

1990

Utah v. Small : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS

DOCKET NO. 900382

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,

Plaintiff/Appellee,

v.

LEMUEL T. SMALL,

Defendant/Appellant.

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BRIEF OF APPELLANT

Case No. 900382-CA

Priority No. 2

**APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR MILLARD COUNTY
THE HONORABLE GEORGE E. BALLIF, JUDGE PRESIDING**

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FILED

SEP 17 1991

COURT OF APPEALS

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH

Plaintiff/Appellee,

v.

LEMUEL T. SMALL,

Defendant/Appellant.

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BRIEF OF APPELLANT

Case No. 900382-CA

Priority No. 2

STATEMENT OF JURISDICTION

This appeal is made pursuant to Rule 26(2)(a) of the Utah Rules of Criminal Procedure and Rule 3(a) of the Utah Rules of Appellate Procedure. This court has appellate jurisdiction in this case pursuant to Title 78, Part 2a, Section 3(2) of the Utah Code (1953 as amended).

NATURE OF THE PROCEEDINGS

This is an appeal of right from a final judgment of conviction for the offenses of Possession of a Controlled Substance with Intent to Distribute, a Second Degree Felony; Possession of a Controlled Substance with Intent to Distribute, a Third Degree Felony; and Possession of a Controlled Substance, a Third Degree Felony.

STATEMENT OF ISSUES PRESENTED FOR APPEAL

Did the roadblock stop of the vehicle in which appellant was riding which resulted in the discovery of controlled substances and firearms, violate his

right to be free from warrantless and unreasonable searches and seizures as described in Article I, Section 14 of the Constitution of Utah?

Did the same roadblock stop violate appellant's right to be free from warrantless and unreasonable searches and seizures as described in the Fourth and Fourteenth Amendments to the United States Constitution?

Was there sufficient attenuation between the illegal roadblock stop and the consent to search the vehicle to relieve the seized evidence of the taint from the initial stop?

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 14 of the Constitution of Utah:

The rights 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.

The Fourth Amendment to the Constitution of the United States:

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.

Utah Code Annotated, §41-1-17(a) through (d) (1953 as amended):

The [State Tax] commission, and such officers and inspectors of the department as it shall designate, peace officers, state patrolmen, and others duly authorized by the department, or by law shall have power and it shall be their duty:

(a) To enforce the provisions of this act and of all the laws regulating the registration or operation of vehicles or the use of the highways.

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

(c) when on duty, upon reasonable belief that any vehicle is being operated in violation of any provision of this act or of any other law regulating the operation of vehicles to require the driver thereof to stop, exhibit his driver's license and submit to an inspection of such vehicle, the registration plates and registration card thereon.

(d) To inspect any vehicle of a type required to be registered hereunder in any public garage or repair shop or in any place where such vehicles are held for sale or wrecking, for the purpose of locating stolen vehicles and investigating the title and registration thereof.

Utah Code Annotated §77-7-15 (1953 as amended):

A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions.

STATEMENT OF THE CASE

Appellant was originally charged in a twelve count information alleging the commission of six felonies and six misdemeanors. (R. 3). Ultimately, appellant was tried on a three count amended information alleging two counts of Possession of a Controlled Substance with Intent to Distribute (methamphetamine and marijuana) and one count of Possession of a Controlled Substance (cocaine). (R. 150-151). Prior to trial, appellant and his co-defendant made a motion to suppress evidence. (R. 26-29). It was alleged that the evidence was seized in violation of Article I, Section 14 of the Constitution of Utah and the Fourth and Fourteenth Amendments to the United States

Constitution. (R. 88-131). That motion was denied after a hearing at which evidence was submitted on the preliminary hearing transcript. (R. 87). Evidence was also taken by the court to supplement that transcript. (Tr.M.S. 1-33).¹ In a written order, the motion to suppress was denied. (R. 68-71). Appellant was tried and convicted by a jury. (R. 195).

On September 29, 1988, law enforcement officers established a roadblock on the south Fillmore interchange of Interstate 15 in Millard County, Utah. (R. 87 p. 6). The roadblock involved the combined efforts of the Utah Highway Patrol, the Sevier County Sheriff's Office and the Millard County Sheriff's Office. (R. 87 p.6). The roadblock was conducted under the direction of Millard County Sheriff, Ed Phillips. (Tr.M.S. p. 9). There was no written plan for the roadblock. The stated purpose for the roadblock was to conduct driver's license, registration and safety inspections of vehicles. (R. 87 p. 6)(Tr.M.S. p. 6)².

The officers manning the roadblock received verbal instructions from Sheriff Phillips, Sergeant Paul Mangleson of the Utah Highway Patrol and Phil Barney of the Sevier County Sheriff's office. (R. 87 pp. 33, 46-48).. Sheriff Phillips instructed the officers to ask all people who were stopped to produce a driver's license and vehicle registration. (R. 87 p. 47). Sergeant Mangleson instructed the officers to look for objects in the vehicles that had been stopped

¹The transcript of the motion to suppress held on August 4, 1989, shall be designated "Tr. M.S.".

²Due to the heavy flow of traffic, the officers manning the roadblock found it to be impossible to conduct safety inspections of the vehicles stopped at the roadblock. (Tr.M.S. p. 15).

that should arouse suspicion. (R. 87 p. 46). Phil Barney instructed the officers to look for suspicious clues in the body language of people stopped at the roadblock. (R. 87 p. 47). It was conceded that one of the purposes of the roadblock was to stop vehicles and look for such suspicious objects or circumstances. (Tr.M.S. p. 19). The roadblock was advertised in the local Millard County newspaper. (R. 87 p. 41). To warn travelers, signs were placed on the freeway. (R. 87 p. 7). The record does not reflect where those signs were located in relation to the roadblock. Nor does the record indicate what was written on the signs.

At about 11:30 a.m. on September 19, 1988, officers at that roadblock stopped a vehicle driven by the co-defendant, Dennis Shoulderblade. (R. 87 p. 7). Appellant was seated in the front passenger seat of the vehicle. (R. 87 p. 8). Deputy Millard County Sheriff, Jeff Whatcott, requested the vehicle registration and license of the driver of the vehicle. (R. 87 p. 9). Shoulderblade produced a driver's license and appellant produced the registration. (R. 87 p. 8-9). The vehicle was registered to Russell Clarence. (R. 87 p. 9). Appellant indicated that the vehicle belonged to a friend. (R. 87 p. 9). Appellant was requested to produce identification. (R. 87 p. 9). As he pulled out his wallet, Deputy Whatcott observed appellant shove a clear ziplock plastic bag between the seats. (R. 87 p. 9-10). The deputy then questioned the two about where they had been (R. 87 p. 10), and if they possessed any alcohol, firearms or controlled substances. (R. 87 p. 11-12). Appellant and Shoulderblade indicated

that they had been to Las Vegas (R. 87 p. 10) and were not in possession of any of the contraband listed by the deputy. (R. 87 p. 11-12).

Deputy Whatcott then requested to search the vehicle. (R. 87 p. 12). The occupants acquiesced to that request. (R. 87 p. 12). Shoulderblade exited the vehicle and a loaded firearm was located under the driver's seat. (R. 87 p. 12). Whatcott then asked appellant if there were other firearms located in the vehicle. (r. 87 p. 13-14). Appellant produced two loaded revolvers. Shoulderblade and appellant were placed under arrest. (R. 87 p. 24). A further search of the vehicle resulted in the discovery of another firearm (R. 87 p. 28), eight ounces of methamphetamine, (R. 87 p. 22), six pounds fourteen ounces of marijuana, (R. 87 p. 25-26), a small quantity of cocaine (R. 87 P. 26-27) and three thousand seven hundred fifty dollars in currency. (R. 87 p. 23).

SUMMARY OF ARGUMENTS

The roadblock stop in Millard County violated appellant's right to be free from warrantless and unreasonable searches and seizures as described in Article I, Section 14 of the Constitution of Utah. The officers had no statutory authority to make such a stop. Prior to the stop, the officers lacked any individualized suspicion that any criminal offense had been committed. The State showed neither that the roadblock significantly advanced the public interest in law enforcement nor that there were less intrusive means available to advance that interest. Consequently, the evidence seized as a result of this constitutional violation should have been suppressed.

The stop at the Millard County roadblock violated appellant's right to be free from warrantless and unreasonable searches and seizures as described in the Fourth Amendment to the United States Constitution. The roadblock in question was not carried out pursuant to a plan designed by neutral and politically accountable authorities. Furthermore, there was not a grave public concern that was advanced by the roadblock. There was no evidence to indicate how the seizures of vehicles of the roadblock advanced any public interest. Finally, the roadblock created a severe interference with the individual liberties of those who were stopped.

STANDARD OF REVIEW

The issue of the constitutionality of a roadblock stop is a matter of law. Matters of law may be reviewed without deference to the trial court. State v. Sims, 808 P.2d 144 (Utah App. 1991). Conclusions of law have been reviewed under a "correction of error" standard. State v. Kitchen, 808 P.2d 1127 (Utah App. 1991). Both of these standards are the same. Questions of law are reviewed de novo by appellate courts.

ARGUMENT

POINT I

ARTICLE I, SECTION 14 OF THE CONSTITUTION OF UTAH PRECLUDES THE USE OF ROADBLOCKS. ANY EVIDENCE SEIZED AT SUCH A STOP MUST BE SUPPRESSED.

Both the court and the Utah Supreme Court have expressed concern with the Fourth Amendment rulings of the federal courts in vehicle search cases. As an alternative, both courts have encouraged counsel to litigate these issues under

Article I, Section 14 of the Constitution of Utah. State v. Earl, 716 P.2d 803 (Utah 1986); State v. Larocco, 742 P.2d 89 (Utah App. 1987) (Billings, J. dissenting).³ In Michigan v. Long, 463 U.S. 1032 (1983), Justice O'Connor encouraged state courts to decide search and seizure issues on state constitutional grounds rather than resorting to a Fourth Amendment analysis. Furthermore, it is also beyond question that a State Constitution may provide greater protections to individuals than does the Federal Constitution.⁴

In State v. Earl, *supra*, the court suggested that the analysis described in State v. Jewett, 500 A.2d 233 (Vt. 1985), be applied to an interpretation of Article I, Section 14 of the Utah Constitution. Roadblocks have been held to be unreasonable seizures of the person on state constitutional grounds.⁵ There are three basic reasons given for this result: First, law enforcement agents lack statutory authority to conduct a roadblock⁶; second, an individual cannot be detained without a showing that the officer has an individualized suspicion that a crime has been committed; and third, a balancing of the interests involved in a roadblock stop indicate that such stops are unreasonable seizures of the person.

³For an extensive discussion of the background of this particular issue see: Davis and Wallentine, A Model for Analyzing the Constitutionality of Sobriety Roadblock Stops in Utah, 3 B.Y.U.J. of Pub. Law 357 (1989).

⁴See footnote 3.

⁵Those cases will be discussed, *infra*.

⁶See: State v. Sims, *supra*, and Point I.A. *infra*.

A.

THE ROADBLOCK IN THIS CASE WAS
CONDUCTED WITHOUT AUTHORITY OF LAW

In State v. Sims, supra, this court held that a roadblock conducted without a specific legislative authorization violated Article I, Section 14 of the Utah Constitution. The court found that the state supreme court in State v. Larocco, 794 P.2d 460 (Utah 1990), announced a policy requiring a neutral authority to authorize police to make seizures on less than probable cause. The court noted that in situations that do not involve exigent circumstances, the judicial branch of the government generally acts as the neutral authority.

In other circumstances it was recognized that the legislature has authorized stops based on less than probable cause.⁷ The court reasoned that in such circumstances the legislature weighs the need for suspicionless stops against the degree of intrusion. Since the legislature essentially involves the citizens of the state acting through elected representatives, such decisions involve a high degree of political accountability. In Sims, the court found that the authorization for the roadblock came solely from law enforcement agents. That resulted in the court concluding,

Consistent with our supreme court's emphasis on the warrant requirement, then, we hold that suspicionless, investigatory motor vehicle roadblocks, conducted without legislative authorization, are per se unconstitutional under article I, section 14 of the Utah Constitution.

808 P.2d at 149.

⁷The court cited brief warrantless stops made pursuant to Utah Code Ann. §41-1-17(c) (1953 as amended) and fish and game roadblocks made pursuant to Utah Code Ann. §23-20-19 (1953 as amended), as examples of such authorization.

Several other state courts have reached the same conclusion regarding the need for express statutory authority for law enforcement officers to conduct a roadblock. The Supreme Court of Oregon addressed this issue in the context of a civil suit for damages by a plaintiff who was stopped at a roadblock. Nelson v. Lane County, 304 Or. 97, 743 P.2d 692 (Or. 1987). Two other criminal cases involving similar roadblocks were addressed by that court at that time: State v. Boyanovsky, 304 Or. 131, 743 P.2d 711 (Or. 1987), and State v. Anderson, 304 Or. 139, 743 P.2d 715 (Or. 1987). In Nelson v. Lane County, *supra*, the state sought to uphold the use of a roadblock on the basis that such a seizure was constitutionally authorized.

In Nelson, the state maintained that it had statutory authority to conduct a roadblock under a general statute that gave law enforcement agencies the authority to enforce the criminal law. The state claimed that the statute implicitly authorized roadblocks and that the roadblock in question was conducted in accordance with "The Oregon State Police Patrol Manual." In rejecting this argument, the court reasoned,

By and large, agencies of the executive branch are free to carry out their assigned responsibilities in ways of their own choosing. Making explicit the manner in which any agency is to accomplish its task falls to the agency head or that official's designee to instruct or sub-delegate to subordinated officials.

However, some procedures may invade the personal freedoms protected from government interference by the constitution. Roadblocks are seizures of the person, possibly to be followed by a search of the person or the person's effects. For this reason, the authority to conduct roadblocks cannot be implied. Before they search or seize, executive agencies must have explicit authority from outside the executive branch.

743 P.2d at 695.

Similarly, in State v. Henderson, 114 Ida. 293, 756 P.2d 1057 (Ida. 1988), the Supreme Court of Idaho held that its constitutional provision prohibiting warrantless and unreasonable searches and seizures required express legislative authority to conduct a roadblock. The Oklahoma Court of Criminal Appeals found roadblocks to be unreasonable under similar provisions of the Oklahoma Constitution. One of the justifications for the court's decision was that officers lacked statutory authority to make such stops. State v. Smith, 674 P.2d 562 (Okla. 1984).

In this case, the only authorization for the roadblock came from law enforcement. The procedures and conduct of this and the Sims roadblock were virtually identical. The two were conducted approximately sixty days apart. The Sims roadblock was located in adjoining Juab County and it was on the same interstate highway as the roadblock in this case. This court's ruling in Sims should govern the roadblock in this case. This court should hold that the roadblock stop of the vehicle in which appellant was riding violated Article I, Section 14 of the Utah Constitution.

B.

ARTICLE I, SECTION 14 OF THE CONSTITUTION OF UTAH REQUIRES INDIVIDUALIZED SUSPICION TO JUSTIFY A SEIZURE OF APPELLANT'S PERSON

In Commonwealth v. Tarbert, 502 A.2d 221 (Pa. Super. 1985), the Superior Court of Pennsylvania discussed the propriety of roadblock stops under the Pennsylvania Constitution. The Pennsylvania legislature had previously enacted a statute allowing law enforcement agencies to utilize roadblock stops for the

purpose of checking vehicles, drivers or documents. The defendant in Tarbert had been convicted of driving under the influence as a result of a roadblock stop. The court reviewed the case law on roadblocks and noted:

Courts upholding the constitutionality of roadblocks are not unmindful of their intrusiveness, but rather, stress that careful control and absence of discretion can bring the use of the roadblock within the Fourth Amendment.

Commonwealth v. Tarbert, supra, at 225. With respect to this reasoning, the court held:

While the arguments supporting the constitutionality of systematic roadblocks are persuasive, the rationale 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. Certainly, the Constitution of our Commonwealth affords its citizens the right to be free from intrusions where one has a reasonable expectation or privacy.

Ibid at 225-226. The court ultimately held that the Pennsylvania Constitution is violated when roadblock stops are not based on probable cause or on a reasonable suspicion that a crime has been committed.

The holding in State v. Henderson, supra, has previously been discussed with respect to the effect of the lack of statutory authority to conduct a roadblock. The Idaho Supreme Court went further in Henderson and held that under the Idaho Constitution, law enforcement officers are required to have individualized suspicion of criminal wrongdoing before a stop of a vehicle may be made. The Supreme Court of Oregon reached the same conclusion in State v. Boyanovsky, supra. Boyanovsky was the companion case to Nelson v. Lane

County, supra. It addressed a roadblock search resulting in a criminal conviction rather than a civil action against law enforcement authorities. The Supreme Court of Louisiana also concluded that there was a need for individualized suspicion to invade one's privacy under its state constitution. Consequently, a roadblock stop was held to be unconstitutional in Louisiana. State v. Parms, 523 So.2d 1293 (La. 1988).

By statute, officers in Utah are required to have individualized suspicion of criminal activity before violating a citizen's privacy interest.⁸ Both the Utah Supreme Court and this court have required such individualized suspicion in addressing Fourth Amendment issues. State v. Mendoza, 748 P.2d 181 (Utah 1987); State v. Sierra, 754 P.2d 972 (Utah App. 1988). The same requirement for individualized suspicion should also be applicable to Article I, Section 14 of the Utah Constitution.

In this case, the only reason for the stop of the vehicle in which appellant was riding was the roadblock. There was no probable cause or articulable suspicion to believe that appellant or the co-defendant, Shoulderblade, were engaged in any criminal conduct prior to the stop. For this reason, the stop of the vehicle in which appellant was riding violated Article I, Section 14 of the Constitution of Utah.

⁸See discussion in point I.A. supra.

C.

**A BALANCING OF INTERESTS RESULTS IN THE
CONCLUSION THAT THE ROADBLOCK STOP IN
THIS CASE WAS UNREASONABLE.
CONSEQUENTLY, THE STOP VIOLATES ARTICLE
I, SECTION 14 OF THE CONSTITUTION OF UTAH**

In determining the reasonableness of police action in relation to an interference with a privacy interest courts may apply a balancing test. State v. Koppel, 499 A.2d 977 (N.H. 1985). In that case the propriety of a roadblock to investigate drunk driving under the New Hampshire Constitution was addressed. The court required that the following test be met:

To justify the search or seizure of a motor vehicle, absent probable cause or even a reasonable suspicion that a criminal offense is being committed, the State must prove that its conduct significantly advances the public interest in a manner that outweighs the accompanying intrusion on individual rights. It must further prove that no less intrusive means are available to accomplish the State's goals.

499 A.2d at 981.

In applying that test, the court held that a roadblock is not an effective means of detecting or deterring drunk driving. The court described the significant number of vehicles stopped, the number of officers deployed at the roadblock and the very few arrests that were actually made. The court concluded that the public interest in deterring drunk driving offenses was not significantly outweighed by the intrusions caused by a roadblock. This is because the court found from the statistics introduced at trial that highly visible roving patrols made more arrests than were effected at the roadblock. The patrols involved about the same number of officers as were deployed at the

roadblock. Consequently, such patrols provided a less intrusive means to accomplish the State's goals.

The Supreme Court of Idaho reached the same conclusion in State v. Henderson, supra. In that case the evidence indicated that officers on patrol would make more arrests than that number of officers deployed at a roadblock. The court concluded:

Thus, the testimony of the two police officials most responsible for the roadblock show unequivocally that these warrantless searches conducted without any suspicion of criminal wrongdoing are less efficient than the normal stops based on probable cause. Therefore, roadblocks are an inefficient and unnecessary constraint on a person's right to remain free of search or seizure absent probable cause.

[emphasis in the original] 756 P.2d at 1061.

In this case, there was no evidence introduced that would demonstrate the effectiveness of a roadblock as opposed to other less intrusive means of investigation. However, the conclusion that can be reached from the case law is that roadblocks are not an effective means of law enforcement. The roadblock is not an efficient use of police manpower. Likewise, a roadblock creates a highly intrusive and inconvenient situation for the travelling public.⁹ For these reasons, roadblocks do not pass the balancing test employed by other state courts to determine the reasonableness of a stop that is based neither on probable cause

⁹See also, State v. Barcia, 549 A.2d 491 (N. J. Super. 1988) where a roadblock on the New Jersey side of the George Washington bridge caused a traffic jam in New York City involving over one million of motor vehicles, and taking over four hours to unravel. The Court described the situation as a "traffic morass of monumental proportions." 549 A.2d at 497.

nor on reasonable suspicion of criminal activity. The State failed to produce any evidence tending to show the effectiveness of this particular roadblock. The state cannot meet the requirements of the balancing test employed in Henderson and Koppel. The only conclusion that can be reached is that the roadblock stop in this case was unreasonable and violated Article I, Section 14 of the Constitution of Utah.

D.

**SUPPRESSION OF EVIDENCE IS THE PROPER
REMEDY FOR A VIOLATION OF ARTICLE I,
SECTION 14 OF THE UTAH CONSTITUTION**

In State v. Thompson, 810 P.2d 415 (Utah 1991), the attorney general's office issued investigative subpoenas in violation of Article I, Section 14 of the Utah Constitution. Citing State v. Larocco, supra, the court held that exclusion of illegally obtained evidence is a necessary consequence of a violation of Article I, Section 14. This is the same conclusion that was reached by this court in State v. Sims, supra. The roadblock stop of the vehicle in which appellant was a passenger violated Article I, Section 14 of the Utah Constitution. The evidence seized as a result of that stop is subject to suppression.

POINT II

**THE ROADBLOCK STOP OF THE VEHICLE IN
WHICH APPELLANT WAS RIDING VIOLATED THE
FOURTH AMENDMENT**

In Michigan Department of State Police v. Sitz, ___ U.S. ___ 110 S. Ct. 2481 (1990), the Supreme Court upheld the use of roadblocks, or sobriety check points, in an effort to curtail a serious drunk driving problem. The roadblock

was operated pursuant to guidelines created by a state advisory committee. That committee was comprised of both law enforcement and citizens. The guidelines limited the time, location and procedures for such roadblocks to meet the problem of drunk driving. The court in Sitz then relied on a three prong balancing test established in Brown v. Texas, 443 U.S. 47 (1979) to determine if a suspicionless stop violated the Fourth Amendment. That test requires a court to weigh the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interests, and the severity of the interference with individual liberty. In State v. Sims, *supra*, and State v. Kitchen, 808 P.2d 1127 (Utah App. 1991), this court determined that two roadblocks that were identical to the roadblock in the instant case, violated the Fourth Amendment. Although two different judges authored the opinions. The analysis employed in both cases was substantially the same.

In Sims, Justice Greenwood focused on the need for the roadblock to be carried out pursuant to an established plan. The plan must include explicit limitations on the conduct of the officers. Furthermore, it must be developed by politically accountable officials, including people who are not involved with law enforcement. In Sims, Justice Greenwood held that the proof of the existence of such a plan is a prerequisite to the Brown balancing test. The roadblock in Sims was established and organized by the highway patrol and Juab County Sheriff's office. There was no explicit plan for that roadblock. Further, whatever plan existed was created solely by law enforcement. Consequently, the court held that the roadblock in Sims violated the Fourth Amendment.

Kitchen also involved a Juab County roadblock that was substantially the same as the roadblock in Sims. Justice Russon authored the panel decision and held that the roadblock in Kitchen was not conducted pursuant to an explicit, neutral plan as required by Sitz. It was also held that the roadblock failed to pass the balancing test established in Brown. With respect to the plan the court in Kitchen noted,

Unlike the plan in Sitz, the plan before us was prepared by the actual officer who conducted the roadblock, rather than by a neutral body. We question the neutrality of any plan which is authored by the same person whose actions the plan is purported to limit. Secondly, the purpose of the plan in Sitz was to provide guidelines for the conducting of roadblocks in general, whereas the plan before us was formed with this specific roadblock in mind. Thirdly, unlike the plan in Sitz, there is no evidence that the plan provided explicit guidelines, beyond the direction to stop only automobiles and light trucks. The guidelines in any plan must, at a minimum, be specific enough to prevent "arbitrary invasions" enacted "solely at the unfettered discretion of officers in the field." Brown, 443 U.S. at 51, 99 S. Ct. at 2640. Clearly, Sergeant Mangleson's plan did not meet this minimum requirement.

808 P.2d at 1130.

With respect to the balancing test, the court in Kitchen first noted that one of the reasons for the roadblock was to curtail the drunk driving problem. This was found to satisfy the first prong of the Brown test. With respect to the second prong of the Brown test the court stated,

However, the second prong of the Brown test, the degree to which the roadblock advances the public interest, has not been met. First, there was no finding as to whether this roadblock advanced the aforementioned public interest. Moreover, there is a paucity of evidence, empirical or otherwise, that this

roadblock accomplished any of the purposes for which it was conducted. In Sitz, in addition to data as to the number of arrests made, records were kept as to the number of vehicles stopped, the number subject to further investigation, and the length of the delay involved. Here, only the number of violations were recorded. Additionally, in Sitz, expert testimony was received as to the effectiveness of roadblocks in advancing detection of drunk drivers; here, no such expert testimony was offered. In short, no evidence was offered or received to support a finding that this roadblock advanced the interests for which it was conducted and, therefore, this prong of the Brown test has not been met. [emphasis in the original, footnote omitted] Id. at 1131.

The court noted that the third prong of the Brown test need not be addressed since the roadblock had failed the second prong of the test.

The roadblock in this case is indistinguishable from those employed in Sims and Kitchen. First, there was no explicit, neutral plan for the roadblock. It was based on a plan established solely by law enforcement. The plan consisted of stopping all vehicles, requesting a driver's license and registration, then looking for suspicious circumstances. It is obvious that the purpose of the plan was to stop all vehicles then gather evidence that the officers would not otherwise be entitled to receive. On this basis alone the roadblock fails to pass the Fourth Amendment requirements as established in Sitz, Sims and Kitchen.

The roadblock in this case also fails the Brown balancing test. The stated purpose of the roadblock was to perform safety license and registration checks of vehicles travelling on the interstate. However, Deputy Whatcott testified that the traffic became too heavy to conduct the safety inspections. (Tr.M.S. p. 19). He also testified that there was no particular problem with unregistered vehicles

or driver's license violations on the interstate. (Tr.M.S. p. 16). Consequently, there were little or no public concerns served by the seizures made of this roadblock. The second prong in Brown cannot be met by the evidence presented in this case. As in Kitchen, there was no evidence introduced on what the roadblock accomplished, the number of arrests made, vehicles stopped or the length of delay. Likewise, there was no expert testimony introduced as to the effectiveness of the procedure in this case. As for the final prong of the Brown test, there was a significant degree of intrusion. Appellant, a traveller on the interstate, was stopped virtually without warning and subjected to questioning about his travel itinerary and asked specific questions about contraband. The roadblock at issue in this case fails to meet both the Sitz and Brown requirements for suspicionless stops. Consequently, the roadblock stop of the vehicle in which appellant was riding violated the Fourth Amendment.

POINT III

ANY CONSENT GIVEN TO SEARCH THE VEHICLE LACKED ATTENUATION FROM THE INITIAL ILLEGAL STOP, MAKING THE EVIDENCE SEIZED INADMISSIBLE

In ruling on the suppression motion in this case, the trial court held that the roadblock in question did not violate the Fourth Amendment and that the defendants consented to the search of the vehicle. (R. 68-71). At the time that the suppression motion was filed and decided the rule in Utah was that a voluntary consent purged the taint of a prior illegal stop. State v. Arroyo, 770 P.2d 153 (Utah App. 1989); State v. Sierra, 754 P.2d 972 (Utah App. 1988).

The Supreme Court of Utah reversed these rulings. The supreme court held that for evidence to be admissible as a result of a consent to search, the consent must be both voluntary and it must be attenuated from any prior illegal search. State v. Arroyo, 796 P.2d 684 (Utah 1990). In this case, appellant did not raise the attenuation argument at the trial court. However, since such a position was not available at the time the motion was heard, this argument may now be raised for the first time on appeal. State v. Sims, *supra*. Furthermore, trial counsel moved to suppress all of the "fruits" of the initial illegal search. (R. 26-29). Under the Arroyo attenuation analysis, the consent is the fruit of the illegal stop.

To determine if a voluntary consent is sufficiently attenuated from a prior illegal stop or search, the courts require analysis of three factors that were initially described in Brown v. Illinois, 422 U.S. 590 (1975). Those factors include: the temporal proximity of the primary illegality and the granting of consent, the presence or absence of intervening circumstances, and the purpose and flagrancy of the illegal police conduct. In State v. Sims, *supra*, the court analyzed these factors and found as a matter of law that the consent was not sufficiently attenuated from the initial illegal roadblock stop. For purposes of this attenuation analysis, the instant case and Sims are indistinguishable.

With respect to the temporal proximity, the court in Sims found that a very short time had passed between the initial stop and the grant of consent. The highway patrol trooper in Sims had requested and inspected the defendant's driver's license and vehicle registration. He had questioned Sims about where

he had been and where he was going. The trooper then asked about the presence of alcohol, firearms and narcotics in the vehicle. During the conversation, the trooper had observed a partially full liquor bottle on the back seat of the vehicle. After the conversation the trooper requested and obtained the defendant's consent to search.

On the issue of temporal proximity, the only difference between this case and Sims is that the deputy in the instant case observed a ziplock baggie rather than an open liquor bottle. The deputy in this case requested the registration and driver's licenses of the occupants, he engaged in exactly the same questioning as was done in Sims. Within an extremely short period of time, the occupants of the vehicle acceded to the officer's request to search.

With respect to the question of intervening factors, the court in Sims held that such circumstances must be independent of the intervening illegality. The court noted that there was nothing in the encounter that would allow the defendant to believe that he was free to leave after the initial stop at the roadblock. The consent was obtained as a result of a request from the trooper. It was not volunteered by the defendant. The court in Sims concluded that the consent was obtained as a result of an unbroken chain of events beginning with the initial illegal stop. This case also involved an unbroken chain of events between the stop and the grant of consent. Those events, likewise included a request from the deputy for the consent to search the vehicle.

With respect to the final factor to be considered, the court in Sims found that one of the purposes of the roadblock, drug interdiction, was a valid

consideration but was pursued by unauthorized means. The court held that officers involved in conducting the roadblock, including Highway Patrol Sergeant Paul Mangleson, were experienced officers who would be properly charged with the awareness that their conduct was not authorized by law. The court also noted that using ten to twelve local officers to staff a roadblock in a rural county may have left other parts of that jurisdiction with delayed police assistance in the event of need. The roadblock in this case was likewise established in a rural county. Sergeant Mangleson was also one of the organizers and instructors of the officers manning the roadblock. Finally, the stated purpose of the roadblock--license, registration and safety checks--appeared to be a ruse to make observations and obtain evidence from drivers that could not be obtained without violating the Fourth Amendment.

The roadblock stop in this case was closely related in time to the consent to search. The consent was the result of an unbroken chain of events that began with the roadblock stop. Finally, there is nothing in the purpose or nature of the roadblock that would relieve the taint from the prior illegal stop. Consequently, the consent to search was not sufficiently attenuated from the initial illegal stop to make the evidence admissible.

The evidence seized as a result of the illegal roadblock stop of the vehicle in which appellant was riding must be ordered suppressed. The court below committed error by allowing that evidence to be admitted at trial. The evidence establishing the three offenses for which appellant was convicted was that same

evidence which is subject to suppression. Consequently, the failure of the trial court to order the evidence to be suppressed was prejudicial error.

CONCLUSION

The roadblock stop of the vehicle in which appellant was riding violated both the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Utah Constitution. Any consent to search the vehicle was not sufficiently attenuated from that stop to make the evidence admissible. The evidence seized as a result of the search of that vehicle should be ordered suppressed. Since the admission of that evidence at trial was prejudicial, this court should further order a new trial where the inadmissible evidence will not be introduced.

DATED this ____ day of September, 1991.

STEPHEN R. McCAUGHEY
Attorney for Appellant

G. FRED METOS
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Appellant's Brief was mailed/hand delivered on this ____ day of September, 1991, to:

PAUL R. VAN DAM
Attorney General for the
State of Utah
236 State Capitol Building
Salt Lake City, Utah 84114

ADDENDUM

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

STATE OF UTAH,)	Case Number 88-2413
Plaintiff,)	
vs.)	RULING
LEMUEL THOMAS SMALL, and DENNIS)	
SHOULDERBLADE,)	
Defendants.)	

This matter came before the Court on the 4th day of August, 1989 on defendant's motion to suppress. The parties proffered certain testimony, a witness was called and testified, and counsel presented their arguments to the Court. The Court, having taken the matter under advisement, and having diligently considered all of the evidence before it, now enters this:

RULING

On September 29, 1988, the Utah Highway Patrol, in conjunction with the Millard County Sheriff's Office conducted a roadblock on a flat section of Interstate Highway 15, south of Fillmore. Notice of the checkpoint was duly given one week before in the local newspaper of general circulation. Prior to setting the roadblock, the officers were briefed and instructed to check for proper driver's license and vehicle registration. Appropriate signs were placed, announcing the checkpoint at some distance in front of the block.

During the roadblock, all cars were stopped. Pursuant to the roadblock, defendants were stopped. During the stop, the officer present observed defendant Small shove a plastic bag between the front seats of the car. The officer checked both defendants' identification and determined that the car was not registered to either defendant. While awaiting confirmation from dispatch regarding registration, the officer asked defendants whether there were any firearms, alcohol, or drugs in the car. The response was in the negative. The officer then requested permission to search the vehicle. Consent was given.

As defendant Shoulderblade exited the car, the officer noticed a gun under the front seat. Subsequent search of the passenger compartment of the vehicle revealed a substantial quantity of drugs, drug paraphernalia, money, and loaded firearms. In the course of the search of the passenger compartment, the officer asked defendants if they knew anything about the firearms or the drugs. Defendants responded in the negative. They were subsequently arrested and were apprised of their rights before any further attempt at questioning.

As the officer searched the passenger compartment of the vehicle, he smelled what he believed to be raw marijuana. He subsequently, opened the trunk and found more drugs and paraphernalia.

The evidence presented indicates that the roadblock was properly instituted at a fixed point as indicated in Delaware v. Prouse, 440 U.S. 648, 654 (1979). The checkpoint was located in

a flat area and was highly visible. By allowing officers to check licenses and vehicle registration, advanced a legitimate governmental purpose as required in United States v. McFayden, 865 F.2d 1306 (D.C. Cir. 1989).

As further required in McFayden, there was no discretion on the part of officers stopping the cars--all were required to stop. While there is some question as to whether all of the large trucks were stopped at the roadblock, there was no clear testimony that they were not stopped. The court notes that the Tenth Circuit has ruled that letting certain vehicles through the roadblock unchecked is not, per se, an unlawful practice. United States v. Corral, 823 F.2d 1389 (10th Cir. 1987). In any event, it is undisputed that all passenger vehicles were stopped.

Questioning as part of an initial stop does not normally rise to the level of a custodial interrogation. The Utah Supreme Court has held that Miranda warnings are not required for investigation and interview pursuant to determining whether a crime has been committed. Salt Lake City v. Carner, 664 P.2d 1168, 1170 (Utah 1983).

The factors required for a Miranda warning under Carner are not present. Here questioning as to the contents of the car was made as the officer awaited information from the dispatcher relative to vehicle registration. Questioning made during the search of the vehicle was not accusatory. Any interrogation if it can be called that was brief and informal. See Carner, at 1171. The defendants were only detained after facts came to

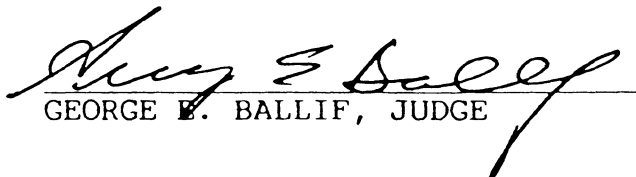
light during the check that created a reasonable suspicion that the occupants were engaged in some criminal activity (Carner). The uncontroverted testimony is that the defendants were properly advised of their rights before further attempts at questioning.

All of the above factors: notice of the stop, its location, legitimate purpose of the stop, training of the officers, the minimal intrusion by the officers unless there was an articulatable and reasonable suspicion, establish a minimum of public inconvenience.

Defendants gave permission to search the vehicle. Consent was never withdrawn. As such, the subsequent search of the trunk was reasonable and proper. Even if the consent was somehow defective, (and there is no evidence that this is the case) this court believes that due to the evidence found in the passenger compartment and the smell of marijuana, the officer had probable cause to search the trunk space. See State v. Earl, 716 P.2d 803 (Utah 1986).

Based on the foregoing, the Court concludes that the vehicle stop, search, and subsequent arrest were properly administered. The Court therefore denies defendants' motion to suppress.

DATED at Provo, Utah this 28th day of August, 1989.


GEORGE E. BALLIF, JUDGE

cc: Dexter Anderson
Milton Harmon
Sumner Hatch