

1999

Utah v. Shayne M. Hansen : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,

Plaintiff/Appellee,

v.

SHAYNE M. HANSEN,

Defendant/Appellant.

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Case No. 990987-CA
Priority No. 2

REPLY BRIEF OF APPELLANT

Appeal from a judgment of conviction for illegal possession/use of a controlled substance, a third degree felony offense in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (1998), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Leslie A. Lewis, Judge, presiding.

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v.	:	
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Case No. 990987-CA

Priority No. 2

On appeal, Defendant Shayne Hansen is challenging the trial court's ruling that he consented to a search of his car. Hansen maintains that the consent was unlawful in two respects: First, it was obtained in violation of State v. Ham, 910 P.2d 433, 438 (Utah App. 1996), where the state failed to present sufficient evidence to support consent; and second, the consent was obtained by police exploitation of a prior illegality.

In response to Hansen's arguments on appeal, the state has claimed the following: With respect to the sufficiency of the evidence, the state has asked this Court essentially to overrule Ham and/or to adopt a new standard of review for consent. That is unnecessary. The state's complaints with Ham are not relevant to this case. The state also has argued that Officer Huntington's conclusory statements concerning consent provide a sufficient basis for the trial court's ruling. The state's assertions are insupportable and should not be upheld for policy reasons. See infra point A, herein.

With respect to the exploitation analysis, Hansen maintains that the consent came on the heels of an unlawful, level-two encounter in violation of Terry v. Ohio, 392 U.S. 1

(1968). The state disagrees, and asserts that the consent was obtained during a level-one, consensual encounter. Thus, the state claims there was no prior illegality to the consent. The state's analysis concerning the matter disregards the total circumstances and should be disregarded. See infra point B, herein.

ARGUMENT

THE STATE'S ARGUMENTS CONCERNING CONSENT ARE UNPERSUASIVE FOR THE FOLLOWING REASONS: (A) THE OFFICER'S CONCLUSORY STATEMENTS DO NOT PROVIDE A SUFFICIENT FACTUAL BASIS FOR CONSENT, AND (B) THE TOTAL CIRCUMSTANCES FAIL TO SUPPORT THE STATE'S CLAIM THAT CONSENT WAS OBTAINED DURING A LEVEL-ONE ENCOUNTER.

Utah law provides that a search following consent is valid only if (1) the consent was voluntarily given, and (2) the consent was not obtained by police exploitation of a prior illegality. State v. Arroyo, 796 P.2d 684, 688 (Utah 1990). Hansen maintains that the consent obtained in this case violated both prongs of Arroyo. (See Brief of Appellant.) The state disagrees and argues consent was valid. The state's arguments should be rejected for the reasons set forth herein.

A. IN DEFENSE OF THE TRIAL COURT'S ERRONEOUS RULING CONCERNING CONSENT, THE STATE SEEMS TO ARGUE THAT THIS COURT SHOULD OVERRULE OR REWORK PORTIONS OF *HAM*. THAT IS UNNECESSARY SINCE THE STATE'S COMPLAINTS CONCERNING *HAM* ARE INCONSEQUENTIAL AND DO NOT CURE THE FACTUAL INADEQUACIES IN THE RECORD.

Hansen maintains that the state failed to present evidence sufficient to support consent. Specifically, during the evidentiary hearing in this matter, Officer Huntington

testified that he obtained consent from Hansen to search the car as follows: Officer Huntington asked Hansen if he had “alcohol, weapons, or drugs” in the vehicle. When Hansen answered “no” to that question, Officer Huntington asked, “Well, do you mind if I check?” (R. 84:17-18, 38-40, 43.) Officer Huntington testified twice that Hansen answered “yes” to the second question. (R. 84:17-18, 38-40.)

Because Officer Huntington’s testimony failed to support consent, Judge Lewis alerted the officer to the problem. (R. 84:17-18, 38-40.) Thereafter, Officer Huntington reconsidered the matter and testified only in a conclusory fashion. He stated that Hansen indicated “Yes, I could have consent,” he “did give me consent,” “he gave me consent,” and “I assume that he said yes” for consent. (R. 84:17-18, 38-40.) Officer Huntington failed to provide a factual basis to support his conclusory statements.¹

Hansen maintains there is no factual basis for the conclusive testimony. In support of his argument, he has challenged relevant findings made by the trial court, and he has relied on this Court’s analysis in State v. Ham, 910 P.2d at 439. (See Brief of Appellant at 12-15.)

In response to Hansen’s arguments on appeal, the state takes issue with Ham.

¹ On closer examination, Officer Huntington testified that he could not recall what he said or what Hansen said regarding consent; he assumed Hansen said yes; and “[h]e probably could have said yes, go ahead,” but he did not recall. (R. 84:17-18, 38-40, 43.) Hansen argued in the opening Brief that this case is similar to Ham. “Undoubtedly, this is not ‘clear and positive’ testimony which is necessary to meet the State’s burden that a defendant unequivocally and specifically consented to a search.” Ham, 910 P.2d at 440.

According to the state, the consent analysis in Ham is not based on persuasive authority and in part must be abandoned.

Hansen maintains that argument is irrelevant to the issue on appeal and should be disregarded. See infra point A.1., herein.

In addition, the state is unable to identify specific, clear facts of record to support the trial court's ruling concerning consent. See infra point A.2., herein. For the reasons set forth in the opening Brief of Appellant, and as more fully set forth below, Hansen requests that this Court reverse the trial court's ruling on the motion to suppress.

1. The State's Arguments Concerning *Ham* Are Irrelevant.

As set forth in the opening Brief of Appellant, this Court has established an analytical framework for considering the issue of consent. The Court reiterated the framework in 1996, when it issued State v. Ham, 910 P.2d at 439. Ham requires the state to adhere to the following standards in proving that consent was voluntarily given:

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

Id. at 439 (citing State v. Carter, 812 P.2d 460, 467 (Utah App. 1991) (quoting State v. Marshall, 791 P.2d 880, 887-88 (Utah App.), cert. denied, 800 P.2d 1105 (Utah 1990) (quoting United States v. Abbott, 546 F.2d 883, 885 (10th Cir. 1977)))); see also United

States v. Medlin, 842 F.2d 1194, 1197 (10th Cir. 1988).

According to the state, Ham was incorrectly decided; its reliance on Abbott was misplaced for two reasons: First, the state claims the "presumption-against-the-waiver" standard identified in Abbott is no longer good law. The state urges this Court to "abandon that [presumption]" in Ham. (State's Brief of Appellee ("S.B.") at 10.) Second, the state claims the first two standards identified in Abbott and reiterated in Ham are combined to formulate the "voluntariness" test. According to the state, that is relevant because under federal law, the "voluntariness" test is reviewed under the deferential "clearly erroneous" standard, while "voluntariness" under Utah law is reviewed for correctness. The state urges this Court to rework the analysis in Ham and to adopt the "clearly erroneous" standard of review for consent issues. (S.B. at 15-18.)

As set forth below, the state's criticisms concerning Ham are not relevant to a resolution of the issue on appeal in this case. This Court does not need to decide the issues presented in the state's Brief of Appellee.

(a) The issue on appeal in this case does not concern the "presumption-against-the-waiver" standard set forth in Ham. Thus, this Court does not need to abandon that presumption in order to resolve the issue on appeal.

The state asserts that the "presumption-against-the-waiver" standard articulated in Ham is inappropriate. According to the state, the United States Supreme Court abandoned that presumption in 1973, and the United States Court of Appeals for the Tenth Circuit

followed suit in 1991. (S.B. at 9-10 (citing Schneckloth v. Bustamonte, 412 U.S. 218 (1973); United States v. Price, 925 P.2d 1268, 1271 (10th Cir. 1991).)

The state's argument concerning the "presumption-against-the-waiver" standard is irrelevant to the issue on appeal in this case. Hansen is not urging this Court to reverse the trial court's ruling on the motion to suppress because of an improper application of that standard; Hansen has not claimed on appeal that the trial judge misapplied the "presumption-against-the-waiver" standard. (See Brief of Appellant in general.)

Stated another way, assuming arguendo the state is correct and the "presumption-against-the-waiver" standard is not applicable to consent under the Fourth Amendment, the state's argument is irrelevant. There is nothing in this case to indicate one way or the other that such a presumption played a part in Judge Lewis' ruling on Hansen's motion to suppress. To the extent it did, Judge Lewis apparently was not influenced by such a presumption when she denied Hansen's motion. Thus, the state's complaint concerning the presumption is inconsequential to the issue on appeal in this case.

Also, to the extent the state is asking this Court to overrule Ham and the framework it has established for determining whether consent was voluntary, this Court may not do so. In State v. Ostler, 2000 UT App 28, ¶ 7, 996 P.2d 1065, 1067, this Court ruled that it is "bound by the doctrine of stare decisis and cannot overrule another panel's

ruling." Id. Thus, Ham is controlling and should not be overruled by this Court.²

(b) According to the state, the first two standards articulated in Ham for determining voluntary consent must be reviewed only under the deferential "clearly-erroneous" standard. The state's argument is irrelevant and in part in conflict with Utah law.

Next, the state asserts that 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." (S.B. at 10.) The state argues that pursuant to federal case law, the prosecution must meet the following standards to establish valid consent: First, the prosecution must present evidence sufficient to support consent. In that respect, the evidence must be convincing, "clear and positive" that consent was "unequivocal and specific." (S.B. at 12-13.) Second, the prosecution must present evidence to support voluntary consent, in that consent was given without **duress or coercion**. (S.B. at 12-14.)

The state's arguments appear to be consistent with the analysis in Ham. Ham, 910

2 The "presumption-against-the-waiver" standard identified in Ham is consistent with state and federal law. That is, the United States Supreme Court and Utah Supreme Court have reiterated time and again that searches and seizures "conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment -- subject only to a few specifically established and well delineated exceptions." Minnesota v. Dickerson, 508 U.S. 366, 372 (1993); Thompson v. Louisiana, 469 U.S. 17, 19-20 (1984); State v. Arroyo, 796 P.2d 684, 687 (Utah 1990). Thus, unless the state has established the application of a well-delineated exception, there is a presumption against the validity of the search. Where the state has failed to establish application of a well-delineated exception, this Court will not presume that defendant waived his right to be free from an unreasonable search and seizure, but will find that the officer's conduct was unconstitutional.

P.2d at 439 (there must be clear, positive testimony that the consent was “unequivocal and specific” and “freely and intelligently given”; and the government must prove consent was without “duress or coercion, express or implied”).

Yet, according to the state, there is a difference in the analysis. The difference is the way in which the issues are reviewed on appeal. (S.B. at 15.) According to the state, the federal courts review “the trial court’s determination that a consent to search was voluntary or involuntary under a clearly erroneous standard” (S.B. at 15), while Utah courts consider the matter under the correctness standard. According to the state, unless this Court applies only the clearly erroneous standard to a review of the trial court’s determinations in this case, it will lead to an absurd result. (See S.B. at 15.)

The state’s argument is unpersuasive two reasons. First, the “clearly erroneous” standard of review already plays a prominent role in review of the issue on appeal in this case. Specifically, Hansen is challenging the sufficiency of the evidence relating to voluntary consent. As set forth in the opening Brief of Appellant, “the findings supporting ‘voluntary’ consent are clearly erroneous.” (Brief of Appellant at 13-14.) To that end, in accordance with Utah (and federal) case law on the matter, Hansen has identified the findings of fact that he maintains are “clearly erroneous,” he has marshaled the evidence in favor of the findings, and he has demonstrated why the evidence is insufficient to support the findings. (See Brief of Appellant at 11-17.) Thus, since the “clearly erroneous” standard is already applicable in this case under Utah law, there is no

need to adopt the federal standard of review. See infra point A.1.(b)(i), herein.

Second, even if federal courts applied a different standard of review, this Court cannot overrule the bifurcated standard applicable to consent issues as articulated by the Utah Supreme Court in State v. Pena, 869 P.2d 932 (Utah 1994), and State v. Thurman, 846 P.2d 1256 (Utah 1993). Pena and Thurman are controlling in this jurisdiction, as further set forth below. See infra point A.1.(b)(ii), herein.

(i) The state's argument is irrelevant since the "clearly-erroneous" standard already plays a prominent role in this case.

According to the state, the United States Court of Appeals for 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." (S.B. at 15 (citing Thurman, 846 P.2d at 1271).) The state apparently is making the argument concerning the different standards of review in an effort to convince this Court to abandon Utah's bifurcated standard of review in favor of the "clearly erroneous" standard used in the Tenth Circuit Court of Appeals.

The state's argument is irrelevant and should be disregarded. The "clearly erroneous" standard of review is applicable in relevant part to the issue on appeal in this case. Under Utah law, findings of fact and the underlying factual issues are reviewed for clear error. State v. Davis, 821 P.2d 9, 11 (Utah App. 1991). The factual issues consist

of “the empirical, such as things, events, actions, or conditions happening, existing, or taking place, as well as the subjective, such as state of mind.” Pena, 869 P.2d at 935. Findings must be grounded in the facts of record. See Woodward v. Fazzio, 823 P.2d 474, 477 (Utah App. 1991). They must be detailed and articulated in such a way so that the basis for the ultimate conclusion can be understood. See Williamson v. Williamson, 1999 UT App 219, ¶9, 983 P.2d 1103. A trial court’s findings are clearly erroneous if they are so lacking in support as to be against the clear weight of the evidence. Young v. Young, 1999 UT 38, ¶15, 979 P.2d 338. Factual findings are clearly erroneous if they are “not adequately supported by the record, resolving all disputes in the evidence in a light most favorable to the trial court’s determination.” Pena, 869 P.2d at 936.

Hansen has challenged the factual basis for the trial court’s findings and ultimate ruling in this matter. He maintains that the findings are not adequately supported by the record. Thus, they are “clearly erroneous.” (See Brief of Appellant at 13-17.) Since the findings are not adequately supported by the record, the ultimate conclusion cannot be upheld as a matter of law.

This Court may disregard the state’s argument to adopt the federal standard of review since the clearly-erroneous standard already plays a prominent role in this case.

(ii) This court is required to apply the law as articulated by the Utah Supreme Court; it is not bound by the standards of review articulated by the Tenth Circuit Court of Appeals.

In support of its argument that this Court should adopt a more deferential standard of review in considering consent issues under the Fourth Amendment, the state cites to Gutierrez-Hermosillo, 142 F.3d at 1231. (S.B. at 15-18.) The state seems to argue that because the court in Gutierrez-Hermosillo applied a deferential standard of review to a determination as to whether consent was voluntary, this Court should follow suit.

The state apparently has dusted off and resurrected an argument that the Utah Supreme Court rejected in Thurman, 846 P.2d at 1265-66. There, the court stated the following:

The State argue[d] that in considering a state trial court's determination of the voluntariness of consent for Fourth Amendment purposes, *Schneckloth* and *Mendenhall* require this court to apply the same standard of review used by federal appellate courts. However, the State does not cite to any authority for this position and does not explain its reasoning. It simply assumes that the appropriate standard of review is a question of federal law. Our own research has revealed little case law or secondary authority on this point. However, after reflecting on the principles governing the choice of a particular standard of review and considering the law on analogous questions, we have concluded that this court is not required to apply federal standards of review when presented with challenges to trial court determinations made under federal law.

Thurman, 846 P.2d at 1265. After clarifying that Utah appellate courts are not bound by federal standards of review, the court in Thurman fixed the standard of review "to be used by Utah appellate courts in reviewing trial court determinations of voluntariness of consent for purposes of deciding whether a search is reasonable under the Fourth Amendment." Id. at 1268. The Utah Supreme Court ruled that the trial court's conclusions of law would be reviewed for correctness, while underlying factual findings

would not be set aside unless they were found to be clearly erroneous. Id. at 1271.

The state has failed to recognize the law set forth in Thurman. That case is controlling. In light of Thurman, the state's argument must fail.

2. The State Claims the Evidence Supports Consent; Yet, the State's Analysis Fails to Recognize the Difference Between Detailed Facts Supporting the Determination, and Conclusions of Law.

With respect to the trial court's findings and conclusions, Hansen maintains that the findings set forth at paragraphs 27-29 are clearly erroneous. (R. 66; Brief of Appellant at 13-17.) The state disagrees and claims that Officer Huntington's testimony -- that he asked for consent -- supports the detailed finding. According to the state, Officer Huntington "asked [Hansen] for consent to search the vehicle," "asked [defendant] for consent," "confirmed at least two more times that he asked for consent," and testified that "[he] did give me consent," "Yes, I could have consent to search," and "Yes, he did give me consent." (S.B. at 18-22.) Conspicuously absent from the state's recitation of "facts" is any detail reflecting positive, clear, unequivocal events, circumstances, conditions, or actions to support the legal determination that Officer Huntington obtained consent to search. See Pena, 869 P.2d at 935 (findings of fact consist of details of "events, actions, or conditions"). The state's argument also lacks legal analysis and support. (See S.B. at 18-24.)

According to Utah case law, "consent" is a legal conclusion. See Thurman, 846 P.2d at 1271-72. Officer Huntington's testimony on the ultimate issue -- without

necessary detail -- erodes confidence in the evidentiary hearing. If Officer Huntington is allowed to provide legal conclusions as a basis for his conduct, his erroneous standards may never be discovered. That is, if Officer Huntington has a definition for consent that is not consistent with the law, his failure to provide details to support his actions will protect his conduct from judicial scrutiny. So long as he is allowed to testify that consent was provided, as he did in this case, he essentially may dictate the ruling in the matter to the trial judge.

In addition, the testimony on the ultimate issue undermines the purpose of the evidentiary hearing. The hearing is a process for seeking truth and for discovering the total circumstances supporting the officer's conduct. The conclusive testimony prevents discovery of the circumstances, and it prevents defense counsel from **engaging in** effective cross-examination. It also prevents the trial and appellate courts from effectively considering the officer's actions to determine whether they were constitutional under the circumstances. Stated another way, the conclusory statements prohibit exploration of the issue **on the basis** of the facts. If the testimony in this case could be found to be sufficient in detail with respect to events and conditions, it would undermine the need for evidentiary hearings and factual findings on the matter. See Woodward v. Fazzio, 823 P.2d 474, 477 (Utah App. 1991) (findings reveal trial court's reasoning process and must be sufficiently detailed); State ex rel. S.T., 928 P.2d 393, 398 (Utah App. 1996).

As set forth in the opening Brief of Appellant, the detailed facts reflect that when Officer Huntington described the circumstances surrounding the event, Hansen did not consent. Officer Huntington testified twice that he sought consent by asking Hansen if he had any drugs, alcohol or weapons in the car. When Hansen answered no, Officer Huntington asked, "do you mind if I check." Hansen answered "yes." Hansen's clear, unequivocal response did not constitute consent to search. (See R. 84:17-18, 38-40.)³

In the evidentiary hearing, Officer Huntington refused to provide any further detail regarding the matter. Rather, his testimony was conclusory and vague. (See S.B. at 23 (officer did not recall how he asked for consent, he did not recall defendant's exact words, he assumed defendant said yes in his "wording", defendant "probably could have said yes, go ahead"); R. 84:17-18, 38-40, 43.)

It stands to reason that if the record must contain sufficient evidence to support the detailed findings, the record must contain the details. Since Officer Huntington failed

³ As set forth in the opening Brief of Appellant, each time Officer Huntington testified with respect to the details of the encounter, Judge Lewis interrupted the examination and pointed out problems with the officer's testimony and the state's case. Curiously, in its brief, the state at one point has identified Judge Lewis as the "prosecutor." (See S.B. at 21, where the state identified the examiner as the "prosecutor," while the record at 84:18 reflected that "The Court" interrupted and conducted the examination.) Certainly Judge Lewis seemed to assist the prosecutor when the detailed evidence did not support consent.

In that regard, while the state asserts that the "clearly erroneous" standard recognizes that the trial judge generally is in the best position to assess the evidence (S.B. at 18), in this case, the record reflects that the trial judge was in the best position to ensure the evidence would support the state's position. That is not a trial court function and should not be condoned.

to provide sufficient detail to support the determination that Hansen provided consent, the trial court's ruling on the matter must be reversed. The record fails to contain substantial or competent testimony to support the findings. Arroyo, 796 P.2d at 687 ("[a] finding not supported by substantial, competent evidence must be rejected").

B. ACCORDING TO THE STATE, AT THE POINT WHERE OFFICER HUNTINGTON RETURNED THE LICENSE AND REGISTRATION TO HANSEN, THE LEVEL-TWO ENCOUNTER ENDED AND THE MATTER BECAME CONSENSUAL. THE STATE'S ARGUMENT SEEMS TO DRAW BRIGHT LINES TO SUIT THE STATE'S PURPOSE, WHILE THE TOTAL CIRCUMSTANCES SUPPORT A CONTINUED, UNLAWFUL, LEVEL-TWO DETENTION.

As set forth in the opening Brief of Appellant, the consent also was invalid where it was obtained by police exploitation of a prior illegality. See Ham, 910 P.2d at 438. Specifically, the alleged consent came on the heels of an unlawful, level-two detention in violation of Terry v. Ohio, 392 U.S. 1, 10 (1968); see also State v. Deitman, 739 P.2d 616, 617-18, (Utah 1987). An unlawful, level-two detention occurs when an officer has detained the occupants of a vehicle beyond the permissible scope.

In response to Hansen's argument concerning the unlawful detention, the state asserts that the matter transformed into a level-one consensual encounter at the point where the officer warned Hansen about the insurance violation and returned Hansen's license and car registration to him. "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.” (S.B. at 30, 31.)

The state’s argument purports to draw bright lines in the encounter to suit its purpose. In addition, the state’s argument fails to take into consideration the totality of the circumstances. See State v. Higgins, 884 P.2d 1242, 1244 (Utah 1994) (person is seized under the fourth amendment when, considering the totality of the circumstances, the police conduct would have communicated to a reasonable person that he was not free to decline the officer’s requests or otherwise terminate the encounter and go about his business).

The total circumstances relating to the matter reflect the following: According to the facts, Officer Huntington engaged in a traffic stop for two reasons: improper lane change, and failure to maintain insurance. (S.B. at 27.) After Officer Huntington stopped Hansen’s vehicle, he approached Hansen’s car and “informed the defendant why he had been stopped.” (R. 84:12; 65, FF at ¶ 17; S.B. at 28.) Officer Huntington also “requested [Hansen’s] driver’s license, registration, and insurance information.” (R. 65, FF at ¶ 17; S.B. at 28.)

Officer Huntington returned to his car to conduct a warrants and computer check, then walked back to Hansen’s car. At that point in the encounter, a second uniformed officer arrived at the scene with emergency lights engaged. He got out of his patrol car and stood behind Hansen’s car. (R. 84:14-15, 36.) Thereafter, Officer Huntington returned the license and registration to Hansen and he informed Hansen that he had to

obtain insurance and **maintain** proof of insurance in his car. (R. 84:16-17, 38.) Officer Huntington also asked Hansen whether he had drugs, alcohol or weapons in the car and he asked to conduct a search. (R. 84:17-18, 38-40.) Officer **Huntington kept the** emergency equipment on his car engaged during the entire matter. (R. 84:36.)

At the point where Officer Huntington warned Hansen about the insurance violation and returned the license and registration to Hansen, the *total circumstances* that made the encounter a level-two detention were still present and arguably escalating. That is, from an objective person's perspective, Officer Huntington still had not indicated how he intended to resolve the violation for the improper lane change, and his emergency lights were still engaged. A reasonable person would expect that before he may be free to leave, the officer would indicate how he intended to resolve the reason **for the** stop. Also, Officer Huntington continued to stand outside Hansen's window asking questions, while a second officer had arrived on the scene with emergency lights engaged. (R. 84:14-15.)

The state argues **that the Fourth Amendment does not "require particular** language, or words at all, to signal the end of a detention." (S.B. at 30.) As set forth in the opening Brief of Appellant, Hansen does not claim it does. (Brief of Appellant at 22 n. 4.) Rather, Hansen asserts that since a reasonable person cannot be expected to read the officer's mind, it is appropriate to consider the total circumstances to determine if the officer has somehow indicated to the person that he is free to leave. See State v.

Patefield, 927 P.2d 655, 659 (Utah App. 1996) (where officer has somehow communicated through words or import of situation that person is free to go, Court will find level-one encounter); State v. Robinette, 685 N.E.2d 762, 769 (Ohio 1997) (on remand from the United States Supreme Court).

For example, an officer's conduct may be construed to communicate that a person is free to leave where the officer has (i) indicated to the person how he intends to resolve the violation that justified the stop in the first place; (ii) advised the person as to how he should proceed in light of the reason for the stop (*i.e.*, when negotiating a left-hand turn, pull into the inside lane); (iii) walked away from the car; (iv) discontinued questioning; (v) disengaged the emergency equipment on his car; or (vi) wished the person a good day. Officer Huntington did none of these things.

In this case, the total circumstances reflected that Officer Huntington "handed [Hansen] his driver's license and registration and I asked him for consent to search the vehicle." (R. 84:16.) Thus, without any apparent break in the conversation, while Officer Huntington remained standing at Hansen's window and a second officer stood behind Hansen's car, Huntington continued to question Hansen. The conduct did not give Hansen any indication that he was free to go, but communicated the opposite -- that Hansen was not free to leave until he answered the additional questions.

In addition, inasmuch as Officer Huntington had communicated to Hansen that he intended only to give him a warning for the insurance violation and Huntington had not

yet communicated his intent with respect to the improper lane change, Hansen may have believed he would be ticketed if he did not cooperate. Those facts are relevant to the total circumstances in considering that Hansen simply submitted to a claim of authority and implied coercion. Given Officer Huntington's superior position of authority, and the total circumstances of this case, any reasonable person would have felt compelled to submit to the additional questioning.

Finally, the state seeks to minimize the improper intrusion by claiming the questions could not have taken "more than a few seconds." (S.B. at 31; see also S.B. at 32 (the "two brief questions did not extend the detention").) That argument is irrelevant.⁴ Under the law, a "temporary" or brief detention is improper unless it is supported by reasonable articulable suspicion. This Court has stated the following:

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

Patefield, 927 P.2d at 659 (bold emphasis added). Also, "[unsupported] by further

⁴ That argument is also incorrect. As the facts reflect, the unrelated interrogation lead from one event to the next, where Hansen answered the questions, stepped out of the car, submitted to a frisk search, submitted to a search of the car, answered more questions, was arrested, and was subjected to a search incident to arrest. (R. 84:19-23, 41-42.) The unrelated investigation was intrusive and extensive.

probable cause or reasonable suspicion, inquiries by the officer to investigate suspicions unrelated to the traffic offense unconstitutionally extend the detention beyond the scope of the circumstances that rendered it permissible." State v. Lopez, 873 P.2d 1127, 1135 (Utah 1994). "[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." Florida v. Royer, 460 U.S. 491, 500 (1983). If a detention lasts any longer than is justified, it is unlawful. At the point where the officer's reasonable suspicions are allayed, there is no further reason for the stop, and the officer must allow the detainee to leave. State v. Chapman, 921 P.2d 446, 452 (Utah 1996).

The continued detention was unlawful where it exceeded the scope of the justification for the stop. See Commonwealth v. Ferrara, 381 N.E.2d 141, 144 (Mass. 1978) (once suspect had identified himself satisfactorily, "there was no basis for further interrogation"); Madison v. State, 357 N.E.2d 911, 913 (Ind. App. 1976) (police unjustifiably continued investigation of person sleeping in parked car at 9:00 a.m. after he adequately answered the initial inquiries concerning his well-being).

The state does not claim that Officer Huntington had reasonable articulable suspicion to support continued, investigative questioning. (See S.B. in general.) Further, the state does not dispute that the questions concerning alcohol, weapons, drugs and a search of the car were unrelated to the justification for the stop in the first place and exceeded the permissible scope. Thus, the continued detention was unlawful. Lopez, 873


P.2d at 1133 (continued investigative questioning that further detains the driver must be supported by reasonable articulable suspicion of more serious criminal activity).

The unlawful detention preceded the consent, thereby rendering the consent unconstitutional. Ham, 910 P.2d at 440-41. The evidence discovered in connection with the unlawful consent must be suppressed.

CONCLUSION

The state failed in the trial court to establish a valid consent to support a search of the vehicle. In addition, the consent was poisoned by the prior police illegality. Hansen respectfully requests that this Court reverse the trial court's ruling on the motion to suppress.

SUBMITTED this 18th day of August, 2000.


LINDA M. JONES
OTIS STERLING III
Counsel for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, LINDA M. JONES, hereby certify that I have caused to be hand delivered an original and 7 copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, Salt Lake City, Utah 84114 and 4 copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114 this 18th day of August, 2000.


LINDA M. JONES

DELIVERED to the Utah Attorney General's Office and the Utah Court of Appeals Court as indicated above this ___ day of _____, 2000.
