

1989

Jose Francisco Arroyo v. State of Utah : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

DOCKET NO: 890128

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :
Plaintiff-Respondent, : Case No. 890128
v. :
JOSE FRANCISCO ARROYO, : Category No. 2
Defendant-Petitioner. :

BRIEF OF RESPONDENT

- - - - -

APPEAL FROM A DECISION OF THE UTAH COURT OF
APPEALS ON PETITION OF CERTIORARI.

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :
Plaintiff-Respondent, : Case No. 880062-CA
v. :
JOSE FRANCISCO ARROYO, : Category No. 2
Defendant-Petitioner. :

BRIEF OF RESPONDENT

- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a decision of the Utah Court of Appeals on Petition of Certiorari. This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2-2(5) (Supp. 1989).

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

1. Did the Utah Court of Appeals correctly decide that defendant conceded the issue of consent?
2. Did the Utah Court of Appeals correctly decide to remand this case for an evidentiary hearing on the issue of consent where voluntary consent vitiates a prior illegal stop?
3. Did defendant waive his state constitutional claims by failing to articulate them to the Utah Court of Appeals?
4. Should this Court adopt a standard similar to the federal standard under the state constitution?

STATEMENT OF CASE

Defendant was arrested and charged with possession of a controlled substance, a second degree felony. Judge Harding granted defendant's Motion to Suppress Evidence and the State

filed an interlocutory appeal to the Utah Court of Appeals. The Court of Appeals reversed Judge Harding's order granting suppression. This Court granted review on Petition for Writ of Certiorari to the Utah Court of Appeals.

STATEMENT OF FACTS

On September 15, 1987, Highway Patrol Trooper Paul Mangelson was driving southbound on Interstate 15 at about 4:00 p.m. when he observed defendant's truck driving northbound near Nephi (R. 50). Mangelson may have observed that defendant's truck displayed out of state license plates (R. 50). He did observe that defendant was following the vehicle in front of him at a distance of about 3 or 4, possible 5 car lengths and he felt that distance was unsafe (R. 51).

Mangelson turned through the median and pulled up to defendant's truck (R. 51, 52). Pulling alongside defendant, Mangelson estimated defendant's speed at approximately 50 miles per hour (R. 51).¹ At that time, Mangelson also observed that defendant appeared to be Hispanic (R. 52). Because Mangelson still felt defendant was following too closely, he pulled defendant over (R. 53).

Mangelson issued a citation to defendant for following too closely and for driving on an expired driver's license (R. 5). At some point, defendant consented to Mangelson's subsequent

¹ Judge Harding found that Mangelson estimated the speed at 50 miles per hour even though Mangelson testified that it was 50 to 55 and defendant said he was travelling 54 miles per hour (T. 169, 192, 195).

search of the truck (R. 53).² Mangelson discovered approximately one kilogram of cocaine inside the passenger door panel. He arrested defendant for possession of a controlled substance (R. 6).

After a preliminary hearing, defendant was bound over to District court on the narcotics charge (R. 1-3). Defendant moved to suppress the cocaine as evidence claiming that Mangelson's traffic stop was pretextual for an investigative search of defendant's truck (R. 12-13). Judge Harding granted the motion to suppress and entered Findings of Fact, Conclusions of Law and an Order suppressing the evidence on January 6, 1988 (R. 49-55).

SUMMARY OF ARGUMENT

The Utah Court of Appeals correctly determined that the record supports a finding that defendant conceded the issue of consent. Defendant never argued that his consent was coerced and he prepared a specific finding of fact that he did consent to the search.

Given that defendant consented to the search, the prior illegality of the stop is vitiated in this case. There is no evidence of coercion of defendant's consent in the record. Defendant's claims to the contrary are mostly based upon a "but for" casual connection that has been rejected by the Tenth Circuit and the United State Supreme Court.

² Defendant conceded that he consented to the search, therefore, no details were presented after the facts surrounding the initial stop. Defendant challenged only the initial stop (R. 53, T. 189).

Defendant waived his opportunity to raise an analysis of the Utah Constitution in the Court of Appeals and should not be allowed to make his analysis for the first time in this Court. Even if this Court does reach the state constitutional argument, it need not suppress the evidence. A consent search is a reasonable search and should vitiate any prior illegality of the stop.

ARGUMENT

POINT I

THE DECISION OF THE COURT OF APPEALS ON THE
ISSUE OF CONSENT IS CORRECT.

Defendant contends that the Utah Court of Appeals erred in its conclusion that the lower court found that defendant consented to the search of his vehicle. Specifically, he complains that his attorney never used the word "stipulate" and that the appellate court's opinion is in error because it states that counsel stipulated. Careful review of the trial court record and of the appellate court's opinion, however, supports a conclusion that defendant, in effect, stipulated that the search was consensual and that, given the lack of any claim of involuntariness, the consent was voluntary.

Defendant correctly admits that the State attempted to present evidence on the issue of voluntary consent and that defense counsel objected claiming that the motion to suppress only addressed the validity of the stop. The trial court then limited the State to evidence concerning the stop. See T. 189. Defendant insists, nevertheless, that he did not "stipulate" that the search was conducted upon his consent. He urges this Court

to do what the Court of Appeals would not do. That is to remand this case for a hearing to determine that his consent was voluntary. This result, however, would reward defendant for misdirecting the trial court in the first instance and allow him to raise a claim at this late date that he studiously avoided in the appropriate stage of the proceeding and overlooks the factual finding already entered by the trial court.

Without ever claiming that his consent to search was not voluntarily given, defendant effectively prevented the State from presenting evidence on the issue. If defendant had stopped there, perhaps his argument on appeal would be well taken. He did not, however, stop there. Defense counsel prepared Findings of Fact for the trial court in which he included the following:

18. The Trooper requested permission to search the Defendant's vehicle, and the **Defendant consented to the search of the vehicle.**

(R. 53) (emphasis added). On appeal, defendant attempted to convince the Court of Appeals that this finding does not mean what it says. He claimed that the trial court made no finding of voluntariness of the consent. The Court of Appeals rejected this argument and this Court should also reject it. The finding of the trial court cannot be limited in the manner that defendant wishes to limit it. Defendant, in effect, conceded that the consent occurred. Without so much as a hint that he did not consent voluntarily, he prepared a specific finding that he did consent to the search of the vehicle. This finding should be read, as the Court of Appeals read it, to include by implication

the logical extension of its express terms that the consent was voluntarily given. This is a logical conclusion for the Court of Appeals to reach because if defendant had argued at trial that his consent was involuntary, he would be arguing that it was not a consent search. Where, on the other hand, defendant prepared a finding of fact stating that he consented, the state, the trial court and the Court of Appeals could rightfully conclude that defendant conceded the issue.

Defendant asserts that the decision of the Court of Appeals "occurred because of a blurring or imprecise use of the word 'consent'." App. Br. at 8. The record is not blurred or imprecise. It plainly supports the Court of Appeals' decision that defendant conceded the issue of consent.

Defendant argues further that the trial court made no conclusions of law about the issue of consent, therefore, the Court of Appeals is incorrect in concluding that the finding of fact on the issue controls. This argument is unsupported and unfounded. The trial court made no findings on this issue because defense counsel was convinced, and convinced the court, that the fact of consent was irrelevant where the stop itself was unlawful. Thus, that the trial court did not enter any conclusions of law on the issue is the result of misapplication of the law, not of lack of support for the conclusion. Defendant appears to assert that his concession of consent should not be enforced because there was no evidence presented on the issue. Litigants often stipulate, waive, or concede issues without the benefit of record evidence upon which later observers can

determine the reason for their actions and courts should not allow a litigant's remorse over the concession to control whether the litigant will be held to the concession.

It is understandable that defendant now regrets his concession because he recognizes his error in believing that an illegal stop always invalidates a subsequent consent search under the federal constitution. The Court of Appeals correctly relied upon the express findings entered by the trial court rather than upon defendant's later claims that he did not intend to close the door on other avenues of attacking the search. This Court should also find that defendant conceded the issue of consent.

POINT II

THE COURT OF APPEALS' DECISION IS CONSISTENT
WITH EXISTING CASE LAW.

Defendant asserts that his case is "not unlike" that of State v. Sierra, 754 P.2d 972 (Utah App. 1988). Contrary to defendant's assertion, this case is not like Sierra. Because this case is distinguishable from Sierra, the Court of Appeals appropriately refused to remand for an evidentiary hearing.

In Sierra, the court remanded for an evidentiary hearing on the issue of consent because there was no evidence in the record on the issue of voluntariness. In that case, unlike this case, the trial court did not enter a finding of fact that the defendant consented to the search. The appellate court remanded Sierra because the police officer had testified that Sierra volunteered to let him search, however, the trial court had not made any findings on the issue whatsoever nor had Sierra conceded the issue of consent. There was also testimony that the

drugs were found in another location after an extensive search of the interior and other areas of the car. From the record, the Court of Appeals also noted that Sierra did not appear to speak English well and perhaps could not understand the officer. Thus, questions of fact remained as to whether Sierra had consented to the portion of the search that revealed the contraband.

In this case, the trial court specifically found that defendant consented to the search. It was, thus, unnecessary to remand for an evidentiary hearing even though the record does not contain evidence of what defendant said or exactly where the officer searched. Here, defendant conceded the issue regardless of whether this Court is able to determine the exact facts upon which he based the concession.

Defendant's concession should be interpreted to include all aspects of the term "consent." The Court of Appeals simply determined that when defendant used that term, he was conceding that the consent was voluntary. This determination makes further factual development unnecessary since voluntary consent is itself an intervening act "sufficiently distinguishable from the primary illegality to purge the evidence of the primary taint." United States v. Carson, 793 F.2d 1141, 1147-48 (10th Cir. 1986), cert. denied, 107 S. Ct. 315 (1986). For this reason, defendant is incorrect in asserting that this Court must remand for a hearing to determine if the consent attenuated the taint of the illegal stop.

In point III of his brief, defendant argues that the Court of Appeals decision is inconsistent with case law analyzing

the Fourth Amendment. He urges this court to read Carson more narrowly than did the Court of Appeals because he claims that voluntary consent to search is not of itself sufficient to overcome an initially unconstitutional stop. Defendant ignores that the Tenth Circuit expressly stated that voluntary consent is of itself an intervening act that vitiates the initial illegality of the stop. 793 F.2d at 1147-48. Where the fruits of the primary illegality (a pretext stop) are not used to coerce a defendant into granting consent, then the consent is voluntary and the illegal stop is irrelevant.

Defendant also ignores Moran v. Burbine, 475 U.S. 412 (1986) in which the United States Supreme Court stated:

The state of mind of the police is irrelevant to the question of the intelligence and voluntariness of [defendant's] election to abandon his rights.

106 S. Ct. at 1141-42. Thus, the focus in a consent search case is the defendant's grant of consent, not the request to search or the reasons underlying it. This concept is consistent with Wong Sun v. United States, 371 U.S. 471 (1963) wherein the Court stated:

We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

371 U.S. at 487-88 (citation omitted). Where there is no evidence of coercion, defendant's voluntary consent is

sufficiently distinguishable from the pretext stop in this case to overcome the need for suppression of the evidence.

Defendant cites Florida v. Royer, 460 U.S. 491 (1983) to support his claim that a consent search is always invalidated by an illegal detention. Royer is distinguishable and more narrow than defendant asserts. The officers in Royer were found to have exceeded the bounds of a permissible stop by engaging in activities that coerced defendant into granting his consent to search. The officers retained Royer's airline ticket and identification while they requested him to accompany them to a small room for questioning. They obtained Royer's luggage without his permission and then asked to search it. While Royer did not object to the search, he merely acquiesced to a coercive show of authority. The Court found that such acquiescence was not a valid consent. It is likely that, faced with other facts, the Supreme Court would find the consent valid.

There have been no facts established in this case that indicate defendant was coerced into granting his consent. Absent such facts, the decision of the Court of Appeals is appropriate.

Defendant also cites cases from other circuit courts of appeal that are contrary to Carson. These cases, however, merely adopt the "but for" causal connection that Carson rejects. See United States v. Gooding, 695 F.2d 78 (4th Cir. 1982), and United States v. Taheri, 648 F.2d 598 (9th Cir. 1981). Carson contains the much more workable analysis of the Wong Sun standard. The Tenth Circuit's analysis should be adopted by this Court on the issue of defendant's federal constitutional claim.

POINT III

DEFENDANT WAIVED THE CLAIM THAT THE UTAH CONSTITUTION AFFORDS HIM BROADER PROTECTION THAN THE FOURTH AMENDMENT. ALTERNATIVELY, HIS ARGUMENT SHOULD BE REJECTED.

In the Utah Court of Appeals, defendant contended that Article I, section 14 of the Utah Constitution affords broader protection to citizens than does the United States Constitution. As the Court of Appeals noted, however, defendant did not articulate what these broader protections are or what is their basis. For this reason, the Court of Appeals refused to reach the issue. This Court should also refuse to reach the issue where defendant failed to make his argument in the court from which he appeals. Cf. State v. Davis, 689 P.2d 5 (Utah 1984) (defendant must have specifically stated to the trial court the same grounds for objection to evidence he presents on appeal).

Alternatively, if this Court reaches the state constitutional claim it should decline defendant's invitation to expand Article I, section 14 in the manner suggested. That section provides:

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

This language does not mandate suppression of the evidence in this case and, in fact, supports its admission. By obtaining defendant's consent to search his vehicle, the officer avoided violating defendant's right to be secure in his effects because a consent search is a reasonable search.

On the other hand, defendant argues that because the initial stop was unreasonable, this Court should hold that a subsequent consent to search is always ineffective. On its face, defendant's claim that his analysis provides a bright line rule is inviting. He argues that officers will avoid stopping vehicles unreasonably if the lure of obtaining a later consent to search is unavailable.

On closer inspection, this rule would not provide a bright line to officers at the stage where a bright line would actually simplify search and seizure rules. It is unrealistic to focus on what occurs after the stop when it is the initial decision whether to make the stop that creates the most confusion for an officer.

In this case, the lower courts held that the officer's decision to stop defendant was pretextual. Although the Court of Appeals acknowledged that the officer's own reasons for making the stop were irrelevant to its holding, it held that an objectively reasonable officer would not have stopped defendant under the circumstances. State v. Arroyo, 102 Utah Adv. Rep. 34, 35 (Utah Ct. App. filed Feb. 15, 1989). The court concluded that the officer would not have stopped defendant "except for some unarticulated suspicion of more serious criminal activity." Id. Conversely, the officer must have thought the stop was reasonable since he actually issued a citation for the offense he claimed he observed. It is very difficult indeed for officers to determine whether they are making an "objectively reasonable" stop for legitimate reasons when they also harbor some suspicions of other

activities about the subject. A rule requiring suppression of evidence obtained after a consent search occurring after an unreasonable stop will not make the decision whether to stop an individual easier for the officer in the field. It is a fact of human frailty that officers will continue to make stops based upon a mistaken judgment of legitimacy regardless of whether permission to search may later be sought.

It is actually much more realistic for this Court to focus upon the fact of defendant's consent in this case and find that a consent search does not violate the right to be free from unreasonable searches. It is unlikely that officers would waste their time stopping individuals they have absolutely no reason to stop merely to ask if they can search the vehicle as defendant warns. It is more likely that the desire to investigate other suspicions clouds an officer's ability to make an objective decision whether to stop. He or she may have difficulty deciding in that situation whether the observed driving pattern is the reason for the stop or whether their suspicions are controlling. For these reasons, a rule of state law that suppresses evidence in a case such as this one is unhelpful and this Court would better utilize its time finding ways to make the decision to stop or not an easier one to make for officers in the field.

The State is aware that several of this Court's recent opinions have suggested that, as has been done in some other states with their constitutions' search-and-seizure provisions, Article I, section 14 could be construed to expand constitutional protection beyond that mandated by the United State Supreme Court

under the fourth amendment. State v. Earl, 716 P.2d 803, 805-06 (Utah 1986); State v. Hygh, 711 P.2d 264, 271-73 (Utah 1985) (Zimmerman, J., concurring separately). This Court could also independently analyze the state provision and conclude that, given its similarity to the Fourth Amendment,³ the Federal analysis is well taken and adopt a similar analysis for the Utah Constitution. However, the State recognizes that the current Court may still give the state provision an independent and more protective interpretation in future cases, perhaps adopting the following view taken by the Mississippi Supreme Court in a recent case:

We accord to the U.S. Supreme Court the utmost respect in its interpretation of the U.S. Constitution. We must, however, reserve for this Court the sole and absolute right to make the final interpretation of our state Constitution and, while of great persuasion, we will not concede that simply because the U.S. Supreme Court may interpret a U.S. Constitution provision that we must fie the same interpretation to essentially the same words in a provision of our state Constitution.

³ The State has been able to find only a brief reference to Article I, section 14 at the Constututional Convention of 1895. The following appears to be the entire record of any proceedings in that regard:

The Chariman: Gentlemen, we will take up section 14,
Section 14 was read and passed without amendment.

Official Report of Proceedings and Debates of the Convention: 1895, 319 (1989). The development of Utah's search-and-seizure provision prior to the adoption of article I, section 14 reflects a steady movement by the drafters toward adoption of the precise wording of the fourth amendment.

Penick v. State, 440 So.2d 547, 551 (Miss. 1983). See also State v. Johnson, 110 Idaho 516, 716 P.2d 1288, 1292 n. 1 (1986); State v. Arrington, 311 N.C. 633, 319 S.E.2d 254, 260 (1981).

Nevertheless, the State urges the Court not to lose sight of its history of construing Article I, section 14 as providing the same scope of protection as the fourth amendment, and the philosophy underlying that history. See e.g., State v. Jesso, 21 Utah 2d, 444 P.2d 517 (1968); State v. Lopes, 552 P.2d 120 (Utah 1976). It should proceed very cautiously into this new territory. As the Vermont Supreme Court correctly stated:

The development of state constitutional jurisprudence will call for the exercise of great judicial responsibility as well as diligence from the trial bar. It would be a serious mistake for this Court to use its state constitution chiefly to evade the impact of the decisions of the United States Supreme Court. Our decisions must be principled, not result-oriented. Justice Pollock of the New Jersey Supreme Court expressed his concern this way: "[s]tate courts should not look to their constitutions only when they wish to reach a result different from the United States Supreme Court. That practice runs the risk of criticism as being more pragmatic than principled."

State v. Jewett, 500 A.2d 233, 235-36 (Vt. 1985) (footnote citation omitted). A recent opinion from the New Jersey courts echoes this concern:

There are certain dangers inherent in state courts relying too heavily on state Constitutions to afford greater protection to its citizens. The erosion of national constitutional doctrine is one illustration. We are therefore mindful of the desirability of uniformity between the state and federal courts in the interpretation of parallel constitutional provisions. Divergent interpretations should be avoided unless

guidelines such as those discussed in State v. Hunt, 91 N.J. at 358-368, 450 A.2d 952, justify a departure.

State v. Novembrino, 200 N.J. Super. 229, 239-40, 491 A.2d 37, 43 (1985), aff'd, 105 N.J. 95, 519 A.2d 820 (1987). In the Hunt case cited by the Novembrino court, Justice Handler in a concurring opinion identified the following criteria for deciding whether to interpret the state constitution differently than has the federal constitution: (1) textual language; (2) legislative history; (3) preexisting state law; (4) structural differences; (5) matters of particular state interest or local concern; (6) state traditions, and (7) public attitudes. This would be a reasonable set of factors for this Court to take into account before resorting to independent state constitutional interpretation to provide protections that are either less expansive or nonexistent under federal constitution.

It is highly significant that, even after the issuance of the "suggestive" opinions in Earl and Hygh, the Court continues to rely solely on federal precedent interpreting the fourth amendment in deciding search-and-seizure issues, with no indication that those issues might be decided differently under Article I section 14 or that additional briefing on the state constitutional question was necessary. See, e.g., State v. Banks, 720 P.2d 1380, 1382-84 (Utah 1986); State v. Kelly, 718 P.2d 385, 389-92 (Utah 1986). Cf. State v. Nielsen, 727 P.2d 188 (Utah 1986) (noting that "what the appropriate remedy might be if [the defendant] had argued that the officer's action violated his rights under article I, section 14 of the Utah Constitution is an

open question"). This is not to say that the federal precedents in this area must necessarily represent the most satisfactory resolution of the issues in all instances, or that alternative approaches to search and seizure law should never be considered. See Bradley, "Two models of the Fourth Amendment," 83 Mich. L. Rev. 1468 (1985)⁴ The point is that this Court will often find an acceptable resolution of a search or seizure problem in the federal case law (on both philosophical and public policy grounds), as it apparently did in Banks and Kelly, and therefore have no reason to interpret Article I, section 14 differently. See, e.g., State v. Quinn, 50 Or. App. 383, 623 P.2d 630, 638-9 (1981) (adopting federal position for purposes of state constitution on search-and-seizure issues); State v. Caraher, 293 Or. 741, 653 P.2d 942, 948 (1982) (citing cases where the state court recognized the possibility of expanding protection under the state constitution beyond that required under the federal constitution, but declined to take such a step in the given case).

Defendant also suggests that officers be instructed to tell people that they are not required to permit a search. This suggestion also sounds good at first blush. It, nevertheless, has difficulties in application. Officers frequently ask for

⁴ Professor Bradley, in an excellent article, discusses two alternative models for clarification of fourth amendment law. He argues that adoption of either model would solve many of the problems the Supreme Court has had with search-and-seizure issues and would change a widely held view that "[t]he fourth amendment is the Supreme Court's tarbaby: a mass of contradictions and obscurities that has ensnared the 'Brethren' in such a way that every effort to extract themselves only finds them more profoundly stuck." 83 Mich. L. Rev. at 1468.

permission to search even where the search may be sustainable on probable cause, or even where there is a search warrant. See e.g. State v. Valdez, 748 P.2d 1050, 1056 (Utah 1987). If officers in such a situation inform the suspect there is no need to allow the search, the other bases for the search are undercut or must be articulated to the individual. This would require police officers to be legal scholars and inform a person that they do not need to permit a search but that the officer is going to search anyway based upon a warrant, and/or probable cause, and/or exigent circumstances, etc. Officers would be effectively precluded from using the consent search as a back up basis for a search. Such an approach is impractical and unworkable.

Finally, defendant merely assumes that if any of his state constitutional arguments are adopted by this Court, suppression will result. This Court need not, however, choose suppression to remedy a state constitutional violation. Instead, this Court could adopt some other remedy it deems appropriate, such as civil liability, to discourage violations rather than mandating the frustration of prosecution where the evidence suppressed is the crucial evidence of criminal activity suppression of which will result in dismissal of the case. The State urges this Court to consider alternatives other than suppression under the Utah Constitution if it finds that defendant's separate state constitutional rights were violated.

Three major rationales for the exclusionary rule in search-and-seizure cases have developed in the case law and legal literature: (1) the remedial or personal right rationale; (2)

the juridical integrity rationale; and (3) the deterrence rationale. Coe, The ALI Substantiality Test: A Flexible Approach to the Exclusionary Sanction, 10 Ga. L. Rev. 1, 14-24 (1975).

The remedial or personal right rationale embraces the notion that the exclusion of evidence is a right inherent in the personal constitutional right to be free from unreasonable searches and seizures. However, despite some degree of support, the remedial or compensatory justification for the exclusionary rule has generally been rejected. Coe, supra at 15; Schroeder, Deterring Fourth Amendment Violations: Alternative to the Exclusionary Rule 69 Geo. L.J. 1361, 1426 (1981). But see State v. Johnson, 716 P.2d at 1297 n. 11; State v. Grawein, 123 Wis.2d 428, 431-32, 367 N.W.2d 816, 817-18 (Wis App. 1985) (citing State v. Kreigbaum, 194 Wis. 229, 232, 215 P.2d 1061, 1071 (1982)). A frequently cited flaw in this theory is that the text of the fourth amendment does not directly require exclusion; nor is there anything in the events giving rise to the adoption of the fourth amendment that supports the view that it was intended to require exclusion. Stewart, The Road Map to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search and Seizure Cases, 83 Colum. L. Rev. 1365, 1383 (1983). The Supreme Court clearly rejected this theory in United State v. Leon, 468 U.S. 897, 906 (1984). Because Article I, section 14, like the fourth amendment, contains no textual requirement for exclusion and there appears to be nothing in the history of its adoption to indicate that exclusion of evidence

would be required for a violation of the provision, this Court should again reject the remedial or personal right rationale as a constitutional basis for the exclusionary rule, as it did, for all practical purposes, in State v. Aime, 62 Utah 476, 220 P.2d 704, 706--08 (1923).

The theory that exclusion is necessary to preserve judicial integrity has also received much criticism and has generally played only a minor role in the development of the exclusionary rule. Coe, supra at 17. The notion underlying this theory was perhaps best articulated in the dissent of Justice Brandels in Olmstead v. United States, 227 U.S. 438, 485 (1928) (Brandels, J., dissenting):

Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the Government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself, it invites anarchy.

In that same case, Justice Holmes wrote in his dissenting opinion:

We have to choose, and for my part I think it less evil that some criminals should escape than that the Government should play an ignoble part.

277 U.S. at 470.

Although some courts continue to recognize the judicial integrity rationale as the most compelling justification for the exclusionary rule, see, e.g., State v. Novembrino, 200 N.J. Super. at 244, 491 A.2d at 45, it is subject to the same attack as in the personal right rationale--i.e., there appears to be no constitutional basis for it, either textually or historically.

Stewart, supra at 1383. Historically, courts have in a variety of circumstances admitted illegally obtained evidence, apparently not overly concerned that to do so would necessarily involve the court in "dirty business." Id. Stone v. Powell, 428 U.S. 465, 486 (1976) (observing that the fourth amendment "has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons"); Coe, supra at 17. This criticism appears sound, and although there is a good deal of merit to the value judgment inherent in the judicial integrity doctrine, it does not provide a sound constitutional basis for the exclusionary rule. Indeed, the judicial integrity rationale was explicitly rejected as an independent constitutional basis for the exclusionary rule by the Supreme Court in Michigan v. Tucker, 417 U.S. 433, 450 n. 25 (1974). The text and history of Article I, section 14 demands no different conclusion by this Court.

The deterrence rationale is with little doubt the most widely accepted justification for the exclusionary rule. In Leon, the Supreme Court made clear that it perceived deterrence as the only purpose for the rule. 468 U.S. at 906. Numerous state courts have taken a similar position regarding their own exclusionary rules. See e.g., Mers v. State, 482 N.E.2d 778, 782-83 (Ind. App. 1985); State v. Wood, 457 So.2d 206, 210-11 (La. App. 1984); State v. LePage, 102 Idaho 387, 630 P.2d 674, 678-79 (1981), cert. denied 454 U.S. 1057 (recognizing that, although other reasons for its use exist, the primary purpose of Idaho's exclusionary rule is to deter police misconduct). The

Leon decision and a number of state court opinions e.g., State v. Brown, 708 S.W.2d 140 (Mo. 1986); Stringer v. State, 491 So.2d 837, 847 (Miss. 1986) (Robertson, J., concurring), reflect the majority, and probably better reasoned, view that the deterrence rationale, like the other rationales, has no readily discernible basis in the federal constitution or the state constitutions. On the other hand, Justice Potter Stewart has articulated what is perhaps the most compelling counterargument to that view:

To give effect to the Constitution's prohibition against illegal searches and seizures, it may be necessary for the judiciary to remove the incentive for violating it. Thus, it may be argued that although the Constitution does not explicitly provide for exclusion, the need to enforce the Constitution's limits on government--to preserve the rule of law--requires an exclusionary rule. Under this third "doctrinal" basis for the exclusionary rule, which has been described as "constitutional common law," the exclusion of unconstitutionally obtained evidence is not a constitutional right but a constitutional remedy. It is a right only in the sense that every remedy vests a right in those who may claim it.

Stewart, supra at 1384. But even he qualified his argument by stating:

Under such an approach, the determination whether the exclusionary rule is constitutionally required turns on whether there are other adequate remedies available to ensure that the government does not violate the fourth amendment at its pleasure.

Id.

Assuming that this Court is among those courts that see deterrence of police misconduct as the primary purpose of the exclusionary rule, the Court should explicitly hold that an

exclusionary rule, in any form, is not required either by Article I, section 14, or any other provision in the state constitution, on a theory that exclusion is a constitutional remedy premised upon the deterrence doctrine. Although Justice Stewart's constitutional theory regarding the deterrence rationale is not without some force, by adopting it the court would unnecessarily entangle itself in a less than clear constitutional analysis. Elevating a question into the realm of a constitutional question, when that is avoidable, is not the preferred course. See State v. Wood, 648 P.2d 71, 82 (Utah 1982), cert. denied, 459 U.S. 988. Instead, this Court could adopt some other sanction, such as civil liability, that would adequately deter unconstitutional searches.

CONCLUSION

Based upon the foregoing, the State requests this Court to affirm the decision of the Court of Appeals. Alternatively, if this Court determines that only defendant's state constitutional rights were violated, the State urges the Court to adopt some appropriate remedy other than suppression of the evidence.

RESPECTFULLY submitted this 2nd day of August, 1989.

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CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Respondent were mailed, postage prepaid, to Walter F. Budgen, attorney for appellant, 257 Towers, Suite 340, 257 East 200 South - 10, Salt Lake City, Utah 84111, this 2nd day of August, 1989.

A handwritten signature in cursive script, appearing to read "David R. Larson for SLS".