

2000

Utah v. Robert Todd Brown : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Maurice Richards; Public Defenders Association; Attorney for Appellant.

Jan Graham; Attorney General; Attorney for Appellee.

Recommended Citation

Brief of Appellant, *Utah v. Brown*, No. 2000707 (Utah Court of Appeals, 2000).
https://digitalcommons.law.byu.edu/byu_ca2/2538

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

MAURICE RICHARDS, #2736
JERALD N. ENGSTROM #8178
PUBLIC DEFENDER ASSOCIATION, INC
of WEBER COUNTY
Attorney for Defendant
2568 Washington Blvd, Suite 102
Ogden, UT 84401
Telephone (801) 399 4191

IN THE COURT OF APPEALS OF THE STATE OF UTAH

STATE OF UTAH /

Plaintiff/Respondent /

vs. / Case No 2000707-CA

ROBERT TODD BROWN /

Priority # 2

Defendant/Appellant /

BRIEF OF APPELLANT

This appeal is from a refusal of the Trial Judge to suppress evidence obtain as a result of a search and seizure where the investigating office had no reasonable suspicion to conduct a warrant less search..

MAURICE RICHARDS #2736
PUBLIC DEFENDERS ASSOCIATION, INC OF WEBER CTY
2568 Washington Blvd, Suite 102
Ogden, Utah 84401, Attorney for Appellant

JAN GRAHAM
ATTORNEY GENERAL
Heber M. Wells Building, 160 East 300 South 6th Floor
Salt Lake City, Utah 84114-0854, Attorney for Appellee

FILED
Utah Court of Appeals

OCT 24 2000

Paulette Stagg
Clerk of the Court

MAURICE RICHARDS, #2736
JERALD N. ENGSTROM #8178
PUBLIC DEFENDER ASSOCIATION, INC
of WEBER COUNTY
Attorney for Defendant
2568 Washington Blvd, Suite 102
Ogden, UT 84401
Telephone (801) 399 4191

IN THE COURT OF APPEALS OF THE STATE OF UTAH

STATE OF UTAH /

Plaintiff/Respondent /

vs. / Case No 2000707-CA

ROBERT TODD BROWN /

Priority # 2

Defendant/Appellant /

BRIEF OF APPELLANT

This appeal is from a refusal of the Trial Judge to suppress evidence obtain as a result of a search and seizure where the investigating office had no reasonable suspicion to conduct a warrant less search..

MAURICE RICHARDS #2736
PUBLIC DEFENDERS ASSOCIATION, INC OF WEBER CTY
2568 Washington Blvd, Suite 102
Ogden, Utah 84401, Attorney for Appellant

JAN GRAHAM
ATTORNEY GENERAL
Heber M. Wells Building, 160 East 300 South 6th Floor
Salt Lake City, Utah 84114-0854, Attorney for Appellee

TABLE OF CONTENTS

| | <u>PAGE</u> |
|---|-------------|
| TABLE OF AUTHORITIES | iii |
| JURISDICTIONAL STATEMENT | 0 |
| STATEMENT OF ISSUES AND STANDARD OF REVIEW | |
| DID THE TRIAL COURT COMMIT REVERSIBLE ERROR WHEN IT FAILED TO SUPPRESS EVIDENCE OBTAINED BY OFFICER GENT OF THE OGDEN CITY POLICE DEPARTMENT, WHERE OFFICER GENT DID NOT HAVE REASONABLE, ARTICULABLE SUSPICION THAT CRIMINAL ACTIVITY WAS AFOOT ? | 1 |
| STANDARD OF REVIEW | 1 |
| STATEMENT OF THE CASE | 2 |
| STATEMENT OF FACTS | 3 |
| SUMMARY OF ARGUMENT | 9 |
| ARGUMENT | |
| THE COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO SUPPRESS EVIDENCE OBTAINED FROM THE DEFENDANT WHERE THE OFFICER HAD NOTHING MORE SUBSTANTIAL THAN INARTICULATE HUNCHES THAT THE DEFENDANT WAS ENGAGED IN CRIMINAL ACTIVITY. | 9 |
| CONCLUSION | 15 |
| CERTIFICATE OF MAILING | 16 |
| ADDENDUM | 17 |

TABLE OF AUTHORITIES

CASES CITED

| | <u>PAGES</u> |
|---|--------------|
| <u>UNITED STATES SUPREME COURT CASES</u> | |
| <u>Illinois v. Wardlow</u> 145 L Ed 2d 570 (2000) | 11 |
| <u>Terry v. Ohio</u> 392 U. S. 1 (1968) | 1, 10 |
| <u>UTAH STATE CASES</u> | |
| <u>State v. James</u> 977 P 2d 489 (Utah App 1999) | 2 |
| <u>State v. Palmer</u> 803 P 2d 1294 (Utah App 1990) | 2 |
| <u>State v Schlosser</u> 774 P 2d 1132 (Utah 1989) | 12 |

STATUTES AND RULES

| | |
|-----------------------------------|------|
| <u>United States Constitution</u> | |
| Amendment IV | 9,15 |
| Amendment XIV | 10 |
| <u>Utah Code Annotated</u> | |
| 58-37-8 | 3, 6 |
| Section 78-2-2 (3) (i) | 1 |

MAURICE RICHARDS #2736
JERALD N. ENGSTROM #8178
APPELLANT DIVISION
PUBLIC DEFENDER ASSOCIATION, INC
OF WEBER COUNTY
Attorney for Appellant
2568 Washington Blvd, Suite 102
Ogden, UT 84401
Telephone: (801) 399 4191

IN THE COURT OF APPEALS OF THE STATE OF UTAH

STATE OF UTAH, /

Plaintiff/Respondent /

vs / Case No 2000707-CA

ROBERT TODD BROWN / Judge_____

Defendant/Appellant / Priority No 2

BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

This appeal is from the Trial Court's failure to suppress evidence obtained from a pretense stop and search of the Defendant. The basis of the Defendant's appeal is that Officer Gent of the Ogden City Police Department did not have reasonable, articulable suspicion that criminal activity is afoot when he stopped the Defendant on or adjacent to a public street and there searched the Defendant

STATE OF UTAH V BROWN
Case Number 20000707-CA

without first obtaining a search warrant. Even assuming Officer Gent had reasonable suspicion to initially conduct a Terry v. Ohio 392 U. S 1 (1968) stop, when he found no weapons on the Defendant, Officer Gent lacked authority to continue the search. On July 21, 2000 the Defendant entered a conditional plea to a third degree felony, possession of a controlled substance and on the same day was sentenced to serve an indeterminate term of 0 to 5 years in the Utah State Prison, to run concurrent with another prison sentence the Defendant was serving and Defendant was given credit for time served.

The notice of appeal was filed with the Court on the 10th Day of August, 2000. The Jurisdiction of this Court is conferred pursuant to U.C.A. Sec 78-2-2(3)(l).

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

Did the Trial Court commit reversible error when it failed to suppress evidence obtained by Officer Gent of the Ogden City Police Department, where Officer Gent did not have reasonable, articulable suspicion that criminal activity was afoot.?

STANDARD OF
REVIEW

The question of whether the Court committed reversible error when it failed to suppress evidence that was obtained by Officer Gent of the Ogden City Police

STATE OF UTAH V. BROWN
Case Number 20000707-CA

Department from a warrant less search of the Defendant, where it is alleged that the Officer did not have reasonable, articulable suspicion that criminal activity is afoot in violation of the Defendant's rights under the Fourth Amendment to the United States Constitution as made applicable to the States by the Fourteenth Amendment to the United States Constitution it is a legal question and review able of the trial court's decision for correctness. State v James 977 P 2nd 489 (Utah Ct. App 1999), State v Palmer 803 P 2d 1249 (Utah Ct. App 1990)

STATEMENT OF THE CASE

The Defendant was charged by information with one count of possession of a controlled substance, with intent to distribute in violation of Section 58-37-8, U.C.

A. The Defendant moved to suppress evidence obtained on June 10, 1999 by Officer Gent of the Ogden City Police Department on the basis that the Officer conducted a level one search, where the Officer had no reasonable suspicion that a crime had been committed. The Officer testified that on at approximately 1600 hours in the six hundred block of 28th Street in Ogden, Utah he made a traffic stop on a motorcycle because it had an expired registration. In speaking to the driver the driver stated that he did not own the vehicle. The drivers girlfriend came out of an apartment and stated the owner was in the apartment.

STATE OF UTAH V BROWN
Case Number 20000707-CA

At about that time a little kid came running up and said a white man in a blue T-shirt jumped out the window and took off running. The Officer came back to the area a number of times. About two hours later he observed the Defendant knocking on the door of the alleged house the girlfriend came out of.

The Officer stopped and asked the Defendant to come and talk to the Officer. The Officer testified that the Defendant was very nervous, shaking and with sweat forming on his forehead. Also he kept putting his hands in and out of his pockets. The Officer testified that he thought the Defendant might have a weapon in his pocket and so he began to search the Defendant. In finding a large bulge in the Defendant's pocket the Officer asked the Defendant what it was. The Defendant stated that it was money, which the Officer removed. There was no weapon in the pockets. Then the Officer continued the search around the groin area, where he found a square box, which contained a narcotic. The Officer never found any weapon on the Defendant.

STATEMENT OF FACTS

By information the Defendant was charged with a count of possession of a controlled substance with intent to distribute in violation of Section 58-37-8, U. C. A. The charge resulted from the events that occurred on June 10, 1999 in the

STATE OF UTAH V BROWN
Case Number 20000707-CA

600 block of 28th Street in Ogden, Utah. At approximately 1600 hours on that date, Officer James Gent of the Ogden City Police Department made a traffic stop at 660 28th Street in Ogden. The basis for the stop was that he noticed a motorcycle with an expired registration (T. Preliminary. Hearing p. 5) Officer Gent in talking to the Driver, Rocco Colantonio determined that the driver did not own the motorcycle, but that it belonged to an individual in the apartment building near the stop. At that time the driver's girlfriend came out and identified the driver and told the Officer that the owner of the cycle was in the apartment. At that point all the Officer desired was to inform the owner of the expired registration and that it was improperly registered and get it taken care of. (T. preliminary Hearing pg's 5-6)

The girlfriend went to find the owner. A few minutes later she returned and said the owner did not desire to talk to the Officer. At that point a few little kids that lived in the neighborhood came running up to the Officer and said that a white man in a blue T-shirt jumped out the window of the apartment and took off running. (T. Preliminary Hearing pg's 6-7)

Approximately two hours later the Officer was driving by the same area when he noticed a white male in a blue T-shirt knocking on the apartment door. The Officer pulled up to the curb. Officer Gent called to the Defendant and asked if he

STATE OF UTAH V BROWN
Case Number 20000707-CA

could talk to the Defendant. (T. Preliminary Hearing pg's 7-8)

As the Defendant approached the Officer testified that the Defendant appeared very nervous. The Defendant was shaking and sweat was forming on his forehead. The Defendant keep putting his right hand in his front right pocket. The Officer testified that there was something in the pocket that the Defendant needed to keep his hand on and that raised his suspicion that it was a gun and was concerned for his safety. The Officer explained to the Defendant that he was going to search him for weapons. As the Officer searched the Defendant he started grabbing the clothing, feeling for anything unusual or anything hard or shaped like a weapon in the pockets and when he found none, without the Defendant's consent felt around his groin area.. (T. Preliminary Hearing pg's 8-10)

As part of the search the Officer said he felt a large bulge in the pocket and that it felt like money. The officer testified that he asked if he could remove the money and the Defendant said fine. The Officer removed the wad of money, which was \$133.00. (T. preliminary Hearing p. 10) At this point the Officer found nothing else in the pocket.

The Officer continued the search, and said he felt a bulge in the groin area. The item felt like a square box with rounded edges. The Defendant tried to protect

STATE OF UTAH V BROWN
Case Number 20000707-CA

the item, but when the Officer asked the Defendant what it was, the Defendant said it was dope. (T. Pg's 10-11) The Officer did a field test on the contents of the bag and it was methamphetamine and marijuana. (T. Preliminary Hearing p 11-12)

After the Defendant was bound over for trial on one count of possession of a controlled substance in violation of Section 58-37-8 U. C. A., a first degree felony, the Defendant through his attorney filed a motion to suppress any evidence obtained by reason of the search.

At the hearing on the Motion to Suppress, counsel for the Defendant recalled Officer Gent to the stand. At this hearing in answer to a question by counsel for the Defendant, Officer Gent testified that he was only told that a white male in a blue T-shirt jumped out the back window and ran away. This was the total description that the Officer had. The Officer never had seen the Defendant. The Officer said the Defendant wearing a blue T-shirt and based on that the Officer stated "Hey, come here, talk to me". (T. Suppression Hearing pg's 3-4) When the Defendant started towards the Officer he was nervous and was putting his hand in and out of his right pocket. The Officer did his search where he removed the money from the Defendant's right pocket. However, the Officer found no weapon in the pocket, but did place his hand in the Defendant's pocket to remove the money. Then the

STATE OF UTAH V BROWN
Case Number 20000707-CA

Officer continued the search by putting his hand back in the Defendant's pocket, feeling for other items other than a gun. Finding no gun in the pocket, the officer, without cause, felt the groin. That is when the Officer found the small package in the groin area. (T. Suppression Hearing pg's 4-6)

The basis of the Defendant's argument to suppress the evidence obtained from the search, was, first the Officer lacked a reasonable suspicion to detain the Defendant in the first instance. The State argued that it was a level one detention. But the Defendant argued that when the Office said "Come here, I need to talk to you", this was a command, not a request for a voluntary confrontation under *Florida v Bostwick*. (T. Suppression Hearing pg's 7-8)

The second point is that even if the Officer had a right to conduct a level one search, when he found no weapon of the Defendant, the Officer had no right to continue the search. (T. Preliminary Hearing p. 10)

The Court in the continued suppression hearing on July 6, 2000 stated that he did not have problems with the initial stop, a level one stop, complying with the law. The Court further stated that based on the description of this person and his nervousness and his repeated efforts to put his hand in his pocket despite the Officer telling him not to, that the Officer had reasonable, articulable suspicion to detain

STATE OF UTAH V BROWN
Case Number 20000707-CA

him and to perform a weapons search. As part of the search the Officer put his hand in the right pocket where the Defendant's hand had been and removed the money, but found no weapon.(T. Suppression Hearing p. 18) After removing the money, which was not an unusual amount for a man to carry, the Officer continued to search the pocket to determine if anything else is in the pocket. Finding no weapon he moved the search to the groin area. (T. Suppression Hearing pg's 19) The Court then believed that when the Officer determined that there was nothing in the pocket, the search should be ended. (T Suppression Hearing p 21, 23)

At the Hearing held on the 21st of July, 2000 a statement was made that the Court ruled the stop was proper (T. Hearing p 28) As a result of that ruling and negotiations with the State the charge was amended to simple possession of a controlled substance, a third degree felony, to which the Defendant agreed to plead guilty to. However, the Defendant reserved the right to appeal the Courts finding with regard to the stop. (T. Hearing p 28) Based upon the Defendant's plea of guilty to a third degree felony, possession of a controlled substance, and the Defendant's desire to be sentenced the same day, the Court sentenced the Defendant to serve a term of not less than zero no more than five years at the Utah State Prison. (T. Hearing p 36)

SUMMARY OF ARGUMENT

The Trial Court committed reversible error when it found that the initial stopping and searching of the Defendant was a level one stop, which stop was justified as a search for weapons.. The Court questioned whether Officer Gent, after finding no weapons on the Defendant, was justified in continuing the search where on another part of the Defendant's body he located a small packet containing a controlled substance. However, before the Court ruled on the issue of whether Officer Gent was justified in continuing a search, the Defendant, reserving the right to appeal the denial of his suppression motion, plead guilty to a third degree felony, possession of a controlled substance. The Court never ruled on the issue of whether the continued search was justified. It did not suppress the evidence located by the continued search. The failure to suppress the evidence located by the second search was reversible error.

ARGUMENT

THE COURT COMMITTED REVERSIBLE ERROR
WHEN IT FAILED TO SUPPRESS EVIDENCE
OBTAINED FROM THE DEFENDANT WHERE THE
OFFICER HAD NOTHING MORE SUBSTANTIAL
THAN INARTICULATE HUNCHES THAT THE
DEFENDANT WAS ENGAGED IN ILLEGAL ACTIVITY.

The Fourth Amendment to the United States Constitution, which is made

STATE OF UTAH V BROWN
Case Number 20000707-CA

applicable to the States by the Fourteenth Amendment to the United States Constitution provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated . . ." The United States Supreme Court in the case of Terry v Ohio 392 U. S. 1, 20 L. Ed. 2nd 889 (1968) at page 8 stated this inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study. Within this right the United States Supreme Court in Terry v Ohio, supra considered the power of the police to "stop and frisk"-- as it is sometimes euphemistically termed --suspicious persons.

In an attempt to resolve the issue, the Court in Terry v Ohio, supra at page 17 stated that :

"It must be recognized that whenever a police officer accosts and individual and restrains his freedom to walk away, he has 'seized' that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a 'search'"

To justify the particular intrusion, the Court stated the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more

STATE OF UTAH V BROWN
Case Number 20000707-CA

substantial than inarticulate hunches. The Court further stated that it is the governmental interest which underlies the recognition that a police officer may in appropriate circumstances and an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest. The compelling interest of the police officer is to take steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him.

The Supreme Court concluded that the search must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a "full" search, even though, it remains a serious intrusion. To conduct the search the officer need not be absolutely certain that the individual is armed; the issue being whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or others was in danger.

In reconsidering this issue, the United States Supreme Court in the recent case of Illinois v. Wardlow 528 U. S. , 145 L Ed 2d 570 (2000) stated that while reasonable, articulable, suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence. the officer must be able to articulate more than an "inchoate and unparticularized

STATE OF UTAH V BROWN
Case Number 20000707-CA

suspicion or hunch" of criminal activity.

The Utah Supreme Court in the case of State v Schlosser 774 P 2d 1132 (Utah 1989) at 1137 stated that furtive gestures by a passenger did not rise to the level of articulable suspicion suggesting criminal activity. Passenger's actions of turning to the left and to the right, appearing fidgety, bending forward, and turning to look at the officer, do not, without more, show a reasonable possibility that criminal conduct had occurred or was to about to occur.

This search began when Officer Gent noticed a motorcycle with an expired sticker. When Officer Gent approached the driver of the motorcycle, he was informed that the driver did not own the motorcycle, but the owner was in an apartment next to the driveway where the officer was talking to the driver. Officer Gent desired to inform the owner of the motorcycle that the license plates did not belong to the vehicle and anyway it had expired. This was the sum total of Officer Gent's involment in this matter. Officer Gent had no idea that other criminal activity might be involved.

Officer Gent asked the driver's girlfriend to ask the owner to come and talk to the officer. However, Officer Gent was informed that the owner did not desire to talk to him. At that point of time, some young children informed Officer Gent that a white male in a blue T-shirt climbed out the back window and started running.

STATE OF UTAH V BROWN
Case Number 20000707-CA

Officer Gent never obtained a better description of the individual.

About two hours later when Officer Gent was driving his patrol car in the area he noticed the Defendant, being white and wearing a blue T-shirt, walking up to the apartment. Officer Gent pulled up to the curb in front of the apartment. Officer Gent called to the Defendant and ask him to come and talk to him. The Defendant came over and appeared very nervous. The Defendant had sweat forming on his forehead and kept putting his right hand in and out of his right pocket. (T. Preliminary Hearing pg's 8-9)

Officer Gent testified that based on the fact the Defendant was white and wearing a blue T-shirt caused him to order the Defendant to stop what he was doing and come over to him. Because the Defendant appeared nervous he decided to search the Defendant. The Officer did a pat down search of his out side clothes and felt a bulge in his right pocket. Officer Gent then asked the Defendant what it was and the Defendant said it was money. The Officer asked if he could remove the money and the Officer testified the Defendant said fine. The Officer reached in the pocket and removed \$133.00 in a wad. (T. Preliminary Hearing pg's 9-10)

At this point the Officer did not find any type of weapon on the Defendant. Despite this fact and without consent the Officer continued searching the Defendant until he located a small square box in the groin area, which box contained a

STATE OF UTAH V BROWN
Case Number 20000707-CA

controlled substance. (T. Preliminary Hearing Pg's 10-12)

At the time of the initial search the Officer had no suspicion of criminal activity. Further, he had no idea as to whether the Defendant was the individual described by the eight year old children, who merely informed the officer that a white male wearing a blue T-shirt came out of a back window of the apartment house and started running. The Officer had no better description of the individual. There could be many white males wearing a blue T-shirt which matched the description given by the children.

The only other basis for the Officer to decide to search the Defendant was that the Defendant appeared nervous. The Officer testified that these two factors decided the Officer to search the Defendant for weapons. Under the principles set forth in Terry v Ohio, supra and Illinois v Dulaney, supra, as also adopted in Utah in State v. Schlosser, supra and State v. James, supra, the Officer lacked probable cause to conduct the initial search. At this point the Officer had no reasonable articulable suspicion that the Defendant was involved in criminal activity.

Even if the Court finds that the initial search was proper, when the Officer found no weapon on the Defendant, the Officer imposed a serious intrusion on the Constitutional rights of the Defendant as set forth in the Fourth Amendment to the United States Constitution when he continued to search the Defendant and finally

STATE OF UTAH V BROWN
Case Number 20000707-CA

found evidence of criminal activity. Further, the search violated the limitations set forth in Terry v Ohio, supra in that the Officer did not limit his search to a pat down of the outer clothing to determine if the Defendant had a weapon, but actually put his hand in the Defendant's pocket to determine if there were any other items on the Defendant's body.

The Court committed reversible error when it refused to suppress the evidence which was obtained by the illegal search conducted by Officer Gent. The suppression of evidence is the only remedy available to the Court to counter the illegal activity of Officer Gent in searching the Defendant in violation of his rights guaranteed by the Fourth Amendment to the United States Constitution.

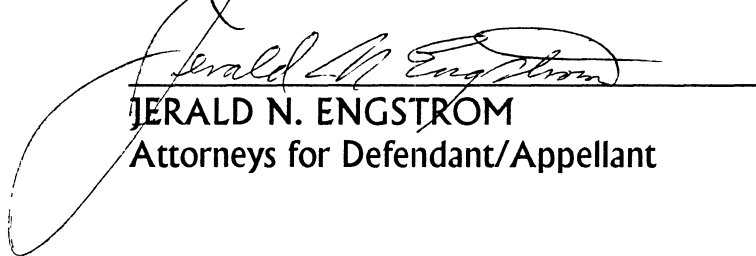
CONCLUSION

This Court must suppress the evidence which was obtained by the search made by Officer Gent which violated the Defendant's right against search and seizure as guaranteed by the Fourth Amendment to the United States Constitution. Since the evidence of criminal activity must be suppressed to correct the Officer's illegal actions the Defendant should be allowed to withdraw his plea of guilty to a third degree felony, and based on the suppression of the evidence decide anew whether he desires to make a new plea.

DATED this____ of October, 2000

STATE OF UTAH V BROWN
Case Number 20000707-CA

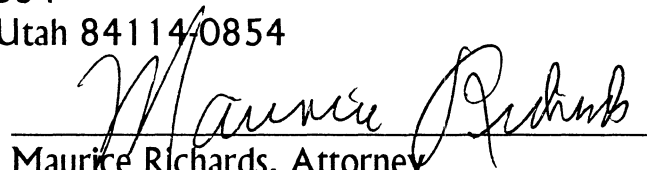

MAURICE RICHARDS


GERALD N. ENGSTROM
Attorneys for Defendant/Appellant

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing Brief of Appellant was posted in the United States mail, postage prepaid, on this 23 day of October, 2000 and addressed to:

Jan Graham
Attorney General
Heber M. Wells Building
160 East 300 South, 6th Floor
P. O. Box 140854
Salt Lake City, Utah 84114-0854


Maurice Richards, Attorney

1 time.

2 Q. Approximately at 1600 hours, what was your location?

3 A. Six hundred block of 28th Street.

4 Q. Okay. Did something draw your attention at that point?

5 A. It did. I made a traffic stop in front of 660 28th

6 Street on an expired registration on a motorcycle.

7 Q. Okay. Again, explain to the Court the reasons for that

8 traffic stop.

9 A. The license plate was expired. I later determined that

10 it was improperly registered. The plates did not belong to

11 that vehicle.

12 Q. And what was the vehicle?

13 A. It was a motorcycle.

14 Q. Okay. Did you have some conversation with the driver at

15 that point?

16 A. I did. I spoke to a Rocco Colantonio. He told me that

17 he was just test driving the motorcycle and that the owner

18 was inside his apartment, and I had just happened to stop

19 him right in front of the apartment building.

20 Q. Okay. At that point, what happened?

21 A. His girlfriend came out --

22 MR. GRAVIS: Your Honor, for the record, I believe

23 this would just be an offer for preliminary, not for the

24 truth of the matter asserted.

25 MR. SAUNDERS: Your Honor, we -- we want to show

1 why this officer was looking for a person that fit the
2 general description of this defendant later on that night,
3 and I think it's relevant to that point. But we're not --
4 we're not offering it for the truth of the matter asserted.

5 **THE COURT:** Okay. The Court will overrule the
6 objection --

7 **MR. GRAVIS:** I'm just making --

8 **THE COURT:** -- or do you withdraw it?

9 **MR. GRAVIS:** I didn't actually object. I just
10 wanted to make sure it was clear it was not being offered
11 for --

12 **THE COURT:** Very well. Thank you.

13 **Q. (By Mr. Saunders)** What happened at that point?

14 **A.** The driver of the vehicle's (sic) girlfriend came out
15 and I asked who he was because he had no identification.
16 She said it was Rocco Colantonio and -- and I told her why I
17 had stopped him on the motorcycle. And they both told me
18 that the owner of the motorcycle was in the apartment.

19 **Q.** Okay. Did you want to talk to the owner at that time?

20 **A.** I did, and I asked --

21 **Q.** Why?

22 **A.** To explain to him about the expired registration. And
23 then finding out that it was improperly registered, I was
24 going to tell him not to drive it and to get it taken care
25 of.

/

1 Q. Okay. At that point, what happened, Officer Gent?

2 A. Well, she went in to -- to find the owner, and she came

3 back out a few minutes later and said he -- he won't come

4 out. He doesn't want to talk to you.

5 Q. Okay.

6 A. So I thought that was kind of suspicious. And then

7 within a minute or so, a few little kids that lived in the

8 neighborhood, little eight-year-old kids, came running up to

9 me and said that a man -- a white man in a blue T-shirt just

10 jumped out the window of the apartment where the owner of

11 the vehicle was and took off running.

12 Q. Okay. Did you later look for a person fitting that

13 description?

14 A. I did. I went by the apartment several times. After

15 searching the area, I couldn't find him anywhere.

16 Q. Okay. Again, why were you looking for that person?

17 A. Well, I thought it was kind of unusual that someone

18 would jump out the window instead of just coming out to talk

19 to me.

20 Q. Okay. What was the original reason you wanted to talk

21 to him?

22 A. For the expired registration.

23 Q. Okay. Did you later on in your shift observe somebody

24 that fit that general description?

25 A. Approximately two hours later I was driving by the same

1 apartment and I saw a white male in a blue T-shirt knocking
2 on Rocco's door.

3 Q. Okay. At that point, what did you do?

4 A. I made a U-turn. As I pulled up to the curb, the
5 individual was now walking toward a vehicle that was parked
6 on the street. When I stopped, he turned around and quickly
7 went the other way.

8 Q. Okay.

9 A. I called to him and asked him if I could talk to him.

10 Q. Again, describe -- as he's leaving the doorway, Rocco's
11 doorway, describe -- when you turn around, is it apparent to
12 you that he sees you?

13 MR. GRAVIS: Objection. Calls for speculation.

14 THE COURT: Sustained.

15 Q. (By Mr. Saunders) Describe exactly what you observed
16 him do.

17 A. His back was to me when I saw him knocking on the door.
18 As I made the U-turn and came back to park, he was now
19 walking toward the street. I don't know if he looked at me
20 or not, but I was in a marked vehicle in full uniform as I
21 stepped from the vehicle, when he turned directions and
22 started going back toward the -- the sidewalk area.

23 Q. Okay. At that point, what happened?

24 A. I called to him and asked him to come talk to me.

25 Q. And what did he say?

1 **A.** He came over and -- and immediately was very nervous.
2 He had a large drink in his hand like a 7-Up Big Gulp kind
3 of cardboard cup, and he was just shaking. I could see
4 sweat forming on his forehead. He was just very unusually
5 nervous.

6 **Q.** Okay. What else did you notice about him?

7 **A.** He kept putting his right hand in his front right
8 pocket, and I told him several times to get his hands out of
9 his pockets, and continued to put them back in.

10 **Q.** Okay. What was going on in your mind at that point?

11 **A.** Well, I -- there was obviously something in his pocket
12 that he doesn't want me to know about or something that he
13 needs to keep his hand on and that raised my suspicion and
14 my concern for my safety.

15 **Q.** Okay. Again, why were you concerned for your safety at
16 that point?

17 **A.** Well, he could have had a weapon in his pocket or -- and
18 he's already got his hand on it. He's got the jump on me.

19 **Q.** Okay. At that point, what did you decide to do?

20 **A.** I explained to him that I was going to search him for
21 weapons. I took the cup from his hand, put it on the trunk
22 of his car, had his hands put on the back of his head, and I
23 begin to search him for weapons.

24 **Q.** Okay. Describe just briefly or explain how you did your
25 pat-down search.

1 **A.** Well, he had his hands behind his head with his fingers
2 in a lock. I'd just hold on to his fingers, just grab on to
3 the -- the fingers, and then you just grab starting with
4 the -- the front waistband working your way to the back,
5 just grabbing the clothing, feeling for anything unusual or
6 anything hard or shaped like a weapon, and then check the
7 front pockets and anywhere that he could easily access
8 without me being aware of.

9 **Q.** Okay. As you're proceeding with this search, did you
10 locate something?

11 **A.** I felt a large bulge in his pocket and I -- I said it
12 felt like money; he said it was. I asked him if I could
13 remove it; he said fine. I took out a wad of money from his
14 pocket, it was all crumpled up, placed it next to his cup on
15 the trunk of the car and continued to search.

16 **Q.** What was the amount of money, if you know?

17 **A.** There was \$133, I believe.

18 **Q.** Okay. At that point, what happened?

19 **A.** I felt a large bundle or bulge in his groin area that
20 was not supposed to be there and it was something unusual.
21 It was a solid -- later turned out to be a pouch full of --
22 of certain items, but it -- it just didn't belong there. It
23 was toward the right pocket.

24 **Q.** Describe how it felt to you.

25 **A.** It felt like a square box with rounded edges.

1 Q. Okay. What was the approximate size?

2 A. Three to 4 inches high, 2 to 3 inches wide.

3 Q. Okay. In your experience, based on the -- what you

4 felt, were you still concerned for your safety?

5 A. I -- yeah. I didn't know what it was, and he kept

6 putting his hand in his right pocket. I just -- I didn't --

7 I didn't have a clue what it was and I asked him --

8 Q. Okay.

9 A. -- what the item was.

10 Q. As you felt that there, what happened?

11 A. Well, as soon as I grabbed on to it he tried to pull

12 away from me and I cinched down on my hand so he couldn't

13 pull his hands away. And then I asked him, you know, as I

14 held on to it, what is it, and he told me it was dope.

15 Q. Okay. By him telling you it was dope, did you

16 understand what he meant by that?

17 A. Yes.

18 Q. And what did he mean?

19 A. My understanding was some type of narcotic.

20 Q. Okay. At that point, what did you do?

21 A. I removed it from his pants.

22 Q. Okay. And describe briefly what was inside that packet.

23 A. I removed a small velvet-type bag with a drawstring on

24 the top. It was inside of his pants -- not in his pocket.

25 It was between the pants and his -- and his skin. And I

1 removed it and opened it up and found some crystal
2 methamphetamine and marijuana, glass pipe -- several glass
3 pipes.

4 Q. Describe the glass pipe.

5 A. It was just a -- the typical methamphetamine used glass
6 pipe, just a glass tube.

7 Q. Okay. What else was inside the bag?

8 A. There was three -- three small glass vials; there was
9 three ziplocks with crystal meth, separated; and I believe
10 there was some empty baggies, also.

11 Q. Okay. There's been a prior stipulation about some
12 methamphetamine that was tested and marijuana that was
13 tested. What did you do with the substances once you
14 collected them?

15 A. I did a field nick test kit on them and it tested
16 positive for amphetamine, and then they were placed in
17 evidence for scientific evaluation.

18 Q. Okay. Can you identify the person known to be Robert
19 Brown in court here today?

20 A. Yes. He's at the defendant's table.

21 Q. Okay. Did you measure the distance from where he was to
22 a church in the area?

23 A. We did. It was 112 feet from the location of arrest to
24 the property of the church.

25 Q. Okay. What kind of church was that and what is the

1 WITNESS STAND AND BE SWORN FIRST.

2 OFFICER GENT,

3 CALLED AS A WITNESS, BEING FIRST DULY SWORN,

4 WAS EXAMINED AND TESTIFIED AS FOLLOWS:

5 DIRECT EXAMINATION

6 BY MR. GRAVIS:

7 Q. OFFICER GENT, JUST TO REHASH BRIEFLY SOME THE THINGS OUTA
8 THE PRELIMINARY HEARING, AND I'LL TRY TO LEAD AND WITH -- THE
9 STATE DOESN'T OBJECT AND COMPOUND AND TRY TO GET IT ALL IN
10 QUICKLY. YOU MADE A TRAFFIC STOP ON ROCKY COLANTONO. HE WAS
11 DRIVING UNREGISTERED MOTORCYCLE YOU SAID BELONGED TO AN
12 INDIVIDUAL NAMED CLIFF.

13 A. RIGHT.

14 Q. YOU WERE APPROACHED BY SOME CHILDREN WHOSE NAME YOU
15 DIDN'T GET.

16 A. RIGHT.

17 Q. SAID A WHITE MALE IN A BLUE T-SHIRT JUMPED OUT THE
18 BLACK -- BACK WINDOW AND RAN AWAY. THAT WAS THE ENTIRE
19 DESCRIPTION YOU GOT.

20 A. YES.

21 Q. AND YOU NEVER SAW THE SUSPECT AT THAT TIME, NEVER GOT
22 YOUR OWN INDEPENDENT VERIFICATION.

23 A. NO.

24 Q. TWO HOURS LATER YOU SAW THE DEFENDANT WEARING A BLUE
25 T-SHIRT, MR. COLANTONO'S FRONT DOOR, AND BASED UPON THAT,

1 YOU -- AS HE STARTED WALKING AWAY FROM YOU, YOU SAID, COME
2 HERE. I NEED TO TALK TO YOU.

3 A. NOT EXACTLY THAT WAY, BUT -- I DIDN'T USE THAT TONE OF
4 VOICE.

5 Q. WELL, BUT THOSE ARE THE WORDS YOU TESTIFIED.

6 A. YEAH, SOMETHING TO THAT EFFECT THAT, HEY, COME HERE, TALK
7 TO ME.

8 Q. OKAY. AND YOU DIDN'T HAVE -- OTHER THAN HE TOLD YOU HIS
9 NAME WASN'T CLIFF, WHICH IS NAME YOU'D BEEN GIVEN ON
10 MOTORCYCLE AND THAT HE HAD NOT BEEN TO THE RESIDENCE EARLIER
11 THAT DAY.

12 A. I DON'T KNOW THAT FOR A FACT.

13 Q. BUT HE TOLD YOU THAT.

14 A. YEAH, HE TOLD ME THAT.

15 Q. THAT WAS BEFORE YOU DID THE TERRY FRISK.

16 A. RIGHT.

17 Q. AND HE ALSO HAD SOME WRITTEN DOC -- PAPERS WITH HIS NAME
18 ON IT, BUT NO PICTURED I.D.

19 A. I DIDN'T KNOW ABOUT THAT UNTIL AFTER THE DRUGS WERE
20 FOUND.

21 Q. OKAY. AND THE REASON WHY YOU WERE LOOKING -- YOU DID THE
22 TERRY FRISK IS THAT YOU WERE CONCERNED HE HAD A WEAPON IN HIS
23 RIGHT FRONT POCKET BECAUSE HE KEPT STICKING HIS HAND IN THERE
24 AND YOU TOLD HIM TO TAKE HIS HAND OUT, HE'D STICK HIS HAND
25 BACK IN.

1 A. HE DID THAT SEVERAL TIMES, YES.

2 Q. AND ALL YOU FOUND IN THAT POCKET WAS MONEY WHICH HE

3 AGREED THAT YOU COULD REMOVE AND YOU DID AND THERE WAS

4 NOTHING -- NOTHING, NO CONTRABAND, NO WEAPON IN THAT POCKET.

5 A. WELL, WHEN I REMOVED THE CONTENTS OF THAT POCKET AND I

6 WENT BACK TO RE-SEARCH IT, THAT'S WHEN I FOUND --

7 Q. WELL, YOU ACTUALLY STUCK YOUR HAND IN HIS POCKET.

8 A. NO. NO, IT WAS GRABBED FROM THE OUTSIDE OF THE PANTS.

9 TO REMOVE HIS -- TO REMOVE HIS MONEY AND STUFF, YES, I DID --

10 Q. YEAH.

11 A. -- BUT DURING THE SEARCH, IT WAS -- MY HANDS WERE OUTSIDE

12 OF --

13 Q. OKAY. YOU'D ALREADY REMOVED THE MONEY FROM HIS

14 POCKETS --

15 A. WITH HIS PERMISSION, YES.

16 Q. YES. AND YOU REMOVED EVERYTHING OUT OF THAT POCKET AT

17 THAT TIME.

18 A. YES.

19 Q. THEN YOU CONTINUED TO TERRY FRISK.

20 A. YES.

21 Q. OKAY. AND YOU TESTIFIED THAT YOU WERE ASKED ABOUT HIM

22 ASKING YOU IF HE HAD -- TELLING YOU THAT HE HAD HIS

23 REGISTRATION IN HIS VEHICLE AND THAT TYPE OF THING?

24 A. THAT WOULD HAVE BEEN WAY AFTER THIS ALL OCCURRED.

25 Q. WELL, YOU TESTIFIED THAT THAT WASN'T EVEN HIS VEHICLE,

1 CORRECT?

2 A. YOU KNOW, IT'S BEEN OVER A YEAR. I THOUGHT THE VEHICLE
3 BELONGED TO HIS SISTER OR HIS MOTHER OR SOMETHING TO THAT
4 EFFECT. I DON'T REMEMBER EXACTLY WHO THE REGISTERED OWNER
5 WAS.

6 Q. YOU DID -- IN YOUR REPORT, YOU INDICATE THAT HE'S THE
7 REGISTERED OWNER. YOU ALSO DID AN IMPOUND REPORT AND
8 INVENTORY AND WROTE THAT -- ON THAT THAT HE IS THE REGISTERED
9 OWNER, IS THAT CORRECT?

10 A. I DON'T RECALL ANYTHING SAYING THAT HE WAS THE REGISTERED
11 OWNER. I REMEMBER SAYING THE VEHICLE WAS IMPOUNDED FOR A SAFE
12 KEEP BY QUICK HOOK.

13 Q. SHOW YOU WHAT'S MARKED AS DEFENDANT'S PROPOSED EXHIBIT
14 NUMBER 1. ASK YOU IF YOU RECOGNIZE THAT DOCUMENT?

15 A. IT'S AN IMPOUND SHEET.

16 Q. AND IS IT IMPOUND SHEET OF MR. BROWN'S VEHICLE?

17 A. OF A VEHICLE THAT I WROTE AS HIM BEING THE OWNER. I
18 DON'T REMEMBER WHY I WROTE HIS NAME IN THERE. I DON'T
19 REMEMBER SEEING THE REGISTRATION. I DON'T REMEMBER THE -- WHY
20 I DETERMINED THAT, BUT THEY NEED A NAME IN THERE AND WE JUST
21 USUALLY PUT THE DRIVER IF WE CAN'T DETERMINE WHO IT WAS AT THE
22 TIME.

23 Q. OR IF YOU LOOKED AND FOUND THE REGISTRATION.

24 A. BUT I DON'T REMEMBER FINDING REGISTRATION.

25 Q. YOU DON'T REMEMBER FINDING IT, BUT YOU COULD HAVE IF YOU

1 PUT HIS NAME IN THERE, CORRECT?

2 A. I PUT A NAME IN THERE, YES.

3 Q. OWNER'S NAME, ROBERT BROWN.

4 A. THEY NEED A NAME IN THERE. IF I CAN'T DETERMINE WHOSE

5 VEHICLE IT IS, I'LL PUT THAT PERSON'S NAME IN THERE.

6 Q. INSTEAD OF PUTTING UNABLE TO DETERMINE OR ANYTHING --

7 SOMETHING LIKE THAT?

8 A. I DON'T KNOW.

9 Q. YOU PUT HIS NAME IN THERE, THOUGH.

10 A. I DID.

11 MR. GRAVIS: ASK TO ADMIT DEFENDANT'S EXHIBIT --

12 MR. SAUNDERS: NO OBJECTION.

13 MR. GRAVIS: -- 1.

14 THE COURT: OKAY. IT'S RECEIVED. THANK YOU.

15 MR. GRAVIS: I HAVE NOTHING FURTHER.

16 MR. SAUNDERS: I DON'T HAVE ANY QUESTIONS, YOUR HONOR.

17 THE COURT: YOU MAY STEP DOWN.

18 MR. GRAVIS: BASICALLY, YOUR HONOR, THIS IS KIND OF A

19 TWO-PRONGED ARGUMENT. FIRST OFF, OUR POSITION IS THE OFFICER

20 LACKED A REASONABLE SUSPICION TO DETAIN THE DEFENDANT TO START

21 WITH. THE STATE HAS ARGUED THIS IS A LEVEL ONE DETENTION.

22 IT'S OUR POSITION THAT WHEN THE OFFICER SAYS, COME HERE, I

23 NEED TO TALK TO YOU, THAT IS A COMMAND, NOT A REQUEST UNDER

24 FLORIDA VERSUS BOSTWICK FOR A VOLUNTARY CONFRONTATION. BUT

25 THAT HE'S -- IT'S A COMMAND THAT HE RUNS A RISK OF BEING

1 ARRESTED FOR INTERFERING WITH A POLICE OFFICER BY REFUSING
2 BECAUSE THE OFFICER SAYS, COME HERE. THE OFFICER'S IN
3 UNIFORM, AND TELLS HIM -- TELLS YOU COME HERE, I SUBMIT THAT A
4 REASONABLE PERSON WILL COME HERE.

5 THE COURT: BUT DOES THE CASE LAW SUPPORT THAT,
6 MR. GRAVIS? I MEAN, DOESN'T THE CASE LAW SAY THAT -- THAT AT
7 THAT POINT, YOU KNOW, BUT ANY POLICE OFFICER HAS THE RIGHT TO
8 APPROACH SOMEONE AND ASK SOME QUESTIONS --

9 MR. GRAVIS: HOW --

10 THE COURT: -- AND THEY -- AND THE PERSON WHO'S
11 BEING ACCOSTED HAS THE RIGHT TO SAY, HEY, I DON'T WANNA TALK
12 TO YOU.

13 MR. GRAVIS: CASE LAW -- BUT THE RIGHT TO APPROACH
14 AND ASK HIM QUESTIONS IF IT'S VOLUNTARY, BUT IF THE OFFICER --
15 IF THE OFFICER TELLS -- TELLS THEM TO COME HERE, I WANT TO
16 TALK TO YOU, OR I NEED TO TALK TO YOU, INSTEAD OF, WOULD YOU
17 MIND STEPPING OVER HERE, MAY I ASK YOU SOME QUESTIONS, I
18 SUBMIT THAT MAKES A DIFFERENCE. IF IT'S --

19 THE COURT: WELL, EXCEPT --

20 MR. GRAVIS: -- IF IT'S COMMAND, THEN IT'S A
21 DETENTION. IF IT'S A SIMPLE REQUEST, IT'S A LEVEL ONE STOP.
22 AND I WOULD SUBMIT WHEN AN OFFICER IN UNIFORM SAYS, COME HERE,
23 I NEED TO TALK TO YOU, THAT'S A LEVEL TWO STOP. BECAUSE IT --
24 OFFICER HAS THE APPARENT AUTHORITY AND HE'S MAKING A COMMAND.

25 THE COURT: BUT I DON'T THINK THAT'S WHAT OFFICER

1 GENT JUST SAID.

2 MR. GRAVIS: HE MIGHT TESTIFY -- I ASKED HIM TO --

3 THE COURT: HE CHALLENGED THE TONE OF YOUR VOICE AND
4 HE CHALLENGED THE WAY THAT YOU EVEN FRAMED THE WORD --

5 MR. GRAVIS: WELL, YOUR HONOR, AS WE -- AWARE,
6 OFFICER GENT CAN'T REMEMBER THINGS FROM A YEAR AGO, BUT WHEN
7 HE'S ACCOSTED ABOUT INCONSISTENCIES WITH HIS TESTIMONIES IN
8 HIS REPORTS, AND SO THEREFORE, YOU HAVE TO JUDGE HIS
9 CREDIBILITY WHEN HE TALKS ABOUT TONE. BUT EVEN IF THE TONE
10 WAS DIFFERENT THAN WHAT I SAID, IF HE SAYS, COME HERE, I NEED
11 TO TALK TO YOU, DOESN'T MATTER THE TONE OF VOICE, IT'S WHAT
12 THE WORDS ARE. AND I'D SUBMIT, A REASONABLE PERSON WOULD NOT
13 FEEL FREE TO LEAVE WHEN AN OFFICER SAYS, COME HERE, I NEED TO
14 TALK TO YOU. IF AN OFFICER SAYS, MAY I SPEAK WITH YOU, WOULD
15 YOU MIND STEPPING OVER HERE, THEN A REASONABLE PERSON WOULD
16 BE -- FEEL FREE TO LEAVE. I THINK FLORIDA VERSUS BOSTWICK,
17 THAT SITUATION THE OFFICER ASKED HIM IF THEY WOULD MIND
18 TALKING TO HIM, ASKING THEM IF THEY'D STEP OVER HERE, NOT
19 TELLING THEM TO COME HERE, I NEED TO TALK TO YOU, WOULD YOU
20 STEP OVER HERE, WOULD YOU MIND TALKING TO ME, WOULD YOU MIND
21 CONSENTING TO A SEARCH OF YOUR SUITCASE. SO --

22 THE COURT: OKAY.

23 MR. GRAVIS: -- THAT'S OUR POSITION ON STOP.

24 FURTHERMORE, EVEN IF THE STOP IS LEGAL, TO CONDUCT A TERRY
25 FRISK, YOU HAVE TO HAVE REASONABLE SUSPICION BASED UPON

1 ARTICULABLE FACTS. AT THE PRELIM, OFFICER GENT SAID HE
2 NOTICED NO BULGES ANYWHERE ON THE DEFENDANT. HIS REASON FOR
3 FEELING THAT THE DEFENDANT MAY BE PRESENTLY ARMED AND
4 DANGEROUS, IS HE'S STICKING HIS HAND IN HIS RIGHT FRONT
5 POCKET. HE SEARCHED -- DID A PAT-DOWN, FELT AN OBJECT IN
6 THERE, FELT LIKE MONEY. HE REMOVED THE OBJECT. IT WAS MONEY.
7 THAT POINT IN TIME, OUR POSITION IS, IS REASONABLE SUSPICION
8 FOR THE FRISK WAS THERE -- THEREBY DISSIPATED, SINCE HE -- THE
9 ONLY REASON HE THOUGHT HE HAD A WEAPON BECAUSE OF HIS HAND IN
10 HIS POCKET. WHEN HE FOUND NO WEAPON IN THAT POCKET, HE HAD NO
11 FURTHER REASON TO -- SUSPICION TO CONTINUE TERRY FRISK.

12 **THE COURT:** DID YOU UNDERSTAND HIS TESTIMONY TO BE
13 THAT AFTER HE HAD REMOVED THE CONTENTS OF HIS FRONT POCKET
14 THAT HE HIS HAND BACK THERE JUST AS ONE EFFORT --

15 **MR. GRAVIS:** BUT --

16 **THE COURT:** -- MAKE SURE THERE WAS NOTHING ELSE
17 THERE AND --

18 **MR. GRAVIS:** BUT THE TEST -- TESTIMONY AT THE
19 PRELIMINARY HEARING WAS THAT THE OBJECT WAS NOT IN THE POCKET.
20 HE FELT IT BY GRABBING THE OBJECT IN HIS GROIN AREA, NOT IN
21 HIS POCKET AREA.

22 **THE COURT:** BUT IT WAS MY UNDERSTANDING -- MAYBE I'M
23 MISTAKEN IN THE FACTS AND WHAT HAS BEEN PRESENTED HERE TODAY
24 HAS BEEN SO CURSORY THAT MAYBE I'VE MISSED SOMETHING, AND YOU
25 CORRECT ME. BUT I THOUGHT THAT I UNDERSTOOD THE TESTIMONY TO

1 THAT A PORTION THAT I'VE LISTENED TO TWICE. AND I'VE REVIEWED
2 AGAIN THE ARGUMENTS. LET ME FOCUS BOTH COUNSEL ON WHAT I'M --
3 HOW I'M SEEING THIS CASE JUST KIND OF PROVISIONALLY AND GIVE
4 YOU AN OPPORTUNITY TO DIRECT FURTHER ARGUMENT BEFORE I ISSUE
5 MY RULING.

6 I DON'T HAVE ANY PROBLEMS WITH THIS CASE INSOFAR AS THE
7 INITIAL STOP, A LEVEL ONE STOP, COMPLYING WITH THE LAW. I
8 DON'T HAVE EVEN ANY PROBLEMS WITH THE FACT THAT -- THAT BASED
9 ON THE DESCRIPTION OF THIS PERSON AND THE -- AND HIS
10 NERVOUSNESS AND HIS REPEATED EFFORTS TO PUT HIS HAND IN HIS
11 POCKET DESPITE THE OFFICER TELLING HIM NOT TO, THAT THE
12 OFFICER HAD REASONABLE, ARTICULABLE SUSPICION TO DETAIN HIM
13 AND TO PERFORM A WEAPONS SEARCH.

14 LET ME TELL YOU WHERE I'M FEELING SOME CONCERN ABOUT THIS
15 CASE, MR. SAUNDERS. THE OFFICER INDICATED IN HIS TESTIMONY
16 THAT HE SAYS, I INFORMED THE DEFENDANT THAT I WAS GOING TO
17 PERFORM A SEARCH FOR WEAPONS. AND HE INDICATED THAT HE WAS
18 GOING TO PERFORM A SEARCH OF HIS POCKETS AND THE AREAS THAT
19 WOULD BE EASILY ACCESSIBLE FOR A WEAPON. EASILY ACCESSIBLE A
20 WEAPON. HE SAYS THEN HE BEGAN TO FEEL AROUND THE BELT AREA,
21 AND MOVED DOWN AND PATTED THE POCKETS. AND AS HE DID SO, AND
22 THAT'S A LOGICAL THING TO DO BECAUSE THIS MAN IS -- REPEATEDLY
23 KEEPS PUTTING HIS HAND IN HIS RIGHT POCKET WHERE THE OFFICER
24 COULD REASONABLY FEEL CONCERNED ABOUT A WEAPON. HE SAYS AS HE
25 FELT THAT POCKET, HE SAYS, I FELT A WAD, AND IT FELT LIKE

1 MONEY. I ASKED HIM IF IT WAS, AND HE SAID, YES. HE ASKED
2 PERMISSION TO REMOVE IT. SO HE -- SO WHAT HE FEELS IN THE
3 RIGHT POCKET, WHICH IS HIS AREA OF CONCERN, IS THIS WAD OF
4 MONEY. AND HE -- AND IT FEELS LIKE MONEY. DOESN'T FEEL LIKE
5 A WEAPON --

6 MR. SAUNDERS: CORRECT.

7 THE COURT: -- HE THEN ASKS THE DEFENDANT TO CONFIRM
8 WHETHER THAT'S IN FACT WHAT IT IS, AND THE DEFENDANT SAYS YES,
9 AND HE SAYS, MAY I REMOVE IT. IT SEEMS TO ME AT THAT POINT,
10 THE SEARCH SHOULD END. I SUPPOSE THAT IF YOU WANTED TO BE --
11 IF THE OFFICER WANTED TO BE ULTRACONSERVATIVE, HE COULD AGAIN
12 PUT HIS HAND TO THE POCKET TO SEE IF THERE'S ANYTHING ELSE
13 THERE. BUT THAT'S NOT WHERE HIS HAND WENT. HIS HAND
14 EVENTUALLY FOUND ITSELF IN THE GROIN AREA WHERE HE THEN FELT
15 THIS BULGE THAT SEEMED LIKE A FOREIGN OBJECT AND AT THAT
16 POINT, YOU KNOW, HE SAYS, YOU KNOW, WHAT IS THAT, AND HE SAYS,
17 IT'S DOPE.

18 MR. SAUNDERS: YOUR HONOR, THAT'S NOT MY UNDERSTANDING
19 EXACTLY ABOUT WHERE THE SEARCH TOOK PLACE. MY UNDERSTANDING
20 FROM WHAT THE OFFICER SAID IS THAT HE DID FEEL THE WAD OF
21 MONEY, ASKED WHAT THAT WAS, REMOVED THAT WITH CONSENT. HE
22 THEN WENT BACK TO THE POCKET AREA TO SEE IF THERE WAS ANYTHING
23 ELSE IN THE POCKET. UPON PATTING THAT ARE DOWN, THAT'S MY
24 UNDERSTANDING IS THE POCKET AREA HERE, THAT'S WHEN HE FEELS
25 THE OBJECT UNDERNEATH THE POCKET. THAT'S WHAT HE TERMED TO BE

1 OF THE OFFICER --

2 **THE COURT:** WELL, I DON'T -- I DON'T HAVE ANY
3 PROBLEMS WITH THE FACT THAT IF HE HAD A -- IF HAD HE A RIGHT
4 TO FEEL THAT OBJECT, I DON'T HAVE ANY PROBLEMS AT THAT POINT
5 AND OBVIOUSLY HE THEN SAID, YOU KNOW, WHAT IS IT. AND HE MADE
6 A VOLUNTARY DISCLOSURE THAT IT WAS DOPE. I GUESS WHERE I'M
7 HUNG UP IS ONCE HE WAS SATISFIED THERE WAS NOTHING IN THE
8 POCKET THAT POSED ANY IMMEDIATE THREAT TO HIM, THAT THE SEARCH
9 SHOULD BE ENDED.

10 **MR. SAUNDERS:** AND THAT'S NOT MY UNDERSTANDING OF HIS
11 TESTIMONY. MY UNDERSTANDING OF HIS TESTIMONY WAS AFTER HE
12 PULLED THE MONEY OUT, HE WENT BACK TO THE POCKET.

13 **THE COURT:** BUT THERE'S NOTHING THERE, AND THE ONLY
14 THING HE FELT WAS MONEY.

15 **MR. SAUNDERS:** WELL, HE DIDN'T KNOW THAT AT THAT TIME,
16 YOUR HONOR. HE DIDN'T KNOW IF THERE WAS SOMETHING ELSE IN THE
17 POCKET. HE FELT THE MONEY, ASKED WHAT IT WAS, ASKED IF HE
18 COULD TAKE IT BACK. AND THEN HE WENT BACK TO THE POCKET TO
19 SEE IF THERE WAS ANOTHER ITEM THERE. AND THAT'S MY
20 UNDERSTANDING WHEN HE WENT BACK TO THE POCKET IS WHEN HE FELT
21 THIS OTHER OBJECT.

22 **THE COURT:** I DIDN'T PICK THAT UP, BUT MAYBE --

23 **MR. GRAVIS:** I DISAGREE THAT THAT'S THE FACTS. HE
24 PATTED THE OBJECT DOWN, FELT THE MONEY, ASKED WHAT IT WAS, WAS
25 MONEY. HE STUCK HIS HAND IN THE POCKET AND REMOVED THE MONEY.

1 IS BECAUSE HE WAS GRABBING SOMETHING IN THE POCKET AREA.

2 **THE COURT:** LET ME JUST ASK A QUESTION ABOUT THAT.
3 AS I UNDERSTAND TERRY VERSUS OHIO, THAT AUTHORIZES A SEARCH TO
4 DISARM A PERSON OF A POTENTIALLY DANGEROUS WEAPON. AND IT'S
5 MY UNDERSTANDING, THE READING OF THAT CASE IS THAT THE OFFICER
6 MUST BE JUSTIFIED IN HIS SEARCH AT THE INCEPTION, NOT WHAT
7 MIGHT LATER DEVELOP, AND THAT THAT CONCERN FOR SAFETY MUST
8 EXIST RIGHT THEN AND THERE AND BE RELATED TO THE CIRCUMSTANCES
9 CREATING THE NEED FOR THE RISK.

10 **MR. SAUNDERS:** I AGREE WITH THAT.

11 **THE COURT:** NOW, SEEMS TO ME THAT WHAT CREATED THAT
12 NEED FOR A SEARCH WAS THAT THE DEFENDANT KEPT REPEATEDLY
13 PUTTING HIS HAND IN HIS RIGHT POCKET DESPITE THE OFFICER
14 TELLING HIM NOT TO DO THAT. SO AS I'M LOOKING AT THE -- AS I
15 TRIED TO ANALYZE THE FACTS OF THIS CASE, WHAT IS CREATING AN
16 EXIGENCY PERHAPS IN THE OFFICER'S MIND FOR HIS OWN SAFETY IS
17 THIS HAND GOING TO THE WEAPON. THERE'S NOTHING ELSE THAT
18 SUGGESTS THAT THIS MAN'S ARMED. THERE'S NOTHING ELSE THAT
19 SUGGESTS THAT -- THAT -- THAT HE OTHERWISE OUGHT TO BE
20 CONCERNED ABOUT HIS SAFETY. AND SO HE PERFORMS A SEARCH OF
21 THAT POCKET AND IS SATISFIED THAT THE ONLY THING THAT'S THERE
22 IS A WAD OF MONEY. WHY DOESN'T HE THEN END HIS SEARCH?

23 **MR. SAUNDERS:** BECAUSE I THINK ONCE THE SEARCH IS
24 JUSTIFIED, YOUR HONOR, HE HAS REASONABLE SUSPICION TO CONDUCT
25 A PAT-DOWN SEARCH, AND I THINK HE CAN PAT DOWN THIS PERSON.

1 OGDEN, UTAH JULY 21, 2000 10:00 A.M.

2 **THE COURT:** WHAT'S READY?

3 **MR. LAKER:** NUMBER 18, YOUR HONOR.

4 **THE COURT:** STATE OF UTAH VERSUS ROBERT BROWN.

5 **MR. LAKER:** YOUR HONOR, I'M HERE FOR MR. GRAVIS IN
6 THIS MATTER. IT'S MY UNDERSTANDING THAT THERE HAS BEEN A
7 SUPPRESSION MOTION THAT THE COURT HAS RULED ON, BUT THAT THERE
8 ARE STILL PORTIONS. THE COURT HAS RULED ON THE ISSUE OF THE
9 STOP, IT'S MY UNDERSTANDING, AND YOU FOUND THAT THE STOP WAS
10 PROPER. IT'S MY UNDERSTANDING THAT YOU HAD SOME OTHER ISSUES
11 THAT THERE'S A BRIEFING SCHEDULE FOR. AS A RESULT OF THAT,
12 WE'VE ARRIVED AT A NEGOTIATION. MR. BROWN IS GOING TO ENTER A
13 PLEA OF GUILTY TO POSSESSION OF A CONTROLLED SUBSTANCE, A
14 THIRD DEGREE FELONY, AND THE OTHER COUNTS WILL BE DISMISSED.
15 WE ARE RESERVING THE RIGHT TO APPEAL YOUR FINDING WITH REGARD
16 TO THE STOP. AND THE STATE IS GOING TO RECOMMEND ON WHAT HE'S
17 DOING THAT, ON THE POSSESSION OF CONTROLLED SUBSTANCE, A THIRD
18 DEGREE, THAT THAT SENTENCE -- THAT YOUR SENTENCE RUN
19 CONCURRENT AND THAT HE BE GIVEN CREDIT FOR THE TIME THAT HE'S
20 SERVED. IS THAT ACCURATE?

21 **MR. SAUNDERS:** CORRECT, YOUR HONOR, THAT HE BE GIVEN
22 CREDIT FOR THE TIME THAT HE'S DONE ALREADY, NOT THAT THAT BE
23 THE WHOLE TIME THAT HE DOES. BUT WE'RE NOT -- WE'RE NOT --
24 (UNINTELLIGIBLE)

25 **MR. LAKER:** YEAH, THAT HE BE GIVEN CREDIT FOR THE

1 FILE IT WITHIN 30 DAYS OF THE DATE OF YOUR SENTENCE, WHICH
2 WOULD BE TODAY.

3 THE COURT: SO YOU NEED TO GIVE YOUR LAWYERS
4 ADEQUATE TIME IN ORDER TO GET THE PAPERWORK DONE, SO IF YOU'RE
5 GOING TO DO THAT, YOU OUGHT TO DO THAT IN THE NEXT COUPLE
6 WEEKS.

7 MR. BROWN: YES, YOUR HONOR.

8 THE COURT: ALL RIGHT. IF THERE'S NOTHING FURTHER
9 TO BE SAID, IT IS THE SENTENCE OF THIS COURT THAT YOU SERVE A
10 TERM NOT TO EXCEED FIVE YEARS IN UTAH STATE PRISON. THE
11 REMAINING CHARGES ARE DISMISSED ON MOTION OF STATE.

12 MR. LAKER: THANK YOU, YOUR HONOR.

13 THE COURT: THANK YOU. YES, AND THIS SENTENCE MAY
14 RUN CONCURRENTLY WITH THE SENTENCE THAT YOU'RE NOW SERVING.

15 MR. LAKER: AND MAY HE HAVE CREDIT FOR THE TIME THAT
16 HE'S SERVED?

17 THE COURT: AND HE MAY HAVE CREDIT FOR TIME SERVED.

18 MR. BROWN: THANK YOU, YOUR HONOR.

19 MR. LAKER: THANK YOU.

20 THE COURT: OR AT LEAST I WILL MAKE THAT
21 RECOMMENDATION TO THE DEPARTMENT OF CORRECTIONS. THAT'S ALL I
22 CAN DO. ALL RIGHT. WHAT ELSE IS READY?

23 *****
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE

STATE OF UTAH)
) SS
COUNTY OF WEBER)

THIS IS TO CERTIFY THAT THE FOREGOING 36 PAGES OF
TRANSCRIPT CONSTITUTE A TRUE AND ACCURATE RECORD OF THE
PROCEEDINGS TO THE BEST OF MY KNOWLEDGE AND ABILITY AS A
CERTIFIED SHORTHAND REPORTER IN AND FOR THE STATE OF UTAH.

DATED AT OGDEN, UTAH THIS 15TH DAY OF AUGUST, 2000.



DEAN OLSEN, CSR