

2000

Julianne Evans v. State of Utah : Brief of Appellant

Utah Court of Appeals

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**IN THE COURT OF APPEALS
FOR THE STATE OF UTAH**

JULIANNE EVANS,
Appellant

vs.

STATE OF UTAH,
Appellee

Case # 20000065-CA

Priority 2

BRIEF OF APPELLANT

APPEAL FROM A FINAL ORDER OF THE FIRST JUDICIAL DISTRICT COURT,
HONORABLE THOMAS WILLMORE PRESIDING

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ORAL ARGUMENT/PUBLISHED OPINION REQUESTED

FILED

Utah Court of Appeals

JUN 12 2000

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Appellee

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BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

Julianne Evans appeals from a decision entered by the Honorable Thomas Willmore of the First District Court of Utah, denying her Motion to Suppress. This court has jurisdiction over the appeal of the court pursuant to Utah Rules of Appellate Procedure, 78-2(a)-3(2)(e) Utah Code Annotated (Supp. 1999).

ISSUES PRESENTED BY THIS APPEAL

The issues presented by this appeal is whether the consent allegedly given by appellant was voluntary, or coerced, when viewed in light of the totality of the circumstances.

Standard of Review

A “trial court’s ultimate conclusion that a consent was voluntary or involuntary is to be

reviewed for correctness.’ State v. Thurman, 846 P.2d 1256, 1271 (Utah 1993). However, ‘the trial court’s underlying factual findings will not be set aside unless they are found to be clearly erroneous.’ State v. Harmon 910 P.2d 1196, 1199 (Utah 1995).” State v. Archuleta 925 P.2d 1275, 1277 (Utah App. 1996).

STATUTES AND CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment IV

United States Constitution, Amendment XIV.

Utah Constitution, Article I, Section XIV

STATEMENT OF THE CASE/FACTS

On March 25, 1999 , a Division of Child and Family Services caseworker went unannounced to the home of Julianne Evans to remove her newborn child on allegations of dependency, neglect or abuse of the child. Officer Crapse and Officer DeRyke of the Brigham City Police Department were dispatched to Ms. Evans’ home on a keep the peace call (Record at 94, page 2, lines 19-25)(“R. at p.2, ll.19-25”). Ms. Evans, though distraught and upset that her infant was being taken away from her, was cooperative with the caseworker of the Division of Child and Family Services (“DCFS”), and the officers. (R. at p.6, l.10). The officers noted that Ms. Evans was “in a distressed state.” (R. at p.19, l.6). The officers did not observe Ms. Evans to be under the influence of alcohol or drugs. (R. at p.6, ll.14-15). While Ms. Evans was packing up baby formula and toys for the infant, Officer DeRyke asked Ms. Evans if they could “take a quick look around the house.” (R. at p.7, ll.2-4). Ms. Evans paused in her packing, and stated “I don’t know what to say to you.” (R. at p.7, ll.9-10) Officer DeRyke asked, “does that

mean you have something here that you don't want us to find?" (R. at p.7, ll.12-13). Ms. Evans remained silently packing her baby's belongings. (R. at p.7, ll.15-16). Officer Crapse asked again, "do you mind if we search the home." (R. at p.7, ll.21-22). Ms. Evans, packing up the baby's belongings, shook her head no. (R. at p.7, l.24). Officer Crapse persisted, "is that no, you don't mind if we do that, or no, you don't want us to look around." (R. at p.8, ll.5-6). Ms. Evans sat still and contemplated her response. (R. at p.8, ll.10-11). Ms. Evans made no indication, verbal or nonverbal, that the officers could search her home. (R. at p.8, ll.12-17). Again, Officer DeRyke asked if they could search the home. (R. at p.28, ll.9-10). Again, the Defendant remained silent, and did not indicate, verbally or otherwise, that the officers could search the home. (R. at p.9, ll.1-3). Officer DeRyke further stated, "if you have drugs here look what its doing to your life, look what its doing to your family. It's ruining your life." (R. at p.29, ll.17-19). Officer Crapse continued, "I'll tell you what, if you give me the drugs you have in the house I promise not to take you to jail today." (R. at p.9, ll.13-15). Officer Crapse had no intention of arresting Ms. Evans at that point. (R. at p.9, l.25 to R. at p.10, l.1). Again, Ms. Evans merely contemplated the officers' statement, and made no indication of consent to a search. (R. at p.10, l.13). Finally, Ms. Evans responded that she could not remember where she had any drugs. (R. at p.11, ll.4-5). Officer Crapse asked her to think of where she normally kept her drugs and look for them there. (R. at p.11, ll.9-10). The DCFS worker added, "it would be best for you to give this officer what drugs you have so when you get sent to take a urinalysis it will come back as negative." (R. at p.10, ll.19). Ms. Evans subsequently went to her purse, and produced a small container with alleged controlled substance. (R. at p.11, ll.14-17). Subsequently, Officer Crapse prepared a permission to search form which he had Ms. Evans

sign. (R. at p.17, ll.9-11). The officers searched her home, finding further evidence of alleged controlled substance. (R. at p.14, ll.20-21).

Appellant, by and through her attorney of record, motioned to Suppress Evidence at a hearing held before the Court on August 10, 1999. The Honorable Thomas L. Willmore entered a memorandum judgment on Appellant's Motion to Suppress on October 13, 1999. (R. at 61-64). Ms. Evans entered a conditional plea of guilty, and preserved her right to an appeal. Appellant was sentenced on a third degree felony on December 22, 1999, and a judgment and order of probation was entered on December 22, 1999. (R. at 78-79).

SUMMARY OF THE ARGUMENT

Probable cause can be difficult to pin down, and getting a warrant takes time. Rather than laboring under the state and federal prohibition against unreasonable searches, an officer can easily persuade a member of the public to give "consent." Confused and upset by an encounter with law enforcement, the average citizen easily agrees to a search of his or her person and property.

However, a consent that is the product of duress and coercion is not consent. If the Fourth Amendment protection is to be upheld, a consent search must be given freely and intelligently, in an environment free of strong-arm tactics, even emotional pressuring. Finally, a police officer may not claim consent was given because the suspect never adamantly, explicitly, and consistently refused. Instead, the burden is on the State to overcome every reasonable presumption against the waiver of fundamental constitutional rights and to show that consent was validly obtained.

In the instant case, Ms. Evans, a young mother, finds herself in a personal crisis. DCFS shows up at her home to take away her newborn infant. DCFS is accompanied by two male officers, fully uniformed, carrying firearms. As she hurriedly packs the baby's belongings, and receives hasty instructions from DCFS, the two officers ask her repeatedly if they can search the home. Obviously distraught, Ms. Evans tells them she does not know how to respond to them, but they persist. In the course of obtaining "consent," the officers employ several techniques. They question her directly several times. When she says no, they attempt to "clarify." Finally, they try to work a deal: "produce contraband, and we will not take you to jail today" even though they have no cause to take her to jail at that time. The DCFS worker also implies that she will have a better opportunity to visit her infant if she produces contraband for the officers.

The "consent" obtained by the Brigham City police officers was anything but. Ms. Evans only relented once she had been questioned several times, and threatened by incarceration. When viewed in the totality of the circumstances it is clear that Ms. Evans' consent was the product of coercion and duress, and was thus invalid. As such, evidence obtained against her is properly suppressed.

ARGUMENT

I. Search Violated Ms. Evans' Rights Under the United States and Utah Constitutions.

The Fourth 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." According to the well established judicial doctrine, the right to be free from unreasonable governmental intrusion exists "whenever an individual may harbor

a ‘reasonable expectation of privacy.’” Terry v. Ohio, 392 U.S. at 9, 88 S. Ct. At 1873 (quoting Katz v. United States, 389 U.S. 347, 361, 88 S. Ct. 507, 516, 19 L. Ed. 2d 576 (1967)(Harlan, J., concurring). The Fourth Amendment further requires that a search be conducted pursuant to a warrant based on probable cause. There are, however, several narrow exceptions to the warrant requirement, including but not limited to: a search incident to arrest, a search of an automobile based on probable cause because it contains contraband, and seizure of evidence in the plain view of one who is lawfully in the place from where the evidence is seen. State v. Hygh, 711 P.2d 264, 267 (Utah 1987).

The Court determines whether sufficient specific and articulable facts exist to establish the constitutionality of a search by examining the totality of the facts and circumstances of the case. Once the Defendant has raised the issue of an invalid search and seizure, the burden shifts to the State to prove that the search and seizure was valid, and that the circumstances of the seizure constitute an exception to the warrant requirement. Chimel v. California, 395 U.S. 752, 762, 89 S.Ct. 2034, 2039, 23 L.Ed.2d 685 (1969); State v. Christensen, 676 P.2d 408, 411 (Utah 1984); State v. Sterger, 808 P.2d 122 (Utah App. 1991)(“Courts indulge every reasonable presumption against the waiver of fundamental constitutional rights.”)

This Court has established an analytical framework for determining whether the State has met its burden of proving that a consent was voluntarily given: (1) There must be clear and positive testimony that the consent was ‘unequivocal and specific’ and ‘freely and intelligently given’; (2) the government must prove consent was given without duress or coercion, express or implied; and (3) [when evaluating these first two standards, the Court will] indulge every reasonable presumption against the waiver of fundamental constitutional rights and there must be

convincing evidence that such rights were waived.” State v. Carter, 812 P.2d at 467 (*quoting State v. Marshall*, 791 P.2d 880, 887-88 (Utah App.), *cert. denied*, 800 P.2d 1105 (Utah 1990))(*quoting United States v. Abbot*, 546 F.2d 883, 885 (10th Cir. 1977); *see also United States v. Medlin*, 842 F.2d 1194, 1197 (10th Cir. 1988).

a. Evans’ Consent Was Not Freely and Intelligently Given.

First, there is no clear and positive testimony that Ms. Evans’ consent was freely and intelligently given, as it was given under the most chaotic and personally disturbing of circumstances. Secondly, there is no clear and positive testimony that Ms. Evan’s consent was unequivocal and specific. On the contrary, Ms. Evans’ consent was the very definition of equivocation.

Ms. Evans was clearly not in the state of mind to give consent to search freely and intelligently, as the police officers found her in the middle of a personal crisis. At the suppression hearing, Officer Crapse testified he was called to the home of Ms. Evans on March 25, 1999, as a Division of Child and Family Services caseworker went unannounced to the home of Julianne Evans to remove her newborn child from her (R. at p2, ll.19-25). Officer Crapse and Officer DeRyke both noted in their testimony that Ms. Evans was obviously distraught and upset that her infant was being taken away from her. (R. at p.19, l.6). Ms. Evans was hurriedly packing up baby formula and toys for the infant, and was receiving information from DCFS about visiting her child, and how her child would be provided for (R. at p.7). It is in the middle of this chaotic and disturbing time, that the officers repeatedly ask if they can search the home (R. at 94.7-11). As Ms. Evans explicitly states, she does not know how to respond to the

officers at that point in time (R. at p.7, ll.9-10). She pauses in her packing, indicating her uncertainty, and her inability to process the information being requested by the officers. (R. at p.7).

b. Evans' Consent Was Not Unequivocal and Specific.

Further, there is no clear and positive testimony that Ms. Evan's consent was unequivocal and specific. Instead, Ms. Evans' consent defines uncertainty and equivocation. At the suppression hearing, Officer Crapse testified there were a series of exchanges that took place between Ms. Evans and the officers. (R. at p.7, ll.14). At first, Ms. Evans did not know what to say (R. at p.7, ll.9-10). Ms. Evans then shakes her head no (R. at p.7, l.24). When the officers fail to obtain the response they want, they persist. Officer Crapse states that he is forced to clarify whether they may search or not, specifically because her answer is so indefinite. (R. at p.8, ll.5-6). At no point did Ms. Evans make any indication, verbal or nonverbal, that the officers could search her home. (R. at p.8, ll.12-17). The officers asked whether that was "no she did not mind if they searched" or "no, they could not search." (R. at p.8, ll.5-6). Also, Ms. Evans nodded or shook her head from side to side in response to another request to search (R. at p.8). After repeated requests to search the home, Officer Crapse finally promises Ms. Evans she would not go to jail that day (R. at p.9, ll.13-15). From the evidence presented at the suppression hearing, it is clear that Ms. Evan's production of the alleged contraband and later consent to search were not unequivocal and specific. Were it so, the officers would not have had to continually request permission to search; the officers would not have been unsure about whether Ms. Evans was stating "no, she didn't mind if they searched" or "no, she did mind if they searched." Finally, if the consent was unequivocal and specific, the officers would not have had to make a promise to

Ms. Evans in exchange for permission to search. It requires the persistent requests of the officers, and the contributing of the comments of the DCFS worker for Ms. Evans to finally give in. Viewed in the totality of the circumstances, it is clear that the officers take advantage of Ms. Evans when she is in a weakened state. Although Ms. Evans was involved in a traumatic situation personally, having her newborn child removed from her, the officers show no compassion for those circumstances. Even when she denies them permission to search her home, they assert that such denial is equivocal, and for that reason, they were compelled to clarify. Finally, had the consent to search been unequivocal and specific, the officers would not have had to bargain for permission to search.

II. The State Cannot Prove that Ms. Evans' Consent Was Given Without Duress or Coercion, Express or Implied.

“A consent that is the product of duress and coercion is not a consent at all.” Harmon 910 P.2d 1196 (Utah 1995). Because Ms. Evan’s alleged consent was produced by the deceptive practices of the officers, all fruits of her invalid consent are properly suppressed. The issue of whether a consent to search is voluntary depends upon ‘the totality of all the surrounding circumstances — both the characteristics of the [person consenting] and the details of police conduct.” State v. Arroyo, 796 P.2d 684, 689 (Utah 1990) quoting Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854 (1973), accord Harmon, 910 P.2d at 1206. Elements showing the absence of duress or coercion include: 1) the absence of a claim of authority to search by the officers, 2) the absence of an exhibition of force by the officers, 3) a mere request to search, 4) cooperation by the defendant, and 5) the absence of deception or trick

on the part of the officer. State v. Whittenback, 621 P.2d 103, 106 (Utah 1980), as cited by State v. Archuleta 925 P.2d 1275, 1277 (Utah App. 1996).

a. Officer Crapse Coerces Consent by Making a Claim of Authority.

The officer's statement that he would not take Ms. Evans to jail if she produced contraband represents a claim of authority by the officers. Firstly, the two officers show up in full uniform, bearing firearms (R. at p.15). DCFS and the officers are removing Ms. Evans' infant child from her care, an overwhelming display of the authority of the State (R. at p.2). Against this backdrop, Officer's Crapse represents that he has both the discretion and the authority to decide whether or not she will go to jail that day (R. at p.10). His statement represents express coercion in that he indicated that Ms. Evans was somehow afoul of the law, and the threat of jail was imminent if she did not comply. His statement also implies that he had some reason to take Ms. Evans to jail at the time he made the statement.

b. The Officers's Requests Exceed a "Mere Request" to Search

In the instant case, the officers clearly exceed a mere request to search. The officers begin by asking if they can search. When the officers fail to obtain the response they want, they persist. At no point did Ms. Evans make any indication, verbal or nonverbal, that the officers could search her home. (R. at p.8, ll.12-17). The officers attempt to "clarify" her negative response (R. at 94.8.5-6). Again, Ms. Evans nodded or shook her head from side to side in response to another request to search (R. at p.8). After repeated requests to search the home, Officer Crapse finally promises Ms. Evans she would not go to jail that day (R. at p.9, ll.13-15). It requires the persistent requests of the officers, and the contributing of the comments of the DCFS worker for Ms. Evans to finally give in.

c. Officer Crapse Deceives Ms. Evans into Believing He Has the Authority and Cause to Arrest Her.

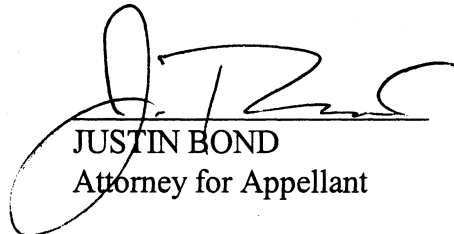
The officer's statement that he would not take Ms. Evans to jail if she produced contraband also represents deception on the part of the officers inasmuch as the Officer readily admitted that, at the time he made the statement, he had no cause to take Ms. Evans to jail (R. at p.25, l.22). In fact, Officer Crapse had no authority to take Ms. Evans to jail until after the alleged controlled substance was produced. Ms. Evans gave consent simply because the Officer promised he would not take her to jail. However, at the time of the promise, Officer Crapse had no authority to make such a promise because there was no basis upon which to take Ms. Evans to jail at that time. Officer Crapse was there merely on a keep the peace call, and not on any independent business of the police department (R. at p.2). Because of this, Officer Crapse clearly deceived Ms. Evans into thinking that he had the authority to take her to jail.

CONCLUSION

Taking advantage of one's emotional state cannot be tolerated when one's constitutional rights are involved. No person could be expected to make calm, rational decisions when one's newborn infant is removed, regardless of the circumstances leading to removal. The officers conceded that Ms. Evans seemed very upset and emotionally distraught throughout their exchange. The officers capitalized on Ms. Evans' fragile condition by further playing on her emotions. It is when Officer DeRyke makes a blatant appeal to her emotional state, saying, "you have drugs here and look what its doing, you're losing your family and it's ruining your life." that Ms. Evans finally begins to weaken, producing evidence against herself. Further, solid relations between police officers and the public require that officers not deceive the public into

believing the officers possess an authority that they do not. Officer Crapse had no authority or ability to arrest Ms. Evans or take her to jail at that time. Thus, the promise by Officer Crapse that he would not take Ms. Evans to jail if she turned over the drugs falsely asserted that he possessed an authority which he did not. As such, his representation was coercive and amounted to deception or trick on the part of the officer. Viewed in light of the totality of the circumstances, the State cannot prove that Ms. Evans consent was freely and intelligently given, absent coercion or duress. For this reason, all evidence presented against Ms. Evans is properly suppressed. Accordingly, her appeal should be granted, and the First District Court's judgment overturned.

RESPECTFULLY SUBMITTED this 12 day of June, 2000.



JUSTIN BOND
Attorney for Appellant

Addendum 1

*1196 910 P.2d 1196

STATE of Utah, Plaintiff and Respondent,
v.
Julie HARMON, Defendant and Petitioner.

No. 930414.
Supreme Court of Utah.
Dec. 14, 1995.
Rehearing Denied Feb. 13, 1996.

Defendant was convicted in the Third District Court, Salt Lake County, Anne M. Stirba, J., of possession of controlled substance, and she appealed from denial of motion to suppress evidence. The Court of Appeals affirmed, 854 P.2d 1037. Certiorari was granted. 868 P.2d 95. The Supreme Court, Howe, J., held that: (1) arrest was valid, and (2) consent to search was voluntary.

Affirmed.

Durham, J., dissented and filed opinion in which Stewart, Associate C. J., joined.

1. CRIMINAL LAW ⌘ 1134(3)
110 ----
110XXIV Review
110XXIV(L) Scope of Review in General
110k1134 Scope and Extent in General
110k1134(3) Questions considered in general.

[See headnote text below]

1. CRIMINAL LAW ⌘ 1158(1)
110 ----
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158 In General
110k1158(1) In general.

Utah 1995.

On certiorari, the Supreme Court reviews decision of Court of Appeals, not decision of trial court; in so doing, court adopts same standard of review used by Court of Appeals and reviews questions of law for correctness and trial court's factual findings for clear error.

2. CRIMINAL LAW ⌘ 1134(3)
110 ----
110XXIV Review
110XXIV(L) Scope of Review in General
110k1134 Scope and Extent in General
110k1134(3) Questions considered in general.
Utah 1995.

Questions whether arrest was constitutional and whether consent to search was voluntary are questions of law reviewed for correctness.

3. AUTOMOBILES ⌘ 349(4)
48A ----
48AVII Offenses
48AVII(B) Prosecution
48Ak349 Arrest, Stop, or Inquiry; Bail or Deposit
48Ak349(2) Grounds
48Ak349(4) License or registration offenses.
Utah 1995.

Police had statutory and constitutional authority to effect full, custodial arrest of driver caught driving after her license was suspended, regardless of whether officer's subjective intent was to obtain consent to search driver's home for drugs. U.S.C.A. Const.Amend. 4; Const. Art. 1, § 14; U.C.A. 1953, 77-7-2.

4. AUTOMOBILES ⌘ 349(10)
48A ----
48AVII Offenses
48AVII(B) Prosecution
48Ak349 Arrest, Stop, or Inquiry; Bail or Deposit
48Ak349(10) What is arrest; stop distinguished.
Utah 1995.

Term "arrest," as used in Motor Vehicle Act refers to detention or traffic stop rather than to formal, custodial arrest. U.C.A. 1953, 41-1-17 (1991).

See publication Words and Phrases for other judicial constructions and definitions.

5. AUTOMOBILES ⌘ 349(4)
48A ----
48AVII Offenses
48AVII(B) Prosecution
48Ak349 Arrest, Stop, or Inquiry; Bail or Deposit
48Ak349(2) Grounds
48Ak349(4) License or registration offenses.
Utah 1995.

Statute limiting police authority to arrest for misdemeanor traffic violations did not apply to arrest for driving with suspended license, inasmuch as statute by its terms applied only to Uniform Act Regulating Traffic on Highways, and driving after suspension was violation of a different statute. U.C.A. 1953, 41-6-166, 53-3-227; U.C.A. 1953, 41-2-136 (1992).

6. AUTOMOBILES ☞ 349(3)

48A ----

48AVII Offenses

48AVII(B) Prosecution

48Ak349 Arrest, Stop, or Inquiry; Bail or Deposit

48Ak349(2) Grounds

48Ak349(3) Offense in officer's presence, in general.

Utah 1995.

General statute governing arrest allows police officers, at their discretion, either to cite or to arrest for traffic offenses committed in their presence. U.S.C.A. 1953, 77-7-2.

7. ARREST ☞ 68(4)

35 ----

35II On Criminal Charges

35k68 Mode of Making Arrest

35k68(4) What constitutes seizure.

Utah 1995.

Arrest of person is quintessentially a "seizure," required by Fourth Amendment to be reasonable. U.S.C.A. Const. Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

8. AUTOMOBILES ☞ 349(4)

48A ----

48AVII Offenses

48AVII(B) Prosecution

48Ak349 Arrest, Stop, or Inquiry; Bail or Deposit

48Ak349(2) Grounds

48Ak349(4) License or registration offenses.

Utah 1995.

Custodial arrest for driving with suspended driver's license is "reasonable," within meaning of Fourth Amendment, in light of public safety concerns and fact that allowing unqualified driver to proceed on her way without valid license permits the unlawful activity to continue. U.S.C.A. Const. Amend. 4; U.C.A. 1953, 53-3-227; U.C.A. 1953, 42-2-136 (1992).

See publication Words and Phrases for other judicial constructions and definitions.

9. SEARCHES AND SEIZURES ☞ 23

349 ----

349I In General

349k23 Fourth Amendment and reasonableness in general.

Utah 1995.

In defining scope of Fourth Amendment right, there is no ready test for determining reasonableness other than by balancing need to search or seize against invasion which search or seizure entails. U.S.C.A. Const. Amend. 4.

10. ARREST ☞ 58

35 ----

35II On Criminal Charges

35k58 Grounds and purpose in general.

Utah 1995.

Two primary governmental interests are served by taking suspect into custody: insuring that suspect will answer charges against him or her and preventing harm to the public.

11. ARREST ☞ 63.4(2)

35 ----

35II On Criminal Charges

35k63 Officers and Assistants, Arrest Without Warrant

35k63.4 Probable or Reasonable Cause

35k63.4(2) What constitutes such cause in general.

Utah 1995.

Validity of arrest depends upon police officers' objective authority to arrest, as opposed to subjective motivations for arrest, and, therefore, otherwise valid arrest is not rendered unconstitutional by fact that officer may have had other motives for the arrest. U.S.C.A. Const. Amend. 4.

12. ARREST ☞ 63.1

35 ----

35II On Criminal Charges

35k63 Officers and Assistants, Arrest Without Warrant

35k63.1 In general.

Utah 1995.

Rejection of pretext doctrine with regard to Fourth Amendment challenges to arrests extends to state constitutional challenges to arrests. U.S.C.A. Const. Amend. 4; Const. Art. 1, § 14.

13. SEARCHES AND SEIZURES ☞ 181

349 ----

349V Waiver and Consent

349k179 Validity of Consent

349k181 Particular concrete applications.

Utah 1995.

Defendant's consent to search her home was voluntary, despite allegations that officer made false claims of authority to search and made show of force in order to obtain consent, where defendant continued to withhold consent to search in response

to those alleged actions, did not consent to search until some time later after being read her *Miranda* rights, and was friendly and cooperative during search. U.S.C.A. Const.Amend. 4; Const. Art. 1, § 14.

14. SEARCHES AND SEIZURES ☞ 180

349 ----

349V Waiver and Consent

349k179 Validity of Consent

349k180 Voluntary nature in general.

Utah 1995.

Whether consent to search is voluntary depends on totality of surrounding circumstances, including characteristics of accused and details of police conduct. U.S.C.A. Const.Amend. 4; Const. Art. 1, § 14.

15. SEARCHES AND SEIZURES ☞ 182

349 ----

349V Waiver *1196 and Consent

349k179 Validity of Consent

349k182 Prior official misconduct;
misrepresentation, trick, or deceit.

Utah 1995.

Consent to search that is product of duress and coercion is not "consent" at all. U.S.C.A. Const.Amend. 4; Const. Art. 1, § 14.

See publication Words and Phrases for other judicial constructions and definitions.

16. SEARCHES AND SEIZURES ☞ 182

349 ----

349V Waiver and Consent

349k179 Validity of Consent

349k182 Prior official misconduct;
misrepresentation, trick, or deceit.

Utah 1995.

Factors indicating lack of duress or coercion in obtaining consent to search include absence of claim of authority to search by officers, absence of exhibition of force by officers, mere request to search, cooperation by owner of property to be searched, and absence of deception or trick on the part of the officer. U.S.C.A. Const.Amend. 4.

17. SEARCHES AND SEIZURES ☞ 182

349 ----

349V Waiver and Consent

349k179 Validity of Consent

349k182 Prior official misconduct;
misrepresentation, trick, or deceit.

Utah 1995.

Statement by police that they have valid search

warrant in hand, when, in fact, they do not, is "coercive" for purposes of determining whether consent to search was voluntary. U.S.C.A. Const.Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

18. SEARCHES AND SEIZURES ☞ 182

349 ----

349V Waiver and Consent

349k179 Validity of Consent

349k182 Prior official misconduct;
misrepresentation, trick, or deceit.

Utah 1995.

It was deceptive, for purposes of determining whether defendant's consent to search was voluntary, for police officer to tell defendant that he "could" come back with a warrant when he, in fact, knew that he could not obtain a warrant. U.S.C.A. Const.Amend. 4.

19. SEARCHES AND SEIZURES ☞ 184

349 ----

349V Waiver and Consent

349k179 Validity of Consent

349k184 Custody, restraint, or detention
issues.

Utah 1995.

Consent to search given while one is in custody is not, per se, involuntary; question is whether officers used coercive tactics or took unlawful advantage of the arrest in order to obtain consent to search. U.S.C.A. Const.Amend. 4.

*1197 Jan Graham, Atty. Gen. and J. Kevin Murphy, Asst. Att'y Gen., Salt Lake City, for plaintiff.

Joan C. Watt, Mark R. Moffat, and Robert K. Heineman, Salt Lake City, for defendant.

ON CERTIORARI TO THE UTAH COURT OF APPEALS

HOWE, Justice:

We granted certiorari to review the court of appeals' decision in this case. *Siute v. Harmon*, 854 P.2d 1037 (Ct.App.), cert. granted, 868 P.2d 95 (Utah 1993). Defendant Julie Harmon entered a conditional guilty plea to possession of a controlled substance, a third degree felony, while reserving her *1198 right to appeal the trial court's denial of her pretrial motion to suppress evidence. The court of

appeals affirmed her conviction. *Id.* at 1041.

I. FACTS

On November 19, 1991, Detective Robert Russo, an eight-year deputy county sheriff assigned to the Metro Narcotics Task Force, received a tip from an informant that Harmon was distributing narcotics from her home in Magna. At approximately 6:00 that evening, Russo went to her home to ask her for information confirming or rebutting the accusations. When he arrived, Harmon was in her car backing out of her driveway. Russo approached her, identified himself, told her about the tip, and asked if he could search her home. She denied the accusations and refused to allow the search, stating that she was on her way to visit her father, who had recently suffered a heart attack and was returning home from the hospital.

Russo advised Harmon that if she refused to consent, he "could come back at a later time with a [search] warrant," which, he warned, was an "unpleasant experience." (FN1) She again declined to allow an immediate search. Russo testified that Harmon said she would allow him to search upon her return. However, Harmon testified that she told him that if he wanted to "hang around," she would talk to him when she returned.

Harmon then drove to her parents' home. As she drove away, Russo called to check on Harmon's driver's license and was informed that it had been suspended. He decided he would arrest her for driving with a suspended driver's license ("driving on suspension"). Seeing Harmon drive by shortly thereafter, Russo called for an assisting officer in a marked patrol car, and together they stopped her in a parking lot two blocks from her home. Russo placed her under arrest for driving on suspension, and she was handcuffed by an assisting officer. The testimony differs at this point, (FN2) but both parties agree that Harmon informed Russo that he would need a warrant if he wanted to search her home.

Russo searched her person incident to the arrest and found pills in a prescription vial with its label scratched off. (FN3) He also confiscated \$285 found in Harmon's purse. Russo placed her in his car, advised her of her *Miranda* rights, and proceeded to take her to the Salt Lake County jail. The other officers stayed behind to impound her car.

Harmon testified that on the way to jail, Russo told her that he knew she had drugs in her home, that he

would have to get a warrant, and that they would "tear my house apart." Russo did not recall making these statements. Harmon admitted to Russo that she had been afraid to let him into her home because at one time she had sold drugs and the home contained drug paraphernalia but that she was trying to clean up her act. She told him that if he drove her back to her home, she would sign a search consent form and let him in so that he could retrieve those items. Russo did not promise her any benefit for permitting a search of her home and told her that she would probably go to jail anyway. When Harmon again told Russo she would consent to the search of her home, Russo turned his car around, started back to her home, and called for assistance. On their arrival, Russo again advised her of her *Miranda* rights and read her a written consent form which she signed. Harmon's dog was in the home. Harmon indicated that the dog may try to bite the officers. Russo told her that he would have to shoot her dog if it attacked the officers. After some discussion, the officers permitted Harmon to go into the *1199 home alone to take the dog out into the back yard.

Russo and several back-up officers proceeded inside. Harmon, who was friendly and cooperative during the search, assisted the officers by pulling various items of drug paraphernalia and illegal drugs out from underneath a sofa in the living room. She was permitted to telephone her brother--who is a police officer--to seek advice. When the search concluded, Russo permitted Harmon to stay at her home with instructions to phone him the following morning. She was not cited for driving on suspension but was later charged with possession of a controlled substance.

Harmon moved to suppress the evidence obtained during the search of her home. The trial court denied the motion, and she subsequently entered a conditional guilty plea and was placed on probation for eighteen months. The court of appeals affirmed the denial of her motion to suppress, holding that Harmon's stop and arrest were not unconstitutional and that her consent to search her home was freely and voluntarily given. *Harmon*, 854 P.2d at 1039-40.

II. ANALYSIS

[1] [2] We first clarify our standard of review. On certiorari, we review the decision of the court of appeals, not the decision of the trial court. *Butterfield v. Okubo*, 831 P.2d 97, 101 n. 2 (Utah 1992); see also *Allen v. Utah Dep't of Health*, 850

P.2d 1267, 1269 n. 4 (Utah 1993). In doing so, this court adopts the same standard of review used by the court of appeals: questions of law are reviewed for correctness, and the trial court's factual findings are reversed only if clearly erroneous. *Landes v. Capital City Bank*, 795 P.2d 1127, 1129 (Utah 1990); see also *State v. Arroyo*, 796 P.2d 684, 687 (Utah 1990). The issues presented in this case--whether Harmon's arrest was constitutional and whether her consent to search was voluntary--are questions of law that we review for correctness. See *State v. Thurman*, 846 P.2d 1256, 1271-72 (Utah 1993). The trial court's underlying factual findings will not be set aside unless they are found to be clearly erroneous. *Id.*

A. Validity of Harmon's Arrest

[3] Harmon contends that the court of appeals erred in holding that her arrest for driving on suspension did not violate the Fourth Amendment of the United States Constitution or article I, section 14 of the Utah Constitution.

1. Statutory Authority to Arrest

Initially, we observe the fundamental rule that courts should avoid reaching constitutional issues if the case can be decided on other grounds. *West v. Thomson Newspapers*, 872 P.2d 999, 1004 (Utah 1994); *Thurman*, 846 P.2d at 1262. Thus, we begin by examining whether the arrest was valid under our state statutes. If it was not, then we need not go further.

[4] When Harmon was arrested in November 1991, Utah's Motor Vehicle Act provided:

[P]eace officers, state patrolmen, and others duly authorized by the [motor vehicle] department or by law shall have the power and it shall be their duty:

....

(b) To make arrests upon view and without warrant for any violation committed in their presence of any of the provisions of this act or other law regulating the operation of vehicles or the use of the highways.

Utah Code Ann. § 41-1-17 (1988) (emphasis added). (FN4) The State argues that the "shall" wording of this statute made it presumptively, if not conclusively, Russo's duty to take Harmon into custody for driving on suspension. This

interpretation of the statute is not persuasive. Obviously, it is not police policy and practice to arrest all traffic offenders- *1200 --in fact, almost the exact opposite is true. The statute, originally passed in 1935, used the word "arrest" to mean a seizure or detention, not a formal, custodial arrest. "An arrest is an actual restraint of the person arrested or submission to custody." Utah Code Ann. § 77-7-1 (emphasis added). Under this definition, a traffic stop qualifies as an arrest because the alleged violator is not free to leave until he is satisfactorily identified and has signed a written promise to appear, even though the stop is a limited seizure more like an investigative detention than a custodial arrest. See *State v. Parker*, 834 P.2d 592, 594 (Utah Ct.App.1992); see also Utah Code Ann. § 41-6-167(d) (referring to "the arresting officer's" issuance of traffic citation to "the arrested person"). Thus, the proper interpretation of section 41-1-17 is that officers have the authority and duty to "arrest"--meaning stop or seize--traffic offenders. The section does not authorize or require officers to take all traffic offenders into custody. (FN5)

[5] Harmon asserts that police authority to arrest for a misdemeanor traffic violation, including driving on suspension, is limited by the following sections:

41-6-166. Appearance upon arrest for misdemeanor--Setting Bond

Whenever any person is arrested for any violation of this act punishable as a misdemeanor, the arrested person, for the purpose of setting bond, shall in the following cases, be taken without unnecessary delay before a magistrate within the county in which the offense charged is alleged to have been committed and who has jurisdiction of such offense and is nearest or most accessible with reference to the place where said arrest is made, in any of the following cases:

(1) When a person arrested demands an immediate appearance before a magistrate.

(2) When the person is arrested upon a charge of driving or being in actual physical control of a vehicle while under the influence of alcohol or any drug or combination thereof....

(3) When the person is arrested upon a charge of failure to stop in the event of an accident causing death, personal injuries, or damage to property.

(4) In any other event when the person arrested refuses to give his written promise to appear in court as hereinafter provided, or when in the discretion of the arresting officer, a written promise to appear is insufficient.

41-6-167. Notice to appear in court--Contents--Promise to comply--Signing--Release from custody....

(a) *Upon any violation of this act* punishable as a misdemeanor, whenever a person is [not] (FN6) immediately taken before a magistrate as hereinbefore provided, the police officer shall prepare in triplicate or more copies a written notice to appear in court containing the name and address of such person, the number, if any, of his operator's license, the registration number of his vehicle, the offense charged, and the time and place when and where such person shall appear in court.

....

(d) The arrested person, in order to secure release as provided in this section, must give his written promise satisfactory to the arresting officer so to appear in court by signing at least one copy of the written notice prepared by the arresting officer. The officer shall deliver a copy of such notice to the person promising to appear. Thereupon, said officer shall forthwith release the person arrested from custody.

(Emphasis added.)

Harmon contends that under section 41-6-166, persons stopped for misdemeanor traffic *1201 violations are to be arrested and arraigned in only four specific circumstances: (1) when requested by the suspect, (2) when arrested for DUI, (3) when arrested for hit and run, or (4) when the suspect refuses to sign the promise to appear contained in the citation or when, in the discretion of the officer, the written promise to appear is insufficient. She argues that for all other misdemeanor traffic violations, officers have the authority to issue a citation only for a violation under section 41-6-167, after which they must release the suspect.

We decline to address this argument because these sections do not apply to the violation for which Harmon was arrested. By their very terms, both sections apply only when a person is arrested for "any violation of this act." "This act" refers to the

Uniform Act Regulating Traffic on Highways, passed by the legislature in 1941. See 1941 Utah Laws 113-40. The act in its present form is now codified at title 41, chapter 6. Thus, the reference to "this act" should now properly be read "this chapter," meaning chapter 6. The driving on suspension statute upon which Harmon's arrest was based was not part of the original Uniform Act Regulating Traffic on Highways and is not part of title 41, chapter 6 of the current code. Rather, the statute was initially passed in 1933, see 1933 Utah Laws 82, and has been renumbered several times, most recently at section 41-2-136 (Supp.1987) and section 53-3-227 (Supp.1993). If Harmon had been subject to a formal, custodial arrest for a violation under title 41, chapter 6, the interpretation of sections 41-6-166 and -167 would be squarely before us. Because these sections apply only to arrests for violations of title 41, chapter 6 of the Code, and we are not faced with an arrest under that chapter, these sections are not relevant to the issue before us.

[6] Utah's general statute governing arrests provides, "A peace officer ... *may*, without warrant, arrest a person ... for any public offense committed or attempted in the presence of any peace officer...." Utah Code Ann. § 77-7-2 (emphasis added). However, "[a] peace officer, in lieu of taking a person into custody ... *may* issue and deliver a citation requiring any person subject to arrest or prosecution on a misdemeanor or infraction charge to appear at ... court...." Utah Code Ann. § 77-7-18 (emphasis added). Both of these statutes are couched in permissive language allowing police officers, at their discretion, to either cite or arrest for traffic offenses committed in their presence. (FN7) In this case, Harmon drove on suspension in Detective Russo's presence and in violation of Utah Code Ann. § 41-2-136(2) (Supp.1990) (now codified at § 53-3-227(2)). We conclude that Russo was statutorily authorized to arrest Harmon for driving on suspension.

2. Reasonableness of the Arrest Under the Fourth Amendment

[7] Even though the arrest was permissible under statutory authority, Harmon contends her arrest still violated the Fourth Amendment of the federal constitution, which prohibits "unreasonable searches and seizures." The arrest of a person is "quintessentially a seizure," required by the Fourth Amendment to be reasonable. *Payton v. New York*, 445 U.S. 573, 585, 100 S.Ct. 1371, 1379, 63 L.Ed.2d 639 (1980) (quoting *United States v.*

Watson, 423 U.S. 411, 428, 96 S.Ct. 820, 830, 46 L.Ed.2d 598 (1976) (Powell, J., concurring)).

[8] Although the United States Supreme Court has not examined whether a custodial arrest for a traffic offense could be a violation of the Fourth Amendment, the issue did arise in a concurring opinion in *Gustafson v. Florida*, 414 U.S. 260, 94 S.Ct. 488, 38 L.Ed.2d 456 (1973). In that case, Gustafson was pulled over for weaving across the center line. He could not produce a driver's license, and the officer placed him under arrest. The officer, in searching Gustafson, discovered marijuana. Gustafson conceded that the arrest was lawful, basing his appeal *1202 only upon the constitutionality of the subsequent search. *Id.* at 262, 94 S.Ct. at 490. Justice Stewart began his concurrence by stating:

It seems to me that a persuasive claim might be made in this case that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments. But no such claim has been made. Instead, petitioner has fully conceded the constitutional validity of his custodial arrest.

Id. at 266-67, 94 S.Ct. at 492 (Stewart, J., concurring); see also *Robbins v. California*, 453 U.S. 420, 450 n. 11, 101 S.Ct. 2841, 2858 n. 11, 69 L.Ed.2d 744 (1981) (Stevens, J., dissenting) (noting that the Court has not imposed constitutional restrictions on authority to arrest for routine traffic stops), *rev'd on other grounds*, *United States v. Ross*, 456 U.S. 798, 824, 102 S.Ct. 2157, 2172, 72 L.Ed.2d 572 (1982); *United States v. Robinson*, 414 U.S. 218, 220-21, 94 S.Ct. 467, 470, 38 L.Ed.2d 427 (1973) (defendant similarly conceded the legality of arrest for driving on suspension and for obtaining a permit by misrepresentation). The issue, at least regarding an arrest for driving on suspension, is now before us.

[9] "In defining the scope of Fourth Amendment rights, 'there is "no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails." ' " *State v. Lopez*, 873 P.2d 1127, 1133 (Utah 1994) (alterations in original) (quoting *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968); *Camara v. Municipal Court*, 387 U.S. 523, 534-35, 87 S.Ct. 1727, 1734, 18 L.Ed.2d 930 (1967)); see also 2 Wayne R. LaFare, *Search and Seizure* § 5.1(h), at 435-36 (1987) [hereinafter 2 LaFare]. In other

words, "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Delaware v. Prouse*, 440 U.S. 648, 654, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660 (1979). We apply this balancing test to assess an officer's choice to arrest--rather than merely to detain and cite--a person for driving on suspension. The test permits consideration of a totality of circumstances, recognizing that a multitude of factors may influence an officer's discretion to arrest.

[10] Two primary governmental interests are served by taking a suspect into custody: insuring that the suspect will answer the charges against him or her and preventing harm to the public. See Utah R.Crim.P. 6(b) (magistrate may issue summons in lieu of arrest warrant if it appears accused will appear and "there is no substantial danger of a breach of the peace, or injury to persons or property, or danger to the community"); Utah Code Ann. § 77-7-2(3)(a), (c) (authorizing arrest where officer has reasonable cause to believe person committed offense and person may "flee or conceal himself to avoid arrest" or "injure another person or damage property belonging to another person"); 2 LaFare at 435 ("Arrest is justified when a person may flee from legal process, or where he may constitute a danger to the public if allowed to remain at large."). (FN8) Arrest of a suspect can enhance the state's interest in assuring appearance by allowing officers to establish the suspect's identity, investigate the suspect's ties to the community, and require a bond or other condition of release. Arrest of a suspect can also support the state's interest in protecting public safety by removing from the public those who present a danger to others.

Nothing in the record indicates that Detective Russo's arrest of Harmon was motivated by the governmental interest of assuring her appearance at trial to answer the charge of driving on suspension. There was no question as to her identity. Her home was just a few blocks away, and her brother, a deputy sheriff, and her father, recovering from a heart attack, both lived in the area. The State admits that "given her community ties, *1203 Harmon was relatively unlikely to evade prosecution for driving under suspension." Indeed, the officers' actions best demonstrate that they did not consider her a flight risk: after they discovered drugs in her home--a much more serious offense than driving on suspension--they permitted her to stay at her home,

with instructions to phone Russo the following morning.

Those who drive while on suspension, however, do present genuine public safety concerns. License suspension can result from any number of serious driving problems: convictions for automobile homicide, DUI, or reckless driving; mental or physical limitations; or driving or permitting the driving of an uninsured vehicle. See Utah Code Ann. §§ 41-2-127, -128 (Supp.1992) (now codified at §§ 53-3-220, -221). The State correctly asserts, "A driver whose license has been suspended should be presumed unfit to drive, owing to the problems that prompted the suspension." When that person continues to drive in deliberate violation of a legally binding order not to drive, the governmental interest in keeping the public safe is compromised. Physically removing the offender from the road helps achieve this interest by preventing the offender, at least for a time, from resuming the dangerous activity and by emphasizing to the offender the seriousness of the offense, thereby discouraging future violations.

These governmental interests must be weighed against the intrusion that the arrest entails.

A custodial arrest is a serious intrusion on a person's freedom and privacy. In a society in which freedom and independence are valued, arrest is the gravest of indignities. One arrested is not only no longer free to walk away, but also is suddenly in the control of another human being. If he resists, force will be used. A person arrested can no longer choose when he eats, with whom he associates, where or whether he will sit or stand, or even when he may go [to] the bathroom.

Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 Temple L.Rev. 221, 263-64 (1989). In addition, any full custodial arrest, even for a misdemeanor traffic violation, allows an officer to conduct a highly intrusive search of the arrested person, *Robinson*, 414 U.S. at 235, 94 S.Ct. at 477, and his or her vehicle, *New York v. Belton*, 453 U.S. 454, 460, 101 S.Ct. 2860, 2864, 69 L.Ed.2d 768 (1981).

We recognize that a number of factors weigh in favor of Harmon's argument that her arrest was unreasonable. First, she was arrested only blocks from her home to which she could have walked,

arguably without any danger of future harm to the public. Second, driving on suspension is a class C misdemeanor, comparable to most other traffic offenses. See Utah Code Ann. § 41-6-12(1) (violations of traffic rules and regulations are class C misdemeanors unless otherwise provided). Finally, the officers apparently have few, if any, limits on their discretion to arrest since there are no statutory (see section II.A.1. above) or administrative (we find none in the record) guidelines governing that decision. But see *State v. Parker*, 834 P.2d 592, 595-96 (Utah Ct.App.1992) (holding that officer abused his statutory discretion in arresting, at gunpoint, person who exceeded the speed limit by about twenty miles per hour). (FN9)

These factors notwithstanding, we conclude that Harmon's arrest for driving on suspension was not unreasonable in light of the governmental interest in removing unlicensed drivers from the road for public safety reasons. Other jurisdictions have uniformly held that driving on suspension is sufficiently serious to justify the offender's arrest rather than mere detention and citation. See, e.g., *State v. S.P.*, 580 So.2d 216, 217 (Fla.Dist.Ct.App.), review denied, 592 So.2d 682 (1991); *People v. Anderson*, 169 Ill.App.3d 289, 120 Ill.Dec. 123, 129, 523 N.E.2d 1034, 1040, appeal denied, 122 Ill.2d 579, 125 Ill.Dec. 223, 530 N.E.2d 251 (1988), *1204 cert. denied, 490 U.S. 1036, 109 S.Ct. 1935, 104 L.Ed.2d 407 (1989); *State v. Pierce*, 136 N.J. 184, 642 A.2d 947, 958 (1994) (upholding arrest in part because driving on suspension "poses grave danger to the public"); *State v. Hollis*, 161 Vt. 87, 633 A.2d 1362, 1364 (1993); *State v. Reding*, 119 Wash.2d 685, 835 P.2d 1019, 1023 (1992) (overruling prior contrary authority). (FN10) Harmon has not identified, and we have not found, a single case where an arrest for driving on suspension has been held to be unconstitutional.

This holding should be construed narrowly and does not necessarily apply to other traffic violations. "It should be the policy of every law enforcement agency to issue citations in lieu of arrest or continued custody to the maximum extent consistent with the effective enforcement of the law." 2 LaFave at 432 (citing A.B.A. Standards Relating to Pretrial Release § 2.1 (Approved Draft, 1968)); see also *Parker*, 834 P.2d at 595 ("[I]t is difficult to imagine any circumstances surrounding a routine traffic stop in which [an arrest] would be justified."). As we stated in *Lopez*:

[A]n officer conducting a routine traffic stop may

request a driver's license and vehicle registration, conduct a computer check, and issue a citation. However, *once the driver has produced a valid driver's license and evidence of entitlement to use the vehicle*, "he must be allowed to proceed on his way, without being subjected to further delay by police for additional questioning."

Lopez, 873 P.2d at 1132 (emphasis added) (quoting *State v. Robinson*, 797 P.2d 431, 435 (Utah Ct.App.1990)); *see also United States v. Guzman*, 864 F.2d 1512, 1519 (10th Cir.1988). In this case, Harmon could not produce a valid driver's license or evidence of entitlement to use her vehicle. Her offense of driving on suspension is different from, for example, speeding, because allowing her to "proceed on her way" without a valid license permits the continuation of her unlawful activity. We conclude that her arrest was reasonable.

3. Pretext Arrest Doctrine

[11] Harmon argues that we should apply the "pretext doctrine" to her traffic arrest. The pretext doctrine focuses on whether a hypothetical reasonable officer, in view of the totality of the circumstances, *would* have undertaken the challenged Fourth Amendment activity. *Lopez*, 873 P.2d at 1134. In *Lopez*, we rejected the doctrine as applied to temporary stops for traffic violations. We concluded that settled "cause-to-stop" and "scope-of-detention" rules adequately protect citizens from improper police stops for traffic violations. *Id.* at 1135-36. We also explained that the doctrine erroneously focuses on the subjective, "unconstitutional motivation" of the detaining officer and discourages equal protection of the law. *Id.* at 1136-40. We are now presented with the issue of whether a pretext analysis may still be applied to invalidate an *arrest* when it appears the arresting officer hoped to discover evidence of criminal activity other than that for which the arrest was made.

In *State v. Archuleta*, this court addressed a pretext arrest argument. 850 P.2d 1232 (Utah), *cert. denied*, 510 U.S. 979, 114 S.Ct. 476, 126 L.Ed.2d 427 (1993). There, a man arrested for violating his parole was also, at the time of his arrest, a murder suspect. *Id.* at 1237. In seeking to have his incriminating statements about the murder suppressed, he asserted that he was arrested for the sole purpose of gathering evidence against him on the murder charge rather than for the parole violation. We stated, "An arrest may not be used

solely as a pretext to search for evidence of another crime." *Id.* at 1237-38 (citing *United States v. Lefkowitz*, 285 U.S. 452, 467, 52 S.Ct. 420, 424, 76 L.Ed. 877 (1932)). Although we suggested that an arrest could be unconstitutionally "pretextual," we upheld the arrest for the parole violation. We held:

*1205 [I]f police have a valid right to arrest an individual for one crime, it does not matter if their subjective intent is in reality to collect information concerning another crime.... In other words, if the alleged pretext arrest could have taken place absent police suspicion of the defendant's involvement in another crime, then the arrest is lawful.... The arrest was not rendered invalid solely because the officers had a separate motive for arresting him....

Id. at 1238 (citing, among others, 1 Wayne R. LaFave, *Search and Seizure* § 1.4(e) (1987) [hereinafter 1 LaFave]).

Unfortunately, the pretext issue was not squarely before the court in *Archuleta* because the officers had attempted to arrest the parolee for the parole violation even before they suspected him of involvement in the murder. *Id.* In other words, they "would" have arrested him even if he had not been a murder suspect. Nevertheless, the opinion indicates that where officers were justified in arresting a defendant for crime A--even if the defendant would not have been arrested but for his or her suspected involvement in crime B--the arrest for crime A would still be valid.

In *State v. Pena*, 869 P.2d 932 (Utah 1994), we considered another pretext arrest argument. In that case, officers pulled over a car whose occupants were suspected in a recent theft. *Id.* at 934. The passenger in the car was arrested for giving false personal information to an officer. At the jail, officers conducted a search of the defendant and discovered cocaine. *Id.* The defendant contended that his arrest for giving false information was a pretext for the search. *Id.* at 941. We stated: "This contention is based on the assumption that the arrest was improper. Because we find that the officers had probable cause to arrest Pena [for giving false information], we do not consider his pretext argument." *Id.* (citing *Archuleta*, 850 P.2d at 1237-38). As in *Archuleta*, we held that where officers were authorized to arrest a defendant for one crime, it did not matter that their subjective intent may have been to collect information concerning another crime. In fact, the court in *Pena*

refused to examine any consideration other than whether the arrest for the stated crime was proper.

This is the position taken by the United States Supreme Court. In *Scott v. United States*, 436 U.S. 128, 98 S.Ct. 1717, 56 L.Ed.2d 168, *reh'g denied*, 438 U.S. 908, 98 S.Ct. 3127, 57 L.Ed.2d 1150 (1978), federal agents wiretapped a telephone which they believed was being used by drug dealers. The agents made no attempt to comply with a portion of the wiretap statute requiring that such activities be conducted so as to minimize their interceptions of nondrug-related conversations. The Court found that the agents' actions were reasonable under the circumstances and rejected a proposed examination of the agents' motives:

[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.

Id. at 138, 98 S.Ct. at 1723 (citing *United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973)); *see also United States v. Villamonte-Marquez*, 462 U.S. 579, 584 n. 3, 103 S.Ct. 2573, 2577 n. 3, 77 L.Ed.2d 22 (1983) (refusing to examine customs officers' motives when they were authorized to board ship); 1 LaFave § 1.4(a), at 83 (supporting the above wording in *Scott* as "precisely what the rule ought to be").

Other courts have similarly held that the officers' objective authority to arrest, not their subjective motive, is the relevant inquiry. In *People v. Holloway*, 416 Mich. 288, 330 N.W.2d 405, 406 (1982), *cert. denied*, 461 U.S. 917, 103 S.Ct. 1900, 77 L.Ed.2d 288 (1983), a case with facts somewhat similar to those in this case, police officers arrested a suspected drug dealer for driving on suspension. The defendant asserted that his arrest was really a pretext to search his car. *Id.* at 407. The Michigan Supreme Court held:

The fact that the police officers effectuated the arrest also realizing that they might find narcotics or other evidence of illegal activity is entirely irrelevant, unless police officers primarily concerned with enforcing *1206 certain laws are prohibited from enforcing other laws as well. We are aware of no such constitutional proscription.

Id.; *see also State v. Pickett*, 126 Ariz. 173, 613

P.2d 837, 838 (Ct.App.1980) (officer properly arrested person suspected of other crimes for drinking alcohol in public); *Traylor v. State*, 458 A.2d 1170, 1174 (Del.1983) (officer properly arrested suspected drug dealer for driving on suspension); *People v. Anderson*, 169 Ill.App.3d 289, 120 Ill.Dec. 123, 129, 523 N.E.2d 1034, 1040 (1988) (officer properly arrested murder suspect for driving on suspension).

In attempting to apply the pretext doctrine, Harmon argues that her arrest was unconstitutional because even if she "could" have been arrested for driving on suspension, a reasonable officer in Detective Russo's position "would" not have done so. After considering our opinions in *Lopez*, *Archuleta*, and *Pena*, as well as cases from other jurisdictions, we conclude that the "pretext arrest" analysis should be rejected for many of the same reasons that we rejected the "pretext stop" analysis. The validity of an arrest must be analyzed on objective criteria, not on an officer's subjective motivations or suspicions. Inquiring into "what a reasonable officer would do" focuses on a question that is falsely objective, "fails to provide the consistency and predictability officers need," and ignores the possibility that usual police practice may be unconstitutional. *Lopez*, 873 P.2d at 1138. Rather than debating the label or propriety of Detective Russo's motivations, we need only look at whether his arrest of Harmon for driving on suspension was reasonable under the balancing test in the previous section. If it was reasonable, it was constitutional.

4. Reasonableness of the Arrest Under Article I, Section 14

[12] Harmon argues that even if the arrest was reasonable under the Fourth Amendment of the federal constitution, the arrest was unreasonable under article I, section 14 of the Utah Constitution. We disagree. The federally based balancing analysis, although admittedly imprecise, is straightforward, unburdened of unworkable "pretext" inquiries, and fundamentally sound. In *Lopez*, 873 P.2d at 1140, we concluded that "because the pretext doctrine is unsound, we refuse to adopt it under article I, section 14 ... of the Utah Constitution." This holding also applies to pretext arrests.

B. Consent to Search

[13] Harmon contends that the court of appeals

erred in holding that her consent to search her home given to Detective Russo following her arrest was voluntary and not the fruit of an illegal arrest. Because we have concluded that Harmon's arrest for driving on suspension was valid, we need only examine whether her consent was voluntary. See *Thurman*, 846 P.2d at 1262.

[14] [15] [16] Whether a consent is voluntary depends upon " 'the totality of all the surrounding circumstances--both the characteristics of the accused and the details of' police conduct." *Id.* at 1262-63 (quoting *Arroyo*, 796 P.2d at 689); see also *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). A "consent" that is the product of duress and coercion is not a consent at all. *Florida v. Bostick*, 501 U.S. 429, 438, 111 S.Ct. 2382, 2388, 115 L.Ed.2d 389, 401 (1991). Factors indicating a lack of duress or coercion include

- 1) the absence of a claim of authority to search by the officers;
- 2) the absence of an exhibition of force by the officers;
- 3) a mere request to search;
- 4) cooperation by the owner of the vehicle; and
- 5) the absence of deception or trick on the part of the officer.

State v. Whittenback, 621 P.2d 103, 106 (Utah 1980); see also *State v. Delaney*, 869 P.2d 4, 8 (Utah Ct.App.1994).

In this case, the first and fifth factors are closely related so we will examine them together. Harmon asserts that Detective Russo made a false claim of authority to search, involving deception and trickery, by implying that he could get a warrant if she withheld her consent. At their initial confrontation, Russo advised Harmon that if she refused to consent to a search of her home, he "could come back at a later time with a [search] warrant," the execution of which he warned *1207 was an "unpleasant experience." Later, on the way to jail, Russo allegedly told her "he would have to" get a warrant. At the suppression hearing, Russo admitted that he knew he did not have sufficient evidence to obtain a warrant. (FN11) Yet Harmon testified, "He acted like he could run two blocks away and get it. That was my impression."

[17] Clearly a statement by police that they have a valid search warrant in hand, when in fact they do not, is coercive. See *Bumper v. North Carolina*, 391 U.S. 543, 549-50, 88 S.Ct. 1788, 1792, 20 L.Ed.2d 797 (1968). Less clear, however, is the validity of a

police threat to obtain a warrant if consent is withheld. According to the leading scholar of search and seizure issues, "[t]he only noticeable difference between a false claim that a warrant *has been* obtained and a false claim that a warrant *will be* obtained is that the latter is less immediate...." 3 Wayne R. LaFare, *Search and Seizure* § 8.2(c), at 187 (1987) [hereinafter 3 LaFare]; see also *United States v. Faruolo*, 506 F.2d 490, 495-98 (2d Cir.1974) (Newman, J., concurring). The claim is especially offensive when there is a clear lack of information to obtain a warrant. See *State v. Bobo*, 803 P.2d 1268, 1274 n. 7 (Utah Ct.App.1990) ("[A]ny indication by officers that issuance of a warrant was inevitable would vitiate an ensuing consent if probable cause was anything less than iron-clad.").

[18] Russo's statement that "I could" come back with a warrant, while not as misleading as "I will" come back with a warrant, is still troubling. It implies full confidence that a warrant will issue. Even worse, the statement may cause a layperson to believe that the warrant will *automatically* issue, without any exercise of judicial power. Even though the trial court found that he "made no representations that he would most likely be granted a warrant," we conclude that Russo's representation that he "could come back" with a warrant, when in fact he knew he could *not* come back with a warrant absent more evidence, was deceptive. See *Dotson v. Somers*, 175 Conn. 614, 402 A.2d 790, 794 (1978) (police represented that they "could" get a warrant); *State v. Mitchell*, 360 So.2d 189, 191 (La.1978) (police represented that they could get a warrant "in twenty minutes"). (FN12)

While Russo's statement is one factor indicating coercion, it does not, by itself, render Harmon's later consent involuntary. Importantly, Harmon refused her consent to the search following Russo's statement. She simply drove away. Russo's second alleged statement--that "he would have to" get a warrant as a result of Harmon's refusal to allow the search--was accurate and not coercive. It is also significant that the trial court credited Russo's testimony that he "informed Harmon multiple times that he was not authorized to search her house without her consent" because he did not have a search warrant. The record confirms that Harmon always knew that Russo did not have a warrant and could not search absent her consent.

[19] Harmon asserts that there was a clear exhibition of force when four officers participated in

arresting and searching her, confiscating her money, and searching and impounding her car. A consent given while one is in custody does not, per se, render the consent involuntary, but it is an important consideration. *United States v. Watson*, 423 U.S. 411, 424, 96 S.Ct. 820, 828, 46 L.Ed.2d 598 (1976); *Thurman*, 846 P.2d at 1273. " 'The question is whether the officers used coercive tactics or took unlawful advantage of the arrest situation to obtain the consent.' " 3 LaFave § 8.2(b), at 182 (quoting *United States v. Jones*, 475 F.2d 723, 730 (5th Cir.1973)).

In assessing this question, we examine the characteristics of this arrest. *Id.* at 183. The arrest did not occur late at night, was not made at gunpoint, was not made by a forcible entry, and did not involve the use of force against Harmon. However, Harmon argues that Russo used the arrest as leverage to obtain consent to search, i.e., he would not take her to jail if she gave her consent. If true, this fact certainly would be a significant aggravating factor demonstrating lack of voluntary consent. *See id.* at 183 n. 48. However, the trial court specifically found that "Detective Russo did not promise Harmon any benefit for permitting a search of her house and stated that Harmon would probably go to jail" even if she consented to the search. Harmon does not mount an argument against that credibility assessment. We conclude that it is supported by the record and is not clearly erroneous.

Although Harmon was placed in handcuffs upon her arrest, this apparently did not have any real impact upon her decision to consent since, at that time, she clearly refused to allow the search. Only later, after any "show of force" had dissipated, did Harmon agree to the search. Other cases involving far more extreme demonstrations or threats of force have resulted in holdings that consents or confessions were voluntarily given. *See Thurman*, 846 P.2d at 1272-73; *State v. Bishop*, 753 P.2d 439, 464 (Utah 1988); *State v. Hegelman*, 717 P.2d 1348, 1350 (Utah 1986).

Harmon alleges that Russo made repeated "demands" to search her home. The record does not support this assertion. At their first confrontation, Harmon refused Russo's request to search and drove away. Harmon testified that after her arrest some time later, Russo again asked to search--an assertion that he denied. (FN13) Even assuming that Harmon's testimony is true, both parties agree that she again refused to allow a search at that time.

Only later in Russo's car, and not in response to any request, did Harmon state that she would allow a search.

Harmon further asserts that her concern for her father's health made her more susceptible to consent because she did not want to cause him additional stress. Although her father was apparently recovering from a heart attack, he was no longer in the hospital and apparently somewhat active. When Harmon went to visit her father after refusing Russo's initial request to search, she discovered that he had gone elk hunting with a friend. Regardless of his condition, the trial court correctly reasoned that "it is not unusual for someone to be apprehensive that family members will be upset to learn of that person's arrest and pending criminal charges." We are not persuaded that Harmon's apprehension about her father prevented her from voluntarily consenting to the search.

Other facts demonstrate that her consent was voluntary. The record indicates that Harmon, once past the indignation of her arrest, was friendly and cooperative. She twice offered her consent after being advised of her *Miranda* rights. Upon arriving at her home, Russo repeated the *Miranda* warnings and read to Harmon a written search consent form, which she then signed. "[I]t is the duty of an appellate court ... 'to examine the entire record and make an independent determination of the ultimate issue of voluntariness.' " *Bishop*, 753 P.2d at 464 n. 76 (quoting *Beckwith v. United States*, 425 U.S. 341, 348, 96 S.Ct. 1612, 1617, 48 L.Ed.2d 1 (1976)). Having examined the record here, we conclude that Harmon's consent to search her home was voluntary.

We affirm the court of appeals' decision upholding Harmon's conviction.

ZIMMERMAN, C.J., and RUSSON, J., concur in Justice HOWE's opinion.

DURHAM, Justice, dissenting:

I respectfully dissent. The majority holds that "Harmon's arrest for driving on suspension was not unreasonable in light of the governmental interest of removing unlicensed drivers from the road for public safety reasons," while simultaneously concluding that "[n]othing in the record indicates that *1209. Russo's arrest of Harmon was motivated by the governmental interest of assuring her appearance at trial." Part of the rationale for the second

conclusion--that Harmon was eventually left at her home and not incarcerated--is, it seems to me, equally applicable to the first. In other words, there is nothing in the record to suggest that Harmon's arrest was motivated by the governmental interest in getting her off the road for public safety reasons. She was only a few blocks from her home; her car was parked off the roadway, and she was not driving it or threatening to drive it when arrested. This arrest appears to have been motivated solely by the desire of the arresting officer to intimidate Harmon into consenting to a search of her home and, more significantly, to have been unreasonable under these circumstances.

STEWART, Associate C.J., concurs in Justice DURHAM's dissenting opinion.

FN1. At the suppression hearing, Russo admitted that he did not have sufficient information to obtain a warrant.

FN2. Harmon testified that Russo again asked her to search her home and when she refused, he said, "Then, you are going to jail." According to Harmon, she then asked, "[I]f I let you search my house, then you [w]on't take me to jail?" whereupon Russo responded, "You're right." Russo denied asking to search following the arrest or making any of these statements. The trial court did not make any findings of fact regarding this testimony.

FN3. The criminal charge based on the mislabelled prescription medication was dismissed following Harmon's preliminary hearing and is not challenged in this appeal.

FN4. This statute has since been completely rewritten and is now found at Utah Code Ann. § 41-1a-107 and § 41-3-105. These current statutes do not mention officers' arrest power for all vehicle-related violations as did section 41-1-17. *But see* § 41-3-105(8)(a) (1993) (officers "shall" arrest for violations of the Motor Vehicle Act, title 41, chapter 1a, or the Motor Vehicle Business Regulation Act, title 41, chapter 3).

FN5. Our use of the word "arrest" throughout the remainder of this opinion refers to a full, custodial arrest.

FN6. The word "not" was included in the original 1941 bill but was accidentally omitted when the bill was enrolled. *See* 1941 Utah Laws 139; 1949

Utah Laws 186. We have previously held that "the only logical reading of the statute is that it has application only when a citation is issued in lieu of an arrest and *no appearance* is made before a magistrate." *Woytko v. Browning*, 659 P.2d 1058, 1061 (Utah 1983) (emphasis added). Thus, the statute should read "whenever a person is *not* immediately taken before a magistrate."

FN7. *See* Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 Temple L.Rev. 221, 250 n. 188 (1989) [hereinafter Salken] (listing Utah among twenty-eight states that have no limitations on police discretion to arrest for a traffic offense). Many states have statutes that limit arrests for traffic offenses. *Id.* at 251 n. 189.

FN8. Other governmental interests in arresting suspects may include obtaining evidence of the crime for which the suspect is accused, providing certain social service functions, and maintaining the proper respect for law and the police. *See* Utah Code Ann. § 77-7-2(3)(b); Salken, 62 Temple L.Rev. at 266.

FN9. *See also* Joanne R. Whiting, *When Probable Cause is Constitutionally Suspect*, 1991 Wis.L.Rev. 345, 369-72; Arthur Mendelson, *Arrest for Minor Traffic Offenses*, 19 Crim.L.Bull. 501, 510-12 (1983) (both encouraging statutory and administrative guidance to limit officer discretion to arrest for traffic violations).

FN10. We note that in several Utah cases, arrests for driving on suspension were not challenged. *See In re One Hundred Two Thousand Dollars*, 823 P.2d 468, 469 (Utah 1992); *State v. Rice*, 717 P.2d 695, 696 (Utah 1986); *State v. Pacheco*, 712 P.2d 192, 193 (Utah 1985), *cert. denied*, 479 U.S. 813, 107 S.Ct. 64, 93 L.Ed.2d 22 (1986); *State v. Jackson*, 805 P.2d 765, 769 (Utah Ct.App.1990), *cert. denied*, 815 P.2d 241 (1991); *State v. Baird*, 763 P.2d 1214, 1216 (Utah Ct.App.1988).

FN11. At the suppression hearing, Harmon's counsel asked Russo, "[B]ased on the information you had, you couldn't have gotten a search warrant, could you?" Counsel for the State objected to the question because the answer "calls for the officer to make a legal conclusion." The court initially sustained the objection but later permitted the question after Harmon's counsel clarified that Russo had applied for about forty

search warrants before this incident and was basing his testimony only upon his own experience. Russo admitted that he did not have enough information to obtain a warrant to search Harmon's home.

stated, "[O]fficers would be well advised to refrain from any commentary, direct or by implication, on the likelihood a warrant would actually issue." *State v. Bobo*, 803 P.2d 1268, 1274 n. 7 (Utah Ct.App.1990).

*1209_ FN12. The court of appeals has wisely

FN13. The trial court did not make any factual finding regarding this testimony.

Addendum 2

*122 808 P.2d 122

STATE of Utah, Plaintiff and Appellee,
v.
Michael Allen STERGER, Defendant and Appellant.

No. 900078-CA.
Court of Appeals of Utah.
March 6, 1991.

Defendant brought motions to suppress evidence consisting of controlled substances, drug paraphernalia and sample of defendant's blood which was obtained following automobile accident. The Sixth District Court, Garfield County, Don V. Tibbs, J., denied the motions. Defendant appealed. The Court of Appeals, Jackson, J., held that: (1) inventory search of defendant's automobile was authorized and legal, but (2) remand was required to allow for taking of findings of fact concerning issue of voluntary consent.

Affirmed in part, remanded in part.

1. CRIMINAL LAW ☞ 1130(5)

110 ----
110XXIV Review
110XXIV(I) Briefs
110k1130 In General
110k1130(5) Points and authorities.

[See headnote text below]

1. CRIMINAL LAW ☞ 1178

110 ----
110XXIV Review
110XXIV(R) Error Waived in Appellate Court
110k1178 In general.
Utah App. 1991.

Court would not consider whether inventory search of defendant's vehicle violated Utah Constitution, where defendant failed to brief or argue state constitutional guarantees in either pretrial hearing or on appeal.

2. CRIMINAL LAW ☞ 1158(4)

110 ----
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158 In General
110k1158(4) Reception of evidence.
Utah App. 1991.

Findings of fact supporting trial court's decision on motion to suppress are reviewed under clearly

erroneous standard. Rules Civ.Proc., Rule 52(a).

3. SEARCHES AND SEIZURES ☞ 66

349 ----
349I In General
349k60 Motor Vehicles
349k66 Inventory and impoundment; time and place of search.

Utah App. 1991.

Failure to offer defendant opportunity to make arrangements for his car does not eliminate justification for conducting inventory of car, or render inventory illegal. U.S.C.A. Const.Amend. 4.

4. SEARCHES AND SEIZURES ☞ 60.1

349 ----
349I In General
349k60 Motor Vehicles
349k60.1 In general.

Formerly 349k60

Utah App. 1991.

Deputy sheriff was justified in taking defendant's car into custody following accident, where front windshield of car was shattered, car was inoperable and blocking road in remote area, all of car's occupants had been taken for medical attention and there was no opportunity to ask defendant what he wanted done with car. U.S.C.A. Const.Amend. 4.

5. SEARCHES AND SEIZURES ☞ 58

349 ----
349I In General
349k58 Inventory or booking search.

[See headnote text below]

5. SEARCHES AND SEIZURES ☞ 66

349 ----
349I In General
349k60 Motor Vehicles
349k66 Inventory and impoundment; time and place of search.

Utah App. 1991.

Inventory searches meet the need to protect individual property in police custody, protect police against claims of loss or theft of property, and detect dangerous conditions of instrumentality within impounded vehicles. U.S.C.A. Const.Amend. 4.

6. SEARCHES AND SEIZURES ☞ 66

349 ----
349I In General
349k60 Motor Vehicles

349k66 Inventory and impoundment; time and place of search.

Utah App. 1991.

Police officer was authorized to examine and inventory contents of defendant's vehicle, where officer was authorized to take custody of defendant's vehicle after it was involved in accident and all of vehicle's occupants were taken for medical attention. U.S.C.A. Const.Amend. 4.

7. SEARCHES AND SEIZURES ☞66

349 ----

349I In General

349k60 Motor Vehicles

349k66 Inventory and impoundment; time and place of search.

Utah App. 1991.

Bifurcated inventory search of defendant's vehicle was legally justified, even though there was time lapse of at least one day between impounding of defendant's vehicle and time inventory was completed, where initial search was performed contemporaneously with impounding, and inventory was completed at later time because remoteness of area required deputy sheriff to prioritize his duties, which meant removing victims for medical care, getting defendant's blood drawn, and arresting and transporting defendant. U.S.C.A. Const.Amend. 4.

8. SEARCHES AND SEIZURES ☞66

349 ----

349I In General

349k60 Motor Vehicles

349k66 Inventory and impoundment; time and place of search.

Utah App. 1991.

Where there is initial search performed contemporaneously with impounding of vehicle, and second search conducted after vehicle has been impounded, both parts of search are legally justified. U.S.C.A. Const.Amend. 4.

9. SEARCHES AND SEIZURES ☞65

349 ----

349I In General

349k60 Motor Vehicles

349k65 Scope; trunk, compartments, containers, and luggage.

Utah App. 1991.

Deputy sheriff did not improperly selectively open containers in inventory search of defendant's vehicle; deputy testified he opened all closed containers in vehicle except sealed cans of food. U.S.C.A. Const.Amend. 4.

10. SEARCHES AND SEIZURES ☞194

349 ----

349VI Judicial Review or Determination

349k192 Presumptions and Burden of Proof

349k194 Consent, and validity thereof.

Utah App. 1991.

Determination of whether defendant voluntarily consented to blood test could not rest simply on trial court's observation that defendant submitted to the test; State must meet its burden of proof on consent issue.

11. AUTOMOBILES ☞418

48A ----

48AIX Evidence of Sobriety Tests

48Ak417 Grounds for Test

48Ak418 Consent, express or implied.

Utah App. 1991.

Implied consent statute was not applicable where defendant was not placed under arrest prior to his blood being drawn. U.C.A.1953, 41-6-44.10, 41-6-44.10(1)(a).

*123 Phillip L. Foremaster, St. George, for defendant and appellant.

R. Paul Van Dam, State Atty. Gen., and Dan R. Larsen, Asst. Atty. Gen., Salt Lake City, for plaintiff and appellee.

OPINION

Before BENCH, JACKSON and RUSSON, JJ.

JACKSON, Judge:

This is an interlocutory appeal from the trial court's denial of two motions to suppress evidence consisting of controlled substances, drug paraphernalia and a sample of defendant's blood which was obtained following an automobile accident.

Defendant seeks review of the following issues: (1) whether the inventory search of his automobile was authorized and legal under the existing circumstances; (2) and whether the sample of his blood was legally taken. We affirm as to the evidence obtained during the inventory search and remand as to the blood sample.

FACTS

On July 23, 1989, the vehicle in which defendant,

his wife and two passengers were riding, left the road and collided with an embankment. The accident took place in a remote area of eastern Garfield County, Utah. Defendant left the vehicle and went for help. A helicopter transported defendant's wife and the two passengers to a hospital in Page, Arizona. Prior to leaving the accident site, one of the passengers accused defendant of being drunk and causing the accident. The other passenger died en route to the hospital. Defendant, who appeared to be the least injured was transported to the Bullfrog Clinic, a nearby medical facility.

Deputy Shawn Draper of Garfield County arrived shortly after the accident. After the passengers had been transported for medical attention, a tow truck arrived to remove the inoperative vehicle from the road. Because the vehicle was locked, Draper used a "slim jim" to force open one of the doors. Draper then inventoried the contents of the vehicle. During the inventory, Draper opened a camera case and found a film canister, which he also opened. He then seized a green leafy substance found inside the canister, believing it to be marijuana. After discontinuing the inventory, Draper had the vehicle towed to his home in Ticaboo, Utah, where he planned to continue the inventory. After the tow truck left the scene, Draper drove to the Bullfrog Clinic, where defendant had been transported, and called the Sheriff's office to determine how to proceed. Draper was instructed to have blood drawn from defendant.

Draper told defendant he was required to submit to a blood test since he had been involved in an accident. Defendant was not told he could refuse, and he was not under arrest at this time. William Patrick Quinn, a certified park medic, summoned Peter Hollis, a physicians assistant employed by the Bullfrog Clinic, to take the *124 blood. Hollis explained to defendant that Draper wanted the blood taken, and proceeded to take the blood. After several unsuccessful attempts by Hollis, Quinn located a vein and started the catheterization. After defendant's blood was taken, Draper transported him to Koosharem, Utah, and placed him in the custody of another deputy. The test revealed that defendant's blood alcohol level was within the legal limit, but traces of THC, a marijuana by-product were present.

The day following the accident, defendant's vehicle was towed from Draper's ho

except canned goods. In a Tupperware container, Draper found marijuana and drug paraphernalia. He seized these items. All of the items found in the vehicle were eventually listed on an inventory sheet by Draper.

At his pretrial hearing, defendant moved to suppress the contents of the film canister, the contents of the Tupperware container, and the results of the blood test. Defendant alleged that these items were illegally seized. The trial court denied his motions and this appeal followed.

[1] At the outset, this court must determine if defendant waived his state constitutional claims. The State asserts that the lower court had no such arguments before it and therefore the issue was decided only under the United States Constitution. We agree. This court has often urged counsel, most recently in *State v. Bobo*, 803 P.2d 1268, 1272-73 (Utah Ct.App.1990), to include more than a "nominal allusion" to state constitutional rights in appellate briefs and arguments. In the present case, defendant failed to brief or argue state constitutional guarantees at either the pretrial hearing or on appeal. Accordingly, we decline to consider his arguments based on the Utah Constitution.

STANDARD OF REVIEW

[2] Findings of fact supporting a trial court's decision on a motion to suppress are reviewed under the "clearly erroneous" standard of Utah R.Civ.P. 52(a). *State v. Hargraves*, 806 P.2d 228, 231 (Utah Ct.App.1991) (citing *State v. Palmer*, 803 P.2d 1249 (Utah Ct.App.1990)).

INVENTORY SEARCH

[3] [4] Deputy Draper testified that he took custody of defendant's car, inventoried its contents, and had the car removed from the scene of the accident. Defendant first argues Draper did not have to impound the car but could have left it locked and where it was. This assertion is without merit. Defendant's car was partially blocking the road in a remote area where the accident occurred. The front windshield was shattered and the car inoperable. All of the occupants had been taken for medical attention and Draper had no opportunity to ask defendant what he wanted done with the car. (FN1) "[T]he existence or absence of justification for the impoundment of an automobile may be determined from the surrounding circumstances." *State v. Johnson*, 745 P.2d 452, 454

impound yard. Draper completed his inventory of the items in the vehicle two days after the accident. Draper testified that he opened all closed containers,

(Utah 1987) (citations omitted). Given the condition of defendant's car and where it was located after the accident, there was justification for taking the car into police custody.

[5] [6] Before defendant's car was towed from the accident scene, Draper inventoried its contents. Inventory searches conducted under these circumstances are justified, *Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S.Ct. 2523, 2528, 37 L.Ed.2d 706 (1973), and it is well settled that such a search is an exception to the warrant requirement of the fourth amendment. *South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976); *State v. Earl*, 716 P.2d 803, 805 (Utah *125 1986); *State v. Shamblyn*, 763 P.2d 425, 426 (Utah Ct.App.1988). Inventory procedures meet three distinct needs: (1) to protect individual property in police custody; (2) protect police against claims of loss or theft of property; and (3) detect dangerous conditions of instrumentality within impounded vehicles. *Johnson*, 745 P.2d at 454 (citing *Opperman*, 428 U.S. at 369, 96 S.Ct. at 3097). Having determined that Draper was authorized to take custody of defendant's vehicle, a concomitant right existed to examine and inventory its contents. See *State v. Criscola*, 21 Utah 2d 272, 444 P.2d 517 (1968).

Our analysis does not stop at determining that the impoundment and inventory search of defendant's car were justified. We must also determine if the search was conducted for inventory purposes, in a legal manner, and not merely as a "fishing expedition for evidence." Defendant alleges that, even if an inventory search was authorized, it was illegal because it was not carried out pursuant to standardized procedures. (FN2)

Bifurcated Inventory Searches

[7] The Garfield County Sheriff's Department has written procedures governing when the contents of a vehicle shall be inventoried, and how that inventory shall be carried out:

4.05 Vehicle Inventories

(1) Any vehicle impounded shall be inventoried. A written inventory shall be made of all contents of vehicle, both in opened, closed and/or locked containers. The trunk and also any compartments shall be opened and the contents inventoried. All evidence seized in any inventory shall be placed in the evidence locker. Such record shall become a

part of the case file. When custody of the vehicle changes from one person to another, the person taking custody of the vehicle shall also assume custody of the contents by placing his/her signature on the inventory list.

These procedures are silent as to how soon after a vehicle is impounded the inventory must be completed, and whether bifurcated searches are permitted.

The fourth amendment requires a sufficient proximity in time between the impoundment of a vehicle and the subsequent inventory search. *Ex Parte Boyd*, 542 So.2d 1276, 1279, cert. denied, 493 U.S. 883, 110 S.Ct. 219, 107 L.Ed.2d 172 (1989). Each moment, hour or day that passes detracts from a full effectuation of the objectives of the inventory, namely to protect property. *Id.* (FN3)

In the present case, there was a time lapse of at least one day between the impounding of defendant's vehicle and the time the inventory was completed. However, the inventory was initiated immediately after the accident. It was completed at a later time because, as Draper testified, the remoteness of the area required him to prioritize his duties, and that meant removing victims for medical care, getting defendant's blood drawn, arresting and transporting defendant, and completing the preliminary investigation of the accident.

[8] We agree with defendant that a bifurcated inventory search, such as was conducted here, is not specifically provided for in the applicable procedures. That fact alone, however, does not make the inventory search illegal. Where there is an initial *126 search performed contemporaneously with the impounding of a vehicle, and a second search conducted after the vehicle has been impounded, both parts of the search are legally justified. Cf. *Florida v. Meyers*, 466 U.S. 380, 104 S.Ct. 1852, 80 L.Ed.2d 381 (1984) (upholding a second search conducted after vehicle was impounded); *Michigan v. Thomas*, 458 U.S. 259, 102 S.Ct. 3079, 73 L.Ed.2d 750 (1982) (upheld warrantless search even though prior inventory search had already been made); *State v. Earl*, 716 P.2d 803, 805 (Utah 1986) (warrantless search after automobile impounded upheld).

Closed Containers

[9] Defendant also alleges that, contrary to the inventory search guidelines, Draper did not open all

closed containers found in the vehicle. The Garfield County Sheriff's guidelines specifically state that "A written inventory shall be made of all contents of vehicle, both in opened, closed and/or locked containers." As to the opening and inventorying of closed containers, the United States Supreme Court has stated that standardized criteria, *Colorado v. Bertine*, 479 U.S. 367, 375, 107 S.Ct. 738, 743, 93 L.Ed.2d 739 (1987), or established routine, *Illinois v. Lafayette*, 462 U.S. 640, 648, 103 S.Ct. 2605, 2610-11, 77 L.Ed.2d 65 (1983), regulate the opening of containers found during an inventory search. See also *Florida v. Wells*, 495 U.S. 1, 110 S.Ct. 1632, 1635, 109 L.Ed.2d 1 (1990) (absent specific policies, search *not* sufficiently regulated to satisfy fourth amendment); *Shamblin*, 763 P.2d at 427-28 (state trooper's opening of a zipped bag during a warrantless inventory search was defective in absence of standardized police procedures mandating the opening of closed containers during such a search).

We are not persuaded by defendant's argument. In *Shamblin* this court interpreted recent cases to establish "that the Fourth Amendment is violated when closed containers are opened during a vehicle inventory search *in the absence of a standardized, specific procedure mandating their opening.*" *Shamblin*, 763 P.2d at 427-28. (Emphasis added). "With a standardized, mandatory procedure, the minister's picnic basket and grandma's knitting bag are opened and inventoried right along with the biker's tool box and the gypsy's satchel." *Id.* at 428. Draper testified that he opened all closed containers except sealed cans of food found in defendant's vehicle. He did not arbitrarily or selectively open containers, as defendant would have us believe. Accordingly, defendant's reliance on *Shamblin* is misplaced. (FN4) In this case, not only did standardized procedures exist, but they were followed as well.

Conclusion as to Inventory Search

None of the arguments put forth by defendant as to the inventory search, persuade us that the evidence obtained during that search should have been suppressed. Accordingly, we affirm the trial court's denial of defendant's motion to suppress the evidence found in his vehicle.

BLOOD SAMPLE

[10] Defendant next claims that the sample of his blood should be suppressed because it was drawn

without his consent, and because the persons who drew the blood were not authorized to do so. We deferentially review the trial court's determination that defendant consented to the blood test, as is appropriate with all factual determinations. *State v. Webb*, 790 P.2d 65, 82 (Utah Ct.App.1990). (FN5)

*127 Defendant contends that at no time did he voluntarily consent to the blood test. He claims he acquiesced because Draper told him he was required to submit to a blood test. The State acknowledges defendant was told that blood was required to be drawn because there had been an accident, and they do not dispute the inaccuracy of the statement. Nonetheless, they contend, and the trial court found, that defendant consented to the test twice: once after he was told by Draper that a sample was required, and again when the medical personnel present asked him to proceed with the sampling.

The trial court found defendant consented simply because there was no dispute in the record that defendant submitted to the test. However, a determination of voluntary consent cannot rest on such a cursory observation. In sustaining its burden that voluntary consent was given the State must meet its burden of proof:

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

State v. Webb, 790 P.2d 65, 82 (Utah Ct.App.1990) (quoting *United States v. Abbott*, 546 F.2d 883, 885 (10th Cir.1977)) (citations omitted).

Our examination of the record reveals that the trial court failed to make adequate findings of fact concerning the issue of voluntary consent. The trial court did not make any findings as to the factors outlined above. The record is devoid, for example, of any discussion regarding whether defendant knew that he could refuse the test. Second, Draper told defendant such a test was required. Because factual issues are best addressed at the trial level, *State v. Hargraves*, 806 P.2d 228, 231 (Utah Ct.App.1991),

we remand for a rehearing on this critical issue.

[11] In an alternative argument, defendant contends that the blood test result should have been suppressed because the blood sample was taken by persons not authorized to draw blood pursuant to Utah Code Ann. § 41-6-44.10 (Supp.1990), the implied consent statute. The State responded to this argument in their brief, stating it was unnecessary to determine if Hollis and Quinn were authorized to draw blood, because defendant voluntarily consented to the blood test, making the implied consent statute inapplicable. We agree that § 41-6-44.10 is inapplicable to the facts at hand, but we find it inapplicable for the reason that defendant was not placed under arrest prior to his blood being drawn. (FN6) Because the implied consent statute *128. is not applicable in this case, defendant's claim fails. (FN7)

CONCLUSION

We affirm the trial court's denial of defendant's motion to suppress the evidence found as a result of the inventory search of defendant's vehicle. As to the motion to suppress the results of the blood test, we remand for an examination of the voluntariness of defendant's consent.

BENCH and RUSSON, JJ., concur.

FN1. In any case, failure to offer defendant an opportunity to make arrangements for his car does not eliminate the justification for conducting an inventory of that property, *Colorado v. Bertine*, 479 U.S. 367, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987), or render the inventory illegal. *State v. Hygh*, 711 P.2d 264 (Utah 1985).

FN2. Defendant states the following specific grounds of error: (1) the inventory procedures did not provide for bifurcated searches, (2) the procedure for opening closed containers was not followed, (3) the inventory sheet was not signed by the tow truck driver when he assumed custody of the vehicle, and (4) the procedures do not outline when the police are to impound a vehicle. Because defendant fails to cite support or provide any meaningful analysis as to arguments three and four, we decline to rule on them. See *State v. Amicone*, 689 P.2d 1341, 1344 (Utah 1984).

FN3. Searches with a time lapse between impoundment and the inventory have been upheld under certain circumstances. See, e.g., *Rudd v.*

State, 649 P.2d 791 (Okla.Crim.App.1982) (eight-hour lapse due to officer in charge of inventory being detained by complexity of accident in which subject vehicle was involved); *Black v. State*, 418 So.2d 819 (Miss.1982) (officers had to spend time on emergency detail).

FN4. At any rate, a strict interpretation of the *Shamblin* language was tempered by the United States Supreme Court in *Florida v. Wells*, 495 U.S. 1, 110 S.Ct. 1632, 109 L.Ed.2d 1 (1990): "A police officer may be allowed sufficient latitude to determine whether a particular container should or should not be opened in light of the nature of the search and the characteristics of the container itself. The allowance of the exercise of judgment based on concerns related to the purposes of an inventory search does not violate the Fourth Amendment." *Id.* 110 S.Ct. at 1635.

FN5. We note that there is no bright-line test used when a reviewing court examines whether consent to a search was properly obtained. Rather, "the question of whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *State v. Marshall*, 791 P.2d 880, 887 (Utah Ct.App.1990) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S.Ct. 2041, 2047-48, 36 L.Ed.2d 854 (1973)). See also *State v. Arroyo*, 796 P.2d 684, 687 (Utah 1990) ("trial court's finding of consent was clearly erroneous."); *State v. Whittenback*, 621 P.2d 103, 106 (Utah 1980); *State v. Robinson*, 797 P.2d 431 (Utah Ct.App.1990); *Webb*, 790 P.2d at 82. Federal cases addressing voluntariness of consent to a search have also traditionally spoken in terms of voluntary consent as a fact question. See, e.g., *Thompson v. Louisiana*, 469 U.S. 17, 23, 105 S.Ct. 409, 412, 83 L.Ed.2d 246 (1984) (issue of consent a factual issue); *United States v. Mendenhall*, 446 U.S. 544, 557, 100 S.Ct. 1870, 1878-79, 64 L.Ed.2d 497 (1980) (voluntariness of consent is a question of fact); *United States v. Carson*, 793 F.2d 1141, 1153 (10th Cir.1986) (defendant's consent a factual finding); *United States v. Oyekan*, 786 F.2d 832, 839 (8th Cir.1986) (consent reviewed under a "clearly erroneous" standard); *United States v. Espinosa*, 782 F.2d 888, 892 (10th Cir.1986) (voluntariness of consent a finding of fact); *United States v. Cox*, 752 F.2d 741, 747 (1st Cir.1985) (question of consent is one of fact, not of law); *United States v. Lopez*, 777 F.2d 543 (10th

Cir.1985) (trial court's finding of fact on issue of voluntariness for consent cases must be accepted on appeal unless clearly erroneous); *United States v. Cooper*, 733 F.2d 1360, 1364 (10th Cir.1984) (standard of review for denial of motion to suppress is the clearly erroneous standard).

*128_ FN6. Utah Code Ann. § 41-6-44.10(1)(a) (Supp.1990) provides that a person operating a motor vehicle is considered to have consented to a chemical test or tests of his breath, blood, or urine. This statute is applicable only to persons who have been placed under arrest. *State v. Cruz*, 21 Utah 2d 406, 446 P.2d 307 (1968) (implied consent statute only applicable to persons who have been placed under arrest); *In the Interest of R.L.I.*, 771 P.2d 1068 (Utah 1989) (blood sample taken from motorist

who was not under arrest, who was not informed he could refuse to submit to the test, and who did not consent thereto, was taken contrary to provisions of implied consent statute and results therefore inadmissible); *State v. Wight*, 765 P.2d 12 (Utah Ct.App.1988) (chemical test cannot be taken without driver's consent prior to arrest unless driver is *unconscious* or otherwise not able to give consent).

FN7. Our counterpart in Oregon has addressed this issue on similar facts, and held that defects in administering such a test go to the weight to be given its results by the trier of fact, but *do not make the results inadmissible*. *Gildroy v. Motor Vehicles Division*, 100 Or.App. 538, 786 P.2d 757, 758 (1990) (emphasis added).

Addendum 3

James Crapse - D

1 A. That's what we were informed of, yes. I believe at that
2 time Officer Deryke asked -- let's see. (Pause.) Yes. He
3 asked Ms. Evans if myself and he could take a look around
4 the house.

5 Q. The report says a quick look around the house. Is that
6 your best recollection?

7 A. Yes.

8 Q. And then what was her response to that?

9 A. Umm, she was gathering her stuff and said I don't know
10 what to say to you.

11 Q. All right. And then Officer Deryke's response to that?

12 A. He quoted, does that mean that you have something here
13 that you don't want us to find, end quote.

14 Q. Did Ms. Evans make any response at all?

15 A. No, she didn't. She just remained silent, still packing
16 the stuff.

17 Q. And then you took over at that point, I think, at least
18 in terms of talking to her, is that correct?

19 A. Yeah.

20 Q. And what did you ask her?

21 A. I then asked her again if she would mind if we searched
22 the residence.

23 Q. And did she reply or make some sort of response?

24 A. She shook her head no and then I asked her --

25 Q. She just shook her head, right?

1 A. Yeah.

2 Q. She didn't say anything?

3 A. (Witness shook his head.)

4 Q. Okay. Go ahead.

5 A. I then asked her is that no, you don't mind if we look
6 around or, no, we can't look around.

7 Q. So you were trying to clarify the issue at that point?

8 A. This is correct.

9 Q. And what did she do then, if anything?

10 A. She still sat and contemplated as to what she should
11 respond with.

12 Q. So she didn't say anything?

13 A. No.

14 Q. Didn't shake her head this time either?

15 A. No.

16 Q. No response?

17 A. (Witness shook his head.)

18 Q. Okay. And then you asked her again, I believe?

19 A. Yeah. At that time, from past experiences, I felt that
20 there was something in the residence that she didn't want to
21 know about or to find.

22 Q. Okay.

23 A. So at that time I told her that if she were to give
24 me --

25 Q. Excuse me, James. Was there one other time you asked

1 her again if you could look through the residence and one
2 more time she just didn't respond?

3 A. Correct.

4 Q. Okay. And then you finally told her what?

5 A. I said, quote, I'll tell you what, if you give me the
6 drugs you have in the house I promise not to take you to
7 jail today.

8 Q. Okay. And let me ask you a little bit about that. What
9 were you thinking about the promise not to take her to jail
10 today?

11 A. Okay. I explained to her that because of her situation,
12 her child being taken away, that she was in such a
13 distressed state, that if she gave me the drugs right at
14 that time that I would not actually handcuff her and take
15 her down to the jail right then and there.

16 Q. Do you mean you wouldn't arrest her for the drugs she
17 gave you, is that what you meant?

18 A. No, I didn't say that.

19 Q. What were you thinking?

20 A. I was thinking I wouldn't take her to jail, physically
21 handcuff her, put her through that, put her in my car and
22 take her to jail. That's what I was thinking.

23 Q. Okay. Did you have plans to arrest her for something?
24 Suppose she didn't produce any drugs, did you have any plans
25 to arrest her for anything at that point?

1 A. No.

2 Q. So you're talking about if she produces drugs -- at
3 least this is your thought process, that if she produces
4 drugs then I'm not going to take her to jail for the drugs,
5 is that what you meant?

6 A. This is correct.

7 Q. Okay. What you said is just what you've stated here,
8 I'll tell you that if you give me the drugs you have in the
9 house, I promise not to take you to jail, that's how it came
10 out?

11 A. Yes.

12 Q. Okay. And what was her response to that?

13 A. She still doesn't respond as affirmative or negative.
14 At that time I asked her to think where in the house she
15 might store the drugs that she had been using in the past.
16 And then Mr. Burgess stated, quote, it would be best for you
17 to give this officer what drugs you have so when you get
18 sent to take a urinalysis it will come back as negative, end
19 quote.

20 Q. Let me back up a minute. Maybe I'm reading the report
21 wrong or there's something in your notes that I don't
22 understand. I'm reading this. "I finally stated to Ms.
23 Evans, I'll tell you what, if you give me the drugs you have
24 in the house I promise not to take you to jail today"?

25 A. This is correct. I'm sorry. I didn't see that line.

Addendum 4

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF
UTAH, IN AND FOR THE COUNTY OF BOX ELDER, PH '99

THE STATE OF UTAH,
Plaintiff,**vs.****JULIANNE EVANS,**
Defendant.

HON. THOMAS L. WILLMORE**MEMORANDUM DECISION****Case No. 991100182**

This matter is before the Court on defendant's Motion to Suppress Evidence. Plaintiff has responded and a hearing was held before the Court on August 10, 1999.

The issue before the Court is whether defendant's consent to search her home was voluntary. The Utah Supreme Court has held that whether a consent is voluntary depends upon "the totality of all the surrounding circumstances - both the characteristics of the accused and the details of police conduct." *State v. Harmon*, 910 P. 2d 1196, 1206 (Utah 1995). The United States Supreme Court has held that if a consent is the product of duress and coercion, it is not a consent at all. The Utah Supreme Court has set forth factors indicating a lack of duress or coercion which are as follows:

- (1) the absence of a claim of authority to search by the officers;
- (2) the absence of an exhibit of force by the officers;
- (3) a mere request to search;
- (4) cooperation by the owner of the vehicle; and
- (5) the absence of deception or trick on the part of the officer.

State v. Harmon, 910 P. 2d 1196, 1206

The facts as testified to, by Officers James Crapse and Michael Deryke, at the Suppression hearing are as follows:

(1) Officer James Crapse stated he was present at defendant's home on March 25, 1999 at the request of an agent of the Department of Family Services, who was present to remove defendant's newborn child from her home because the child had tested positive for unlawful drugs.

(2) Officer Crapse observed the defendant and Mr. Burgess from DFS discussing the infant and why the infant was being removed. The infant was with defendant and she was gathering infant items. The defendant was cooperating and did not appear at that time to be under the influence of any alcohol or illegal substances.

(3) Officer Crapse asked defendant to be allowed to take a quick look around the house for illegal drugs. The defendant responded by indicating she did not know what to say to the officer. Officer Crapse asked her if that meant she had something to hide from the officer. Officer Crapse testified that defendant did not respond to that question.

(4) Officer Crapse then testified the defendant shook her head in a negative way and the officer

attempted to clarify whether defendant did not mind if the police officers looked around or that she did not want the police officers to look around. The defendant did not respond to Officer Crapse's question.

(5) Officer Crapse then told the defendant that if she gave him the illegal drugs in the house, he would not take her to jail today and arrest her today.

(6) The defendant did not respond further until additional assurances had been made by the officers that they would not take the defendant to jail that day. The defendant then told the officers that she did not remember where she put the drugs.

(7) Mr. Burgess told the defendant to turn the illegal drugs over to the police. The defendant walked to her purse and pulled out a yellow case which contained a small baggie of methamphetamine, a brown vile and a glass pipe.

(8) Officer Michael DeRyke was present during the statements and questions by Officer Crapse to the defendant and his testimony is essentially the same.

(9) Defendant was subsequently furnished a Permission To Search form which was marked and **admitted** as State's Exhibit 1. The Permission To Search was filled out by Officer Crapse. Defendant read and signed the Permission To Search and a search of defendant's residence was then conducted, which located other illegal drugs..

The Court must apply the facts as testified to at the hearing to the factors as set forth in the Harmon case to determine whether defendant's consent is voluntary. The first factor centers on an absence of a claim of authority to search by the officers. In this case, there was no claim of authority to search by the officers. No evidence has been presented to the Court that Officer Crapse and Officer Deryke claimed any authority whatsoever to search defendant's house. The officers simply asked the defendant for permission to search.

Concerning the second factor, which is an absence of an exhibition of force by the officers, no evidence has been presented to the Court showing any exhibition of force by the officers to search or to force a consent search. The only evidence presented at the hearing were requests made by the officers to search. The officers did not use coercive tactics and did not take unlawful advantage of an arrest situation to obtain defendant's consent. In fact, defendant was never arrested by the officers once the drugs were turned over. She received a summons and information filed at a later date.

The third factor is whether the officers made "a mere request to search." Defendant argues that because the officers requested to search numerous times, that renders the consent involuntary. Both officers testified at the hearing that defendant's answers to the questions were unclear and that is why she was asked numerous times whether the officers could search her home. The Court finds that because her answers were unclear, the officers were entitled to ask further questions to clarify her responses. Her answers centered on she did not know what to say and she shook her head in the negative to compound questions. Even though the officers requested to search more than once, their repeated requests were proper given the responses of the defendant.

In reviewing the fourth factor of whether the defendant cooperated in the search, the officers were present because defendant's baby was being taken into custody by Department of Family Services


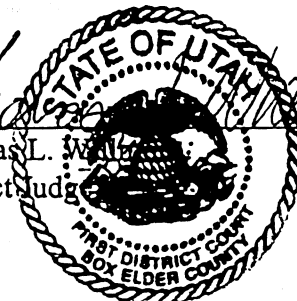
because the infant had tested positive for illegal substances. The officers testified that there was discussion with the defendant concerning illegal drugs and the fact that they were destroying her life and her family. The defendant nodded her head in the affirmative to this fact. After the officers had talked to her and told her they would not take her to jail if she gave the drugs to them, the defendant walked over to her purse and pulled out a yellow case containing illegal drugs and paraphernalia, which was given to the officers. The defendant cooperated with the officers. The defendant further cooperated with the officers by reviewing and signing a Permission To Search, which allowed the officers to search defendant's residence. This factor strongly shows the consent was voluntary, given the surrounding circumstances.

The final factor to be reviewed is whether there was any deception or trick on the part of the officer in obtaining defendant's consent. Defendant argues that the promise by Officer Crapse that he would not take the defendant to jail if she turned over the drugs is coercive or amounts to deception or trick on the part of the officer. In this case, Officer Crapse testified that he promised to not take the defendant to jail "today" and he was not going to arrest the defendant at that time if she turned over the illegal drugs she had in her possession. Officer Crapse did not say, "I'm taking you to jail, unless you will give me the drugs." On the contrary, Officer Crapse's statement was quite the opposite, "If you give me the drugs, I will not take you to jail today or arrest you today." Officer Crapse had no authority or ability to arrest her or take her to jail at that time. Furthermore, he did not use any deception or trick to obtain defendant's consent. The Court finds that the promise made by the officers was not deceptive or coercive.

Also, when these facts are reviewed with the fact that defendant's baby was being removed from her home because the baby tested positive for an illegal drug, there was clearly no deception or trick on the part of the officer. In fact, the officer did not arrest the defendant or take her to jail that day when the illegal drugs were furnished to the officers.

Based upon the totality of the circumstances, as presented to the Court at the Suppression hearing, the Court finds that defendant's presentation to the officers of the yellow case containing illegal substances and a glass pipe was voluntary and that defendant's consent to search her residence was voluntary. Therefore, the Court denies defendant's Motion to Suppress Evidence.

DATED this 13 day of October, 1999.

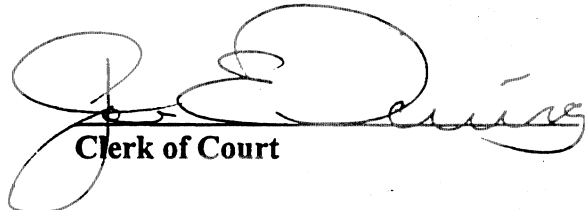

Thomas L. Walle
District Judge


CERTIFICATE OF MAILING

I hereby certify that on the 13th day of October, 1999, I mailed a true and correct copy of the foregoing Memorandum Decision, in the case of *State vs. Evans*, case number 991100182 as follows:

**Jon J. Bunderson
Box Elder County Attorney
45 North First East
Brigham City, Utah 84302**

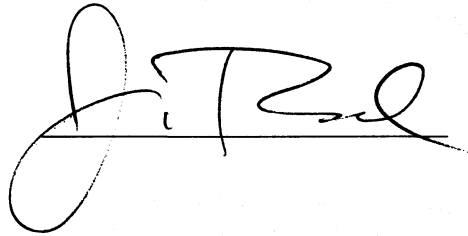
**Dale M. Dorius
Justin C. Bond
Attorneys At Law
P. O. Box 895
29 South Main
Brigham City, Utah 84302**


Clerk of Court

CERTIFICATE OF MAILING

I hereby certify that on the 12 day of June, 2000, I caused to be mailed, postage prepaid, two true and exact copies of BRIEF OF APPELLANT to:

CHRISTINE SOLTIS
Office of the Utah Attorney General
Post Office Box 140854
160 East 300 South, 6th Floor
Salt Lake City, Utah 84114

A handwritten signature in black ink, appearing to be "J. T. R. L.", written over a horizontal line.