2010

State of Utah v. Luis Parra Gomez : Brief of Appellee

Utah Court of Appeals

Case No. 20100486-CA

IN THE

UTAH COURT OF APPEALS

State of Utah,
Plaintiff/Appellee,

vs.

Luis Parra Gomez,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions for two counts of possession of a controlled substance with intent to distribute in a drug-free zone, a first and a third degree felony; and possession of drug paraphernalia in a drug-free zone, a class A misdemeanor, in the Fourth Judicial District Court of Utah, Utah County, the Honorable Lynn W. Davis presiding.

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STATEMENT OF JURISDICTION

Defendant appeals from convictions for two counts of possession of a controlled substance with intent to distribute in a drug-free zone, a first and a third degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(iii) (West Supp. 2009); and one count of possession of drug paraphernalia in a drug-free zone, a class A misdemeanor, in violation of Utah Code Ann. § 58-37a-5(1) (West Supp. 2010). This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(j) (West 2009), following the transfer of the appeal from the Utah Supreme Court.

STATEMENT OF THE ISSUES

1. Did Defendant's response to the officer's request for consent to search his hotel room dispel reasonable suspicion?

2. Did officers exploit the allegedly illegal detention to obtain Defendant's consent to search?

Standard of Review. Because Defendant did not preserve these issues below, this Court will review his claim only upon a showing "that 'exceptional circumstances' exist or 'plain error' occurred." *State v. Holgate*, 2000 UT 74, ¶ 11, 10 P.3d 346.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

No constitutional provision, statutes, or rules are determinative of the issues presented in this appeal.

STATEMENT OF THE CASE

Defendant was charged with two counts of possession of a controlled substance with intent to distribute in a drug free zone, one first- and one third-degree felony, and one count of possession of drug paraphernalia in a drug free zone, a class A misdemeanor. R. 1-2. Following a preliminary hearing, the court found probable cause and bound defendant over as charged. R. 33-34. Defendant thereafter moved to suppress evidence seized during a consensual search of his hotel room. R. 43-58. He later amended that motion, arguing that he was illegally detained from the initial stop and again from the moment the search of the car concluded without discovery of contraband, that the officers exploited the illegal

detention to obtain his involuntary consent to a search of his hotel room, and that his prolonged detention constituted a de facto arrest lacking in probable cause. R. 77-99.

The parties submitted the motion without an evidentiary hearing, and the district court denied it. R. 115, 116-28; R. 158:4-20. The judge ruled that Defendant's initial detention was lawful based on the traffic violation as well as on the officer's belief that Defendant was not wearing a seat belt; that reasonable suspicion continued to escalate to justify Defendant's detention and the search of the vehicle and its occupants, regardless of whether contraband was ultimately found in the car; that numerous circumstances justified the officers in seeking permission to search the hotel room; and that nothing under these circumstances overpowered Defendant's will or otherwise rendered his consent involuntary. R. 117-120 (attached in **Addendum A**).

Under a plea agreement, Defendant pled guilty as charged, reserving his right to appeal the district court's denial of his amended motion to suppress. R. 132-33, 134-40, 141-43; R. 158:20-29. *See generally State v. Sery*, 758 P.2d 935, 939 (Utah App. 1988). The court obtained a presentence investigation report, then sentenced Defendant to two indeterminate terms of zero-to-five years in prison on the felony counts, and a year in jail on the class A misdemeanor. R. 133, 148-49; R. 158:36-37.

The court suspended the terms of incarceration and sentenced Defendant to thirty-six months' probation. R. 148-49; R. 158:37. Defendant timely appealed. R. 150.

STATEMENT OF FACTS

Around midnight on August 4, 2008, Officer Scott Speeth was patrolling in Orem when he stopped a car for an inoperative taillight. R. 157:4-6, 26. He found the car was occupied by three men and noticed that Defendant, seated in back, was not wearing a seatbelt. R. 157:6-7, 28-29, 53. Officer Speeth spoke with the driver, Jose Reyes, who told him that he had rented the car, and that the three men were on their way "back to Provo." R. 157:7. The officer found the information "odd" because the car was "right near the freeway" but headed away from it and toward Orem. R. 157:7, 31.

The officer obtained the necessary information, returned to his car to run a records check, and discovered that Reyes had a suspended license and a criminal history involving narcotics trafficking. R. 157:6-7, 29. Given the "odd" information from Reyes and his criminal history, Officer Speeth called for a canine unit while he began to issue the citation for driving without a license. R. 157:7-8. Officer Trent College arrived with his dog and walked the perimeter of the car while Officer Speeth worked on the citation. R. 157:8-9, 32-33. The dog alerted on the car,

prompting Officer Speeth to remove all three men and speak to each one individually. R. 157:9-10, 33.

The officer reasoned that a rental car could suggest that the men were on a trip, might be visiting someone, and may need a place to stay. R. 157:10-11. He also knew from his experience that drugs and hotels were a common combination and that there were hotels near where the stop occurred. R. 157:11, 31, 54. When asked, however, all of the men claimed they had not gotten a hotel and were not visiting anyone. R. 157:11

In the meantime, another canine officer arrived, and the rental car was searched based on the canine alert. R. 157:11-12, 34. While the car was being searched, officers also searched the three men. R. 157:37. Officer Speeth explained that the men had been inside the car when the dog alerted, and he was concerned that drugs may be on the men instead of in the car. *Id.* No drugs were found, but the driver had $4,000.00 in cash in one of his shoes. R. 157:15.

The search of the car revealed a parking pass issued by the Comfort Inn that bore the dates of August 3 and 4 and referenced room 109. R. 157:12-13, 39. The Comfort Inn was about 100 feet from where the car had been stopped. R. 157:12, 31. Officer Speeth called the front desk and discovered that room 109 was registered to

Defendant. R. 157:13, 40. With this new information, the officer again spoke with each of the three men separately. R. 157:15.

Defendant appeared shocked when the officer told him what he had discovered about the hotel, and he "stammered a bit" as he discussed it with the officer. R. 157:13-14. When asked why he had lied about it, Defendant first claimed that he had not yet been to the room, then said he had been there, but decided to have Reyes give him a ride to his mother's home in Provo. *Id.*

Considering the numerous discrepancies in a number of the statements made by the men, the narcotics history of one man, the alert by the drug dog, the money found in the driver's shoe, the fact that all the men had lied about the hotel, and the body language observed by the officer as he interacted with the men, Officer Speeth believed that there were narcotics in the hotel room. R. 157:44-45. Consequently, he asked Defendant for consent to search the room. R. 157:16, 46. Defendant responded that "he didn't want to be put in that kind of a position[,]" and his body language told the officer that the question "made him really uncomfortable." *Id.* Officer Speeth interpreted the response as Defendant's way of "trying to protect somebody else" who may have "had something incriminating inside the hotel room" and simply "not wanting to incriminate his friends." *Id.*

To clarify the response and test his interpretation, the officer asked Defendant if he would be okay with the search if the other men "were okay with it[.]" *Id.* Defendant agreed, and the officer spoke to the other men. R. 126; R. 157:16, 46-47. Both men "denied ever being in the room and denied having any claim to anything in the room." R. 157:16-17. When the officer relayed the responses to Defendant, he "shrugged his shoulders and agreed to let [them] in." *Id.* He walked with two of the officers to the hotel and used his card key to open room 109. R. 157:17. Inside, the officers found Defendant's clothes together with multiple packages of cocaine, a large baggie of marijuana, a digital scale and measuring spoons. R. 157:17-22, 49. The quantity and packaging of the narcotics suggested that they were intended for distribution. R. 157:19-23. All three men were then arrested. R. 157:49.

SUMMARY OF ARGUMENT

Defendant argues that once he refused to give consent to a search of his hotel room, the officers lacked reasonable suspicion to extend his detention for any further investigation. This Court should not reach his claim because he failed to preserve this issue in the trial court and argues neither plain error nor exceptional circumstances on appeal to avoid the preservation rule. His amended suppression motion below presented six claims, all of them involving challenges to various parts of his detention and consent. However, none of his arguments made reference to

the fact that he believed he had initially refused to grant consent to a search of his hotel room or that the refusal had robbed the officers of reasonable suspicion to extend his detention further. Not surprisingly, the trial court's ruling is also devoid of any mention of these points. Because Defendant failed to preserve his claim and makes no reference to an exception to the preservation rule, this Court should decline to review his claim on appeal.

In any event, Defendant's refusal neither added nor detracted from reasonable suspicion, and the officer took reasonable steps to resolve his reluctance and obtain his consent to search.

Defendant also contends that the officers exploited the illegal detention outlined in his first argument in an attempt to obtain his ultimate consent to search his hotel room. As with his first claim, Defendant failed to raise this claim in the trial court and argues no exception to the preservation rule to justify appellate review. Moreover, his failure to establish the illegality of the detention in his first argument prevents him from establishing its exploitation on appeal.

ARGUMENT

I.

THIS COURT SHOULD NOT REACH DEFENDANT'S ILLEGAL DETENTION CLAIM BECAUSE IT WAS NOT PRESERVED AND HE ARGUES NO EXCEPTION TO THE PRESERVATION REQUIREMENT; MOREOVER, DEFENDANT'S REFUSAL DID NOT DISPEL REASONABLE SUSPICION

Defendant contends that the trial court should have granted his suppression motion because his continued detention was illegal once he refused to give consent to a search of his hotel room. *See* Aplt. Br. at 9-15. At that point, he claims, the officer "had done all that he could to quickly confirm or dispel his suspicion" of drug activity, but without something more, he lacked reasonable suspicion to extend the detention for further investigation. *Id.* at 14-15. Although Defendant agrees that the officer's findings and suspicions provided the necessary reasonable suspicion to ask for consent to search the hotel room, he argues that his initial refusal to consent barred any further detention or investigation by the officers. *Id.* at 10, 14.

This Court should not reach the merits of Defendant's argument because it was not preserved for appellate review, and Defendant fails to assert any exception to the preservation requirement. Moreover, Defendant's reluctance to consent did not dispel reasonable suspicion.

A. Defendant did not Preserve his Claim and Alleges no Exception to the Preservation Requirement

Appellate review of Defendant's claim is not warranted because he failed to preserve it in the trial court. "'[I]n order to preserve an issue for appeal the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue.'" *State v. Featherhat*, 2011 UT App 154, ¶ 21 (quoting *State v. Maese*, 2010 UT App 106, ¶ 13, 236 P.3d 155) (alteration in original) (internal quotation marks omitted), *cert. denied*, 247 P.3d 774 (2011)); *State v. Diaz-Arevalo*, 2008 UT App 219, ¶ 10, 189 P.3d 85 (stating requirement that issues must be preserved for appeal by presentation to the district court), *cert. denied*, 199 P.3d 970 (2008). This requires a timely and specific objection below. *See State v. Low*, 2008 UT 58, ¶ 17, 192 P.3d 867.

The district court judge recognized that Defendant's amended suppression motion contained six challenges.[1] R. 122-25. First, Defendant challenged the legality of his initial detention. R. 91-92, 124. Second, he argued that once the officers completed searching the car following the canine alert, they lacked reasonable suspicion to continue the investigative detention. R. 88-91, 123-24. Third, he claimed that the officers should have terminated further detention and questioning

[1] A copy of Defendant's amendment to his motion to suppress and the supporting memorandum is attached in **Addendum B**.

after the search of the car, and the officers should not have discovered the money in Reyes' shoe. R. 85-88, 124. Fourth, he complained that the prolonged detention constituted a de facto arrest that lacked probable cause. R. 85-83, 123. Fifth, he claimed his ultimate consent was not voluntary. R. 81-83, 122-23. Finally, he argued that the ultimate consent was, in any event, obtained by exploitation of the prior illegality, i.e., detaining the occupants for further questioning after the vehicle search. R. 80-81, 122.

On appeal, Defendant now "concedes that Officer Speeth lawfully stopped the vehicle in which [he] was a passenger." Aplt. Br. at 9. He concedes that "continued investigation of drug trafficking after the vehicle search" was justified by reasonable suspicion. *See id.* He also acknowledges that questioning immediately following the car search was lawful. *See id.* at 10, 14. He concedes that "after concluding the vehicle search, Officer Speeth diligently pursued a means of investigation that was likely to confirm or dispel his suspicion that [he] was involved in drug trafficking" when he "called the front desk of the Comfort Inn," "questioned each of the passengers and challenged their prior statements," and "searched each of the passengers." *Id.* at 10. And on appeal, he has not argued that his consent was involuntary or that his continued detention was a de facto arrest.

See id. at 9-17. In short, Defendant has abandoned on appeal all of the challenges he made in his amended motion to suppress.

Defendant now seeks reversal based on a claim never raised or addressed below – that his initial refusal to give consent to search the hotel room brought his lawful detention to an end and rendered any further detention unlawful. *See id.* at 9-15. The proceedings below did not require any evaluation of whether Defendant initially denied the request for consent to search or of what effect his response had on the legality of his continued detention.

Because Defendant's argument was not presented to the trial court but is raised for the first time on appeal, this Court will address it only if plain error or exceptional circumstances are established. *See State v. King*, 2010 UT App 396, ¶ 18, 248 P.3d 984; *State v. Norton*, 2003 UT App 88, ¶ 10, 67 P.3d 1050. Defendant makes neither argument. Consequently, this Court should not address his claim. *See King*, 2010 UT App 396, ¶ 18.

B. Defendant's Refusal did not, in any Event, Dispel Reasonable Suspicion

In any event, contrary to Defendant's unpreserved claim, his initial refusal to consent to a search of the hotel room did not dispel reasonable suspicion so as to require termination of the stop. If anything, his refusal to consent to a search would

add to reasonable suspicion, suggesting that Defendant had something to hide. Notwithstanding this reasonable inference, courts have generally recognized that a suspect's "constitutionally protected refusal to consent to search is not considered in determining whether [an officer] had reasonable suspicion." *State v. McGinnis*, 608 N.W.2d 605, 610 (Neb. App. 2000); *accord United States v. Santos*, 403 F.3d 1120, 1125 (10th Cir. 2005) (holding that "[a] refusal to consent to a search cannot itself form the basis for reasonable suspicion"). As explained by the Tenth Circuit, "[i]f refusal of consent were a basis for reasonable suspicion, nothing would be left of Fourth Amendment protections. A motorist who consented to a search could be searched; and a motorist who refused consent could be searched, as well." *Santos*, 403 F.3d at 1125.

As noted, Defendant has conceded that "after concluding the vehicle search," Officer Speeth was justified in continuing his investigation into possible drug trafficking—at least up to the point where Defendant initially refused consent. *See* Aplt. Br. at 10. But as discussed, that refusal neither added nor detracted from reasonable suspicion. Accordingly, the refusal neither confirmed nor dispelled the suspicion—it remained unresolved. Sensing that Defendant's refusal was in deference to his companions' privacy concerns, Officer Speeth reasonably took the next step: he asked Defendant if he would consent to the search if it was agreeable

to his companions. R. 157:16, 46. Once the officer obtained their approval, Defendant then consented.

II.

THIS COURT SHOULD NOT REACH DEFENDANT'S EXPLOITATION CLAIM BECAUSE IT WAS NOT PRESERVED, HE ARGUES NO EXCEPTION TO THE PRESERVATION REQUIREMENT, AND HE HAS NOT ESTABLISHED THE EXISTENCE OF AN ILLEGAL DETENTION

Defendant contends that Officer Speeth exploited the allegedly illegal detention in order to obtain Defendant's consent to a search of his hotel room. *See* Aplt. Br. at 15-17. Specifically, he argues that the relevant factors in an exploitation analysis establish that the officer used the illegal detention that occurred following Defendant's refusal to consent to a search of his hotel room to create circumstances that would persuade Defendant to change his mind and consent to the search. *See id.* at 17.

This Court should reject Defendant's claim because it was not preserved for appellate review, and because he has not established that the specific detention was illegal.

A. Defendant did not Preserve his Claim and Alleges no Exception to the Preservation Requirement

Defendant's claim is not properly before this Court for review because he failed to preserve it below. He argued below that the officers exploited a different

allegedly illegal detention which commenced immediately upon completion of the vehicle search. R. 88-90.

In contrast, he now claims that the illegal detention exploited by the officers began following his refusal to permit the search of the hotel room. *See* Point I, *supra*. Because the exploitation analysis presented to this Court differs materially from the exploitation analysis he presented below, the present claim was not preserved, and, absent any claim of either plain error or exceptional circumstances, this Court should decline to address it. *See King*, 2010 UT App 396, ¶18.

B. Review is not Warranted Absent Proof that the Challenged Detention was Illegal

Moreover, Defendant cannot establish that the officers exploited an illegal detention because, as explained *supra* at 10-12, he fails to establish that the illegal detention existed. *See, e.g., State v. Hansen*, 2002 UT 125, ¶¶ 27-46, 61-70, 63 P.3d 650 (establishing the existence of an illegal detention before undertaking an exploitation analysis to determine whether police exploited the illegality in order to obtain consent).[2] Consequently, Defendant's exploitation claim fails at the outset.

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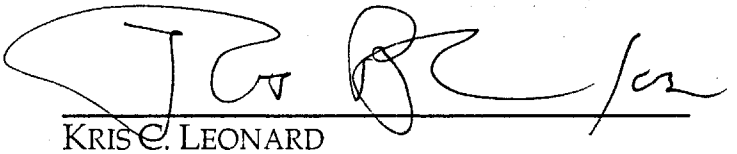
[2] His illegal detention claim on appeal is unpreserved, and he has conceded or abandoned the claims advanced in the trial court. *See* Point IA, *supra*.

CONCLUSION

For the foregoing reasons, the Court should affirm Defendant's convictions and sentences.

Respectfully submitted July 20th, 2011.

MARK L. SHURTLEFF
Utah Attorney General



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CERTIFICATE OF SERVICE

I certify that on July 20, 2011, two copies of the foregoing brief were ☑ mailed

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A digital copy of the brief was also included: ☑ Yes ☐ No

Melissa Fryer

Addenda

Addendum A

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

STATE OF UTAH, Plaintiff, vs. LUIS PARRA GOMEZ, Defendant.	**RULING** Date: January 11, 2010 Case No.: 081402283 Judge: Lynn W. Davis

This matter comes before the court upon Luis Parra Gomez's ("Defendant's") Amendment to Motion to Suppress. David S. Sturgill represents the State of Utah, and Barbara A. Gonzales represents Defendant. The court, having carefully reviewed the parties' memoranda and heard the oral arguments, hereby rules as follows:

I.

Procedural History

1. On May 26, 2009, Defendant filed his Motion to Suppress and accompanying memorandum.

2. On September 23, 2009, Defendant filed his Amendment to Defendant's Motion to Suppress and accompanying memorandum, which were to replace the documents filed on May 26.

3. The State's opposition memorandum was also filed on September 23, 2009.

4. On December 16, 2009, oral arguments were held. The Court indicated at that time that it would rule in writing within 30 to 45 days.

II.

Factual Background

At around midnight on the night of August 3, 2008, Officer Scott Speeth ("Speeth") of the Orem Police Department stopped a vehicle traveling west near 400 West University Parkway in Orem for a brake light violation. The vehicle, a rental, had three occupants: the driver ("Driver"), front-seat passenger ("Passenger") and Defendant. Speeth was the only officer on the scene.

Speeth approached Driver and requested identification. Looking to the back seat, Speeth noticed that Defendant was not wearing a seat belt. Speeth took their identification information and ran a records check on both Driver and Defendant. While examining the documents and making a records check, Speeth requested a K-9 unit. Officer Colledge ("Colledge") and Officer Thomas ("Thomas") came about five minutes later with the K-9 unit, which indicated that drugs were in the vehicle.

Following the positive alert by the drug dog, Speeth ordered all three occupants to exit the vehicle, and he questioned each one separately while Thomas stood next to the other two. Speeth asked the occupants what they were doing, where they were going that day, and other questions as Corporal Lopez and Officer Colledge searched the vehicle with the K-9 unit. The

three occupants said they had no reason to visit any of the nearby hotels, and they denied visiting any hotels in the area. Even though the K-9 dog had alerted positively, no drugs were located in the vehicle.

Speeth searched the vehicle and found a parking permit for the Comfort Inn, a hotel that was within 100 feet of the vehicle. Driver and Defendant were searched. No contraband was found on any of the three occupants. At least $4,000 was found hidden in Driver's shoe. Speeth called the Comfort Inn and was told that a room was registered to Defendant.

Speeth asked Defendant why Driver had $4,000 in cash hidden in his shoe. Defendant shrugged his shoulders. Speeth asked Defendant about the Comfort Inn room, and asked why Defendant had lied. Speeth told Defendant he was "aware of what was going on" and asked Defendant what was in the room. Defendant told Speeth he did not have anything in the room. Speeth asked for consent to enter and search the room. Defendant said he "did not want to be in that position." Defendant agreed to allow Speeth inside the hotel room if the other two occupants consented.

Driver and Passenger told Speeth that they had no claim to anything in the room and had never been in the room. Driver said he could not consent to entry because it was not his room, and Passenger said he did not care if the room was searched because he was never in that room. Speeth then told Defendant that the other two occupants had no objection to officers searching the room, and that they had relinquished any claim to a search. Defendant shrugged his shoulders, and Speeth asked him to escort him to the room. They walked together to the nearby

room; Defendant was not handcuffed or physically restrained.

The court notes that for the duration of the stop, emergency lights from the patrol vehicles flashed.

Inside the hotel room, Speeth found electronic scales, a spoon, marijuana and cocaine. Defendant is charged with three drug possession counts: a first-degree felony, a third-degree felony, and a Class-A misdemeanor.

III.

Standard of Review for a Motion to Suppress Evidence

Pursuant to the Fourth Amendment of the U.S. Constitution and Article 1, section 14 of the Utah Constitution, people have a right to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. This constitutional protection extends to automobiles. The court must accordingly determine, based on the facts presented and the law cited, whether any of Defendant's constitutional rights were violated by police actions on August 3 and 4, 2008.

IV.

The Parties' Arguments

a. Defendant's Arguments Supporting his Motion to Suppress

Defendant argues that Speeth initiated a level-two stop, the second of the three types of police/citizen encounters. Defendant cites to case law holding that the length and scope of the stop must be justified by the circumstances which rendered the stop permissible. In such a stop,

the officer must have reasonable, articulable suspicion that the detained individual(s) has been, or is about to be, engaged in criminal activity. The Utah Supreme Court has held that the officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *State v. Johnson*, 805 P.2d 761, 764 (Utah 1991).

Defendant contends that the officer had no reasonable suspicion that Defendant was engaging in crime. Defendant was merely a passenger in a car with a broken brake light. Regarding the seat belt violation, Speeth never found out whether Defendant had been wearing his seat belt while the vehicle was moving. Defendant argues that there is no evidence of a seat belt ticket being issued to him. Based on the illegal detention, any information obtained was tainted by a constitutional violation.

Defendant further argues that following the unsuccessful search based on the drug dog's indication, Defendant's continued investigation was unlawful. Because no drugs or illegal items were found in the vehicle or on any of the occupants, and because none of the occupants showed signs of drug use, the purpose for the level-two encounter was concluded. Therefore, the occupants should have been permitted to leave. The State claims that the existence of the Comfort Inn parking pass provides reasonable suspicion that crime was afoot. Defendant disputes this. Therefore, Speeth should have stopped questioning the occupants and should not have found the money in Driver's shoe.

Defendant argues that the continued investigation was unconstitutional. In the

preliminary hearing, Speeth testified that he made it clear that the occupants were detained. By the time that Speeth called the Comfort Inn and learned that the room was rented to Defendant, the detention had lasted 30 to 40 minutes. Admittedly, some inconsistent statements were made regarding the hotel room, but Speeth did not provide reasonable, articulable facts justifying further detention.

A person is seized if, considering all the circumstances, he reasonably "would have believed that he was not free to leave." *State v. Merworth*, 2006 UT App, ¶ 7, 153 P.3d 775. Defendant argues that any reasonable person in his position would not have felt free to leave: (1) Physical touching occurred when Defendant was searched; (2) There were multiple patrol cars; (3) The emergency lights flashed during the stop; (4) Four officers were present with weapons; (5) Two drug dogs were present; (6) The occupants were continually detained for further questioning after the purpose for the stop and search was completed; (7) The occupants were not told they were free to leave, and were not told they did not have to answer questions; (8) The officers used deception and lies during their questioning. Defendant also contends that the prolonged illegal detention was a de facto arrest which required probable cause.

Defendant argues that the consent to search the hotel room was not given voluntarily. Using the totality of the circumstances test, specifically several factors discussed in case law, Defendant claims that his will was overborne and that he was coerced into consenting. There was an exhibition of force by the number of officers, dogs, and flashing patrol vehicles. Speeth used deception and trickery when he told Defendant he "was aware of what was going on." The

request to consent for search was not simply a mere request. Further, there is clear evidence that Defendant did not want to consent when he told Speeth that he "was not comfortable with [the search]."

Defendant contends that the fraudulently obtained consent was not sufficiently attenuated to dissipate the taint of the illegal detention. The initial stop escalated continually without justification in mere minutes, until Defendant was being tricked into reluctantly consenting to a search of the hotel room. Therefore, the exploitation of the illegal detention was the but-for cause of Speeth's requested consent.

Based on all the foregoing, Defendant argues that all evidence found in the hotel room should be suppressed under the Exclusionary Rule.

b. The State's Arguments Opposing the Motion to Suppress

The State agrees with Defendant that Speeth initiated a level-two stop. The stop was based on the broken brake light, which was a violation of Utah Code Ann. § 41-6a-1604(2).

The State argues that during the stop, Speeth requested a canine sniff of the exterior of the car which did not extend the stop. *See State v. Wilkinson*, 2008 UT App 395, ¶¶ 7, 9, 197 P.3d 96. Because the drug dog alerted on the vehicle, the police then had probable cause to extend the stop and search the vehicle. *Id.* at ¶ 9. At the least, there was reasonable suspicion that someone in the car was in possession of illegal drugs. During the car search, Speeth noticed the Comfort Inn parking pass. The State argues that based on the officer's training and experience, Speeth's knowledge that drug deals often occur in hotel rooms, combined with the room rental, the

automobile rental, and the positive indication by the drug dog, there was reasonable suspicion that Defendant had drugs in the hotel room. Speeth became even more suspicious when he found more than $4,000 hidden in Driver's shoe. Therefore, it was entirely reasonable for Speeth to ask for permission to search the room.

Regarding Defendant's argument that he was unlawfully detained when asked for his identification, the State argues that Speeth had reasonable suspicion that Defendant had violated the seat belt law, found in Utah Code Ann. § 41-6a-1803(2). It is not likely that a person would unfasten his safety belt in the few seconds between getting pulled over and the officer approaching. The seat belt statute requires the officer to identify the violator in issuing the ticket; therefore, Speeth had the right to ask for Defendant's name and date of birth.

The State contends that even if the request for Defendant's identification was unlawful, the discovery of evidence was so attenuated from the initial detention that the taint of the initial detention had dissipated. The events leading to the discovery of the drugs in the hotel room would have proceeded just as they did regardless of Defendant's identification and detention. The canine sniff was a separate occurrence, which led to the officer spotting the parking pass, which led to the officer calling the Comfort Inn, which led to the officer requesting permission to search the room, and eventually finding contraband.

Finally, the State argues that it had consent to search the hotel room. Even if the initial detention was illegal, the evidence may be admissible in a later search which was granted through valid, voluntary consent. Evaluating the consent under the relevant factors, the State

contends that the consent was voluntary under the totality of the circumstances. Defendant knew better than Speeth that the room was under his name, and that it did not matter what supposed authority the other two occupants gave for the search. Further, Defendant's initial reluctance to allow the search is evidence that he knew that he had the right to refuse consent. The presence of flashing lights and multiple officers was not sufficient to overcome Defendant's will. Speeth did not claim any authority to search the room. The State likens this case to *State v. Hansen*, in which officers asked for permission to search the defendant's car after the purpose for the initial stop had been fulfilled and there was no reasonable suspicion of drugs. 2002 UT 125, ¶ 14, 63 P.3d 650. Despite the presence of another police cruiser with its lights flashing, and despite the officer not telling the defendant he was free to leave or free to refuse the consent, the Utah Supreme Court held that the consent was voluntary. *Id.* at ¶¶ 54, 58.

Therefore, the State argues, Defendant's Motion to Suppress should be denied.

V.

Case Analysis

This is an unusual case because the ultimate search took place, not at the vehicular stop, but at the adjacent motel, and because of the unique attenuation arguments.

The officer, as a matter of law, had the right to ask Defendant for ID based upon his observance of Defendant's failure to wear a seat belt in violation of Utah Code Ann. Section 41-6a-1803(2). The fact that Defendant or Driver was never charged with a seat belt violation is of no legal consequence.

While an officer has a duty to quickly confirm or dispel reasonable articulable suspicion, he cannot ignore escalating suspicion. With the drug dog hit, reasonable suspicion escalated and the search of the vehicle and its occupants was authorized. *See Wilkinson*, 2008 UT App at ¶¶ 7, 9, 12. It is not material that drugs were not found in the vehicle after the positive alert by the K-9 unit; the indication itself "provided independent reasonable suspicion" to search the vehicle and the occupants. *Id.* at ¶ 12.

With the discovery of the $4,000 hidden in the shoe of Driver, inconsistent and conflicting answers to questions posed to the occupants, the discovery of the rental car status, and the discovery of the rental of the room by Defendant in the adjacent motel, it was not improper to seek permission to search the room. This information, especially when considered by an officer of Speeth's specialized training and experience, suffices to arouse reasonable articulable suspicion. *See State v. Prows*, 2007 UT App 409, ¶ 12, 178 P.3d 908. Based on their experience, officers are accorded deference in their "ability to distinguish between innocent and suspicious actions." *Id.*

Defendant has no standing to challenge the search of Driver's shoe, and the discovery of the $4,000 in the shoe supported additional reasonable suspicion and supported reasonable inquiry.

The statement by Officer Speeth that he was "aware of what was going on," while perhaps not entirely accurate, did not overpower Defendant's will. "A defendant's will is not overborne simply because he is led to believe that the government's knowledge of his guilt is

greater than it actually is." *Merworth*, 2006 UT App at ¶ 11. Further, the factors listed in the previous paragraph apparently were red flags or warning signs in Speeth's view. Arguably, he was "aware of what was going on," just not to the level of specificity that Defendant may have believed.

The court also notes that Defendant, not any officer, was the one who swiped his hotel card key to gain entry to the room. Further, there was no restraint of Defendant, or threat to use handcuffs during the escort. Also, Officer Speeth testified that his tone was conversational, rather than harsh and accusatory. Another factor showing consent is that Speeth did not claim any authority to search the room; he even asked for permission from the other two occupants before returning to seek consent from Defendant. As is well established by case law, the officers were not required to tell Defendant that he was free to leave or that he was free to refuse consent. *See Hansen*, 2002 UT at ¶ 54; *see also Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996).

Examining the consent of Defendant under a "totality of the circumstances" test, the court concludes by a preponderance of the evidence that consent was not obtained by trickery, fraud, deception, lies, or force. The consent was voluntary.

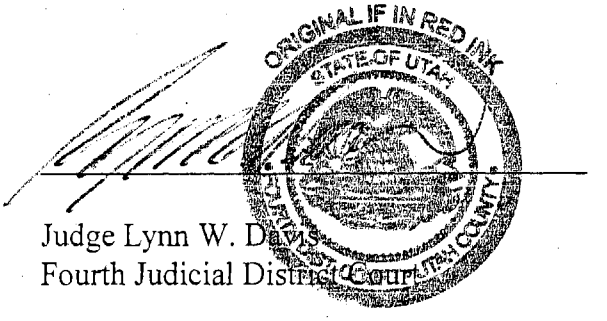
VI.

Ruling

Based on the foregoing, Defendant's Amendment to Motion to Suppress is denied. Neither counsel is instructed to prepare an Order based on this Ruling. However, both counsel are to appear at the Further Proceedings hearing set for February 10, 2010, at 8:30 a.m. and

inform the court of how they wish to proceed.

Dated this 12 day of January, 2010.



Judge Lynn W. Davis
Fourth Judicial District Court

A certificate of mailing is on the following page.

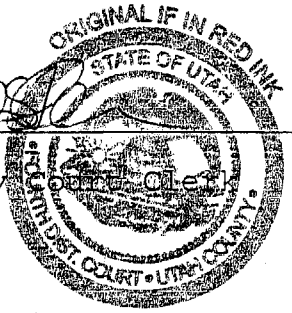
CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 081402283 by the method and on the date specified.

BY HAND: STATE OF UTAH
BY HAND: DEFENDER PUBLIC

Date: 1/12/10

Deputy Court Clerk



Addendum B

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

STATE OF UTAH, Plaintiff, vs. **LUIS PARRA GOMEZ,** Defendant.	**AMENDMENT TO DEFENDANT'S MOTION TO SUPPRESS** CASE NO. 081402283 JUDGE LYNN W. DAVIS

Defendant, **LUIS PARRA GOMEZ**, through his attorney of record, BARBARA A. GONZALES, pursuant to Rule 12 of the Utah Rules of Criminal Procedure, submits this Amendment to Defendant's Motion to Suppress and accompanying Memorandum in Support of Amendment to Defendant's Motion to Suppress. This amendment replaces Defendant's previous submitted Motion To Suppress filed on May 26, 2009.

DATED this 22 day of Sept, 2009.

Barbara A. Gonzales
Attorney for Defendant

BARBARA A. GONZALES (10382)
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IN THE FOURTH JUDICIAL DISTRICT COURT

STATE OF UTAH, UTAH COUNTY

STATE OF UTAH, Plaintiff, vs. **LUIS PARRA GOMEZ,** Defendant.	**MEMORANDUM IN SUPPORT OF AMENDMENT TO DEFENDANT'S MOTION TO SUPPRESS** CASE NO. 081402283 JUDGE LYNN W. DAVIS

Defendant, **LUIS PARRA GOMEZ**, through his attorney of record, Barbara A. Gonzales, pursuant to Rule 12 of the Utah Rules of Criminal Procedure, submits this Memorandum in Support of Amendment to Defendant's Motion to Suppress.

STATEMENT OF RELEVANT FACTS

1. Sometime around midnight of August 3, 2008 going into August 4, 2008, Officer Scott Speeth (Speeth) of the Orem Police Department stopped a vehicle traveling

west on University Parkway in Orem for a brake light that was not illuminated. The stop occurred in the vicinity of 400 West University Parkway in Orem. There were three occupants, the driver (Driver), Luis Parra Gomez (Defendant), and the front seat passenger (2nd passenger). The vehicle was a rental vehicle. At this time Speeth was the only officer at the scene.

2. Speeth approached the Driver and requested identification. Speeth also noticed the Defendant, Luis Parra Gomez, who was a passenger in the back seat and was not wearing a seat belt. Speeth took driver's identification and Defendant's identification and went back to his vehicle to run a records check on Driver and Defendant. (Incident Report p. 9, para. 2-3.) (Incident Report will hereinafter be referred to as IR.)

3. At the Preliminary Hearing on February 18, 2009, Speeth stated he had not checked to determine if Defendant had taken off the seat belt after the stop or if he was not wearing it while the vehicle was being driven. (PHT p. 28, 12-19.)

4. While Speeth was conducting a records check on Driver and Defendant and issuing a citation to the driver, he requested a K-9 unit. Officer Colledge (Colledge) arrived within 10 minutes of the initial stop with his K-9 and Officer

Thomas. Colledge employed the K-9 on the outside of the vehicle and the K-9 indicated that drugs were in the vehicle.

5. Speeth then ordered all the occupants to exit the vehicle and questioned each one separately. (IR p. 9, para. 4.) Officer Thomas would stand next to the other two occupants while Speeth spoke with one occupant. (PHT p. 34, 17-20.) Speeth questioned the occupants regarding where they were going and what they had been doing that day. (IR p. 9, para. 5-7.) While speaking with the occupants another officer, Corporal Lopez (Lopez), arrived in his patrol vehicle with his K-9.

6. Colledge and Lopez searched the vehicle, but no drugs or any other illegal items were found.

7. Speeth then searched the vehicle and found a parking permit to the Comfort Inn. The Comfort Inn was within 100 feet of the stop.

8. Speeth searched the Driver and Defendant was also searched. Nothing illegal was found on either person, nor on 2nd passenger. $4,000 was found in Driver's shoe. None of the occupants exhibited signs of drug use.

9. Speeth phoned the Comfort Inn and determined that a room was registered to the Defendant.

10. Speeth questioned Defendant about why Driver would have $4,000 in his shoe. Defendant shrugged his shoulders. Speeth questioned Defendant about the hotel room and asked Defendant why he had lied. (PHT 13, 25.) He then told Defendant that he was "aware of what was going on" and then asked Defendant about what was in the room. Defendant stated he did not have anything in the room. Speeth then asked Defendant for consent to enter and search the room. Defendant replied that "he did not want to be in that position". Speeth told Defendant if he would consent to allow him into the room if Driver and 2nd passenger would consent. (IR p. 10, para. 5.)

11. Speeth asked Driver and 2nd passenger for consent to enter the room. Both denied having any claim to anything in the room (PHT 16, 25; 17, 1-2.) Driver said he could not give consent because it was not his room. 2nd passenger told Speeth he did not care if officers entered the room because he had never been in the room. (IR p. 10, para. 6.)

12. Speeth then told Defendant that Driver and 2nd passenger had no problem with officers searching the room. (IR p. 11, para. 1.) That they had relinquished any claim [to the room]. Defendant then shrugged his shoulders. (PHT 17, 4-11.) Speeth then asked Defendant to escort him to the room. (IR p. 11, para. 1.)

13. During the entire stop emergency lights from patrol vehicles continued to flash. (PHT 27, 17-22.)

14. Inside the room Speeth located electronic scales, a spoon, marijuana, and cocaine. Defendant is charged with:

Possession of a controlled substance with intent to distibute (DFZ), cocaine, a first degree felony;

Possession of a controlled substance with intent to distribute (DFZ), marijuana, a third degree felony;

Possession of drug paraphernalia (DFZ), a class A misdemeanor.

ARGUMENT

THE DETENTION OF THE DEFENDANT WENT BEYOND THE PERMISSIBLE SCOPE ALLOWED BY THE SEARCH AND SEIZURE PRINCIPLES GUARANTEED BY THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 14 OF THE UTAH CONSTITUTION.

The Fourth Amendment to the United States Constitution and Article 1, section 14 of the Utah Constitution protect the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. The right to be free from unreasonable searches and seizures extends to a person's automobile. "When an officer stops a vehicle for a traffic violation, he may briefly detain the vehicle and its occupants while he examines the vehicle registration and the driver's license." *State v.*

Schlosser, 774 P.2d 1132, 1135 (Utah 1989) (citing *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979)). The length and scope of the detention must be "'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Terry v. Ohio*, 392 U.S. 1, 19-20, 88 S. Ct. 1868, 1879, 20 L. Ed. 2d 889, 905 (1968).

"'When a police officer makes a traffic stop, the driver of the car [and the passengers are] seized within the meaning of the Fourth Amendment.' *Brendlin v. California*, 551 U.S. 249, ---, 127 S.Ct. 2400, 2403, 168 L.Ed.2d 132 (2007). Thus, both driver and passenger 'may challenge the constitutionality of the stop.' *Id.* at 2405 (quoting *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497(1980))".

It has been well established that there are three levels of police-citizen encounters, each requiring a different degree of justification under the Fourth Amendment. *State v. Munsen*, 821 P.2d 13 (Utah Ct. AP&P. 1991), *see also Terry v. Ohio*, 392 U.S. 1 (1968). The first level occurs when an officer approaches and questions a suspect. An officer may approach and question a suspect at any time so long as the person is not detained against his will. The second level is reached when an officer detains an individual. The United States Supreme Court has declared that "a police officer may detain and question an individual 'when the officer has reasonable, articulable suspicion that the person has been,

is, or is about to be engaged in criminal activity." *State v. Chapman*, 921 P.2d 446, 450 (Utah 1996) (quoting *United States v. Place*, 462 U.S. 696, 702-03 (1983)). The third level is arrest, which requires that the officer have probable cause to believe that a crime has been or is about to be committed.

In *State v. Johnson*, 805 P.2d 761 (Utah 1991), the Supreme Court of Utah held that "[i]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. at 21, 88 S. Ct. at 1880, 20 L. Ed. 2d at 906; *State v. Bruce*, 779 P.2d 646, 650 (Utah 1989).

In the present case, Speeth's actions constituted a level two encounter. In order to justify a level two stop the officer must have had a reasonable, articulable suspicion that the person is, or is about to be engaged in criminal activity. The only alleged "criminal" activity in this case was the fact that Defendant was a passenger in a vehicle driven by someone else and the officer stopped the vehicle because one of the brake lights was not working. Speeth did not ascertain whether Defendant had just taken off his seatbelt or if he was not wearing it while the vehicle was being driven. Speeth stated at preliminary hearing that it was possible Defendant could have been wearing the seatbelt [while the car was being driven], but had taken it off. (PHT 28, 12-19.) The Driver's and Defendant's

identifications were taken and Speeth ran computer checks on both. (IR p. 9, para. 2.) Speeth had no reasonable suspicion that Defendant had engaged, or was about to be engaged in criminal activity. Under these circumstances Defendant was illegally detained. These facts did not justify any suspicion that Defendant intended to commit a crime. There is no evidence that Speeth ever issued a citation to Defendant for the alleged seatbelt violation. If Defendant had been allowed to leave, Speeth would not have been able to question him about the hotel parking permit. Because there was no need to further detain Defendant while conducting the investigation of the Driver, his subsequent detention was unlawful.

After the purpose for the vehicle search had been concluded due to the K-9 indication, Defendant's continued investigative detention was unconstitutional.

In *United States v. Rosenborough,* 366 F.3d 1145, 1153 (10th Cir. 2004), "[a] dog alert creates general probable cause to search a vehicle..."

In the present case, within 8-10 minutes of the initial stop, Officers College and Thomas arrived in a patrol car with a drug sniffing K-9. The K-9 alerted on the vehicle. Speeth ordered the occupants out of the vehicle to question them. During this time, Lopez arrived in his patrol car with another drug sniffing K-9. Colledge and Lopez searched the vehicle, but no drugs or any illegal items were found. None of the occupants of the vehicle

showed signs of drug use . (PHT 42, 23-25; 43, 1-3.) Nothing illegal was found on any of the occupants.

Here, the purpose for the level two encounter because of the K-9 alert had been concluded. Speeth had determined that no one showed any signs of impairment, nothing illegal was found in the car and nothing illegal was found on the occupants. The only additional item found in the vehicle was a parking pass for the Comfort Inn.

In *State v. Worwood*, 164 P.3d (2007 UT 47), the Utah Supreme Court stated, "[i]nvestigative detentions are bound by the Fourth amendment. Justification for an investigation detention exists when an officer has 'reasonable, articulable suspicion that the person has been is, or is about to be engaged in criminal activity.'"(Quoting *State v. Chapman*, 921 P.2d 446, 450 (Utah 1996).

In the present case the locating of the parking pass did not rise to the level of reasonable articulable suspicion that a crime had been or was about to be committed. However, Speeth continued to question occupants of the vehicle and Driver allowed Speeth to search his person. Speeth found $4,000 in Driver's shoe. (PHT 36, 13-23; 37, 16,17.)) Defendant was also searched and nothing illegal was found on his person. (PHT 37, 22-23.)

Defendant's continued detention was impermissible under Utah Constitution.

After searching the vehicle and Defendant and no illegal substances or drugs were found, Speeth continued to detain Defendant for questioning regarding the hotel room because Speeth had located a parking permit for the Comfort Inn. Speeth "made it clear they were detained..." (PHT 14, 25.) Speeth then searched Driver and found the $4,000 in his shoe. Speeth then called the Comfort Inn and determined the room was rented to Defendant. (PHT 54, 16-15; 55, 1-11.) By this time Defendant had been detained for at least 30 - 40 minutes. (PHT 42, 4-18.)

The fourth amendment to the United States Constitution and article I, section 14 of the Utah Constitution protect the right of the people against unreasonable searches and seizures. Utah Code Ann. §77-7-15 (2003) states, "A peace officer may stop any person in a public place when he has a reasonable suspicion to believe 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." The officer must have reasonable, articulable suspicion of criminal activity that must be "based on objective facts". *State v. Martinez*, 2008-UT-R0314.013 (citing *State v. Trujillo*, 739 P.2d 85, 88 (Utah Ct. App. 1987).

When Speeth questioned Defendant about the hotel room after finding the parking permit, Defendant told Speeth that he had been inside the hotel room, but he was having

Driver give him a ride to his mother's house in Provo(PHT 14, 5-13), although Defendant had previously told Speeth they were not visiting anyone or stopping at any of the hotels nearby. (PHT 11, 4-7.) Speeth continued to detain Defendant based on the inconsistent statements. (PHT 14, 11-25.) However, Speeth did not provide any reasonable, articulable suspicion of criminal activity "based on objective facts". *Id.*

Defendant was not free to leave and the illegal detention was a seizure that had escalated rather than de-escalated.

The standard in seizure cases is the reasonable belief that one is not free to leave. *State v. Merworth*, 2006 UT App. 489 ¶2 (2006). A seizure occurs only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at ¶7 (quoting *State v. Struhs*, 940 P.2d 1225, 1227 (Utah Ct. App. 1997).

Under the totality of the circumstances, it is obvious that the police conduct in the present case would have communicated to a reasonable person that the person was not free to decline the officer's request to search, answer additional questions or otherwise terminate the encounter and go about his or her business. *State v. Higgins*, 884 P.2d 1242, 1244 (Utah 1994).

Speeth called the Comfort Inn and determined that a room was registered in Defendant's name. Speeth continued to question Defendant regarding the room. Defendant admitted to renting the room. Speeth then requested permission to search the room and Defendant replied that "he did not want to be in that position". Defendant consented to the search of the room after Speeth questioned Driver who stated that he could not give consent because it was not his room and 2nd passenger told Speeth he did not care if officers entered the room because he had never been in the room. Speeth told Defendant that the other two did not have a problem with him searching the room. (See aforementioned Relevant Facts, 11.)

In *State v. Hansen*, 63 P.3d 650 (Utah 2002), the Utah Supreme Court stated that although no single factor is dispositive, factors that would tend to show de-escalation would include informing a person he is free to leave, or that he does not have to answer additional questions. Likewise, a "coercive show of authority, such as the presence of more than one officer, the display of a weapon, physical touching by the officer, or his use of a commanding tone of voice indicating that compliance might be compelled" would tend to show a stop had not de-escalated. *Id.* At 662.

Here, the search of the vehicle and occupants showed no evidence of illegal activity. However, Defendant and other occupants were not free to leave. Speeth continued

to question Driver and Defendant. The *Hansen* factors that would lead a reasonable person to believe the encounter had escalated are the following:

1. Physical touching had occurred. Defendant and Driver had been personally searched. (The report is silent regarding 2nd passenger.)

2. During questioning of Defendant and Driver there was a coercive show of force:

a. there were 3 patrol cars and emergency lights continued to flash during the entire stop;

b. 4 officers were present with weapons;

c. 2 drug sniffing K-9s were present;

d. occupants were on the side of the road, not free to leave and were being detained for further questioning after the purpose for the initial stop and search of the passenger compartment of the vehicle had been completed;

e. occupants were not told they were free to leave.(PHT 35, 1-25.) In fact, Speeth had made it clear to them that they were detained. (PHT 14, 25.)

f. occupants were not told they did not have to answer questions. (PHT 41, 20-24.)

G. Speeth told Defendant that he was "aware of what was going on" (IR p. 10, para. 5.) And asked Defendant why he had lied. (PHT 13, 25.)

A reasonable person in this case, like Defendant in *Hansen*, would not believe he was free to leave. The encounter was not consensual and had escalated rather than de-escalated.

The prolonged illegal detention was a defacto arrest.

In *State v. Worwood*, 164 P.3d 398 (UT 2007), the Utah Supreme Court stated, "In considering the constitutionality of an investigative detention, we remain mindful of the Supreme Court's two initial justifications for allowing seizures based on reasonable suspicion, rather than on probable cause. First, a detention based on a reasonable and articulable suspicion is justified when the need to prevent 'imminent criminal activity . . . outweigh[s] the . . . privacy interests implicated by a limited [investigatory] stop.' Second, a detention is supposed to involve a 'wholly different kind of intrusion upon individual freedom' than a traditional arrest. Because a detention is supposed to be less intrusive than an arrest, we are particularly cognizant of the level of coercion involved, given the suspected crime." *Id.* at ¶ 24. (Quotes omitted.)

In *Worwood*, the defendant was stopped by an off duty officer who had observed the defendant outside of his truck with a "big wet spot on the road" and a can of beer behind the truck. Defendant got into the truck to allow the off duty officer to pass by in his vehicle. When the off duty officer pulled up beside defendant and spoke to him, he noticed

slurred speech, blood shot eyes and the odor of alcohol. Instead of conducting field sobriety tests at the scene. The off duty officer told the defendant, "[W]e'd better have a trooper look at you before you drive anymore." Off duty officer then used his own vehicle to transport the defendant to the off duty officer's home to have field sobriety tests conducted by an on duty officer. *Id.* at 402-03.

The Court concluded that the defendant's detention exceeded what would be justified under reasonable suspicion and was therefore a de facto arrest. *Id.* at 407. The Court used the analysis in *State v. Chism* that "[i]nvestigative acts that are not reasonably related to dispelling or resolving the articulated grounds for the stop are permissible only if they do not add to the delay already lawfully experienced and do not represent any further intrusion on the detainee's rights." *State v. Chism*, 2005 UT App 41, ¶ 15, 107 P.3d 706 (citation, internal quotation marks, and brackets omitted). *Id.* at 408. "The reasonableness of a detention should be evaluated on the basis of the totality of the circumstances facing the officer ..." and added that the court should consider whether the 'circumstances, viewed objectively', justify the officer's actions. *Id.* at 408.

The Court concluded that the off duty officer's transporting the defendant changed the level of coercion involved in an investigative detention to a degree no longer justified

under reasonable suspicion and the detention had escalated into a de facto arrest. Thus, the required level of justification changed from reasonable suspicion to probable cause. *Id.*

The Court then determined whether the off duty officer had established probable cause to justify a de facto arrest. "Probable cause exists where the facts and circumstances within the officer's knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief than an offense has been or is being committed." *Id.* at 409.

In the present case, Speeth continued to illegaly detain the Defendant after the purpose for the K-9 search had been concluded. Defendant should have been allowed to proceed on his way. Speeth could not articulate any reasonable belief that a crime had been or was being committed. Speeth had no trustworthy information to believe a crime had been or was being committed, except to state that based on the inconsistent statements by Defendant, Driver and 2nd passenger regarding the hotel room and their statements they were going to Provo, Speeth "made it clear they were detained". (PHT 14.) Therefore, the continued detention amounted to a de facto arrest without probable cause and without Miranda warnings. (PHT 41, 10-14.)

Consent to search the hotel room was not voluntary.

"The appropriate standard to determine voluntariness is the totality of the circumstance test, and the burden of proof is by preponderance of the evidence. *United States v. Matlock*, 415 U.S. 164, 177 n. 14, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974)." *Hansen* at 664.

"The totality of the circumstances must show consent was given without duress or coercion...a person's will cannot be overborne, nor may 'his capacity for self-determination [be] critically impaired.' *Schneckloth*, 412 U.S. at 248, 93 S.Ct. 2041. Further, we have stated that

> [f]actors which may show a lack of duress or coercion include: 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.*

Here, factors 2, 3, 4 and 5 are relevant. Factor 2, there was an exhibition of force by the officers that included the presence of 4 officers and 2 K-9s , 3 patrol vehicles with emergency lights flashing during the entire period of the stop. (See Statement of Relevant Facts, 13.) Factor 3,Speeth told Defendant that he "was aware of what was going on" and

that Defendant was not being truthful. (PHT 40, 11-17.) Then, Speeth requested consent from Defendant to search the hotel room. Therefore, the request for consent was not a "mere request". Factor 4, Defendant originally did not cooperate with Speeth's request to search the hotel room. Defendant told Speeth that he "was not comfortable with that". Factor 5, consent was obtained by deception or trick when Speeth asked Defendant if he would consent to the search of the room if Driver and 2nd passenger would allow the search. Speeth knew that the room was registered to Defendant and that Driver and passenger had no standing to consent or deny a search of the room. Therefore, consent was obtained through deception or trick on the part of Speeth when consent was originally not given.

Therefore, under the totality of the circumstance of the *Hansen* factors, consent was not valid because it was not obtained through valid means, but was obtained by duress and coercion.

Defendant's eventual involuntary consent was not sufficiently attenuated to dissipate the taint of the illegal detention.

In *Worwood*, the Court determined if evidence obtain is the result of exploitation of a prior police illegality that evidence may still be admitted if the discovery of the evidence is "sufficiently attenuated to dissipate the taint of the illegality. . . . Attenuation can occur

if the connection between the illegality and the evidence is too remote." If an event occurs that breaks the causal connection between the illegality and the discovered evidence, then the evidence will not be excluded. If the illegality is the "but for" cause of the discovery of the evidence, then the evidence could only be admitted if the discovery was sufficiently attenuated to dissipate the taint of the prior illegality. *State v. Worwood*, 164 P.3d 398, 411 (UT 2007).

In the case here, there was no break in the causal connection between the illegal detention of Defendant at the time of the initial stop or the subsequent continued illegal detention after the search of the vehicle and of Defendant's person that produced nothing illegal. Defendant should have been free to leave when the initial stop occurred and, certainly, after the search of the vehicle and his person produced nothing illegal. Speeth had no information that Defendant had committed or was about to commit a crime. The continued illegal detention and interrogative questioning was a de facto arrest and an exploitation of the illegal detention was the "but for cause" of Speeth's requested consent from Defendant to search the hotel room.

The Exclusionary Rule demands suppression of all evidence discovered as a result of the illegal detention.

The United States Supreme Court has long held that illegally obtained evidence is inadmissible through operation of the exclusionary rule. *Weeks v. United States*, 232 U.S. 383, 398 (1914). Further, the Utah Supreme Court has upheld application of the rule with reference to the federal and state constitution:

> Implicit in, but fundamental to, this court's treatment of the legal issue in Louden, Montayne, Criscola, Kent, and other cases is the principle that if evidence used against the Defendant had been found to have been acquired in violation of constitutional guarantees, its exclusion would be inevitably required. ... We now expressly hold that *exclusion of illegally obtained evidence is a necessary consequence of police violations* of article I, section 14.

Lorocco, 794 P.2d at 471 (emphasis added).

As the detention of Defendant's person in this case was conducted in violation of his right to be free from search and seizure, was a de facto arrest without probable cause, and consent was obtained by duress and coercion without de-escalation or sufficient attenuation, the exclusionary rule should bar the admissibility of all evidence found as a result of the seizure, de facto arrest, and involuntary consent.

Conclusion

Defendant's detention went beyond the permissible scope allowed by the search and seizure principles guaranteed by the Fourth Amendment of the United States Constitution and Article I, Section 14 of the Utah Constitution. Additionally, Defendant's

subsequent consent to search the hotel room was illegally obtained under *Hansen*, there was no probable cause for the de facto arrest, and the illegality of the evidence obtained was not sufficiently attenuated.

WHEREFORE, Defendant requests that the Court suppress all evidence obtained as a result of the unconstitutional actions of all officers involved with Defendant's arrest.

Dated this 22 day of September, 2009.

Barbara A. Gonzales
Attorney for Defendant

CERTIFICATE OF HAND DELIVERY

I hereby certify that I caused to be hand delivered a copy of the foregoing Motion to Suppress and Memorandum in Support of Motion to Suppress to David Sturgill, Deputy Utah County Attorney, 100 East Center, Suite 2100, Provo, Utah 84606.

Dated this 22 day of Sept., 2009.