

1999

Utah v. Hansen : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

v.

SHAYNE M. HANSEN,

Defendant/Appellant.

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Case No. 990987-CA
Priority No. 2

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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IN THE UTAH COURT OF APPEALS

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SHAYNE M. HANSEN,

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Case No. 990987-CA

Priority No. 2

JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2a-3(2)(c) (1996), where the defendant in a district court criminal action may take an appeal to the Court of Appeals from a final order for anything other than a first degree or capital felony offense. In the underlying case related to this appeal, Appellant Shayne M. Hansen ("Hansen") was convicted of 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). A copy of the judgment is attached hereto as Addendum A.

STATEMENT OF THE ISSUE AND STANDARD OF REVIEW

The issue presented for review is as follows: Whether the trial court erred in denying Hansen's motion to suppress evidence, where the officer conducted an unlawful, warrantless search.

Standard of Review: The standard applicable is bifurcated. "The factual findings of a trial court that underlie its decision to grant or deny a motion to suppress will not be

disturbed on appeal unless clearly erroneous." State v. Davis, 821 P.2d 9, 11 (Utah App. 1991); Salt Lake City v. Ray, 2000 UT App 55, ¶8, No. 99049-CA, slip op. at 3. The trial court's legal conclusions are reviewed for correctness, where "the appellate court decides the matter for itself and does not defer in any degree to the trial judge's determination of law." State v. Pena, 869 P.2d 932, 936 (Utah 1994); State v. Maguire, 1999 UT App 45, ¶5, 975 P.2d 476.

PRESERVATION OF ARGUMENT

The issue is preserved in the record on appeal (hereinafter "R.") at 23-25 and 84.

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

The following constitutional provision will be determinative of the issue on appeal: U.S. Const. amend. IV. The text of that provision is contained in the attached Addendum B.

STATEMENT OF THE CASE

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

On February 18, 1999, the state filed an Information against Hansen, charging him with unlawful possession of a controlled substance, a third degree felony offense in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (1998), and unlawful possession of drug paraphernalia, a class B misdemeanor in violation of Utah Code Ann. § 58-37a-5 (1998). (R. 2-3; 64, Findings of Fact ("FF") at ¶ 1.) On July 2, 1999, Hansen's counsel filed a motion to suppress evidence obtained during an unlawful and warrantless search. (R. 23-

25.)

On August 4, 1999, the trial court held an evidentiary hearing on the matter. (R. 49: 84.) Thereafter, the court issued findings of fact and conclusions of law denying the motion to suppress. (R. 63-69.) A copy of the trial court's findings and conclusions is attached hereto as Addendum C.

On August 20, 1999, Hansen entered into a conditional guilty plea, wherein he pled guilty to unlawful possession/use of a controlled substance, a third degree felony offense. The trial court dismissed the charge for drug paraphernalia and Hansen specifically "retain[ed] his right to appeal pursuant to State v. Sery, [758 P.2d 935, 940-41 (Utah App. 1988),]" the trial court's "denial of his motion to suppress." (R. 55: see also 58.) On October 22, 1999, the trial court ordered Hansen to serve an indeterminate prison term not to exceed five years, suspended the prison term, and placed Hansen on probation. (R. 70-71.) He is not incarcerated.

STATEMENT OF FACTS

On December 11, 1998, at approximately 11:15 p.m., Officer Bruce Huntington ("Officer Huntington") was traveling southbound in the area of Holden Street, Midvale, behind 20-year-old Hansen and a friend. (R. 84:6-7; 64, FF at ¶¶ 2-3.) Officer Huntington pulled behind Hansen's vehicle in the left-hand turn lane at an intersection, and he observed Hansen engage the left-hand turn signal to complete a turn to the outside lane of eastbound traffic. (R. 84:8-9; 64, FF at ¶¶ 5-6; 65, FF at ¶ 9.) According to

Officer Huntington, state law provides that a vehicle must "turn into the appropriate lane"; in this case, Hansen was required to turn into the inside lane of eastbound traffic. (R. 84:10; see also 64, FF at ¶ 8.)

Officer Huntington testified that the maneuver constituted an "improper lane change." (R. 84:12.) Before observing the turn, Officer Huntington initiated a computer check on the vehicle and learned that it was not insured. (R. 84:10; 65, FF at ¶¶ 10-11.) After Hansen completed the "improper lane change," Officer Huntington decided to pull the vehicle over, and he activated his overhead lights. (R. 84:10-11; 65, FF at ¶ 12.) Hansen pulled off the road and into a Maverick store parking lot with Officer Huntington behind him. (R. 84:11; 65, FF at ¶ 13.)

Officer Huntington was dressed in uniform with a firearm. (R. 84:8, 19.) He approached Hansen and explained the reason for the stop: "[I]mproper lane change and no insurance according to state records." (R. 84:12; 65, FF at ¶ 17.)

Hansen told Officer Huntington that he did not have insurance "because he could not afford it." (R. 84:12-13; 65, FF at ¶ 18.) Officer Huntington requested Hansen's driver's license and registration, then returned to his patrol car to run a computer check. The license was valid and there were no warrants outstanding for Hansen's arrest. (R. 84:13; 65, FF at ¶¶ 18-20.) As Officer Huntington returned to Hansen's car, a second officer arrived at the scene with overhead lights engaged. The second officer got out of his car. (R. 84:14, 36.)

Officer Huntington testified that he was "going to give [Hansen] a warning." (R. 84:16.) He told Hansen that the state required him to have automobile insurance and to mail proof of insurance to the Division of Motor Vehicles ("DMV"). (R. 84:16.)

Officer Huntington did not recall saying anything to Hansen with regard to the "improper lane change." (R. 84:32-34, 35, 38, 43-45; 65, FF at ¶ 21 (trial judge found only that Officer Huntington "warned [Hansen] that he had to obtain insurance for his car and to carry proof of insurance in the car": no indication that officer communicated to Hansen how he intended to resolve the "improper lane change" violation).)

Officer Huntington then handed the driver's license and registration to Hansen "and I asked him for consent to search the vehicle." (R. 84:16, 29, 38.) According to Officer Huntington, Hansen consented to a search. The specific facts relating to "consent" are as follows.

Officer Huntington stated it was his practice to ask for consent by asking, "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?" (R. 84:17; see 65, FF at ¶ 24.) Officer Huntington testified twice that Hansen answered "no" to the first question and "yes" to the second question. (R. 84:17-18, 38-40.) In an effort to clarify Officer Huntington's testimony on the matter, Judge Lewis asked further questions, and Officer Huntington rephrased his responses to provide legal conclusions without factual specifics:

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

A. He did give me consent

* * *

[PROSECUTOR]: And [] you asked, Do you mind [if] I check?

A. Uh-huh.

Q. And what was his response to that question?

A. He said yes.

[JUDGE LEWIS]: Yes, he minded?

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

* * *

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

A. I did.

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

A. Not specifically.

Q. Do you have any idea?

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

Q. He said no?

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

Q. Okay.

A. And then he said yes.

[JUDGE LEWIS]: He said?

[DEFENSE COUNSEL]: He [said] yes.

THE WITNESS: Yes.

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

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

[DEFENSE COUNSEL]: (Resuming)

Q. So you said he gave you consent?

A. Yes, he did give me consent.

Q. What did he say?

A. What?

Q. What did he say?

A. What did he say?

Q. Yeah.

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

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

A. Not exactly.

Q. So are you assuming that he said yes?

A. I assume that he said yes.

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

A. I'm sorry?

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

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

Q. Yes, in terms of his response.

A. I assume that he said yes.

Q. Nothing more than that?

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

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

A. I don't recall.

* * *

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

A. It was verbal.

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

A. I don't recall the exact wording.

(R. 84:17-18, 38-40, 43.)¹

1 Officer Huntington twice provided specific testimony with respect to what was said to Hansen to obtain consent. Both times, Officer Huntington testified that he obtained consent by first asking if Hansen had alcohol, weapons, or drugs in the car. Both times, Officer Huntington testified that Hansen answered, "no." Both times, Officer Huntington testified that he then asked Hansen, "Do you mind if I check." Both times, Hansen answered "yes." (R. 84:17-18, 38-40.) Officer Huntington's specific testimony failed to support consent. If Officer Huntington asked Hansen, "Do you mind if I check," as represented, and Hansen said "yes," as represented, Officer Huntington did not have consent to search.

Apparently, Judge Lewis recognized the facts failed to support consent. Rather than accept the testimony that Officer Huntington twice presented, the judge twice interjected, causing Officer Huntington simply to conclude that Hansen gave consent without providing specific facts to support the conclusion. (R. 84:17-18, 38-40.)

Officer Huntington testified that in connection with obtaining consent to search, he did not make any promises to Hansen and he did not threaten him in any way. (R. 84:18.) Hansen and his friend stepped out of the car. Officer Huntington asked Hansen to place his hands on his head and he frisked Hansen for weapons. Officer Huntington then asked Hansen and his friend to stand next to the second officer while Officer Huntington searched the car. (R. 84:19, 23, 41-42.)

During the search of the car, Officer Huntington found a homemade billy club (R. 84:20) and a marijuana pipe on the floor in the driver's area of the car. (R. 84:21.) Officer Huntington asked "whose marijuana pipe it was" and Hansen said it was his. (R. 84:21.) Thereafter, Officer Huntington took Hansen into custody and performed a search incident to arrest. (R. 84:22.) During the search, Officer Huntington found a substance in Hansen's pocket that he believed to be a controlled substance. (R. 84:22.)

SUMMARY OF THE ARGUMENT

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. Ham, 910 P.2d 433, 438 (Utah App. 1996) (cites omitted). In this case, the consent was invalid.

The consent was not voluntarily given. Although Officer Huntington testified that Hansen provided consent to search the car, he was unable to provide "clear and positive testimony that the consent was 'unequivocal and specific' and 'freely and intelligently

given'." State v. Ham, 910 P.2d 433, 439 (Utah App. 1996). Rather, Officer Huntington testified that he "assumed" Hansen gave consent when Officer Huntington asked "Do you mind if I check [the car,]" and Hansen responded "yes." The evidence fails to support that Hansen gave voluntary consent to conduct the search. (R. 84:37-38.)

In addition, the consent was obtained by police exploitation of a prior illegality. The prior illegality in this case was an unlawful detention.

A detention following a routine traffic stop is generally limited to the following: The officer "may request a driver's license and vehicle registration, conduct a computer check, and issue a citation." State v. Robinson, 797 P.2d 431, 435 (Utah App. 1990) (citing United States v. Guzman, 864 F.2d 1512, 1519 (10th Cir. 1988)); State v. Humphrey, 937 P.2d 137, 144 (Utah App. 1997). An officer may not make further inquiry of the detainee and he may not extend the scope of a detention beyond that set forth in Robinson unless he is able to articulate probable cause or reasonable suspicion supporting a basis for the continued detention.

In this case, Officer Huntington detained Hansen in a routine traffic stop for making an "improper lane change" and failing to insure his vehicle. During the detention, Officer Huntington examined Hansen's license and vehicle registration, conducted computer checks, and informed Hansen that he would be required to insure his vehicle and to send proof of insurance to the DMV. Thereafter, Officer Huntington testified that he returned Hansen's license and registration to him and asked whether

Hansen had any alcohol, weapons or drugs in the car. When Hansen answered no, Officer Huntington asked to conduct a search.

Officer Huntington exceeded the scope of the permissible detention. He failed to limit the encounter to examination of the license and registration, a computer check and the issuance of a warning or citation. Rather, he extended the scope of the detention without justification for the purpose of inquiring into drug-related activity. The continued detention was unlawful; it poisoned the subsequent consent to search.

ARGUMENT

THE EVIDENCE FAILS TO SUPPORT A VALID CONSENT TO SUPPORT THE WARRANTLESS SEARCH OF THE CAR AND THE SUBSEQUENT SEARCH INCIDENT TO ARREST.

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

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

U.S. Const. amend. IV. Unless a governmental agency has secured a valid warrant to conduct a search, the search is presumptively unlawful, "subject only to a few specifically established and well-delineated exceptions." Katz v. U.S., 389 U.S. 347, 357 (1967); see Payton v. New York, 445 U.S. 573, 586 (1980); State v. Gallegos, 967 P.2d 973, 976 (Utah App. 1998) (quoting State v. Holmes, 774 P.2d 506, 510 (Utah App. 1989)); State v. Ham, 910 P.2d 433, 438 (Utah App. 1996).

One of the "specifically established" exceptions to the warrant requirement is

consent. Ham, 910 P.2d at 438-39; State v. Arroyo, 796 P.2d 684, 687 (Utah 1990); State v. Sepulveda, 842 P.2d 913, 918 (Utah App. 1992). According to case law,

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 the prior illegality.” [State v. Harmon, 854 P.2d 1037, 1040 (Utah App. 1993), aff’d, 910 P.2d 1196 (Utah 1995); accord State v. Arroyo, 796 P.2d 684, 688 (Utah 1990)]. It is the State’s burden to prove that a consent was voluntarily given. [State v. Thurman, 846 P.2d 1256, 1263 (Utah 1993)]; State v. Robinson, 797 P.2d 431, 437 (Utah App. 1990). If the State fails to meet this burden, the evidence is deemed inadmissible against the defendant. Robinson, 797 P.2d at 437.

Ham, 910 P.2d at 438-39 (footnote omitted).

In this case, as set forth below, the state failed to present a factual basis to support the determination that the consent was voluntary. See Point A., infra. In addition, after Officer Huntington completed the purpose of the stop, he detained Hansen for further questioning. The further questioning was not reasonably related to the circumstances which justified the stop in the first place. Therefore, it violated Hansen’s rights under the Fourth Amendment. The consent was obtained by police exploitation of a prior illegality. See Point B., infra.

A. THE CONSENT WAS NOT VOLUNTARILY GIVEN.

This Court has established an analytical framework for determining whether the state has met its burden of proving that consent was voluntarily given.

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

convincing evidence that such rights were waived.”

Ham, 910 P.2d at 439 (cites omitted). In this matter, the state cannot establish the first factor. As set forth below, the findings supporting “voluntary” consent are clearly erroneous: Officer Huntington was not able to provide “clear and positive” testimony that the consent to search was “‘unequivocal and specific’ and ‘freely and intelligently given.’” Ham, 910 P.2d at 439 (cites omitted).²

1. The Marshaled Facts Fail to Support Unequivocal and Specific Consent.

In considering search and seizure issues, this Court will not disturb the trial court’s findings unless they are clearly erroneous. State v. Davis, 821 P.2d 9, 11 (Utah App. 1991). While the facts will be construed in the light most favorable to the findings, this Court nevertheless will “review the facts in detail.” State v. Jackson, 805 P.2d 765, 766 (Utah App. 1990). Also, “[a] finding not supported by substantial, competent evidence must be rejected.” Arroyo, 796 P.2d at 687. If the evidence does not support a finding, the finding is clearly erroneous. Id.

In this matter, the trial court’s findings supporting voluntary consent are clearly

² In determining whether consent was obtained by use of coercion or duress, this Court considers the following factors: “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 [defendant]; and 5) the absence of deception or trick on the part of the officer.” Ham, 910 P.2d at 439. In this case, Officer Huntington demonstrated authority and force to search when he stood outside the car with a second -- and later third -- officer at the scene. (R. 84:14, 19-20.) The officers also had engaged overhead lights on their patrol cars in a show of authority; and at least Officer Huntington was armed. (R. 84:19, 37.)

erroneous. Hansen challenges the following findings as insupportable.

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

(R. 66.)

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

(R. 66.)

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

(R. 66.)

The marshaled evidence relating to the findings reflects the following: Officer Huntington testified that he assumed Hansen provided consent to conduct the search. Also, Officer Huntington could not recall what was said to obtain that consent. Rather, the only clear, positive, specific testimony that he could provide concerning the situation supported the opposite conclusion: that is, Hansen did not provide consent.

Specifically, Officer Huntington testified that it was his practice to ask a car occupant 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?” (R. 84:17; see 65, FF at ¶ 24.) Officer Huntington testified twice that he asked those questions of Hansen; Hansen answered “no” to the first question, and “yes” to the second question. (R. 84:17-18, 38-40.) Judge Lewis apparently recognized that Officer Huntington’s testimony would not support consent. She alerted Officer Huntington to the problem. (R. 84:17-18; 84:43-44). Thereafter, Officer Huntington rephrased his response and provided legal

conclusions that Hansen “did give me consent,” “he gave me consent,” and “I assume that he said yes” for consent. (R. 84:17-18, 38-40, 43.) Officer Huntington was unable to provide a factual basis to support the conclusions.

There is no testimony to support that Officer Huntington “asked defendant whether he could search his car” (see R. 66, FF at ¶ 27), or that such a question was “permissive and did not suggest that he had a right to search” (see R. 66, FF at ¶ 28). In addition, the record fails to provide a factual basis for the trial court’s finding that “Defendant clearly and unequivocally said ‘yes,’ permitting the search.” (R. 66, FF at ¶ 29.) Indeed, the only facts presented by Officer Huntington’s testimony support the determination that Hansen clearly and unequivocally said yes to Officer Huntington’s specific question, “Do you mind if I check?” (R. 84:17-18, 38-40.) That evidence supports the determination that Hansen objected to the search.

2. Pursuant to this Court’s Ruling in *Ham* the Record Fails to Support Voluntary Consent.

This case is similar to Ham, 910 P.2d at 433. In that matter, this Court considered “the specific characteristics of the accused and the details of the police conduct involved” to determine voluntary consent. Id. at 439. “Defendant claims his consent was not voluntary because the agents’ testimony was not ‘clear and positive ... that the consent was “unequivocal and specific” and “freely and intelligently given.”’ [State v. Carter, 812 P.2d 460, 467 (Utah App. 1991) (citations omitted)]. We agree.” Id.

In Ham, probation agents went to defendant's home "to ensure defendant's compliance with [a] no alcohol provision in his probation agreement." Id. at 435. The agents told defendant, "We need to look in the refrigerator for alcohol." Id. "Although neither agent could recall defendant's precise response, both testified that defendant responded affirmatively." Id. "[B]oth Agent McCullough and Agent Hiram testified that defendant did in fact consent to the search." Id. at 438. The agents' specific testimony consisted of legal conclusions and what they believed about the matter.

Agent McCullough testified that although he did not remember a particular conversation about the matter, he believed defendant said "go ahead" when the agents requested permission to search. Id. at 439.

Agent Hiram testified that defendant responded affirmatively to the request to search. "I don't know the exact words. If it would have been a 'no,' we probably would have stopped and talked with him an additional amount more, as my policy would be." Id. at 439-440. Counsel asked if Hiram remembered "there being an affirmative response of some sort." Hiram answered, "Yes, there was. I believe there was;" "[i]t was, or we would not have continued." Id. at 440.

In considering whether there was "clear and positive testimony that the consent was 'unequivocal and specific' and 'freely and intelligently given,'" id. at 439, this Court stated the following:

It is evident from the agents' testimony that they themselves are not sure whether

defendant gave any type of consent at all. Agent McCullough initially testified that defendant "did not respond" to Agent McCullough's announcement that he was going to search the refrigerator for alcohol, but then suggested that defendant "might have" said, "Go ahead." Agent Hillam's testimony was no more articulate. When asked whether defendant responded to Agent McCullough's declaration that he needed to search the refrigerator for alcohol, Agent Hillam testified that he "believe[d] there was" a response. 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.

Id. at 440.

In this matter, Officer Huntington twice testified that in seeking consent to search, he asked Hansen, "Do you mind if I check?" And Hansen answered "yes." Officer Huntington then rephrased his testimony to assert that Hansen gave consent to search: he did not recall what he said to Hansen; he did not recall what Hansen said to him; 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.) As in Ham, "[u]ndoubtedly, 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.

The record does not support the trial court's determination that consent to search the car was voluntarily obtained. Thus, the consent was invalid, and Officer Huntington's warrantless search of the car was unlawful.

3. Since the Consent Was Not Voluntary, All Evidence Obtained as a Result of the Unlawful Consent Must be Suppressed.

After Officer Huntington assumed he had consent, he conducted a warrantless

search of the car and discovered drug paraphernalia on the car floorboards. Officer Huntington arrested Hansen and conducted a second search -- incident to arrest -- where he discovered a controlled substance in Hansen's pocket. (R. 84:22.) The evidence discovered during a search of the car and incident to arrest is poisoned by the invalid consent. See point B.4., infra; State v. Arroyo, 796 P.2d 684, 688-89 (Utah 1990) (the fruit of the poisonous tree doctrine applies; police illegality will serve to poison subsequent conduct); State v. Ramirez, 817 P.2d 774, 786 (Utah 1991); State v. Johnson, 805 P.2d 761, 764 (Utah 1991) (original police action was unlawful; thus, all evidence had to be suppressed); State v. Hansen, 837 P.2d 987, 989 (Utah App. 1992); U.S. v. Lockett, 484 F.2d 89, 91 (9th Cir. 1973). Thus, the evidence obtained as a result of the unlawful consent must be suppressed.

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

The consent was also invalid since it was obtained by 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 under Terry v. Ohio, 392 U.S. 1, 10, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); see also State v. Deitman, 739 P.2d 616, 617-18 (Utah 1987).

In Terry, the United States Supreme Court articulated three levels of police-citizen encounters. This Court described the levels as follows:

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

Salt Lake City v. Smoot, 921 P.2d 1003, 1006 (Utah App. 1996) (citing State v. Munsen, 821 P.2d 13, 15 n.1 (Utah App. 1991), cert. denied, 843 P.2d 516 (Utah 1992)); see Terry, 392 U.S. at 10.

As a starting place for the analysis in this case, this Court will assess the level and nature of the stop. As set forth above, this case involved a traffic stop (R. 64-66, FF at ¶¶ 2-3, 5-6, 9-13, 18-21), which constitutes a level-two seizure under the Fourth Amendment. State v. Lopez, 873 P.2d 1127, 1131 (Utah 1994) (quoting Delaware v. Prouse, 440 U.S. 648, 653 (1979)); State v. Robinson, 797 P.2d 431, 433 (Utah App. 1990); State v. Sepulveda, 842 P.2d 913, 917 (Utah App. 1992).

To be constitutional, a seizure following a traffic stop must be limited in scope to the circumstances which justified the interference in the first place.

An officer conducting a routine traffic stop may request a driver's license and vehicle registration, conduct a computer check, and issue a citation. United States v. Guzman, 864 F.2d 1512, 1519 (10th Cir. 1988). However, once the driver has produced a valid license and evidence of entitlement to use the vehicle, "he must be allowed to proceed on his way, without being subject to further delay by police for additional questioning." Id. Any further temporary detention for investigative questioning after the fulfillment of the purpose of the initial traffic stop is justified under the fourth amendment only if the detaining officer has a reasonable

suspicion of serious criminal activity.

Robinson, 797 P.2d at 435; State v. Delaney, 869 P.2d 4, 7 (Utah App. 1994); State v. Castner, 825 P.2d 699, 703 (Utah App. 1992) (cite omitted); State v. Godina-Luna, 826 P.2d 652, 654-55 (Utah App. 1992). If an officer detains the occupants of a vehicle beyond the permissible scope, this Court will make a dual inquiry to determine whether continued detention was reasonable. This Court will ask, “(1) Was the police officer’s action ‘justified at its inception’? and (2) Was the resulting detention ‘reasonably related in scope to the circumstances that justified the interference in the first place?’” Lopez, 873 P.2d at 1131-32; State v. Humphrey, 937 P.2d 137, 141 (Utah App. 1997); see Castner, 825 P.2d at 702 (citing Terry, 392 U.S. at 20).

In this case, Hansen does not dispute that the stop was lawful at its inception. According to the record and the findings, the officer stopped Hansen for an “improper lane change” and failure to carry insurance. (R. 84:12; 65.)

Hansen maintains that the continued detention for further questioning constituted an unlawful detention; it exceeded the scope of the traffic stop. In addition, Officer Huntington did not articulate reasonable suspicion of criminal activity to justify the continued detention. Thus, the drug-related questioning and resulting search constituted a seizure or detention that violated Hansen’s Fourth Amendment rights.

1. The Continued Detention Constituted a Level-Two Seizure.

The trial court in this matter did not consider whether the continued detention was

reasonably related in scope to the circumstances that justified the interference in the first place. Rather, the court side-stepped the issue by ruling that at the time of the continued questioning, the matter no longer constituted a level-two detention; the matter had become a level-one, consensual encounter: "From an objective viewpoint, defendant was clearly free to leave after his documents had been returned to him." (R. 66, FF at ¶ 23.) That determination is a legal conclusion. This Court will consider the matter without deference to the trial court.³ See Pena, 869 P.2d at 936 (appellate court gives no deference to trial court's legal conclusions).

To that end, this Court will review the objective facts from a reasonable person's perspective to determine whether the person believed s/he was free to go. Johnson, 805 P.2d at 763 (court will consider objective facts to determine whether reasonable person would believe she was free to go) (cite omitted).

The officer's subjective belief and intent that the defendant is free to leave is immaterial for Fourth Amendment purposes. See Lopez, 873 P.2d at 1136-37 (an officer's state of mind is irrelevant); see also State v. Sery, 758 P.2d 935, 940-41 (Utah App. 1988) (the uncommunicated, subjective good faith or intent of an officer during a

³ The trial court included ¶ 23 in the findings of fact. (See R. 66.) This Court is not bound by the trial court's classification of findings and conclusions. 50 West Broadway Associates v. Redevelopment Agents of Salt Lake City, 784 P.2d 1162, 1171 (Utah 1989). Since ¶ 23 reflected the trial court's determination that the matter was no longer a level-two detention, according to Utah case law it is a legal conclusion. See State v. Bean, 869 P.2d 984, 985 (Utah App. 1994) (trial court's determination concerning level of an encounter under Terry is a legal conclusion).

Terry stop is not relevant to the analysis): State v. Patefield, 927 P.2d 655, 659 (Utah App. 1996); State v. Barnes, 978 P.2d 1131, 1135 (Wash. App. 1999) (officer's subjective belief that defendant was free to walk away was immaterial); see also Ohio v. Robinette, 519 U.S. 33, 38, 117 S.Ct. 417, 420-21 (1996). However, where the officer has communicated through words or the import of the situation that defendant is free to go, the court will consider those circumstances relevant in finding a level-one encounter. Patefield, 927 P.2d at 659; see also U. S. v. Mendenhall, 446 U.S. 544 (1980).

In this case, since the encounter started as a level-two traffic stop, there must be objective evidence to show that the character of the encounter had changed. See State v. Robinette, 685 N.E.2d 762, 770 (Ohio 1997). For example, did the officer somehow indicate to detainee that he was finished with his business as it related to the justification for the stop – either by issuing a citation/warning, or through some other action?⁴ Although Officer Huntington *testified* in this case that he had finished his business with Hansen as it related to the traffic stop (R. 84:17), the officer's conduct did not communicate that fact to Hansen.

Specifically, the findings concerning the matter reflect the following: After

4 In considering the transition between a detention and a level-one encounter, the United States Supreme Court has declined to impose bright-line rules. That is, the Court refused to find that an officer is required to "inform detainees that they are free to go" before a level-two encounter may transform into a level-one encounter. Robinette, 117 S.Ct. at 421. Hansen is not seeking imposition of a bright-line rule. Rather, Hansen maintains that consistent with Robinette, a totality of the circumstances must be considered to determine the level of the encounter.

Officer Huntington stopped Hansen's vehicle, he approached Hansen's car and "informed the defendant why he had been stopped." (R. 65, FF at ¶ 17.) According to the marshaled evidence, Officer Huntington told Hansen that he had been stopped for two reasons: First, an "improper lane change" and second, "no insurance according to state records." (R. 84:12.) Next, Officer Huntington "requested [Hansen's] driver's license, registration, and insurance information." (R. 65, FF at ¶ 17.)

Hansen produced the license and registration, and he informed Officer Huntington that he could not afford insurance. Officer Huntington returned to the patrol car and ran a computer/warrants check on Hansen that reflected a valid license and no outstanding warrants for Hansen's arrest. Officer Huntington returned to Hansen's car and handed the license and registration to Hansen. Officer Huntington informed Hansen that he had to "obtain insurance for his car and to carry proof of insurance in the car." (R. 65-66, FF at ¶¶ 18-21.)

The facts fail to indicate how Officer Huntington resolved the first justification for the stop, that is, the "improper lane change." Officer Huntington intended to issue a warning, but did not say anything about it to Hansen.⁵ (R. 84:16, 31-34, 43-44.) Thus,

⁵ Even if Officer Huntington mentioned a warning on the "lane change" to Hansen, he did not inform Hansen that he would be receiving a verbal warning, rather than a written warning. (R. 84:43 (Officer Huntington did not inform Hansen that he was "not going to give [him] a citation, you're free to go type thing"); 84:43 (Officer Huntington's department does not issue written warnings)). Thus, Hansen would not have known whether he needed to stay until the warning was issued/articulated or whether he was free to go on about his business.

from the perspective of a reasonable person, the officer had not completed his business as it related to the traffic stop; the detainee was not free to go.

In addition, at that point in time, a second officer had arrived on the scene with overhead lights engaged. The second officer stepped out of his car and was standing by at the scene. A third officer also arrived at some point. (R. 84:14.) Under those circumstances, a reasonable person would not feel free to leave. See Salt Lake City v. Ray, 2000 UT App 55, ¶11 (presence of several officers may indicate seizure).

Next, Officer Huntington “asked defendant two brief questions.” (R. 67, FF at ¶ 24.) The officer asked about drugs, alcohol, and weapons, and he asked Hansen, “Do you mind if I check” for such items in the car. (See R. 84:17-18, 38-40); point A.1., supra. A reasonable person would not feel free to ignore the officer’s questions and go on about his business. “When these factors are combined with a police officer’s superior position of authority, any reasonable person would have felt compelled to submit to the officer’s questioning.” State v. Robinette, 685 N.E.2d 762, 771 (Ohio 1997) (on remand from the United States Supreme Court, Robinette, 117 S.Ct. at 421, the Ohio Supreme Court ruled that total circumstances failed to support a level-one encounter).

In view of the circumstances identified in the findings and the record, a reasonable person would not believe he was free to leave. Unless the officer issued a warning or citation, or advised the person as to how he intended to resolve the justification for the

stop (*i.e.* the improper lane change), a reasonable person would feel detained." Also, the continued questioning and arrival of additional officers suggested Hansen was not free to go. The trial court erred in ruling that the encounter was a level-one, consensual stop.

2. The Continued Detention Was Not Reasonably Related to the Circumstances Which Justified the Interference in the First Place.

The trial court did not determine whether Officer Huntington's further questioning was reasonably related to the circumstances which justified the interference in the first place. (See R. 67-68.) This Court can address the matter. Officer Huntington

6 Since a reasonable person cannot be expected to read the officer's mind, it is appropriate to consider the circumstances to determine if the officer has somehow indicated to the person that he is free to leave. See Patefield, 927 P.2d at 659 (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 at 769 (on remand from the United States Supreme Court). If an officer fails to indicate how he intends to resolve the traffic stop violation and the person leaves the scene, the person may face other charges for his conduct.

Again, Hansen does not claim that the officer is required specifically to "inform detainees that they are free to go." Robinette, 117 S.Ct. at 421. Rather, there must be a basis in the facts for a reasonable person to believe he is free to leave. For example, the officer may issue a citation or warning; advise 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); or wish the person a good day. Such an act may be relevant in considering whether the encounter is consensual.

Significantly, such an act may be only one factor in the determination. For example, issuance of a warning -- on its own -- may not be sufficient to transform the detention into a consensual encounter. See State v. Robinette, 685 N.E.2d at 770 (on remand from the United States Supreme Court, the Ohio court found that although officer specifically administered a verbal warning and advised Robinette that he was letting him off with only a warning, a reasonable person would not feel free to go under the totality of the circumstances). In Miller's case, the officer failed to engage in such an act.

stopped Hansen for an "improper lane change" and no insurance. After Officer Huntington returned Hansen's license and registration, he asked Hansen if he had any drugs, alcohol or weapons in the car. There is no apparent connection between that question and the initial detention for an "improper lane change" and insurance violation. See Sepulveda, 842 P.2d at 918 (if defendant had properly preserved issue as to whether officer exceeded scope when he pulled defendants over for expired registration sticker and asked about drugs, alcohol and weapons, defendant may well have prevailed on issue of unreasonable detention); see Robinson, 797 P.2d at 437-48. Thus, unless the officer had reasonable articulable suspicion regarding drug activity, he was not allowed to exceed the scope of the justification for the detention. The continued questioning was not reasonably related to the circumstances which justified the interference in the first place.

3. Officer Huntington Failed to Articulate Reasonable Suspicion to Justify the Continued Detention.

According to the case law, Officer Huntington would be justified in detaining Hansen for further questioning if Officer Huntington had reasonable articulable suspicion of serious criminal activity. Robinson, 797 P.2d at 435. The trial court did not reach the issue of reasonable articulable suspicion in this case. (See the record in general.) This Court may decide the matter. Salt Lake City v. Ray, 2000 UT App 55.

¶18: State v. Carter, 812 P.2d 460, 465-66 (Utah App. 1991) ("We must now determine whether defendant's temporary detention was justified, that is, whether it was supported

by a reasonable articulable suspicion to believe he was engaged in criminal activity”); State v. Hansen, 837 P.2d 987, 988 (Utah App. 1992); State v. Trujillo, 739 P.2d 85, 88 (Utah App. 1987).

In considering the facts articulated and known by Officer Huntington at the time of the continued questioning, it is plain there was no reasonable articulable suspicion that Hansen might have committed or was about to commit a drug crime to support the continued detention for questioning. “Accordingly, there is no basis on which to justify” the continued detention. Ray, 2000 UT App 55, ¶19. The further questioning violated Hansen’s rights under the Fourth Amendment.

4. Hansen Is Entitled to Suppression of the Evidence Since the Consent Was Obtained by Police Exploitation of the Illegal Detention.

Where consent was obtained as a result of an officer’s exploitation of his antecedent illegality, the consent may not be upheld. That is, even if this Court finds that the consent to search was voluntary, the evidence discovered in connection with the search may be suppressed because it was obtained as a result of police exploitation of a prior illegality -- the unlawful detention. See Ham, 910 P.2d at 441; Robinson, 797 P.2d at 437.

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

88 (cite omitted).

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

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

Ham, 910 P.2d at 440-41 (cites omitted).

In considering the “attenuation issue” identified in Ham, the record in this case reflects that no time passed between the continued, illegal detention and the request for consent to search. (R. 84:16, 29, 38.) In addition, there were no intervening circumstances. (Id.) Hansen’s consent was procured in connection with the unlawful detention. Also, the record reflects that Officer Huntington unlawfully detained Hansen and asked further questions for the purpose of obtaining consent to search the car. Accordingly, Hansen’s consent, even if voluntary, was invalid because it was gained by the officer’s exploitation of his prior illegal conduct. Therefore, “all evidence obtained thereby must be suppressed.” Ham, 910 P.2d at 441.


CONCLUSION

Hansen did not provide valid consent to search his vehicle. The consent was involuntary and it was poisoned by the illegal detention. The trial court erred in denying

the motion to suppress evidence obtained in connection with the unlawful conduct.

Hansen respectfully requests that this Court reverse the trial court's ruling on the matter.

SUBMITTED this 18th day of April, 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, 140230, Salt Lake City, Utah 84114-0230 and 4 copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, this 18th day of April, 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.

ADDENDA

ADDENDUM A

THIRD DISTRICT COURT - SLC COURT
SALT LAKE COUNTY, STATE OF UTAH

| | | |
|------------------|---|--------------------------------|
| STATE OF UTAH, | : | MINUTES |
| Plaintiff, | : | SENTENCE, JUDGMENT, COMMITMENT |
| | : | NOTICE |
| | : | |
| | : | |
| VS. | : | Case No: 991903645 FS |
| | : | |
| SHAYNE M HANSEN, | : | Judge: LESLIE LEWIS |
| Defendant. | : | Date: October 22, 1999 |

PRESENT

Clerk: chells

Prosecutor: MARK KOURIS

Defendant

Defendant's Attorney(s): OTIS STERLING

DEFENDANT INFORMATION

Date of birth: April 24, 1978

Video

Tape Number: 12:36 pm

CHARGES

1. ILLEGAL POSS/USE OF CONTROLLED SUBSTANCE - 3rd Degree Felony
Plea: Guilty - Disposition: 08/20/1999 Guilty Plea

SENTENCE PRISON

Based on the defendant's conviction of ILLEGAL POSS/USE OF CONTROLLED SUBSTANCE a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

The prison term is suspended.

Case No: 991903645
Date: Oct 22, 1999

SENTENCE FINE

Charge # 1 Fine: \$500.00
 Suspended: \$0.00
 Surcharge: \$425.00
 Due: \$925.00

 Total Fine: \$500.00
 Total Suspended: \$0
 Total Surcharge: \$425.00
 Total Principal Due: \$925.00
 Plus Interest

SENTENCE TRUST

The defendant is to pay the following:
Attorney Fees: Amount: \$300.00 Plus Interest
Pay in behalf of: LEGAL DEFENDARS ASSOC.

ORDER OF PROBATION

The defendant is placed on probation for 3 year(s).
Probation is to be supervised by Adult Probation & Parole.
Defendant is to pay a fine of 925.00 where the surcharge has been
added to the fine. Interest may increase the final amount due.
Pay fine to The Court.

PROBATION CONDITIONS

Usual and ordinary conditions required by the Department of Adult
Probation & Parole.
Submit to searches of person and property upon the request of any
Law Enforcement Officer.
Do not use, consume or possess alcohol or illegal drugs, nor
associate with any people using, possessing or consuming alcohol or
illegal drugs.
Submit to tests of breath and urine upon the request of any Law
Enforcement Officer.
Violate no laws.
Submit to drug testing.
Not frequent any place where drugs are used, sold, or otherwise

Case No: 991903645
Date: Oct 22, 1999

distributed illegally.

Refrain from the use of alcoholic beverages.

Serve 60 days in the Salt Lake County Jail with credit for time served of 5 days. The remainder of the jail time is held in abeyance at this time. The Court sets a review hearing on 4/21/99 and will consider suspending jail if the defendant has remained cleaned and has complied with conditions of probation.

Attend 90 AA meetings in 95 days. Thereafter attend 4 AA meetings per week.

Be interviewed for out patient program at Odyssey House. If accepted the defendant is to enter into and complete and pay any costs.

Defendant is to be given towards fine for paying costs of program. When the defendant goes into Odyssey House the terms of AA meetings are suspended.

Drug tested today at APPD.

Drug tested every 2 weeks until in Odyssey House. If clean for 6 months, drug tests to be 1 time per month.

Court recommends the Drivers License Division allow the defendant to drive to and from work. Mr Sterling will prepare a letter for the court's signature.

Pay \$300.00 recoupment fee.

A warrant is not needed for searches by Officer/APPD.

Prior consent of Court/APPD for perscriptions by Doctor.

REVIEW HEARING is scheduled.

Date: 04/21/2000

Time: 08:30 a.m.

Location: Fourth Floor - N44

THIRD DISTRICT COURT

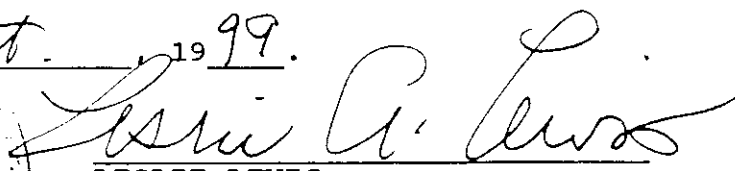
450 SOUTH STATE

SLC, UT 84111-1860

Before Judge: LESLIE LEWIS

Dated this 22nd day of Oct., 1999.




LESLIE LEWIS
District Court Judge

Case No: 991903645
Date: Oct 22, 1999

In compliance with the Americans with Disabilities Act, individuals needing special accommodations (including auxiliary communicative aids and services) during this proceeding should call Third District Court at 238-7300 at least three working days prior to the proceeding. The general information phone number is (801)238-7300.

ADDENDUM B

CONSTITUTION OF THE UNITED STATES

AMENDMENT IV

[Unreasonable searches and seizures.]

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

ADDENDUM C

DAVID E. YOCOM
District Attorney for Salt Lake County
N. M. D'ALESSANDRO, Bar No. 4818
Deputy District Attorney
231 East 400 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 363-7900

SEP 1 1999

SALT LAKE COUNTY
By M. Snell

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

| | |
|--|--|
| THE STATE OF UTAH, Plaintiff, -v- SHAYNE M. HANSEN, Defendant. | FINDINGS OF FACT AND CONCLUSIONS OF LAW Case No. 991903645FS Hon. Leslie A. Lewis |
|--|--|

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

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

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

FINDINGS OF FACT

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

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

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

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

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

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

7. Holden and Center Streets are public highways.

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

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

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

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

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

13. Both cars stopped at 20 South Main Street.

14. Officer Huntington approached the other car on foot.

15. There were two male occupants in the car.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

38. Defendant was arrested.

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

40. Officer Huntington's testimony was credible.

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

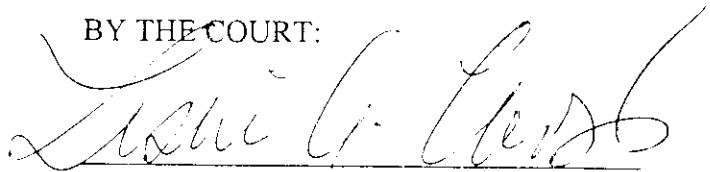
9. There was no illegality preceding defendant's consent to search that rendered the consent involuntary.

10. Defendant's car was lawfully searched.

11. The evidence was lawfully seized.

DATED this 19th day of Sept, 1999.

BY THE COURT:


LESLIE A. LEWIS, Judge

Approved as to form:

Otis Sterling III
Attorney for Defendant

SEP 1 1999

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by David E. Yocom

IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT

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

THE STATE OF UTAH,

Plaintiff,

-v-

SHAYNE M. HANSEN,

Defendant.

ORDER

Case No. 991903645FS

Hon. Leslie A. Lewis

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

DATED this 15th day of Sept., 1999.

BY THE COURT:

Leslie A. Lewis
LESLIE A. LEWIS, Judge

Approved as to form:

Otis Sterling III
Attorney for Defendant