1998

Utah v. William J. Brownlee : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Priority No. 2
v.	:	
WILLIAM J. BROWNLEE	:	Case No. 981295-CA
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM CONVICTION FOR POSSESSION OF A CONTROLLED SUBSTANCE, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37-8 (1996), IN THE THIRD JUDICIAL DISTRICT, SALT LAKE COUNTY, UTAH, THE HONORABLE HOMER M. WILKINSON, PRESIDING

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conditional guilty plea to one count of possession of a controlled substance (methamphetamine), a third degree felony, in violation of Utah Code Ann. § 58-37-8 (1996). This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(e) (1996).

ISSUE ON APPEAL AND STANDARD OF REVIEW

Did the trial court properly deny defendant's motion to suppress on the ground that the officer had probable cause to arrest defendant? A "bifurcated" review standard applies to this issue. A trial court's underlying factual findings are reviewed deferentially and reversed only for "clear error." *See State v. Pena*, 869 P.2d 932, 935-40 (Utah 1994); *State v. Wright*, 977 P.2d 505, 506 (Utah App. 1999). Its conclusions of law are reviewed

for correctness, allowing some "measure of discretion" in the application of legal standards to the facts. *See Pena*, 869 P.2d at 935-40; *Wright*, 977 P.2d at 506.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

U.S. Const. Amend. IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .

Utah Code Ann. § 77-7-15 (1995)

> A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions.

STATEMENT OF THE CASE

Defendant was charged with one count of possession of an explosive device, a second degree felony, in violation of Utah Code Ann. § 76-10-306 (1995); one count of unlawful possession of a controlled substance (methamphetamine) with intent to distribute , a third degree felony, in violation of Utah Code Ann. § 58-37-8 (1996); one count of carrying a concealed dangerous weapon, a class A misdemeanor, in violation of Utah Code Ann. § 76-10-504 (Supp. 1996); and one count of unlawful possession of a controlled substance (marijuana), a class B misdemeanor, in violation of Utah Code Ann.

§ 58-37-8 (1996) [R. 7-10]. Defendant was bound over after a preliminary hearing [R. 88].

On August 6, 1997, defendant, relying on the preliminary hearing transcript, moved to suppress "all evidence which the arresting and investigating officers obtained from the defendant and the vehicle occupied by the defendant and from the person of the defendant subsequent to the arrest in this case" [R. 33]. The trial court denied defendant's motion [R. 55].

Defendant then entered a conditional guilty plea to one count of possession of a controlled substance (methamphetamine), reserving his right to appeal "the trial court's decision as to the police officer's probable cause for arresting the Defendant" [R. 96-97, 137-38]. *See* Utah R. Cr. P. 11(i); *State v. Sery*, 758 P.2d 935, 938 (Utah Ct. App. 1988).

Defendant filed a timely notice of appeal [R. 133]. This Court remanded the case to the trial court for clarification that defendant had reserved his right to challenge the trial court's suppression ruling under *Sery*. The trial court provided such clarification in an amended order [R. 137-38].

STATEMENT OF THE FACTS

A. Voluntary encounter

On April 5, 1996, Deputy Fountaine, of the Salt Lake County Sheriff's Office, was driving near 5450 South Coliseum Court in Salt Lake County when a concerned citizen flagged him down and advised him that a vehicle with out-of-state license plates was

parked around the corner and that a male was asleep in it [R. 88:6]. The concerned citizen identified himself to Deputy Fountaine, explained that there had been a lot of problems in the area, including some burglaries and thefts, and asked Deputy Fountaine to "check the car out and the person" [R. 88:6, 18-19].

Deputy Fountaine proceeded to the area described and found a Corvette with Illinois license plates parked against the curb [R. 88:6-7]. As he approached the vehicle, Deputy Fountaine noticed a television set on the seat, "a whole bunch of [other] property," and a man sleeping inside [R. 88:6-7]. It was about 9:36 a.m. [R. 88:7].

Several possibilities occurred to the officer: out-of-state license plates in conjunction with all the property inside the car alerted the officer to the possibility of burglary [R. 88:7]. "I also wondered if possibly he had stopped because he was intoxicated and then fallen asleep or something" [R. 88:7].

Deputy Fountaine knocked on the window and woke up defendant [R. 88:8,22]. Deputy Fountaine then asked defendant both for identification and to roll down the window so that the deputy could speak with him [R. 88:8, 22]. Defendant appeared intoxicated: he had bloodshot eyes and acted confused [R. 88:8, 21, 23]. For about five minutes, Deputy Fountaine continued to request that defendant roll down his window and defendant continued to act confused [R. 88:8].

B. Detention for possible DUI supported by reasonable suspicion

Defendant then reached for his keys; at that point, Deputy Fountaine pulled his gun

out of his holster and put the gun on the roof of defendant's car, aiming it into the air [R. 88:8]. Deputy Fountaine told defendant that he couldn't leave and that defendant needed to roll down the window or unlock or open the door so that Deputy Fountaine could talk with him [R. 88:8, 24]. Deputy Fountaine explained: "I don't see that I have the obligation to let somebody drive away in a car, that was possibly intoxicated and could endanger other human beings"; "the jeopardy he would have imposed on–on people if I would have let him drive away from there, led me to feel that I had to keep him there" [R. 88:21, 23].

Defendant still did not roll down his window [R. 88:8]. Instead, defendant again reached for his keys [R. 88:8]. At that point, Deputy Fountaine brought his hand back and told defendant that he would break the window if defendant did not open the door [R. 88:8-9]. Defendant then unlocked the door and the officer was able to open it [R. 88:9].

C. Arrest for possession of a concealed weapon

Deputy Fountaine called for backup, and Deputy Rogers arrived about one minute later [R. 88:9]. Deputy Fountaine then asked defendant to step out of the car because "we needed to frisk him to make sure he didn't have any weapons" [R. 88:10]. As Deputy Fountaine began to handcuff defendant for safety and bring defendant to the deputy's car, Deputy Rogers saw a firearm between the seat where defendant had been sitting and the console [R. 88:10]. About half of the firearm was visible once defendant exited the car [R. 88:11, 25]. Upon examination, Deputy Rogers found the gun was loaded [R. 88:11].

Deputy Fountaine asked defendant for his name and for information on the gun [R. 88:11]. When defendant gave Deputy Fountaine a fictitious name, Deputy Fountaine placed him under arrest for possession of a concealed weapon [R. 88:11-12].

D. Search incident to arrest

Following defendant's arrest, Deputy Fountaine and another deputy began a more thorough search of defendant [R. 88:12-13]. The deputies found three pipe bombs in one of the fanny packs around defendant's waist and a small bag of marijuana in defendant's left front pocket [R. 88:12-13, 32]. A subsequent search of the car revealed two small bags of methamphetamine, numerous small plastic bags, more marijuana, and two pagers [R. 88:29].

E. Ruling on Motion to Suppress

At the hearing on the motion to suppress, defendant conceded that Deputy Fountaine had reasonable suspicion to detain defendant to investigate defendant's possible intoxication when defendant first attempted to leave the scene:

> COURT: So are you thinking the probable cause was there to detain him to take a sobriety test or drug test there at the scene?
>
> DEFENSE: If indeed that's what was on the officer's mind in terms of probable cause at that point, that's what he could have done.

[R.148:15; Addendum B].[1]

Before ruling on defendant's motion, the trial court clarified that defendant was challenging the deputy's conduct prior to defendant's actual arrest, which took place only after discovery of defendant's gun [R. 148:11].

In its oral ruling on defendant's motion, the trial court found:

1. That Deputy Fountaine had reasonable suspicion to stop and question defendant, "the reasonable suspicion being that the neighbor had approached the officer and told him of this situation."[2]

2. That "the car was parked in an area which was an unusual place for a person, if he's going to be taking a nap, to be parked."

3. That defendant's "eyes were bloodshot."

4. That defendant "did not roll down the window, causing the officer to take his gun out" because "there was the threat there."

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[1]An officer needs only reasonable suspicion that a person has committed or is about to commit a crime in order to detain that person. *See* Pp. 9, 12-16 herein. Because "probable cause" is a higher standard than "reasonable suspicion," defendant's concession that Deputy Fountaine had probable cause to detain defendant is also a concession that the deputy had reasonable suspicion to detain him. As is evident throughout the suppression hearing transcript, the trial court often applied a higher standard of justification to Deputy Fountaine's actions than the Fourth Amendment requires. *See, e.g.,* footnote 2 herein.

[2]In determining that Deputy Fountaine had reasonable suspicion to justify Deputy Fountaine's initial approach of defendant's vehicle, the trial court applied a higher standard of justification than the Fourth Amendment requires. A police officer may approach a parked car in a public place at any time without offending the Fourth Amendment. *See* Pp. 9, 10-11 herein.

5. That Deputy Fountaine, "by this time, has seen other things in the car which led him to somewhat of a suspicious nature . . . a television in the back, and some furniture.

6. That defendant's attempt to leave the area "causes questions to arise in the officer's mind."

[R. 148:17-18; Addendum A]. Although recognizing that no one of these factors alone would be sufficient to uphold the detention, arrest, or search, the trial court concluded:

7. "That an accumulation of things gives probable cause to the officer to approach the individual to question him and to see if he is deceased or some foul play has taken place."[3]

8. That, after the officer revealed his gun, the confrontation "went to Level 2 there."

9. That "when he tries to start the car, the officer had the right to take the force necessary to stop the individual from leaving the scene."

[R. 148:17-18; Addendum A].

SUMMARY OF ARGUMENT

The trial court properly denied defendant's motion to suppress where Deputy Fountaine's approach of a parked car on a public street did not implicate defendant's Fourth Amendment rights; where defendant's detention thereafter was supported by reasonable suspicion of a possible DUI; and where his arrest was supported by probable cause, i.e., a concealed weapon in plain view. The subsequent searches of defendant's

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[3]*See* footnote 2.

person and the passenger compartment of his vehicle were proper as searches incident to arrest.

ARGUMENT

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS BECAUSE THE SEARCH WAS INCIDENT TO AN ARREST SUPPORTED BY PROBABLE CAUSE

Defendant asserts that the only information that Deputy Fountaine had when he arrested defendant was that defendant was asleep in the driver's seat "of a vehicle legally parked which had personal property in it " and that, when defendant was awakened, he had bloodshot eyes and was confused. Aplt. Br. at 8. Defendant argues that this information was "not sufficient probable cause to warrant a level 3 stop as the officer did in the instant case." Aplt. Br. at 8.

The Utah Supreme Court has identified three levels of constitutionally permissible police/citizen encounters:

> "(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) (per curiam) (quoting *United States v. Merritt*, 736 F.2d 223, 230 (5th Cir. 1984)).

Defendant's brief implies that Deputy Fountaine needed probable cause to justify his actions throughout his escalating encounter with defendant, *see* Aplt. Br. at 7-10. However, the deputy's encounter with defendant began as a level-one encounter, before escalating to a level-two and then to a level-three encounter only upon the increasingly suspicious nature of the circumstances. A different standard of justification applies to each of these levels. *See Deitman*, 739 P.2d at 617-18.

Furthermore, in challenging the deputy's actions, defendant contends that "the confusion of defendant" alone was insufficient to support probable cause and that defendant's "blood shot eyes" alone were also insufficient, *see* Aplt. Br. at 8-9. However, the Utah Supreme Court has held that the reasonableness of police action "depends on the totality of the circumstances." *Provo City v. Warden*, 844 P.2d 360, 362 (Utah App. 1992) (citations and internal quotation marks omitted).

Here, the trial court properly denied defendant's motion on the grounds that Deputy Fountaine's conduct throughout his encounter with defendant was in compliance with *Deitman* and the Fourth Amendment.

A. Level-one voluntary encounter

Deputy Fountaine's encounter with defendant began as a level-one encounter. Deputy Fountaine approached defendant's vehicle in response to a concerned citizen's request to check it out; the vehicle was unfamiliar to the citizen, had a man sleeping in it at 9:30 a.m., and was parked in a residential area that had recently experienced several

burglaries and thefts [R. 88:6, 18-19].

Although several possibilities occurred to Deputy Fountaine as he approached defendant's car, he did nothing at this point to detain defendant. Deputy Fountaine merely knocked on defendant's window to ask defendant some questions and thereby allay the fears of the concerned citizen who first approached him [R.88:8, 22].

Because Deputy Fountaine had done absolutely nothing to this point to stop defendant from leaving if he so chose, this initial encounter was a level-one encounter that did not implicate defendant's Fourth Amendment rights. *See State v. Bean*, 869 P.2d 984, 986 (Utah App. 1994) ("'[A] seizure within the meaning of the fourth amendment does not occur when a police officer merely approaches an individual on the street and questions him, if the person is willing to listen.'" (quoting *State v. Trujillo*, 739 P.2d 85, 87-88 (Utah App. 1987)); *Deitman*, 739 P.2d at 617 ("'[A]n officer may approach a citizen at anytime [sic] and pose questions so long as the citizen is not detained against his will.'"); *Thompson v. State*, 797 S.W.2d 450, 452 (Ark. 1990) (holding officer's approach of parked car in public place "is not a 'seizure' within the meaning of the fourth amendment").

Defendant's reliance on *State v. Struhs*, 940 P.2d 1225 (Utah App. 1997), then, is misplaced. In that case, the officer instituted a level-two stop based solely on the fact that a vehicle was parked in an isolated area late at night. In this case, Deputy Fountaine's initial approach to defendant's vehicle constituted only a level-one encounter.

B. Level-two detention supported by reasonable suspicion

The encounter between Deputy Fountaine and defendant rose to a level-two encounter only when Deputy Fountaine took out his gun and told defendant not to leave [R. 88:8, 24]. *See Bean*, 869 P.2d at 986 (holding that level-two stop "occurs when the officer 'by means of physical force or show of authority has in some way restrained the liberty' of a person." (quoting *United States v. Mendenhall*, 446 U.S. 544, 552 (1980) (citation and additional internal quotation marks omitted)). A level-two encounter must be supported by reasonable suspicion. *See Deitman*, 739 P.2d at 617.

Here, Deputy Fountaine had reasonable suspicion to believe defendant was involved in criminal activity. The deputy had approached defendant's vehicle upon the request of a concerned citizen [R. 88:6, 19]. The car had an out-of-state license plate and several items of personal property inside—including a television set—and was parked in a residential neighborhood which had recently been the site of numerous thefts and burglaries [R. 88:6,-7, 19]. The property in the car alerted the deputy to the possibility that defendant had been involved in a burglary [R. 88:7].

Deputy Fountaine also observed that defendant was asleep in the vehicle, although it was approximately 9:30 a.m. [R. 88:6-7]. When defendant woke up after Deputy Fountaine knocked on the window, Deputy Fountaine saw—in the driver's seat of a car—a confused man with bloodshot eyes [R. 88:8]. Furthermore, defendant's confusion did not dissipate, even over a relatively significant period of time, during which defendant

did not respond to Deputy Fountaine's requests [R. 88:8, 24]. This fact alerted the deputy to the possibility that defendant "had stopped because he was intoxicated and then fallen asleep or something" and that defendant thus "could endanger other human beings" [R. 88:7, 21]. Finally, defendant reached for his keys, from which the deputy reasonably inferred that defendant intended to drive away [R. 88:8, 23].

Under the Fourth Amendment, 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. *See Terry v. Ohio*, 392 U.S. 1, 30 (1968); *see also Deitman*, 739 P.2d at 617-18; *see also State v. Rodriguez-Lopi,* 954 P.2d 1290, 1292-93 (Utah App. 1998). The reasonable suspicion standard is "less demanding" than probable cause and requires only "some minimal level of objective justification." *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (citations and quotation marks omitted). Whether there is some minimal level of objective justification "depends on the totality of the circumstances." *Warden*, 844 P.2d at 362 (citations omitted); *see also State v. Lopez*, 873 P.2d 1127, 1132 (Utah 1994); *Bean*, 869 P.2d at 988.

Thus, the suspicion may be based on the observation of "unusual conduct which leads [the officer] reasonably to conclude in light of his experience that criminal activity *may* be afoot." *Terry*, 392 U.S. at 30, 88 S. Ct. at 1884; *see also Rodriguez-Lopi*, 954 P.2d at 1293. Although many of the facts relied upon may be "consistent with innocence, all that is required is that the [officer's] suspicion be 'reasonable' and 'articulable,' as

determined by the totality of the circumstances." *United States v. Erwin*, 155 F.3d 818, 823 (6th Cir. 1998) (en banc), *cert. denied*, 119 S. Ct. 906 (1999); *see also* 4 Wayne R. LaFave, Search and Seizure, A Treatise on the Fourth Amendment, §9.4(b) & n.64 (p. 147) (3rd ed. 1996) (citing cases holding that officer need not rule out possibility of innocent behavior).

Furthermore, the attempt to flee is a relevant factor. *See Illinois v. Wardlow*, No. 98-1036 (U.S. January 12, 2000) (recognizing that "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion" and that "flight—wherever it occurs—is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such").

Section 41-6-44(2)(a) of the Utah Code prohibits a person from being "in actual physical control" of a vehicle if the person is under the influence of alcohol. Utah Code Ann. § 41-6-44(2)(a) (Supp. 1994). As this Court has noted, the purpose of this provision is to "enable the drunken driver to be apprehended before he strikes." *Richfield City v. Walker*, 790 P.2d 87, 91 (Utah App. 1990) (citations and internal quotation marks omitted); *see also State v. Clayton*, 748 P.2d 401, 403 (Idaho 1988) (stating "State's interest in determining whether person in control of automobile was intoxicated, before person had opportunity to drive in an intoxicated state, outweighed person's Fourth Amendment interest in being left alone" (citation omitted).

Thus, a person can be "in actual physical control" of a motionless vehicle. *See,*

e.g., Walker, 790 P.2d at 92. Factors relevant to determining whether a person is "in actual physical control" of a motionless vehicle include whether the person "was positioned in the driver's seat" and whether the person "had possession of the ignition key, and had the apparent ability to start and move the vehicle." *Id.* (citing *Lopez v. Schwendiman*, 720 P.2d 778, 780-81 (Utah 1986) (holding that "as long as a person is physically able to assert dominion by starting the car and driving away, he has substantially as much control over the vehicle as he would if he were actually driving it")).

As defendant conceded to the trial court in the hearing on his motion to suppress, the totality of the circumstances to this point was sufficient to raise at least an articulable suspicion that defendant had committed or was committing a DUI [R. 148:15]. Further detention was thus warranted. *See Warden*, 844 P.2d at 363 ("The Fourth Amendment's requirement of reasonableness is analyzed by weighing the individual's right to personal security against the public interest.").

Neither *State v. Lovegren*, 829 P.2d 155 (Utah App. 1992), nor *State v. Godina-Luna*, 826 P.2d 652 (Utah App. 1992), both cited by defendant, suggest otherwise. The issue in *Lovegren* was whether continued detention was reasonable after the officer had already checked out the defendant's license and issued defendant a citation. *See Lovegren*, 829 P.2d at 156-58 (finding violation of Fourth Amendment where officer "did nothing to confirm or deny his suspicion that Defendants were under the influence of

drugs or alcohol" and "[w]ithout any other indication of criminal activity, the officer simply made the decision to search the car"). The *Godina-Luna* court had the same concern. *See Godina-Luna*, 826 P.2d at 654 (holding that officer had no reasonable suspicion to continue to detain defendant after determining that defendant was not intoxicated and that identification and registration of auto disclosed "nothing amiss").

In this case, far from dispelling Deputy Fountaine's suspicions, defendant's uncooperativeness heightened them, extending the scope of the level-two detention.

C. Scope of detention justified

Deputy Fountaine detained defendant only as long as necessary to confirm or dispel his suspicions of criminal activity. Under the Fourth Amendment, "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" as long as the detention is "no longer than necessary to effectuate the purpose of the stop." *Deitman*, 739 P.2d at 617; *see also Rodriguez-Lopi,* 954 P.2d at 1292. "[T]he officer must diligently pursue a means of investigation likely to confirm or dispel the suspicions quickly." *City of St. George v. Carter*, 945 P.2d 165, 170 (Utah App. 1997), *cert. denied*, 953 P.2d 449 (Utah 1998).

In *Carter*, the purpose of the detention was to determine if the defendant was intoxicated. *See Carter*, 945 P.2d at 170. The defendant had rolled down the window but the officer still could not confirm or dispel his suspicion that defendant was under the influence of alcohol, since other odors were present in the car. *See id.* This Court held

that, under those circumstances, the officer's subsequent "request that defendant exit the vehicle was an appropriate means to quickly confirm or dispel his reasonable suspicion." *Id. Cf. State v. Lopez*, 873 P.2d 1127, 1132 (Utah 1994) (holding that officer need not observe actual violation to justify stop of automobile; "[s]topping a vehicle may also be justified when the officer has 'reasonable articulable suspicion that the driver is . . . driving under the influence of alcohol'" (citation omitted)).

Here, as in *Carter*, one purpose of the initial detention was to determine if defendant was intoxicated. Deputy Fountaine sought to quickly dispel or confirm his suspicions by asking defendant to either roll down the window or open the door to the truck [R. 88: 8, 24]. Defendant did not roll down his window [R. 88:8]. Thus, Deputy Fountaine could not yet confirm or dispel his reasonable suspicion that defendant was under the influence of alcohol. Deputy Fountaine then asked defendant to exit defendant's vehicle. As in *Carter*, that request "was an appropriate means to quickly confirm or dispel his reasonable suspicion" and was therefore "permissible." *Id.*[4]

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[4]Defendant cites to *State v. James,* 977 P.2d 489 (Utah App.), *cert. granted*, 984 P.2d 1023 (Utah 1999), to support his claim that the search in this case was illegal. However, the precedential value of *James* is uncertain. The Utah Supreme Court has granted the State's petition for certiorari in that case. *See State v. James*, 984 P.2d 1023 (Utah 1999). Furthermore, *James* is distinguishable on the facts. In *James*, this Court found that the officer "may or may not have knocked on the window, but, without necessarily waiting for a response, opened the door," *James*, 977 P.2d at 490; here, Deputy Fountaine repeatedly gave defendant a choice of either rolling down the window or opening the door [R. 88:8-9, 22, 24]. Defendant's unlocking his door rather than opening his window indicated his preference that contact be made through an open door [R. 88:9].

D. Level-three arrest supported by probable cause

The encounter rose to a level-three encounter when Deputy Fountaine arrested defendant. It was only the arrest—which occurred *after* defendant's gun was seen in plain sight, and *after* defendant provided Deputy Fountaine with a fictitious name [R. 88:12, 26; 148:11]—that had to be supported by probable cause.

As discussed above, Deputy Fountaine lawfully detained defendant to determine at least whether defendant was intoxicated. Completion of that investigation required, at the least, that defendant lower his car window, or, in the alternative, exit his car. Defendant, by unlocking his door [R. 88:9], apparently chose the latter, at which point Deputy Fountaine called for backup [R. 88:9]. Deputy Rogers arrived within about one minute [R. 88:9]. Deputy Fountaine then asked defendant to step out of the car "to frisk him to make sure he didn't have any weapons" [R. 88:10]. *See State v. Schlosser*, 774 P.2d 1132, 1135 (Utah 1989) (holding that "officer, for his own protection, may . . . order a driver out of a vehicle."). Almost immediately, Deputy Rogers identified a loaded firearm in plain view next to where defendant had been sitting [88:10-11, 25].

"A seizure is valid under the plain view doctrine if (1) the officer is lawfully present, (2) the item is in plain view, and (3) the item is clearly incriminating." *State v. Shepard*, 955 P.2d 352, 357 (Utah App. 1998). Deputy Fountaine had reasonable suspicion to detain defendant and order defendant out of his car to determine whether he was about to drive away while intoxicated. The officers were thus lawfully present when

they saw defendant's gun in plain view. *See, e.g., Schlosser*, 774 P.2d at 1135; *Carter*, 945 P.2d at 170. Furthermore, the gun was clearly incriminating, especially in light of the television and other items of personal property in defendant's car suggesting a possible burglary and defendant's confused behavior. *See, e.g., United States v. Hatten*, 68 F.3d 257, 261 (8th Cir. 1995) ("Hidden guns, even badly hidden guns, are by their nature incriminating.") (and cases cited therein). Seizure of the gun was therefore justified under the plain view doctrine. *Cf. Shepard*, 955 P.2d at 357 (upholding seizure of corncob pipe in passenger side door which came into plain view when passenger exited automobile after request by officer to do so); *State v. O'Brien*, 959 P.2d 647, 649-50 (Utah App. 1998).

Thus, in addition to defendant's suspicious behavior, his persistent state of confusion, and the items of personal property in the car in a neighborhood recently plagued with burglaries, defendant was carrying a concealed and loaded weapon [R. 88:6-11]. Defendant then gave the deputies a false name [R. 88:11-12].

In *State v. Wright*, 977 P.2d 505 (Utah App. 1999), this Court explained:

> Probable cause is present when """the facts and circumstances within [the officers'] knowledge and of which they ha[ve] reasonably trustworthy information [are] sufficient in themselves to warrant a [person] of reasonable caution in the belief that" an offense has been or is being committed.'"

Id. at 507 (quoting *State v. Spurgeon*, 904 P.2d 220, 225 (Utah App. 1995) (other citations omitted)). As with reasonable suspicion, whether there is probable cause

depends on the totality of the circumstances. *See State v. Anderson*, 910 P.2d 1229, 1233 (Utah 1996); *Spurgeon*, 904 P.2d at 227. In this case, the totality of the circumstances indicate that probable cause existed to arrest defendant [R. 88:11-12, 26].[5]

E. Search incident to arrest

During a search of defendant's person subsequent to his arrest, the deputies found three pipe bombs in a fanny pack around defendant's waist and a bag of marijuana in his front pocket [R. 88:13]. A search of the passenger compartment of his car revealed methamphetamine, marijuana, two pagers, and numerous small plastic bags [R. 88:29].

"According to the rule allowing a search incident to an arrest, an arresting officer may, without a warrant, lawfully search the area surrounding the person he or she is arresting if: (1) the arrest is lawful, (2) the search is of the area within the arrestee's immediate control; and (3) the search is conducted contemporaneously to the arrest." *State v. Giron*, 943 P.2d 1114, 1117-18 (Utah App. 1997).

As established in Subsection D above, the arrest in this case was lawful. *See* Pp. 18-20 herein. Furthermore, because a search incident to arrest may include the search

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[5]Defendant suggests that failure to arrest defendant for the crime originally suspected of forecloses the ability to arrest him for any other crime. *See* Aplt. Br. at 9. However, in light of this more immediately serious criminality, it is neither unusual nor improper that the deputy did not further investigate defendant's suspected intoxication. *See, e.g., State v. Maycock*, 947 P.2d 695 (Utah App. 1997); *State v. Ottesen,* 920 P.2d 183 (Utah App. 1995); *State v. Spurgeon*, 904 P.2d 220 (Utah App. 1996) (all involving stops pursuant to observed traffic violation where no traffic citation was ultimately issued due to discovery of more serious offenses).

both of the person actually arrested and of the passenger compartment of the automobile in which the person was an occupant, the search in this case was a search of the area within defendant's immediate control. *See Giron*, 943 at 1118 (holding search of passenger compartment is proper "even when . . . the arrested occupant of the car has already been handcuffed and removed from the car" (quoting *New York v. Belton*, 453 U.S. 454, 460, 101 S. Ct. 2860, 2864 (1981))); *Spurgeon*, 904 P.2d at 228. Finally, the search occurred contemporaneously with defendant's arrest [R. 88:12-14].

Although defendant argues that the evidence taken from his person and his car is inadmissible because the searches were illegal, both searches were valid as searches incident to defendant's arrest.

CONCLUSION

Based on the above, the State requests that the Court affirm the trial court's denial of defendant's motion to suppress below.

RESPECTFULLY SUBMITTED 20th January 2000.

JAN GRAHAM
Utah Attorney General

KAREN A. KLUCZNIK
Assistant Attorney General

CERTIFICATE OF MAILING

I certify that on 20th January, 2000, I caused to be mailed, by U.S. Mail, postage prepaid, two accurate copies of this ***BRIEF OF APPELLEE*** to:

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ADDENDA

Addendum A

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,

Plaintiff,

vs.

WILLIAM BROWNLEE,

Defendant,

Case No. 971900791

Transcript of:

HEARING ON MOTION TO SUPPRESS

BEFORE THE HONORABLE HOMER F. WILKINSON

SCOTT M. MATHESON COURTHOUSE
450 SOUTH STATE STREET
SALT LAKE CITY, UTAH 84114-1860

ORIGINAL

REPORTER'S TRANSCRIPT OF PROCEEDINGS

AUGUST 13, 1997

REPORTED BY: ED MIDGLEY, RPR, RMR
238-7533

man and question him, because he suspected him to be under the influence of alcohol or drugs, he would have given him a field sobriety test and asked him to take a blood or urine test.

THE COURT: Does he have probable cause to unholster his gun and detain him when he tried to start the car?

MR. MCCOY: Well, to tell you the truth, I don't think he did. Because no crime had been committed. There's no evidence that any crime had been committed. There isn't anything there. I mean this is a casual encounter that isn't -- the guy doesn't want to talk to him. That's all I have.

THE COURT: You're standing, Mr. Lemcke. If I allow you, then I'd have to allow Mr. McCoy. I would indicate to you, counsel, that I have read your memoranda, and I have read the cases submitted by Mr. McCoy, and the court was somewhat familiar with some of these cases. And of course I've dealt with probable-cause type cases many times.

And it's always a close question -- well, not always, but I'd say an awful lot of cases that are close. And of course in the *Struhs* case, it does give the three situations as far as the levels of stopping.

And the court would find that an officer

does have the right, under reasonable suspicion, to stop and question an individual, the reasonable suspicion being that the neighbor had approached the officer and told him of this situation.

Now, I guess the neighbor said, "The man is sleeping in the car." I guess the neighbor didn't know if he was sleeping or if he was dead or what the situation was.

But the car was parked in an area which was an unusual place for a person, if he's going to be taking a nap, to be parked. I'm not saying that if a person wants to take a nap in a residential area that he doesn't have a right to, but I'm saying that an accumulation of things gives probable cause to the officer to approach the individual to question him and to see if he is deceased or some foul play has taken place.

When he approached him, the person awakened. His eyes were bloodshot. I don't think bloodshot eyes were sufficient. I know it's not, in and of itself, to be sufficient.

But the person did not roll down the window, causing the officer to take his gun out. He didn't point the gun at him at that point, but I think there was the threat there, the evidence of fear on the part

of the officer as he took his gun out and held it on the roof of the car.

I'm sure the defendant saw the gun, and I'm sure that was the intent of the officer; the intent being to want him to roll down the window and not start the car and not leave.

I think it went to Level 2 there, as I think both counsel argued. I think that when he tries to start the car, the officer had the right to take the force necessary to stop the individual from leaving the scene. He also, by that time, has seen other things in the car which led him to somewhat of a suspicious nature; but that itself would not be sufficient, if he had just seen a television in the back, and some furniture. Maybe he's moving.

But he tries to leave the area, in which case it causes questions to arise in the officer's mind. The court finds -- first of all, let me indicate that there are some close situations here, but I do find that the officer had probable cause to question the individual. He had probable cause to detain the individual.

Upon the individual trying to leave, he had probable cause to then take him into custody, to search the car, and to arrest him, with the evidence

that he found.

The court would find in favor of the State, denying the defendant's motion to suppress the evidence, and allow the evidence to be used at the time of trial. Any questions?

MR. MCCOY: No. Thank you.

THE COURT: Counsel, we have a trial date coming up. Keep me informed. I do have other matters and situations. Keep me informed as to what's taking place. Thank you, counsel.

MR. LEMCKE: Thank you, your Honor.

(Whereupon, the instant proceedings came to a close.)

Addendum B

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,

Plaintiff,

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WILLIAM BROWNLEE,

Defendant,

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test or urine test. He didn't do it.

I'm saying that his lack of doing that shows his real intent that morning. That's what is relevant. He didn't have the intent of stopping this man for a DUI or drug-related driving offense, or he would have put him through sobriety tests and asked him to then take a blood test. He didn't do that.

THE COURT: So are you thinking the probable cause was there to detain him to take a sobriety test or drug test there at the scene?

MR. MCCOY: If indeed that's what was on the officer's mind in terms of probable cause at that point, that's what he could have done.

THE COURT: But if that was not on his mind, if he had no intention of stopping for that purpose, does he have the right to stop and question him at the point that he did, and then do what followed?

MR. MCCOY: I'm saying that I don't think he had -- that that was in his mind that morning. He just wanted to talk to him, and I don't think that this business of bloodshot eyes or nervousness has anything to do with this case as far as a practical matter.

And that morning, the officer is truly -- if he truly thought he had probable cause to stop this