

2001

Utah v. Shayne M. Hansen : Unknown

Utah Supreme Court

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Recommended Citation

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
	:	
Plaintiff/Petitioner,	:	
	:	
v.	:	
	:	
SHAYNE M. HANSEN,	:	Case No. 20010100-SC
	:	
Defendant/Respondent.	:	Priority No. 13

BRIEF OF RESPONDENT ON CERTIORARI REVIEW

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UTAH**

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SHAYNE M. HANSEN,	:	Case No. 20010100-SC
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JURISDICTIONAL STATEMENT AND OPINION BELOW

This Court granted the state's Petition for Writ of Certiorari to the Utah Court of Appeals in State v. Hansen, 2000 UT App 353, 17 P.3d 1135. The court of appeals' decision in Hansen is attached hereto as Addendum A. Jurisdiction is conferred on this Court pursuant to Utah Code Ann. § 78-2-2(3)(a) and (5) (1996); and as set forth in State v. South, 924 P.2d 354, 355-57 (Utah 1996).

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

The issues presented for review are as follows:

- A. Whether the court of appeals' ruling in State v. Hansen, 2000 UT App 353, should be affirmed since the totality of the circumstances failed to support consent to search.
- B. Whether the "consent" and resulting seizure were invalid where they were poisoned by a prior police illegality.

STANDARD OF REVIEW: On certiorari, this Court adopts the same standard of review used by the court of appeals: questions of law are reviewed for correctness, and findings are reversed only if clearly erroneous. State v. Leyva, 951 P.2d 738, 741 (Utah 1997) (cite omitted). The court of appeals reviewed the issues on appeal in this case using a bifurcated standard: "[T]he trial court's ultimate conclusion that consent was voluntary or involuntary is reviewed for correctness. See *State v. Thurman*, 846 P.2d 1256, 1271 (Utah 1993). However, '[T]he trial court's underlying factual findings will not be set aside unless they are found to be clearly erroneous.' *Id.*" Hansen, 2000 UT App 353, ¶7.

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

The following provision will be determinative of the questions presented for review: U.S. Const. amend. IV. The text of that provision is contained in the attached Addendum B.

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings, Disposition in the Court Below.

On February 18, 1999, the state filed an Information against Hansen for unlawful possession of a controlled substance, a third degree felony offense under Utah Code Ann. § 58-37-8(2)(a)(i) (1998), and unlawful possession of drug paraphernalia, a class B misdemeanor under Utah Code Ann. § 58-37a-5 (1998). (R. 2-3.) On July 2, 1999, Hansen filed a motion to suppress evidence obtained during a warrantless search. (R. 23-25.) After an evidentiary hearing (R. 49; 84), the trial judge denied the motion. (R. 69.) A copy of the trial court's findings of fact and conclusions of law is attached hereto as Addendum C

(hereinafter "Findings" and/or "Conclusions").

On August 20, 1999, Hansen entered into a conditional guilty plea, wherein he pled guilty to unlawful possession/use of a controlled substance, a third degree felony offense. The trial court dismissed the charge for drug paraphernalia and Hansen specifically "retain[ed] his right to appeal" the trial court's "denial of his motion to suppress," pursuant to State v. Sery, 758 P.2d 935 (Utah App. 1988). (R. 55; see also 58.) Thereafter, Hansen appealed. On December 14, 2000, the court of appeals issued an opinion reversing the trial court's ruling on the matter. Hansen, 2000 UT App 353. This Court granted the state's petition for a writ of certiorari review.

STATEMENT OF FACTS

On December 11, 1998, Officer Huntington was driving behind Hansen. As Huntington initiated a computer check on Hansen's car, he observed Hansen make "an improper lane change." (R. 84:6-12.) Also, the computer check revealed that Hansen's car was uninsured. (R. 84:10.) Huntington initiated a traffic stop and pulled behind Hansen in a convenience store parking lot. (R. 84:10-11.) Huntington's emergency lights were activated. (Id.); Hansen, 2000 UT App 353, ¶2.

"Officer Huntington, dressed in uniform and carrying a sidearm, exited his patrol car and confronted Hansen." Hansen, 2000 UT App 353, ¶3; (R. 84:8, 11, 19). Huntington told Hansen he had been stopped for "improper lane change" and lack of insurance. (R.84:12.) Hansen told Officer Huntington that he did not have insurance "because he could not afford

it." (R. 84:12-13.) Huntington then requested Hansen's license and registration and returned to his patrol car to run a computer check. The check revealed a valid license and no outstanding warrants for arrest. (R. 84:13); Hansen, 2000 UT App 353, ¶3.

As Officer Huntington returned to Defendant Hansen's car, the encounter intensified: a second officer pulled behind Hansen, activated his emergency lights, and stepped out of his patrol car. Hansen, 2000 UT App 353, ¶3; (R. 84:14, 36-37).

Huntington returned the license and registration to Hansen and informed him to obtain insurance for the car. Huntington intended to give Hansen a warning for the "improper lane change" (R. 84:16-17), but did not recall saying anything about the matter. (R. 84:32-34, 35-36, 43-45.) Instead, without any break in the conversation and without any discussion concerning the lane change, Huntington asked Hansen if he had alcohol, weapons, or drugs in the vehicle. Hansen, 2000 UT App 353, ¶4; (R. 84:16-17, 37-38). Hansen answered, "no." Huntington then asked, "Do you mind if I check?" Hansen answered, "yes." Hansen, 2000 UT App 353, ¶4; (R. 84:17-18, 38-40).

Thereafter, Huntington told Hansen and his passenger to step out of the car and to stand next to the second officer. Hansen, 2000 UT App 353, ¶5 (R. 84:19-20). Hansen and the passenger complied. Huntington conducted a search and found a billy club and a marijuana pipe on the floor of the driver's area of Hansen's car. (R. 84:20-21.) Officer Huntington asked "whose marijuana pipe it was" and Hansen said it was his. (R. 84:21.) The officer arrested Hansen and searched him incident thereto, locating a substance that he

believed to be methamphetamine. Hansen, 2000 UT App 353, ¶5; (R. 84:22).

During proceedings in the trial court, Hansen moved to suppress the evidence seized during the warrantless search. (R. 23-25, 84). The trial court denied the motion. (R. 69.) Hansen appealed. The court of appeals reversed the matter on the grounds that the state failed to establish consent. Hansen, 2000 UT App 353.

Hansen also argued on appeal that the "consent" and seizure of evidence were poisoned by a prior illegality. See id. at ¶25, n.9. This Court may consider that issue on review as an alternative basis for affirming the court of appeals' ruling. South, 924 P.2d at 355-57. Additional facts relating to this matter are set forth below.

SUMMARY OF THE ARGUMENT

The trial court upheld Officer Huntington's warrantless search in this case on the basis that Hansen gave valid consent. A search following consent is lawful if (1) the consent was voluntarily given, and (2) it was not obtained by police exploitation of a prior illegality. Thurman, 846 P.2d at 1262. In this case, the trial court erred in its determination; the "consent" was unlawful under both prongs of the Thurman analysis.

Specifically, with respect to the first prong, Huntington testified that he requested consent to search by asking Hansen, "Do you mind if I check [the car for alcohol, weapons, or drugs]." According to the officer, Hansen said "yes." The officer's testimony of the matter failed to support consent. Thereafter, the officer testified in a conclusory fashion that he had consent to search and he assumed he had consent. According to the law, conclusory statements will not support a search under the Fourth Amendment. Also, an officer's

impressions/assumptions are irrelevant to the analysis. The court of appeals ruled the evidence was insufficient for consent. Hansen, 2000 UT App 353. That ruling was correct.

The state takes issue with the court of appeals' ruling because the court cited to a "'presumption against waiver' standard" in State v. Ham, 910 P.2d 433 (Utah Ct. App. 1996). The court of appeals' reference to that standard constitutes dictum in the context of Hansen's case, and it is irrelevant. Indeed, this Court rejected the "'presumption against waiver' standard" in State v. Bisner, 2001 UT 99, ¶¶44-47, 435 Utah Adv. Rep. 3. Hansen has relied on Bisner in the analysis in this case. This Court's ruling in Bisner does not change the result in Hansen, 2000 UT App 353. The court of appeals' ruling should be upheld.

Next, even if this Court determined that consent was voluntary under the first prong of the Thurman analysis, the consent was invalid where it was obtained by police exploitation of a prior illegality. Officer Huntington unlawfully exceeded the scope of the justification for the stop in this case in order to engage in an investigatory search of Hansen's car. The unlawful investigation and detention poisoned "consent."

The state disagrees and claims that when Officer Huntington obtained "consent" to search the car, Hansen was free to go. The state ignores the facts in evidence. When Officer Huntington obtained "consent," the matter was escalating: Hansen remained detained. The court of appeals correctly ruled that Officer Huntington unlawfully continued the detention and the investigation in order to search the car. On that basis, the officer's prior conduct poisoned the consent and seizure of evidence. The warrantless search may not be upheld.

ARGUMENT

POINT I. THE RECORD IN THIS CASE FAILS TO SUPPORT CONSENT.

The state claims the court of appeals applied an incorrect analysis to the consent issue in this case. Yet, the court of appeals looked to the "totality of the circumstances" to find that the evidence failed to support consent. See infra, Points I.A. and C., herein.

The court of appeals also cited to a "'presumption against waiver' standard" that has been rejected by this Court. The court of appeals' reference to the "presumption" standard was incorrect, but otherwise inconsequential. That is, rejecting the "'presumption against waiver' standard" does not change the result in this case. See infra, Point I.B., herein.

Also, the state claims the court of appeals failed to give proper deference to the trial court's findings relating to consent. The state has failed in its analysis to identify any findings that were not given deference, and it has failed to identify how the court of appeals' review of those findings was incorrect. On that basis, the state's argument must fail.

A. THE "TOTALITY OF THE CIRCUMSTANCES" ANALYSIS APPLIES IN CONSIDERING "CONSENT" UNDER THE FOURTH AMENDMENT. THE COURT OF APPEALS APPLIED THE "TOTALITY OF THE CIRCUMSTANCES" ANALYSIS IN *HANSEN*.

The Fourth Amendment to the United States Constitution provides the following:

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. Unless a governmental agency has secured a valid warrant to conduct a search, the search is presumptively unlawful, "subject only to a few specifically

established and well-delineated exceptions." Katz v. U.S., 389 U.S. 347, 357 (1967); see State v. Brown, 853 P.2d 851, 855 (Utah 1992).

One of the "recognized exception[s]" to the warrant requirement is consent. Brown, 853 P.2d at 855; State v. Bisner, 2001 UT 99, ¶43; State v. Arroyo, 796 P.2d 684, 687 (Utah 1990); State v. Sepulveda, 842 P.2d 913, 918 (Utah App. 1992).

In considering consent, this Court has consistently followed U.S. Supreme Court precedent. It has considered the totality of the circumstances and it has looked to whether consent was obtained "as 'the product of duress or coercion, express or implied.'" Bisner, 2001 UT 99, ¶47 (citing Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973)); see also, State v. Harmon, 910 P.2d 1196, 1206 (Utah 1995); State v. Whittenback, 621 P.2d 103, 106 (Utah 1980). This Court also has ruled that consent must be voluntary, and it may not be obtained by police exploitation of a prior illegality. Bisner, 2001 UT 99, ¶43 (citing Thurman, 846 P.2d at 1262).

In the underlying opinion to this case, the court of appeals relied on the "totality of the circumstances" analysis identified above. Hansen, 2000 UT App 353, ¶18 ("In determining whether consent was voluntarily given we will look to the 'totality of all the circumstances'" (citing Schneckloth, 412 U.S. at 227). The court of appeals also relied on the two-part test articulated in Thurman, 846 P.2d at 1262. See Hansen, 2000 UT App 353, ¶7 n.5 & ¶18 ("[A] defendant's consent to a search following illegal police activity is valid under the Fourth Amendment only if both of the following tests are met: (i) The consent was given voluntarily, and (ii) the consent was not obtained by police exploitation of the prior

illegality") (citing Thurman, 846 P.2d at 1262; State v. Arroyo, 796 P.2d 684, 688 (Utah 1990)). Those standards support the court of appeals' ruling in this case that "consent" was invalid, as further discussed below. See infra, Point I.C., herein.

B. THE COURT OF APPEALS REFERRED TO LANGUAGE IN *STATE v. HAM* THAT THIS COURT IN *BISNER* HAS SPECIFICALLY REJECTED. THAT IS NOT FATAL TO THE RESULT IN HANSEN'S CASE SINCE THE COURT OF APPEALS' REFERENCE TO *HAM* IS DICTUM.

In addition to applying the "totality of the circumstances" analysis to the consent issue, the court of appeals in Hansen, 2000 UT App 353, also quoted from State v. Ham, 910 P.2d 433 (Utah App. 1996). It stated the following:

This court has adopted the following analytical framework to determine whether the State has met its burden of proving that consent was voluntarily given:

"(1) There must be clear and positive testimony that the consent was 'unequivocal and specific' and 'freely and intelligently given'; (2) the government must prove consent was given without duress or coercion, express or implied; and (3) [when evaluating these first two standards, we] indulge every reasonable presumption against the waiver of fundamental constitutional rights and there must be convincing evidence that such rights were waived."

Hansen, 2000 UT App 353, ¶18 (citing Ham, 910 P.2d at 439).

This Court in Bisner has since rejected portions of the court of appeals' "analytical framework" identified above. Bisner, 2001 UT 99, ¶¶44-47. That does not change the court of appeals' result in Hansen for two reasons.

First, in ruling that consent was invalid, the court of appeals did not rely on those portions of Ham that have been rejected. Thus, the state's arguments concerning Ham are irrelevant. See infra, Points I.B.1. and I.B.2. Second, under the "totality of the circumstances" analysis, the record in this case fails to support consent. On that basis, the court

of appeals' ruling must be affirmed. See infra, Point I.C.

1. While the Court of Appeals' Analysis Set Forth in *State v. Ham* Is Incorrect in Part, It Is Also Irrelevant: In *Hansen*, the Reference to *Ham* Constitutes Dictum.

In this case, the court of appeals quoted from Ham, 910 P.2d at 439, as follows: "[we] *indulge every reasonable presumption against the waiver of fundamental constitutional rights and there must be convincing evidence that such rights were waived.*" Hansen, 2000 UT App 353, ¶18 (emphasis added) (citing Ham). The state refers to the emphasized language above as the "*presumption against waiver' standard.*" (State's Brief of Petitioner, at 15-16.) According to the state, the court of appeals' reference to the "presumption" standard renders Hansen invalid. The state's claims are incorrect.

Specifically, the "'presumption against waiver' standard" has been construed to mean that in order for consent to be valid, the state first must establish that the "consenting party *affirmatively waived* [his] constitutional right against unreasonable searches and seizures." See Bisner, 2001 UT 99, ¶44 (emphasis added). That is, as a necessary prerequisite to the consent determination, the state would be required to show that the officer provided Miranda-type warnings¹ and obtained a "knowing and intelligent waiver" from the defendant under the Fourth Amendment. See Schneckloth, 412 U.S. at 235. In Schneckloth, the United States Supreme Court rejected the use of such warnings and the "presumption" standard as it stood for that proposition. Id. at 242-44.

The Utah Court of Appeals likewise has rejected the proposition that an officer must

¹ Miranda v. Arizona, 384 U.S. 436 (1966).

first obtain a "knowing and intelligent waiver" with Miranda-type warnings in order for consent to be valid. State v. Contrel, 886 P.2d 107, 111-12 (Utah App. 1994), cert. denied, 899 P.2d 1231 (Utah 1995) (*"In Schneckloth[], the United States Supreme Court expressly rejected the proposition that the Fourth Amendment requires an enforcement officer to inform a person of his or her right to refuse consent to search. . . .This interpretation of the Fourth Amendment has been continuously applied in Utah" . . . "[W]e decline to interpret article I, section 14 of the Utah Constitution as requiring a knowing consent"*) (citing Whittenback, 621 P.2d at 106; State v. Keitz, 856 P.2d 685, 691 (Utah App.1993); State v. Carter, 812 P.2d 460, 468 (Utah App.1991), cert. denied, 836 P.2d 1383 (Utah 1992); State v. Grovier, 808 P.2d 133, 137 (Utah App.1991); and State v. Robinson, 797 P.2d 431, 437 (Utah App.1990)); see also State v. Genovesi, 909 P.2d 916, 920 (Utah App. 1995) (*"Defendant contends that his wife's consent was not voluntary because she was unaware of her right to refuse consent. He argues that, on the strength of Article I, section 14, of the Utah Constitution, we should mandate Miranda-type disclosures about one's rights when police ask for permission to conduct a search"..."We recently rejected this contention and held that proving voluntary consent under the Utah Constitution, as well as its federal counterpart, does not include proving that the defendant knew of his or her right to refuse to consent to a search"*) (cites omitted).

Thus, while the Utah Court of Appeals has complied with Schneckloth and rejected the "'presumption against waiver' standard" in cases where the issue of a "knowing and

intelligent waiver" has been raised and discussed on appeal, the court of appeals nevertheless has continued to refer to the "presumption" standard in its "analytical framework" for consent. See Ham, 910 P.2d at 439; see also State v. Marshall, 791 P.2d 880, 887-88 (Utah Ct. App.), cert. denied, 800 P.2d 1105 (Utah 1990).² That reference is confusing.

This Court specifically has rejected the court of appeals' references to the "presumption" standard. Bisner, 2001 UT 99, ¶¶44-47. That is appropriate.

Inasmuch as Hansen's case does not hinge on "the proposition that the Fourth Amendment requires an enforcement officer to inform a person of his or her right to refuse consent to search," see Contrel, 886 P.2d at 111, and it does not hinge on the "'presumption against waiver' standard," it is inconsequential that the court of appeals in State v. Hansen

²The Supreme Court in Schneckloth recognized that "[w]aiver" is a vague term used for a great variety of purposes, good and bad, in the law." Schneckloth, 412 U.S. at 235. To that end, it may be argued that in those cases where the Utah Court of Appeals simply made reference to the "'presumption against waiver' standard," it was not citing to the standard for any improper or "bad" purpose. That is, the court of appeals was not suggesting officers first had to obtain a "knowing and intelligent waiver" to support consent. See Contrel, 886 P.2d at 111 (specifically rejecting the "knowing and intelligent waiver" standard).

By way of explanation, the "waiver" doctrine identified by the court of appeals may be interpreted as follows: The U.S. Supreme Court and this Court have reiterated time and again that searches and seizures "conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions." Minnesota v. Dickerson, 508 U.S. 366, 372 (1993); Arroyo, 796 P.2d at 687. In that regard, unless the state has established the application of a well-delineated exception, there is a "*presumption against*" the validity of the warrantless search, *i.e.* the search is "*per se* unreasonable." That is proper in the law. Under that interpretation, the court of appeals may have been using the "presumption" language for a "good" purpose.

Although the court of appeals likely had "good" intentions, the "presumption" language is somewhat confusing. In that regard, the better approach is to discontinue reference to the "presumption." See Bisner, 2001 UT 99, ¶47.

made reference to the "presumption" standard. See Bisner, 2001 UT 99, ¶47 ("[T]o the degree [the court of appeals' analysis] hinges consent upon waiver -- and to the extent our prior cases have not made our position perfectly clear-- we today explicitly reject the court of appeals' voluntariness test as enunciated in *Marshall* and its progeny").

That is, in Hansen's case, the court of appeals' reference to the "presumption" standard was harmless. The standard was irrelevant to the appeal issue and to the final determination in the case. Hansen did not rely on the "presumption" in demonstrating the illegality of the search. He did not claim that in order for the state to establish consent, it must show that he was informed of his constitutional rights against an unreasonable search, or that he "knowingly and intelligently waived" those rights.

Thus, the reference to the "presumption" in the underlying opinion to this case constituted dictum. It was not controlling and it carried little persuasive authority. See McGoldrick v. Walker, 838 P.2d 1139, 1140 (Utah 1992).

Finally, the state has failed to explain how rejection of the "'presumption against waiver' standard" would change the analysis in this case. (See State's Brief of Petitioner in general.) On that basis, its claims must be rejected on review.

2. The State Has Attacked the First Prong Under *State v. Ham* on the Basis That It Is "Founded" in the "'Presumption Against Waiver' Standard." The State's Argument Is Irrelevant.

In its brief on certiorari, the state also seems to attack the "first prong" of the court of appeals' "analytical framework" in Ham. (See State's Brief of Petitioner at 16-19.) The "first prong" concerns the following: "[To determine whether the State has met its burden

of proving that consent was voluntary] (1) There must be clear and positive testimony that the consent was 'unequivocal and specific' and 'freely and intelligently given.'" Hansen, 2000 UT App 353, ¶18 (citing Ham, 910 P.2d at 439).

The state claims that under that prong, the United States Supreme Court has ruled that "any consent must be 'freely' given" (State's Brief of Petitioner at 16), but has rejected the notion that consent must be "intelligent" (State's Brief of Petitioner at 16-17 (citing Schneckloth, 412 U.S. at 234-35)); and the court of appeals' "requirement of clear and positive testimony simply employs [the] presumption against waiver requirement." (State's Brief of Petitioner at 17.)

The state does not take issue with the court of appeals' use of the language "unequivocal and specific" in the "first prong." In fact, the state asserts that language "simply requires the State to make the threshold showing that consent was in fact given and that the search was within the scope of the consent." (State's Brief of Petitioner at 18.)

In response to the state's complaints regarding the "first prong," Hansen maintains the state has misread the court of appeals' ruling in Hansen, and misapplied Schneckloth. In addition, the state's complaints are irrelevant. In this case, Bisner governs.

By way of explanation, in Hansen, 2000 UT App 353, the court of appeals looked to whether consent was "freely and intelligently given" to assess "duress and coercion." Id. at ¶22 (the phrase "freely and intelligently" relates to whether consent was obtained without duress or coercion, express or implied). Duress and coercion are relevant to the analysis under Bisner. See Bisner, 2001 UT 99, ¶47 (consent is not voluntary if it is obtained with

duress and coercion, express or implied). This Court in Bisner, stated that the test articulated in Ham and Marshall "correctly requires absence of duress or coercion for consent to be deemed voluntary." Bisner, 2001 UT 99, ¶44. Thus, read in context, that language is appropriate.³

As for the phrase "clear and positive testimony," it is another way of saying the state must prove consent with "substantial, competent evidence" on the matter. Bisner, 2001 UT 99, ¶42 (citing Arroyo, 796 P.2d at 687). The state must establish "that consent was in fact given and that the search was within the scope of the consent." (State's Brief of Petitioner at 18 (state does not take issue with court of appeals' language that evidence must support "unequivocal and specific" consent)); see Hansen, 2000 UT App 353, ¶21 (court of appeals determined whether consent was in fact given by assessing whether there was "clear and positive" testimony that "Hansen's response was unequivocal and specific").

The phrase should not be construed to mean anything more than what is set forth in Bisner. In addition, the phrase does not impose a greater burden on the prosecution than that which already exists. (See State's Brief of Petitioner at 17-18 (state recognizes

³ The state claims Schneckloth rejected the use of the term "intelligently" in assessing consent. Yet, in that case, the Supreme Court addressed a "narrow" question: whether the government must provide evidence of a "knowing and intelligent *waiver*" to obtain a valid consent. Schneckloth, 412 U.S. at 234-35; 248. The Court in Schneckloth did not discuss the issue of "intelligent" *consent*.

Also, the phrase "freely and intelligently" as used in Hansen should not be misconstrued. Specifically, Hansen did not claim that for consent to be valid the state must establish he was educated or of high intelligence. Hansen likewise did not argue that "consent" must be intelligent in that it must be "informed" or "knowing." In the context of this case, the phrase "freely and intelligently" related to the absence of duress or coercion. Hansen, 2000 UT App 353, ¶22. Thus, the state's claims on review are irrelevant.

preponderance-of-the-evidence standard, then asserts that "[t]o the extent the requirement of 'clear and positive testimony' requires something more, it is error").) The court of appeals has specifically recognized the preponderance-of-the-evidence standard in suppression hearings and has not required more. See State v. Warren, 2001 UT App 346, ¶17, 434 Utah Adv. Rep. 31; State v. Davis, 965 P.2d 525, 533 (Utah Ct. App. 1998); Genovesi, 909 P.2d at 923 n. 8. The state's suggestions to the contrary are irrelevant.

Whether this Court accepts or rejects the "first prong" set forth in Ham and Marshall is of no consequence. When the brush is cleared, the state's arguments are irrelevant. In this case, the record fails to contain "substantial, competent evidence" to support consent under the totality of the circumstances. Under the standard articulated in Bisner and Thurman, the court of appeals reached the correct result, as further set forth below.

C. UNDER THE "TOTALITY OF THE CIRCUMSTANCES" ANALYSIS, THE STATE FAILED TO ESTABLISH CONSENT IN THIS CASE.

In Bisner, this Court ruled that the issue of consent must be supported by "substantial, competent evidence." Bisner, 2001 UT 99, ¶42. "Substantial, competent evidence" consists of "the empirical, such as things, events, actions, or conditions happening, existing, or taking place, as well as the subjective, such as state of mind." Pena, 869 P.2d at 935; (see State's Brief at 18 (acknowledging that "consent" must be unequivocal and specific)).

The substantial, competent evidence must furnish the basis for the trial court's factual findings. Bisner, 2001 UT 99, ¶42. Also, "[t]he findings of fact must show that the court's judgment or decree 'follows logically from, and is supported by, the evidence.' The findings

'should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached.'" State v. Real Property at 633 East 640 North, Orem, 924 P.2d 925, 931 (Utah 1997) (cite omitted). It stands to reason that if the findings must be sufficiently detailed and articulated, the evidence supporting the findings must be likewise. (See State's Brief of Petitioner at 18 (consent must be unequivocal and specific).)

In this case, the court of appeals determined the findings were deficient. See Hansen, 2000 UT App 353. The officer's testimony concerning the "events, actions, or conditions happening, existing, or taking place," Pena, 869 P.2d at 935, failed to support consent.

The state disagrees with that ruling. It claims the court of appeals failed to give proper deference to the trial court's *finding of fact* "that defendant consented to the search." (State's Brief of Petitioner at 22.)

The state's argument is incorrect as a matter of law since "consent" is a legal conclusion, see Bisner, 2001 UT 99, ¶42 (consent is a question of law),⁴ and it is incorrect

⁴ The state has dedicated relevant portions of its argument to the proposition that "consent" is a "factual finding." (See State's Brief of Petitioner at 19-27.) That is incorrect, as this Court specified in Bisner: "The question of whether a party has consented to a search is a question of law, and we therefore review it for correctness." Bisner, 2001 UT 99, ¶42; see Thurman, 846 P.2d at 1271 (ultimate conclusion that consent was voluntary or involuntary is a question of law); State v. \$175,800, 942 P.2d 343, 346 (Utah 1997) ("Whether consent is an exception to a warrantless seizure is a question of law to be reviewed for correctness"); State v. Pena, 869 P.2d 932, 935 (Utah 1994).

The state advanced the same, incorrect proposition in the court of appeals. (See State's Brief of Appellee, dated June 19, 2000, at pp. 15-18.) As a result, when that court reversed the trial court's ruling on consent, it also stated, "To the extent its determination

in the context of this case. Here, the trial court did not "find" consent. Rather, the trial court "concluded" consent. (See R. 68, ¶8; a copy of the trial court's Findings and Conclusions is attached hereto as Addendum C.)

Also, the state's argument is deficient. The state has failed in its brief to identify any "*finding of fact*" on consent that should have been sustained.⁵ (See State's Brief of Petitioner in general.) Indeed, the state has failed to mention any trial court "Finding" whatsoever in its argument. (See State's Brief of Petitioner in general; see also R. 63-39 ("Findings of Fact and Conclusions of Law").)

Next, the state claims the evidence of record supports consent. The evidence reflects the following:

[PROSECUTOR:] And when you asked him for consent, do you recall now exactly how you phrased that?

[HUNTINGTON:] It's my practice to ask them for consent by stating, Do you have any alcohol, weapons or drugs in the vehicle? And if they say no, I say, Well, do you mind if I check?

Q. Do you recall Mr. Hansen responding to your question[s]?

amounted to a finding of fact, it was clearly erroneous." Hansen, 2000 UT App 353, ¶21.

That language does not support that the court of appeals was "uncertain as to the appropriate standard of appellate review," as the state claims here. (See State's Brief of Petitioner at 20.) Rather, the court of appeals simply was responding to the state's incorrect assertion that consent is a "factual finding."

⁵ To be clear, the state is not claiming that Hansen somehow failed in the court of appeals to properly challenge the relevant findings or to marshal the evidence. Indeed, the state has no claim where that is concerned. (See Hansen's Brief of Appellant, dated April 18, 2000, at 13-18; Hansen's Reply Brief of Appellant, dated August 18, 2000, at 9-10.)

A. He did give me consent.

Q. Well first, with respect to the question as to whether he had those items in his car.

A. No. He said no.

Q. He said no.

THE COURT: And the query again, Officer, was, Do you have any –

THE WITNESS: Alcohol, drugs or weapons.

[PROSECUTOR RESUMING]

Q. To which Mr. Hansen said no?

A. That's correct.

Q. And then you asked, Do you mind [if] I check?

A. Uh-huh.

Q. And what was his response to that question?

A. He said yes.

[JUDGE LEWIS]: Yes, he minded?

THE WITNESS: Yes, I could have consent to search.

* * *

[DEFENSE COUNSEL]: So you then indicated that you asked him if you could search the vehicle?

A. I did.

Q. Do you recall specifically what you said to him.

A. Not specifically.

Q. Do you have any idea?

A. I would imagine I stated: Do you have any alcohol, drugs or weapons in the vehicle?

Q. He said no?

A. He said no. Do you mind if I check?

Q. Okay.

A. And then he said yes.

[JUDGE LEWIS]: He said?

[DEFENSE COUNSEL]: He [said] yes.

THE WITNESS: Yes.

[JUDGE LEWIS]: Do you mind if I check and he said yes?

THE WITNESS: Well, do you mind if I check, and then yes, he gave me consent. Sorry.

[DEFENSE COUNSEL]: (Resuming)

Q. So you said he gave you consent?

A. Yes, he did give me consent.

Q. What did he say?

A. What?

Q. What did he say?

A. What did he say?

Q. Yeah.

A. I don't recall exactly other than it was consent.

Q. So you don't recall his exact words?

A. Not exactly.

Q. So are you assuming that he said yes?

A. I assume that he said yes.

Q. That's what you're doing today?

A. I'm sorry?

Q. That's what you're doing today?

A. That's what I'm doing today?

Q. Yes, in terms of his response.

A. I assume that he said yes.

Q. Nothing more than that?

A. He probably could have said yes, go ahead.

Q. But you don't recall him saying that?

A. I don't recall.

* * *

[PROSECUTOR]: Now, Officer Huntington, when you say the defendant gave his consent for you to check inside his vehicle, was it verbal.

A. It was verbal.

Q. Is it you just don't recall what the exact words were?

A. I don't recall the exact wording.

(R. 84:17-18, 38-40, 43).

In sum, the officer testified to the basic substance of his conversation with Hansen.

The officer asked, "Do you mind if I [search your car]?" and Hansen answered, "yes." (R. 84:17-18, 38-40.) The officer's testimony of the *facts* and *circumstances* failed to support consent. (See R. 84:18, 39-40); Hansen, 2000 UT App 353.

In its brief, the state claims that "Officer Huntington *clarified* that *defendant responded*, 'Yes, I could have consent to search.'" (State's Brief of Petitioner at 23 (emphasis added).) That claim disregards the evidence of record and misrepresents the matter.

According to the record, when Huntington was given the opportunity to *clarify* or *explain* the *circumstances supporting consent*, he failed to do so. (R. 84:38-40.) Huntington was either unable or unwilling to provide substantial, competent evidence of consent. (R. 84:38-40, 43.) Indeed, in *clarifying* the matter, Huntington specifically *did not* recall that Hansen responded "yes, go ahead" for consent (R. 84:40), or anything to that effect. (R. 84:38-40.) Huntington simply assumed he had consent to search (R. 84:40), and he admitted to the prosecutor that he could not recall what was said, other than it was verbal. (Compare R. 84:43 (Huntington could not recall what was said), with State's Brief of Petitioner at 23 (state claims "defendant responded 'yes, I could have consent to search'").)

The substantial, competent evidence fails to support consent, as explained below.

1. The Conclusory Statements Relating to "Consent" Are Insufficient Under the Law.

Under the totality of the circumstances analysis, conclusory statements are insufficient to support a search under the Fourth Amendment. Conclusory statements do not constitute substantial, competent evidence of the *circumstances* surrounding the matter. See Black's Law Dictionary at 284 (7th ed. 1999) (a "conclusory" statement is a "factual inference" that

does not include "the underlying facts on which the inference is based").

To explain, in this case the state was required to establish "consent" by a preponderance of the evidence. See Brown, 853 P.2d at 855 (*the state bears the burden of proving consent at a motion to suppress hearing by a preponderance of the evidence*). This Court has ruled that the preponderance-of-the-evidence standard is greater even than the probable-cause standard. See State v. Clark, 2001 UT 9, ¶11, 20 P.3d 300. Under the *lesser* probable-cause standard, the United States Supreme Court, this Court and the Utah Court of Appeals have consistently ruled that conclusory statements will not justify an officer's search under the Fourth Amendment. Illinois v. Gates, 462 U.S. 213, 239 (1983) (applying the "totality of the circumstances" analysis, a judge must be presented with sufficient, specific facts to issue a search warrant, otherwise, the judge's ruling will consist of "a mere ratification of the bare conclusions of others"); see id. at 234 (recognizing that "preponderance of the evidence" standard is more finely-tuned than the "probable cause" standard); State v. Babbell, 770 P.2d 987, 990 (Utah 1989) (in the context of the warrant requirement under the lesser, probable-cause standard, an officer's conclusory statements are insufficient); see also State v. Droneburg, 781 P.2d 1303, 1304-05 (Utah Ct. App. 1989) (conclusory statements are insufficient).

Here, Huntington's testimony was conclusory, where he stated, "[Hansen] did give me consent"; "Yes, I could have consent to search"; "He gave me consent"; and "Yes, he did give me consent." (R. 84:17-18, 38-40.) When counsel asked Huntington to describe

generally the circumstances supporting those conclusory statements,⁶ Huntington refused and failed to do so, relying on his conclusory impressions of the matter. (Id.)

In this case, the conclusory statements were insufficient to support consent.

2. Huntington's Testimony Concerning "Consent" Reflects His Impressions of the Matter. His Impressions Are Irrelevant.

Next, Huntington's statements supporting "consent" consist only of his impressions or assumptions. Huntington's impressions fail to include the "things, events, actions, or conditions happening, existing, or taking place," Pena, 869 P.2d at 935, under the total circumstances. Thus, under the law they are irrelevant. See State v. Lopez, 873 P.2d 1127, 1136-37 (Utah 1994) (an officer's state of mind is irrelevant); State v. Patefield, 927 P.2d 655, 659 (Utah App. 1996); State v. Barnes, 978 P.2d 1131, 1135 (Wash. App. 1999) (officer's belief is immaterial); see also Ohio v. Robinette, 519 U.S. 33, 38 (1996).

3. The "Substantial, Competent Evidence" Fails to Support "Consent."

⁶ As set forth above, the state claims the following: "Officer Huntington clarified that defendant responded 'Yes, I could have consent to search.'" (State's Brief of Petitioner at 23.) That claim is not supported by the record.

Specifically, according to Huntington, Hansen answered "yes," to Huntington's question, "Do you mind if I check?" When counsel *asked* for clarification and a general description of the circumstances supporting consent, Huntington was unable to provide such. (R. 84:38-40 (defense counsel asked if Huntington had an "idea" how consent was obtained, and counsel asked generally, "what did [Hansen] say?"); R. 84:43 (Huntington could not recall what was said).) Instead, Huntington provided conclusory statements. (Id.)

Huntington also twice conceded that he assumed he had consent to search. (R. 84:40.) When counsel asked if there was anything more, Huntington stated: "[Hansen] probably could have said yes, go ahead," but he did not recall that Hansen made that statement. (R. 84:40.) The record reflects that Huntington either was unable or he refused to provide a general description of the circumstances supporting consent. Either way, the state failed in its burden of proof.

The state apparently considers Huntington's testimony to be "contradictory" on the issue of consent. The state seems to acknowledge that the specific facts and circumstances fail to support consent, while Huntington's impressions "verif[y]" consent. (State's Brief of Petitioner at 23.) The state also argues that the court of appeals was required to defer to the trial court's reliance on Huntington's impressions of the matter, rather than the facts relating to the total circumstances. (See id. at 24.) That is incorrect.

Under the law, an appellate court gives deference to the trial court's findings of fact because of the "trial court's advantaged position in judging credibility and resolving evidentiary conflicts." Thurman, 846 P.2d at 1271. In this case, the trial court found Huntington to be credible. The court of appeals deferred to the trial court on that issue. See Hansen, 2000 UT App 353, ¶4 n.3 (Huntington testified with commendable candor). Also, there were no evidentiary conflicts since Huntington was the only person to testify. While Huntington was credible, his testimony was not sufficient to support consent. The testimony did not constitute substantial, competent evidence on the matter.

Stated another way, the record does not reflect a contradiction *in the facts*. According to the *facts and circumstances*, Huntington asked Hansen "Do you mind if I check [your car for alcohol, drugs or weapons]?" Hansen answered unequivocally, "yes." (R. 84:17-18, 38-40.) The facts fail to support consent. Thereafter, the officer testified in a conclusory fashion to his impressions of the matter. His impressions and conclusory statements are irrelevant. See supra subpoint I.C.1. and I.C.2., above. The court of appeals' ruling should be affirmed.

4. The State Claims the Officer's Question, "Do You Mind If I Check," and Hansen's Answer, "Yes," Support Consent. Yet, Hansen's Response Constitutes an Unequivocal Objection to the Search.

Finally, the state argues that Huntington's testimony regarding the specific circumstances supports consent: "Common experience teaches that questions beginning with the words, 'do you mind,' are often answered in the affirmative even though the intent is to indicate that the speaker does not mind." (State's Brief of Petitioner at 24.) The state fails to identify the basis for that assertion.⁷ Rather, it cites to cases where the witness was not expected at trial to recall a conversation verbatim, but was asked only to give the "substance" of the conversation. (State's Brief of Petitioner at 26-27.)

⁷ The state is incorrect about "common experience," since the answer "yes" to a question that begins "do you mind" literally means the answering party objects. For example,

"Do you mind if I smoke?"

[From the 16-year-old son]: "Dad, do you mind if I take the Porsche?"

[From the 16-year-old daughter]: "Do you mind if I stay out until 3:00 a.m."

According to the state's argument, when an officer testifies that he obtained consent by asking, "Do you mind if I search," a trial judge should be free to interpret the defendant's affirmative response to support consent. That argument conflicts with the state's acknowledgment that consent must be "unequivocal and specific." (State's Brief of Petitioner at 18.) It also disregards the law, which requires the evidence to be competent and substantial on the matter. Bisner, 2001 UT 99, ¶42.

In this case, the trial court did not consider the substantive evidence to support consent. According to the record, when the officer testified that Hansen responded in the affirmative to the question, "Do you mind if I check," the trial court interrupted the examination and pointed out the problem with the officer's testimony. Thereafter, the trial court disregarded the substantive evidence and relied only on the officer's unsubstantiated, irrelevant conclusory statements and impressions to find consent.

Finally, the state's argument about "common experience" supports potentially troubling results. Imagine a criminal defendant claiming he had "consent" to engage in sexual activity when he specifically asked the victim, "Do you mind if I do this," and she said "yes." In that instance, surely the state would argue that the word "yes" must be given its plain, unambiguous, and literal meaning: the victim objected to the sexual conduct.

In this case, Officer Huntington was not expected to recall verbatim the conversation supporting "consent." Rather, counsel for the defense asked Officer Huntington to give only an "idea" of the events that transpired in the matter. (R. 84:39-40 (counsel asked Huntington, "Do you have any idea" what you said to him; and he asked, "what did [Hansen] say" regarding consent).) Defense counsel requested a general description of the events.

Officer Huntington refused to provide a description, other than to say that he asked Hansen, "Do you mind if I check," and Hansen answered, "yes." The officer also responded to defense counsel's requests for general information by stating, "I don't recall exactly other than it was consent" and he assumed he had consent. (R. 84:17-18, 38-40.) Thus, the *officer* declined to describe the general events supporting consent.

Next, the state has cited to Commonwealth v. Boswell, 721 A.2d 336, 342 (Pa. 1998), in support of the proposition that the facts in this case establish consent. (State's Brief at 27.) In Boswell, officers in plain clothes identified themselves to defendant, an airline passenger, and asked if they could speak to her. Defendant agreed. The officers discussed defendant's travel plans, asked to review her ticket, and then asked if a gray tweed suitcase belonged to defendant. She answered it did. Thereafter, the officer asked "Would you mind if I take a look inside this bag?" The officer testified that defendant answered "yes," then on cross-examination he clarified that "she said, 'Go ahead.'" Boswell, 721 A.2d at 338-39.

Those circumstances do not exist in Hansen's case. Huntington twice testified that when he asked Hansen, "Do you mind if I check," Hansen answered, "yes." When Huntington was given the opportunity to clarify the matter, he refused to provide any

additional facts, and instead provided conclusory testimony, stated that he did not "recall exactly other than it was consent," and admitted he assumed he had consent. (R. 84:38-40.)

If Huntington's description of the facts, together with his conclusory statements and impressions may be sufficient to support consent, the Fourth Amendment protections will be rendered meaningless. For this officer -- who typically seeks consent by asking "Do you mind if I search" -- it is irrelevant whether the defendant answers "yes" or "no," so long as *Huntington believes* he has consent to search. That is unacceptable. Huntington's impressions and conclusions cannot be sufficient to support consent under the Fourth Amendment.

In this case, the substantial, competent evidence concerning the events and circumstances support that Hansen provided an unambiguous, unequivocal and specific response to the question, "Do you mind if I check": Hansen objected to the intrusion. Huntington's conclusory statements and impressions to the contrary are irrelevant. The court of appeals correctly determined that the facts here fail to support consent.

D. FOR POLICY REASONS, AN OFFICER'S CONCLUSORY STATEMENTS AND ASSUMPTIONS SHOULD NOT BE SUFFICIENT TO SUPPORT A SEARCH UNDER THE FOURTH AMENDMENT. IF THE LAW ALLOWED OFFICERS SIMPLY TO TESTIFY THAT THEY HAD "CONSENT" OR "PROBABLE CAUSE" TO SUPPORT THE CONDUCT, THE STANDARD WOULD ERODE THE PROTECTIONS OF THE FOURTH AMENDMENT.

In reviewing "consent" to search on appeal, this Court is concerned with "ensuring the consistent and uniform protection of a fundamental civil liberty," and providing statewide standards that guide law enforcement officers and prosecutors in those functions that affect

the rights of citizens. Thurman, 846 P.2d at 1271. This Court also is sensitive to the need to provide clarity to law enforcement so that it may be effective in its investigative efforts.

In order that this Court may effectively declare whether certain police conduct is lawful or unlawful, this Court and the court of appeals must be able to consider substantial, competent evidence on the matter. Bisner, 2001 UT 99, ¶42 (considering the circumstances of the matter to determine consent). The circumstances of a particular case, as supported by the evidence, must justify the legal conclusion. If substantial, competent evidence is lacking, the state has failed in its burden of proof and the conduct may not be upheld.

By way of illustration, imagine an officer who was unable to recall the circumstances supporting his conduct, but who testified nevertheless that "Yes, I saw the item in plain view"; or "yes, I had exigent circumstances" and "probable cause." If the law allowed a warrantless search to be conducted based on conclusory testimony and assumptions, the standard would render evidentiary hearings, cross examination, trial court determinations, and appellate review meaningless. The standard essentially would allow the officer to dictate the result in each case to the trial court, without inquiry as to whether the objective circumstances supported the officer's impressions and without any analysis as to whether the officer comprehended the law in reaching his conclusions about the matter. See Gates, 426 U.S. at 239 (a judge may not rely on conclusory statements, since such action would reduce his function to a mere ratification of the bare conclusions of others).

Public policy compels the need for "substantial, competent" evidence to support an officer's conduct. Here, the trial court and court of appeals had an uncontroverted record of

the circumstances surrounding the search. Officer Huntington testified with commendable candor. He stated that to obtain consent, he asked if Hansen had "any alcohol, drugs or weapons in the vehicle." (R. 84:17.) When Hansen answered "no," to the that question, Officer Huntington asked, "Do you mind if I check." (R. 84:17-18, 38-40.)

According to Huntington, Hansen said, "yes." Both the trial court and the court of appeals expressed concern with the testimony and both recognized it was insufficient to support consent. (See R. 84:18, 38-40); Hansen, 2000 UT App 353. Thereafter, Huntington provided only conclusory statements of his impressions. (R. 84:18, 38-40.) When Huntington was asked to clarify the matter and to describe the general circumstances supporting "consent," he was unable and/or unwilling to do so. (See R. 84:38-40, 43 (Huntington admitted to the prosecutor that he could not recall what was said to obtain consent, other than it was verbal).) Instead, Huntington testified to his assumptions and he suggested that Hansen "probably could have said yes, go ahead," but he specifically *did not recall* that Hansen made that statement. (R. 84:38-40.)

The trial court considered the conclusory statements to be sufficient to support consent, while the court of appeals did not. The court of appeals was correct. Huntington's testimony on the ultimate issue -- without necessary detail -- erodes confidence in the evidentiary hearing. If Officer Huntington has a definition for "consent" that is not consistent with the law, his failure to provide details to support his actions will protect his conduct from judicial scrutiny, and his erroneous standards may never be discovered. So

long as Huntington may be allowed to testify that consent was provided, as he did in this case, he essentially may dictate the ruling in the matter to the trial judge.

If the law permitted conclusory statements and ambiguities to support a warrantless search, the evidentiary standard would eviscerate constitutional protections and make appellate review unworkable. Indeed, trial court discretion and appellate review would consist simply of "rubber stamping" the officer's impressions and conclusions without evidence of the "things, events, actions, or conditions happening, existing, or taking place." Pena, 869 P.2d at 935. Here, the conclusory statements and impressions were insufficient to support the warrantless search. The court of appeals' ruling should be affirmed.

POINT II. THIS COURT DOES NOT NEED TO DECIDE THE EFFECTS OF HAM ON THIS CASE, SINCE THE "CONSENT" AND SEIZURE WERE POISONED BY A PRIOR ILLEGALITY, RENDERING THEM UNCONSTITUTIONAL UNDER THE SECOND PRONG OF THE THURMAN ANALYSIS.

A. THE CONSENT WAS OBTAINED BY POLICE EXPLOITATION OF A PRIOR ILLEGALITY: OFFICER HUNTINGTON DETAINED HANSEN FOR FURTHER QUESTIONING WITHOUT REASONABLE ARTICULABLE SUSPICION.

Even if this Court finds voluntary consent, it still must assess whether consent was poisoned by a prior police illegality. See Thurman, 846 P.2d at 1262. If the state fails in its burden of proof under either prong of Thurman, the consent is invalid. Id.

In this case, "consent" came on the heels of an unlawful, level-two detention. See State v. Deitman, 739 P.2d 616, 617-18 (Utah 1987). The unlawful detention poisoned the consent to search the car and the resulting seizure of evidence.

1. Huntington Continued the Detention Beyond the Permissible Scope.

To begin the analysis, this Court has identified the three levels of a police-citizen encounter as follows:

(a) [Under the first level] an officer may approach a citizen at [any time] and pose questions so long as the citizen is not detained against his will; (2) [under the second level] 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) [and under the third level] an officer may arrest a suspect if the officer has probable cause to believe an offense has been committed or is being committed.

Deitman, 739 P.2d at 617-18 (citing U. S. v. Merritt, 736 F.2d 223, 230 (5th Cir. 1984)); see also Salt Lake City v. Smoot, 921 P.2d 1003, 1006 (Utah App. 1996) (citing State v. Munsen, 821 P.2d 13, 15 n.1 (Utah App. 1991), cert. denied, 843 P.2d 516 (Utah 1992)).

The encounter in this case began as a level-two or three traffic stop. "[A] police officer is constitutionally justified in stopping a vehicle if the stop is 'incident to a traffic violation committed in the officers' presence.'" Lopez, 873 P.2d at 1132 (cites omitted); State v. Sepulveda, 842 P.2d 913, 917 (Utah App. 1992).

Such an encounter must be limited in scope to the circumstances which justified the interference in the first place. "Once a traffic stop is made, the detention 'must be temporary and last no longer than is necessary to effectuate the purpose of the stop.'" Lopez, 873 P.2d at 1132 (quoting Florida v. Royer, 460 U.S. 491, 500 (1983)). Both "[t]he length and scope of the detention must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." State v. Johnson, 805 P.2d 761, 763 (Utah 1991) (quoting Terry

v. Ohio, 392 U.S. 1, 19-20 (1968)).

[A]n officer conducting a routine traffic stop may request a driver's license and vehicle registration, conduct a computer check, and issue a citation. However, once the driver has produced a valid driver's license and evidence of entitlement to use the vehicle, "he must be allowed to proceed on his way, without being subjected to further delay by police for additional questioning."

State v. Chapman, 921 P.2d 446, 452 (Utah 1996) (cites omitted); Lopez, 873 P.2d at 1131-32; State v. Castner, 825 P.2d 699, 703 (Utah App. 1992).

If an officer continues to detain the occupants of a vehicle, this Court will make a dual inquiry to determine whether continued detention was reasonable. This Court will ask, "(1) Was the police officer's action 'justified at its inception'? and (2) Was the resulting detention 'reasonably related in scope to the circumstances that justified the interference in the first place?'" Lopez, 873 P.2d at 1131-32 (citing Terry, 392 U.S. at 19-20); State v. Humphrey, 937 P.2d 137, 141 (Utah Ct. App. 1997); see Castner, 825 P.2d at 702. If the continued detention was not related in scope to the reason for the stop, this Court will assess whether the officer had reasonable articulable suspicion of criminal activity beyond that which justified the stop, to support continued detention and investigative questioning. See Chapman, 921 P.2d at 453.

In this matter, "Hansen does not dispute the legality of the initial stop and the first part of the Terry inquiry is not at issue." Hansen, 2000 UT App 353, ¶10. According to the record and the findings, Officer Huntington stopped Hansen for an "improper lane change" and failure to carry insurance. (R. 84:12); Hansen, 2000 UT App 353, ¶3.

However, Hansen maintained in the court of appeals that the continued detention for

further investigative questioning constituted an unlawful seizure; it exceeded the scope and the purpose of the traffic stop. See Hansen, 2000 UT App 353, ¶¶12-13; see also State v. Bean, 869 P.2d 984, 985 (Utah App. 1994) (trial court's determination regarding the level of an encounter is a legal conclusion). In addition, Huntington did not articulate reasonable suspicion of serious criminal activity to justify the continued detention. Thus, the drug-related questioning and resulting search and seizure violated Hansen's rights.

The court of appeals agreed with Hansen. Hansen, 2000 UT App 353, ¶16. It ruled "Hansen was illegally detained" when Officer Huntington asked him questions about drugs, alcohol, and weapons, and when Huntington "requested consent to search the car." Id.

The state takes issue with the court of appeals' ruling. It claims the matter transformed into a level-one, consensual encounter at the point where Officer Huntington requested "consent" to search Hansen's car. "In short, Officer Huntington's verbal warning that defendant needed to obtain insurance and his return of defendant's registration and driver's license signaled the end of the detention such that a reasonable person would feel free to leave." According to the state, Hansen was no longer detained when he provided "consent"; he was free to go on about his business. (State's Brief of Petitioner at 37.) The state is incorrect, as explained below.

2. The State Claims the Encounter Transformed from a Level-Two to a Level-One Encounter. The Objective Facts Fail to Support the State's Claim.

In considering whether an encounter has diminished in intensity from a level-two detention to a level-one consensual encounter, this Court will review the objective facts from

the perspective of a reasonable person. This Court will assess whether the officer communicated through words or the import of the situation that defendant was free to go. See State v. Higgins, 884 P.2d 1242, 1244 (Utah 1994); Johnson, 805 P.2d at 763 (court looks to objective facts to determine if person would believe she was free to go); Patefield, 927 P.2d at 659; State v. Robinette, 685 N.E.2d 762, 770 (Ohio 1997). For example, did the officer indicate to detainee that he was finished with his business as it related to the justification for the stop, either by issuing a citation/warning, or through some other action? (See State's Brief at 36 (the issuance of a warning may signal the end of the detention).)

Also, this Court will not consider the officer's subjective belief regarding the situation. If the officer had an uncommunicated belief that defendant was free to leave, that is irrelevant to the analysis. See Lopez, 873 P.2d at 1136-37 (an officer's state of mind is irrelevant); Patefield, 927 P.2d at 659; Barnes, 978 P.2d at 1135 (officer's subjective belief that defendant was free to walk away was immaterial); see also Robinette, 519 U.S. at 38.

In this case, the court of appeals correctly determined that while Officer Huntington believed he had finished his business with Hansen when he requested "consent" to search (R. 84:16-17), the officer did not communicate that belief to Hansen, and the objective facts surrounding the matter were such that the reasonable person would not feel free to leave. The totality of the circumstances supported continued detention. Hansen, 2000 UT App 353, ¶¶12-17.

Specifically, Huntington testified that when he requested "consent" to search, Hansen was free to go. Yet, at that point, the officer had not completed his business as it related to

the stop. Huntington had failed to indicate to Hansen how he intended to resolve the “improper lane change.” (R. 84:31-34, 43-44.) Under those facts, a reasonable person would not feel free to leave. (See State's Brief at 36-37; R. 84:30 (acknowledging that a detainee would not feel free to leave before an officer issued a citation or warning).)

In addition, as Officer Huntington returned the documentation to Hansen, Huntington expanded the scope of the detention without justification: He continued investigative questioning, and asked about drugs, alcohol, and weapons. Huntington also asked Hansen, “Do you mind if I check” for such items in the car. (See R. 84:16-18, 37-40); Point I, supra.

Also, during the continued detention, a second officer arrived on the scene, with emergency lights engaged. The second officer stepped out of his car, and stood behind Hansen's car. (R. 84:14-15, 37.)

Under the circumstances, a reasonable person would not feel free to ignore the increase in officer presence, and Huntington's questions, particularly in light of the fact that the officer had not indicated how he intended to resolve the “improper lane change.” “When these factors are combined with a police officer’s superior position of authority, any reasonable person would have felt compelled to submit to the officer’s questioning.” State v. Robinette, 685 N.E.2d at 771 (on remand from Ohio v. Robinette, 519 U.S. 33, the Ohio Supreme Court ruled that total circumstances failed to support a level-one encounter).

In view of the total circumstances, the court of appeals properly determined that “Hansen remained seized for Fourth Amendment purposes” when Huntington questioned him about alcohol, drugs and weapons, and when Huntington requested “consent” to search.

Hansen, 2000 UT App 353, ¶16.

Next, the state argues that the Fourth Amendment does not “require particular language, or words at all, to signal the end of a detention.” (State's Brief of Petitioner at 37-38.) The court of appeals recognized that proposition as well. See Hansen, 2000 UT App 353, ¶13.

In this case, at the point where Huntington claimed Hansen was free to leave, the *total circumstances* that made the encounter a level-two detention were still present and escalating. That is, from an objective person’s perspective, Huntington had not indicated how he intended to resolve the improper lane change, his emergency lights were still engaged, he continued to ask investigative-type questions, and a second officer had arrived, standing behind Hansen's car with emergency lights engaged. (R. 84:14-17, 36-37.)

The conduct did not give Hansen any indication he was free to go, but communicated the opposite -- he was not free to leave -- and indeed was still at risk for receiving a ticket on the "improper lane change" -- until he answered the additional questions.

Finally, the state attempts to minimize the improper intrusion by claiming the questions could not have taken "more than a few seconds." (State's Brief of Petitioner at 38.) That is irrelevant.⁸ Under the law, a "temporary" or brief detention is improper unless it is

⁸ That argument also is incorrect. As the facts reflect, the unrelated, unlawful interrogation facilitated one event after the other, where Hansen answered the questions, stepped out of the car, submitted to a frisk search, was subjected to a search of the car, answered more questions, was arrested, and was subjected to a search incident to arrest. (R. 84:19-23, 41-42.) The unrelated, unlawful investigation was intrusive and extensive.

supported by reasonable articulable suspicion.

[Once] the occupants of the vehicle have satisfied the reasons for the initial stop, the officer must permit them to proceed." [*State v. Sepulveda*, 842 P.2d 913, 917 (Utah App. 1992)] "Any further **temporary** detention for investigative questioning after the fulfillment of the purpose for the initial traffic stop is justified under the fourth amendment **only if** the detaining officer has a reasonable suspicion of serious criminal activity.'" *Id.* (quoting [*State v. Robinson*, 797 P.2d 431, 435 (Utah App. 1990)].)

Patefield, 927 P.2d at 659 (bold emphasis added). Also, "[unsupported] by further probable cause or reasonable suspicion, inquiries by the officer to investigate suspicions unrelated to the traffic offense unconstitutionally extend the detention beyond the scope of the circumstances that rendered it permissible." Lopez, 873 P.2d at 1135. "[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." Florida v. Royer, 460 U.S. 491, 500 (1983). At the point where the officer's reasonable suspicions are allayed, there is no further reason for the stop, and the officer is required to allow the detainee to leave. Chapman, 921 P.2d at 452. If a detention lasts any longer than is justified, it is unlawful.

The court of appeals properly ruled the continued detention here was unlawful; it exceeded the scope of the justification for the stop. See Hansen, 2000 UT App 353, ¶¶8-16.

3. The Officer Failed to Articulate Reasonable Suspicion for the Continued Detention.

An officer may continue to detain a person beyond the justification for the stop if the officer has articulated independent facts to support reasonable suspicion of further criminal activity. See Chapman, 921 P.2d at 453. In this matter, the state does not dispute that Officer Huntington failed to articulate any basis to justify the continued detention. (See

State's Brief of Petitioner; see also R. 84:38.)

Indeed, the state conceded in the court of appeals "that Officer Huntington did not have a reasonable articulable suspicion of more serious criminal activity to justify the investigative questions." Hansen, 2000 UT App 353, ¶16. Thus, "Hansen was illegally detained when Officer Huntington asked him questions that were not reasonably related in scope to the traffic violation which justified the initial seizure." Id.

4. Hansen Is Entitled to Suppression of the Evidence Since the Officer Obtained "Consent" Through Exploitation of a Prior Illegality.

Even if this Court finds that the consent to search was voluntary, see supra Point I, herein, the "consent" and seizure of evidence were poisoned by the unlawful detention. Thus, the evidence discovered in connection with the "consent" must be suppressed. See Thurman, 842 P.2d at 1262; Arroyo, 796 P.2d at 688-89.

"When the prosecution attempts to prove voluntary consent after an illegal police action ..., the prosecution 'has a much heavier burden to satisfy than when proving consent to search' which does not follow police misconduct." Arroyo, 796 P.2d at 687-88.

This is because in addition to proving a valid and voluntary consent to search, the State must also establish the existence of intervening factors which prove that the consent was sufficiently attenuated from the police misconduct.

It is well settled that evidence is not subject to exclusion if "the connection between the illegal police conduct and the discovery and seizure of the evidence is 'so attenuated as to dissipate the taint.'" The Utah Supreme Court has established several factors that the reviewing court must examine in evaluating the attenuation issue: temporal proximity of the initial illegality and the consent in question, the presence of intervening circumstances, and the purpose and flagrancy of the illegal misconduct.

Ham, 910 P.2d at 440-41 (cites omitted), overruled on other grounds, Bisner, 2001 UT 99, ¶¶44-46.

The state has failed to argue "attenuation" in this case. In that regard, the state has failed to satisfy its "heavier burden" of proof in the matter. See Arroyo, 796 P.2d at 687-88. In addition, the state is prohibited from arguing attenuation in its reply brief.

In considering the "attenuation issue," the record in this case reflects that no time passed between the continued, illegal detention and the request for consent to search. (R. 84:16, 38.) Also, there were no intervening circumstances between the unlawful conduct and the "consent." (Id.) Hansen's "consent" was procured during the illegal detention. In addition, the record reflects that Officer Huntington unlawfully detained Hansen and asked further questions for the specific purpose of obtaining consent to search the car. Accordingly, Hansen's consent, even if voluntary, was invalid because it was gained by the officer's exploitation of his prior illegal conduct. On that basis, all evidence discovered and seized as a result of the unlawful conduct must be suppressed.

This Court may find that consent was poisoned by the prior illegality. The evidence obtained in connection therewith must be suppressed.

B. THE COURT OF APPEALS RULED THAT THE CIRCUMSTANCES CONCERNING THE PRIOR ILLEGALITY CONSTITUTED COERCION.

As a final matter, the court of appeals considered the totality of the circumstances set forth above, including the prior illegality, to determine that consent was coerced. While the "coercion" analysis relates to the voluntariness of the consent, see supra, Point I, herein,

Hansen has addressed it here, because poison and coercion are intertwined and related.

With regard to coercion, the court of appeals stated the following:

[T]he Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting "consent" would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed.

Hansen, 2000 UT App 353, ¶22 (citing Schneckloth, 412 U.S. 228).

The state takes issue with the court of appeals' ruling that consent was coerced. It claims the ruling cannot be upheld for the following reasons: the "presumption against waiver" standard tainted the coercion analysis; and "detention" may not be a basis for finding coerced consent. (State's Brief at 29-30.)

With regard to the state's claim regarding the "presumption" standard, it is incorrect. The court of appeals in this matter specifically considered the totality of the circumstances. See Hansen, 2000 UT App 353, ¶25. That is, the court of appeals looked to the "details of police conduct and the characteristics of the accused, Arroyo, 796 P.2d at 684[,], *which include 'subtly coercive police questions*, as well as the possibly vulnerable subjective state of the person who consents.' Schneckloth, 412 U.S. at 229." Hansen, 2000 UT App 353, ¶22.

Any reference in the "coercion" analysis to the "presumption against waiver" was inconsequential and constituted dictum. See supra Point I, herein.

With respect to the state's claim that "detention alone cannot by itself render an otherwise voluntary consent involuntary" (State's Brief of Petitioner at 30), the court of

appeals did not rely on that factor alone. It looked to the totality of the circumstances, including the following:

Officer Huntington remained at Hansen's vehicle and continued to ask Hansen questions, both Officer Huntington and a second armed officer's vehicles remained parked behind Hansen with their emergency lights flashing, and the second officer remained outside his vehicle throughout the encounter. Finally, Officer Huntington did not make any indication to Hansen as to how he intended to handle the improper lane change before he asked Hansen if he had any alcohol, weapons, or drugs in the vehicle. Officer Huntington merely told Hansen to have his insurance agent call the Division of Motor Vehicles, and he returned Hansen's license and registration.

Hansen, 2000 UT App 353, ¶15. Also,

[T]he circumstances surrounding the request to search made the request subtly coercive. Specifically, Officer Huntington had only issued a warning regarding the lack of insurance and he had not taken any action regarding the improper left turn. Therefore, a reasonable person would not have felt that their consent, if given, was a voluntary act of free will because Officer Huntington could have cited Hansen for the improper lane change if Hansen was uncooperative regarding the search. See Florida v. Royer, 460 U.S. 491, 497, 103 S.Ct. 1319, 1324, 75 L.Ed.2d 229 (1983) ("[W]here the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was *freely and voluntarily given....*") (emphasis added).

Hansen, 2000 UT App 353, ¶24.⁹ The court of appeals' analysis supports coercion. It should

⁹The state claims the factors set forth in State v. Whittenback, 621 P.2d 103, 106 (Utah 1980), support that consent was not coerced. (State's Brief at 28.) The Whittenback factors include the following: "[1] the absence of a claim of authority to search by the officers; [2] the absence of an exhibition of force by the officers; [3] a mere request to search; [4] cooperation by the owner of the vehicle; and [5] the absence of deception or trick on the part of the officer." Id.

Since "coercion" is assessed under the "totality of the circumstances" analysis, the Whittenback factors should serve as a starting place for the analysis. See Robinette, 519 U.S. at 39 (Court refuses to apply rigid tests under the "totality of the circumstances" analysis).

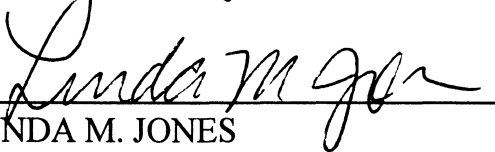
With respect to factors [1] and [2], Officer Huntington testified that as he returned Hansen's license and registration, a second officer pulled in behind Hansen's car with emergency lights engaged, and he stepped out of his patrol car to stand behind Hansen's car.

be affirmed on review. Where the consent is coerced, it is deemed unlawful.

CONCLUSION

For the reasons set forth herein, Hansen respectfully requests that this Court affirm the court of appeals' determination that the state failed to prove valid consent.

SUBMITTED this 4th day of January, 2002.




LINDA M. JONES
OTIS STERLING III
Attorneys for Defendant

Both officers were in uniform and armed. The increased intensity supports an exhibition of authority and force by the officers, under factors [1] and [2].

With respect to factors [3] and [4], Officer Huntington's testimony concerning the facts supports that Hansen objected to the officer's request to search. See supra, Point I. Those factors support coercion. And finally, with respect to factor [5], at the time Officer Huntington requested "consent" to search, he had not indicated to Hansen how he intended to resolve the "improper lane change." He left the impression that to avoid a citation, Hansen was required to cooperate. Those facts support manipulation and deception on the part of Officer Huntington. Under Whittenback and the totality of the circumstances, the record supports coercion.

CERTIFICATE OF DELIVERY

I, LINDA M. JONES, hereby certify that I have caused to be hand-delivered 10 copies of the foregoing to the Utah Supreme Court, 450 South State Street, Salt Lake City, Utah 84114, and 4 copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 4th day of January, 2002.


LINDA M. JONES

DELIVERED to the Supreme Court and the Attorney General's office as set forth above, this ___ day of _____, 2002.

ADDENDA

ADDENDUM A

1587). Moreover, "it is quite clear that a defendant who procures a judgment against him upon an indictment to be set aside may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he had been convicted." *Ball v. United States*, 163 U.S. 662, 665, 16 S.Ct. 1192, 1195, 41 L.Ed. 300 (1896).

¶ 17 The rationale underlying this policy is clear; "[i]t would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." *Burks*, 437 U.S. at 15, 98 S.Ct. 2141 (quoting *Tateo*, 377 U.S. at 466, 34 S.Ct. 1587). Further, "reversal for trial error, as distinguished from evidentiary insufficiency . . . is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental aspect, e.g., . . . incorrect instructions." *Id.* "When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished." *Id.* Because we conclude that the juvenile court committed a procedural error in utilizing the clear and convincing standard in C.S.B.'s delinquency proceeding, we reverse and remand, noting that such a remand does not violate the Due Process Clause of the United States Constitution.

CONCLUSION

¶ 18 The juvenile court erred when it used the clear and convincing standard in its written findings for C.S.B.'s delinquency hearing. Therefore, we reverse. Additionally, we conclude that our authority to remand is clear, and, in this instance, that remand does not violate C.S.B.'s Fifth Amendment double jeopardy protections.

¶ 19 We remand this case to the juvenile court for further appropriate written findings, wherein the court is instructed to apply the appropriate standard of beyond a reasonable doubt. The juvenile court may accomplish this in its discretion through reevaluating the evidence, conducting a new trial, or other means deemed appropriate. We further direct the juvenile court to explain on

the record its reasons for choosing the direction it takes.

¶ 20 WE CONCUR: RUSSELL W. BENCH, Judge, and JAMES Z. DAVIS, Judge.



STATE of Utah, Plaintiff and Appellee,

v.

Shayne M. HANSEN, Defendant
and Appellant.

No. 990987-CA.

Court of Appeals of Utah.

Dec. 14, 2000.

Defendant pleaded guilty in the District Court, Salt Lake Department, Leslie A. Lewis, J., to illegal possession of a controlled substance. He appealed. The Court of Appeals, Davis, J., held that: (1) officer's questions about drugs were outside scope of traffic stop, and (2) defendant's consent to search his car following illegal traffic stop was not voluntary.

Reversed and remanded.

Greenwood, P.J., filed an opinion concurring in the result.

1. Criminal Law § 1134(3)

In determining whether a defendant's consent to a search following illegal police activity is valid under the Fourth Amendment, an appellate court looks to: (1) the voluntariness of the consent, and (2) whether the consent was obtained by police exploitation of the prior illegality. U.S.C.A. Const. Amend. 4.

2. Criminal Law § 1134(3), 1158(2)

A trial court's ultimate conclusion that consent to search was voluntary or involun-

tary is reviewed on appeal for correctness; however, its underlying factual findings will not be set aside unless they are found to be clearly erroneous. U.S.C.A. Const.Amend. 4.

3. Criminal Law ⚖1134(3)

In reviewing the legality of a traffic stop, an appellate court considers two questions: whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place. U.S.C.A. Const.Amend. 4.

4. Automobiles ⚖349(3)

A police officer is constitutionally justified in stopping a vehicle if the stop is incident to a traffic violation committed in the officer's presence. U.S.C.A. Const.Amend. 4.

5. Automobiles ⚖349(17)

Once a traffic stop is made, the detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. U.S.C.A. Const.Amend. 4.

6. Automobiles ⚖349(18)

An officer conducting a routine traffic stop may request a driver's license and vehicle registration, conduct a computer check, and issue a citation, however, once the driver has produced a valid license and evidence of entitlement to use the vehicle, he must be allowed to proceed on his way, without being subject to further delay by police for additional questioning. U.S.C.A. Const.Amend. 4.

7. Automobiles ⚖349(18)

Following conclusion of traffic stop, investigative questioning that further detains the driver must be supported by reasonable suspicion of more serious criminal activity. U.S.C.A. Const.Amend. 4.

8. Arrest ⚖63.5(4)

"Reasonable suspicion" required to validate *Terry* stop means suspicion based on specific, articulable facts drawn from the totality of the circumstances facing the officer at the time of the stop. U.S.C.A. Const.Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions

9. Arrest ⚖68(4)

Once a person is seized for Fourth Amendment purposes, the seizure does not cease simply because the police formulate an uncommunicated intention that the seized person may go on his way; for the seizure to end, it must be clear to the seized person, either from the words of an officer or from the clear import of the circumstances, that the person is at liberty to go about his business. U.S.C.A. Const.Amend. 4.

10. Automobiles ⚖349(10, 18)

During traffic stop, defendant remained seized under the Fourth Amendment after police officer returned driver's license and registration, and accordingly, a reasonable articulable suspicion of more serious criminal activity was required to justify subsequent investigative questioning about drugs, as such questions were outside scope of initial stop, a reasonable person in defendant's position would not believe that he was free to leave, where officer remained at the car and asked questions, a second police vehicle was present, and officer did not address one of the reasons for the initial stop. U.S.C.A. Const.Amend. 4; U.C.A.1953. 58-37-8(2)(a)(i)

11. Searches and Seizures ⚖182

A defendant's consent to a search following illegal police activity is valid under the Fourth Amendment only if both of the following tests are met: (1) the consent was given voluntarily, and (2) the consent was not obtained by police exploitation of the prior illegality. U.S.C.A. Const.Amend. 4.

12. Searches and Seizures ⚖194

It is the state's burden to prove that a consent to search was voluntarily given; if the state fails to meet this burden, the evidence is deemed inadmissible against the defendant. U.S.C.A. Const.Amend. 4.

13. Criminal Law ⚖1134(2)

In determining whether consent to search was voluntarily given, an appellate court will look to the totality of all the circumstances. U.S.C.A. Const.Amend. 4.

14. Searches and Seizures ¶182

Defendant's consent to search his car for drugs following illegal traffic stop was not freely and voluntarily given; officer was coercive and a reasonable person would not have felt free to ignore the request, as officer only addressed one of the two reasons for the stop when the request was made, which would indicate to defendant that he could be cited for the other reason if he was uncooperative. U.S.C.A. Const. Amend. 4; U.C.A.1953, 58-37-8(2)(a)(i).

Linda M. Jones and Otis Sterling, III, Salt Lake Legal Defender Association, Salt Lake City, for appellant.

Jan Graham, Atty. Gen., and Jeffrey S. Gray, Assistant Attorney General, Salt Lake City, for appellee.

Before GREENWOOD, P.J., DAVIS and ORME, JJ

OPINION

DAVIS, Judge:

¶1 Defendant Shayne Michael Hansen (Hansen) appeals his conviction for illegal possession of a controlled substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (1998).

BACKGROUND

¶2 On December 11, 1998, Officer Bruce Huntington of the Midvale City Police Department was driving behind Hansen. Officer Huntington initiated a computer check of Hansen's vehicle with the Utah Division of Motor Vehicles. While Officer Huntington waited for the results of the computer check, he observed Hansen make an improper left turn.¹ After Officer Huntington observed the turn, the computer check revealed that Hansen's car was uninsured. Due to these violations, Officer Huntington decided to stop

the vehicle, and he activated his overhead emergency lights. Hansen pulled off the road and stopped in the parking lot of a convenience store. Officer Huntington parked directly behind Hansen.²

¶3 Officer Huntington, dressed in uniform and carrying a sidearm, exited his patrol car and confronted Hansen. Officer Huntington told Hansen that he stopped him because of the improper lane change and lack of insurance. Hansen admitted that he did not have any insurance and stated that he could not afford insurance. Officer Huntington requested Hansen's driver's license and registration, and returned to his patrol car to run a computer check on Hansen. After approximately five minutes, the computer check revealed that Hansen's license was valid, and Hansen did not have any outstanding warrants. Officer Huntington then exited his patrol car and returned to Hansen. While Officer Huntington was walking back to Hansen's vehicle, another officer pulled into the parking lot. This second officer parked next to Officer Huntington's car, got out of his patrol car, and remained by the patrol cars. The emergency lights on both patrol cars were flashing, and they remained flashing throughout the encounter.

¶4 Upon returning to Hansen's vehicle, Officer Huntington told Hansen that state law required him to have automobile insurance, and Hansen needed to have an insurance agent mail proof of insurance to the Division of Motor Vehicles. Officer Huntington did not say anything to Hansen regarding the improper lane change. Officer Huntington then returned Hansen's driver's license and registration, however, Officer Huntington did not tell Hansen that he was free to leave. Instead, Officer Huntington asked Hansen if he had any alcohol, weapons, or drugs in his vehicle. Hansen replied that he did not have any such items. Officer Huntington then asked Hansen, "Do you mind if I check?"³ Officer Huntington testi-

1. Hansen completed his left turn by entering the right lane rather than the extreme left-hand lane, presumably in violation of Utah Code Ann. § 41-6-00 (1998).

2. It is not clear from the record whether Officer Huntington impeded Hansen's ability to drive off when he parked behind Hansen.

3. Officer Huntington testified with commendable candor that it is his practice to ask them for

fied that Hansen responded, "Yes."⁴

¶5 Officer Huntington then told Hansen and his passenger to step out of the car, and Officer Huntington directed them to stand next to the other officer. Officer Huntington conducted a search of the car where he found a homemade billy club and a marijuana pipe on the floor of the driver's area of the car. Officer Huntington arrested Hansen and searched him incident to the arrest. During the search of Hansen, Officer Huntington found a substance he suspected to be methamphetamine. Hansen was later charged with possession of a controlled substance in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (1998), and unlawful possession of drug paraphernalia in violation of Utah Code Ann. § 58-37a-5 (1998).

¶6 Prior to trial, Hansen moved to suppress evidence obtained in the searches, claiming that Officer Huntington illegally detained him and that he did not voluntarily consent to the search of his car. The trial court denied Hansen's motion to suppress, concluding that the evidence was lawfully seized because "[a]t the time consent was obtained, there was no seizure for Fourth Amendment purposes because defendant was free to leave," and "[d]efendant's consent to search was freely and voluntarily given." Hansen later entered a conditional guilty plea to unlawful possession of a controlled substance. Hansen now appeals the trial court's denial of his motion to suppress.

ISSUES AND STANDARDS OF REVIEW

[1,2] ¶7 Hansen alleges that the trial court erred in denying his motion to suppress because Officer Huntington's search violated

consent by stating "Do you have any alcohol weapons or drugs in the vehicle?" and if they say no "I say 'Well do you mind if I check?'"

4. The record indicates that Officer Huntington was unsure about Hansen's response. For example, during both direct and cross examination, Officer Huntington testified that Hansen responded "yes" to the question "Do you mind if I check?" However, in both instances the court interjected by asking Officer Huntington if Hansen said "yes" he minded. Officer Huntington responded to the court's questions by stating that Hansen said "yes" I could have consent. However, Officer Huntington later admitted that he

his Fourth Amendment right against unreasonable searches and seizures. Specifically, Hansen argues that his consent to search was not valid because it was obtained through Officer Huntington's exploitation of an illegal seizure, and his consent was not voluntarily given.⁵

[B]ecause the determination of whether an encounter with law enforcement officers constitutes a seizure under the Fourth Amendment "calls for consistent application from one police encounter to the next, regardless of the particular individual's response to the actions of the police," such determination is a legal conclusion that we review for correctness.

Salt Lake City v. Ray, 2000 UT App 55, ¶8, 998 P.2d 274 (citations omitted). Similarly, the trial court's ultimate conclusion that consent was voluntary or involuntary is reviewed for correctness. See *State v. Thurman*, 846 P.2d 1256, 1271 (Utah 1993). However, "[T]he trial court's underlying factual findings will not be set aside unless they are found to be clearly erroneous." *Id.*

ANALYSIS

I. Nature of the police encounter

¶8 Hansen argues that the trial court erred in its conclusion that, at the time the consent was obtained, there was no seizure for Fourth Amendment purposes because Hansen was free to leave.

The Fourth Amendment of the United States Constitution guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The United States Su-

did not remember Hansen's exact response regarding his question—"Do you mind if I check?"

5. In determining whether a defendant's consent to a search following illegal police activity is valid under the Fourth Amendment, we look to (i) the voluntariness of the consent and (ii) whether the consent was obtained by police exploitation of the prior illegality. See *State v. Thurman*, 846 P.2d 1256, 1262 (Utah 1993). Therefore, we begin our analysis with the issue of whether Officer Huntington's seizure was illegal and then analyze whether Hansen's consent was voluntary.

preme Court has held that "stopping an automobile and detaining its occupants constitute[s] a seizure" within the meaning of the Fourth Amendment, "even though the purpose of the stop is limited and the resulting detention quite brief." *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). Thus, "[a]lthough a person has a lesser expectation of privacy in a car than in his or her 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) (citation omitted).

State v. Lopez, 873 P.2d 1127, 1131 (Utah 1994) (alteration in original).

[3,4] ¶9 "In reviewing the legality of a traffic stop, we consider two questions: '[W]hether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.'" *State v. Patefield*, 927 P.2d 655, 657 (Utah Ct.App.1996) (alteration in original) (quoting *Terry v. Ohio*, 392 U.S. 1, 20, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968)), accord *Lopez*, 873 P.2d at 1131-32. With respect to the first question, a police officer is constitutionally justified in stopping a vehicle if the stop is "incident to a traffic violation committed in the officers' presence." *State v. Talbot*, 792 P.2d 489, 491 (Utah Ct.App.1990); see also *State v. Marshall*, 791 P.2d 880, 881-83 (Utah Ct.App.1990), *State v. Sierra*, 754 P.2d 972, 975 (Utah Ct.App.1988).

¶10 Here, Hansen was seized by Officer Huntington when he was stopped for the improper lane change and lack of insurance. It is clear that Officer Huntington was justified in seizing Hansen because Hansen committed two traffic violations in the officer's presence. Consequently, Hansen does not dispute the legality of the initial stop and the first part of the *Terry* inquiry is not at issue.

[5-8] ¶11 The second question in reviewing the legality of a traffic stop is whether the stop was reasonably related in scope to the traffic violation which justified it in the first place. See *Patefield*, 927 P.2d at 657. "Once a traffic stop is made, the detention 'must be temporary and last no longer than is necessary to effectuate the purpose of the

stop.'" *Lopez*, 873 P.2d at 1132 (quoting *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983)). Both "[t]he length and scope of the detention must be 'strictly tied to and justified by the circumstances which rendered its initiation permissible.'" *State v. Johnson*, 805 P.2d 761, 763 (Utah 1991) (quoting *Terry*, 392 U.S. at 19-20, 88 S.Ct. 1868). Therefore,

[a]n officer conducting a routine traffic stop may request a driver's license and vehicle registration, conduct a computer check, and issue a citation. *United States v. Guzman*, 864 F.2d 1512, 1519 (10th Cir. 1988). However, once the driver has produced a valid license and evidence of entitlement to use the vehicle, "he must be allowed to proceed on his way, without being subject to further delay by police for additional questioning." *Id.*

State v. Robinson, 797 P.2d 431, 435 (Utah Ct.App.1990). "Investigative questioning that further detains the driver must be supported by reasonable suspicion of more serious criminal activity. Reasonable suspicion means suspicion based on specific, articulable facts drawn from the totality of the circumstances facing the officer at the time of the stop." *Lopez*, 873 P.2d at 1132.

[9] ¶12 Here, Hansen claims that he was illegally seized at the time the alleged consent was obtained because Officer Huntington engaged in investigative questioning without reasonable suspicion of more serious criminal activity. The State counters that when Officer Huntington gave Hansen a warning and returned his license and registration, the encounter between Officer Huntington and Hansen ceased to be a seizure under the Fourth Amendment.

Under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and its progeny, there are three levels of police-citizen encounters, each requiring a different degree of justification under the Fourth Amendment. *State v. Munson*, 821 P.2d 13, 15 n. 1 (Utah App.1991), cert. denied, 843 P.2d 516 (Utah 1992). The first level occurs when an officer approaches and questions a suspect. An officer may stop and question a person at any time so long

as that person "is not detained against his [or her] will." *Id.* The next level is reached when an officer temporarily seizes a person. In order to legally effect a temporary seizure, the officer must have "articulable suspicion" that the suspect has or is about to commit a crime, and the detention must be limited in scope. *Id.* The third level is arrest, which requires probable cause for the officer to believe that a crime has been or is about to be committed. *Id.*

Salt Lake City v. Smoot, 921 P.2d 1003, 1006 (Utah Ct.App.1996) (alteration in original). The Supreme Court of Utah has declared:

Not every encounter between a police officer and a citizen is a seizure. A person is seized under the Fourth Amendment when, considering the totality of the circumstances, the police conduct would have communicated to a reasonable person that the person was not free to decline the officer's requests or otherwise terminate the encounter and go about his or her business.

State v. Higgins, 884 P.2d 1242, 1244 (Utah 1994) (internal citations omitted).

Illustrating this standard, the United States Supreme Court noted: "Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."

State v. Patefield, 927 P.2d 655, 659 (Utah Ct.App.1996) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980)). Furthermore,

[o]nce a person is seized for Fourth Amendment purposes, the seizure does not cease simply because the police formulate an uncommunicated intention that the seized person may go on his or her way. *For the seizure to end, it must be clear to the seized person, either from the words of an officer or from the clear import of the*

circumstances, that the person is at liberty to go about his or her business.

Higgins, 884 P.2d at 1244 (emphasis added).

[10] ¶13 In the present case, the trial court concluded that the detention did not exceed the scope of the traffic stop and that at the time Hansen consented to the search, there was no seizure for Fourth Amendment purposes. We disagree. The record clearly indicates that neither the words of Officer Huntington nor the clear import of the circumstances would have communicated to a reasonable person that the person was free to decline the officer's requests, terminate the encounter, and go about his or her business. Although Officer Huntington returned Hansen's driver's license and registration, given the surrounding circumstances, this act alone would not have communicated to a reasonable person that he or she was free to leave. *See United States v. Sandoval*, 29 F.3d 537, 540 (10th Cir.1994) ("In the context of traffic stops this Circuit has adopted as an indicium of a seizure the officer's taking of necessary documentation (driver's license and vehicle registration) from a driver, and we have also considered as a necessary (but not always sufficient) condition of the termination of that seizure the officer's return of such documentation. "). For example, after Officer Huntington returned Hansen's license and registration, Officer Huntington did not say anything to Hansen that would have indicated that Hansen was free to go. We recognize that an officer is not required to inform a detainee that they are free to go, *see Ohio v. Robinette*, 519 U.S. 33, 38, 117 S.Ct. 417, 421, 136 L.Ed.2d 347 (1996); however, such a statement would have supported the trial court's conclusion that Hansen was not seized at the time he gave consent. *See United States v. Torres-Guevara*, 147 F.3d 1261, 1265 (10th Cir.1998) (stating defendant was not seized for Fourth Amendment purposes, in part, because officers told defendant she was free to leave); *United States v. Gregory*, 79 F.3d 973, 979 (10th Cir.1996) ("Although not prerequisites, in determining whether consent is voluntary when given following the return of defendant's documents, we look at such factors as whether the officer informed the defendant that he was free to leave the scene or that he could refuse to

give consent.”); *United States v McSwain*, 29 F.3d 558, 563 (10th Cir.1994) (same).

¶ 14 Not only did Officer Huntington fail to communicate to Hansen that he was free to leave, the question that Officer Huntington asked Hansen—“Do you have any drugs, alcohol or weapons in the car?”—communicated the message that Hansen was not free to leave. This question, although not directly accusatory, was clearly investigatory, indicating that Officer Huntington suspected that Hansen was engaged in some sort of illegal activity. Therefore, investigatory questions such as the one asked here actually cut against the proposition that a reasonable person would feel that the initial seizure has ended and that he or she is now free to terminate the encounter. Cf. *Sandoval*, 29 F.3d at 542 (stating that the crucial predicate to a voluntary police citizen encounter was missing because “[a]t no point did the nature of those inquiries [about defendant’s drug involvement] change the climate so that the reasonable listener would view participation in the exchange as freely terminable”), *Washington v Soto-Garcia*, 68 Wash.App. 20, 841 P.2d 1271, 1273–74 (1992) (holding that progressive intrusion into defendant’s privacy was of such a nature that a reasonable person would not believe that he or she was free to end the encounter).

¶ 15 In addition to Officer Huntington’s words, the clear import of the circumstances in the present case would not have indicated to a reasonable person that he or she was free to leave. Officer Huntington remained at Hansen’s vehicle and continued to ask Hansen questions, both Officer Huntington and a second armed officer’s vehicles remained parked behind Hansen with their emergency lights flashing, and the second officer remained outside his vehicle throughout the encounter. Finally, Officer Huntington did not make any indication to Hansen as to how he intended to handle the improper lane change before he asked Hansen if he had any alcohol, weapons, or drugs in the vehicle. Officer Huntington merely told Hansen to have his insurance agent call the Division of Motor Vehicles, and he returned Hansen’s license and registration. Because of the clear import of the circumstances,

especially the fact that Officer Huntington had not addressed one of the reasons for the initial stop, a reasonable person would not have felt free to terminate the encounter and proceed on his or her way.

¶ 16 Due to the factors discussed above, we find that Hansen remained seized for Fourth Amendment purposes when, and because, Officer Huntington asked him whether there was alcohol, drugs, or weapons in the vehicle. Likewise Hansen was seized for Fourth Amendment purposes when Officer Huntington requested consent to search the car. The State concedes that Officer Huntington did not have a reasonable articulable suspicion of more serious criminal activity to justify the investigative questions. Therefore, Hansen was illegally detained when Officer Huntington asked him questions that were not reasonably related in scope to the traffic violation which justified the initial seizure. See *United States v Walker*, 933 F.2d 812, 816 (10th Cir.1991) (holding that defendant was unreasonably seized under Fourth Amendment when officer detained him to ask questions unrelated in scope to the reasons that justified the initial traffic stop).

II. Voluntariness of Consent

¶ 17 We now turn to the issue of whether Hansen’s consent to search was valid despite the illegality of Officer Huntington’s seizure.

A warrantless search is a per se Fourth Amendment violation unless the State can establish one of the “few specifically established and well-delineated exceptions.” *State v Arroyo*, 796 P.2d 684, 687 (Utah 1990) (quoting *Katz v United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967) (citations omitted)), accord *State v Sepulveda*, 842 P.2d 913, 918 (Utah App.1992). One of the clearly established exceptions is a consent. *Arroyo*, 796 P.2d at 687, *Sepulveda*, 842 P.2d at 918.

State v Ham, 910 P.2d 433, 438 (Utah Ct. App.1996).

[11–13] ¶ 18 “[A] defendant’s consent to a search following illegal police activity is valid under the Fourth Amendment only if both of the following tests are met. (1) The consent was given voluntarily, and (2) the consent was not obtained by police exploita-

tion of the prior illegality.” *State v. Thurman*, 846 P.2d 1256, 1262 (Utah 1993); see also *State v. Arroyo*, 796 P.2d 684, 688 (Utah 1990). “It is the State’s burden to prove that a consent was voluntarily given. If the State fails to meet this burden, the evidence is deemed inadmissible against the defendant.” *Ham*, 910 P.2d at 439; accord *Thurman*, 846 P.2d at 1263; *State v. Robinson*, 797 P.2d 431, 437 (Utah Ct.App.1990). This court has adopted the following analytical framework to determine whether the State has met its burden of proving that consent was voluntarily given:

‘(1) There must be clear and positive testimony that the consent was “unequivocal and specific” and “freely and intelligently given”, (2) the government must prove consent was given without duress or coercion, express or implied; and (3) [when evaluating these first two standards, we] indulge every reasonable presumption against the waiver of fundamental constitutional rights and there must be convincing evidence that such rights were waived.’

Ham, 910 P.2d at 439 (citations omitted) (alterations in original). In determining whether consent was voluntarily given we will look to the “totality of all the circumstances” *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S.Ct. 2041, 2048, 36 L.Ed.2d 854 (1973), accord *Ham*, 910 P.2d at 439.

[14] “19 As stated above, Hansen was illegally seized at the time Officer Huntington requested consent to search Hansen’s vehicle. Therefore, for the evidence discovered in the search to be admissible, Hansen’s consent, if given, must have been voluntary, and the consent must not have been obtained by police exploitation of the prior illegality. The trial court concluded that Hansen’s “consent to search was freely and voluntarily given”⁶ We disagree for the following reasons.

“20 First, Officer Huntington’s testimony was neither clear nor positive regarding Hansen’s response to his second question. See *Ham*, 910 P.2d at 439 (requiring testimony that consent was unequivocal and specific

and freely and intelligently given). Specifically, the following colloquies took place:

Q. [Prosecutor] And then you asked, “Do you mind if I check?”

A. [Officer Huntington] Uh-huh.

Q. And what was his response to that question?

A. He said yes.

Q. [Court] Yes, he minded?

A. Yes, I could have consent to search.

Q. [Defense Counsel] Do you recall specifically what you said to him?

A. Not specifically.

Q. Do you have any idea?

A. I would imagine that I stated: “Do you have any alcohol, drugs or weapons in the vehicle?”

Q. He said no?

A. He said no. Do you mind if I check?

Q. Okay.

A. And then he said yes.

Q. [Court] He said?

Q. [Defense Counsel] He says yes?

A. [Officer Huntington] Yes.

Q. [Court] Do you mind if I check—and he says yes?

A. Well, do you mind if I check and then yes, he gave me consent. Sorry.

Q. [Defense Counsel] What did he say?

A. What did he say?

Q. Yeah.

A. I don’t recall exactly other than it was consent.

Q. So you don’t recall his exact words?

A. Not exactly.

“21 Officer Huntington testified twice that he asked Hansen, “Do you mind if I check?” and Hansen responded, “Yes.” The court clearly realized the import of officer Huntington’s testimony and interrupted the attorneys in an effort to clarify Officer Hunt-

6. The trial court did not make any conclusion regarding the second factor—whether the consent was obtained by police exploitation of the

prior illegality—because the trial court concluded, erroneously, that there was no illegality preceding defendant’s alleged consent to search. To

ington's testimony. However, Officer Huntington's responses to the court's questions were conclusory rather than "clear and positive testimony" that Hansen's reply was "unequivocal and specific." *Ham*, 910 P.2d at 439 (citations omitted). Moreover, Officer Huntington admitted that he did not recall Hansen's exact words. Therefore, we hold that the trial court's determination that the testimony was clear and positive that Hansen's response was unequivocal and specific was incorrect. To the extent its determination amounted to a finding of fact, it was clearly erroneous.

¶22 The *Ham* analytical framework requires us to next address whether Hansen's response was freely and intelligently given and obtained without duress or coercion, express or implied.⁷ See *Ham*, 910 P.2d at 439.

[T]he Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting "consent" would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed.

Schneekloth, 412 U.S. at 228, 93 S.Ct. 2041.

In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, a court must take

into account both the details of police conduct and the characteristics of the accused. *Arroyo*, 796 P.2d at 684[,] which include "subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents." *Schneekloth*, 412 U.S. at 229, 93 S.Ct. at 2049.

State v. Robinson, 797 P.2d 431, 437 (Utah Ct.App.1990) (emphasis added).

¶23 The present case is quite similar to *Ohio v. Robinette*, 80 Ohio St.3d 234, 685 N.E.2d 762 (1997). In *Robinette*, an officer stopped the defendant for a speeding violation. See *id.* at 764. The officer issued the defendant a verbal warning for the speeding violation, and returned the defendant's driver's license. See *id.* The officer then said to the defendant, "One question before you get gone [sic]: are you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?" *Id.* When defendant responded that he did not have any contraband in the car, the officer asked if he could search the vehicle. See *id.* The defendant answered "yes" to the officer's request. See *id.* On remand from the Supreme Court of the United States, see *Ohio v. Robinette*, 519 U.S. 33, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996), the Supreme Court of Ohio looked at the totality of the circumstances to determine whether a reasonable

7. Our colleague suggests that our analysis should conclude with our ruling that the trial court incorrectly determined that the testimony was clear and positive that Hansen's response to the officer's second question was unequivocal and specific.

While we may elect to forego further analysis in cases where one or more decided issues may arguably be dispositive, we are not obliged to do so. Indeed, there are numerous circumstances under which we may elect to reach an issue that arguably need not be addressed in order to resolve the case. Our election to treat moot issues which are of significant public import and likely to recur, even where the issue is not likely to evade judicial review, finds a particularly appropriate analog in this case. See, e.g., *In re S.L.*, 1999 UT App 390, *40 995 P.2d 17 (reaching merits of issue capable of judicial review because it was of significant public import and was likely to recur) *cert denied*, 4 P.3d 1289 (Utah 2000); *W. & G. Co. v. Redevelopment Agency*, 302 P.2d 755, 765 (Utah Ct.App.1990) (addressing issue, even though other issue dispositive, because "it is of wide concern . . . it significantly affects the

public interest, and it is likely to recur in a similar manner"); cf. *State v. Roaiguez-Lopi*, 954 P.2d 1290, 1294 n. 2 (Utah Ct.App.1998) (Davis, J., concurring) (addressing issue because "[t]his situation is somewhat analogous to a determination of whether to reach a moot issue"). We may also analyze an issue to enable the supreme court to address that issue on review. Cf. *State v. Maguire*, 957 P.2d 598, 600 (Utah 1998) (stating that issue was outside scope of review because court of appeals did not reach issue). We may also wish to provide guidance for further proceedings. See, e.g., *State v. James*, 819 P.2d 781, 795 (Utah 1991) ("Issues that are fully briefed on appeal and are likely to be presented on remand should be addressed by [an appellate] court."). *State v. Bell*, 770 P.2d 100, 108 (Utah 1988) (addressing issue in interest of judicial economy, since issue likely to recur, to provide trial court with guidance); *Atlas Corp. v. Clovis Nat'l Bank*, 737 P.2d 225, 231 (Utah 1987) (same); *Vitale v. Belmont Springs*, 916 P.2d 359, 363 (Utah Ct.App.1996) (addressing issue in interest of judicial economy, even though case decided on other grounds).

person would have believed that they could refuse to answer further questions and leave. See *Robinette*, 685 N.E.2d at 769. The court then ruled that

[the officer's] words did not give Robinette any indication that he was free to go, but rather implied just the opposite—that Robinette was *not* free to go until he answered [the officer's] additional questions. The timing of [the officer's] immediate transition from giving Robinette the warning for speeding into questioning regarding contraband and the request to search is troubling. "The transition between detention and a consensual [sic] exchange can be so seamless that the untrained eye may not notice that it has occurred. The undetectability of that transition may be used by police officers to coerce citizens into answering questions that they need not answer, or to allow a search of a vehicle that they are not legally obligated to allow." When these factors are combined with a police officer's superior position of authority, any reasonable person would have felt compelled to submit to the officers' questioning.

Id. at 770–71 (citation omitted) (emphasis in original).

¶24 Here, as in *Robinette*, the intrusive and suspicious questions asked by the officer, combined with the fact that the questions were asked immediately after the defendant was detained, indicate that a reasonable person would not have felt free to go until they answered the additional questions. Furthermore, although the questions were not expressly coercive, the circumstances surrounding the request to search made the request subtly coercive. Specifically, Officer Huntington had only issued a warning regarding the lack of insurance and he had not taken

any action regarding the improper left turn. Therefore, a reasonable person would not have felt that their consent, if given, was a voluntary act of free will because Officer Huntington could have cited Hansen for the improper lane change if Hansen was uncooperative regarding the search.⁸ See *Florida v. Royer*, 460 U.S. 491, 497, 103 S.Ct. 1319, 1324, 75 L.Ed.2d 229 (1983) ("[W]here the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was *freely and voluntarily given*" (emphasis added)).

¶25 Officer Huntington did not provide clear and positive testimony that Hansen's alleged consent was unequivocal and specific. Furthermore, in looking at the totality of the circumstances, it is clear that officer Huntington's request was coercive, and a reasonable person would not have felt free to ignore Officer Huntington's request. Therefore, because we indulge every reasonable presumption against the waiver of fundamental constitutional rights, see *Ham*, 910 P.2d at 439, we hold that the trial court erred in concluding that Hansen's consent was freely and voluntarily given.⁹

CONCLUSION

¶26 We conclude that the trial court erred in denying Hansen's motion to suppress the evidence obtained in the search of Hansen's car. Hansen was illegally detained when Officer Huntington asked for consent to search Hansen's vehicle. Officer Huntington did not provide clear and positive testimony that Hansen's alleged consent was unequivocal and specific and freely and intelligently given. In addition, the State did not prove that Hansen's alleged consent was given

8. It is irrelevant that Hansen may have known that the search would have turned up contraband, thereby reducing the coercive nature of the situation (i.e., Hansen should have preferred the citation over the search) because the reasonable person test presupposes an innocent person. *Florida v. Bostick*, 501 U.S. 429, 437, 111 S.Ct. 2382, 2388, 115 L.Ed.2d 389 (1991) (emphasis in original); accord *Michigan v. Chesternut*, 486 U.S. 567, 574, 108 S.Ct. 1975, 1979–80, 100 L.Ed.2d 565 (1988) ("This reasonable person standard ensures that the scope of

Fourth Amendment protection does not vary with the state of mind of the particular individual being approached.")

9. Because we conclude that Hansen did not voluntarily consent to the search, we do not address whether the consent was obtained by police exploitation of the prior illegality. See *Thurman*, 846 P.2d at 1262 ("If the court determines that the consent was not voluntary, no further analysis is required: the consent is invalid and the proffered evidence must be excluded.")

en without duress or coercion. Consequently, Officer Huntington's search of Hansen's vehicle violated Hansen's rights under the Fourth Amendment and the trial court erred in denying his motion to suppress the evidence discovered in the search.

¶27 Reversed and remanded for further proceedings consistent with this opinion.

¶28 I CONCUR: GREGORY K. ORME, Judge.

GREENWOOD, Presiding Judge
(concurring in result):

¶29 I agree with my colleagues that Hansen was illegally detained when the officer asked for permission to search his vehicle and conducted that search. I also agree that the trial court erred in determining that Hansen gave his clear and unequivocal consent to the search. Having made that determination, I would not undertake to analyze whether Hansen's non-consent was obtained without duress or coercion. I would therefore concur in the conclusion that the trial court erred in denying Hansen's motion to suppress.



2001 UT App 4

STATE of Utah, Plaintiff and Appellee,

v.

Blaine HORROCKS, Defendant
and Appellant.

No. 990411-CA.

Court of Appeals of Utah.

Jan. 5, 2001.

Defendant moved to dismiss felony charges on ground that they were barred by double jeopardy because of his pleas in the Justice Court to various misdemeanor offenses arising out of same incident. The Fourth District Court, Provo Department,

Anthony W. Schofield, J., denied motion, and defendant entered conditional guilty pleas to use or possession of psilocybin and use or possession of marijuana. Defendant appealed. The Court of Appeals, Greenwood, P.J., held that: (1) jeopardy attached when justice court accepted defendant's pleas to misdemeanor offenses; (2) manifest necessity existed to allow misplea and dismissal of misdemeanor charges, such that prosecution could proceed on new information without violating double jeopardy.

Affirmed.

1. Criminal Law ⇨1134(8)

A trial court's decision to grant or deny a motion to dismiss presents a question of law, which is reviewed for correctness.

2. Criminal Law ⇨260.13

Defendant exhausted his right to appeal from justice court's dismissal of misdemeanor offenses in favor of subsequent felony information when he appealed to district court under statute providing for trial de novo, and he had no right thereafter to appeal district court's decision affirming the dismissal. U.C.A.1953, 78-5-120.

3. Judgment ⇨642

Issue of whether double jeopardy barred State's reprosecution of defendant on felony charges was not barred on basis of res judicata or other legal principles by earlier appeal of justice court's dismissal of misdemeanor offenses arising out of same incident, where issue in that case was whether signed final order was ever issued on defendant's pleas and thus whether those charges could be dismissed.

4. Double Jeopardy ⇨57

Jeopardy attaches when a court accepts a guilty plea; entry of the plea, rather than the actual imposition of the sentence, is the critical moment for determining jeopardy. U.S.C.A. Const. Amend. 5.

5. Criminal Law ⇨274(3.1)

Double Jeopardy ⇨57

Jeopardy attaches once a plea is accepted by the court, but the plea can be set aside upon a showing of manifest necessity before

ADDENDUM B

CONSTITUTION OF THE UNITED STATES

AMENDMENT IV

[Unreasonable searches and seizures.]

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.

ADDENDUM C

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SEP 1 1999

SALT LAKE COUNTY
By no small

IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT
IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

THE STATE OF UTAH,

Plaintiff,

-v-

SHAYNE M. HANSEN,

Defendant.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Case No. 991903645FS

Hon. Leslie A. Lewis

Defendant's Motion to Suppress Evidence Seized Illegally, filed in the above-entitled matter, came on for hearing before the Court on August 4, 1999. Defendant was present with his counsel, Otis Sterling III, Salt Lake Legal Defender Association, and the State of Utah was represented by N. M. D'Alesandro, Deputy District Attorney.

Defendant moved to suppress evidence gathered as a result of a warrantless search of a vehicle that defendant was driving, arguing that the search was beyond the scope of defendant's detention for a traffic stop and that the defendant had not given his voluntary consent for officers to search the vehicle.

Having considered defendant's motion, the sworn testimony of Midvale City Police Officer Bruce Huntington, and oral argument, and being fully advised in the premises, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Defendant is charged by Information with Unlawful Possession of a Controlled Substance (methamphetamine), a Third Degree Felony, and Unlawful Possession of Drug Paraphernalia, a Class B Misdemeanor.

2. The Information is based on a traffic stop that occurred on December 11, 1998, at 20 South Main Street, in Midvale, Salt Lake County, State of Utah.

3. On that date, Midvale Police Officer Bruce Huntington was on patrol, alone, in a marked patrol car.

4. Officer Huntington had been a Midvale police officer for a year and a half and had a total of three years of law enforcement experience.

5. At approximately 11:15 p.m. on December 11, 1998, Officer Huntington was southbound on Holden Street in Midvale behind another car.

6. At the intersection of Holden Street and Center Street, the car that Officer Huntington was following made a left turn onto Center Street in order to travel east.

7. Holden and Center Streets are public highways.

8. At the intersection of Holden Street and Center Street, vehicles turning east onto Center Street are required to enter the inside traffic lane.

9. The car that Officer Huntington was following turned into the outside eastbound traffic lane of Center Street.

10. Officer Huntington used his laptop computer to check the license plate number on the car he was following.

11. Officer Huntington retrieved the computer record on the license plate number and found no insurance information listed.

12. Officer Huntington stopped the other car by turning on his overhead emergency lights.

13. Both cars stopped at 20 South Main Street.

14. Officer Huntington approached the other car on foot.

15. There were two male occupants in the car.

16. The driver was identified as Shayne M. Hansen, the defendant.

17. Officer Huntington informed the defendant why he had been stopped and requested his driver's license, registration, and insurance information.

18. Defendant produced a driver's license and registration, but said that he could not afford insurance.

19. Officer Huntington returned to his patrol car and checked the status of defendant's driver's license and whether defendant was the subject of warrants.

20. The driver's license was determined to be valid and there were no outstanding warrants.

21. Officer Huntington approached defendant, returned his driver's license and registration, and warned him that he had to obtain insurance for his car and to carry proof of insurance in the car.

22. At the time defendant was warned, he had been detained less than ten minutes.

23. From an objective viewpoint, defendant was clearly free to leave after his documents had been returned to him.

24. After returning the defendant's documents to him, Officer Huntington asked defendant two brief questions.

25. Officer Huntington first asked defendant whether he had any drugs, weapons, or paraphernalia in his car.

26. Defendant told the officer he did not have any drugs, weapons, or paraphernalia in the car.

27. Officer Huntington then asked defendant whether he could search his car.

28. The officer's question was permissive and did not suggest that he had a right to search.

29. Defendant clearly and unequivocally said "yes," permitting the search.

30. No appreciable time passed while the officer requested and received permission to search.

31. At the time Officer Huntington requested permission to search, defendant was not in custody and had not been cited or told to exit the vehicle.

32. There was no coercive conduct on the part of the officer to secure defendant's consent to search.

33. Officer Huntington's demeanor, voice, and stature were not coercive in nature.

34. At the time Officer Huntington sought defendant's consent for a search, there were no other officers surrounding the defendant.

35. Officer Huntington did not inform the defendant that he was free to leave or that he could deny his request to search.

36. Officer Huntington asked both occupants to step out of the vehicle.

37. Officer Huntington searched the interior of the car and found contraband.

38. Defendant was arrested.

39. During a search of defendant incident to the arrest, Officer Huntington found suspected methamphetamine.

40. Officer Huntington's testimony was credible.

CONCLUSIONS OF LAW

1. Given the factual findings, the most compelling legal precedent is Ohio v. Robinette, 519 U. S. 33, 136 L. Ed. 2d 347, 117 S. Ct. 417 (1996).

2. The officer had probable cause to stop the car and detain the occupants for a traffic violation committed in the officer's presence.

3. The stop of the vehicle and detention of the occupants were also justified by a reasonable suspicion that the vehicle was uninsured.

4. In the totality of circumstances, defendant was lawfully stopped and detained.

5. The detention of the defendant did not exceed the scope of the traffic stop.

6. At the time consent was obtained, there was no seizure for Fourth Amendment purposes because defendant was free to leave.

7. Although the officer had no warrant, he searched the car pursuant to consent given by the defendant, who had apparent authority and control over the vehicle.

8. Defendant's consent to search was freely and voluntarily given.

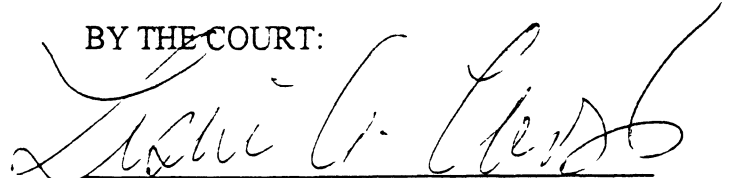
9. There was no illegality preceding defendant's consent to search that rendered the consent involuntary.

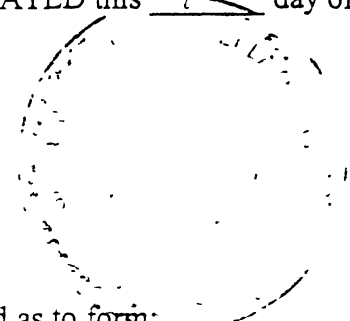
10. Defendant's car was lawfully searched.

11. The evidence was lawfully seized.

DATED this 19th day of Sept, 1999.

BY THE COURT:


LESLIE A. LEWIS, Judge

Approved as to form: 

Otis Sterling III
Attorney for Defendant

SEP 1 1999

SALT LAKE COUNTY

By



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IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT

IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

THE STATE OF UTAH,

Plaintiff,

-v-

SHAYNE M. HANSEN,

Defendant.

ORDER

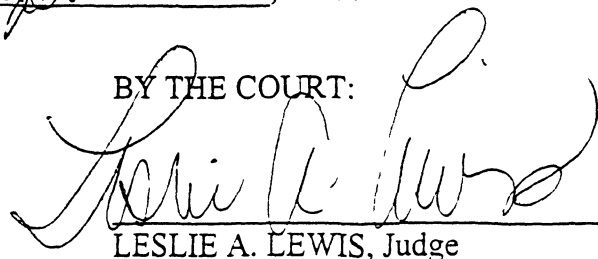
Case No. 991903645FS

Hon. Leslie A. Lewis

The Court having reviewed the evidence and the law, having made findings of fact and conclusions of law, and being fully advised of the premises, hereby denies defendant's Motion to Suppress Evidence Seized Illegally.

DATED this 15th day of Sept., 1999.

BY THE COURT:



LESLIE A. LEWIS, Judge

Approved as to form:

Otis Sterling III
Attorney for Defendant