, 805 P.2d at 762; *Godina-Luna*, 826 P.2d at 653. Police in *Johnson* and *Godina-Luna* were thus required to justify with reasonable suspicion of criminality, any detention of the vehicles' occupants outside the initial traffic purposes for the stops. *Id.*

In *Johnson*, the supreme court found that Johnson, a passenger in the stopped vehicle, was unreasonably detained when the officer asked for her name and date of birth for purposes of running a warrants check because the officer lacked reasonable suspicion that the vehicle was stolen. 805 P.2d at 764.

In *Godina-Luna*, this court held that the defendants were unlawfully seized when, after satisfying himself that defendants were not intoxicated, the officer did not return the car registration and other papers, but continued to investigate criminal activity of which he had no reasonable suspicion. 826 P.2d at 655.<sup>6</sup> Notably, it was not the officer's running of a warrants check that *Godina-Luna* found objectionable, but rather the officer's posing of the question whether the defendants' had "any alcohol, firearms, or drugs in the vehicle[.]" 826 P.2d at 654.

Here, in contrast to *Johnson*, *Godina-Luna*, and every other traffic-stop case, the police-citizen encounter began as a voluntary encounter and continued as such until defendant was arrested on the outstanding warrants. Accordingly, Officer Edwards was not required to justify either his request for identification, *Bostick*, 501 U.S. at 435, or his request for permission to run a warrants check. See *People v. Bouser*, 32 Cal.Rptr.2d 163, 166 (Cal. App. 1994), *cert. denied*, 514 U.S. 1039 (1995) (commencing a warrants

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<sup>6</sup>Since *Johnson* and *Godina-Luna*, the Utah Supreme Court has clarified that in a traffic stop scenario, "running a warrants check during the course of a routine traffic stop does not violate the Fourth Amendment, so long as it does not significantly extend the period of detention beyond that reasonably necessary to request a driver's license and valid registration and to issue a citation." *State v. Lopez*, 873 P.2d 1127, 1133 (Utah 1994). See also *State v. Smoot*, 921 P.2d 1003, 1007 (Utah App.) (where police-citizen encounter was initially consensual, but was also supported by reasonable suspicion, it was unnecessary to determine when defendant was seized for Fourth Amendment purposes; rather, only question was whether detention for purposes of running a warrants check significantly extended the detention beyond that reasonably necessary to effectuate the purpose of the initial stop), *cert. denied*, 925 P.2d 963 (Utah 1996).

check on a suspect does not automatically convert a consensual encounter into a Fourth Amendment seizure); *State v. Soukharith*, 570 N.W.2d 344, 353 (Neb. 1997) (reasonable suspicion not required to run a warrants check where suspect was not seized within the meaning of the Fourth Amendment). *See also State v. Jackson*, 805 P.2d 765, 768 (Utah App. 1990) (recognizing that as a matter of law a request for identification cannot constitute a show of authority sufficient to convert an innocent encounter into a seizure), *cert. denied*, 815 P.2d 241 (Utah 1991). Defendant was free to decline either request and nothing in the officer's conduct suggested otherwise. *See Statement of the Facts, supra*.

In contrast to *Johnson*, *Godina-Luna* and other cases where the police-citizen encounter began as a level two detention, this case is more closely analogous to the consensual police-citizen contact upheld by the supreme court in *State v. Deitman*, 739 P.2d 616 (Utah 1987). The supreme court rejected the *Deitman* defendants' claims that they were seized without probable cause when an officer asked if he could speak to them, and also requested their identification upon which he ran a warrants check and uncovered outstanding warrants. 739 P.2d at 617-18. Instead, the supreme court found the police-citizen contact constituted a level one or voluntary encounter which required no Fourth Amendment justification. *Id.* In so ruling, the *Deitman* court found the officer's non-forceful conduct and the defendants' willing compliance significant: "Here, defendants were not stopped by the officer and raised no objection when the officer asked if he could talk to them. They crossed the street, produced identification on request, and were not

detained against their will." *Id.* at 618. In this case, defendant also willingly complied with Officer Edward's non-forceful requests for his identification and for permission to run a warrants check. *See* Statement of the Facts, *supra*.

Based on the above, the trial court erred as a matter of law when it concluded that on these facts, the running of a warrants check transformed an otherwise consensual encounter into a level two detention requiring reasonable suspicion of criminality.

**B. Any Detention Supported by Reasonable Suspicion**

Even assuming the Court were to deem the running of a warrants check on the instant facts to constitute a level two detention requiring Fourth Amendment justification, the trial court erroneously concluded that such justification was absent here.

There is reasonable suspicion to justify a detention if, from the facts and the reasonable inferences drawn therefrom, police would reasonably suspect that criminal activity is afoot. *Terry v. Ohio*, 392 U.S. 1, 30 (1968). Accordingly, the reasonable suspicion standard is "less demanding" than probable cause, requiring only "'some minimal level of objective justification'" for the detention. *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (citations and quotations omitted). *Accord State v. Menke*, 787 P.2d 537, 541 (Utah App. 1990) (reasonable suspicion "must be based on objective facts suggesting that the individual may be involved in criminal activity"). In evaluating this minimal objective justification, a court must consider "the totality of the circumstances – the

whole picture." *United States v. Cortez*, 449 U.S. 411, 417 (1981). As the Supreme Court notes:

The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common sense conclusions about human behavior; jurors as factfinders are permitted to do the same – and so are law enforcement officers.

*Id.* at 418.

Here, the record establishes that at the time Officer Edwards requested defendant's identification and permission to run the warrants check, he reasonably suspected defendant had committed or was about to commit a class C misdemeanor offense, driving a vehicle with expired registration (R. 38: 8,18-19), add. B. *See, e.g.*, Utah Code Ann. § 41-1a-1303 (Supp. 1998) (prohibiting the driving upon any highway of the state of any vehicle required to be registered in this state that is not registered or for which the required fee has not been paid). The officer's testimony that he observed the substantially expired registration upon approaching defendant's Chevy in the church parking lot is uncontested. *See* Statement of the Facts, *supra*. Yet, the trial court failed to consider the evidence in evaluating the reasonableness of the officer's conduct. The trial court's findings are therefore incomplete, and contribute to its erroneous determination that the purported seizure was made without reasonable suspicion.

Additionally, Officer Edwards reasonably suspected defendant was physically impaired. Indeed, the trial court found that defendant's responses were "abnormal," "non-

responsive and delayed," and that this behavior "raised some suspicion that the defendant was under the influence of drugs or alcohol" (R. 27, 25), add. C. The trial court declined to find, however, that these facts constituted reasonable suspicion because in its view Officer Edwards "did nothing further to confirm or deny his suspicion. He failed to administer a sobriety test" (R. 25), add. C. The trial court's findings are again incomplete for their failure to recognize the officer's uncontradicted testimony that he declined to further pursue his suspicion of DUI only after learning that defendant was mentally disabled, and after determining to arrest defendant on the outstanding warrants (R. 38: 31-32), add. B. Defendant's "abnormal" behavior may not have amounted to probable cause to arrest for DUI, but it certainly warranted the minimal detention found to have occurred here. The trial court's contrary conclusion is erroneous and should be overturned.

\* \* \*

For the reasons detailed above, on these facts, the trial court erred as a matter of law in concluding that defendant was seized for Fourth Amendment purposes when the officer obtained his identification and ran a warrants check. Even if a seizure is deemed to have occurred, the trial court further erred in concluding that the seizure was unsupported by reasonable suspicion of a registration violation and/or possible DUI. The trial court's erroneous conclusions are driven by its incomplete factual findings overlooking the officer's uncontradicted testimony as to the voluntary and consensual nature of the police-citizen contact, and his reasons for not further investigating his




suspicion defendant was physically impaired. The trial court's erroneous conclusions also result from its misapprehension of controlling authority. As a result, the trial court's determinations of seizure, and of no reasonable suspicion, exceed legal boundaries and merit no measure of discretion. The ruling below should be overturned.

### CONCLUSION

The Court should reverse the trial court's suppression of defendant's statements and remand this case for trial.

RESPECTFULLY submitted on 13<sup>th</sup> October 1998.

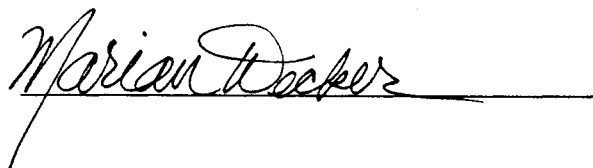
JAN GRAHAM  
Utah Attorney General

  
MARIAN DECKER  
Assistant Attorney General

### CERTIFICATE OF MAILING

I certify that on 13<sup>th</sup> October 1998, I caused to be mailed, by U.S. Mail, postage prepaid, two accurate copies of this *BRIEF OF APPELLANT* to:

RANDALL K. SPENCER  
Utah County Public Defenders Assoc.  
245 North University Avenue  
Provo, Utah 84601



## **ADDENDA**

## **ADDENDUM A**

Randall K. Spencer (6992)  
**UTAH COUNTY PUBLIC DEFENDER ASSOCIATION**  
Attorneys for Defendant  
245 North University Avenue  
Provo, Utah 84601  
Telephone 379-2570

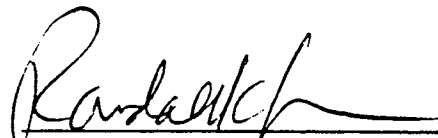
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**IN THE FOURTH JUDICIAL DISTRICT COURT  
UTAH COUNTY, STATE OF UTAH**

STATE OF UTAH,  Plaintiff,	MOTION TO SUPPRESS
vs.	CASE NO. 981403433
MARVIN NEWELL GREEN,  Defendant.	JUDGE RAY M. HARDING

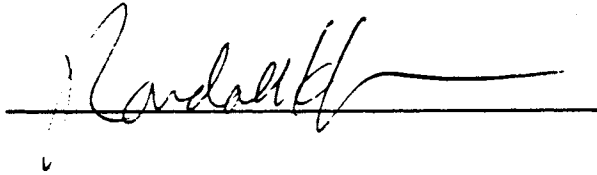
Defendant, MARVIN NEWELL GREEN, through his counsel of record, Randall K. Spencer, hereby moves the Court pursuant to Rule 12 of the Utah Rules of Criminal Procedure, Article I, §14 of the Utah Constitution and the Fourth Amendment of the United States Constitution to suppress evidence obtained from a warrantless search of Defendant's person and automobile. Additionally, Defendant respectfully requests an evidentiary hearing on his motion.

DATED this 30 day of March, 1998.

  
\_\_\_\_\_  
Randall K. Spencer  
Attorney for Defendant

## MAILING CERTIFICATE

I hereby certify that I caused to be delivered a copy of the foregoing to the Office of the Utah County Attorney, 100 East Center, Suite 2100, Provo, UT 84606, this 30 day of March, 1998.



Randall K. Spencer (6992)  
**UTAH COUNTY PUBLIC DEFENDER ASSOCIATION**  
Attorneys for Defendant  
245 North University Avenue  
Provo, Utah 84601  
Telephone 379-2570

**FILED** 03/30/98  
Fourth Judicial District Court  
of Utah County  
CARRIE B. [unclear]  
[Signature]

**IN THE FOURTH JUDICIAL DISTRICT COURT  
UTAH COUNTY, STATE OF UTAH**

STATE OF UTAH,	Plaintiff,	<b>MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS</b>
vs.		CASE NO. 981403433
MARVIN NEWELL GREEN,	Defendant.	JUDGE RAY M. HARDING

Defendant, MARVIN GREEN, through his counsel of record, Randall K. Spencer, hereby submits the following memorandum of points and authorities in support of his motion suppress evidence in the above entitled case.

**STATEMENT OF MATERIAL FACTS**

1. On or about January 3, 1998, Defendant was parked in a private parking lot at approximately 10:30 in the evening.
2. Defendant's vehicle was facing a curb which bordered some shrubbery and a fence.
3. Officer Roger Edwards of the Springville City Police Department approached Defendant's vehicle, parked behind the vehicle with his headlights shining into the vehicle, and approached and engaged Defendant in conversation.
4. Officer Edwards asked Defendant for identification, and Defendant produced a driver's license.
5. Officer Edwards returned to his vehicle and did a warrant check on Defendant and

discovered outstanding warrants.

6. Officer Edwards also noticed that the license plates on Defendant's vehicle were expired, but did not issue a citation because Defendant was private property, and the Officer knew that he could not cite Defendant for expired plates until he pulled onto public roads.
7. After discovering the warrants, Officer Edwards arrested Defendant, and found evidence of controlled substances and paraphernalia in the search incident to arrest.

### **ARGUMENT**

#### **I. DEFENDANT WAS STOPPED AND SEIZED WITHOUT REASONABLE SUSPICION TO SUPPORT DEFENDANT'S DETENTION.**

The Fourth Amendment to the United States Constitution reads as follows:

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.

Article I, §14 of the Utah Constitution contains nearly the same language as the federal constitution. Defendant was stopped and searched illegally under both the United States Constitution and the Utah Constitution.

The search and seizure limitations of the fourth amendment and article I, § 14 of the Utah Constitution are applicable to investigatory stops or seizures that are not official arrests. State v. Trujillo 739 P.2d 85, 87 (Utah App. 1987). When a person remains not in the spirit of cooperation with an officer, but because he believes that he is not free to leave, a seizure has occurred. Id.

The Utah Supreme Court has defined three levels of police encounters together with

the standard for justifying such a detention:

- (1) an officer may approach a citizen at anytime [sic] and pose 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 has been committed or is being committed.

State v. Deitman, 739 P.2d 616, 617-18 (Utah 1987). In the present case, a level two encounter occurred when Officer Edwards stopped behind Defendant's vehicle in a marked patrol car blocking Defendant's vehicle from immediate egress, placed the patrol vehicle such that the bright lights were shining directly into the vehicle, approached Defendant's vehicle in full uniform while carrying a firearm, and interrogated Defendant. State v. Struhs, 940 P.2d 1225 (Utah App. 1997); State v. Smith, 781 P.2d 879 (Utah App. 1989). State v. Lopez, 783 P.2d 479 (N.M. App. 1989). A reasonable person in the situation that Defendant was in when Officer Edwards approached his vehicle would not have felt free to leave. According to Officer Edwards' report, it is undisputed that Officer Edwards did not have reasonable suspicion to detain Defendant in this manner. Because the manner in which Officer Edwards approached Defendant is factually equivalent to a normal traffic stop, all evidence discovered as a result of this illegal detention must be suppressed.

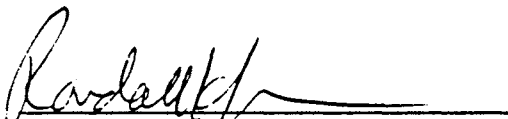
Even if the Court were to find that the manner in which Officer Edwards blocked Defendant's vehicle and approached Defendant late at night is not sufficient to constitute a "level two stop," the moment that Officer Edwards seized Defendant's identification and returned to his patrol vehicle to run a warrant check, Defendant was seized within the meaning of the Fourth Amendment without question.



If an officer has effectuated a level two stop, the officer may permissibly run a warrants check so long as it does not significantly extend the period of detention beyond that necessary for the original stop. State v. Lopez, 873 P.2d 1127, 1133 (Utah 1994). However, if a police officer has not effectuated a level two stop, expecting a person to remain while the officer conducts a warrant check is a level two stop requiring reasonable suspicion. State v. Johnson, 805 P.2d 761 (Utah 1991). The Utah Court of Appeals and Utah Supreme Court stated in the Johnson case that a seizure occurred "when [the officer] took [defendant's] name and birth date and expected her to wait while he ran a warrants check." Id. at 763. Therefore, notwithstanding the initial blocking of Defendant's vehicle, a level two encounter requiring reasonable suspicion occurred at the time Officer Edwards seized Defendant's driver's license and expected Defendant to wait in his vehicle while he ran a warrant check. Therefore, all evidence found as fruit of the unconstitutional stop of Defendant must be suppressed.

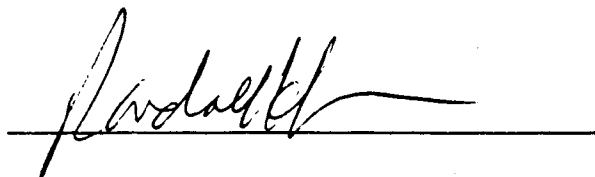
For all of the reasons set forth above, Defendant respectfully requests the Court to suppress all evidence seized as a result of the unreasonable stop and detention of Defendant.

DATED this 30 day of March, 1998.

  
Randall K. Spencer  
Attorney for Defendant

#### MAILING CERTIFICATE

I hereby certify that I caused to be delivered a copy of the foregoing to the Office of the Utah County Attorney, 100 East Center, Suite 2100, Provo, UT 84606, this 30 day of March, 1998.



## **ADDENDUM B**

Machine-generated OCR, may contain errors.

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A P P E A R A N C E S

FOR THE PLAINTIFF:

CURTIS L. LARSON  
DEPUTY UTAH COUNTY ATTORNEY  
100 East Center, #2100  
Provo, Utah 84606

FOR THE DEFENDANT:

RANDALL K. SPENCER  
UTAH COUNTY PUBLIC DEFENDERS  
245 North University Avenue  
Provo, Utah 84601

I N D E X

<u>WITNESSES</u>	<u>PAGE NO.</u>
ROGER EDWARDS	
Direct examination by Mr. Larson	4
Cross-examination by Mr. Spencer	15
Redirect examination by Mr. Larson	30

E X H I B I T S

<u>EXHIBIT NO.</u>	<u>PAGE NO.</u>
STATE'S EXHIBIT NO. 1	15

PROVO, UTAH; APRIL 2; 10:00 A.M.

## P R O C E E D I N G S

THE COURT: Be seated, please. This is  
981403433, State of Utah vs. Green.

Okay, counsel.

MR. LARSON: The State is ready to proceed,  
your Honor.

THE COURT: Is the defendant ready?

MR. SPENCER: Yes, your Honor.

THE COURT: All right. You may proceed.

MR. LARSON: Thank you, your Honor. The State will call Officer Edwards.

THE COURT: If you'll come forward and raise your right hand, the clerk will administer the oath to you.

                                    ROGER EDWARDS,

called as a witness by the Plaintiff, was duly sworn and testified as follows:

THE CLERK: You do solemnly swear the testimony you are about to give in the case now pending before the Court will be the truth, the whole truth, and nothing but the truth, so help you God.

THE WITNESS: Yes.

THE COURT: Be seated in the witness chair,  
please.

1 DIRECT EXAMINATION

2 BY MR. LARSON:

3 Q. Will you state your name, please.

4 A. Roger Edwards.

5 Q. Where are you employed?

6 A. Springville Police Department.

7 Q. Were you employed with the Springville Police  
8 Department on January 3rd of this year?

9 A. Yes, I was.

10 Q. And on that date at approximately 10:30 p.m.  
11 were you on duty?

12 A. Yes, I was.

13 Q. While you were on duty, what were your  
14 responsibilities as a member of the Springville Police  
15 Department?

16 A. My responsibilities were to patrol, respond  
17 to calls, protect and serve the public.

18 Q. While you were on duty and at approximately  
19 that time, did you observe a vehicle parked in an LDS  
20 church parking lot?

21 A. Yes, I did.

22 Q. And could you describe that vehicle to the  
23 Court?

24 A. The vehicle was an older model -- I believe  
25 it was an older model Chevy two-door, maroon or dark



1 some bushes.

2 Q. Okay. How was the vehicle facing, the front  
3 end?

4 A. The front of the vehicle was facing south.

5 Q. Was it facing towards the parking lot or the  
6 wall?

7 A. It was facing towards the fence.

8 Q. Did you decide to make contact with the  
9 vehicle?

10 A. Yes, I did.

11 Q. So you drove into the parking lot?

12 A. That's correct.

13 Q. Did you observe anybody in the vehicle?

14 A. I could tell that there was one occupant  
15 inside the vehicle.

16 Q. What position in the vehicle did that one  
17 person occupy?

18 A. They were in the driver's seat.

19 Q. Could you tell if it was a male or female --

20 A. I could not.

21 Q. -- at that time?

22 A. At that time I could not.

23 Q. As you approached the vehicle, did you use  
24 any lights on your vehicle?

25 A. No, I did not.



1 Q. You obviously had your headlights on.  
2 A. Headlights on. That's correct.  
3 Q. Did you park near the vehicle?  
4 A. I did. I parked behind and to the right of  
5 the vehicle, leaving a great deal of distance between  
6 my vehicle and the suspect vehicle.  
7 Q. Approximately how much distance was between  
8 your vehicle and the suspect?  
9 A. Between 20 and 25 feet.  
10 Q. Now, you indicated that the vehicle was not  
11 up against the curb.  
12 A. That's correct.  
13 Q. What was the distance, from your  
14 recollection, from the curb to the front of this other  
15 vehicle?  
16 A. Approximately 10 feet.  
17 Q. When you parked your vehicle in the parking  
18 lot, did you shine the lights into this other vehicle,  
19 your headlights?  
20 A. My headlights were shined on the vehicle,  
21 yes.  
22 Q. Did you use a spotlight at all?  
23 A. No, I did not.  
24 Q. Is your vehicle equipped with a spotlight?  
25 A. Yes, it is.

1           Q.    And you could have used that spotlight to  
2 illuminate the interior of the vehicle?

3           A.    No, I could not. The spotlight was broken.

4           Q.    You didn't use any of your emergency lights,  
5 red and blues?

6           A.    No, I did not.

7           Q.    Did you turn on any flashing lights?

8           A.    No.

9           Q.    As you approached the vehicle and your lights  
10 were shining on the vehicle, what did you see the  
11 occupant in the vehicle doing?

12          A.    The occupant in the vehicle was moving around  
13 a lot. He wasn't like sitting in one place. He would  
14 lean to one side or to the other. You could see his  
15 arms were moving. Pretty much that was it. He was  
16 moving around in the vehicle as I approached.

17          Q.    Is it standard procedure for police officers  
18 to call in license plate numbers and things,  
19 descriptions, when they make contact with vehicles?

20          A.    That is correct.

21          Q.    Did you do that in this particular case?

22          A.    Yes, I did.

23          Q.    While you were observing the license plate,  
24 did you notice anything about the license?

25          A.    I noticed that the license plate was -- I

1 think it was at least two years expired.

2 Q. You made contact with the individual?

3 A. Yes, I did.

4 Q. How did you do that?

5 A. I walked up to the driver's side door and  
6 tapped on the window. The individual slowly rolled  
7 the door down. I made contact, asked him if he was  
8 okay. I used my flashlight to look into the car to  
9 see if I could see what the individual may have been  
10 doing as I was approaching.

11 Q. Did you have any suspicion at the time you  
12 decided to make contact that he was or this individual  
13 was involved in any type of criminal activity?

14 A. No, I did not.

15 Q. What was the purpose of making the contact?

16 A. I had two purposes in making the contact.  
17 One was a welfare check of this individual. It was  
18 later in the evening. As I recall, it was at least a  
19 quarter after 10, so I went to check on this  
20 individual to make sure he was okay.

21 I also had taken a report just a couple  
22 minutes earlier of a broken window approximately two  
23 blocks south of this location, and I had stopped to  
24 talk to this individual to see if he may have seen  
25 anyone go through the parking lot of the church,

1 leaving that general area, or if possibly the person  
2 in that vehicle may have been involved in the broken  
3 window.

4 Q. Now, you indicated that you spoke with the  
5 individual?

6 A. That's correct.

7 Q. Could you explain to the Court how you first  
8 approached, the language that you used, the tone of  
9 voice that you used in making contact with that  
10 individual?

11 A. When I first approached him, I used very --  
12 what I felt was a very calm voice in talking to him.  
13 I asked him if he was okay. I waited approximately  
14 somewhere between 45 and 60 seconds for any type of  
15 response from the individual. When he responded, he  
16 asked if he was doing anything wrong. I told him that  
17 he was not doing anything wrong; I was just checking  
18 to see if he was okay.

19 I also asked the individual if he had seen  
20 anyone come through the parking lot in the last couple  
21 of minutes. And the individual's response was, "I was  
22 just listening to my radio." So I again repeated the  
23 question.

24 Each question that I asked there was a delay  
25 in the amount of time it took for the individual to

1     respond, at which time, you know, his responses  
2     weren't what I would consider normal responses to the  
3     questions; such as, I asked him if he had seen anyone  
4     and him responding that he was just listening to his  
5     radio.

6           Q.     Now, you have stated that there was a  
7     response time between your questions and the answers.

8           A.     That's correct.

9           Q.     And you've indicated at least to your initial  
10    question there was between a 45 to 60 second delay?

11          A.     That's correct.

12          Q.     During that period of time did you observe  
13    the individual?

14          A.     I was watching the individual in the vehicle.  
15    He was moving very slowly. He would sit there. He  
16    wouldn't actually look at me. He would just look in  
17    the car and look down towards his feet.

18          Q.     How did you position yourself as you spoke  
19    with him? Were you behind the door or in front  
20    looking at him?

21          A.     I was behind -- I was on the driver's side,  
22    behind the doorjamb of the door. And I would lean  
23    over the vehicle and would talk -- lean over into the  
24    window and talk to the individual.

25          Q.     So in order to look at you, he would have had

1 to turn his head a fair amount to actually look at  
2 you, like look over his shoulder?

3 A. Yeah, he would have had to.

4 Q. You indicated that his movement seemed to be  
5 slow. Could you describe those a little more?

6 A. I asked the individual if he had any I.D.  
7 that he could show me. And again a slight delay, and  
8 then he responded, "Yes." I watched the individual  
9 slowly reach back to his pocket and pull out his  
10 wallet. He was moving very slowly. He opened the  
11 wallet, fumbled for his driver's license, which was --  
12 I could see it was actually right on top.

13 As he pulled the license out, it was very --  
14 he was having trouble keeping hold of the license.  
15 When he handed it up to me, he handed it up about this  
16 far. He didn't actually turn and hand it to me. I  
17 had to reach down into the vehicle to take the license  
18 from him.

19 Q. And as you observed the individual and spoke  
20 with the individual and listened to his responses, did  
21 you cultivate a concern with regard to his being in a  
22 vehicle?

23 A. Yes. With the slow responses he was giving,  
24 I was concerned that there may be a possibility that  
25 the individual was driving under the influence. While

1 I couldn't smell an alcoholic beverage, I could tell  
2 his responses were extremely slow. His movements were  
3 very slow. He couldn't seem to concentrate, couldn't  
4 answer questions, things of that nature. That gave  
5 rise to me that he may be impaired.

6 Q. Did you know this individual before? Had you  
7 ever seen him before?

8 A. No, I had not.

9 Q. Had you ever heard of his name before?

10 A. No, I had not.

11 Q. He handed you his driver's license?

12 A. That's correct.

13 Q. What did you do then?

14 A. I asked Mr. Green if he would mind if I took  
15 his license back to my vehicle and check on a few  
16 things. Again, a slow response, and his response was,  
17 "Okay" -- Mr. Green's.

18 Q. So you asked him if it would be okay if you  
19 went and ran some checks on his license?

20 A. That's correct.

21 Q. And his response was, "Okay"?

22 A. That's correct.

23 Q. You then took the license and went where?

24 A. I went back to my vehicle. Once in my  
25 vehicle, I ran a driver's license and warrants check

1 on Mr. Green. Within a minute I was notified that  
2 Mr. Green had two warrants on statewide.

3 Q. And you arrested the individual based on  
4 those warrants?

5 A. That's correct.

6 Q. And then there was a search of the vehicle  
7 after that?

8 A. That's correct.

9 Q. And after that you found evidence of a  
10 controlled substance, possession and drug  
11 paraphernalia?

12 A. That's correct.

13 Q. Were you asked to provide a diagram of how  
14 the vehicles were positioned?

15 A. Yes, I was.

16 Q. Do you have that in court today or a copy of  
17 that in court today?

18 A. Yes.

19 MR. LARSON: May I approach, your Honor?

20 THE COURT: You may.

21 MR. LARSON: May I mark this?

22 THE COURT: You may.

23 MR. SPENCER: No objection.

24 MR. LARSON: We'd request the Court accept  
25 Exhibit No. 1, which is the diagram the officer was



1 just indicating.

2 THE COURT: And there's no objection?

3 MR. SPENCER: No, your Honor.

4 THE COURT: One will be received.

5 (State's Exhibit No. 1  
6 was received into evidence.)

7 Q. (BY MR. LARSON) Were you in uniform that  
8 night?

9 A. Yes, I was.

10 Q. Did you have a gun belt on?

11 A. Yes, I did.

12 Q. Did you ever draw your weapon?

13 A. No, I did not.

14 Q. Did you ever place your hand on your gun in a  
15 threatening manner?

16 A. No, I did not.

17 Q. What did you have in your hands as you  
18 approached the vehicle?

19 A. I had my flashlight in my hand.

20 MR. LARSON: The State has nothing further,  
21 your Honor.

22 THE COURT: You may cross-examine.

23 CROSS-EXAMINATION

24 BY MR. SPENCER:

25 Q. Officer Edwards, how long have you been a

1 police officer?

2 A. I was a military police officer for three  
3 years. I've been employed as a police officer for the  
4 State of Utah just under a year.

5 Q. So essentially then you have four years of  
6 experience as a police officer?

7 A. That's correct.

8 Q. And you've been through POST or something  
9 equivalent to POST, I presume.

10 A. Yes.

11 Q. Did you go through the POST in Utah or did  
12 you do that through the military?

13 A. I went through both.

14 Q. So you've actually been through two POSTs?

15 A. That's correct.

16 Q. So you would consider yourself then a  
17 professional police officer; correct?

18 A. Yes, I would.

19 Q. And in the training you've received at both  
20 POSTs you certainly were trained on the importance of  
21 writing reports; correct?

22 A. That's correct.

23 Q. And perhaps that training included emphasis  
24 on the fact that your reports would be relied upon by  
25 both the prosecution and also the defense in

1 evaluating the cases which were submitted for  
2 prosecution; correct?

3 A. That's correct.

4 Q. So as a professional police officer, you  
5 currently endeavor to only put true and correct  
6 information in your police reports, knowing that it  
7 will be relied upon by the prosecution; correct?

8 A. Correct.

9 Q. And you did that in this case also; correct?

10 A. Yes, I did.

11 Q. And you observed the vehicle in the church  
12 parking lot as you testified on the night of January  
13 the 3rd; correct?

14 A. That's correct.

15 Q. And you found it suspicious; correct?

16 A. I had reason to stop and talk to him. I  
17 don't know necessarily that I found the vehicle  
18 suspicious.

19 Q. Okay. You indicated that you stopped behind  
20 the vehicle, approximately 20 to 25 feet behind it;  
21 correct?

22 A. That's correct.

23 Q. Your headlights were shining directly into  
24 the vehicle; correct?

25 A. I was actually offset a bit, so my lights

1       were shined on the vehicle, yes.

2           Q.     Even though you're offset, your lights are  
3       shining directly through the back window and into the  
4       vehicle; correct?

5           A.     More at an angle because it was offset.

6           Q.     At an angle or straight on, they were shining  
7       directly into the vehicle; correct?

8           A.     Yes, some of the light was shining into the  
9       vehicle, but the whole vehicle was not illuminated.

10          Q.     Even with the angle, the lights were shining  
11       in the vehicle such that you could see the head of the  
12       occupant of the vehicle; correct?

13          A.     Yes.

14          Q.     So the lights, therefore, were shining at  
15       least onto the head of the occupant of the vehicle?

16          A.     That's correct.

17          Q.     And then after you stopped behind the  
18       vehicle, you called dispatch and checked on the  
19       license plate; is that correct?

20          A.     I called on the license plate in. I did not  
21       ask for registration information. It's standard when  
22       you stop for any reason to call the license plate in  
23       on a vehicle.

24          Q.     So at that point in time then, you did not  
25       check on the registration information?

1           A.     No, I did not.

2           Q.     So is it a correct statement then that it  
3     wasn't until after you were doing the warrants check  
4     on Mr. Green's information --

5           MR. LARSON:  Objection, your Honor.  It's  
6     argumentative.  He's asking for a conclusion.  A  
7     simple request of the officer to not testify but agree  
8     with Mr. Spencer's conclusion of what is true and  
9     correct?

10          THE COURT:  I'll permit the question.  Go  
11     ahead.

12          Q.     (BY MR. SPENCER)  So it would be correct  
13     then that you didn't actually find out that the  
14     registration was two years expired until you were  
15     examining Mr. Green's personal information for  
16     warrants; is that correct?

17          A.     No.

18          Q.     When was it then that you --

19          A.     When I drove up.  All vehicles have vehicle  
20     registrations stickers on the license plate.  And I  
21     could see that the last registration sticker on the  
22     vehicle was from '95.  And this was in '98.

23          Q.     Okay.  So when you called Mr. Green's  
24     information in to check -- to do a warrants check,  
25     then did you also call in the registration on the

1 vehicle?

2 A. Yes, I did.

3 Q. And did that confirm what you observed from  
4 the sticker that it had not been registered for two  
5 years?

6 A. Yes.

7 Q. Did you determine who the vehicle was  
8 registered to?

9 A. I do not recall the actual name of the  
10 individual it was registered to, but it was not  
11 registered to Mr. Green.

12 Q. After you stopped behind the vehicle, how  
13 long would you say you parked there observing the  
14 circumstances before you felt it safe for you to  
15 alight from your vehicle and approach the subject  
16 vehicle?

17 A. I'm sorry.

18 Q. How long did you stay in your patrol car  
19 after you parked behind Mr. Green's vehicle?

20 A. I exited my vehicle as soon as I stopped and  
21 placed it in park.

22 Q. Okay. And then you approached with your  
23 flashlight?

24 A. That's correct.

25 Q. And you use that flashlight for officer

1 safety purposes; is that correct?

2 A. That's correct.

3 Q. In your training at POST and other training,  
4 you've been trained that effective use of the  
5 flashlight for officer safety is to shine that  
6 flashlight directly into the face of a suspect so that  
7 essentially their vision is hampered to a degree;  
8 isn't that correct?

9 A. No, that's not correct. I was never taught  
10 to shine my flashlight in a suspect's eyes.

11 Q. Is that not the procedure that you followed  
12 that evening is to shine the flashlight on Mr. Green's  
13 eyes as you approached him?

14 A. No, it is not.

15 Q. Where did you shine the flashlight, then?

16 A. Inside the vehicle. I did shine my  
17 flashlight on Mr. Green while he was searching through  
18 the vehicle, but I did not shine the flashlight into  
19 Mr. Green's face.

20 Q. So you stopped, as you described earlier, I  
21 guess, just behind the driver's side door of the  
22 vehicle; is that correct?

23 A. That's correct.

24 Q. And from that point in time you took the  
25 flashlight and you shined it all through the vehicle,

1 including on Mr. Green?

2 A. That's correct.

3 Q. And did you do that before you initiated any  
4 questioning of Mr. Green?

5 A. No, I did that the while I was talking to  
6 Mr. Green.

7 Q. While you were talking to him?

8 A. That's correct.

9 Q. Now, I'd like you to look over at that  
10 beautiful picture on the wall. Okay?

11 A. Okay.

12 Q. And now I'd like you to respond to this  
13 question in the same length of time that it took  
14 Mr. Green to respond to your first question.

15 MR. LARSON: Objection, your Honor. That  
16 would be improper. We don't have the same  
17 circumstances that we had on the night of the  
18 incident.

19 THE COURT: I don't think that demonstration  
20 is of any value, counsel. If you want to ask him how  
21 long and in what direction, you can do that.

22 MR. SPENCER: Your Honor, I just think that  
23 his guesstimate of 45 to 60 seconds is a mighty long  
24 time. I guess you ruled. I've learned that lesson  
25 before.



1 THE COURT: Okay.

2 MR. SPENCER: So pardon me for forgetting my

3 lessons of the past.

4 Q. (BY MR. SPENCER) Officer Edwards, you

5 testified under direct examination that it took 45 to

6 60 seconds for Mr. Green to respond; isn't that what

7 your testimony was?

8 A. That's correct.

9 Q. Isn't it true that that's probably a little

10 longer than it actually took?

11 A. No, it took him a very long time to respond

12 to my question.

13 Q. Okay. When you're asking somebody a question

14 and waiting for a response, would you not agree with

15 me that sometimes seconds can seem like hours?

16 A. Yes, I would agree with that.

17 Q. Okay. You asked him quite a number of

18 questions, didn't you?

19 A. Yes, I did.

20 Q. And however long it took, he responded to all

21 of them, didn't he?

22 A. He responded with an answer, yes.

23 Q. Yeah. Okay. So you approached his vehicle

24 and you asked him if everything was all right;

25 correct?

1           A.     That's correct.

2           Q.     And in your report you indicated that he was  
3 slow in answering; correct? You did not indicate that  
4 it took him 45 to 60 seconds, did you?

5           A.     No, I did not.

6           Q.     There's a huge difference between being slow  
7 in answering and 45 to 60 seconds; would you not agree  
8 with me?

9           A.     I would say there's a difference, but slow  
10 doesn't have a time put on it.

11          Q.     I'd agree with you there. But you did not  
12 put in your report that it took him 45 to 60 seconds  
13 to answer your first question, did you?

14          A.     No, I did not.

15          Q.     And then after he answered your first  
16 question, he asked you if he was doing anything wrong;  
17 correct?

18          A.     That's correct.

19          Q.     And you told him that he wasn't; you just  
20 wanted to see if he was all right.

21          A.     That's correct.

22          Q.     You didn't have any reason to suspect when  
23 you approached his vehicle that there was a threat to  
24 life or limb?

25          A.     At any time you approach a vehicle, you have



1 evening.

2 Q. So the answer to my question then would be  
3 no, you did not have any reason to suspect that there  
4 would be a threat to life or limb?

5 A. I had some reason, enough that I felt it was  
6 necessary to stop and check on his welfare.

7 Q. Okay. You're not answering my question. My  
8 question is did you have any reason to think that  
9 there was a threat to his life or limb at the time  
10 that you approached his vehicle?

11 A. Did I know that there was something wrong  
12 with Mr. Green at that time? No, I did not.

13 Q. After Mr. Green asked you if he was doing  
14 anything wrong, you told him that he wasn't; correct?

15 A. That's correct.

16 Q. And then you asked Mr. Green who the vehicle  
17 belonged to; correct?

18 A. Yes, that is correct.

19 Q. And he said that his brother had just given  
20 it to him for Christmas?

21 A. That's correct.

22 Q. In your report you didn't indicate that he  
23 was slow to respond to that question, did you?

24 A. No, I did not.

25 Q. And then Mr. Green asked you if he was on

\* 1 private property; correct?

2 A. That's correct.

3 Q. And you again told Mr. Green that he was  
4 doing nothing wrong and that you were just checking to  
5 see if he was all right?

6 A. That's correct.

7 Q. And then you told him that you were also  
8 wondering why the vehicle's registration was expired  
9 by a couple years?

10 A. That's correct.

11 Q. So at this point in time he was on private  
12 property, so that actually wasn't an offense you could  
13 cite him for?

14 A. That's correct.

15 Q. Then you asked Mr. Green if he had seen  
16 anyone coming through the parking lot in the last few  
17 minutes; correct?

18 A. That's correct.

19 Q. And he said that he was just sitting there  
20 listening to the radio?

21 A. That's correct.

22 Q. And then you asked again if he had seen  
23 anyone, and he answered, "No"; correct?

24 A. That's correct.

25 Q. And then at this point in time you asked if

1 he had any I.D. that you could see; correct?

2 A. That's correct.

3 Q. And he answered, "Yes"; correct?

4 A. Yes.

5 Q. So all of the answers to your questions were  
6 logical, correct, and coherent?

7 A. I didn't really feel that the answer of just  
8 listening to his radio was a necessarily logical  
9 response to the question. I didn't ask what he was  
10 doing. I had asked if he had seen anyone.

11 Q. Okay. You then asked Mr. Green if he would  
12 mind if you went back to his car and checked a few  
13 things?

14 A. Back to my car. That's correct.

15 Q. And Mr. Green said, "Okay"?

16 A. Yes.

17 Q. And then you went back to your car, and you  
18 checked his information for warrants; correct?

19 A. That's correct.

20 Q. And then you discovered warrants?

21 A. That's correct.

22 Q. And as you indicated in your report,  
23 Mr. Green was free to leave at any time up to the  
24 point that you found the information about the  
25 warrants; correct?

1           A.     That's correct.

2           Q.     However, you indicated if he was to leave the  
3 church parking lot in his vehicle, he would have been  
4 stopped once he was on the street because of the  
5 expired registration?

6           A.     That's correct.

7           Q.     But I suppose he could have driven around in  
8 the church parking lot?

9           A.     He could have driven around. He could have  
10 walked out of the parking lot, anything like that.

11          Q.     And then you also indicated that he could  
12 also have left on foot at any time until you  
13 discovered the warrants?

14          A.     That's correct.

15          Q.     And also at no time did you tell Mr. Green  
16 that he could not leave until you arrested him on the  
17 warrants?

18          A.     That's correct.

19          Q.     So, clearly, then, until you found the  
20 warrants, it was your opinion that Mr. Green was free  
21 to leave; correct?

22          A.     I was a little concerned with his responses.  
23 But at that time I didn't necessarily have a reason to  
24 hold him, no.

25               MR. SPENCER: That's all the questions I

1 have.

2 THE COURT: Redirect?

3 MR. LARSON: Yes, your Honor, just a couple  
4 of things.

5 REDIRECT EXAMINATION

6 BY MR. LARSON:

7 Q. Officer Edwards, you indicated that as you  
8 spoke with the individual Mr. Green -- I suppose we  
9 can refer to him as Mr. Green -- you thought there may  
10 be a problem with him being under the influence?

11 A. That's correct.

12 Q. Would that have given you a basis to hold  
13 him?

14 A. It could have, yes, but I didn't have --  
15 necessarily have the training belt to say that he was  
16 under the influence of anything. It was at that time  
17 that I also was running the warrants that I had --  
18 that I thought of calling for a DRE, a drug  
19 recognition expert, to look at Mr. Green.

20 Q. Did you do that?

21 A. No, I did not.

22 Q. Why not?

23 A. Because as soon as I got back to my vehicle  
24 and ran the checks, I was notified of the warrants on  
25 Mr. Green. So I didn't feel it necessary to pursue



1     that avenue because he would have been able to leave  
2     in his vehicle.

3           Q.     So you had a concern?

4           A.     I had a concern, yes.

5           Q.     But you did not follow through with further  
6     investigation into that concern?

7           A.     No, I did not.

8           Q.     And you decided that you would not pursue  
9     that at what time?

10          A.     I guess there's two parts that made me decide  
11     that. One was the fact that I had the warrants on  
12     Mr. Green to arrest him on. And also when my  
13     supervisor responded to the scene and saw the address  
14     for Mr. Green, it came back to a Community Care Living  
15     Center for mentally disabled people where they can  
16     live on their own but still have some State people to  
17     look after them. So at that time I thought that his  
18     slow responses may be contributed to any type of  
19     disability that he may have.

20          Q.     Did you know that that address was to a  
21     developmental center?

22          A.     At the time I did not, when I saw the  
23     license. But I knew of the center. And when my  
24     supervisor informed me that that's what the address to  
25     the center was, that's when I assumed that that's what



1 voluntary contact. According to State vs. Deedman, an  
2 officer may approach a citizen at any time and pose  
3 questions so long as the citizen is not detained  
4 against his or her will.

5 A level two stop, here again under Deedman,  
6 is an officer may seize a person if the officer has an  
7 articulable suspicion that the person has committed or  
8 is about to commit a crime. However, the detention  
9 must be temporary and last no longer than necessary to  
10 effect the purpose of the stop.

11 Of course, the third, which is also involved  
12 in this case, is an actual arrest based on probable  
13 cause or in this particular incident a warrant that  
14 came about.

15 Of course, we need to keep in mind that under  
16 a level one stop, according to State vs. Jackman, it  
17 must be a completely voluntary encounter, and a  
18 citizen may respond to an officer's inquiries but is  
19 free to leave at any particular time. Also in State  
20 vs. Trejillo, the Court said a seizure within the  
21 meaning of the Fourth Amendment does not occur when a  
22 police officer merely approaches an individual on the  
23 street and questions him if the person is willing to  
24 listen.

25 A case in -- well, in State vs. Higgins, the

1 court indicated a person is seized under the Fourth  
2 Amendment when considering the totality of the  
3 circumstances the police conduct would have  
4 communicated to a reasonable person that the person  
5 was not free to decline the officer's request or  
6 otherwise terminate the encounter and go on with his  
7 or her business.

8 If we look at this particular circumstance  
9 and the facts surrounding the circumstance, we've got  
10 an officer on general patrol. He sees a vehicle in  
11 the late evening in the church parking lot. It's not  
12 pulled into a parking stall. It's somewhat out of  
13 place. It's about ten feet -- as the officer  
14 testified and as is diagramed, it indicates about ten  
15 feet away from the curb. The officer also had just  
16 recently taken a report on a broken window nearby. He  
17 decides that he's going to make contact with this  
18 individual.

19 He testified on the stand that he had no  
20 indication whatsoever that this particular individual  
21 was involved in criminal activity, so his purpose in  
22 making contact with the officer was just solely to  
23 find out if he was okay, if everything was all right  
24 with the individual, and to ask if he might have been  
25 a witness to a criminal event that took place just a

1 little time prior to that.

2 As he pulled into the parking lot, he  
3 positioned his vehicle -- the diagram is clear he  
4 positioned his vehicle, and the testimony is clear,  
5 about 20 to 25 feet behind the vehicle. And then, of  
6 course, the vehicle was ten feet from the curb, giving  
7 the vehicle nearly 30 feet of free space to maneuver,  
8 if he wanted to maneuver, the vehicle at the time the  
9 officer was making the check -- making the contact.

10 The officer at no time used his emergency  
11 lights to indicate there was a stop ensuing. He used  
12 no spotlights. He did, of course, have his headlights  
13 on and positioned in such a way that it didn't shine  
14 directly into the vehicle, but it shined into the  
15 vehicle enough to where he could see the individual  
16 was there and what he was doing.

17 The officer alights from his vehicle, makes  
18 contact with the individual, and at that time finds  
19 that the defendant is extremely slow. Now, granted  
20 the State will, of course, stipulate that the  
21 defendant does have some difficulties in that regard.  
22 However, the officer at the time -- and we have to  
23 look at the time of this incident. The officer had  
24 never met Mr. Green before and did not know of his  
25 medical circumstances or his mental circumstances at

1 the time. And so as he approached, his response was,  
2 "There's obviously something going on here."

3 Even though the officer decided not to pursue  
4 the circumstances, it raised the suspicion level of  
5 the officer at least to a level two stop. He had gone  
6 from a level one to a level two stop as he conversed  
7 with the individual, Mr. Green, and obtained from him  
8 his driver's license.

9 Now, according to all the case law that's  
10 come from Terry, as soon as an officer has a  
11 suspicion, a reasonable suspicion, that there may be  
12 some crime afoot, he has the right under the law and  
13 under Terry and under the constitution to seize that  
14 individual and perform certain checks.

15 State vs. Lopez specifically held that a  
16 warrants check could be done on an individual that's  
17 being detained on a level two stop. And in this  
18 particular case the officer initiated a level one,  
19 immediately went to a level two as he discussed and  
20 conversed with the individual. And then because of  
21 that, obtained the driver's license, some  
22 identification, went back to his patrol car, went back  
23 to his car, and found out there were warrants on him.  
24 And then it went to a level three circumstance.

25 If we look at it from the standpoint also

1     that the defendant was asked if it would be okay for  
2     the officer to make some checks, the defendant said it  
3     would be okay that the officer go back and make these  
4     particular checks after he obtained his driver's  
5     license. So we have a voluntariliness involved in  
6     this.

7             And in State vs. Pattafield, which is a 1996  
8     case, the court in an analogous type of circumstance  
9     took a level two traffic stop down to a level one  
10    circumstance because of the voluntariliness of the  
11    defendant in the matter which was just simply he  
12    decided to repair a broken light on his vehicle at the  
13    behest of the officer. He did not have to do it at  
14    that particular time. But because of that  
15    circumstance, there were other incriminating evidence  
16    or material that came out. And a subsequent charge  
17    came from that, and the court held that that was okay  
18    based on the voluntariliness of the defendant.

19            So our argument would be, your Honor, that we  
20    started with a level one stop of the defendant. And  
21    as soon as the officer made contact with the  
22    individual, he noticed the mental problems that were  
23    going on. That switched his thinking to there may be  
24    a possibility of a DUI or somebody under the influence  
25    of alcohol being in possession or actual physical

1 control of a motor vehicle. In the state of Utah,  
2 that's a violation of state law. And then he obtained  
3 the license from the individual, ran a check, found  
4 there were warrants, and then the arrest took place.

5 Based on that, we submit to the Court that  
6 the motion to suppress should just basically be  
7 denied. Thank you.

8 THE COURT: Mr. Spencer.

9 MR. SPENCER: Your Honor, at the expense of  
10 the court suspecting me of looking at cases through  
11 rose-colored tinted glasses, I think this is probably  
12 one of the most clear cut suppressions I've ever  
13 argued before your Honor. If it were only the  
14 blocking issue, then it would be a close call in my  
15 opinion based upon the case law, if we had to  
16 differentiate between whether he would actually have  
17 had to maneuver back and forth once or twice or  
18 whatnot to get around the vehicle. That would  
19 certainly be something that the Court would have to  
20 consider and determine from the circumstances whether  
21 or not the partial blocking, as the officer has  
22 described, would be sufficient to constitute the  
23 equivalent of a stop.

24 However, this case becomes patently clear by  
25 the case law that it rose to the level of a level two



1 stop at the point in time when the officer asked for  
2 Mr. Green's I.D., took that I.D., and went back to his  
3 vehicle to check on it. State v. Johnson is exactly  
4 on point where there is not a level two -- let me  
5 rephrase that. Where there is not reasonable  
6 suspicion to support a level two stop, the officer  
7 hasn't engaged in a level two stop. And when he asks  
8 to check for I.D., then State v. Johnson clearly held  
9 that that was the equivalent of a level two stop and  
10 requires reasonable suspicion.

11 The testimony of the officer before the Court  
12 today was clear that Mr. Green was free to leave at  
13 any point in time up until he found the warrants. So  
14 he was clearly acting under the pretenses of a level  
15 one stop. And just because the State comes in now and  
16 tries to change things and create the possibility that  
17 there was reasonable suspicion is irrelevant.

18 I forget the name of the case, but I read it.  
19 I know that there's a case out there that states that  
20 it's the officer's intent at the time -- your Honor  
21 probably knows it. But it's the officer's intent at  
22 the time that is the focus of the Court in evaluating  
23 this type of issue.

24 In this case it's clear that the officer's  
25 intent was to conduct a level one stop. Perhaps

1 unbeknownst to the officer when he took Mr. Green's  
2 I.D., returned to his vehicle to do a warrant's check  
3 that heightens the intent to a level two stop. He did  
4 not have reasonable suspicion at the time of stop,  
5 according to his testimony. And, therefore,  
6 basically, the matter should be suppressed.

7 Oh, one other thing I should address.  
8 Voluntariliness. That doesn't make a difference  
9 either. Once there's a level two stop, whether a  
10 person is cooperating with the level two encounter or  
11 whether they attempt to evade after being notified  
12 that they're expected to stay, is irrelevant.

13 State v. Payfield is the case where there was  
14 a traffic stop. The business of the traffic stop was  
15 completed. A portion of the reason for the stop was  
16 the because a taillight's out on the vehicle. And  
17 after everything was all done, the driver of the  
18 vehicle wanted some help or wanted assistance after  
19 the traffic stop, so he continued to actually ask  
20 questions of the officer, which extended the presence  
21 of the officer there, which resulted in some further  
22 discovery, incriminatory evidence. Clearly different  
23 circumstances than the present case. I think the  
24 circumstances of the present case are clear, and the  
25 evidence should be suppressed.

1           THE COURT: The Court will take the matter  
2 under advisement, and I'll advise you of my decision  
3 in writing. At the waiver hearing I believe we simply  
4 set it for a suppression hearing and did not set it  
5 for trial; isn't that correct?

6           MR. LARSON: That's correct, your Honor.

7           THE COURT: In setting it for trial, I'm not  
8 making a decision as to my ruling on the motion, but I  
9 think to expedite the matter with the defendant in  
10 custody it would be appropriate to set it as soon as  
11 possible. One day?

12          THE CLERK: Actually, we have April 22nd.

13          MR. SPENCER: I have a trial set on that day,  
14 your Honor. I think we could set it on that day. I  
15 don't anticipate this is going to trial if your Honor  
16 rules against us. And it always makes me nervous when  
17 they set the trial --

18          THE COURT: As I said, the defendant is here.  
19 You're here. It just makes sense to set it rather  
20 than wait, whether I do or don't suppress. Is that  
21 date okay?

22          MR. SPENCER: Yeah.

23          MR. LARSON: Fine, your Honor.

24          THE COURT: The 22nd at 9:00. Okay. Jury  
25 instructions would, therefore, be due on the 15th.

1 And I should be able to rule on this by next week. Do  
2 you want it set for pretrial?

3 MR. LARSON: Yes. May as well set the  
4 whole -- you will not be holding calendar on the 10th,  
5 as I understand it.

6 MR. SPENCER: Your Honor, I think we could  
7 advise the court in an informal pretrial what we're  
8 going to do rather than set it a day or two before the  
9 scheduled trial date.

10 THE COURT: Well, we could probably -- how  
11 about a pretrial on the 21st?

12 At what time?

13 THE CLERK: 8:15.

14 THE COURT: 8:15.

15 MR. SPENCER: Okay.

16 THE COURT: All right. That will be the  
17 order. And defendant is ordered to be present at the  
18 time set for pretrial as well as the time set for the  
19 trial. And I'll try to get a determination on this  
20 next week so you'll know in advance.

21 MR. LARSON: Thank you.

22 THE COURT: Thank you.

23 (Proceedings in the above-entitled  
24 matter were concluded.)  
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REPORTER'S CERTIFICATE

STATE OF UTAH                    )  
                                      :   SS.  
County of Utah                    )

I, Vonda Bassett, 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 reported the  
occasion of the proceedings of the above-entitled  
matter at the aforesaid time and place.

That the proceeding was reported by me in  
stenotype using computer-aided transcription  
consisting of pages 1 through 43 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 22nd day  
of July, 1998.

  
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Vonda Bassett, RPR, CSR  
Utah License No. 87-108390-7801

## **ADDENDUM C**

Official District Court  
of Utah County, State of Utah:  
CARMA B. SMITH, Clerk  
RT 4/15/98 Deputy

## MEMORANDUM DECISION

CASE NO. 981403433

DATE: April 7, 1998

JUDGE: RAY M. HARDING

DEPUTY CLERK: Georgia Snyder

**LAW CLERK:** David Sturgill

**Defendant.**

This matter came before the Court upon Defendant's Motion to Suppress. Having received and considered the Motion and a supporting memorandum, the Court hereby grants the Motion and delivers the following Decision.

## Statement of Facts

On or about January 3, 1998, at approximately 10:30 P.M., Officer Robert Edwards of the Springville Police Department observed Defendant's vehicle parked in a private parking lot. The officer entered the lot, exited his patrol car and approached the driver's side of Defendant's vehicle. Defendant was seated in the driver's seat. As he approached the vehicle he observed the defendant "moving around a lot." The officer engaged Defendant in conversation, and noted that Defendant's responses to his questions were non-responsive and delayed. Officer Edwards asked Defendant for identification, and Defendant produced a driver's license. The officer returned to his patrol car, ran a warrant check, and discovered that Defendant had several outstanding warrants. The officer arrested Defendant, and subsequently found evidence of a controlled substance and drug paraphernalia in Defendant's vehicle. Defendant moves that this evidence be suppressed because it was discovered during an unlawful search and seizure.

### Opinion of the Court

The Fourth Amendment to the United States Constitution provides: "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]" U.S. CONST. amend. IV. Although the expectation of privacy in a vehicle is less than that of a home, "one does not lose the protection of the Fourth Amendment while in an automobile." State v. Schlosser, 774 P.2d 1132, 1135 (Utah 1989).

In Utah a seizure within the meaning of the Fourth Amendment does not occur when a police officer simply approaches an individual on the street and questions him, if the person voluntarily responds, and is free to leave at any time. The Utah Supreme Court determined: "[A]n officer may approach a citizen at any time and pose questions so long as the citizen is not detained against his will." State v. Johnson, 805 P.2d 761, 763 (Utah 1991). This type of police encounter, in Utah, is referred to as a "level one stop." *Id.*

Officer Edwards observed Defendant's parked vehicle, entered the lot and parked his patrol car. The officer approached the driver's side of Defendant's vehicle and made contact with the defendant. At the preliminary hearing, the officer stated that at the time he decided to make contact with Defendant, he did not suspect that he was involved in any type of criminal activity. The officer stated further that he had two purpose in approaching the defendant. One purpose was to check the welfare of the defendant. The other, was to ask Defendant if he had seen anyone pass through the parking lot. Earlier that evening, Officer Edwards received a report of a broken window and was searching for suspects.

Officer Edwards initially asked Defendant "if he was OK." Defendant responded by asking the officer if he was "doing anything wrong." The officer assured him that he was not, and then asked Defendant if "he had seen anyone come through the parking lot in the last couple minutes." Defendant responded: "I was just listening to my radio." This initial inquiry, clearly a level one stop, did not constitute a Fourth Amendment seizure, and was therefore lawful. The defendant responded to the officer's questions voluntarily and there is no indication that Defendant wasn't free to leave.

In contrast to the level one stop, "[w]hen a reasonable person, based on the totality of the circumstances, remains, not in the spirit of cooperation with [an] officer's investigation, but



because he believes he is not free to leave a seizure occurs.” State v. Trujillo, 739 P.2d 85, 87 (Utah Ct. App. 1987). This type of police encounter, in Utah, is referred to as a “level two stop,” and must be justified by a reasonable suspicion of criminal activity. *See* 805 P.2d at 763. Utah’s court of appeals held: “[D]etention for investigative questioning after the fulfillment of the purpose for the initial [interference] . . . is justified under the fourth amendment only if the detaining officer has a reasonable suspicion of serious criminal activity.” State v. Robinson, 797 P.2d 431, 435 (Utah Ct. App. 1990).

In the present case, Officer Edwards took possession of the defendant’s license and returned to his patrol car to run a warrant check. At that point, the initial encounter rose to a level two stop. In State v. Johnson, the Utah Supreme Court held that the defendant was “seized” when an officer “took [the defendant’s] name and birth date and expected her to wait while he ran a warrants check.” 805 P.2d at 762-763 (*quoting State v. Johnson*, 771 P.2d 326, 328 (Utah Ct. App. 1989)). Similarly, Utah’s court of appeals held in State v. Godina, 826 P.2d 652, 655 (Utah Ct. App. 1992), defendants “were not free to leave because the deputy continued to hold their papers after he had satisfied himself that they were not intoxicated.” In this case, Defendant was reasonable if he believed that he was not free to go while the officer ran the warrant check, and if he felt compelled to wait for the return of his license. Defendant was clearly seized within the meaning of the Fourth Amendment. The question is whether the seizure was based upon a “reasonable suspicion of serious criminal activity.” 797 P.2d at 435.

Officer Edwards detained Defendant because the initial inquiry raised some suspicion that the defendant was under the influence of drugs or alcohol. According to the officer, Defendant’s responses were delayed and non-responsive. Officer Edwards stated: “Each question that I asked there was a delay in the amount of time it took for the individual to respond . . . [and] his responses weren’t what I would consider normal responses to the questions[.]” The officer, however, did nothing further to confirm or deny his suspicion. He failed to administer a sobriety test or take any other action to determine whether the abnormal responses were the result of drugs or alcohol use, or something else.

Without any other indication of criminal activity, the officer simply asked Defendant for his driver’s license and permission to return to his patrol car to run a warrant check. This further

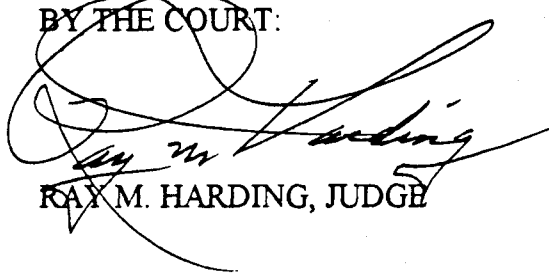
detention was unsupported by articulable facts that would lead a reasonable person to suspect that Defendant was under the influence of drugs or alcohol. *See Terry v. Ohio*, 392 U.S. 1, 21 (1968). The Court concludes that Officer Edwards's detention of Defendant beyond the initial inquiry was not justified by a reasonable suspicion of criminal activity.

**Order**

Accordingly, the Defendant's Motion to Suppress is hereby granted.

DATED this 15 day of April, 1998.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Ray M. Harding", is written over the printed name. The signature is fluid and cursive, with a large loop at the beginning and a long, sweeping tail.

RAY M. HARDING, JUDGE

cc: Curtis L. Larson, Utah County Attorney  
Randy Spencer, Attorney for Defendant