1998

State of Utah v. Marvin Newell Green : Brief of Appellee

Utah Court of Appeals

Randall K. Spencer; Utah County Public Defender Association; Attorney for Appellee.
Marian Decker; Assistant Attorney General; Curtis Larson; Deputy Utah County Attorney; Attorneys for Appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, **Plaintiff/Appelllant,** **vs.** **MARVIN NEWELL GREEN,** **Defendant/Appellee.**	**Priority No. 2** **CASE NO. 981332-CA**

BRIEF OF APPELLEE

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

RANDALL K. SPENCER (6992)
Utah County Public Defender Association
245 North University Avenue
Provo, UT 84601

Attorney for Appellee

MARIAN DECKER
Assistant Utah Attorney General
160 East 300 South, 6th Floor
Salt Lake City, UT 84114-0854

CURTIS LARSON
Deputy Utah County Attorney

Attorneys for Appellant

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, **Plaintiff/Appelllant,** **vs.** **MARVIN NEWELL GREEN,** **Defendant/Appellee.**	**Priority No. 2** **CASE NO. 981332-CA**

BRIEF OF APPELLEE

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

RANDALL K. SPENCER (6992)
Utah County Public Defender Association
245 North University Avenue
Provo, UT 84601

Attorney for Appellee

MARIAN DECKER
Assistant Utah Attorney General
160 East 300 South, 6th Floor
Salt Lake City, UT 84114-0854

CURTIS LARSON
Deputy Utah County Attorney

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Federal Statutes

State Statutes

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, **Plaintiff/Appelllant,** **vs.** **MARVIN NEWELL GREEN,** **Defendant/Appellee.**	**Priority No. 2** **CASE NO. 981332-CA**

BRIEF OF APPELLEE

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, a second degree felony, in violation of Utah Code Ann. §§ 58-37-8(2)(a)(i) and 58-37-8(5)(vi)(1996); and unlawful possession of drug paraphernalia in a drug-free zone, a 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 following the trial court's order suppressing evidence. This Court has jurisdiction of the appeal under Utah Code Ann. § 78-2a-3(2)(e)(1996).

ISSUES PRESENTED ON APPEAL AND STANDARD OF REVIEW

1. **Whether the trial court correctly determined as a matter of law that a level one police-citizen encounter rose to a level two seizure upon the officer's request to see Green's driver's license, and for permission to return with it to his patrol car.**

2. **Whether the trial court correctly determined as a matter of law that the level two seizure was unsupported by reasonable suspicion of criminal activity.**

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).

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 nor 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

Green was charged with possession of cocaine in a drug free zone, a second degree felony, in violation of Utah Code Ann. §§ 58-37-8(2)(a)(i) and 58-37-8(5)(vi)(1996); and unlawful possession of drug paraphernalia in a drug-free zone, a class A misdemeanor, in violation of Utah Code Ann. §§ 58-37a-5 and 58-37-8(5)(vi)(1996) (R.2-1).[1] Green's Motion to Suppress evidence seized from his person and vehicle pursuant to a warrantless search was granted following an evidentiary hearing (R. 27-24). Because the State was unable to proceed

[1]The record is numbered in reverse chronological order.

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 MATERIAL FACTS

Level-Two Seizure

On or about January 3, 1998, Defendant Marvin Green was parked in a private parking lot at approximately 10:30 in the evening (R. 38:4). Green's vehicle was facing a curb which bordered some shrubbery and a fence (R. 38:5-6). Officer Roger Edwards of the Springville City Police Department observed Green's vehicle and decided to investigate. The officer stopped his vehicle behind Green's, at least partially blocking Green's ability to egress, approached Green and engage him in conversation (R. 38:9-10). Officer Edwards also noticed that the license plates on Green's vehicle were expired, but did not issue a citation because Green was parked on private property (R. 38:27). The officer reported that Green's responses to his initial questions were slow.[2] Soon after the officer had engaged Green in conversation, Officer Edwards asked Green for identification, and Green produced a driver's license (R. 38:12). Officer Edwards then returned to his vehicle and did a warrant check on Green and discovered outstanding warrants (R. 38:12-14). After discovering outstanding warrants for Green's arrest, Officer Edwards arrested Green, and found evidence of controlled substances and paraphernalia on Green's person and inside his vehicle (R. 38:14).

---

[2]Officer Edwards testified at the suppression hearing that Green's response to his question of whether Green was okay, was delayed "somewhere between 45 and 60 seconds." Green responded by asking the officer if he was doing something wrong. The officer then asked Green whether he had seen anyone recently pass through the parking lot, to which Green responded, after some delay, "I was just listening to my radio" (R. 38:10-11).

Suppression Hearing

At the close of the suppression hearing the state conceded that the officer's initial contact with Green rose to a level two seizure even before the officer asked Green for identification. The State argued "in this particular case the officer initiated a level one [stop], [but] immediately went to a level two as he discussed and conversed with the individual." (R. 38: 36).

The officer testified at the suppression hearing during cross-examination that he had no reasonable suspicion of criminal activity until he discovered Green's outstanding warrants. The officer testified that even though Green's slow responses raised some concern, until he discovered the warrants, he "didn't necessarily have a reason to hold him" (R. 38:29).

It should also be noted that the State failed to submit to the trial court a written response to Green's Motion to Dismiss.

Ruling

The trial court determined that once Officer Edwards asked to see Green's identification, and for permission to return with it to his vehicle, he was "clearly seized within the meaning of the Fourth Amendment" (R. 25). The Court further held that the seizure "was unsupported by [reasonable], articulable facts," and as a result, granted Green's Motion to Suppress (R. 25-24).

SUMMARY OF THE ARGUMENT

The trial court correctly determined that Officer Edward's initial contact with Green had risen to a level two seizure at the time the officer requested from Green identification and permission to return with it to his patrol car. The Utah Supreme Court held that a defendant was seized within the meaning of the Fourth Amendment, when an officer "took [the defendant's] name and birth date and expected her to wait while he ran a warrants check." State v. Johnson,

805 P.2d 761, 762-763 (Utah 1991) (quoting State v. Johnson, 771 P.2d 326, 328 (Utah Ct. App. 1989). In addition, the State argued at the close of the suppression hearing that the initial encounter "immediately went to a level two [stop] as [the officer] discussed and conversed with [Green]" (R. 38:36). Having already conceded that a level two seizure occurred, the State should not now be allowed to argue to the contrary. If the trial court's decision that a level two seizure occurred is erroneous, as the State contends, that error was clearly invited by the State.

The trial court correctly determined that the level two seizure was unsupported by reasonable suspicion. The trial court held that the officer's concern that Green was under the influence of alcohol or illegal drugs fell short of reasonable suspicion; namely, because he failed to confirm or deny whether Green's behavior was the result of drug or alcohol use, or something else (R. 25). It should be noted that subsequent to Green's arrest, the officer discovered that Green's slow responses during the initial encounter were likely the result of a mental impairment.[3] In addition, Appellant's repeated claims that Officer Edward's reasonably suspected criminal activity directly contradicts the officer's testimony at the suppression hearing. Officer Edwards testified that although he was concerned about Green's behavior during the initial encounter, until he discovered the outstanding warrants he "didn't necessarily have a reason to hold him." (R. 39:29).

Furthermore, Officer Edwards agreed that the expired license plates on Green's vehicle did not constitute criminal activity because Green was parked on private property (R. 38:27).

---

[3]Upon learning that Green resided at a community care living center for mentally disabled people, the officer testified at the suppression hearing that he "thought that his slow responses may be contributed to any type of disability that he may have" (R. 38:31).

The officer obviously knew that he could not cite Defendant for expired plates until he pulled onto public roads.

ARGUMENT

I. GREEN WAS SEIZED WITHIN THE MEANING OF THE FOURTH AMENDMENT AT THE TIME THE OFFICER REQUESTED GREEN'S IDENTIFICATION AND RETURNED WITH IT TO HIS PATROL CAR.

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. Green 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, The trial court determined that the officers initial contact and questioning of Green constituted a level-one encounter, notwithstanding Green's argument that the officer blocked Green's vehicle, shined his lights into his vehicle, and created circumstances equivalent to a defacto stop.[4] The officer testified that he first made contact with Green to determine whether he was okay, and whether he had recently seen anyone pass through the parking lot. (R. 38:9). The trial court determined, however, that once the officer asked Green for his driver's license and permission to return with it to his patrol car, the encounter rose to a "level two" stop (R. 25).

The trial court correctly cited authority to support its finding of a level two seizure. The Utah Supreme Court, in State v. Johnson, 805 P.2d 761, 762-763 (Utah 1991), held that the defendant was "seized" when the officer "took [the defendant's] name and birth date and expected her to wait while he ran a warrants check." The trial court also cited State v. Godina-Luna, 826 P.2d 652, 655 (Utah Ct. App. 1992). In that case, Utah's court of appeals held that the 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, before the officer reasonably suspected any criminal activity, he asked Green to surrender his driver's license and wait while

[4]The trial court held: "The initial inquiry, clearly a level one stop, did not constitute a Fourth Amendment seizure and was therefore lawful" (R. 26).

he returned to his vehicle to "check on a few things" (R. 38:13). The trial court held at that point of the encounter, Green reasonably believed that he was not free to leave (R. 25).

In addition, the State conceded that the stop rose to a level two encounter even before the officer asked Green for identification. The State argued at the close of the suppression hearing that the stop "immediately went to a level two as [the officer] discussed and conversed with [Green]. And then because of that, obtained the driver's license, some identification, went back to his patrol car, went back to his car [sic], and found there were warrants on him" (R. 38:36).

Appellant now argues on appeal that the trial court erroneously determined that Green was seized for Fourth Amendment purposes at the time Officer Edwards requested Green's identification and permission to return with it to his patrol car. This argument clearly contradicts the concession the State made at the suppression hearing that a level two seizure did in fact occur. If the trial court erred in its conclusion that Green was unjustifiably detained, that error was clearly invited by the State and Appellant is prohibited from complaining of it on appeal. The "invited error" doctrine prohibits a party from setting up an error at trial and then complaining of it on appeal." State v. Lyman, 953 P.2d 782, 785 (Utah Ct. App. 1998) (*quoting* State v. Perdue, 813 P.2d 1201, 1205 (Utah Ct. App. 1991); *see also* State v. Dunn, 850 P.2d 1201, 1220 (Utah 1990) (holding a party cannot take advantage of an error committed at trial when that party lead the trial court into committing the error).

Appellant also argues on appeal that Green consented to the continued detention because he responded "okay" to the officer's request for permission to take Green's identification back to his patrol car "to check on a few things" ® 38:13). Whether Green consented to the continued

detention is irrelevant considering the fact that the State admitted that a level two seizure had begun before the officer even asked for Green's identification (R. 38:36).

II. GREEN'S LEVEL TWO SEIZURE WAS UNSUPPORTED BY REASONABLE SUSPICION OF CRIMINAL ACTIVITY.

A level two stop "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). The State's argument that Green's detention beyond the officer's initial inquiries was justified is erroneous and unsupported by the evidence presented at the suppression hearing.

The trial court found that Green's delayed responses were not enough to raise the officer's concern that Green was under the influence of drugs or alcohol to a reasonable suspicion of criminality. The trial court determined that, because the officer failed to confirm or deny whether Green's behavior was the result of drugs or alcohol use, or something else, any suspicion that Green was involved in criminal activity was unreasonable (R. 25-24). It should be noted that subsequent to Green's arrest, the officer discovered that Green's slower than normal responses during the initial encounter were likely the result of a mental impairment.[5] However, as the record reflects, Green did respond rationally to all of the officer's questions.[6]

In addition, at the suppression hearing, during cross-examination, defense counsel asked the officer whether Green was free to leave at anytime before the officer discovered Green's

---

[5]Upon learning that Green resided at a community care living center for mentally disabled people, the officer testified at the suppression hearing that he "thought that his slow responses may be contributed to any type of disability that he may have" (R. 38:31).

[6]Even though officer Edwards testified at the suppression hearing that Green's response to his questions were delayed, they were certainly rational. To Officer Edwards question whether Green was okay, Green responded by asking the officer if he was doing something wrong. To the officer's next question, whether Green had seen anyone recently pass through the parking lot, Green responded, "I was just listening to my radio" (R. 38:10-11).

warrants. The officer responded that although he was "a little concerned with [Green's] responses . . . at that time [he] didn't necessarily have a reason to hold him" (R. 38:29). The officer admitted concern but clearly indicated that he had no reasonable suspicion of criminal activity until he discovered the outstanding warrants for Green. Furthermore, Officer Edwards agreed that the expired license plates on Green's vehicle did not constitute criminal activity because Green was parked on private property (R. 38:27). The officer obviously knew that he could not cite Defendant for expired plates until he pulled onto public roads. Appellant's repeated claims that the officer reasonably suspected criminal activity contradicts the officer's testimony.

CONCLUSION

The evidence before the trial court was that the officer's initial contact with Green rose from a level one to a level two encounter, and according to the officer's testimony, the level two detention was unsupported by reasonable suspicion. A level two seizure absent reasonable suspicion left the trial court with no choice but to grant Green's Motion to Suppress.

For all of the reasons set forth above, Green respectfully requests the Court to affirm the lower court's decision to suppress the evidence discovered as a result of the unreasonable stop and detention of Green.

DATED this 15th day of December, 1998.

Randall K. Spencer
Attorney for Defendant

MAILING CERTIFICATE

I hereby certify that I caused to be delivered two accurate copies of this BRIEF OF APPELLEE to:

MARIAN DECKER
Assistant Utah Attorney General
160 East 300 South, 6th Floor
Salt Lake City, UT 84114-0854

Dated this 15 day of December, 1998.