

1989

Utah v. Jackson : Brief of Appellant

Utah Court of Appeals

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890546-CA

IN THE COURT

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D JACKSON, : Case No. 890546-CA
: Priority No. 2
ant. :
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BRIEF OF APPEAL

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Controlled Substance, a third degree felony, in violation of Utah
Code Ann. § 58-37-8(2)(a)(i), -8(2)(b)(ii) (Supp. 1989) (effective
July 1, 1990), and Possession of a Controlled Substance, a
class B misdemeanor, in violation of Utah Code Ann.
§ 58-37-8(2)(a)(i), -8(2)(e) (Supp. 1989) (effective until July 1,
, in the Third Judicial District Court in and for Salt Lake
County, State of Utah, the Honorable Michael R. Murphy, Judge,
presiding.

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Respondent,	:	
v.	:	
LEROY RAYMOND JACKSON,	:	Case No. 890546-CA
Defendant/Appellant.	:	Priority No. 2

BRIEF OF APPELLANT

Appeal from a judgment and conviction for Possession of a Controlled Substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i), -8(2)(b)(ii) (Supp. 1989) (effective until July 1, 1990), and Possession of a Controlled Substance, a class B misdemeanor, in violation of Utah Code Ann. § 58-37-8(2)(a)(i), -8(2)(e) (Supp. 1989) (effective until July 1, 1990), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Michael R. Murphy, Judge, presiding.

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TEXT OF STATUTES AND CONSTITUTIONAL PROVISIONS

Amendment IV of the Constitution of the United States provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, § 14 of the Constitution of Utah provides:

Sec. 14. [Unreasonable searches forbidden--Issuance of warrant.]

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 warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

Utah Code Ann. § 58-37-8(2) provides in pertinent part:

(2) Prohibited acts B--Penalties:

(a) It is unlawful:

(i) for any person knowingly and intentionally to possess or use a controlled substance, unless it was obtained under a valid prescription or order or directly from a partitioner while acting in the course of his professional practice, or as otherwise authorized by this subsection.

.
(b) Any person convicted of violating Subsection (2)(a)(i) with respect to:

.
(ii) a substance classified in Schedule I or II (cocaine) . . . is guilty of a third degree felony.

.

(e) Any person who violates Subsection (2)(a)(i) with respect to all other controlled substances not included in Subsection (2)(b)(i), (ii), or (iii), including less than one ounce of marijuana, is guilty of a class B misdemeanor.

Utah Code Ann. § 77-7-15 (1982) provides:

77-7-15. Authority of peace officer to stop and question suspect--Grounds. A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions.

IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Respondent,	:	
v.	:	
LEROY RAYMOND JACKSON,	:	Case No. 890546-CA
Defendant/Appellant.	:	Priority No. 2

JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this Court pursuant to Utah Code Ann. § 77-35-26(2)(a) (Supp. 1989) and Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1989), whereby a defendant in a district court criminal action may take an appeal to the Court of Appeals from a final judgment and conviction for any crime other than a first degree or capital felony. The Honorable Michael R. Murphy, Judge, Third District Court in and for Salt Lake County, State of Utah, presided over the bench trial of Appellant LeRoy Raymond Jackson, rendering final judgment and convicting Mr. Jackson of two counts of unlawful possession of a controlled substance, one being a third degree felony, the other a class B misdemeanor.

STATEMENT OF THE ISSUES

Were the constitutional rights of Appellant violated by a police officer who, without reasonable suspicion to support his actions, blocked Appellant's access out of a parking lot?

When did the officer initiate the encounter with Appellant?

Were the constitutional rights of Appellant violated when the officer, who still possessed no reasonable suspicion of criminal activity, requested Appellant's identification even though he had already recognized Appellant by name on sight?

Did the officer act unreasonably in failing to recognize more prudent alternative means of investigation?

STATEMENT OF THE CASE AND NATURE OF THE PROCEEDINGS

This is an appeal from a judgment and conviction for Possession of a Controlled Substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i), -8(2)(b)(ii) (Supp. 1989) (effective until July 1, 1990), and Possession of a Controlled Substance, a class B misdemeanor, in violation of Utah Code Ann. § 58-37-8(2)(a)(i), -8(2)(e) (Supp. 1989) (effective until July 1, 1990).

STATEMENT OF THE FACTS

On May 24, 1989, Officer Jed Hurst observed Appellant LeRoy Raymond Jackson driving his car in a "normal" and appropriate manner, westbound on 17th South through the Main Street intersection Transcript of Trial Proceedings (July 11, 1989), First Sentencing Proceeding (August 14, 1989) and Second Sentencing Proceeding (October 2, 1989) (hereinafter collectively referred to as "T") at 6, 22. Officer Hurst's testimony revealed that "[e]verything seemed up to date and normal about [Jackson's] vehicle when [Hurst] first saw it driving" (T. 22). Hurst, on duty at the time and driving

eastbound on 17th South, grew "suspicious" of the car driven by Mr. Jackson, a black male (T. 6). Jackson had not committed a traffic violation nor any other statutory crime (T. 27).

Nevertheless, Hurst made a U-turn and followed Jackson's car for approximately one minute (T. 7); Motion to Suppress proceeding (July 7, 1989) (hereinafter referred to as "MS") at 16. Hurst testified that he had two purposes in following the vehicle: "to know any possible suspect's name" and "to find out who the car belonged to" (T. 20-21).

Officer Hurst improperly believed that Jackson's car, a two-tone Lincoln Continental, resembled a vehicle involved in a Postal Shop robbery and described in a May 21, 1989 Deseret News newspaper article (T. 7); (MS. 35). The robbery occurred at "Ninth South and about 150 East" (T. 7). At the time Hurst observed Jackson's car, he "wasn't sure . . . as to whether it matched or not" the vehicle described in the newspaper (MS. 17). When questioned about the newspaper article and his recollection of the car, Hurst recalled that the vehicle was described as a dark top, light bottom Cadillac driven by four black males (MS. 20). During the preliminary hearing and Motion to Suppress, Hurst was "[c]onfused as to what kind of car . . . Mr. Jackson had been driving" (MS. 22), but Hurst ultimately recalled that Jackson's car was a white top, brown bottom Lincoln Continental (MS. 35).

Hurst knew nothing more about the robbery. (T. 21) Hurst did not talk to any witnesses (MS. 19). He did not read any police reports (MS. 19). He did not know "what the [suspects] were suppose

to look like" (MS. 35). He did not even know if any arrests had been made (MS. 22). At the time he observed Jackson's vehicle, Hurst was investigating neither the Postal Shop robbery nor any other specific crime in the area (MS 22). Hurst relied solely on his sketchy recollection of the newspaper article.

When Jackson pulled into the parking lot, "[Hurst] followed the car into the parking lot" (MS. 17). "[Hurst] stayed up by the driveway into the parking lot because as soon as [Jackson's car pulled to the east end of the parking lot and] stopped, it went into reverse, came back out, did sort of a half circle turn, and pulled straight back into another parking stall on the north side of the parking lot. (MS. 17, 23); (T. 7-8). Hurst "didn't know whether [Jackson's car] was going to leave the parking lot or what it was going to do." (MS. 17-18). Hurst waited in the driveway "until [Jackson] maneuvered into a different parking stall than he had initially pulled into." (MS. 23).

According to Officer Hurst, after Jackson stopped, Hurst "pulled [his patrol] car up behind [Jackson's] car," (MS. 23), blocking his access out of the lot (T. 51). "As soon as [Jackson] exited [his car, Hurst] stopped [his] car." (T. 9); (MS. 23). Jackson "got out and came back, back towards [Hurst's patrol] car. At that time [Hurst] got out of [his] car and walked up towards [Jackson]." (MS. 18). There was no one else in Jackson's car (MS. 18).

Based on these facts, the trial court ruled, "[a]t the time the officer pulled in back of the automobile there was no

articulable suspicion of criminal activity on defendant's part."
(MS. 48).

Since there was a fence in front of Jackson's car and no room to maneuver past the police car, Hurst, who could have parked in the empty parking spaces on either side of Jackson's car, had intentionally blocked the car (MS. 23-24). Hurst admitted that he "had no reason to stop [Jackson]" in the parking lot (T. 27). No overhead lights or signals were used (T. 8). The court ruled that there was in fact a block: "[t]he police officer [Hurst] upon stopping [his patrol car], however, did block [Jackson's] automobile, and for me [the court] to find otherwise, frankly, would be intellectually dishonest" (T. 51). The court discredited the trial testimony of Officer Hurst whose recollection of the blocking issue had conveniently improved after he adopted the version of another officer who had told him, prior to trial, that Jackson had enough room to maneuver past the parked patrol car (T. 52).

When Hurst encountered Jackson, Hurst "recognized him as being Mr. Jackson, but [Hurst] couldn't remember what his first name was" (MS. 24). Despite the immediate recognition Hurst continued, asking Appellant if "he was Mr. Jackson" (T. 17). Appellant correctly responded, "I am Mr. Jackson" (T. 18).

Intruding further, Hurst asked, "[d]o you have any identification?" (T. 18). Jackson responded by giving the officer a Checkmart identification card (T. 18); (MS. 24). The card contained Appellant's picture and the name, LeRoy Jackson, on it (T. 10, 11, 18, 19). Hurst testified that Appellant "looked the same as the

picture on the card" and "knew Appellant was Mr. Jackson" (T. 19).

Yet Hurst was still not satisfied. Though fully aware of Jackson's identity, Hurst asked Jackson for his driver's license "[t]o verify who he was and see if he was driving legally or not" (T. 20). Hurst reasoned, "I wanted to get some good identification from the State," (T. 20), because Jackson "was driving a car," (MS. 25), and "Checkmart I.D's are not good I.D." (MS. 25); (T. 27). However, Hurst did admit that he had no "reason to believe that [Jackson's] Checkmart I.D. was false" (MS. 25).

At the time Hurst asked Jackson for his driver's license, Hurst "knew nothing more about [Jackson] than a suspicion [Hurst] had from reading the Sunday [Deseret News] paper" (MS. 26). Hurst nonetheless maintained his investigative focus on Jackson. If Jackson had attempted to walk away without answering him, Hurst "would have demanded a drivers license" (T. 27).

Instead, Jackson simply admitted that he didn't have his license (MS. 26). Unable to "remember if [Jackson] gave [Hurst] a reason, or not, as to why [the license] was taken away," (MS. 27), Hurst continued his questioning in apparent pursuit of his second admitted purpose: "to find out who the car belonged to" (T. 21). Hurst did not "ask [Jackson] what he was doing there or where he was going" (T. 18).

Officer Hurst then asked Jackson for his car registration (MS. 27). Jackson's explanation, again not "remember[ed] exactly" by Hurst, was not incriminating and would not "have changed [Hurst's] investigation" or led him to believe that Jackson had

stolen the car (MS. 27-28). It appears that Jackson may have purchased the car from someone who still had the registration (MS. 27).

The detention was prolonged further as Hurst required Jackson to wait for a computer check on the license plate (T. 28). However, "[a]t the time [Hurst first] saw the vehicle, there was nothing about [the] license plate that would [have given Hurst] a clue that it was a stolen plate" (T. 22). Hurst radioed dispatch to verify Jackson's registration and driver's license. (MS. 28); (T. 12). Dispatch informed Hurst that the license plate on the car had been stolen and Jackson's driver's license was suspended (T. 12). Hurst considered releasing Jackson with a citation but ultimately determined that his lack of "good State identification," (MS. 37), required an arrest (T. 13).

Hurst handcuffed and arrested Jackson for possession of stolen property and driving with a suspended driver's license (MS. 30); (T. 28). Hurst then frisked Jackson for weapons and contraband (T. 29). Nothing was found (T. 30).

By this time, another officer had arrived on the scene. Officer Cracroft conducted an inventory of Jackson's car while Officer Hurst, seated beside Jackson in the patrol car, called a "wrecker" to impound Appellant's car (T. 13); (MS. 30). The officers did not ask Jackson about the contents of the car or whether he had left any personal items therein (MS. 34). In addition, Hurst could not see what Cracroft did inside of Jackson's car during the search (MS. 30-31).

The officers did, however, ask Jackson about a pill vial Cracroft allegedly found in the car (MS. 31). Officer Hurst opened the vial; looked at the contents, "a white powdered substance,"; and showed it to Jackson. (MS. 31). Without informing Appellant of his Miranda rights, Hurst continued questioning him (MS. 32). Mr. Jackson's statements were suppressed by the trial court because of Officer Hurst's unconstitutional inquiry (MS. 50).

The entire detention lasted half an hour (T. 13, 28). The officers took Jackson to the county jail where he was admitted and searched by a correctional officer, Billy Ray Romero (T. 32). Mr. Romero found two tinfoil packages and a "rolled joint of marijuana" on Appellant's person (T. 34).

The proffered testimony of two of the State's witnesses would have indicated that the substances, State's Exhibits 1 and 2, were placed in the evidence room and analyzed by the State Crime Lab (T. 37). Appellant stipulated to the chain of custody and drug analysis (T. 37). The lab technician would have identified the tinfoil exhibits as cocaine and the rolled "joint" as "crushed marijuana and cocaine residue" (T. 37).

In a Motion to Suppress before the Honorable Michael R. Murphy, Appellant Jackson moved to suppress the cocaine seized from his vehicle and the substances found on his person as fruits of an illegal stop (Record 33); (MS. 2, 6, 7). Judge Murphy denied Appellant's motion to suppress the substances (MS. 51). Appellant also argued that the officers conducted an improper inventory search though the State consequently stipulated "to the non-admissibility

of the evidence regarding this inventory search" (MS. 7).

In the subsequent bench trial before Judge Murphy, the court ruled that "there [was] no articulable suspicion to stop the defendant [Jackson] prior to the time that the officer indicated that he had placed the defendant under arrest"; the defendant voluntarily "exited his car and approached the police car on foot before the police car stopped"; the officer "did block the automobile"; the officer reasonably expected "an identification initially in the form of a drivers license . . . given his problems with Checkmart identifications"; "[u]p to that point there had been no stop . . . because a reasonable person in the defendant's position . . . would have believed he was still free to leave. Upon defendant's statement that he had no drivers license, a reasonable suspicion arose that [Jackson had committed the crime of] driving without a license . . . And therefore, at that time there was a basis for a stop . . . and only thereafter did a stop occur." (T. 51-53).

The court found Appellant Jackson guilty of unlawful possession of a controlled substance (cocaine), a third degree felony, and unlawful possession of a controlled substance (marijuana), a class B misdemeanor. A third count (receiving stolen property [the license plate]) had been previously dismissed. (T. 55-56).

SUMMARY OF THE ARGUMENT

Officer Jed Hurst "seized" Appellant LeRoy Raymond Jackson when he parked his patrol car directly behind Mr. Jackson's car. The officer had no legal justification for blocking Mr. Jackson's car. The officer's appearance and conduct led Mr. Jackson to leave his car; Mr. Jackson did not voluntarily approach and talk to Officer Hurst. Their encounter was not a casual consensual meeting free of fourth amendment guarantees.

Despite his recognition of Appellant by name, Officer Hurst unlawfully and repeatedly requested identification from Mr. Jackson. This conduct again constituted a seizure unsupported by the requisite "reasonable articulable suspicion."

Mr. Jackson was driving normally down the street just prior to his encounter with Officer Hurst. Only after "fishing" for some sign of wrongdoing did Officer Hurst discover that Mr. Jackson was driving with a suspended license. Officer Hurst, in pursuit of his objective to identify Mr. Jackson, should have followed a less intimidating course of conduct than blocking, seizing, and unnecessarily questioning Mr. Jackson. The subsequent discovery of controlled substances on Mr. Jackson's person should have been suppressed as "fruits" of an illegal seizure.

ARGUMENT

POINT I

OFFICER HURST "SEIZED" APPELLANT BY BLOCKING HIS CAR.

In State v. Deitman, 739 P.2d 616 (Utah 1987), the Utah Supreme Court acknowledged "three levels of police encounters with the public which . . . are constitutionally permissible." Id. at 617.

- (1) An officer may approach a citizen at any time and pose questions so long as the citizen is not detained against his will;
- (2) An officer may seize a person if the officer has a "reasonable suspicion" that the person has committed or is about to commit a crime; however, the "detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop";
- (3) An officer may arrest a suspect if the officer has probable cause to believe an offense has been committed or is being committed.

Id. at 617-18 (quoting United States v. Merritt, 736 F.2d 223, 230 (5th Cir. 1984)); cf. Utah Code Ann. § 77-7-15 (1982) (reasonable suspicion standard required for questioning). If a police encounter does not fall within a "level one" encounter, the individual may invoke the fourth amendment which "provides that people have the right to be secure in their persons against unreasonable searches and seizures." State v. Trujillo, 739 P.2d 85, 87 (Utah App. 1987); U.S. Const. Amend. IV; Utah Const. Art. I, § 14..

In the police encounter, here, between Officer Jed Hurst and Appellant LeRoy Raymond Jackson, the initial determination is

whether a seizure occurred. "A fourth amendment analysis of police officer conduct is fact sensitive; thus [appellate courts] review the facts in detail." State v. Smith, 781 P.2d 879, 880 (Utah App. 1989).

A. OFFICER HURST BLOCKED AND SEIZED APPELLANT'S CAR WITHOUT A REASONABLE SUSPICION OF CRIMINAL ACTIVITY.

"The simple language of the [Fourth] Amendment applies equally to seizures of persons and to seizures of property." Payton v. New York, 445 U.S. 573, 585 (1980). Officer Hurst blocked and seized Mr. Jackson's car which, in turn, constituted a seizure of Mr. Jackson's person. State v. Smith, 781 P.2d 879 (Utah App. 1989), lends authoritative guidance in this regard.

In Smith, a case similar to the instant action, this Court considered, inter alia, whether defendant Jerome Smith was "seized" by an officer who had followed Smith's car into a parking lot, waited for him to stop, and then "stopped [the patrol] car behind defendant's car, blocking the car." Id. at 880. The officer testified that he followed Smith's vehicle because it turned without signaling. Id. at 880.

"The State [in Smith] contended defendant [Smith] voluntarily pulled into the parking lot and parked his car and thus no fourth amendment stop had occurred." Id. at 880. "The trial court, focusing on defendant's initial parking of his car, [similarly found] that there was no stop because the defendant [Smith] voluntarily pulled into the parking lot." Id. The

appellate court disagreed, finding the trial court's "inquiry was too narrow" Id. at 881.

Characterization of the encounter between [the] Officer . . . and defendant [Smith] must be determined by examining the totality of the circumstances . . . We also must consider whether defendant "remain[ed], not in the spirit of cooperation with the officer's investigation, but because he believ[ed] he [was] not free to leave"

Smith, 781 P.2d at 881 (citations omitted).

Like the defendant in Smith, Appellant Jackson believed that he was not free to leave. If Jackson had initially possessed the "spirit of cooperation," the officer's intimidating conduct quickly turned his mood into a fear of non-cooperation.

Officer Hurst had suddenly made a U-turn in the middle of a main thoroughfare to follow Jackson, despite the fact that Jackson had not committed a traffic violation (T. 7, 27). When Jackson pulled into the parking lot, "[Hurst] followed [Jackson's] car into the parking lot" (MS. 17). "[Hurst] stayed up by the driveway into the parking lot because as soon as [Jackson's car pulled to the east end of the parking lot and] stopped, it went into reverse, came back out, did sort of a half circle turn, and pulled straight back into another parking stall on the north side of the parking lot. (MS. 17, 23); (T. 7-8). Hurst "didn't know whether [Jackson's car] was going to leave the parking lot or what it was going to do." (MS. 17-18). Hurst waited in the driveway "until [Jackson] maneuvered into a different parking stall than he had initially pulled into." (MS. 23).

If Jackson had not already seen Officer Hurst's car following him, he clearly saw the police car when he parked. Jackson went forward to the east, looked behind him to the west whereupon he "backed up, sort of a half U-turn" (T. 8) into the other stall on the north side (MS. 18). The front of his car faced south. Hurst's police car was clearly visible to Jackson during at least one point of the maneuvering.

Being the driver, (MS. 18), Jackson could see everything in front of him. According to Officer Hurst, after Jackson stopped, Hurst "pulled [his patrol] car up behind [Jackson's] car," (MS. 23), blocking his access out of the lot (T. 51). "As soon as [Jackson] exited [his car, Hurst] stopped [his] car." (T. 9); (MS. 23). Jackson "got out and came back, back towards [Hurst's patrol] car. At that time [Hurst] got out of [his] car and walked up towards [Jackson]." (MS. 18). There was no one else in Jackson's car (MS. 18).

The trial court focused entirely on Jackson's decision to exit the car rather than the officer's appearance and conduct which precipitated it. Although the court did not have the benefit of reviewing the recent decision of State v. Smith, 781 P.2d 879 (Utah App. 1989), the trial court clearly erred by not following the principles of the other submitted decisions. See e.g., People v. Guy, 121 Mich. App. 592, 329 N.W.2d 435 (1982), and United States v. Kerr, 817 F.2d 1384 (9th Cir. 1987). Kerr is especially compelling.

In Kerr, a deputy observed defendant Duane Kerr loading boxes into a vehicle parked in a neighborhood beset with a rash of

recent burglaries. Id. at 1385, 1387. The deputy made a U-turn and turned into the driveway where Kerr was located. Id. at 1385. Kerr "was backing his car out" when he "left his own car and met [the] Deputy . . . on foot." Id. As held by the Court:

Kerr stopped and exited his car primarily in response to [the Deputy's] official appearance and conduct, rather than of his own volition. Arriving in uniform and in a marked patrol car, [the Deputy] unquestionably appeared to be acting in an official capacity. Instead of waiting in his patrol car at the roadside, or parking and walking, [the Deputy] pulled into and blocked the one lane driveway as Kerr was backing out. [The Deputy's] conduct thus precipitated the confrontation with Kerr. . . Under the circumstances, [the Deputy's] authority and conduct provided Kerr with no reasonable alternative except an encounter with the police. Consequently, the encounter cannot be deemed voluntary.

Id. at 1386-87.

Similarly, instead of waiting in the driveway, or parking in one of the available empty parking spaces and walking up to Appellant, Officer Hurst, arriving in uniform and driving a marked patrol car, blocked Jackson's only access out of the parking lot. There were other exits but the close proximity of Hurst's car to Jackson's vehicle eliminated Jackson's ability to leave. Moreover, as inferred by Kerr, the fact that both defendant Kerr and Appellant Jackson left their respective cars does not evidence consent or voluntariness.

The Smith court recognized the likelihood of such police initiated stops even when the defendant actually "stops" first:

Other jurisdictions have held that when an officer blocks a defendant's vehicle, a seizure within the meaning of the fourth amendment has occurred even though the original stop was not initiated by the officer.

Smith, 781 P.2d at 882 n.3 (emphasis added). The Smith court acknowledged applicable case law from other jurisdictions which held that a seizure occurs when a defendant's car is blocked by a policeman's vehicle.

In People v. Guy, 121 Mich. App. 592, 329 N.W.2d 435 (1982), the Michigan Court of Appeals stated:

Although the initial stop of the Continental in the driveway was not the result of Officer Hattis' actions, his partial blockage of the driveway and subsequent visit to the Continental clearly constituted a detention of the automobile and would be the equivalent of a police-initiated "stop."

Id. at 440.

The Ninth Circuit Court of Appeals in United States v. Kerr, 817 F.2d 1384 (9th Cir. 1987), scrutinized a similar "blocking" encounter and found it was a seizure. The court, in finding a seizure had occurred, noted that it was not possible for the defendant to drive around the officer's patrol car: "[He] stopped and exited his car primarily in response to deputy Hendrick's official appearance and conduct rather than of his own volition." Id. at 1386 See also United States v. Zukas, 843 F.2d 179, 182 (5th Cir. 1988).

Smith, 781 P.2d at 882 n.3. The noted authority eviscerates the trial court's focus on Appellant Jackson's initial parking of the car and on the finding that there was no stop.

At the time the officer pulled in back of [Jackson's car] there was no articulable suspicion of criminal activity on defendant's part. There was, however, at that time no stop. The officer was free to pull up where he wished in the parking lot. It is true that the defendant could not pull the car away.

However, the defendant was free to walk wherever he wanted. [Instead] of walking on either side of the car . . . to the bar, he chose [instead, voluntarily] to approach the officer. The officer

then engaged him in conversation, asking for identification. Still no stop.

(MS. 48-49). The court's reasoning is troublesome.

Despite citing the totality of the circumstances" standard, the court quickly dismissed the precipitating conduct of Officer Hurst: "a reasonable person in Mr. Jackson's position should have believed that he was free to leave notwithstanding the fact that the vehicle was blocked" (T. 53). The court clearly erred in its decision thus mandating reversal. State v. Walker, 743 P.2d 191 (Utah 1987).

The very fact that Appellant's vehicle was blocked unquestionably restrained Jackson's freedom to leave the area. While it may be true that Officer Hurst was free to pull up wherever he wished, the fact that his chosen parking spot blocked Jackson's access out of the parking lot turned the entire encounter into a seizure. A fence blocked one side of Jackson's car and Officer Hurst's car blocked the other (MS. 23). The initial seizure of the car is not negated by Jackson's "freedom" to walk wherever he wanted. More specifically,

Blocking a citizen's path or impeding his progress is an indicator that a seizure has occurred. Similarly, retaining his ticket or identification may indicate a seizure if his freedom is thereby restrained. An officer's statement that the individual is the focus of an investigation or that a truly innocent person would cooperate with police tends to indicate lack of consent and therefore a seizure.

United States v. Puglisi, 723 F.2d 779, 783 (11th Cir. 1984). A driver would have no other choice but to approach the officer and

ask, defensively, "Did I do something wrong?"; "Why did you follow me?"; or "Why is my car being blocked?"

Officer Hurst testified that his admitted purpose in following Jackson was "to find out who [the suspect] was," (T. 21), believing improperly that Jackson's car was connected to the reported robbery (T. 20-21). There were no other people in Jackson's car, (MS. 18), and Officer Hurst was not investigating any other matters at the time (MS. 22). If Jackson had attempted to walk away without answering any questions, Hurst "would have demanded a drivers license" (T. 27).

Jackson was undoubtedly the focus of Hurst's investigation. Jackson's desire to drive depended entirely on the withdrawal of the police car. In addition, Hurst initiated the conversation by asking for identification (MS. 24). Hurst asked all the questions, placing Jackson in a defensive posture. Consequently, Jackson's decision to approach the officer cannot be considered voluntary.

As indicated earlier by the authority in Smith,¹ "when an officer blocks a defendant's vehicle, a seizure . . . has occurred even though the original stop was not initiated by the officer." Smith, 781 P.2d at 882 n.3. Even if Jackson did stop his car and

¹ The Smith court ultimately found that the stop was constitutional even though the police seized Smith's car by parking behind him because it was incident to a lawful citation for a traffic violation. Smith, 781 P.2d at 85. By comparison, Officer Hurst's unconstitutional conduct was even more egregious than the officer in Smith, since Hurst conceded that he had no basis for the stop and Jackson was free to leave. At least the officer in Smith observed a traffic violation before he blocked defendant Smith's car.

approached the officer first, his actions were a direct consequence of the blockage. In reality the encounter was a police-initiated stop. United States v. Mendenhall, 446 U.S. 544, 555 (1980) ("In view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave"). The illegal seizure renders inadmissible the subsequent discovery of controlled substances found on Appellant Jackson's person. Cf. State v. Swanigan, 699 P.2d 718 (Utah 1985); Wong Sun v. United States, 371 U.S. 471.

B. OFFICER HURST'S APPEARANCE AND CONDUCT
CONSTITUTED A SHOW OF AUTHORITY

"A seizure . . . occurs only when the officer by means of physical force or show of authority has in some way restricted the liberty of a person." State v. Trujillo, 739 P.2d 85, 87 (Utah App. 1987). Officer Hurst could not have chosen a better way of showing his authority than by parking directly behind Jackson's car when there were empty parking spaces on either side of the car. The car's pathway was blocked, Jackson's exit was impeded, and his freedom was restrained.

A case factually similar to the case at bar, State v. Swanigan, 699 P.2d 718 (Utah 1985), illustrates that before officers can exhibit even the slightest bit of authority, they must first have a reasonable suspicion of criminal activity. In Swanigan, Officer Young, in response to a reported burglary, noticed two individuals walking along the road in the vicinity of the

burglarized home. Id. at 719. Young called dispatch, requested an "attempt to locate" broadcast of the two individuals, and continued towards the home. Id. Approximately two hours later, Officer Bithell observed defendant Swanigan and a companion walking "some three blocks" away from the home. "Bithell ordered the two to stop and then asked for identification. Id. The officers subsequently learned, through a warrants check on the two individuals, that one party had an outstanding warrant. Both men were arrested. Id. During the accompanying pat-down, the officer recovered some of the property stolen from the burglarized home. Id.

On appeal, the Utah Supreme Court held, "the stop was based on a mere hunch rather than the constitutionally mandated 'reasonable suspicion'; consequently, the confiscated evidence was erroneously admitted at trial." Swanigan, 699 P.2d at 719. The facts of Swanigan are essentially identical to the facts in the present case.

Officer Bithell stopped defendant Swanigan and requested identification on a mere hunch. Similarly, Officer Hurst blocked Appellant Jackson's car and requested identification without having a reasonable suspicion of criminal activity. The authority exhibited by Officer Bithell in ordering defendant Swanigan to stop is functionally equivalent to the authority exhibited by Officer Hurst in blocking Appellant Jackson's car. Cf. State v. Trujillo, 739 P.2d 85, 87 (Utah App. 1987).

The officers conduct in both cases was a clear show of

authority.² Both officers appeared in uniform and marked patrol cars. Both officers acted prematurely, relying on second hand authority rather than directly observing criminal activity. Both officers, knowing that they have no legitimate grounds to pursue their investigation further, detained the "suspects" by asking for identification. See infra Point II, page 21. "Fishing" for a sign of wrongdoing, both officers "caught" the suspects for their past misdeeds, albeit unconnected to the investigation. Now armed with "reasonable suspicion" both officers frisked and ultimately found suppressible evidence.

As the Swanigan Court held unlawful the conduct of Officer Bithell, Appellant Jackson respectfully requests that this Court hold unlawful the improper conduct of Officer Hurst.

POINT II

OFFICER HURST "SEIZED" APPELLANT BY REQUIRING IDENTIFICATION.

Assuming, arguendo, that Officer Hurst did not seize Jackson by blocking his car, Hurst, who had no reasonable suspicion to continue his investigation, subsequently seized Jackson's person

² Two additional factors are important: time and location. Lacking further justification for his unlawful conduct, Officer Hurst, unlike Officer Bithell, had neither the immediacy of the situation, nor the geographic closeness of the situation in his favor. Officer Bithell acted on a recent two hour police bulletin; Officer Hurst acted on an outdated four day old newspaper article (T. 6-7). Officer Bithell stopped the suspects three blocks away from the scene of a just reported crime; Officer Hurst stopped a suspect near 17th South and Main, nowhere near the Ninth South and 150 East location of the Postal Shop robbery (T. 6-7).

by asking for identification. Cf. Utah Code Ann. § 77-7-15 (1982). "A person may not be detained and required to identify himself." Commonwealth v. Holloway, 384 S.E.2d 99, 102 (Va. App. 1989). Although Appellant recognizes that not all police questioning of citizens implicates the fourth amendment, Florida v. Royer, 460 U.S. 491, 497-98 (1983), "when [officers detain a suspect] for the purpose of requiring him to identify himself, they [perform] a seizure of his person subject to the requirements of the fourth amendment." Brown v. Texas, 443 U.S. 47, 50 (1979).

In Brown, two officers observed Zachary Brown in an alley walking away from another man in a "high drug problem area." Brown, 443 U.S. at 48. The "officers did not claim to suspect [Brown] of any specific misconduct . . . but still "asked [him] to identify himself and explain what he was doing there." Id. According to the officers, "the situation 'looked suspicious and we had never seen [Brown] in that area before.'" Id. Brown, after refusing to identify himself, was arrested for refusing to give his name and address to an officer in violation of a Texas statute. Id. (citation omitted).

The Texas courts convicted Brown but the United States Supreme Court reversed, holding "appellant may not be punished for refusing to identify himself." Brown, 443 U.S. at 53. "[T]he Texas statute [was] . . . designed to advance a weighty social objective . . . : prevention of crime." The Supreme Court reasoned,

But even assuming that purpose is served to some degree by stopping and demanding identification from an individual without any specific basis for

believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it. When such a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits.

Brown, 443 U.S. at 53.

Like the officer in Brown, id. at 52, Officer Hurst acknowledged that the reason for stopping Jackson was to ascertain his identity (T. 21). But, unlike the officers in Brown, Officer Hurst had ascertained Jackson's identity at the outset of the "encounter." Once both parties exited their vehicles, Hurst saw Jackson and "recognized him as being Mr. Jackson, but . . . couldn't remember what his first name was" (MS. 24); (T. 17). Hurst nonetheless asked Appellant if he was Mr. Jackson (T. 17). Appellant responded, "I am Mr. Jackson" (T. 18). Hurst thus ascertained Jackson's name on sight and then received oral confirmation (T. 18). His purpose, "to know any possible suspect's name," (T. 21) was now satisfied. The protections of Brown apply with even greater force to Officer Hurst, who already knew Jackson's identity. Hurst should have moved on.

Instead, Hurst, who had just confirmed Appellant's identity, intruded further by asking, "Do you have any identification?" (T. 18). Jackson responded by giving the officer a Checkmart identification card (T. 18); (MS. 24). The card contained Appellant's picture and the name, LeRoy Jackson, on it (T. 10, 11, 18, 19). Hurst acknowledged that Appellant "looked the same as the picture on the card" and "knew Appellant was Mr. Jackson" (T. 19). Again, Hurst's purpose was fulfilled.

Yet, Hurst was still not satisfied. He then asked Jackson for his driver's license (MS. 24, 25); (T. 20). Hurst testified that he wanted "some good identification from the State" (T. 20), because Jackson "was driving a car" and "Checkmart identifications are often false" (MS. 25). The trial court held that the officer's conduct was reasonable:

It was reasonable that the police officer would expect an identification initially in the form of a driver's license, and therefore, it was reasonable for him to ask for a driver's license, given his problems with Checkmart identifications.

(T. 52). The trial court erred in this determination.

State v. Schlosser, 774 P.2d 1132 (Utah 1989) would prohibit such intrusions, at least by analogy, when the officer's conduct exceeds the legitimate scope of his objectives. In Schlosser, an officer pulled a car over for speeding. Id. at 1133. Suspicious of the passenger's movements in the car and their apparent attempts to hide something, the officer opened the passenger door of the stopped vehicle. Id. at 1134. Although the initial stop may have been lawful, Justice Stewart, after citing a recent United States Supreme Court decision, recognized "that even a small intrusion beyond the legitimate scope of an initially lawful search is unlawful under the Fourth Amendment." Id. at 1135 (citing Arizona v. Hicks, 480 U.S. 321 (1987)). "The officer's 'clear initial objective' in opening the car door was to see whether [the defendant] was 'hiding something' However, without probable cause to justify it, that act clearly exceeded the lawful scope of a legitimate governmental interest." Schlosser, 774 P.2d at 1135-36.

By analogy, Officer Hurst's "clear initial objective" in following, blocking and questioning Appellant Jackson was "[t]o find out who he was." (T. 21). Assuming, arguendo, that the initial block was not unlawful and the resulting encounter was in fact consensual, Officer Hurst, with neither probable cause nor reasonable suspicion to justify his requests for "any identification," clearly exceeded the lawful scope of his investigation when he had already recognized Appellant by name on sight. Cf. State v. Sierra, 754 P.2d 972, 975 (Utah App. 1988) (citations omitted) ("Anything less [than a reasonable suspicion or probable cause] would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result [the United States Supreme Court] has consistently refused to sanction").

If Officer Hurst's conduct in asking Appellant, "if he was Mr. Jackson?" was proper, (T. 17), once Appellant replied, "I am Mr. Jackson," (T. 18), Officer Hurst should have stopped his questioning. A "small intrusion" occurred when Hurst asked generally for "any identification." (T. 18); (MS. 24). A substantial intrusion then occurred when Hurst asked for the driver's license (MS. 25); (T. 19).

Officer Hurst specifically admitted that, at the time he requested Jackson's driver's license, Hurst had no reason "to believe that Jackson's Checkmart I.D. was false" (MS. 25). Even if Hurst had experienced problems with Checkmart identification cards, that fact would not apply here because Hurst recognized Jackson on

sight; Jackson correctly stated his name, thereby confirming Hurst's initial recognition; and Hurst knew the Checkmart identification card also corroborated Jackson's identity (MS. 24); (T. 17-19). Hurst's testimony that he asked for Jackson's driver's license because "[h]e was driving a car" (MS. 25) is completely improper. Jackson had not committed a traffic violation. Cf. Delaware v. Prouse, 440 U.S. 648 (1979). Hurst even admitted that "he had no reason to stop [Jackson]" (T. 27).

The court's reasoning is also flawed: "upon defendant's statement that he had no driver's license, a reasonable suspicion arose that a crime or infraction had been committed, that is, driving without a license, and the defendant had committed that crime or infraction" (T. 52). The trial court clearly erred because the officer's reasonable suspicion arose only in hindsight and not at the time when the defendant was driving in a "normal" and appropriate manner down the street. Cf. Delaware v. Prouse, 440 U.S. 648, 663 (1979) (except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the fourth amendment").

Hurst's second admitted purpose in following Mr. Jackson was "to find out who the car belonged to" (T. 21), but Hurst, again, could not articulate a reasonable basis for such an inquiry. As

noted above, the request for Jackson's driver's license and registration was improper.

Officer Hurst's subsequent finding that Jackson was driving with a suspended license resulted from an unfounded suspicion. All the substances found on Mr. Jackson were the result of an illegal seizure. The trial court clearly erred in denying Appellant's Motion to Suppress the substances. State v. Walker, 743 P.2d 191 (Utah 1987).

POINT III

THERE WAS NO IMMEDIATE NEED FOR AN INVESTIGATION.

Not only did Officer Hurst illegally seize Appellant Jackson's car and unlawfully request his identification, Hurst also unreasonably detained Jackson to investigate an already completed crime.

The factors . . . may be somewhat different when the stop to investigate past criminal activity is involved rather than the stop to investigate ongoing criminal conduct. This is because the governmental interests and the nature of the intrusions involved in the two situations may differ. As we noted in Terry, the general interests present in the context of ongoing or imminent criminal activity is "that of effective crime prevention and detention." A stop to investigate an already completed crime does not necessarily promote the interest of crime prevention as directly as a stop to investigate suspected ongoing criminal activity. Similarly, the exigent circumstances which require a police officer to step in before a crime is committed or completed are not necessarily as pressing long afterwards. Public safety may be less threatened by a suspect in a past crime who now appears to be going about his lawful business than it is by a suspect who is currently in the process of violating the law. Finally, officers

making the stop to investigate past crimes may have a wider range of opportunities to choose the time and circumstances of the stop.

United States v. Hensley, 469 U.S. 221, 228-29 (1985) (citations omitted).

The Hensley court then qualified their statements. Officers may detain a suspect "if police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony. Id. at 229. Clearly, such a detention would not apply here when the trial court expressly held, "[a]t the time the officer [Hurst] pulled in back of the automobile there was no articulable suspicion of criminal activity on defendant's [Jackson] part" (MS. 48); (T. 51). Officer Hurst should have acquired more information before he acted.

In addition, as noted by the court in Anderson v. State, 387 A.2d 281 (Md. App. 1978), in its discussion of the reasonable suspicion standard:

The rationale underlying Terry is hardly so potent where, as here the crime is six days old and there is no perceptible reason why further surveillance and investigation could not be undertaken, rather than immediately precipitating a street encounter with its concomitant danger to the officers and intrusion upon the personal security of citizens.

Id. at 284. Obviously, if police action cannot be justified under the higher standard of Terry, Officer Hurst's unfounded suspicions cannot justify an unreasonable confrontation of a crime at least four days old, assuming the newspaper reported the robbery a day after it occurred.

Nothing in Appellant Jackson's circumstances required Officer Hurst's immediate attention. The lack of immediacy is one of many factors distinguishing the present case from the somewhat related cases of State v. Deitman, 739 P.2d 616 (Utah 1987); Layton City v. Bennett, 741 P.2d 965 (Utah App. 1987) cert. denied 765 P.2d 1277 (1987); and Bountiful City v. Maestas, No. 890054-CA (Utah App. March 8, 1990).

In Deitman, police officers had just responded to a burglar alarm. "[A]rriving at the scene," the officers observed a truck pull away from the curb across the street from the shop. Id. at 617. The officers followed the truck until it stopped on the other side of the street. Then, an "officer called to defendants and asked if he could speak to them." Id.

In contrast, Officer Hurst observed Jackson's car more than four days after the robbery had actually occurred. Moreover, the officers in Deitman followed but did not block the defendant's truck. Officer Hurst blocked Appellant's car. The officers in Deitman first asked if he could speak to the suspects. No such request was made by Officer Hurst. The officers in Deitman did not recognize or know the suspected individuals. Officer Hurst recognize Appellant on sight. The facts of Deitman constituted a level one encounter. Appellant Jackson was involved in a level two confrontation.

In Layton City v. Bennett, 741 P.2d 965 (Utah App. 1987), an officer followed and parked behind defendant James Bennett's truck. There is no indication that the officer blocked the truck.

Bennett walked up to the police car and "freely initiated a conversation." Id. at 966. Appellant Jackson, having just been blocked by Officer Hurst, did not initiate a conversation, nor does the record reflect that Jackson asked even one question during the encounter.

The officer in Layton City "detected a strong odor of alcohol" coming from Bennett, id. at 967, whereas in the case at bar, Officer Hurst detected nothing incriminating from the conduct, comments, or appearance of Appellant Jackson. The officer in Layton City also had an arguably immediate need to detain the intoxicated Bennett. Appellant Jackson never was or appeared intoxicated. He posed no threat to the public and Officer Hurst improperly detained Jackson after his identity was corroborated by the identification card.

In Bountiful City v. Maestas, No. 890054-CA (Utah App. March 8, 1990), an officer was issuing a traffic ticket when two citizens informed him about an apparently intoxicated person in a vehicle near a State Liquor Store. After completing the traffic stop, the officer spotted the vehicle described by the citizens in the liquor store parking lot. The officer pulled alongside defendant Luis Maestas' car, made initial contact, and received Maestas' driver's license.

The level one encounter of Maestas is not controlling here. The officer in Maestas knew what the vehicle looked like, unlike Officer Hurst, who "wasn't sure . . . [if] it matched or not." (MS. 17). The officer in Maestas responded promptly, driving

to the nearby liquor store where the suspect was reportedly situated. Officer Hurst's response was untimely. The officer in Maestas properly pursued one individual. Officer Hurst followed one suspect in a car which may or may not have been the same vehicle which reportedly contained four individuals. The officer in Maestas "pulled alongside" defendant Maestas' car; Officer Hurst blocked Appellant Jackson's car.

The officer in Maestas may have been legitimately concerned about a preventable, imminent hazard, an allegedly intoxicated party "sitting in the driver's seat with the motor running." Jackson, by comparison, was not driving and presented no articulable hazard. Maestas identified himself. Officer Hurst already knew Jackson's identity.

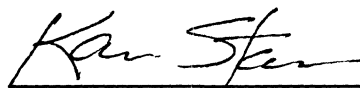
In sum, Officer Hurst acted unreasonably in failing to recognize the more prudent alternatives. First, he should not have blocked Appellant's car. There were other empty spaces in the parking lot. Second, he should not have repeatedly asked for identification when he already knew Jackson's identity. Third, in contrast to the implications argued by the State (T. 45), Officer Hurst was not restricted in what he could do once Jackson parked his car. Hurst still could have radioed dispatch for the license plate check without questioning Jackson. It is clear that Hurst had no grounds for detaining Jackson and his subsequent discovery of the suspended driver's license was fortuitous. All of Officer Hurst's subsequent actions were tainted by the illegal seizure of Jackson's car and the detention of Jackson's person. The controlled

substances found on Jackson's person must be suppressed. Cf.
People v. Bello, 45 Cal. App. 3rd 970, 119 Cal. Rptr. 838 (1975)
(subsequent action of an officer in shining his light in a
defendant's car, revealing the butt of a gun was improper, for "once
the officer had seen and talked to defendant and realized he was not
intoxicated as the officer initially believed, the officer had no
legitimate reason for detaining him further or for pursuing any
further investigation of him"); State v. Chatton, 468 N.E.2d 1237
(Ohio 1984).

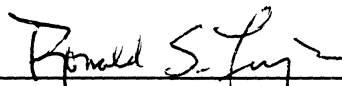
CONCLUSION

Appellant respectfully requests that this Court reverse his
convictions and remand this case for a new trial.

Respectfully submitted this 23rd day of March, 1990.



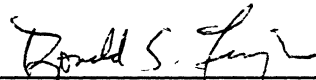
KAREN STAM
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Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, RONALD S. FUJINO, hereby certify that eight copies of the foregoing will be delivered to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102, and four copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 23rd day of March, 1990.



RONALD S. FUJINO

DELIVERED by _____
this _____ day of March, 1990.
