

1999

Utah v. Shayne M. Hansen : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff and Appellee,

vs.

SHAYNE M. HANSEN,

Defendant and Appellant.

Case No. 990987-CA

Priority No. 2

BRIEF OF APPELLEE

**AN APPEAL FROM A JUDGMENT OF CONVICTION FOR UNLAWFUL
POSSESSION OF A CONTROLLED SUBSTANCE, A THIRD DEGREE
FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37-8(2)(A)(I) (SUPP.
1998), IN THE THIRD JUDICIAL DISTRICT COURT OF UTAH, SALT
LAKE COUNT, THE HONORABLE LESLIE A. LEWIS PRESIDING**

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JUN 19 2000

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Clerk of the Court**

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff and Appellee,

vs.

SHAYNE M. HANSEN,

Defendant and Appellant.

Case No. 990987-CA

Priority No. 2

BRIEF OF APPELLEE

* * *

STATEMENT OF JURISDICTION

The defendant appeals from a judgment of conviction for unlawful possession of a controlled substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (Supp. 1998). This Court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(e) (1996).

STATEMENT OF THE ISSUES

The sole issue on appeal is whether the trial court erred in denying defendant's motion to suppress alleging that the police officer's search violated defendant's Fourth Amendment rights against unreasonable searches and seizures.

Standard of Review. "The factual findings underlying a trial court's decision to grant or deny a motion to suppress evidence are reviewed under the deferential clearly-erroneous standard, and the legal conclusions are reviewed for correctness, with a measure of discretion

given to the trial judge's application of the legal standard to the facts." *State v. Moreno*, 910 P.2d 1245, 1247 (Utah App.), *cert. denied*, 916 P.2d 909 (Utah 1996).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The application of the Fourth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, is determinative of the appeal. The Fourth Amendment 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.

U.S. Const., amend. IV.

STATEMENT OF THE CASE

SUMMARY OF PROCEEDINGS BELOW

Defendant was charged by information with unlawful possession of a controlled substance, a third degree felony, and unlawful possession of drug paraphernalia, a class B misdemeanor. R. 02. A warrant was issued for defendant's arrest when he failed to appear for the preliminary hearing. R. 12-13. A week later, defendant was arrested and booked into jail. R. 16. After holding a preliminary hearing, the trial court bound defendant over for trial on both counts. R. 20. Thereafter, defendant moved to suppress the evidence obtained by police from a search of his vehicle. R. 23-24. Following an evidentiary hearing, the trial court denied defendant's motion. R. 51, 63-69, 84.

Pursuant to *State v. Sery*, 758 P.2d 935 (Utah App. 1988), defendant entered a conditional plea of guilty to unlawful possession of a controlled substance and the misdemeanor charge was dismissed. R. 52, 55-62; R. 85: 5, 15-16. In entering his plea, defendant reserved his right to appeal the adverse ruling on his motion to suppress. R. 55, 58; R. 85: 16. The trial court sentenced defendant to an indeterminate prison term of zero-to-five years, but suspended imposition of the prison term and placed defendant on supervised probation. R. 70-72; R. 86: 9-10. Defendant timely appealed. R. 74.

SUMMARY OF FACTS

While on patrol in the late evening of December 11, 1998, Officer Bruce Huntington observed defendant driving southbound on Holden Street in Midvale. R. 84: 7-8 (suppression hearing transcript). Officer Huntington initiated a computer check of defendant's license plate with the database for the Utah Department of Motor Vehicles (DMV). R. 84: 7, 10. While Officer Huntington waited for the computer check, defendant turned left (east) onto Main Street. R. 84: 7-8. However, rather than turning into the inside or extreme left-hand eastbound lane of Main Street as required under section 41-6-66, Utah Code Annotated, defendant turned into the far outside eastbound lane. R. 84: 7-10. After Officer Huntington observed the illegal turn, the computer check revealed that defendant's car was not insured. R. 84: 7, 10.

Officer Huntington activated his overhead emergency lights to initiate a traffic stop. R. 84: 7, 11. Defendant pulled into the parking lot of a convenience store and Officer Huntington parked behind defendant. R. 84: 7, 11, 14. Upon approaching defendant's car,

Officer Huntington observed defendant in the driver's seat and another male in the front passenger seat. R. 84: 12. Officer Huntington advised defendant of the purpose of the stop and defendant admitted that he had no insurance. R. 84: 12-13. After obtaining defendant's driver's license and registration, Officer Huntington returned to his patrol car to check on the status of his license and for any outstanding warrants. R. 84: 13, 29. After approximately five minutes, the computer check revealed a valid driver's license and no outstanding warrants. R. 84: 13. After receiving the information from the computer check, Officer Huntington promptly returned to defendant's car. R. 84: 13-14. At that point, another officer pulled into the parking lot and parked along side Officer Huntington. R. 84: 14-15. The second officer exited his car and walked to the passenger door of Officer Huntington's car where he remained while Officer Huntington spoke with defendant. R. 84: 15-16.

Upon returning to defendant's car, Officer Huntington instructed defendant to obtain insurance and to have his insurance agent notify DMV. R. 84: 16-17, 35, 43-44. After so warning defendant, Officer Huntington returned defendant's license and registration. R. 84: 16-17, 29. Although defendant was then free to leave, Officer Huntington asked defendant if he had any alcohol, drugs, or weapons in the car. R. 84: 17-18. After defendant indicated that he did not, Officer Huntington asked for and obtained defendant's consent to search the car. R. 84: 17-18. In seeking consent to search, Officer Huntington used a normal tone of voice and did not make any promises or threats. R. 84: 18. Although Officer Huntington was armed with a firearm, he did not pull it out during the stop or search. R. 84: 19.

After defendant gave his consent to search, he and his passenger exited the car. R. 84: 18-19. When defendant opened the door, Officer Huntington observed a “billy club” on the floorboard between the door and driver’s seat. R. 84: 20, 41. Officer Huntington then did a brief search of defendant’s person for weapons and found none. R. 84: 23, 41. At Officer Huntington’s request, defendant walked to the patrol car where the second officer was standing while Officer Huntington conducted the search. R. 84: 19-20. A search of defendant’s car revealed a marijuana pipe, smelling of marijuana, on the floorboard in the driver’s area. R. 84: 20-21. When questioned about the marijuana pipe, defendant told Officer Huntington that it belonged to him. R. 84: 20-21. Not more 15 minutes had elapsed from the time Officer Huntington activated his emergency lights to the time he found the billy club on the floorboard. R. 84: 23. Officer Huntington then took defendant into custody, advising him that he was under arrest and placing him in handcuffs. R. 84: 22. Officer Huntington searched defendant incident to his arrest and found methamphetamine in his pocket. R. 56; R. 84: 22; R. 85: 10-11.¹

SUMMARY OF ARGUMENT

This Court should no longer rely on the language in *United States v. Abbott*, 546 F.2d 883 (10th Cir. 1977), as the analytical framework for determining whether a consent to search is voluntary. The requirements articulated in *Abbott* applied to the broader issue of whether a search was valid pursuant to an *alleged* consent. *Abbott* thus intertwined the

¹Officer Huntington testified that he found a controlled substance on defendant’s person in a search incident to arrest. R. 84: 22. Defendant admitted at the plea hearing that the substance was methamphetamine. R. 56; R. 85:10-11.

requirements for finding consent with the requirements for finding voluntariness. The intertwining of those requirements is of no consequence in the Tenth Circuit because it reviews for clear error both the trial court's finding of consent and the trial court's finding of voluntariness. However, under Utah law, those requirements must be clearly distinguished because of the appellate court's bifurcated review in consent cases. The trial court's finding that defendant consented to the search of his car is reviewed by this Court for clear error. The trial court's determination that the consent was voluntary is reviewed for correctness. Moreover, the *Abbott* presumption against a finding of voluntariness has since been rejected by the Tenth Circuit and is contrary to United States Supreme Court precedent. In this case, the trial court's finding that defendant consented to Officer Huntington's request to search the car was not clearly erroneous, but was supported by the unequivocal testimony of Officer Huntington. Moreover, because the evidence demonstrated that the officer did not coerce defendant into consenting, the trial court correctly concluded that defendant's consent was voluntary.

Nor was defendant's consent the result of a prior illegality. The detention of defendant terminated after Officer Huntington warned defendant to obtain insurance and returned to defendant his license and registration. Defendant voluntarily chose to respond to the officer's questioning after the detention terminated.

ARGUMENT

On appeal, defendant claims that the trial court erred in denying his motion to suppress the methamphetamine discovered in the search. Aplt. Brf. at 11. Defendant argues

that the warrantless search of his car violated his Fourth Amendment right against unreasonable searches and seizures, contending that police did not obtain a valid consent to search the vehicle and that, in any event, the consent was tainted by the prior illegal detention. *See* Aplt. Brf. at 13-17, 19-27. Contrary to defendant's claim, however, the evidence was more than sufficient to establish defendant's voluntary consent to search his car. Moreover, because the questions posed by Officer Huntington were made after defendant was free to leave, they did not violate defendant's Fourth Amendment rights. Accordingly, this Court should affirm defendant's conviction.

* * *

"Searches conducted 'outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" *State v. Arroyo*, 796 P.2d 684, 687 (Utah 1990) (*quoting Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514 (1967)). "[O]ne of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043-44 (1973). *Accord State v. Bredehoft*, 966 P.2d 285, 292 (Utah App. 1998).

Evidence seized in a consent search will be admissible in court if: (1) the consent was voluntary, and (2) the consent was not obtained by police exploitation of a prior illegality. *Arroyo*, 796 P.2d at 688. In this case, defendant's consent was voluntary and was not obtained as the result of a prior illegality.

I. THE SEARCH OF DEFENDANT’S CAR WAS JUSTIFIED UNDER THE CONSENT EXCEPTION TO THE WARRANT AND PROBABLE CAUSE REQUIREMENT.

A. Legal Analysis of Consent Searches.

On appeal, defendant argues that this Court’s decision in *State v. Ham*, 910 P.2d 433 (Utah App. 1996), establishes the analytical framework for determining whether the consent was voluntary. Aplt. Brf. at 12-13. *Ham* relies on language from the 1977 Tenth Circuit decision in *United States v. Abbott*, 546 F.2d 883 (10th Cir. 1977), for the standard by which voluntariness of a consent is analyzed. Quoting *Abbott*, the Court in *Ham* held that the following three requirements must be met to establish that voluntary consent was given:

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

Ham, 910 P.2d at 439 (quoting *Abbott*, 546 F.2d at 885) (other citations omitted). *Ham* is the most recent of a series of decisions by this Court which applies the *Abbott* standard to voluntariness determinations. See, e.g., *State v. Genovesi*, 871 P.2d 547, 551 (Utah App. 1994); *State v. Harmon*, 854 P.2d 1037, 1040 (Utah App. 1993), *aff’d*, 910 P.2d 1196 (Utah 1996); *State v. Carter*, 812 P.2d 460, 467 (Utah App. 1991); *State v. Grovier*, 808 P.2d 133, 136 (Utah App. 1991); *State v. Sterger*, 808 P.2d 122, 127 (Utah App. 1991); *State v. Marshall*, 791 P.2d 880, 887-88 (Utah App. 1990); *State v. Webb*, 790 P.2d 65, 82 (Utah

App. 1990). The Utah Supreme Court, however, has never adopted the *Abbott* standard in assessing the voluntariness of a consent.²

A close examination of the *Abbott* decision itself, in light of both federal and state law, suggests that the Court should no longer rely on the *Abbott* standard in analyzing the voluntariness of a consent search. Continued reliance on the *Abbott* standard is problematic for two reasons. First, the third *Abbott* requirement creating a presumption against waiver has since been rejected by the Tenth Circuit and is contrary to United States Supreme Court precedent. Second, the remaining two requirements co-mingle the issue of whether consent was in fact given with the issue of whether any consent given was voluntary. This co-mingling of the issues is significant because unlike the Tenth Circuit, Utah appellate courts review the trial court's determination of voluntariness for correctness.

1. No Presumption Exists Against a Voluntary Consent.

The third prong of the *Abbott* standard as adopted in *Ham* and other appellate decisions of this Court is that the court must “indulge every reasonable presumption against the waiver of fundamental constitutional rights and there must be convincing evidence that such rights were waived.” *Abbott*, 546 F.2d at 885. Four years later, however, the United States Supreme Court in *Schneckloth* held that “unlike those constitutional guarantees that protect a defendant at trial, it *cannot* be said every reasonable presumption ought to be

²Although the Utah Court of Appeals applied the *Abbott* standard in *Harmon*, 854 P.2d at 1040, in affirming that decision, the Utah Supreme Court did not adopt that standard. *See State v. Harmon*, 910 P.2d 1196, 1206-08 (Utah 1996). Instead, the Utah Supreme Court focused solely on whether the consent was “the product of duress and coercion.” *Id.* at 1206.

indulged against voluntary relinquishment” of the right against searches. 412 U.S. at 242-43, 93 S.Ct. at 2056 (emphasis added). Citing *Schneckloth*, the Tenth Circuit abandoned the third *Abbott* requirement in 1991, holding that “a district court determining the admissibility of evidence should not presume a defendant’s consent to a search is either involuntary or voluntary.” *United States v. Price*, 925 F.2d 1268, 1271 (10th Cir. 1991) (citing *Schneckloth*, 412 U.S. at 242-43, 93 S.Ct. at 2055-56); accord *United States v. Hernandez*, 93 F.3d 1493, 1500 (10th Cir. 1996).

Given the Supreme Court’s holding that such a presumption should not be given and the Tenth Circuit’s subsequent abandonment of the presumption, this Court is constrained to now abandon that requirement as well.

2. The Factual Determination of Whether a Consent is Unequivocal and Specific Is Distinct from the Legal Determination of Whether a Consent is Voluntary.

The Tenth Circuit’s concern in *Abbott* was not confined to the voluntariness of the consent, but included the sufficiency of the evidence establishing that consent was given at all. As such, in setting forth the standard for determining whether the search was justified under the consent exception, the Tenth Circuit intermingled the requirements for finding the existence of a consent to search with the requirements for finding that any consent given was voluntary.

Voluntary consent presupposes consent. The *Abbott* requirement that consent be “unequivocal and specific” simply requires the State to establish the existence and scope of the consent. Once consent is demonstrated, the State must establish that the consent was

voluntary—that it was given freely, without duress or coercion. Whether consent was in fact given, and the scope of that consent, are underlying factual issues separate from the legal issue of voluntariness. Accordingly, when determining whether a defendant actually consented to a particular search, this Court will not upset the trial court’s factual findings in that regard unless they are clearly erroneous. *Ham*, 910 P.2d at 438. Once those factual issues are addressed, the Court may then turn to the legal determination of whether the consent given was voluntary. *State v. Thurman*, 846 P.2d 1256, 1271 (Utah 1993).

The Abbott Standard. *In Abbott*, the defendant was placed in jail and his car was impounded following his arrest for illegal automobile registration and possession of a weapon. *Abbott*, 546 F.2d at 884. After Abbott’s arrest, his wife went to the impound garage seeking release of the car. *Id.* At the garage, she and an officer unsuccessfully searched the car’s passenger compartment for the title to the car. *Id.* Because she did not have a trunk key, she was unable to look in the trunk of the car for the title, and returned home to look for the key. *Id.* After she left, an officer located a key in the lining of Abbott’s coat pocket. *Id.* Although Abbott’s wife had not returned, the officer nevertheless opened the trunk where he discovered a .30 caliber carbine which became the subject of Abbott’s prosecution. *Id.* The trial court denied Abbott’s motion to suppress the evidence, finding that Abbott’s wife implicitly consented to the officer’s search of the trunk. *Id.* at 884.

In reversing the trial court, the Tenth Circuit held that the aforementioned requirements were necessary to “sustain the burden required of the government to establish justification for a warrantless search” pursuant to a consent. *Id.* at 885. The court did *not*

characterize the standard solely in terms of assessing the voluntariness of a consent—though voluntariness was certainly a key component. The *Abbott* test required the government to first establish that the consent was actually given to search the defendant’ trunk, and second, to establish that any consent given was voluntary.

In articulating the standard by which consent searches are judged, the Tenth Circuit in *Abbott* cited to *Villano v. United States*, 310 F.2d 680 (10th Cir. 1962). *Abbott*, 546 F.2d at 885. As in *Abbott*, the court in *Villano* addressed the broader question of whether evidence seized in a warrantless search was constitutionally admissible pursuant to an alleged consent. *Villano*, 310 F.2d at 684. *Villano* summarized the government’s burden as follows:

The government must prove that consent was given. It must show that there was no duress or coercion, express or implied. The consent must be unequivocal and specific and freely and intelligently given. There must be convincing evidence that defendant has waived his rights. There must be clear and positive testimony. Courts indulge every reasonable presumption against waiver of fundamental constitutional rights. Coercion is implicit in situations where consent is obtained under color of the badge, and the government must show that there was no coercion in fact.

Id. (internal quotations and citations omitted). Although the *Villano* articulation of the standard is only slightly better, its clarity greatly increases when broken up as follows:

The government must prove that consent was given. It must show that there was no duress or coercion, express or implied. [In other words,] [t]he consent must be unequivocal and specific and freely and intelligently given.

There must be convincing evidence that defendant has waived his rights. There must be clear and positive testimony. Courts indulge every reasonable presumption against waiver of fundamental constitutional rights. Coercion is implicit in situations where consent is obtained under color of the badge, and the government must show that there was no coercion in fact.

Id. Organized in this manner, it is apparent that the certainty and specificity of the consent have nothing to do with the voluntariness of the consent, but are prerequisites to any consideration of voluntariness. The revised construction also reveals that the court required that *the testimony of waiver* be clear and positive. As discussed above, however, the Tenth Circuit no longer indulges in a presumption against waiver.

In summary, the appropriate standard by which consent searches should be judged is best articulated as follows:

Evidence seized in a search is admissible under the consent exception to the warrant requirement only if the State meets a two-part test. First, the State must “prove that consent was given.” *Villano*, 310 F.2d at 684. The consent must be “unequivocal and specific.” *Abbott*, 546 F.2d at 885. Second, the State must establish that the consent was voluntary. In other words, the State must “prove consent was given without duress or coercion, express or implied.” *Id.*

The two-part inquiry is consistent with United States Supreme Court precedent. In *Schneckloth*, the Supreme Court observed that Fourth Amendment concerns with respect to voluntariness of a consent to search are similar to due process concerns with respect to voluntariness of a confession. 412 U.S. at 225-27, 93 S.Ct. at 2047-48. Explaining the concerns in the context of a confession, the High Court noted:

The Due Process Clause does not mandate that the police forgo all questioning, or that they be given carte blanche to extract what they can from a suspect. “The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: *the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker?* If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.”

412 U.S. at 225-26, 93 S.Ct. at 2047 (*quoting Culombe v. Connecticut*, 367 U.S. 568, 602, 81 S.Ct. 1860, 1879 (19--)) (emphasis added). The Supreme Court concluded that no reason existed “to depart in the area of consent searches, from the traditional definition of ‘voluntariness.’” *Id.* at 229, 93 S.Ct. at 2049. As such, the Court observed, “***the Fourth and Fourteenth Amendments [simply] require that a consent [to search] not be coerced, by explicit or implicit means, by implied threat or covert force.***” *Id.* at 228, 93 S.Ct. at 2048 (emphasis added). Thus, “if under all the circumstances it has appeared that the consent was not given voluntarily--that it was coerced by threats or force, or granted only in submission to a claim of lawful authority--then [the Court will find] the consent invalid and the search unreasonable.” *Id.* at 233, 93 S.Ct. at 2051.

Abbott’s requirement that the consent be freely given and made “without duress or coercion, express or implied,” is consistent with the holding in *Schneckloth*. *Abbott*’s requirement that the consent be “unequivocal and specific” goes to the underlying factual issues of whether any consent was in fact given, and if so, the scope of that consent. In short, the certainty and specificity of the consent have nothing to do with the voluntariness of the consent, and *Abbott* did not suggest otherwise.³

³Subsequent Tenth Circuit decisions have included the certainty and specificity requirement in the test for voluntariness. *See, e.g., United States v. Soto*, 988 F.2d 1548, 1557 (10th Cir. 1993). However, as discussed below, the intertwining of requirements that the State establish unequivocal and specific consent with requirements that the State demonstrate the consent was given freely without duress or coercion is of no consequence in the Tenth Circuit.

Bifurcated Standard of Appellate Review. The co-mingling of the inquiries regarding the existence and scope of consent with the inquiry regarding voluntariness of consent is significant because Utah appellate courts apply a different standard of review to voluntariness determinations than that applied by the Tenth Circuit. The Tenth Circuit reviews the trial court's determination that a consent to search was voluntary or involuntary under a clearly erroneous standard. *United States v. Gutierrez-Hermosillo*, 142 F.3d 1225, 1231 (10th Cir. 1998). Utah appellate courts, on the other hand, review the trial court's determination regarding the voluntariness of a consent under a correctness standard. *Thurman*, 846 P.2d at 1271. This distinction is critical when applying the *Abbott* standard to inquiries regarding the voluntariness of a consent.

In the Tenth Circuit, the trial court's determinations regarding the fact of consent, the scope of consent, and the voluntariness of consent are all findings of fact reviewed for clear error. See *Gutierrez-Hermosillo*, 142 F.3d at 1231. Accordingly, any intertwining in the *Abbott* standard of requirements for finding the existence and scope of consent with requirements for finding the voluntariness of consent is of no consequence.

In Utah, however, the consequences of such intertwining is critical. While the determination regarding the voluntariness of consent is reviewed for correctness, the underlying factual issues, *including* "whether a defendant actually consented to a search," are reviewed for clear error. *Ham*, 910 P.2d at 438. Blending factual issues like the existence and scope of consent into the question of voluntariness can lead to absurd results—as it did in *Ham*.

In that case, the Court observed that both agents “testified that defendant did in fact consent to the search.” *Id.* The Court noted that the defendant’s testimony was not substantially inconsistent with that of the agents, testifying “that he ‘simply complied’ with the agent’s request [to search] and did not ‘offer any resistance or . . . voice any objection.’” *Id.* at 438 & n. 7. However, the Court then held that the trial court was entitled to discredit the defendant’s testimony and concluded that the finding of consent was not clearly erroneous. *Id.* at 438. However, in finding that the consent was involuntary, the Court continued its focus on the trial court’s finding of consent. *Id.* at 439-40. After examining the testimony, the Court determined that the evidence showed that the agents “themselves [were] not sure whether defendant gave any type of consent at all.” *Id.* at 440. The Court then concluded that their testimony was “not ‘clear and positive’ testimony [of unequivocal and specific consent] which is necessary to meet the State’s burden.” *Id.* Thus, on the one hand, the Court found the evidence sufficient to support a finding of consent, and on the other hand, it found the evidence insufficient to support a finding of consent.

As discussed above, whether or not consent is unequivocal and specific does not address the constitutional concern of voluntariness, but the underlying factual issues of whether consent was in fact given, and if so, its scope. Accordingly, the Court in *Ham* should have limited its review of those issues to the clearly erroneous standard, deciding whether or not it was clear error for the trial court to find consent based on the agents’ equivocal testimony.

The Court's conclusion that the consent was not voluntary was best supported by its observation that the agents never made a genuine request for consent to search, but instead stated that they "need[ed] to search the refrigerator for alcohol." *Id.* at 440. The Court concluded the statement constituted "a claim of authority to search by the agents, supporting the existence of coercion or duress." *Id.* Such is the proper concern of the court when examining the nature of a consent to search under the Fourth Amendment. *See Schneckloth*, 412 U.S. at 233, 93 S.Ct. at 2051.

Reviewing for clear error a trial court's determination regarding the existence or scope of a consent to search is also consistent with the underlying rationale for such review. In *Thurman*, the Utah Supreme Court held that a correctness standard should be applied to the voluntariness determination because "the concept of 'voluntariness' reflects a balance between the need for effective law enforcement and society's belief that the coercive powers of law enforcement must not be unfairly exercised." 846 P.2d at 1271. The Court reasoned that in striking that balance, the appellate courts are in the best position to establish norms based on substantive policy fixing the limits of acceptable police behavior. *Id.* In this way, it will be less likely that "what constitutes unfairly coercive police behavior [will] not vary from courtroom to courtroom in Utah." *Id.*

On the other hand, the determinations of whether consent was given and the scope of consent do not involve any competing policy interests which must be balanced. They are fact-sensitive issues only and the trial judge is in the best position to make those fact determinations. *See id.* at 1271. As once observed by this Court, "[b]ecause 'the truth is

rarely pure and never simple,’ the trial judge is in the best position to sift witness credibility and the accuracy of conflicting evidence.” *State v. Vigil*, 815 P.2d 1296, 1299 (Utah App. 1991). Indeed, the trial judge was in the best position to determine whether defendant actually consented to the search and the scope of that consent—determining what the defendant intended by his language or by his actions.

B. The Trial Court’s Finding That Defendant Consented to the Officer’s Request to Search His Car Was Not Clearly Erroneous.

Defendant challenges the following findings of fact by the trial court:

27. [After asking defendant whether he had any drugs, weapons, or paraphernalia in the car,]⁴ Officer Huntington then asked defendant whether he could search his car.

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

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

R. 66; Aplt. Brf. at 14. Contrary to defendant’s claim on appeal, those findings are supported by the record and are not, therefore, clearly erroneous.

1. The Evidence Was Sufficient to Sustain the Court’s Finding that Officer Huntington Asked for Consent to Search the Car.

Defendant’s challenge to paragraph 27, in which the court found that Officer Huntington asked defendant whether he could search the car, is frivolous. Officer Huntington testified that after returning to defendant his driver’s license and registration, he

⁴Although the trial court found that the officer asked if he had any drugs, weapons, or paraphernalia in the car, the officer testified that he asked if he had “any alcohol, weapons or drugs” in the car. R. 84: 17.

“asked him for consent to search the vehicle.” R. 84: 16. In explaining the nature of his warning for no insurance, Officer Huntington again testified that he “asked [defendant] for consent.” R. 84: 17. He further testified that after asking whether or not a driver has any alcohol, weapons, or drugs in the vehicle, it was his practice to ask the driver if he “mind[ed] if [he] check[ed]?” R. 84: 17. He responded in the affirmative when the prosecutor queried whether he asked defendant if he minded if he checked the car. R. 84: 18. Officer Huntington confirmed at least two more times that he asked for consent to search defendant’s car. R. 84: 18 (explaining the tone of voice he used in asking if he could check the car), 38-39 (affirming on cross-examination that he asked defendant if he could search the car). No evidence was introduced indicating that Officer Huntington did not seek consent to search. The evidence, therefore, was more than sufficient to support the trial court’s finding in paragraph 27.

2. The Evidence Was Sufficient to Sustain the Court’s Finding That Officer Huntington’s Request to Search the Car Was Permissive and Did Not Otherwise Suggest That He Had a Right to Search.

Defendant also challenges the trial court’s finding in paragraph 28 that the officer’s request to search the car “was permissive and did not suggest that he had a right to search.” R. 66; Aplt. Brf. at 15. Again, defendant’s claim lacks merit. Nothing in the officer’s questioning suggested that he had a right to search or that defendant was required to consent. Officer Huntington used the same tone of voice as he used in court. R. 84: 18. He made no threats or promises. R. 84: 18. Nothing in a question asking defendant if he would consent

to a search or if he minded if the officer checked for drugs, alcohol, or weapons suggests that defendant was required to consent. Accordingly, the trial court's finding in paragraph 28 is also supported by the record.

3. The Evidence Is Sufficient to Sustain the Court's Finding That Defendant Consented to the Search.

Finally, defendant claims that the record did not support the trial court's finding in paragraph 29 that "[d]efendant clearly and unequivocally said 'yes,' permitting the search." R. 66; Aplt. Brf. at 14-15. Again, however, contrary to defendant's contention, the record does not support defendant's claim. The following exchange took place during the State's direct examination of Officer Huntington:

<u>Prosecutor</u>	And when you asked him for consent, do you recall now exactly how you phrased that?
<u>Officer</u>	It's my practice to ask them for consent by stating, Do you have any alcohol, weapons or drugs in the vehicle? And if they say no, I say, Well, do you mind if I check?
<u>Prosecutor</u>	Do you recall Mr. Hansen responding to your question?
<u>Officer</u>	<i>He did give me consent.</i>
<u>Prosecutor</u>	Well first, with respect to the question as to whether he had those items in his car.
<u>Officer</u>	No. He said no.
<u>Prosecutor</u>	He said no.
<u>The Court</u>	And the query again, Officer, was, Do you have any—
<u>Officer</u>	Alcohol, drugs or weapons.
<u>Prosecutor</u>	To which Mr. Hansen said no?
<u>Officer</u>	That's correct.
<u>Prosecutor</u>	And then you asked, [""]Do you mind if I check?[""]
<u>Officer</u>	Uh-huh.

Prosecutor And what was his response to that question?

Officer He said yes.

Prosecutor Yes, he minded?

Officer *Yes, I could have consent to search.*

R. 84: 17-18 (emphasis added). Accordingly, Officer Huntington twice verified that defendant consented to the search. He testified that when he asked if he could search the car, defendant “did give me consent.” R. 84: 17. Although Officer Huntington subsequently appeared to testify that defendant gave a contradictory response when asked if defendant minded if he searched the car, Officer Huntington clarified that defendant responded, “Yes, I could have consent to search.” R. 84: 18.

On cross-examination, Officer Huntington again confirmed that defendant consented to the search:

Def. Counsel So [after defendant said he did not have drugs, alcohol, or weapons in the car,] you then indicated that you asked him if you could search the vehicle?

Officer I did.

Def. Counsel Do you recall specifically what you said to him?

Officer Not specifically.

Def. Counsel Do you have any idea?

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

Def. Counsel He said no?

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

Def. Counsel Okay.

Officer And then he said yes.

The Court He said?

Def. Counsel He says yes.

Officer Yes.

The Court Do you mind if I check and he said yes?

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

Def. Counsel So you said he gave you consent?

Officer *Yes, he did give me consent.*

Def. Counsel What did he say?

* * *

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

Def. Counsel So you don't recall his exact words?

Officer Not exactly.

Def. Counsel So you are assuming that he said yes?

Officer I assume that he said yes.

Def. Counsel That's what you're doing today . . . in terms of his response?

* * *

Officer I assume that he said yes.

Def. Counsel Nothing more than that?

Officer He probably could have said yes, go ahead.

Def. Counsel But you don't recall him saying that?

Officer I don't recall.

R. 84: 38-40 (emphasis added). Officer Huntington's testimony provided more than sufficient basis for the court's finding that defendant "clearly and unequivocally said 'yes,' permitting the search." R. 66. Common experience teaches that questions beginning with the words, "do you mind," are often answered in the affirmative even though the intent is to indicate that the speaker does not mind. The trial court is in the best position to assess the

meaning of defendant's response to Officer Huntington's inquiry. As he did on direct, Officer Huntington twice testified that defendant consented to the search. All that defense counsel established on cross-examination was that Officer Huntington did not recall "specifically" how he asked for consent and that he did not recall defendant's "exact" words. When asked on re-direct examination whether he "just [didn't] recall what the exact words were," Officer Huntington testified that he did not. R. 84: 43. Otherwise, Officer Huntington was undaunted in his testimony that defendant consented. Although Officer Huntington testified that he "assumed" defendant said yes, his assumption was to the wording only, not the consent. Thus, when defense counsel asked if the officer assumed nothing more than that defendant said yes, Officer Huntington testified that defendant "probably could have said yes, go ahead." R. 84: 40.

Officer Huntington's testimony is not like that of the agents in *Ham* as defendant suggests. In *Ham*, the agents "themselves were not sure whether defendant gave any type of consent at all." 910 P.2d at 440. After one agent testified that defendant did not respond to the other agent's announcement that he was going to search the refrigerator, he subsequently testified that defendant "might have" said "Go ahead." *Id.* The other agent was equally unsure, testifying that he "believe[d]" there was a response. *Id.* Although Officer Huntington did not recall the specific wording of the conversation, his testimony was clear and positive that defendant consented to the search. He did not waiver in that regard.⁵

⁵Given the clear and positive testimony from Officer Huntington, even if the Court continued to apply the less deferential *Abbott* standard, the court's finding of consent was correct.

In sum, Officer Huntington testified four times that defendant consented to his request to search the car. Although he did not recall the exact wording of the conversation, Officer Huntington was unequivocal in his testimony that consent was granted. Moreover, nothing in the questioning posed by Officer Huntington suggested that he had a right to search or that defendant was required to consent. As such, the trial court's challenged findings were not clearly erroneous.

C. The Trial Court Correctly Determined That Defendant's Consent Was Voluntary.

As discussed above, the United States Supreme Court in *Schneckloth* held that a consent is constitutionally invalid and the search unreasonable "if under all the circumstances it has appeared that the consent was not given voluntarily—that it was coerced by threats or force, or granted only in submission to a claim of lawful authority." 412 U.S. at 233, 93 S.Ct. at 2051. The Utah Supreme Court has identified the following factors which may show the consent was voluntary, and not the product of duress or coercion: "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." *State v. Whittenback*, 621 P.2d 103, 106 (Utah 1980).

A review of those factors in this case supports the trial court's conclusion that the consent was in fact voluntary. Officer Huntington claimed no right to search, but simply asked for consent to search. R. 84: 16-18. There was no evidence that the officer used

deception or trickery to obtain consent, making neither promises nor threats. R. 84: 18. Nor did Officer Huntington pull out or otherwise display his weapon. R. 84: 19. Although another officer had arrived at the scene, he remained standing next to Officer Huntington's patrol car, never approaching defendant. R. 84: 14-16. Officer Huntington used the same tone of voice as he did in the courtroom at the suppression hearing. R. 84: 18. Moreover, defendant was cooperative during the entire encounter. R. 84: 46. All these facts demonstrate that the trial court correctly concluded that defendant's consent was voluntary and nothing in the record suggests otherwise. Accordingly, the trial court correctly determined that the consent was voluntary.

II. Defendant's Consent to Search His Car Was Not Obtained by Police Exploitation of a Prior Illegality.

Having resolved that defendant's consent was voluntary, the Court must determine whether the consent was obtained by police exploitation of a prior illegality. *See Arroyo*, 796 P.2d at 688. Defendant claims that although Officer Huntington had completed the purpose of the stop, he impermissibly extended the detention by asking defendant whether he had any drugs, alcohol, or weapons in the car and requesting consent to search. *Aplt. Brf.* at 20. When Officer Huntington asked these questions, however, the detention had already terminated.

Traffic stops constitute a seizure subject to Fourth Amendment protection. *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S.Ct. 1391, 1396 (1979); *accord State v. Lopez*, 873 P.2d 1127, 1131 (Utah 1994); *State v. O'Brien*, 959 P.2d 647, 648-49 (Utah App. 1998).

However, the Fourth Amendment does not prohibit all searches and seizures, but only those that are unreasonable. *State v. Parker*, 834 P.2d 592, 594 (Utah App. 1992). The reasonableness of a traffic stop, like any other seizure, “is judged by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate government interests.” *Prouse*, 440 U.S. at 654, 99 S.Ct. at 1396 (footnote omitted).

Because “a traffic stop is limited and is more like an investigative detention than a custodial arrest,” it must satisfy the two-part test established by the United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968). *Parker*, 834 P.2d at 594 (citations omitted); *accord Lopez*, 873 P.2d at 1131-32. First, the stop must be “‘justified at its inception.’” *Lopez*, 873 P.2d at 1131-32 (*quoting Terry*, 392 U.S. at 19-20, 88 S.Ct. at 1879). Second, the resulting detention must be “‘reasonably related in scope to the circumstances that justified the interference in the first place.’” *Id.* (*quoting Terry*, 392 U.S. at 19-20, 88 S.Ct. at 1879). “[O]nce the reasons for the initial stop of the vehicle have been completed, the occupants must be allowed to proceed on their way.” *State v. Lovegren*, 829 P.2d 155, 158 (Utah App. 1992). “Further questioning is permissible only if (1) the encounter between the officer and the driver ceases to be a detention, but becomes consensual, and the driver voluntarily consents to additional questioning, or (2) during the traffic stop the officer gains a reasonable articulable suspicion that the driver is engaged in illegal activity.” *United States v. Mendez*, 118 F.3d 1426, 1429-30 (10th Cir. 1997) (internal quotations and citations omitted).

A traffic stop is justified at its inception if it is “incident to a traffic violation committed in the officer[’s] presence.” *State v. Talbot*, 792 P.2d 489, 491 (Utah App. 1990); accord *Lopez*, 873 P.2d at 1132. “Stopping a vehicle may also be justified when the officer has ‘reasonable articulable suspicion that the driver is committing a traffic offense, such as driving under the influence of alcohol or driving without a license . . . [or that] the driver is engaged in more serious criminal activity, such as transporting drugs.’” *Id.* (quoting *State v. Lopez*, 831 P.2d 1040, 1043 (Utah App. 1992)).

Defendant concedes that Officer Huntington was justified in making the stop. Aplt. Brf. at 20. Officer Huntington observed defendant make an improper left-hand turn and received information from his computer check that the car was not insured. R. 84: 7, 10. Accordingly, the first part of the *Terry* test is not at issue.

“Once a [valid] traffic stop is made, the detention ‘must be temporary and last no longer than is necessary to effectuate the purpose of the stop.’” *Id.* (quoting *Florida v. Royer*, 460 U.S. 491, 500, 103 S.Ct. 1319, 1325 (1983)). This Court has acknowledged that “[w]hen making a routine traffic stop, an officer may request a driver’s license and vehicle registration, conduct a computer check, and issue a citation.” *O’Brien*, 959 P.2d at 649 (citing *Lopez*, 873 P.2d at 1132). So too may an officer run a warrants check during the course of a routine traffic stop, “so long as it does not significantly extend the period of detention beyond that reasonably necessary to request a driver’s license and valid registration and to issue a citation.” *Lopez*, 873 P.2d at 1133.

In this case, Officer Huntington notified defendant of the purpose of the stop, obtained defendant's registration and license, ran a computer check for warrants and to verify licensing and registration information, promptly returned to defendant's car after running the computer check, warned defendant to get insurance, and gave back to defendant his driver's license and registration—all within a period of less than ten minutes. R. 66; R. 84: 13-14, 16-17, 29, 35, 43-44. As the above-mentioned cases make clear, Officer Huntington's actions were reasonably related to the legitimate purpose of the stop and defendant has not argued otherwise. *See* Aplt. Brf. at 20-21.

The trial court concluded that the return of defendant's documentation signaled the end of the detention—that “defendant was clearly free to leave” at that point. R. 66 (Findings of Fact and Conclusions of Law, ¶ 23). Defendant contends, however, that his detention continued beyond the return of his driver's license. Aplt. Brf. at 22-24. The trial court's conclusion is “reviewed for correctness, with a measure of discretion given to the trial judge's application of the legal standard to the facts.” *Moreno*, 910 P.2d at 1247.

The courts have recognized three levels of constitutionally permissible encounters between law enforcement and the public: (1) consensual encounters in which the person is free to leave, (2) brief investigatory stops based on articulable suspicion that the person has committed or is about to commit a crime, and (3) arrests based on probable cause. *Salt Lake City v. Ray*, 2000 UT App. 55, ¶ 10, 998 P.2d 274 (*citing State v. Dietman*, 739 P.2d 616, 617-18 (Utah 1997) (*per curiam*)). The issue here, therefore, is whether Officer Huntington's

return of the driver's license and registration converted the level-two detention of defendant into a level-one consensual encounter.

The Tenth Circuit has held that ““after an officer issues the citation and returns any materials provided, the driver is illegally detained only if the driver has objectively reasonable cause to believe that he or she is not free to leave.”” *United States v. Anderson*, 114 F.3d 1059, 1064 (10th Cir. 1997) (*quoting United States v. Shareef*, 100 F.3d 1491, 1501 (10th Cir. 1996)). The same rationale applies in the case of a warning. Once an officer gives a warning and returns any documentation provided by the driver, the driver is illegally detained only if the driver has objectively reasonable cause to believe that he or she is not free to leave.”” *Id.* (*quoting Shareef*, 100 F.3d at 1501); *see also State v. Jackson*, 805 P.2d 765, 767 (Utah App. 1990) (holding that the appropriate inquiry in determining whether or not a person has been seized is whether a reasonable person, in view of all the circumstances, would believe he or she was free to leave). Defendant has shown no such cause.

A level-two detention converts to a level-one, consensual encounter if, “either from the words of [the] officer or from the clear import of the circumstances,” a reasonable person would believe he or she is free to leave. *State v. Higgins*, 884 P.2d 1242, 1244 (Utah 1994). Factors that suggest a detention exists, or in the converse, that a detention has not ended, include “the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.” *United States v.*

Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877 (1980); *accord State v. Patefield*, 927 P.2d 655, 659 (Utah App. 1996); *Anderson*, 114 F.3d at 1059.

In this case, Officer Huntington had verbally warned defendant to obtain insurance and notify DMV. R. 84: 16-17, 35, 43-44. He had also returned to defendant his driver's license and registration documents. R. 84: 16-17, 29. Defendant was not surrounded by officers. R. 67 (Findings, ¶ 67). Although a second officer arrived after Officer Huntington had walked back to defendant's car, that officer simply parked along side Officer Huntington's car and waited for him there. R. 84: 14-15. He never approached defendant or his car, but stood next to the passenger door of Officer Huntington's patrol car. R. 84: 15-16. The third officer did not arrive at the scene until *after* defendant consented to a search. R. 84: 18-19. Although Officer Huntington was armed, he did not pull out his gun or otherwise display the weapon. R. 84: 19. Nor was there any evidence suggesting that he physically touched defendant or used any means of coercion. *See* R. 67 (Findings, ¶ 32); R. 84: 18-19. In short, Officer Huntington's verbal warning that defendant needed to obtain insurance and his return of defendant's registration and driver's license signaled the end of the detention such that a reasonable person would feel free to leave.

Defendant focuses on the fact that Officer Huntington did not expressly state how he would resolve the improper left-hand turn and that he did not use the word "warning." *Aplt. Brf.* at 23-24 & n. 5. The Fourth Amendment does not require particular language, or words at all, to signal the end of a detention. *See Higgins*, 884 P.2d at 1244. Indeed, any requirement that an officer expressly state that he is only issuing a warning or that he is not

going to cite the offender would be contrary to the reasoning of the United States Supreme Court in *United States v. Robinette*, 519 U.S. 33, 117 S.Ct. 417 (1996). In that case, the High Court expressly rejected as unrealistic any requirement that police officers “always inform detainees that they are free to go before a consent to search may be deemed voluntary.” *Id.* at 39-40, 117 S.Ct. at 421.

Accordingly, Officer Huntington was not required to expressly inform defendant that he was issuing a verbal warning or that he was not citing defendant. The clear import of his action in warning defendant to obtain insurance and in returning the documents was that defendant was free to leave. Contrary to defendant’s claim, Officer Huntington’s question as to whether defendant had any drugs, alcohol, or weapons in the car, and his follow-up request for permission to search the car—which could not have taken more than a few seconds—did not extend the level two detention. Officers are free to pose questions to the public and a citizen’s decision to answer the question does not escalate the encounter into a level two detention. *See State v. Jackson*, 805 P.2d 765, 768 (Utah App. 1990) (holding that a seizure did not occur by virtue of the officer’s request for identification), *cert. denied*, 815 P.2d 241 (Utah 1991).

In *Patefield*, an officer stopped a driver for a burnt out license plate bulb. 927 P.2d at 656. After the officer gave the driver a verbal warning to repair the broken light, the defendant offered to fix it. *Id.* at 656-57. The officer remained at the location, assisting the driver by holding a flashlight. *Id.* at 656. When the driver opened the sliding door of his van to retrieve a toolbox, the officer observed several open containers of beer in the van. *Id.* A

subsequent search of the van revealed marijuana. *Id.* at 657. This Court identified the issue as “whether, when viewed from an objective standard, someone in [the driver’s] position would reasonably have felt free to leave after [the officer] gave the equipment failure warning.” *Id.* at 659. Although no testimony was given indicating whether or not the defendant’s driver’s license was returned or that the defendant was free to leave, the Court nevertheless concluded that a reasonable person would have felt free to leave. *Id.* at 656, 659. In so concluding, the Court observed that nothing in the facts suggested that the officer compelled the driver to repair the light. *Id.* at 659.⁶ Indeed, as the Court noted, “[t]he record [was] void of any evidence suggesting that [the officer] ‘use[d] . . . language or [a] tone of voice’ demonstrating that [the driver] was compelled to fix the light on the spot.” *Id.* at 660 (*quoting Mendenhall*, 446 U.S. at 554, 100 S.Ct. at 1877) (all but first bracket in original).

Likewise in this case, nothing in the facts suggests that Officer Huntington used language or a tone of voice demonstrating that defendant was compelled to respond to his question or consent to a search. Officer Huntington used a normal tone of voice and did not make any threats or promises. R. 84: 18. As explained above, no show of force was made and the only other officer on the scene remained standing at Officer Huntington’s patrol car. R. 84: 14-16, 18-19. As such, the exchange was a consensual encounter in which defendant voluntarily chose to participate. The two brief questions did not extend the detention. The

⁶The defendant in *Patefield* had conceded that the officer “meant only to issue a verbal warning.” 927 P.2d at 659.


stop had ceased and defendant voluntarily consented to the questioning. Therefore, the evidence seized pursuant to the consent search was not tainted by a prior illegality.

CONCLUSION

For the foregoing reasons, the State respectfully requests the Court to affirm defendant's convictions.

Respectfully submitted this 19th day of June, 2000.

JAN GRAHAM
UTAH ATTORNEY GENERAL

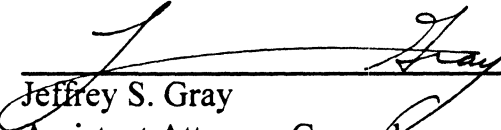


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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of June, 2000, I served two copies of the attached Brief of Appellee upon the defendant/appellant, SHAYNE M. HANSEN, by causing the same to be [] hand delivered [☒] mailed, via first class mail, postage prepaid, to his/her counsel of record, as follows:

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