

1989

# Jose Francisco Arroyo v. State of Utah : Brief of Petitioner

Utah Supreme Court

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Paul Van Dam, Attorney General; Sandra L. Sjogren, Assistant Attorney General; Attorneys for Respondent.

Walter F. Bugden; Attorney for Petitioner.

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UTAH SUPREME COURT

BRIEF

890128

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IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH, :  
Plaintiff/Respondent, : Priority  
v. :  
JOSE FRANCISCO ARROYO, :  
Defendant/Petitioner. : Case No. 890128

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BRIEF OF THE DEFENDANT/PETITIONER

WALTER F. BUGDEN, JR., #480  
257 Towers, Suite 340  
257 East 200 South - 10  
Salt Lake City, UT 84111  
Attorney for Petitioner

PAUL VAN DAM  
Attorney General  
SANDRA L. SJOGREN  
Assistant Attorney General  
236 State Capitol  
Salt Lake City, UT 84111  
Attorneys for Respondent

---

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WALTER F. BUGDEN, JR., #480  
257 Towers, Suite 340  
257 East 200 South - 10  
Salt Lake City, UT 84111  
Attorney for Petitioner

PAUL VAN DAM  
Attorney General  
SANDRA L. SJOGREN  
Assistant Attorney General  
236 State Capitol  
Salt Lake City, UT 84111  
Attorneys for Respondent

COMPLETE LISTING OF ALL PARTIES

Petitioner: Jose Francisco Arroyo

Counsel of Record: WALTER F. BUGDEN, JR.  
257 Towers, Suite 340  
257 East 200 South - 10  
Salt Lake City, UT 84111

Respondent: The State of Utah

Counsel of Record (on  
appeal): SANDRA L. SJOGREN  
Assistant Attorney General  
236 State Capitol  
Salt Lake City, Utah 84114

Counsel of Record (at  
trial court): DONALD J. EYRE

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Constitutional Provisions

Article I, Section 14 of the Utah Constitution:

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 of be searched, and the person or thing to be seized.

Fourth Amendment to the United States Constitution:

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.

### ISSUES PRESENTED

1. Should the decision of the Court of Appeals be reversed because it is erroneously based on the premise that Petitioner's counsel stipulated that his client consented to the search of his truck when there was no such stipulation?

2. Is the decision of the Court of Appeals regarding the voluntariness of Mr. Arroyo's consent supported by the record?

3. Is the decision of the Court of Appeals that voluntary consent automatically untaints the Wong Sun "poisoned fruit" in conflict with Florida v. Royer, 460 U.S. 491 (1982), and other precedent?

4. Does Article I, Section 14 of the Utah Constitution confer a greater protection than the Fourth Amendment; and if yes, does the Utah Constitution mandate the application of a "but for" exclusionary rule for evidence seized as a result of a prior illegality?



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BRIEF OF THE DEFENDANT/PETITIONER

OPINION BELOW

The opinion of the Court of Appeals in State v. Arroyo, No. 880062-CA (filed February 15, 1989) is attached as Appendix A to this petition. A copy of that Court's order denying Respondent's Petition for Rehearing is attached hereto as Appendix B.

JURISDICTION

The Utah Court of Appeals filed its opinion on February 15, 1989 (Appendix A). The Court denied Mr. Arroyo's Petition for Rehearing on March 22, 1989 (Appendix B). A Petition for Writ of Certiorari was timely filed with this Court pursuant to Rule 45 of the Rules of the Utah Supreme Court. A Writ of Certiorari was granted May 15, 1989. This

Court has jurisdiction pursuant to Utah Code Ann. Section 78-2-2(5) (1986).

STATEMENT OF THE CASE

A. Summary of Proceedings Below.

Petitioner, Jose Francisco Arroyo, was arrested and charged with Unlawful Possession of a Controlled Substance with Intent to Distribute for Value in violation of Utah Code Annotated Section 58-37-8(1)(a)(i) (1953 as amended). After a preliminary hearing, the Petitioner was bound over to the District Court on the narcotics charge. Arroyo moved to suppress the evidence asserting that his stop by a highway patrol trooper for the traffic violation of "Following Too Closely" was a pretext stop. The trial court granted the Motion to Suppress and entered Findings of Fact, Conclusions of Law and an Order Suppressing the evidence on January 6, 1989. A copy of the Findings of Fact, Conclusions of Law and Order are attached hereto as Appendix C. The State of Utah appealed the trial court's suppression order.

On direct appeal, the Utah Court of Appeals reversed the trial court's order suppressing the evidence. The court held that:

1. The trial judge's determination that the stop of Arroyo's vehicle was an un-

constitutional pretext to search for drugs was a correct determination because a reasonable officer would not have stopped Arroyo for "Following Too Closely" except for some unarticulated suspicion of more serious criminal activity;

2. Arroyo, through his counsel, stipulated that he had consented to the search of his vehicle and based upon misleading conduct by Arroyo's counsel, said stipulation also included that the consent was given voluntarily;

3. Although the original illegal stop was unconstitutional, Arroyo's subsequent voluntary consent purged the taint from the initial illegality, and the Motion to Suppress was therefore improperly granted.

Mr. Arroyo petitioned for rehearing. The Petition was denied without comment and without addressing that the Court of Appeals' decision had been based upon the erroneous conclusion that Arroyo's counsel had mislead the trial Court and the State by stipulating that Arroyo had consented to the search of his vehicle. This Court granted a Writ of Certiorari.

B. Pertinent Facts.

At approximately 4:00 p.m. on September 15, 1987, Utah Highway Patrol Trooper, Paul Mangelson, was driving home after completing his shift an hour earlier. Trooper

Mangelson was driving southbound on I-15 near Nephi, Utah, when he observed a northbound truck-camper allegedly following the car in front of it too closely. Trooper Mangelson executed a U-turn through the median and caught up with Arroyo's truck.

Trooper Mangelson claimed that the truck was following the vehicle in front of him at a distance of three to eight car lengths at a speed of approximately 50 mph. Trooper Mangelson pulled along side the truck in order to observe its occupants and estimate the truck's speed. Trooper Mangelson noted that Arroyo and his passenger were hispanic, and that the vehicle had out of state license plates.

Arroyo, the driver, was cited for "Following Too Closely" and for Driving on an Expired Driver's License. Trooper Mangelson then requested permission to search the truck, and Arroyo agreed.

The search revealed approximately one kilogram of cocaine inside the passenger door panel. Trooper Mangelson then arrested Arroyo for possession of a control substance with intent to distribute in violation of Utah Code Annotated Section 58-37-8(1)(a)(i) (1986), second degree felony.

## ARGUMENT

POINT I: THE CONCLUSION OF THE COURT OF APPEALS THAT PETITIONER'S COUNSEL STIPULATED THAT ARROYO HAD CONSENTED TO THE SEARCH OF HIS VEHICLE IS CONTRARY TO THE RECORD.

Before the trial court, Petitioner's counsel challenged the propriety of Arroyo's initial stop. The additional issues of the 1) voluntariness of Arroyo's consent and 2) the question of whether the government could establish a break in the causal connection between a pretext stop and the evidence obtained from the "consent" were not addressed at the suppression hearing. Petitioner's counsel believed that the trial court's inquiry ended with the determination of whether Trooper Mangelson's stop of Mr. Arroyo was unconstitutional. Although State v. Sierra, 754 P.2d 972 (Utah Ct. App. 1988), has instructed counsel that a search conducted pursuant to a voluntary consent can purge the taint from a prior illegal stop, that case had not been decided until after the suppression hearing held in the lower court.

The crux of the Court of Appeal's decision reversing the trial court's order of suppression was that Arroyo, through his counsel, had stipulated that Arroyo had consented to the search. The Court of Appeals misconstrued the

facts when it concluded that Petitioner's counsel had entered into such a stipulation. There was no stipulation.

At the suppression hearing, the State's counsel endeavored to probe the question of whether Arroyo's "consent" was voluntary. Arroyo's counsel objected on the basis that the only relevant issue was whether the original stop was a pretext. If Sierra is controlling, then counsel was in error. The trial court agreed with Petitioner's counsel and sustained the objection. However, Arroyo's counsel did not at that time stipulate that Arroyo had consented to the search of the vehicle. The only representation made in that regard was made by the State's counsel, and not Arroyo's counsel. The colloquy was as follows:

Trooper Mangelson: I approached the vehicle. I asked for a driver's license. I made as many observations about the vehicle as I could.

Question (Don Eyre, Juab County Attorney): Describe what you observed. Answer: I observed . . .

Mr. Bugden: Your Honor, for the record, I think I would object to any further inquiry at this point. My motion only goes to the propriety and the lawfulness of the stop. And I think that is what . .

The Court: Was this a consent search?

Mr Eyre: Yes, sir.

The Court: I think that is true, counsel. It goes strictly to the stop.

Mr. Eyre: O.k. Question: Anything else about the stop that you recall that you have not previously testified to? Answer: I don't believe so.

Page 40, transcript of Suppression Hearing.

Thus, the record discloses that it was Mr. Eyre, the Juab County Attorney, who asserted to the trial court that the search was a consent search. By ruling that Arroyo's counsel stipulated that Arroyo consented to the search, the Court of Appeals committed manifest error.

It is important to understand that this fundamental misreading of the record was the basis of the Court of Appeals reversing but not remanding the matter to the trial court. Because the Court of Appeals incorrectly believed that Petitioner's counsel had stipulated that consent was given and had also objected when the State attempted to establish voluntary consent, the Court of Appeals apparently ascribed a devious intent to Petitioner's counsel. In order to punish counsel, the Court of Appeals then determined that the appropriate sanction for this alleged misconduct was to find both a fact and a conclusion of law for the first time on appeal. That is to say, the Court of Appeals found the fact of voluntary consent and the legal conclusion of

"voluntariness" based upon a stipulation which the record demonstrates never happened.

To large extent, the result reached by the Court of Appeals occurred because of a blurring or imprecise use of the word "consent". Fourth Amendment analysis of consent requires reaching a conclusion of consent on at least three different levels. The Court of Appeals lost sight of this important distinction.

In the first instance, a finding of consent must be made in the sense that law enforcement requests permission to search, and consent or acquiescence is given (Officer: Mr. Defendant, may I search your truck? Defendant: Yes, you may; I guess I have no choice). When that happens, it can fairly be said that consent has been given.

On the next level, a finding must be made whether that consent was given voluntarily. Coercion, explicit or implied, would negate a finding of voluntary consent. Some of the factors a court might consider when deciding the voluntariness question of fact include the defendant's age, intelligence, whether the defendant was in custody, the nature of the police questioning, the environment in which it took place, and the defendant's knowledge of his right to withhold consent.



Finally, consent must also be decided as a conclusion of law. See Schneckloth v. Bustamonte, 412 U.S. 218 (1973), a totality of the circumstances test must be applied. The prosecution bears the burden of proving voluntary consent.

In the case at bar, the lines between the different levels of analysis were blurred by the Court of Appeals because of the fundamental misreading of the record. There was no stipulation as to any consent issue.

Admittedly, Finding of Fact 18 adds to the confusion on this issue. That Finding of Fact states, "the trooper requested permission to search the Defendant's vehicle, and the Defendant consented to the search of the vehicle." Based on this Finding of Fact, the Court of Appeals stated, "the trial judge specifically found that Arroyo consented to the search of his truck, and there was nothing in the record to contradict this finding." By this statement, the Court of Appeals seems to have concluded that the trial court considered the consent issue. It did not.

Because both Arroyo's counsel and the trial court erroneously believed that evidence which would not have been discovered "but for" the prior illegal stop was per se inadmissible, absolutely no facts were presented and no stipulations reached in connection with the consent issue.

The trial court found nothing more in Finding of Fact 18 than that Trooper Mangelson requested permission to search Arroyo's truck and Arroyo agreed or consented. The record contains no findings to support a conclusion of law of voluntary consent. See State v. Sierra, 754. P.2d 972 (Utah Ct. App. 1988). The trial court entered no conclusions of law concerning either consent or the voluntariness of that consent.

Under these circumstances, a remand is certainly appropriate to consider the consent issue. Contrary to the Court of Appeals' conclusion, Petitioner's counsel did not enter into any stipulation, and accordingly, he did not mislead the State and the Court. Petitioner's counsel interposed an objection when the State sought to develop the consent issue. If Sierra is controlling on this point, then counsel was wrong in so doing. He erred. However, no mischievous intent or design was contemplated. By objecting, counsel did nothing more than any lawyer does when he erroneously objects and the trial judge erroneously sustains the objection. Under these circumstances, if the "but for" test is rejected and Sierra is controlling, then a remand for a hearing consistent with State v. Sierra, supra, is certainly warranted.

POINT II: THE UTAH COURT OF APPEALS DECIDED BOTH THE CONSENT ISSUE AND THE VOLUNTARINESS OF THE CONSENT ISSUE CONTRARY TO ITS DECISION IN STATE V. SIERRA, 754 P.2d 972 (Utah Ct. App. 1988).

The case at bar is not unlike Sierra, supra. In Sierra, the Court of Appeals remanded the matter to the trial court to make sufficient findings of fact and conclusions of law on whether 1) Sierra's consent was voluntary and 2) whether the evidence was procured by exploitation of the primary illegality or instead was obtained by means sufficiently distinguishable from the initial illegal stop. In Sierra a remand was ordered because so many factual issues were unresolved and undeveloped in the record:

The State has the burden of proving that Sierra's consent was, in fact voluntarily given. Bumper v. State, 391 U.S. 543, 548, 88S.Ct. 1788, 1791, 20 L.Ed.2d 797 (1968). The record below merely indicates that, according to Officer Smith, Sierra offered to let him search the trunk of the car. The record contains no facts indicating Sierra consented to Officer Smith's search of the interior of the car, where he discovered the incriminating evidence. Nor does the record reveal exactly how Officer Smith went from searching the trunk of the car to searching the passenger side of the interior; how Officer Smith came to searching underneath the car and looking at the gas tank; how Officer Smith retrieved the keys to the car to verify the gas level reading; nor how Sierra responded, if at all, to Officer Smith's conduct. A translator was re-

quired for Sierra at the hearing on the motion to suppress, which supports his claim that he had difficulty communicating with Officer Smith. The district court did not find that Sierra's consent was voluntary nor did it find that the evidence procured was not obtained by the officers' "exploitation of [the primary illegality]" and "sufficiently distinguishable" from the initial illegal stop. (Emphasis supplied, Id. at 981).

In the instant matter these same deficiencies in the record exist. Because Arroyo's counsel and the trial court applied a "but for" test, no facts were presented in connection with the consent issues. The consent and the attenuation issues are separate and distinct:

By definition, then, Fourth Amendment "voluntariness" necessarily requires a finding by the district court that the evidence was obtained freely and not by police "exploitation of [the primary] illegality . . . Wong Sun, supra 371 U.S. at 487-88, 83 S.Ct. at 417, making the two findings mutually exclusive. United States v. Carson, 793 F.2d 1141, 1150 (10th Cir. 1986)." (Emphasis supplied).

The omission in this regard does not justify a reversal. Instead, just as in Sierra, this case should be remanded to

the trial court for a further determination of both the voluntary consent and the attenuation of taint issues.

POINT III: THE CONCLUSION OF THE COURT OF APPEALS THAT THE VOLUNTARY CONSENT OF THE PETITIONER NECESSARILY ESTABLISHED A BREAK IN THE CAUSAL CONNECTION BETWEEN THE ILLEGAL PRETEXT STOP AND THE EVIDENCE SUBSEQUENTLY OBTAINED IS IN CONFLICT WITH ESTABLISHED LAW.

Even if it is assumed, contrary to the record, that the trial court did consider the consent issue, the admissibility of the challenged evidence cannot be correctly decided unless the trial court found from the evidence a break in the chain of illegality. In order to admit the challenged evidence, the trial court must have entered Findings of Fact and Conclusions of Law that Arroyo's consent was his free and voluntary act. However, in the instant matter, this issue was never reached by the trial court. Rather, the Court of Appeals entered this Finding of Fact for the first time on appeal as a punishment for what the Court of Appeals perceived to have been inappropriate conduct by Petitioner's counsel. Yet even if there was a voluntary consent by Arroyo, the record is still devoid of any Findings of Fact or Conclusions of Law on the issue of whether the State established a break in the causal connection between the illegal pretext stop and the drugs

subsequently obtained in the search of the vehicle. The Court of Appeals incorrectly assumed that such a Finding of Fact and Conclusion of Law had been made by the trial court when none in fact had been made. Finding of Fact 18 does not support a conclusion of law on the voluntariness of the consent.

The Court of Appeals' assumption that a voluntary consent necessarily vitiates or attenuates the taint of a prior illegal stop is contrary to the decisional law which has developed on this point. Indeed, the Arroyo decision contradicts the Court of Appeals own decision to remand in Sierra.

In reaching this result, the Court of Appeals relied on United States v. Carson, 793 F.2d 1141 (10th Cir. 1986). Petitioner submits that the Court of Appeals interpretation of Carson is overbroad when viewed in context with other rulings from the Tenth Circuit.

To understand the Court of Appeals' misapplication of Carson, a review of the facts is necessary. Carson involved a dove hunting violation. A deputy sheriff observed the defendant hunting, and noticed a large pail belonging to the defendant. The pail contained dead doves. The sheriff then left the area and contacted a state game protection officer.

Upon returning, the officer requested permission to search the defendant's vehicle. The defendant consented to the search. The same pail was searched and it was found that the defendant had exceeded his hunting limit. The trial court found that initial search to be illegal.

On appeal, the defendant claimed that the second search was the fruit of the first illegal search. The court rejected the defendant's argument and held that the consent given under the circumstances of the case made the evidence admissible. The court first considered Wong Sun v. United States, 371 U.S. 471 (1963), and ruled that the Supreme Court had rejected a purely causal or "but for" analysis in applying the exclusionary rule. Rather, the Court required that two alternatives be considered in order to determine the admissibility of evidence seized subsequent to an illegal search. First, if the evidence was obtained by means that were free of police exploitation of the prior unlawful conduct, the evidence would be admissible. Second, if the evidence was obtained in a manner sufficiently distinguishable from the prior illegality so that the evidence was purged of the primary taint, the evidence would also be admissible.

In the context of a claimed voluntary consent to search, the Tenth Circuit court held that the "exploitation of the primary illegality" meant that the law enforcement agents used the fruits of the primary illegality to coerce the defendant into granting his consent. The court noted that normally the issue would be resolved by determining if the grant of consent was voluntary. However, the manner of the request to search may also render the consent involuntary. The court described the critical facts that supported its conclusion. First, the defendant had no idea his pail had even been searched the first time and accordingly, he was totally unaware that the prior illegal search had even taken place. Second, there was no use of the illegal first search to coerce the consent. Those facts are distinguishable from the facts in the case at bar.

Moreover, notwithstanding a finding of voluntary consent, courts have frequently held that the State has not carried its burden to purge the primary illegality of the Wong Sun taint. In Florida v. Royer, 460 U.S. 491 (1982), a suspect's consent to search his two suitcases was tainted by his illegal detention and was ineffective to justify the search of his two suitcases. Royer was approached at an airport by detectives who asked for his airline ticket and



driver's license. Without returning the ticket and license the detectives asked Royer to accompany them to a small room. After obtaining Royer's luggage from the airline without his consent, he then produced a key and unlocked one suitcase. Drugs were found in that suitcase. Royer then indicated to the detectives that he did not know the combination to the lock of the second suitcase. When asked if he objected to the detective opening the suitcase, Royer said, "no, go ahead," and did not object when the detective further explained the suitcase might have to be pried open. The trial court concluded that Royer's consent to the search was "freely and voluntarily given". The Florida District Court of Appeal held, inter alia, that "at the time his consent to search was obtained, he was unlawfully confined

and consent to search was therefore invalid because tainted by the unlawful confinement." 460 U.S. at 495. The Florida Court of Appeals held that because there was no proof in a "break in a chain of illegality" the consent was invalid as a matter of law. In affirming the suppression order, the United States Supreme Court stated:

Because we affirm the Florida District Court of Appeals' conclusion that Royer was being illegally detained when he consented to the search of his

luggage, we agree that the consent was tainted by the illegality . . .

Id at 507.

The Petitioner submits that the same reasoning applies in the instant matter. Once the conclusion is reached that the Petitioner was unlawfully stopped, and therefore unlawfully detained by Trooper Mangelson, then the State in the instant matter has the same burden that the State in Florida v. Royer was unable to sustain.

In United States v. Taheri, 648 F.2d 598 (9th Cir. 1981), an informant contacted the DEA and provided information that a person was selling heroin from a particular motel room. The informant furnished the DEA with a description of the individual. The DEA contacted the motel clerk and confirmed that the defendant matched the description provided by the informant. The clerk advised the DEA that the defendant was expecting a package. When the package arrived, the motel clerk contacted the DEA. The package had been damaged, and when the DEA agent was handling the package, it broke open and a bindle fell out. The bindle tested positive for heroin. Additionally, a trained dog alerted on the package. A search warrant was then obtained and most of the contents of the package were seized. However, the

defendant was permitted to pick up the package with some of its contents still intact. As soon as the defendant took possession of the package he was arrested. Permission was then requested to search his vehicle and a room in a different motel. The defendant executed written consent forms. Opium was found in both locations. On appeal, the issue presented was whether the defendant's post-arrest consent was a sufficiently independent act to avoid the exclusion of the opium. The Ninth Circuit concluded that even assuming the consent was voluntary, "the evidence must nonetheless be suppressed if the unconstitutional conduct was not sufficiently attenuated from the subsequent seizure to avoid exclusion of the evidence . . ." The Petitioner submits that the same should hold true in the instant matter. Even assuming a voluntary consent, the government must still establish that the consent sufficiently attenuated the taint from the prior unlawful pretext stop. In Taheri the government was unable to carry its burden:

The government, which bears the burden of showing admissibility in these circumstances . . . points to no intervening events or lapse of time which would show Taheri's consent was sufficiently an act of free will to purge the primary taint of the unlawful invasion.

Id at 601.

For that reason, the Ninth Circuit held that the opium was inadmissible.

Similarly in United States v. Gooding, 695 F.2d 78 (4th Cir. 1982), the Court stated, "we hold, as a matter of law on the undisputed facts of the record, that Gooding's illegal seizure tainted all that ensued in the investigative encounter, and that his consent to the initial search, even if voluntary, did not vitiate the taint." Id at 84. The Gooding court suppressed the evidence. The Court held as follows:

The connection between the illegal seizure and the consent--all occurring within the same brief, continuous encounter--was not sufficiently attenuated to remove the former's taint from the ultimate fruits of a search.

Id at 84.

In United States v. Recalde, 761 F.2d 1448 (10th Cir. 1985), the Court focused upon the question of whether the consent to search was valid despite the unlawful seizure and detention of the Defendant. In Recalde, the District Court held that the consent was knowing and voluntary. In the instant matter, there was no such finding.

By focusing only on the voluntariness of the Defendant's consent and by not considering whether he had been unlawfully seized, the Recalde court concluded that the

District Court had misapplied the Supreme Court decisions governing the issues. Id at 1457. "The Court therefore did not make its finding in light of the requirement that such consent be free from the taint of the illegal detention. Because of this, and because of the illegal nature of Recalde's seizure and detention are critical, we conclude that the District Court's finding of consent is clearly erroneous." Id at 1458. Thus, notwithstanding that Recalde executed a written consent form, the Court, held that the consent was tainted by his prior illegal arrest and detention. The Petitioner submits that the same conclusion will be borne out by the evidence in the instant matter.

In United States v. Guzman, 864 F.2d 1512 (10th Cir. 1988), the Tenth Circuit found that the stop of the vehicle for a seat belt violation was a pretext for an investigation. The District Court had failed to make any findings with respect to the issue of the consent to search. The case was remanded to the District Court so that the proper findings could be made. The Court ordered that findings on the issue of consent be made applying the factors discussed in Recalde, supra. In doing so, the Court noted that there would be few cases involving an illegal detention where a

subsequent search could be made legitimate by a voluntary consent.

POINT IV: ARTICLE I, SECTION 14 OF THE UTAH CONSTITUTION CONFERS GREATER PROTECTION THAN THE FOURTH AMENDMENT PROTECTION SECURED BY THE FEDERAL CONSTITUTION.

In State v. Nielson, 727 P.2d 188 (Ut. 1986), and State v. Rice, 717 P.2d 695 (Ut. 1986), a majority of the Supreme Court of Utah took the position that Article I, Section 14 of the Constitution of Utah may be interpreted to provide broader protection than the Fourth Amendment. Since both provisions share nearly identical language this would not be the result of any textual differences between the two provisions. The result obtains because a state court may interpret its own constitution independent of the federal decisions, and such decisions are not subject to federal review or reversal. Michigan v. Long, 463 U.S. 1032 (1983). Also see, State v. Earl, 716 P.2d 803 (Utah 1986); State v. Hygh, 711 P.2d 264 (Utah 1985); State v. Larocco, 742 P.2d 89 (Utah 1987).

A state constitutional interpretation of Wong Sun poisoned fruits could greatly simplify the law on this issue. If a "but for" test was applied, then law enforcement officers would not be permitted to profit from prior

illegal conduct. In contrast, allowing law enforcement to attenuate the taint by relying upon some intervening event, such as consent, police are essentially rewarded for violating Fourth Amendments rights. That is to say, by permitting officers to legitimate illegal stops by obtaining consent, an officer's illegal actions are judicially condoned. However, under Utah constitutional precepts, any prior illegality could be held to vitiate or taint any consent which flowed from the prior unlawful conduct.

Moreover, under a purely state analysis, this Court could require that officers inform defendants that they have the right to refuse to permit a search. Likewise, if a defendant is truly free to leave an encounter with a police officer, then this Court could require that defendants be so informed before a voluntary consent may be established by the prosecution.

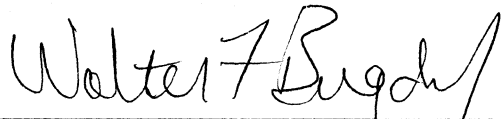
Such holdings based solely on the Utah Constitution would alleviate a number of confusing areas related to the law of search and seizure. Law enforcement officers would then only need to follow the stricter state requirements. Federal search and seizure, with its many cumbersome and many times esoteric exceptions, would be irrelevant to the

officer on the street. Such simplicity would make the application of search and seizure law easier.

CONCLUSION

Applying a state constitutional analysis, Mr. Arroyo respectfully requests that the trial court's ruling suppressing the evidence be affirmed. In the alternative, Mr. Arroyo respectfully requests the matter be remanded to the trial court for a Sierra hearing on the consent and attenuation issues.

RESPECTFULLY SUBMITTED this 26 day of June, 1989.

  
WALTER F. BUGDEN, JR.,  
Attorney for Respondent

CERTIFICATE OF MAILING

I hereby certify that I mailed four (4) true and correct copies of the foregoing Brief of Petitioner, this 26 day of June, 1989 to:

Paul Van Dam  
Attorney General  
Sandra Sjogren  
Assistant Attorney General  
236 State Capitol Building  
Salt Lake City, UT 84114





## APPENDICES

Marveon previously moved for dismissal on this very ground. That motion was denied by the Utah Supreme Court before the case was transferred to this court. We are not inclined to disturb the Supreme Court's disposition of this issue and reject Marveon's jurisdictional challenge. See *Conder v. A.L. Williams & Assoc.*, 739 P.2d 634, 636 (Utah Ct. App. 1987).

3. On the contrary, the "strict construction" rule that is employed in connection with insurance policies accomplishes just the opposite result. Any ambiguity concerning the scope of insurance is construed in favor of coverage. See, e.g., *Fuller v. Director of Finance*, 694 P.2d 1045, 1047 (Utah 1985) ("An insured is entitled to the broadest protection he could have reasonably understood to be provided by the policy."); *Williams v. First Colony Life Ins. Co.*, 593 P.2d 534, 536 (Utah 1979) (ambiguity in insurance contract must be construed in favor of insured); *Dienes v. Safeco Life Ins. Co.*, 21 Utah 2d 147, 442 P.2d 468, 471 (1968) (no ambiguous statement may be enforced against an insured). See also *Colard v. American Family Mut. Ins. Co.*, 709 P.2d 11, 14 (Colo. App. 1985) (if an insurance company intends to exclude from coverage damage resulting from the insured's own negligence, it must do so clearly and unambiguously); *American Excess Ins. Co. v. MGM Grand Hotels, Inc.*, 729 P.2d 1352, 1354 (Nev. 1986) (insurance contracts are construed to accomplish the object of providing indemnity to the insured); *Weldon v. Commercial Union Assurance Co.*, 103 N.M. 522, 710 P.2d 89, 91 (1985) ("When an ambiguity exists, the court must construe the policy so as to sustain indemnity.").

4. Under different facts, the lack of explicit language clearly indicating an intent to provide coverage for the insured's own negligence may leave open the question of whether such coverage was intended. However, such ambiguity would be resolved through the ordinary rules of contract interpretation rather than by invoking the strict construction rule. See generally *Wilburn v. Interstate Electric*, 748 P.2d 582, 585-86 (Utah Ct. App. 1988).

Case no.  
102 Utah Adv. Rep. 34

## IN THE UTAH COURT OF APPEALS

STATE of Utah,  
Plaintiff and Appellant,

v.

Jose Francisco ARROYO,  
Defendant and Respondent.

No. 880062-CA  
FILED: February 15, 1989

Fourth District, Juab County  
Honorable Ray M. Harding

### ATTORNEYS:

David L. Wilkinson and Sondra L. Sjogren,  
Salt Lake City, for Appellant

Walter F. Bugden, Jr., Salt Lake City, for  
Respondent

Before Judges Davidson, Billings, and Garff.

### OPINION

#### BILLINGS, Judge:

The State of Utah filed an interlocutory appeal challenging the district court's suppression of cocaine seized after a Utah Highway trooper stopped Jose Francisco Arroyo ("Arroyo") for an alleged traffic violation. The trial court found the stop of Arroyo's vehicle was a pretext stop which violated Arroyo's fourth amendment rights. We reverse.

#### FACTS

At approximately 4:00 p.m. on September 15, 1987, Utah Highway Patrol Trooper Paul Mangelson ("Trooper Mangelson") was driving home after completing his shift an hour earlier. Trooper Mangelson was driving southbound on I-15 near Nephi, Utah, when he observed a northbound truck-camper following the car in front of it too closely. Trooper Mangelson made a U-turn through the median and caught up with Arroyo's truck.

Trooper Mangelson observed that the truck was following the vehicle in front of him at a distance of three to eight car lengths at a speed of approximately fifty miles per hour. Trooper Mangelson pulled alongside the truck in order to observe its occupants and estimate the truck's speed. Trooper Mangelson noted that Arroyo and his passenger were Hispanic, and he stopped the truck.

Arroyo, the driver, was cited for "following too closely" and for driving on an expired driver's license. Trooper Mangelson then asked Arroyo if he could search his truck, and Arroyo agreed.

The search revealed approximately one kilogram of cocaine inside the passenger door panel. Trooper Mangelson then arrested Arroyo for possession of a controlled substance with intent to distribute in violation of Utah Code Ann. §58-37-4(1)(a)(i) (1986), a second degree felony.

Arroyo moved to suppress the cocaine claiming Trooper Mangelson's traffic stop was a pretext to search his truck for evidence of a more serious crime. The trial court found no traffic violation had occurred and ruled that Trooper Mangelson's stop of Arroyo's truck was a pretext to investigate a vehicle he found suspicious because of out-of-state license plates and Hispanic occupants. The trial court found Arroyo consented to the subsequent search of his truck, but nevertheless, granted the motion to suppress. The State appeals.

The issues on appeal are (1) whether the trial court erred in ruling that Trooper Mangelson's stop of Arroyo for "following too closely" was a pretext stop, and (2) whether Arroyo's subsequent consent to the search of his truck purged the taint of the otherwise unconstitutional stop.<sup>1</sup>

The trial court's factual evaluation underlying its decision to grant or deny a motion to suppress will not be disturbed unless it is clearly erroneous,

Sierra v. Sierra, 754 P.2d 972, 974 (Utah Ct. App. 1988). However, in reviewing the trial court's legal conclusions based upon those findings, we afford no deference and apply a correction of error standard. *Oates v. Chavez*, 749 P.2d 658, 659 (Utah 1988).

### PRETEXT STOP

We first consider whether Trooper Mangelson's stop of Arroyo's truck was incident to a lawful stop for a traffic violation or was a constitutionally defective "pretext" stop. A police officer may stop a vehicle for a traffic violation committed in the officer's presence. Nevertheless, a police officer may not "use a misdemeanor arrest as a pretext to search for evidence of a more serious crime." *Sierra*, 754 P.2d at 977. Courts must look to the totality of the circumstances to determine whether a stop for a traffic violation and subsequent arrest is a pretext. This involves "an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time." *Id.* The actual state of mind of the officer at the time of the challenged action is irrelevant. *Id.* (quoting *Maryland v. Macon*, 472 U.S. 463 (1985)). Thus, in this appeal, the question is whether a reasonable officer, in view of the totality of the circumstances of this case, would have stopped Arroyo for "following too closely." The proper focus is not on whether Trooper Mangelson could have validly made the stop. *Sierra*, 754 P.2d at 978.

Trooper Mangelson observed Arroyo following the vehicle in front of him at a distance of between three and eight car lengths at a speed of approximately fifty miles per hour. It is noteworthy that Trooper Mangelson had completed his shift an hour earlier, and was driving home in the opposite direction from Arroyo when he observed the alleged traffic violation, one for which very few citations are issued.<sup>2</sup> Trooper Mangelson did not stop Arroyo until he had pulled alongside the truck, and observed that the occupants were Hispanic, having already noted that Arroyo was driving a truck with out-of-state license plates.

We agree with the trial judge that the stop was an unconstitutional pretext to search for drugs. We are persuaded that a reasonable officer would not have stopped Arroyo and cited him for "following too closely" except for some unarticulated suspicion of more serious criminal activity.

### CONSENT

Our inquiry does not end with the determination that Trooper Mangelson's stop of Arroyo was unconstitutional. We must next consider whether Arroyo's subsequent consent to the search of his truck purged the taint of the illegal stop thereby making admissible the cocaine seized. The appropriate inquiry 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." *Sierra*, 754 P.2d at 980 (quoting *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963)).

a "but for" exclusionary rule for evidence seized as a result of prior illegality." *Id.* (citations omitted). Thus, even though this evidence would not have been discovered "but for" the prior illegal stop, the evidence is not per se inadmissible. *Id.* Moreover, a search conducted pursuant to voluntary consent purges the taint from the prior illegality. *Sierra*, 754 P.2d at 980 (citing *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963)). Accord *United States v. Carson*, 793 F.2d 1141, 1148-49 (10th Cir. 1986), cert. denied, 107 S.Ct. 315 (1986); *State v. Aguilar*, 758 P.2d 457, 459 (Utah Ct. App. 1988). To determine whether consent is voluntary, we look to the totality of the circumstances to see if the consent was in fact voluntarily given and not the result of "duress or coercion, express or implied." *Sierra*, 754 P.2d at 980 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973)). The State bears the burden of proving that consent was voluntarily given. *Sierra*, 754 P.2d at 981.

In this regard, we note Arroyo did not contest the State's argument at the suppression hearing that he voluntarily consented to the search of his truck. Arroyo, through his counsel stipulated that he consented to the search. Arroyo's counsel objected when the State attempted to offer evidence to establish Arroyo's consent was voluntary, claiming it was not relevant as the only issue was whether the original stop was a pretext. As a result, the trial court limited testimony concerning the circumstances surrounding Arroyo's consent. The trial judge specifically found that Arroyo consented to the search of his truck, and there is nothing in the record to contradict this finding.

For the first time on appeal, counsel now argues that Arroyo's consent was not voluntary as there was no "break in the causal connection between the illegality and the evidence thereby obtained." *United States v. Recalde*, 761 F.2d 1448, 1458 (10th Cir. 1985). However, this argument should have been made below. A defendant cannot mislead the State and the court by stipulating that consent was given, thus preventing the State from exploring the circumstances of the consent, and then argue for the first time on appeal that the consent given was not voluntary. Based on these circumstances, we conclude that defendant's stipulation included that the consent was given voluntarily.

Thus, although the original illegal stop was unconstitutional, Arroyo's subsequent voluntary consent purged the taint from the initial illegality, and the motion to suppress should not have been granted.

Accordingly, the order granting Arroyo's motion to suppress the evidence is reversed, and the case is remanded for trial.

Judith M. Billings, Judge

WE CONCUR:

Reginal W. Garff, Judge

Richard C. Davidson, Judge

1. Our analysis is confined to the protections granted under the Fourth Amendment to the United

States Constitution rather than article I, section 14 of the Utah Constitution. Arroyo attempts to raise the state constitutional issue as has been encouraged by our Supreme Court. See, e.g., 1) *State v. LaFerty*, 749 P.2d 1239, 1247 n. 5 (Utah 1988); 2) *State v. Earl*, 716 P.2d 803, 806 (Utah 1986). However, a three line conclusory statement as to the greater scope of state constitutional protections is an insufficient briefing for us to embark on a state constitutional analysis and we, therefore, refuse to do so. When analyzing state constitutional issues, our Supreme Court has cited with approval the approach taken in *State v. Jewett*, 146 Vt. 221, 500 A.2d 233 (1985).

2. Tooper Mangelson testified that he had issued only three or four citations for "following too closely" in 1987.

Cite as

102 Utah Adv. Rep. 36

### IN THE UTAH COURT OF APPEALS

Wendell E. Taylor,  
Plaintiff and Appellant,

v.

The ESTATE OF GRANT TAYLOR,  
deceased, Esther Taylor, Darren G. Taylor,  
and John Does 1 through 5,  
Defendants and Respondents.

No. 880136-CA

FILED: February 15, 1989

Third District, Salt Lake County  
Honorable Raymond S. Uno

#### ATTORNEYS:

A. Howard Lundgren, Salt Lake City, for  
Appellant

Leland S. McCullough, P. Bryan Fishburn,  
Salt Lake City, for Respondents

Before Judges Billings, Jackson and Orme.

#### OPINION

ORME, Judge:

Wendell Taylor appeals the trial court's entry of summary judgment against him. Wendell argues that 1) summary judgment was inappropriate due to unresolved issues of material fact regarding the validity of his deceased brother's alleged will; 2) a document favorable to him should be given effect as his brother's will, even though it does not strictly comply with the Utah Probate Code; and 3) the trial court erred in ordering Wendell to pay a portion of defendants' attorney fees. We affirm in large part, but remand for reassessment of one aspect of the court's judgment.

#### FACTS

In January 1984, Grant Taylor loaned a sum of money to his brother, plaintiff Wendell Taylor. At the time of the loan, Grant had been divorced for about one month from his wife of more than forty years, defendant Esther Taylor. On June 30, 1984, Grant dictated a document to a second brother, Noel Taylor, providing that the loan to Wendell be forgiven upon Grant's death. Noel typed this document and Grant signed it in the presence of Noel and Noel's wife, Geraldine. Noel then signed the document as a witness and filed it away. Geraldine did not sign the document at that time.

Shortly after executing the June 30 document, Grant, who had been ill with cancer, worsened considerably. On August 30, 1984, he executed a document entitled "Last Will and Testament." In this document, Grant made no provision for his former wife, Esther, nor did he mention the debt owed by Wendell or the June 30 document forgiving the debt. The will recited that the bulk of Grant's estate go to a trust, created the same date, in favor of his children.

Grant and Esther remarried on September 21, 1984, approximately ten months after their divorce. The trust Grant established on August 30 was immediately amended to include Esther as a beneficiary. At the time of the remarriage, Grant's cancer had rendered him unable to walk or speak audibly and he died five days later. Shortly thereafter, his estate was informally probated pursuant to the August 30 will.

Following Grant's death, efforts were made to obtain repayment from Wendell of the money Grant had loaned him. Unaware of the June 30 document forgiving the debt, Wendell complained of these efforts to Noel, at which time Noel informed Wendell of that document. However, the document was not located and delivered to Wendell until early 1985. In October of that year, Wendell filed this action to invalidate the previously probated August 30 document and give testamentary effect to the terms of the original June 30 document forgiving repayment of the loan made by Grant.

Wendell claimed that the June 30 document was actually Grant's last valid will, the August 30 document being a product of duress or undue influence. Wendell attached to his complaint a copy of the June 30 document bearing only the signatures of Grant and Noel. Based on the fact that the purported will bore the signature of only one witness, defendants' counsel filed a motion to dismiss Wendell's complaint. Two days before defendants' motion to dismiss was to be argued, Wendell filed an affidavit in which he claimed that the document attached to his complaint was not an accurate copy of the June 30 document. Attached to his affidavit was another copy of the document bearing the additional witness signature of Geraldine Taylor. Accordingly, defendants' motion to dismiss was continued as it only addressed the validity of a document bearing one witness signature.

Defendants' counsel promptly deposed Noel and Geraldine Taylor. Geraldine testified that she

UTAH STATE COURT OF APPEALS

REC'D MAR 23 1989

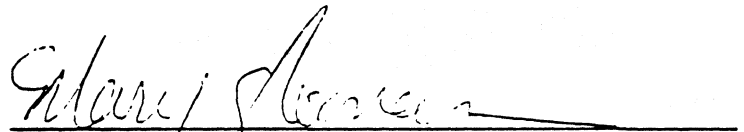
State of Utah,	)	ORDER
	)	
Plaintiff and Appellant.	)	
	)	
v.	)	No. 880062-CA
	)	
Jose Francisco Arroyo,	)	
	)	
Defendant and Respondent.)	)	

This matter is before the Court upon a Petition for Rehearing filed by the Respondent.

IT IS HEREBY ORDERED that the Respondent's Petition for Rehearing is denied.

Dated this 22nd day of March, 1989.

FOR THE COURT:

  
Mary T. Noonan  
Clerk of the Court

WALTER F. BUGDEN, JR. #480  
Attorney for Defendant  
257 Towers, Suite 340  
257 East 200 South - 10  
Salt Lake City, UT 84111  
Telephone: (801) 532-7282

Clerk of District Court, Juab County  
**FILED**

THE FOURTH JUDICIAL DISTRICT COURT  
IN AND FOR JUAB COUNTY, STATE OF UTAH

JAN 6 1988

Pat P. Greenwood, Clerk

-----ooOoo-----

STATE OF UTAH,	:	
	:	FINDINGS OF FACT,
Plaintiff,	:	CONCLUSIONS OF LAW
	:	AND ORDER
v.	:	
	:	
JOSE FRANCISCO ARROYO,	:	
	:	
Defendant.	:	Case No. 81-D

-----ooOoo-----

On December 7, 1987, the Defendant's Motion to Suppress came on before this Court for an Evidentiary Hearing. The State was represented by its attorney, Donald J. Eyre, Jr., the Defendant was present in person, and represented by his counsel, Walter F. Bugden, Jr. Highway Patrol Trooper Paul Mangelson and the Defendant Jose Francisco Arroyo both testified at this hearing. After giving careful consideration to the testimony presented at the hearing, the demeanor of the witnesses on the witness stand, reviewing memoranda and case law submitted to the Court by both counsel, and listening to oral argument, this Court enters the following:

APPENDIX C

### FINDINGS OF FACT

1. On September 15, 1987, at approximately 4:00 p.m. the Defendant, Jose Francisco Arroyo, was the driver of an older model Ford Pick-up with a camper. The vehicle was headed in the northbound direction on I-15 near Nephi, Utah.

2. On the same date, and at the same time, Highway Patrol Trooper Paul Mangelson was driving in a southbound direction on I-15 when he observed the truck driven by the Defendant proceeding in a northbound direction.

3. The Defendant testified he was driving in a group or cluster of three cars, his vehicle being the third vehicle in the group. Trooper Mangelson testified that he only saw two vehicles in the northbound direction and that the Defendant's vehicle was the rear vehicle.

4. Trooper Mangelson <sup>may have</sup> observed that the Defendant's vehicle had out of state (California) license plates. *RTD*

5. In July of 1987, Trooper Mangelson attended a seminar which focused upon the types of individuals who transport controlled substances and the types of vehicles that said controlled substances are transported in.

6. Trooper Mangelson testified that by in large the Utah Highway Patrol had found that most drug trafficking was done by Colombians, Cubans, and Hispanics.

7. Trooper Mangelson also testified that one of the topics discussed at the seminar was the necessity for having a reason to stop an automobile driven by a Colombian, Cuban, or

an Hispanic. Trooper Mangelson understood that he could not stop a vehicle just because the driver was of Latin origin.

8. As a result Trooper Mangelson's training at this seminar, he admitted that whenever he observed an Hispanic individual driving a vehicle he wanted to stop the vehicle. The Trooper also admitted that once he stopped an Hispanic driver, 80% of the time he requested permission to search the vehicle.

9. Trooper Mangelson estimated the Defendant's speed ~~to be 50 miles per hour~~ was 50 miles per hour. As the Trooper's vehicle passed the Defendant's vehicle heading in opposite directions, the Trooper testified that he believed the Defendant's vehicle was three to four, maybe five cars lengths behind the vehicle immediately in front of it. Based on the Trooper's estimate of the Defendant's speed, the Trooper testified that he concluded that the Defendant was "Following too Close" to the vehicle immediately in front of it.

10. The Trooper then executed a U-turn through the median and caught up with the Defendant's vehicle within a half mile to a mile from the location of the initial observation of the Defendant's vehicle.

11. Upon overtaking the Defendant's vehicle the Trooper testified that rather than pulling the Defendant over immediately, he instead pulled up along side the Defendant's vehicle in order to observe the occupants of the Defendant's vehicle, *and to estimate its speed.* ~~and to also observe the distance between the~~ *RJD*



~~Defendant's vehicle and the vehicle immediately in front of the Defendant's vehicle.~~ RMD

12. Trooper Mangelson testified that the Defendant's vehicle was still three to four, maybe five cars lengths behind the vehicle directly in front of it, and that this distance was unsafe, and therefore the Defendant was "Following too Close" in violation of the applicable traffic code.

13. When the Trooper pulled along side the Defendant's vehicle, the Trooper did observe that the two occupants of the Defendant's vehicle were of Latin origin.

14. Under cross-examination, the Trooper denied that it was his normal procedure when issuing a citation to an individual for "Following too Close" to record the license plate of the front car. However, the Trooper's denial on this point was contradicted by tape recorded testimony from the Trooper at the preliminary hearing held in this matter. The Trooper admitted that he had not recorded the license plate number of the front car in this case.

15. The Defendant testified that he was at least 85 to 95 feet or nine car lengths, behind the vehicle immediately in front of his own. The Court finds this testimony to be credible.

16. In contrast, the Court is unpersuaded that Trooper Mangelson rightfully determined that the Defendant was "Following too Close" or that any other attested facts preponderated to the level necessary to permit a

constitutional stop of the Defendant's vehicle. Moreover, the Court finds that the Trooper's own testimony established the probability that no violation of law occurred, and that the alleged violation was only a pretext asserted by the Trooper to justify his stop of a vehicle with out of state license plates and with occupants of Latin origin.

17. The Trooper stopped the Defendant's vehicle for allegedly "Following too Close". Upon stopping the Defendant's vehicle, he asked for and received identification from the Defendant. However, upon receiving this identification, and learning from the Defendant that he had only recently acquired the automobile, the Trooper did not run a NCIC check on either the driver or the Defendant's vehicle (to verify if the vehicle was stolen). The Trooper denied that running a NCIC check was standard police procedure.

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

19. After searching the camper portion of the truck, Trooper Mangelson detected that a package of some sort was inside of the passengers's door. After gaining access to the inside panel of the passengers's door, Trooper Mangelson removed three bundles containing approximately one kilogram of a white powder wrapped in duct tape.

From the foregoing Findings of Fact of the Court now enters the following:

### CONCLUSIONS OF LAW

1. A stop of an automobile can only be made upon reasonable and articulable suspicion, Terry v. Ohio, 392 U.S. 1 (1986) or upon probable cause, Michigan v. Long, 463 U.S. 1032 (1983).

2. Trooper Mangelson lacked any reasonable, articulable suspicion to stop the Defendant in the case at bar. Instead, the stop of the Defendant by Trooper Mangelson for allegedly "Following too Close" was only a pretext utilized by the Trooper to justify the stop of a vehicle with out of state license plates and with occupants of Latin origin. Pretext stops are unconstitutional. State v. Mendoza, Slip opinion no. 20922 (Utah Dec. 1, 1987).

3. The pretextural stop was employed by the Trooper to conceal his genuine investigative purpose. Because the stop of the Defendant in the case at bar was unsupported by either articulable suspicion or probable cause, the Defendant was unlawfully detained in violation of the Fourth Amendment of the United States Constitution and Article 1 Section 14 of the Utah Constitution.

4. All evidence seized as a result of the Defendant's unlawful detention must be suppressed.

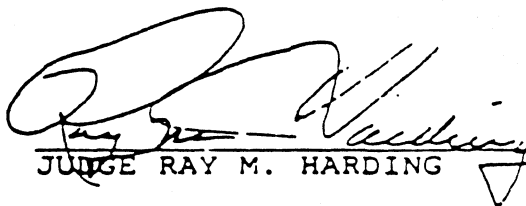
From the foregoing Findings of Fact and Conclusions of Law, the Court now enters its:

### ORDER

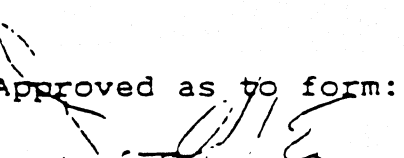
The stop that lead to the consensual search and seizure was a pretext stop and an unconstitutional violation of the

Defendant's right to be free from unreasonable searches  
seizures under the Fourth Amendment of the United States  
Constitution and Article I Section 14 of the Utah  
Constitution. All evidence procured as a result of the  
unlawful stop of the Defendant is therefore suppressed.

DATED this 4th day of January, 1988.

  
JUDGE RAY M. HARDING

Approved as to form:

  
DONALD J. EYRE, JR.,  
Juab County Attorney