

1989

Larry J. Zissi v. State Tax Commission of Utah : Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Larry J. Zissi v. State Tax Commission of Utah*, No. 890317.00 (Utah Supreme Court, 1989).
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UTAH SUPREME COURT

BRIEF

890317

IN THE SUPREME COURT OF THE
STATE OF UTAH

LARRY J. ZISSI,)	CASE NO. 890317
)	
Petitioner,)	ARGUMENT PRIORITY
)	CLASSIFICATION 14(a)
vs.)	
)	
STATE TAX COMMISSION OF)	
UTAH,)	
)	
Respondent.)	

BRIEF OF PETITIONER

Petition for Review of Findings of Fact, Conclusions
of Law, Final Decision of the Utah State Tax Commission

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FILED
5 1989

Clerk, Supreme Court, Utah

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STATEMENT OF JURISDICTION OF THIS COURT AND
DESCRIPTION OF THE NATURE OF THE PROCEEDINGS BELOW

This matter is before the Supreme Court on Petition for Review of an adverse determination by the Utah State Tax Commission in a formal adjudicative proceeding on Petitioner Larry Zissi's Petition for Redetermination of a jeopardy tax assessment against him under the provisions of the Illegal Drug Stamp Tax Act, Utah Code Annotated § 59-19-101 et seq. (1953, as amended).

The Supreme Court has jurisdiction over this Petition for Review pursuant to Utah Code Annotated § 63-46b-16 and Utah Code Annotated § 78-2-2(3)(e)(ii) (1953, as amended).

ISSUES PRESENTED FOR REVIEW

1. Should the Tax Commission have granted Zissi's motion to suppress evidence of the pills on which the tax was based because their discovery was the result of an unconstitutional roadblock seizure?

2. Did the Tax Commission err in ruling that the amphetamines at issue were not taxable by weight?

3. Did the Tax Commission err in its construction the statutory term "dosage units"?

4. Does the Illegal Drug Stamp Tax Act violate Zissi's constitutional right to equal protection?

5. Is the Illegal Drug Stamp Tax Act unconstitutionally vague?

6. Does the Illegal Drug Stamp Tax Act violate

petitioner's right to freedom from self-incrimination?

7. Is the tax assessed in this case an unconstitutionally excessive fine?

CONSTITUTIONAL PROVISIONS AND STATUTES
BELIEVED DETERMINATIVE

Petitioner believes that the interpretation of the following statutes and constitutional provisions is determinative in this case. The complete text of the statutes and constitutional provisions cited is included in Addendum A attached at the end of this brief:

Utah Code Annotated § 59-19-103 (1953, as amended)

United States Constitution, Amendment IV

United States Constitution, Amendment V

United States Constitution, Amendment VIII

United States Constitution, Amendment XIV

Utah Constitution, Article 1, Section 7

Utah Constitution, Article 1, Section 9

Utah Constitution, Article 1, Section 12

Utah Constitution, Article 1, Section 14

Utah Constitution, Article 1, Section 24

STATEMENT OF THE CASE

This is a petition for review of a determination of the State Tax Commission upholding a jeopardy assessment of \$22,000.00 in tax and \$22,000.00 in penalties against petitioner

Larry Zissi (hereinafter "Zissi") under Utah's Illegal Drug Stamp Tax Act, U.C.A. § 59-19-101 et seq. (1953, as amended) (the "Stamp Tax").

The facts as found by the Tax Commission or, where no findings were made on factual issues, all relevant evidence on those issues, are as follows. On June 4, 1988, Zissi was stopped at a driver's license roadblock while driving his 1983 Chevrolet pickup truck. (Findings of Fact R.6). The roadblock was set up by five officers, including St. Doug Whitney and four deputies. (R.99). Sgt. Whitney was in charge of setting up the roadblock, and it was set up at his instigation. Sgt. Whitney is a sergeant on patrol with the Utah County Sheriff's Department. (R.101). It was Sgt. Whitney's decision to set up the roadblock (R.102). He gave his deputies verbal instructions to stop every vehicle for a driver's license and registration, to make sure that everything was current and up to date. No written instructions were given. He also told his deputies that if they found other violations to take appropriate action. That was the extent of the directions he gave. (R.102).

The roadblock was set up on State Road 73 at Fairfield, and was set up from 3:00 to 6:00 p.m. The deputies placed signs 100 yards before the roadblock which said "Sheriff's Office Roadblock Ahead." At the roadblock itself, there were

approximately eight pylon cones placed twenty to thirty feet apart. Then there was a cone with the sign "Sheriff's Roadblock Ahead." (R.98-100).

After Mr. Zissi's vehicle was stopped at the roadblock, one of the deputies smelled an odor of marijuana. (R.102). After directing Mr. Zissi to drive to the side of the road, Mr. Zissi handed over a baggy of marijuana. (R.103). The officers then searched the vehicle and located a shaving cream bag behind the driver's seat of the pickup (R.103). Inside that bag were found what appeared to be crosstop pills. (R.104). Wayne Holman of the Tax Commission later counted the pills and determined that there were more than 500 and there were some that had been broken in pieces in transport and some had become powdered fragments. He counted the total number as 519. (R.129).

Attached as Exhibit "B" to the Respondent's Brief submitted after the conclusion of the hearing was a document on Utah County Sheriff letterhead dated October 11, 1984, prepared by Lt. David Lamph regarding roadblocks. This document requires no need for establishment of a license and registration roadblock, places no restrictions on where or when such roadblocks will be instituted other than they are to be in a "safe location," places no restrictions on how to choose which cars will be stopped, and apparently allows driver's license and registration

roadblocks to be set up in the discretion of any sergeant on patrol in the field for the Utah County Sheriff's Department. (R.46-47).

After being advised by the Utah County Sheriff's Office of the seizure, the Utah State Tax Commission issued a jeopardy assessment against Mr. Zissi for tax and penalty totalling \$44,000.00. (Exhibit 8, R.195-198). U.C.A. § 59-19-103 provides in relevant part as follows:

- (1) A tax is imposed on marihuana and controlled substances as defined under this chapter at the following rates:
 - (a) . . .
 - (b) On each gram of controlled substance or each portion of a gram, \$200; and
 - (c) On each 50 dosage units of a controlled substance that is not sold by weight, or portion thereof, \$2,000.

The statute contains no definition of the term "dosage units." Although the Tax Commission is authorized to adopt rules necessary to enforce the Illegal Drug Stamp Tax Act, U.C.A. § 59-19-107(1), the Tax Commission has not issued any. (R.125).

In making its jeopardy assessment, the Tax Commission first determined that the tax should be assessed under Subparagraph (c) on the number of dosage units of a controlled substance that is not sold by weight, rather than under Subparagraph (b) according to the weight of the controlled substance.

The Tax Commission found that amphetamines such as these are sold as pills and not sold by weight. (Findings of Fact 13, R.7). Gary Nuffer of the Tax Commission testified that his only basis for assessing the pills in this case according to the number of pills was "in our dealings and in our policy or procedures that we've done this that these were not sold by weight. They were sold by units." (R.122).

Wayne Holman, an investigator for the Tax Commission, testified that amphetamines are sold by weight in powder form. He stated that if these pills had been ground into powder form, they would be taxed by weight. (R.128). He said they look at the form of the substance to determine whether it was sold by weight or otherwise. (R.128). He agreed he had no knowledge of whether the pills in this case had been sold by weight or by the number of pills. (R.128).

Loni DeLand, a criminal defense attorney and former narcotics agent, testified that amphetamines can be used by injection, inhalation, ingestion or by suppositories. They can be used any of these ways whether the amphetamines are purchased as a pill or as a powder. In order to inject them, you would have to grind up the pills into powder form. He testified that amphetamines are primarily sold by weight in powder form. He didn't recall purchasing pills by weight, but supposed they could be. (R.138).

Kendra Herlin, a narcotics agent called by the Tax Commission, testified that she had not seen amphetamine tablets sold by weight. (R.158). She said crystal methamphetamine powder is more expensive than pills. (R.169).

After determining that the amphetamines which had been seized should be taxed at the rate of \$2,000.00 per each 50 dosage units, the Tax Commission construed each pill as a "dosage unit" under the statute. (Findings of Fact 12, R.7).

Gary Nuffer's understanding of the term "dosage" is "what you would consume at one time." (R.123). But based on the advice of the Commission's investigator, Wayne Holman, he imposed a tax based on one pill being one dosage unit. (R.122). Mr. Nuffer said that the Commission would construe one pill to be one dosage unit regardless of the size of the pill. (R.124). Wayne Holman said he advised Mr. Nuffer that each pill is a dosage unit. (R.127). He said "by definition, . . . a dose would be something prescribed by a medical physician. And a unit, by definition, is one item." (R.127). He had no information on the quantity of amphetamines generally prescribed by a physician. (R.128).

Loni Deland was asked what dosage unit means, and said that depends to a degree on a person's tolerance. (R.139). Some people inject 1/2 gram in one dosage and sometimes more. He'd seen people take them by the pill form--probably as little

as 5 at a time on some occasions. Typically, people would buy 100 pills and soak the entire thing and inject it. (R.140). He testified that the term "dosage unit" would have a definite meaning for a legal drug. There is a legal methamphetamine on the market--Desoxyn. He said for the pills which were seized, there is no legal dosage unit, and that to him the dosage unit is what the abuser takes--1/2 gram is not unusual, and a truck driver will probably take somewhat less. He said in these pills, at 1/2 gram a dosage unit, there would be 5 dosage units. (R.140-41).

Neither of the dictionaries excerpted as exhibits had definitions for "dosage unit" or for "unit dose." (Exhibits 9 and 10, R. 199-206). Steadman's Medical Dictionary defines dosage as:

1. The giving of medicine or other therapeutic agent in prescribed amounts.
2. The determination of the proper dose of a remedy. Often incorrectly used for the word dose.

Webster's Third New International Dictionary defines dosage as including:

- 1.a. The amount of medicine or other therapeutic agent prescribed or proper for a given patient or illness. . .
- 2.a. Addition of some ingredient or application of or treatment with some agent in one or more measured doses

Both dictionaries defined a dose in essentially the same terms.

The Webster's Dictionary defined dose as:

The measured quantity of a medicine or other therapeutic agent to be taken at one time or in a period of time.

Steadman's Medical Dictionary defines unit as:

1. One, a single person or thing. 2. A standard of measure, weight or any other quality, by multiplications or fractions of which a scale or system is formed. 3. A group of persons or things considered as a whole because of mutual activities or functions.

Webster's Third New International Dictionary describes unit, in relevant part as:

1.a.(1): The first natural number; the number that is the least whole number and is expressed by the number one, (2) a single thing that constitutes an undivided whole. . . .(c) a determinate quantity as of length, time, heat, value, or housing, adopted as a standard of measurement for other quantities of the same kind.

The value of the pills seized was between \$75.00 and \$150.00. (R.139, 161).

SUMMARY OF ARGUMENTS

Mr. Zissi's motion to suppress all evidence of the pills seized in this case should have been granted, and the jeopardy assessment for possession of the pills voided. The exclusionary rule applies in tax proceedings, and is especially applicable to this quasi-criminal tax proceeding, just as it applies in forfeiture proceedings. The seizure of Mr. Zissi and his vehicle at the roadblock in this case violated his

Fourth Amendment rights because his privacy rights were invaded at the unfettered discretion of officers in the field, who determined when, where, and how to set up the roadblock without any plan instituted by administrative level personnel.

Because the United States Supreme Court has not ruled on the issue presented, this Court should base its decision on Utah constitutional grounds. Further, there is no reason to allow an exception to the warrant requirement for roadblocks, and this Court should hold that a statute authorizing roadblocks and setting forth a procedure for obtaining warrants for roadblocks is required for a valid roadblock under the Utah Constitution.

Because of the evidence that amphetamines are a controlled substance which is sold by weight, it was improper to tax the amphetamines in this case on a per pill basis. The Tax Commission's construction of the Tax Stamp statute liberally, rather than strictly, construes the statute and yields a result which violates Mr. Zissi's right to equal protection by imposing disproportionate taxation on the same controlled substance depending only on the meaningless distinction of whether it is seized in pill or powder form. Since there is no evidence of the weight of the pills or that they were of taxable weight, the jeopardy assessment should be invalidated.

Even if these amphetamines should be taxed according to the number of "dosage units" they contain, a person of

ordinary intelligence would understand that term to mean the amount of a controlled substance which comprises a dosage. The Tax Commission adopted a liberal definition to maximize taxability, but that definition is known only to those in the medical profession. The interpretation that a dosage unit means one pill makes the statute in violation of Mr. Zissi's right to due process by adopting an unconstitutionally vague definition of the term "dosage units." The evidence shows the dosage for the pills involved to be at least five, and closer to 50 pills. The assessment against petitioner should be reduced to reflect this.

The Stamp Tax statute does not prohibit the Tax Commission from providing law enforcement authorities information relevant to determining the identity of stamp purchasers. It also requires the stamps to be affixed to the controlled substances they relate to. The purchase and display of the stamps create an appreciable risk of supplying a vital link in a prosecution for possession of controlled substances -- the identity of those in possession and their knowledge of the illegal nature of the substance. The Stamp Tax therefore violates Mr. Zissi's right to freedom from self-incrimination under the Utah and United States Constitutions.

The prohibitions against excessive fines found in the United States and Utah Constitutions apply with regard

to the essentially criminal Stamp Tax law. Because a person in possession of amphetamine pills is subject to a huge fine while a person in possession of the same quantity of amphetamine powder is not taxed, the Stamp Tax violates the principle of proportionality incorporated in the prohibition against excessive fines.

ARGUMENT

I.

THE STANDARD OF REVIEW

Utah Code Annotated §63-46b-16(4) gives guidance as to the standard of review of the Tax Commission's determinations of fact and of law. This Court should grant relief if, on the basis of the agency's record, Mr. Zissi has been prejudiced by any of the following:

(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

. . .

(c) the agency has not decided all of the issues requiring resolution;

(d) the agency has erroneously interpreted or applied the law;

. . .

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court.

The facts stated above marshall all evidence presented to the Commission on the factual questions impliedly determined against him. Scharf v. BMG Corp., 700 P.2d 1068 (Utah 1985).

II.

ALL EVIDENCE OF THE PILLS SEIZED IN
THIS CASE AND ON WHICH THE TAX IS BASED SHOULD BE
SUPPRESSED BECAUSE THEY ARE THE FRUIT OF AN
UNCONSTITUTIONAL ROADBLOCK SEIZURE

A. The Exclusionary Rule Applies in this Proceeding.

Courts have held that the Fourth Amendment exclusionary rule is applicable in a federal civil tax proceeding. Efriant Suriez, 58 T.C. 792 (1972); Pizzarello v. United States, 408 F.2d 579 (2d Cir. 1969); United States v. Blank, 261 F. Supp. 180 (N.D. Ohio 1966); Vander Linden v. United States, 502 F. Supp. 693 (S.D. Iowa 1980).

Policy reasons also favor application of the exclusionary rule in tax proceedings. Evidence relating to tax matters often depends on the most personal of a person's effects and papers, and would often be located in the home. The power of taxation is broad and those charged with enforcing it are often perceived as oppressive. The exclusionary rule should apply to prevent a positive incentive for Tax Commission and law enforcement authorities to violate constitutional rights of taxpayers in order to find evidence to raise tax revenues. Thus, the exclusionary rule should apply in state tax proceedings.

Particularly in this case for the enforcement of the Stamp Tax, the exclusionary rule should apply. In One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965), the Supreme Court held that the exclusionary rule applies to civil forfeiture proceedings. The Supreme Court noted that the leading case on the subject of search and seizure is Boyd v. United States, 116 U.S. 616 (1886) which was itself not a criminal case but a proceeding by the United States to forfeit property. The Supreme Court stated that

A forfeiture proceeding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law It would be anomalous indeed under these circumstances, to hold that in the criminal proceeding the illegally seized evidence is excludible, while in the forfeiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible. One Plymouth 1958 Sedan v. Pennsylvania, supra at 700-701.

This unusual tax proceeding, like a forfeiture proceeding, involves an additional penalty imposed upon the illegal possession of controlled substances. The fact that the legislature has chosen to do so by a tax does not change the character of the proceeding. Just as the Supreme Court noted in the forfeiture situation, the penalties to be imposed upon petitioner by the tax and tax penalty in this case far exceed any penalties which could be criminally assessed against him for possession of the controlled substances or even the criminal penalty

for failure to obtain the illegal drug stamps. In this situation, particularly, it is clear that the exclusionary rule must apply.

B. The Roadblock Involved in this Case was an Unconstitutional Seizure, and the Evidence Resulting from that Seizure must be Suppressed.

In Delaware v. Prouse, 440 U.S. 648 (1979), the Supreme Court held that a patrolman's stopping of a vehicle without reasonable suspicion to check for license and registration was an unconstitutional seizure, and that the evidence discovered as a result of the patrolman's seizing marijuana in plain view on the car floor must be suppressed. First, the Court held that the Fourth and Fourteenth Amendments are implicated because stopping an automobile and detaining its occupants constitutes a "seizure" within the meaning of those amendments, even though the purpose of the stop is limited and the resulting detention quite brief. Id. at 654. The Court summarized its decision as follows:

We hold that except in those situations where there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and registration of the automobile are unreasonable under the Fourth Amendment. This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve

less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative. Id. at 664.

In reaching this decision, the Supreme Court stated that 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. Id. at 665. The Supreme Court recognized that the State had an interest in assuring the safety of its roadways, but held that discretionary spot checks of license and registration in service of those interests did not justify the intrusion upon Fourth Amendment interest which such stops entail. The Court noted that the primary method of enforcing traffic and vehicle safety regulations is acting upon observed violations, that drivers without licenses are presumably the less safe drivers whose propensities may well exhibit themselves, and that in the absence of empirical data to the contrary, "it must be assumed that finding an unlicensed driver among those who commit traffic violations is a much more likely event than finding an unlicensed driver by choosing randomly from the entire universe of drivers." Id. at 660.

The United States Supreme Court has stated a three-factor test or analysis in balancing the competing interests to determine the reasonableness of warrantless searches or seizures as:

[A] weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty. Brown v. Texas, 443 U.S. 47, 51-55 (1979)

The easiest and most common fallacy in "balancing" is to place on one side the entire, cumulated "interest" represented by the state's policy and compare it with one individual's interest in freedom from specific intrusion on the other side. ... [cite] A fairer balance would weigh the actual expected alleviation of the social ill against the cumulated interests invaded.

City of Seattle v. Mesiani, 110 Wash.2d 454, 755 P.2d 775, 778 (1988).

In applying these factors to the situation of warrant-less roadblock seizures, the Supreme Court of Kansas has set out what it considered to be relevant factors.

Among the factors which should be considered are: (1) The degree of discretion, if any, left to the officer in the field; (2) the location designated for the roadblock; (3) the time and duration of the roadblock; (4) standards set by superior officers; (5) advance notice to the public at large; (6) advance warning to the individual approaching motorists; (7) maintenance of safety conditions; (8) degree of fear or anxiety generated by the mode of operation; (9) average length of time each motorist is detained; (10) physical factors surrounding the location, type and method of operation; (11) the availability of less intrusive methods for combatting the problem; (12) the degree of effectiveness of the procedure; and (13) any other relevant circumstances which might bear upon the test. Not all of the factors need to be favorable to the state but all which are applicable to a given roadblock should be considered. Some, of course, such as unbridled discretion of the officer in the field would

run afoul of Prouse regardless of other favorable factors. State v. Deskins, 673 P.2d 1174, 1185 (Kan. 1983). (emphasis added)

Courts of other states have adopted or approved the considerations set out by the Kansas Court. State v. Jones, 483 So. 2d 433 (Fla. 1986); Webb v. State, 695 S.W.2d 676 (Tex. App. 1985). Each of these cases also recognized that some factors can prove fatal to a roadblock regardless of the existence of other favorable conditions. In Webb v. State, supra, the Texas court specifically agreed that such a factor is the unbridled discretion of an officer in the field. Id. at 681. In that case, the court stated:

The only criteria supporting the constitutionality of the roadblock in question is that every car was stopped. . . . The only evidence of "an overall plan" is the testimony of the field officer that he didn't just indiscriminately happen to pick a street. The record contains no specific standards established by superior officers for setting up the roadblock or to structure the procedure to be followed by the officers present at the scene. The Fourth Amendment requires an actual showing that the proper procedures were followed at the time of the inspection. Id. at 683 (emphasis in original).

Other cases after Delaware v. Prouse, supra, have held that roadblocks established at the discretion of officers in the field constitute illegal seizures, the fruits of which must be suppressed. In State v. Crom, 222 Neb. 273, 383 N.W.2d 461 (1986), the Supreme Court of Nebraska held that evidence of intoxication had been illegally obtained as the result

of an unconstitutional roadblock stop and had to be suppressed. In that case, four or five patrolmen and a Sergeant determined to set up a transitory checkpoint at which every fourth vehicle reaching it would be stopped. The field officers were not acting under any standards, guidelines or procedures promulgated by the policy makers for the police department. The Nebraska Court quoted Delaware v. Prouse, supra, regarding a discretionary stop for license and registration checks as follows:

This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the officer in the field be circumscribed, at least to some extent. State v. Crom, supra at 463.

The Court also quoted the following language from Brown v. Texas, 443 U.S. 47 (1979):

A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field.

The Supreme Court of Nebraska then stated:

The uncontradicted evidence in the case before us is that there was no plan formulated at the policymaking level of the Omaha police department, or elsewhere, which considered, weighed, and balanced the factors enumerated in Delaware and Brown. Rather, a six-or-seven-person unit within the department, commanded by a field sergeant, was left free to decide when, where, and how to establish and operate the transitory checkpoint in question. The checkpoint was thus subject to the constitutional infirmity found to exist in both Delaware and

Brown; that is, a driver's reasonable expectation of privacy was rendered subject to arbitrary invasion solely at the unfettered discretion of officers in the field. Id. at 463.

The South Dakota Supreme Court similarly found a roadblock unconstitutional when set up at the discretion of officers in the field, stating "in the absence of record evidence that the decision to establish the roadblock was made by anyone other than the officers in the field, the roadblock in question [has] certain characteristics of a roving patrol" namely, an appreciable risk of an arbitrary basis for the site or time decision. State v. Olgaard, 248 N.W.2d 392 (S.D. 1976).

Simmons v. Commonwealth, 380 S.E.2d 656 (Va. 1989) involved a situation very similar to that presented in this case. There, two Virginia State Troopers set up a roadblock to check driver's licenses, registration and equipment. They stopped all vehicles entering the roadblock. They established the roadblock without any prior direction from their supervisors and without an existing plan. The troopers had total discretion regarding where and when they would set up the roadblock. The trial court held that because all traffic was stopped and checked, the seizure did not violate Simmons' Fourth Amendment rights, but the Supreme Court of Virginia reversed. The court stated:

We do not read Prouse to stand for the proposition that stopping all traffic at a roadblock constitutes sufficient restraint on the exercise of discretion

by police officers to transform the stop into a constitutionally valid roadblock. . . . [T]he roadblock also must be undertaken pursuant to an explicit plan or practice which uses neutral criteria and limits the discretion of the officers conducting the roadblock. The evidence in this case establishes that the decision to establish the roadblock as well as its location and duration was solely within the discretion of the troopers. No advance approval or authoriztion from any supervisor or superior officer was required to set up the roadblock. Id. at 658-59.

Other cases holding roadblock seizures unconstitutional because of insufficient constraints on the discretion of officers in the field include State ex rel. Ekstrom v. Justice Court, 136 Ariz. 1, 663 P.2d 992 (1983); State v. Smith, 674 P.2d 562 (Okla. Cr. 1984); and State v. Marchand, 104 Wash. 2d 434, 706 P.2d 225 (1985).

The roadblock in this case suffered from the same constitutional infirmities as the cases just cited. Particularly, it involves the fatal defect of unbridled discretion of the officers in the field. Sgt. Whitney, the field officer, a sergeant on patrol who was at the roadblock and in charge of the other officers there, personally made the decision to set up the roadblock. None of the officers were given written directions about how to set it up or the duration of it or how to proceed. Clearly, there was no administrative level decision, nor any plan instituted after carefully balancing the interests to be served by the roadblock against the intrusion

on privacy of all the people to be stopped at the roadblock prior to its implementation. Everything about the roadblock was left to the discretion of the officers in the field and the precise dangers present in the cases just cited, and condemned in Delaware v. Prouse were present. For that reason, the roadblock stop constituted an unconstitutional seizure, and the evidence discovered as a result of that seizure must be suppressed.

In an attempt to show some sort of administrative level decision regarding the roadblock at issue in this case, the Collection Division of the Tax Commission attached Exhibit "B" to its Brief of Respondent before the Tax Commission (R. 46-47), which purports to be the roadblock policy of the Utah County Sheriff. That purported policy is not part of the record at the hearing and could not be considered by the Tax Commission or by this Court. This was a formal hearing under the provisions of Chapter 46b of Title 63, Utah Code Annotated. Utah Code Annotated §63-46b-10(1)(a) requires the hearing officer to make findings of fact "based exclusively on the evidence of record in the adjudicative proceedings or on facts officially noted."

The purported Utah County roadblock policy was not presented at the hearing, was not given under oath, is not part of the record, and should be disregarded. Even if it

could be considered, the purported policy contains no meaningful limits on the discretion of officers in the field. It contains no limitations on the field officer's selection of a site for a license and registration roadblock. It does not contain any requirement that there be a showing or any existence of need for license and registration roadblocks. It contains nothing limiting the officers' discretion in how to choose what cars to stop, and contains nothing about the procedures to be used -- how long to detain cars, what should be said to those who are stopped, or anything at all about methods to be used to limit the intrusion on drivers' privacy in conducting such a roadblock.

Other factors also indicate that the constitutional balancing required tips the balance toward unconstitutionality of the roadblock at issue here. The governmental interest involved is to locate people driving without valid licenses or registration. While admittedly a valid interest, the importance of that interest should not be blown out of proportion. Preventing drunk driving, for example, is certainly a much more important interest. There is no evidence in this case of any problems experienced by the Utah County Sheriff's Office regarding unlicensed drivers or unregistered vehicles. There is no evidence that the less intrusive method of making stops only on articulable suspicion of violations is not more effective

in locating unlicensed drivers or unregistered vehicles. The United States Supreme Court in Prouse noted that it could be assumed that unlicensed drivers would be those more likely to be stopped for traffic violations. There is no evidence of the effectiveness of the roadblock procedure in this case. The record at the hearing contains no evidence of the number of vehicles stopped or the number of license and registration violations discovered. There is no evidence of advance notice to the public. The advance warning to motorists occurred 100 yards before the roadblock. If the roadblock in this case were found to be constitutional, any policeman anywhere for no reason at all could on his own initiative set up a roadblock and detain every single car and driver at his absolute discretion to seek evidence of violations of which he has no knowledge or even suspicion. The seizure of Mr. Zissi and his vehicle violated the Fourth Amendment. All evidence of the pills seized from him should be suppressed, and the jeopardy assessment against him invalidated.

C. The Roadblock in This Case Resulted in an Unconstitutional Seizure under the Utah Constitution.

Article I, Section 14 of the Utah Constitution also protects against unreasonable searches and seizures in terms nearly identical to the Fourth Amendment. This Court has indicated an interest in separate constitutional analysis

under the Utah Constitution, and has held out at least the possibility of giving the Utah Constitutional provision separate vitality.

Indeed, choosing to give the Utah Constitution a somewhat different construction may prove to be an appropriate method for insulating the state's citizens from the vagaries of inconsistent interpretations given the Fourth Amendment by the Federal Courts. State v. Watts, 750 P.2d 1219, 1221 n.8 (Utah 1988).

In this case, involving warrantless roadblock seizures, it is appropriate for this Court to rest its ruling on independently sufficient state constitutional grounds.

The first reason for doing so is that there is no definitive statement from the United States Supreme Court regarding the constitutional permissibility of warrantless roadblock stops. Without knowing the precise limits which the United States Supreme Court might set, this Court has the opportunity to say that under the Utah Constitution, the roadblock set up in this case at the absolute discretion of officers in the field is an impermissible invasion of constitutionally protected rights. This is so for all the reasons set forth in the cases cited in the preceding section. It is also the approach taken by the Appellate Division of the New Jersey Superior Court in State v. Kirk, 202 N.J. Super. 28, 493 A.2d 1271 (N.J. App. 1985). In that case, the court relied on Article I, Paragraph 7 of the New Jersey Constitution,

even though it is almost identical in wording to the Fourth Amendment. The New Jersey Court analyzed only cases involving the Fourth Amendment in arriving at this decision, but determined to rest its decision on state constitutional grounds by following the lead suggested by Justice O'Connor in Michigan v. Long, 463 U.S. 1032, 1041 (1983), in which she stated:

It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions.

The New Jersey Court in State v. Kirk, supra, concluded that a roadblock set up in the absolute, unbridled discretion of officers in the field was unconstitutional under the New Jersey Constitution.

The second reason for resting a decision in this case on adequate state constitutional grounds is that the developing interpretations of law under the Fourth Amendment and under Delaware v. Prouse, supra, simply provide inadequate protection for the vast majority of innocent motorists who might be subjected to warrantless roadblock seizures of their vehicles at the whim of the police. Requiring a roadblock to be approved and carried out under a plan formulated by supervisory administrative officials in the police department is not sufficient protection. There is nothing to require an adequate balancing of the competing interests in advance in such a system. Generally, warrantless searches and seizures

which have been held reasonable have been upheld because of the need to act before a warrant could be obtained. Such considerations have resulted in Terry stops on reasonable suspicion, searches incident to arrest, and searches of automobiles based on probable cause. But the situation in a roadblock is much different. It is carefully planned in advance. There is nothing to prevent some prior authorization for the roadblock, either in the form of a warrant issued by a judicial officer or a legislative enactment providing for such roadblocks, or both. The situation of roadblocks presents no reason for abandoning the check and balance of having a non-executive level decision authorizing a roadblock in advance.

The State of Idaho held roadblocks instituted for the purpose of detecting driving under the influence of alcohol to be unconstitutional under the Idaho Constitution, where the roadblocks were instituted without express legislative authority, particularized suspicion of criminal wrongdoing, or prior judicial approval. State of Idaho v. Henderson, 114 Idaho 293, 756 P.2d 1057 (1988). The Idaho provision, like the Utah provision, is virtually identical to the Fourth Amendment. The Idaho Court stated that:

Roadblocks are an inefficient and unnecessary constraint on a person's right to remain free of search or seizure absent probable cause. Id. 756 P.2d at 1061. (emphasis in original)

The Court also noted that the roadblocks were not conducted

pursuant to authority granted by the Idaho Legislature. Id. Similarly in Utah, there is no legislative authority for roadblocks. The Idaho Court quoted from a Pennsylvania case as follows:

While the arguments supporting the constitutionality of systematic roadblocks are persuasive, the rational supporting them is flawed. No amount of control or limited discretion can justify the "seizure" that takes place in the complete absence of probable cause or reasonable suspicion that a motor vehicle violation has occurred. Id. at 1062.

The Idaho Court also quoted State v. Smith, 674 P.2d 562, 564-65 (Okla. App. 1984), as follows:

The court finds such activities by law enforcement authorities, while commendable in their ultimate goal of removing DUI offenders from the public highways, draw dangerously close to what may be referred to as a police state. Here, the state agencies have ignored the presumption of innocence, assuming that criminal conduct must be occurring on the roads and highways, and have taken an "end justifies the means" approach. . . . [A] basic tenet of American jurisprudence is that the government cannot assume criminal conduct in effectuating a stop such as the one presented herein. Were the authorities allowed to maintain such activities as presented in this case, the next logical step would be to allow similar stops for searching out other types of criminal offenders. State v. Henderson, supra, 756 P.2d at 1063.

Without determining exactly what would be required to uphold a roadblock, the Idaho Supreme Court held that:

Where police lack express legislative authority, particularized suspicion of criminal wrongdoing and prior judicial approval, roadblocks established to apprehend drunk drivers cannot withstand

constitutional scrutiny. Id.

The Washington Supreme Court has found DUI roadblocks to be in violation of the Washington Constitution. City of Seattle v. Mesiani, 110 Wash.2d 454, 755 P.2d 775 (1988). The Washington Constitutional provision prohibits disturbing a person in his private affairs or invading his home "without authority of law." In that case, because the City of Seattle failed to show that the DUI roadblock fell within an exception to the warrant requirement, the roadblock was held unconstitutional under the Washington Constitution.

The Oregon Supreme Court held that a roadblock violated Article I, Section 9 of the Oregon Constitution where there was no statutory or judicial authorization for the roadblock given in advance. The Oregon constitutional provision provides:

No law shall violate the right of the people
... against unreasonable search, or seizure,
and no warrant shall issue but upon probable
cause.

The Oregon Supreme Court summarized its decision as follows:

Neither the state nor the county officials
point to a statute or ordinance establishing
an administrative scheme allowing sobriety
roadblocks to prevent driving while intoxicated.
Nelson v. Lane County, 304 Or. 97, 743 P.2d
692 (1987).

There is also analogous Utah precedent. In Industrial Commission v. Wasatch Metal & Salvage Co., 594 P.2d 894 (Utah 1979), this Court held that administrative searches under

the Utah Occupational Safety and Health Act of 1973 must be based on a warrant, and held a provision allowing searches without a warrant unconstitutional under the Fourth Amendment and under Article I, Section 14 of the Utah Constitution. Although it appears possible that federal constitutional law has deviated from the warrant requirement as to administrative seizures for drivers license roadblocks, this Court should treat an administrative seizure such as occurred in the roadblock in this case the same as it treated the administrative search in the case just cited, and require that roadblocks be instituted only after obtaining a proper warrant to conduct such an administrative seizure in advance of the institution of the roadblock. Such a procedure will provide real protections of the constitutional rights of the huge majority of innocent motorists, while also providing an avenue for proper roadblocks to be instituted when necessary in the opinion of a judicial officer outside the executive branch who is trained in performing the sort of constitutional balancing required. At the least, this Court should require statutory authorization for roadblocks in order to make the decision politically accountable.

III.
THE STATUTORY CONSTRUCTION IMPOSED
BY THE TAX COMMISSION TO TAX ZISSI
IN THIS CASE IS IMPROPER

A. Relevant Principles of Statutory Construction.

There are three relevant principles of statutory construction, each of which has been violated by the Tax Commission's decision upholding the huge tax assessed against Petitioner. Each of the principles is a common one. The first is that the terms of a statute should be given an interpretation and application which is in accord with their usually accepted meanings. Board of Education of Granite School District v. Salt Lake County, 659 P.2d 1030 (Utah 1983); Grant v. Utah State Land Board, 26 Utah 2d 100, 485 P.2d 1035 (1971). The second principle is that taxing statutes are strictly construed against the taxing authority and favorably to the tax payer. Continental Telephone Co. of Utah v. State Tax Commission of Utah, 539 P.2d 447 (Utah 1975). Thus, doubts as to meaning of terms in a tax statute are to be resolved in favor of the tax payer. Ogden Union Railway and Depot Company v. State Tax Commission, 16 Utah 2d 23, 395 P.2d 57 (1964), modified 16 Utah 2d 255, 399 P.2d 145 (1965). The third principle is that if by any reasonable construction the statute can be made to harmonize with constitutional provisions, it will be so construed. State v. Lindquist, 674 P.2d 1234 (Utah 1983); Timpanogos

Planning and Water Management Agency v. Central Utah Water Conservancy District, 690 P.2d 562 (Utah 1984). In this case, the Tax Commission failed to apply these provisions in two respects. First, by failing to assess taxes on the amphetamines seized on the basis of their weight. Second, by interpreting the statutory term "dosage unit" to mean each individual pill which was seized. Each of these issues will be discussed separately below in light of the principles of statutory construction just described.

B. Amphetamines Should Be Taxed By Weight.

U.C.A. § 59-19-103 imposes a tax on controlled substances as follows:

(b) On each gram of controlled substance, or each portion of a gram, \$200; and

(c) On each 50 dosage units of a controlled substance that is not sold by weight, or portion thereof, \$2,000.

The Tax Commission found that amphetamines are sold by the pill or quantity of pills when in pill form. That finding is not disputed, but its sufficiency to determine whether the amphetamine pills which were seized should not be taxed by weight is disputed. The uncontested testimony in this case is that amphetamines are generally sold in powder form and generally sold by weight. If these pills had been ground into powder form, they would be taxed according to weight.

The principles of statutory construction noted above require that these pills should have been assessed on their weight. First, tax statutes must be strictly construed against the taxing authority. There is no question that amphetamines are the controlled substance at issue here and that they are sold by weight. The statute makes no mention of the form of the substance. The tax on amphetamines should be assessed by weight, because it is not a "controlled substance that is not sold by weight." U.C.A. § 59-14-103(c). The tax would be much less based on the weight of the substance, in fact, the amount which was seized was probably not taxable based on weight. To allow the Tax Commission to assess a tax hugely out of proportion to the tax which would be assessed on a similar amount of amphetamine powder is not indicated by the terms of the statute and broadly, rather than strictly, construes the taxing authority under the statute.

Finally, the construction given by the Tax Commission exalts the form of the controlled substance over the controlled substance itself, and creates an equal protection problem in the enforcement of this statute, as will be discussed in Section IV below. In order to avoid the equal protection problem of greatly different taxes based upon possession of identical quantities of the same controlled substance, the Tax Commission should charge taxes on amphetamines on the

basis of weight, which is how they are generally sold.

The Tax Commission has authority to issue regulations under the Stamp Tax. U.C.A. § 59-19-107. By following appropriate rule-making procedures, the Tax Commission could interpret the statute and determine which controlled substances are sold by weight and which are not. But without such rules, it is improper for the Tax Commission to treat amphetamines as taxable by weight in some circumstances and by the number of pills in others, in order to impose the maximum conceivable tax in every case.

C. Even if the Tax Should be Assessed According to the Number of Dosage Units, the Tax Commission Erred in Construing Each Pill as a Dosage Unit.

U.C.A. § 59-19-103(1)(c) imposes a tax of \$2,000 "on each 50 dosage units of a controlled substance that is not sold by weight." There is no definition in the statutes of the term "dosage units." No regulations interpreting the statutes have been issued by the Tax Commission. There is no reasonable way to arrive at a single pill being a dosage unit if a pill does not constitute what a dosage would be. Under the dictionary definitions in the record, a reasonable interpretation of "dosage unit" is a standard measure of the amount of a controlled substance taken at one time. If 5 or 50 pills are taken as a dosage, that would be a dosage

unit, because it would be the amount of amphetamines taken as a dosage, which would be the single undivided whole dosage.

The Tax Commission gave a construction of the statute which disregards the meaning of the term dosage and equates the term dosage unit with unit dose, a term which all evidence indicates is not intelligible to the average person. The construction given by the Tax Commission does not give the words dosage unit their ordinary meaning. It gives those words a meaning known only in the medical profession, and a meaning contrary to the common understanding of the term dosage. Gary Nuffer clearly understood the meaning of the term dosage which he described as "what you would consume at one time." The Tax Commission simply hasn't followed the definition it understood of that term in assessing this tax. Rather than determine the meaning of "dosage units" by its common meaning, the Tax Commission liberally construed that term to provide for maximum taxation by equating each pill with a dosage unit. Finally, tax statutes are to be construed to avoid constitutional problems, and the construction of the term dosage units given by the Tax Commission creates a constitutional problem of vagueness, as will be discussed in Section V below, by giving a construction to the term which is not intelligible to the ordinary person.

For these reasons, this Court should hold that if

the tax should be based on the number of "dosage units," that term should be given the meaning which would be ascribed by ordinary people, which is the amount of controlled substance taken on the average by abusers. Petitioner has presented evidence that that amount is not less than 5 pills per dosage unit, and maybe as much as 100 pills.

IV.
THE TAX COMMISSION'S INTERPRETATION
OF THE STATUTE CREATES A VIOLATION OF
EQUAL PROTECTION

If the statute requires the Tax Commission to tax amphetamines on a per pill basis when in that form but on the basis of weight when in powder form, that violates Mr. Zissi's right to equal protection. He is guaranteed the right to equal protection of law by the Fourteenth Amendment to the United States Constitution and by Article I, Sections 7 and 24 of the Utah Constitution.

Equal protection protects against discrimination within a class. The legislature has considerable discretion in the designation of classifications but the Court must determine whether such classifications operate equally on all persons similarly situated. State Tax Commission v. Department of Finance, 576 P.2d 1297, 1298 (Utah 1978).

In applying that principle, this Court determined that the tax on one insurer from among a larger class of insurers to pay a tax imposed on no one else is arbitrary and constitutionally prohibited.

This Court has also noted that Article I, Section 24 of the Utah Constitution incorporates the same general fundamental principles as are incorporated in the equal protection clause but that construction of Article I, Section 24 is not controlled by federal courts' construction of the equal protection clause. Malan v. Lewis, 693 P.2d 661 (Utah 1984). In that case, in which the automobile guest statute was held to be in violation of equal protection, the Court stated the test for meeting equal protection standards.

Whether a statute meets equal protection standards depends in the first instance upon the objectives of the statute and whether the classifications established provide a reasonable basis for promoting those objectives. . . .

Article I, Section 24 protects against two types of discrimination. First, a law must apply equally to all persons within a class. [cites] Second, the statutory classifications and the different treatment given the classes must be based on differences that have a reasonable tendency to further the objectives of the statutes. [cite] If the relationship of the classification to the statutory objectives is unreasonable or fanciful, the discrimination is unreasonable. [cite]. Id. at 670-71.

Applying these standards to this case, the purpose of the Stamp Tax is to inhibit and punish those in possession of controlled substances. But the construction of the statute claimed by the Tax Commission, imposes a \$22,000 tax on Mr. Zissi for possession of amphetamine pills while admitting that if those pills had been crushed, the tax would be determined

by weight and in this case no tax would be payable, is arbitrary and capricious. The powder form of amphetamines must be regarded as the more dangerous form, being readily injectible. There is no reasonable basis on which a person possessing an equal amount of powdered amphetamines could receive no tax but this petitioner be taxed \$22,000 merely because of a difference in the form in which the identical controlled substance is discovered. If the Tax Commission's construction of the Stamp Tax statutes is correct, the statute must be unenforceable as in violation of the federal and state equal protection guarantees.

When persons are similarly situated, it is unconstitutional to single out one person or a group of persons from among a larger class on the basis of a tenuous justification that has little or no merit. Malan v. Lewis, supra, at 671.

V.

THE TAX COMMISSION'S INTERPRETATION OF A
"DOSAGE UNIT" TO MEAN EACH PILL, REGARDLESS
OF DOSAGE, RENDERS THE STATUTE
UNCONSTITUTIONALLY VAGUE AND IN VIOLATION
OF DUE PROCESS

The Tax Commission claims that a "dosage unit" is different from a dosage. The Tax Commission relies on a term common in medical circles, "unit dose" which is said to be discussed in those circles as synonymous with "dosage unit" in order to define a dosage unit as a single pill. But both

the pharmacist and the narcotics agent who testified about this meaning agreed that people on the street don't use the term dosage unit or unit dose and wouldn't know the meanings which those terms have in medical circles. The due process clause of the Fourteenth Amendment to the U.S. Constitution requires that statutes or regulations be sufficiently specific to provide fair notice of what they proscribe. Basslett v. Cota, 761 F.2d 827 (1st Cir. 1985). Statutes must provide adequate warning as to what they command or forbid such that persons of common intelligence will not have to guess at their meaning and may act accordingly. Fleming v. U.S. Department of Agriculture, 713 F.2d 179 (6th Cir. 1983); State v. Blowers, 717 P.2d 1322 (Utah 1986). The problem with a vague statute is two fold: it fails to provide the public with fair notice of what is required, and it allows fundamentally legislative decisions to be made on a subjective basis at the point of enforcement rather than enactment. Record Head Corp. v. Sachen, 682 F.2d 672 (7th Cir. 1982). In this case, the only interpretation of the statute which persons of common intelligence could understand is that a "dosage unit" is the amount which would be taken as a dosage. The term "dosage unit" in the statute appears to be an attempt to make the statute more fair by assessing the tax on the number of dosages comprising a particular quantity of controlled substance. A person of

ordinary intelligence would understand the statute that way. But the Tax Commission didn't rely on the amount that anybody takes. The only evidence is that the very minimum dosage for someone taking these pills would be 5 pills, and more commonly 50 - 100. The lack of any definition of the term in the statute and the lack of any regulations interpreting the statute, render the obscure definition relied on from the medical profession to make every pill a "dosage unit" untenable and, if the statute must be interpreted that way, the statute itself is unconstitutionally vague.

VI.

THE ILLEGAL DRUG STAMP TAX ACT IS UNCONSTITUTIONAL
IN THAT IT VIOLATES PETITIONER'S RIGHT TO FREEDOM
FROM SELF-INCRIMINATION UNDER THE FIFTH AMENDMENT TO
THE UNITED STATES CONSTITUTION AND UNDER ARTICLE 1,
SECTION 12 OF THE UTAH STATE CONSTITUTION

The Fifth Amendment of the United States Constitution states that "no person shall be . . . compelled in any criminal case to be a witness against himself." Article I, Section 12 of the Utah Constitution provides "the accused shall not be compelled to give evidence against himself."

The Fifth Amendment secures the right not to provide information as long as that information may be used in a subsequent criminal proceeding. Garvey v. United States, 424 U.S. 648, 653 (1974). The rights provided by the Amendment arise whenever the government seeks information that will subject the individual to criminal

liability. Id. at 255. The possession of amphetamines without a prescription is illegal under both Utah and Federal law.

The United States Supreme Court has established a test to determine whether or not a tax statute violates the Fifth Amendment right against self-incrimination, thus making penalties for non-compliance unenforceable. The test consists of three elements:

(1) Whether the tax is in an area permeated with penal laws and therefore directed towards a select group inherently suspected of criminal activities;

(2) Whether, in order to comply with the tax, one is compelled to provide information which he might reasonably suppose to be available to prosecuting authorities; and

(3) Whether the compelled information is such as would surely provide a significant link in the chain of evidence tending to establish guilt.

See Leary v. U.S., 395 U.S. 6 (1969); Marchetti v. U.S., 390 U.S. 39 (1968).

Under the federal statute in Marchetti, an individual was required to register with the Internal Revenue Service, buy wagering stamps, and post the stamps in a conspicuous place. The Court found the statute created a "real and appreciable . . . hazard of incrimination." Id. at 48. The Supreme Court found that the "petitioner was confronted by a comprehensive system of federal and state prohibitions against wagering activities, he was required to provide information which he

might reasonably suppose would be available to prosecuting authorities, and which would surely prove a significant link in the chain of evidence tending to establish his guilt." Id.

In Leary v. United States, supra, the Supreme Court considered the Federal Marihuana Tax Act. That Act imposed a tax on marihuana transfers as well as an occupational tax on those who dealt in the drug. It required that marihuana transfers be carried out on written forms provided by the government. The IRS was to keep copies of the forms and make them available for inspection by treasury personnel and state and local officials. The Supreme Court struck down the act as being in violation of the Fifth Amendment rights of those subject to it.

The mere purchase of stamps under Utah's Illegal Drug Tax Stamp Act is an admission of illegal activity. The law does not apply to persons lawfully in possession of controlled substances. U.C.A. § 59-19-107(2). The possession of controlled substances is an area permeated with penal laws. In addition, the very purchase of the tax stamps provides information which the purchaser might suppose would be available to prosecuting authorities, i.e. the identity of the purchaser. There is nothing in the statute to prevent the Tax Commission from providing prosecuting authorities with information about the

purchasers, such as their appearance, the amount of tax stamps purchased, or the license number of their vehicle. The statute also requires the stamps to be affixed to the controlled substances. Utah Code Annotated § 59-19-105 (1953, as amended). In any prosecution for possession of controlled substances, an element of scienter--knowing possession--must be shown. Any person who attempts to comply with the Illegal Drug Stamp Tax Act would thus be required to provide a significant piece of evidence tending to show guilt by providing direct evidence of knowing possession of illegal controlled substances. The purchase and display of the stamps is a significant link in a chain of evidence tending to establish guilt for possession of controlled substances. Because each of the three elements of the test for illegal self-incrimination required by a tax law is satisfied, the Illegal Drug Stamp Tax Act should be held unconstitutional under the Utah and United States Constitutions.

VII.

THE TAX ASSESSED IN THIS CASE CONSTITUTES
AN EXCESSIVE FINE OR FORFEITURE IN VIOLATION
OF THE EIGHTH AMENDMENT TO THE UNITED STATES
CONSTITUTION AND ARTICLE I, SECTION 9 OF THE
UTAH CONSTITUTION

Both the Eighth Amendment of the United States Constitution and Article I, Section 9 of the Utah Constitution prohibit imposition of excessive fines or the infliction of cruel and

unusual punishment. To assert a tax of \$22,000 and a penalty of an additional \$22,000 against Zissi on the basis of alleged possession of amphetamine tablets worth no more than \$150 constitutes an excessive fine. Presuming that the legislature could pass a tax of any size it wanted for the possession of drugs, the tax imposed is not proportionate with that assessable to others. A person in possession of an identical quantity of amphetamine powder would probably not be taxed at all. The fortituous situation of finding pills rather than powder does not change the amount of controlled substance or its danger to the public. It is cruel and unusual and an excessive fine to impose the tax in this case when it would not be imposed in those cases. The United States Supreme Court has held that the Eighth Amendment's proscription of cruel and unusual punishment prohibits sentences that are disproportionate to the crime committed. Solem v. Helm, 463 U.S. 277 (1983). This Court should adopt and apply a proportionality analysis and hold that the tax and penalty assessed against Mr. Zissi in this case is constitutionally invalid because Mr. Zissi is taxed a total of \$44,000 while a person in possession of an identical quantity of amphetamine powder would not be taxed, or at the least, at a disproportionately lower rate.

Although the United States Supreme Court has referred to the Eighth Amendment as involving only criminal sanctions

when it refused to extend the amendment to corporal punishment in schools, Ingraham v. Wright, 430 U.S. 669 (1977), the Utah Constitutional provision has never been so narrowly interpreted. At any rate, it should be recognized that the Illegal Drug Stamp Tax Act is a criminal or quasi-criminal statute to which the prohibition against excessive fines and cruel and unusual punishment is applicable. The United States Supreme Court stated:

This Court has often stated that the question whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction. Our inquiry in this regard has traditionally proceeded on two levels. First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicates either expressly or impliedly a preference for one label or the other. Second, where Congress had indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention. United States v. Ward, 448 U.S. 242, 248-49 (1980).

By calling the penalty imposed on possession of controlled substances a tax, apparently the legislature wanted the penalty to appear to be a civil one. However, U.C.A., § 59-19-106 makes failure to obtain the drug stamps a third-degree felony for which a specially enhanced penalty of \$10,000 is provided. U.C.A. § 59-19-106. Even with doubling the usual fine for a third-degree felony, the tax and penalty in this case far exceed the possible criminal penalty.

The Supreme Court has indicated that there are seven traditional elements in determining whether an act is penal or regulatory in character. All of the factors are relevant to the inquiry, and may point in different directions. The factors are:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment--retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

In this case, the sanction of a tax nearly 150 times the value of the property taxed would certainly be regarded as punishment, and the requirement of the payment of such an amount requires a finding of knowing possession, since the legislature did not intend to tax persons such as common carriers in unknowing possession of controlled substances. The operation of this extremely punitive tax clearly promotes the traditional aims of retribution and deterrence, and the property which is taxed is already illegal to possess. It is submitted that there is no purpose other than punishment and deterrence which could be the purpose of this statute. Thus, of the factors which relate to this case at all, each of the factors cited by the Supreme Court indicate that this

statute is not a civil statute but is in reality a criminal statute to which the prohibition against excessive fines clearly applied.

CONCLUSION

The pills which were seized from defendant's truck were seized illegally because the initial stopping of petitioner's vehicle constituted an illegal seizure where the driver's license checkpoint at which petitioner was stopped was created at the whim of the field officers on patrol, without written guidelines, directions or policies and procedures to govern the location and conduct of a driver's license roadblock.

The Tax Commission has construed the statute to maximum disadvantage of the taxpayer. It clearly took the punitive intent of the statute to heart. However, the insistence on taxing amphetamines by the pill despite the evidence that amphetamines are typically sold by weight, and the admission that if these pills had been crushed, they would have been taxed by weight, create an equal protection violation. Taxing \$22,000 for possession of pills while the tax would be zero if the pills had been ground up is a distinction without a difference, an exaltation of form over controlled substance, and is arbitrary and irrational.

Second, the Collection Division's interpretation

of dosage unit to mean each individual pill, regardless of the quantity of pills constituting a dosage creates a problem of vagueness. The words dosage unit have a meaning intelligible to the ordinary person, just as they were to Gary Nuffer, of how much a person takes. The definition urged by the Collection Division in reliance on a specialized meaning known only to the medical profession makes the statute unintelligible to persons of ordinary intelligence and therefore void for vagueness as a denial of due process. To avoid these constitutional problems, to give the statutory words their ordinary meaning, and to construe the tax statute strictly against the taxing authority, it is appropriate to determine that these amphetamines should be treated like any other amphetamines and taxed on the basis of weight. Or, at a minimum, the Court should determine the dosage which would be taken by people using these controlled substances. The minimum amount in evidence is 5 pills per dosage unit, and the maximum amount is 100, with an average somewhere in between at 50 pills.

Because it does not prohibit the Tax Commission from providing information relevant to determining the identity of Tax Stamp purchasers and because affixing stamps to controlled substances provides evidence of the crucial criminal element of intent, the Illegal Drug Stamp Tax Act violates Mr. Zissi's

rights against self-incrimination and should be held invalid and unenforceable.

Finally, because the statute violates the principle of proportionality by imposing a huge tax on possession of amphetamine pills while imposing no tax on the same quantity of amphetamines in powder form, the tax constitutes an excessive fine and is prohibited.

RESPECTFULLY SUBMITTED this 15th day of December, 1989.

RICHARDS, BIRD & KUMP

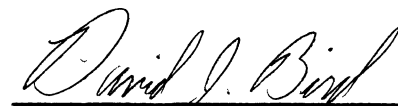


David J. Bird

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of December, 1989, I served PETITIONER'S BRIEF FOR HEARING by mailing four (4) true and correct copies thereof, via United States Mail, postage prepaid thereon, to the following:

Lee Dever, Esq.
Assistant Attorney General
State Capitol Building
Salt Lake City, Utah 84114



ADDENDUM A

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59-19-103. Tax imposed on marihuana and controlled substances.

(1) A tax is imposed on marihuana and controlled substances as defined under this chapter at the following rates:

- (a) on each gram of marihuana, or each portion of a gram, \$3.50;
- (b) on each gram of controlled substance, or each portion of a gram, \$200; and
- (c) on each 50 dosage units of a controlled substance that is not sold by weight, or portion thereof, \$2,000.

(2) For the purpose of calculating the tax under this chapter, a quantity of marihuana or other controlled substance is measured by the weight of the substance, whether pure or impure or dilute, or by dosage units when the substance is not sold by weight, in the dealer's possession. A quantity of a controlled substance is dilute if it consists of a detectable quantity of pure controlled substance and any excipients or fillers.

History: C. 1953, 59-19-103, enacted by L. 1988, ch. 246, § 3.

Effective Dates. — Laws 1988, ch. 246, § 8 makes the act effective on April 1, 1988.

AMENDMENTS

TO THE

CONSTITUTION OF THE UNITED STATES

AMENDMENT IV

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

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF UTAH

ART. I, § 7

Sec. 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

ART. I, § 9

Sec. 9. [Excessive bail and fines—Cruel punishments.]

Excessive bail shall not be required; excessive fines shall not be imposed; nor shall cruel and unusual punishments be inflicted. Persons arrested or imprisoned shall not be treated with unnecessary rigor.

ART. I, § 12

Sec. 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

ART. I, § 14

Sec. 14. [Unreasonable searches forbidden—Issuance of warrant.]

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

ART. I, § 24

Sec. 24. [Uniform operation of laws.]

All laws of a general nature shall have uniform operation.

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BEFORE THE UTAH STATE TAX COMMISSION

LARRY J. ZISSI,

Petitioner,)

v.)

AUDIT DIVISION OF THE)
STATE TAX COMMISSION OF UTAH,)

Respondent.)

:
: FINDINGS OF FACT
: CONCLUSIONS OF LAW
: FINAL DECISION
: Appeal No. 88 2508

This matter came before the Utah State Tax Commission pursuant to the Rules of Administrative Procedure and the Administrative Procedures Act for formal adjudicative proceedings on the 28th day of February 1989. James E. Harward, Presiding Officer, heard the matter for and in behalf of the Tax Commission. Wayne Holman, Gary Nuffer and Lee Dever appeared representing the Respondent. David Bird appeared representing Larry Zissi. Mr. Zissi was also present.

Evidence was taken, arguments were made and the matter submitted to the Presiding Officer for his recommendation. Based upon the recommendation of the Presiding Officer and the facts and evidence presented at the hearing, the Tax Commission makes its:

FINDINGS OF FACT

1. The tax in question is the illegal drug stamp tax.

2. The period in question is June 4, 1988.

3. On said date the Petitioner was stopped by the Utah County Sheriff's office in a 1983 Chevrolet pickup truck license plate number NC8331 at a routine traffic stop in conjunction with a drivers license roadblock check.

4. The vehicle was owned by the Petitioner.

5. Subsequent to the stop and as a result of the search of the vehicle, the sheriff's office located a shaving kit behind the drivers side of the vehicle which contained approximately 550 tablets which were stipulated as being amphetamines.

6. No drug stamps were affixed to the amphetamines.

7. A brief case located in the Petitioner's vehicle contained money and was the property of the Petitioner.

8. At the routine traffic stop, the officers were suspicious of the vehicle. When approaching the drivers side, they smelled the odor of marijuana. They then requested that the vehicle pull to the side of the road. At the side of the road, the Petitioner then handed over to the officer a baggie and a roach apparently containing marijuana. Thereafter the vehicle was searched for any other contraband or illegal drugs. During the course of the search, the amphetamines were located.

9. The sheriff's office stopped all cars and vehicles at the roadblock.

10. The Respondent assessed a tax and penalty according to state statute of \$22,000 tax and \$22,000 penalty.

11. The tax was computed by taking the 550 pills divided by 50 dosage units equals 11 times the statutory tax of \$2,000 equaling \$22,000 plus a 100% penalty. (Utah Code Ann. § 59-19-103 (c).)

12. Under the terms of the statute, the term dosage unit is equivalent to one pill.

13. Amphetamines such as these are sold as pills and not by weight.

14. The Petitioner's statement that the shave kit did not belong to him is self-serving and given little weight.

CONCLUSIONS OF LAW

1. The taxes imposed upon a controlled substance as set forth in Utah Code Ann. § 59-19-103 et. seq. in the sum of \$2000 for each 50 dosage units of a controlled substance that is not sold by weight.

2. A stamp must be purchased to evidence the payment of the tax imposed by the Utah Code. Failure to affix the stamp or to purchase the stamp results in an imposition of the tax plus a civil penalty of 100% of the tax. (Utah Code Ann. § 59-19-106.)

3. The Tax Commission is bound to follow the state statutes. (State Tax Commission vs Wright 596 Pacific Second 634, 636 Utah 1979.) However, the Commission is not a judicial body established under the constitution of the State of Utah nor is it empowered or authorized to determine the legality or constitutionality of legislative enactments. (See Shea vs Utah State Tax Commission 120 Pacific Second 274, 275 Utah 1941; State Tax Commission vs Wright 596 Pacific Second 634, 636 (Utah 1979); and Belco Petroleum Corporation vs State Board of Equalization 587 Pacific Second 204 (Wyoming, 1978).)

DECISION AND ORDER

The Petitioner has raised five issues in this matter. They are:

1. Whether or not the evidence should be suppressed due to an unconstitutional search and seizure.
2. Whether there is sufficient evidence that would indicate that the illegal drugs were in the possession of the petitioner.
3. Whether the statutory construction of Utah Code Ann. § 59-19-101 et. seq. is vague and therefore unconstitutional.
4. Whether the Petitioner's equal protection rights have been violated.
5. Whether or not there has been a violation of the Petitioner's due process.

The Tax Commission, in reviewing the evidence and arguments at the hearing, shall divide the issues raised by the Petitioner into those of substantive and constitutional questions. The constitutional questions involve the suppression under an unconstitutional search and seizure, and the equal protection and due process arguments. The substantive issues are those relating to possession and statutory construction as it relates to definition of dose or dosage unit. However, the two issues overlap somewhat on the definition of dosage unit in that the Petitioner argues that the term is sufficiently vague as to render the application of the statute either discriminatory or void for vagueness.

As to the constitution issues, the Tax Commission is an administrative body established for the administration and the overseeing of the taxing statutes. As such, the Tax Commission has no authority to determine the constitutionality of a state statute. The state statute in all cases before the State Tax Commission is presumed to be constitutional and therefore correct. Therefore, the arguments as it relates to constitutionality cannot be determined by the Tax Commission and are therefore denied.

The argument that the stop and search was an unconstitutional search and seizure suffers from the same problem in that the Tax Commission has no authority to rule upon the constitutionality of such conduct. However, the Tax Commission notes that it appears that the search was not a discretionary search. Every vehicle was stopped. It also appears that there are standards and guidelines published by the Utah County Sheriff's office that govern such roadblock type searches.

The Tax Commission further finds that the arguments of the Petitioner relating to equal protection and due process also relate to a determination by the Commission as to whether or not the statute is unconstitutional or void for vagueness. These determinations cannot be made by the Tax Commission. However, the Tax Commission notes that the statute on its face is clear and does not leave the matter of determination open which would make the statute void.

The Tax Commission finds that the testimony was clear and convincing that a dosage unit under the terms of the statute is one pill.

The Tax Commission now turns to the substantive issues before it. Those substantive issues relate to the elements of the offense or the need for a tax to be paid upon the illegal drugs. The statute requires that a tax be imposed upon an illegal controlled substance which is not sold by weight of \$2000 for every 50 dosage units. To be responsible for the payment of that tax, a person must acquire or possess in any manner seven or more grams of any controlled substance or ten or more dosage units of any controlled substance which is not sold by weight. The Tax Commission finds that there is sufficient evidence before it to find that the Petitioner had acquired "in any manner" or possessed ten or more dosage units of any controlled substance which is not sold by weight.

It was stipulated that the controlled substance did not have affixed to it the tax stamps which evidence payment of the taxes required by the Utah Code Ann. § 59-19-101 et. seq.

The Petitioner argues that the controlled substance which is the subject of this matter really is in all actuality sold by weight and therefore the tax is substantially less on the controlled substances than that as imposed by the Respondent. The Petitioner finds that this argument fails. The evidence was clear that the controlled substance was in pill form. In pill form, it is sold by pill and not by weight.

Therefore, it is the decision of the Utah State Tax Commission, that the Petitioner's request be denied. Specifically, the search and seizure which resulted in the obtaining of the controlled substances was not unconstitutional.

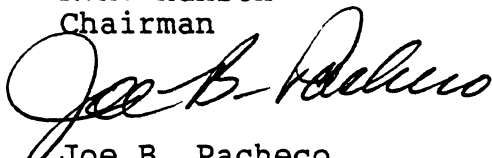
Further, there is sufficient evidence to indicate that the Petitioner did have in his possession or in some manner acquired the controlled substance. Finally, that the term dosage unit used in the statute means one pill. Finally, the Tax Commission finds that the Petitioner's arguments as it relates to equal protection and violation of due process are denied.

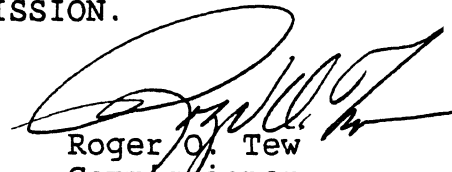
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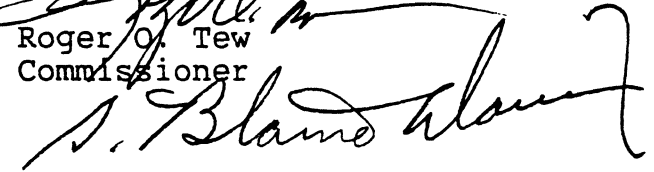
BY ORDER OF THE UTAH STATE TAX COMMISSION.

ABSENT

R.H. Hansen
Chairman


Joe B. Pacheco
Commissioner


Roger O. Tew
Commissioner


G. Blaine Davis
Commissioner

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