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Utah v. Small : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff/Appellee, : Case No. 900382-CA
v. : Priority No. 2
LEMUEL T. SMALL, :
Defendant/Appellant. :

BRIEF OF APPELLEE
- - - - -

THIS IS AN APPEAL FROM CONVICTIONS OF
POSSESSION OF A CONTROLLED SUBSTANCE WITH
INTENT TO DISTRIBUTE (METHAMPHETAMINE), A
SECOND DEGREE FELONY, IN VIOLATION OF UTAH
CODE ANN. § 58-37-8(1)(a)(iv) (Supp. 1991);
POSSESSION OF A CONTROLLED SUBSTANCE WITH
INTENT TO DISTRIBUTE (MARIJUANA), A THIRD
DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN.
§ 58-37-8(1)(A)(IV) (SUPP. 1991), IN THE
FOURTH JUDICIAL DISTRICT COURT IN AND FOR
MILLARD COUNTY, STATE OF UTAH, THE HONORABLE
GEORGE E. BALLIF, JUDGE PRESIDING.

OF APPEALS

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 900382-CA
v.	:	Priority No. 2
LEMUEL T. SMALL,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from convictions of possession of a controlled substance with intent to distribute (methamphetamine), a second degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(iv) (Supp. 1991); possession of a controlled substance with intent to distribute (marijuana), a third degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(iv) (Supp. 1991); and possession of a controlled substance (cocaine), a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (Supp. 1991). This Court has jurisdiction to hear the appeal pursuant to Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1991).

STATEMENT OF ISSUES PRESENTED AND STANDARD OF APPELLATE REVIEW

The sole issue on appeal is whether the trial court correctly denied defendant's motion to suppress evidence, ruling that the roadblock stop of defendant's vehicle was proper and that defendant consented to the subsequent search of the vehicle. The factual findings underlying the trial court's ruling on a motion to suppress will not be disturbed on appeal unless they

are clearly erroneous; however, in assessing the trial court's legal conclusions based on its factual findings, the appellate court applies a correction of error standard of review. State v. Cayer, 814 P.2d 604, 610 (Utah App. 1991). Accord United States v. Butler, 904 F.2d 1482, 1484 (10th Cir. 1990).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Any relevant text of constitutional, statutory, or rule provisions pertinent to the resolution of the issues presented on appeal is contained in the body of this brief.

STATEMENT OF THE CASE

Defendant, Lemuel Thomas Small, was charged in an amended information with one count of possession of a controlled substance (cocaine), a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (Supp. 1991), and two counts of possession of controlled substances with intent to distribute (methamphetamine and marijuana), as second and third degree felonies, in violation of Utah Code Ann. § 59-37-8(1)(a)(iv) (Supp. 1991) (Record [R.] 150-51).

After the trial court denied defendant's motion to suppress evidence seized incident to the roadblock stop of defendant's vehicle,¹ a jury convicted defendant as charged (R. 28; defendant's motion to suppress; R. 55-58, trial court's ruling denying defendant's motion to suppress; R. 200-02, guilty verdict). The court sentenced defendant to a term of not less

¹ Although defendant was tried jointly with a codefendant, Dennis Shoulderblade, defendants elected to take separate appeals. See State v. Shoulderblade, No. 900288-CA.

than one nor more than fifteen years in the Utah State Prison for the second degree felony, and two terms not to exceed five years in the Utah State Prison for the two third degree felonies, all terms to run concurrently (R. 302).

STATEMENT OF THE FACTS

For purposes of the issues raised on appeal, the pertinent facts are those set out in the trial court's ruling, which defendant does not challenge (R. 55-58). Those findings of fact are as follows:

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. [The] [s]ubsequent 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.

. . .

(R. at 55-56) (See Addendum A for a complete copy of the lower court's ruling).²

SUMMARY OF ARGUMENT

The State concedes that the Millard County roadblock, established to check licenses and registration, as well as to observe any other violations of the criminal law, fails to meet the requirements for suspicionless roadblock stops under the federal constitution. The record before this Court fails to show that the roadblock was carried out pursuant to an explicit neutral plan, developed by politically accountable officials, which limited the conduct of individual officers. Moreover, there is no indication in the record that the authorization process involved any balancing of fourth amendment interests, law enforcement interests, or an assessment of the effectiveness of

² Defendant's recitation of the facts on appeal appears to contain cites to the transcript of a preliminary hearing apparently held on October 11, 1988 which has not been made part of the record before this Court.

the roadblock in meeting those interests. Therefore, the roadblock stop violated defendant's fourth amendment rights against unreasonable seizure.

In spite of the initial illegality of the roadblock stop of defendant's vehicle, the issue remains whether the subsequent warrantless search of the vehicle was nevertheless a valid consent search. Because the trial court ruled on the validity of defendant's consent to search prior to the Utah Supreme Court's decision in State v. Arroyo 796 P.2d 684 (Utah 1990), this Court should remand the case to the trial court for evaluation of defendant's consent under Arroyo and the entry of appropriate factual findings and legal conclusions on the voluntariness and exploitation prongs of Arroyo's two-prong test.

In remanding to the trial court, the Court first should clarify what standard of proof applies to the determination of whether there was voluntary consent to search. The majority, and better reasoned view, is that the state need only prove voluntary consent by a preponderance of the evidence. Second, the Court should direct the trial court to apply the exploitation prong of the Arroyo test in a manner different from that employed by the panels in State v. Sims, 808 P.2d 141 (Utah App. 1991), cert. pending, 167 Utah Adv. Rep. 25 (Utah May 14, 1991), and State v. Park, 810 P.2d 456 (Utah App.), cert. denied, ___ P.2d ___ (Utah 1991). The approach followed in Sims and Park is not consistent with either Florida v. Royer, 460 U.S. 491 (1983), relied on by

the supreme court in Arroyo, or the remand that occurred in Arroyo.

ARGUMENT

POINT I

THE ROADBLOCK STOP OF DEFENDANT'S VEHICLE
FAILS TO PASS FEDERAL CONSTITUTIONAL MUSTER.

Defendant asserts that the suspicionless roadblock at which he was stopped violated his federal and state constitutional rights against unreasonable search and seizure because the roadblock, which was established to check for proper driver's licenses and registration, as well as to observe any other violations of the criminal law, was not explicitly authorized by statute, nor was it supported by a reasonable suspicion of criminal activity. Moreover, defendant asserts "[t]he 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" (Br. of App. at 6). The State concedes that the roadblock in the present case fails to meet the requirements for suspicionless roadblock stops under the federal constitution.

At the time of its denial of defendant's motion to suppress, the trial court ruled without benefit of the United States Supreme Court's decision in Michigan Department of State Police v. Sitz, ___ U.S. ___, 110 S.Ct. 2481 (1990), which discussed the validity of a Michigan state sobriety checkpoint under the fourth amendment. In addition, the trial court ruled without benefit of this Court's subsequent interpretative

opinions in State v. Sims, 808 P.2d 141, 146 (Utah App. 1991), cert. pending, 167 Utah Adv. Rep. 25 (Utah 1991); State v. Kitchen, 808 P.2d 1127, 1129 (Utah App. 1991), and State v. Park, 810 P.2d 456 (Utah App.), cert. denied, ___ P.2d ___ (Utah 1991), where this Court held suspicionless roadblocks identical to the one at issue here invalid under the fourth amendment.³ Thus, the State concedes that while the trial court's factual findings underlying its ruling upholding the roadblock in this case are not clearly erroneous, its resultant legal conclusion, drawn from those facts, is not supportable under the aforementioned case law.

As in Sims, Kitchen and Park, the record before this Court fails to show that the roadblock was carried out pursuant to an explicit neutral plan, developed by "politically accountable officials," which limited the conduct of individual officers. Park, 810 P.2d at 458; Sims, 808 P.2d at 146-47. Cf. Kitchen 808 P.2d at 1130 (noting that unlike the plan in Sitz, the roadblock plan before the court was prepared by the actual officer who conducted the roadblock, rather than by a neutral body). Moreover, there is no indication in the record "that the authorization process involved any balancing of fourth amendment interests, law enforcement interests, or an assessment of the

³ Sims also reached the state constitutional issue, holding that the roadblock there was invalid under article I, section 14 of the Utah Constitution as well. 808 P.2d at 147-50. Because the State concedes the invalidity of the present roadblock under the fourth amendment, this Court need not consider its validity under the state constitution. Id. at 152 (Orme, J., concurring specially).

effectiveness of the roadblock in meeting those interests." Park, 810 P.2d at 458; see also Sims, 808 P.2d at 146-47 (noting that officials authorizing a roadblock are responsible for performing an initial balancing between the fourth amendment and the interests served by the roadblock plan, which balancing is a prerequisite to any judicial balancing analysis of a suspicionless roadblock). Therefore, the roadblock stop violated defendant's fourth amendment rights against unreasonable seizure.

POINT II

THIS COURT SHOULD REMAND THE CASE TO THE TRIAL COURT FOR A DETERMINATION OF WHETHER DEFENDANT'S CONSENT TO SEARCH WAS VALID UNDER STATE V. ARROYO.

Despite the initial illegality of the roadblock stop of defendant's vehicle, the issue remains whether the subsequent warrantless search of the vehicle was nevertheless valid. Relying on Sims, defendant asserts that his consent to search "was obtained as a result of an unbroken chain of events that began with the roadblock stop[;] [c]onsequently, the consent to search was not sufficiently attenuated from the initial illegal stop" (Br. of App. at 22-23).⁴

⁴ Defendant's non-attenuation argument is raised for the first time on appeal before this Court (Br. of App. at 21). However, a non-attenuation argument was arguably unavailable to defendant in the trial court because, as acknowledged in Sims, "then-standing decisions effectively held that a non-coerced search consent, by itself, purged the taint of a primary illegality," id. at 150; Park, 808 P.2d at 458. Thus, the State makes no argument concerning defendant's arguable waiver of the issue and acknowledges that this Court considered similar non-attenuation arguments raised for the first time on appeal in both Sims and Park.

In light of the State's concession regarding the illegality of the roadblock under the fourth amendment, the State recognizes its burden "to show that evidence obtained following illegal police conduct is attenuated from the illegality." Sims, 808 P.2d at 151 (citing Brown v. Illinois, 422 U.S. 590, 604 (1975)).⁵ Under State v. Arroyo, 796 P.2d 684, 688 (Utah 1990), the inquiry whether a consent to search is lawfully obtained following initial police misconduct must focus on two factors: (1) whether the consent was voluntary, and (2) whether the consent was obtained by police exploitation of the prior illegality. Because the trial court ruled on the validity of defendant's consent without benefit of the Arroyo analysis, this Court should remand the case to the trial court for an evaluation of defendant's consent to search under Arroyo and the entry of appropriate factual findings and legal conclusions on the voluntariness and exploitation prongs of Arroyo's two-prong test. However, in remanding, this Court should provide direction to the trial court on the proper application of Arroyo.

A. Voluntariness

As to the first prong of the Arroyo test, it is well settled that to determine whether consent to search is voluntary,

⁵ As noted previously, defendant was tried jointly with a codefendant, Dennis Shoulderblade; however, defendants elected to take separate appeals. With the exception of its discussion of Shoulderblade's failure to attack the trial court's finding of consent to search his vehicle on appeal to this Court, the State's analysis of the consent issue raised in this case is identical to its analysis of the issue in State v. Shoulderblade, Case No. 900288-CA. The State's brief in Shoulderblade was filed on November 5, 1991.

a totality of circumstances test applies to ascertain whether the consent was in fact voluntarily given and not the result of "duress or coercion, express or implied." Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973). See also State v. Marshall, 791 P.2d 880, 887 (Utah App.), cert. denied, 800 P.2d 1105 (Utah 1990). And, the issue of voluntary consent is a question of fact on which the state carries the burden of proof. United States v. Mendenhall, 446 U.S. 544, 557 (1980); State v. Webb, 790 P.2d 65, 82 (Utah App. 1990). But see State v. Bobo, 803 P.2d 1268, 1272 (Utah App. 1990) (trial court's ultimate determination of voluntary consent is a conclusion of law). However, this Court has not made clear what standard of proof applies to this factual inquiry. See State v. Carter, 812 P.2d 460, 467 n.7 (Utah App.) (declining to decide whether the applicable standard of proof is the clear and convincing standard or the preponderance of evidence standard), cert. pending, 167 Utah Adv. Rep. 25 (Utah July 26, 1991). There is no good reason not to resolve this question and provide the trial courts with needed direction.

In State v. Marshall, 791 P.2d at 887-88, and State v. Webb, 790 P.2d at 82, this Court appeared to adopt a clear and convincing standard of proof by embracing the standard espoused in United States v. Abbott, 546 F.2d 883 (10th Cir. 1976). Quoting Abbott, the Marshall Court set out the following standard which must be met by the state "to sustain its burden to show that voluntary consent was given":

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

791 P.2d at 887-88 (quoting Abbott, 546 F.2d at 885 (quoting Villano v. United States, 310 F.2d 680, 684 (10th Cir. 1962))). This standard has been questioned by at least one other court as being an unduly strict standard of proof. United States v. Miller, 589 F.2d 1117, 1130-31 (1st Cir. 1978), cert. denied, 440 U.S. 958 (1979). Indeed, insofar as the Abbott standard imposes a clear and convincing standard of proof on the government, it is contrary to the clear majority view that the government need only prove voluntary consent to search by a preponderance of the evidence. See, e.g., United States v. Matlock, 415 U.S. 164, 177 n.14 (1974) (where, in reviewing the voluntariness of a consent to a warrantless search, the Court said the "controlling burden of proof at suppression hearings should impose no greater burden than proof by a preponderance of the evidence"); Bourjaily v. United States, 483 U.S. 171, 176 (1987) (citing Matlock for the principle that "voluntariness of consent to search must be shown by a preponderance of the evidence"); United States v. Hurtado, 905 F.2d 74 (5th Cir. 1990); United States v. Chaidez, 906 F.2d 377 (8th Cir. 1990); White Fabricating Company v. United States, 903 F.2d 404 (6th Cir. 1990); People v. Harris, 199 Ill.App.3d 1008, 557 N.E.2d 1277 (Ill. App. 1990); State v. Cress, 576 A.2d

1366 (Me. 1990); State v. O'Dell, 576 A.2d 425 (R.I. 1990); People v. Henderson, 220 Cal.App.3d 1632, 270 Cal.Rptr. 248 (1990).

While acceptance of the preponderance standard in this context is not universal, see 4 LaFave, Search and Seizure, § 11.2(c) at 236-37 (1987), the United States Supreme Court has made clear that that standard is appropriate, thus explaining the majority view. As the Fifth Circuit Court of Appeals said in overruling its prior decisions that adopted a clear and convincing standard of proof:

Since 1972, the Supreme Court has stated that the preponderance of evidence standard supplies the burden which the government must carry to defeat a defendant's motion to suppress evidence when the motion concerns the voluntariness of a confession, Lego v. Twomey, 404 U.S. 477, 482-89, 92 S.Ct. 619, 623-26, 30 L.Ed.2d 618 (1972), the voluntariness of a consent to a warrantless search, United States v. Matlock, 415 U.S. 164, 177 n. 14, 94 S.Ct. 988, 996 n. 14, 39 L.Ed.2d 242 (1974), the inevitable discovery of evidence, Nix v. Williams, 467 U.S. 431, 444 n. 5, 104 S.Ct. 2501, 2509 n. 5, 81 L.Ed.2d 377 (1984), or the waiver of Miranda rights, Colorado v. Connelly, 479 U.S. 157, 107 S.Ct. 515, 523, 93 L.Ed.2d 473 (1986).

In conformity with the rationale announced by the Supreme Court, we overrule our previous decisions requiring the government at a suppression hearing to prove voluntariness [of consent to search] by clear and convincing evidence. "[T]he controlling burden of proof at suppression hearings should impose no greater burden than proof by a preponderance of the evidence." United States v. Matlock, 415 U.S. 164, 177 n. 14, 94 S.Ct. 988, 996 n. 14, 39 L.Ed.2d 242 (1974).

United States v. Hurtado, 905 F.2d at 76. In Lego v. Twomey, the Supreme Court explained its rationale for the preponderance standard:

Since the purpose that a voluntariness hearing is designed to serve has nothing whatever to do with improving the reliability of jury verdicts, we cannot accept the charge that judging the admissibility of a confession by a preponderance of the evidence undermines the mandate of In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Our decision in Winship was not concerned with the standards for determining the admissibility of evidence or with the prosecution's burden of proof at a suppression hearing when evidence is challenged on constitutional grounds. Winship went no further than to confirm the fundamental right that protects "the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Id. at 364, 90 S.Ct., at 1072. . . . A guilty verdict is not rendered less reliable or less consonant with Winship simply because the admissibility of a confession is determined by a less stringent standard. . . .

404 U.S. at 486-87. The Court also rejected the argument that the admissibility of evidence challenged on constitutional grounds should be determined under a stricter standard of proof in order to protect the values that exclusionary rules are designed to protect:

The argument is straightforward and has appeal. But we are unconvinced that merely emphasizing the importance of the values served by exclusionary rules is itself sufficient demonstration that the Constitution also requires admissibility to be proved beyond a reasonable doubt. Evidence obtained in violation of the Fourth Amendment has been excluded from federal criminal trials for years. The same is true

of coerced confessions offered in federal or state trials. But, from our experience over this period of time no substantial evidence has accumulated that federal rights have suffered from determining admissibility by a preponderance of the evidence. . . . Without good cause, we are unwilling to expand currently applicable exclusionary rules by erecting additional barriers to placing truthful and probative evidence before state juries Sound reason for moving further in this direction has not been offered here nor do we discern any at the present time. This is particularly true since the exclusionary rules are very much aimed at deterring lawless conduct by the police and prosecution and it is very doubtful that escalating the prosecution's burden of proof in Fourth and Fifth Amendment suppression hearings would be sufficiently productive in this respect to outweigh the public interest in placing probative evidence before juries for the purpose of arriving at truthful decisions about guilt or innocence.

404 U.S. at 488-89 (citations and footnote omitted). Although the Court said that "the States are free pursuant to their own law, to adopt a higher standard[,] [in that] [t]hey may indeed differ as to the appropriate resolution of the values they find at stake," id. at 489, the reasoning of Lego v. Twomey is sound and should provide the basis for this Court clearly specifying that the state need only prove voluntary consent to search by a preponderance of the evidence. See State v. Stevens, 311 Or. 119, 806 P.2d 92, 104 (1991) (in holding that, under Oregon Constitution, state must prove voluntary consent to search by only a preponderance of the evidence, court adopts reasoning of Lego v. Twomey). Cf. State v. Carter, 776 P.2d 886, 890 (Utah 1989) ("State bears burden of proving by at least a preponderance of the evidence that a defendant's confession is voluntary").

In short, if this case is remanded, the Court should direct the trial court that the state need only prove voluntary consent by a preponderance of the evidence.

B. Exploitation

The exploitation prong of the Arroyo test is not so easily understood or applied. Without explaining precisely how the exploitation analysis is to proceed, the Utah Supreme Court said only that the primary inquiry is whether the consent was sufficiently "attenuated" from the prior illegality such that the consent was not "tainted" by that illegality. 796 P.2d at 690-91. The court noted the Brown v. Illinois, 422 U.S. 590 (1975), factors which should be considered, id. at 690-91 n.4, but did not make clear whether the primary focus of the exploitation analysis is the possible effect of the initial police misconduct on the voluntariness of the consent or rather the police misconduct itself. Arroyo cites numerous cases on the issue of exploitation, id. at 690-91, but does not express a preference for one of the two approaches those cases appear to adopt. Under one approach, voluntariness of the consent is the primary consideration, and if there is voluntary consent (i.e., the consent has not been rendered involuntary by the prior police illegality), the evidence seized pursuant to the consent is generally admissible. Under the other approach, the police misconduct itself is the primary consideration. A consent to search that is obtained close in time and circumstance to the

police illegality, although entirely voluntary, is "tainted," and the evidence seized pursuant to the consent is inadmissible.

For example, some of the cases cited in Arroyo discuss the exploitation question primarily in terms of the potential effect of the police misconduct on the voluntariness of the consent. See, e.g., United States v. Miller, 821 F.2d 546, 550 (11th Cir. 1987) ("[W]e hold that the consent was the product of the illegal detention, and that the taint of the unreasonable stop was not sufficiently attenuated. . . . [T]here were insufficient intervening circumstances that might have reduced the coercive nature of the stop and permitted the appellant to make a voluntary decision about the consent search."); United States v. Taheri, 648 F.2d 598, 601 (9th Cir. 1981) ("no intervening events or lapse of time which would show [the defendant's] consent was 'sufficiently an act of free will to purge the primary taint of the unlawful invasion'"); State v. Raheem, 464 So.2d 293, 298 (La. 1985) ("Under the circumstances presented here, we cannot say that [the defendant's] consent was sufficiently attenuated from the illegal arrest and search to be a product of her free will.").

On the other hand, some of the cases mechanically apply the exploitation analysis with no apparent concern about whether the voluntariness of the consent had been undermined by the police misconduct. These cases seem to focus solely on the police misconduct and whether it "taints" the consent such that the evidence seized must be suppressed under the "fruit of the

poisonous tree" doctrine. See, e.g., United States v. Melendez-Gonzalez, 727 F.2d 407, 414-15 (5th Cir. 1984); United States v. Thompson, 712 F.2d 1356, 1362 (11th Cir. 1983); People v. Odom, 83 Ill.App.3d 1022, 39 Ill.Dec. 406, 404 N.E.2d 997, 1002 (1980).

The latter approach was followed by two panels of this Court in Sims and Park, which, as already noted, involved consent searches after illegal roadblock stops. In Sims, the panel began its analysis by acknowledging that the defendant did not challenge the voluntariness of his consent to the search, but that he claimed "there was insufficient attenuation between his detention and the consent . . . to purge the taint of the illegality of the detention." 808 P.2d at 150. It applied the Brown v. Illinois factors which Arroyo had identified as pertinent to the evaluation of the "non-exploitation or attenuation element": "the temporal proximity of the primary illegality and the granting of the consent, the presence or absence of intervening circumstances, and the purpose and flagrancy of the illegal police conduct." Ibid. Concluding that "the record demonstrates [the defendant's] consent to search his vehicle was arrived at by exploitation of the illegal roadblock," id. at 152, the panel relied most heavily on two factors: (1) "the consent was obtained within minutes of the illegal stop, and not even under our clear error standard of review could the trial court find enough time between the stop and the grant of consent to attenuate the relationship between the two;" and (2) "the record reveal[ed] [no] possibility of intervening circumstances

between the illegal stop and [the defendant's] grant of consent to the search," id. at 151.⁶ An identical approach was followed by the Park panel in reversing the trial court's denial of the defendant's motion to suppress. 810 P.2d at 458-59. This mechanical application of the exploitation prong, which automatically invalidates a search and/or seizure if the voluntary consent is closely connected in time and by circumstance to the prior illegality (a scenario which is frequently present in these kinds of cases), amounts to the "but for" rule of exclusion that was rejected in Wong Sun v. United

⁶ Although the Sims panel also considered the "purpose and flagrancy" factor, 808 P.2d at 151-52, it is not clear whether it concluded that the officers' misconduct was purposeful or flagrant. However, the panel seemed to suggest that the officers' conduct was flagrant because (1) "[t]he troopers each had years of law enforcement experience, and [could] properly be charged with awareness that their action was not authorized by law," and (2) "[u]sing ten to twelve law officers to staff the roadblock may have also left distant parts of the largely rural jurisdiction with delayed police assistance in the event of need." 808 P.2d at 151. First, at the time of the roadblock there was no decision from either of Utah's appellate courts or the federal courts that would have made it clear to the officers that their actions were unconstitutional. And, to require of the officers the clairvoyance necessary to anticipate Michigan Dept. of State Police v. Sitz and the unique state constitutional holding of Sims is unreasonable. Second, the panel's criticism of the use of law enforcement resources, beyond being speculative and outside of any particular expertise of the judiciary, does not form a basis for concluding that the officers were guilty of a flagrant or purposeful constitutional violation.

Furthermore, Sims's suggestion that the absence of purposeful or flagrant police misconduct can serve to "correct the constitutional violation," 808 P.2d at 152, is wrong. All that Arroyo recognizes is that voluntary consent to search, which is not obtained by exploitation of an initial illegality, can be the basis for the admission of evidence seized pursuant to such consent; it does not stand for the proposition that such consent "corrects" the prior constitutional violation.

States, 371 U.S. 471, 487-88 (1963). See United States v. Wellins, 654 F.2d 550, 555 (9th Cir. 1981) ("lack of significant intervening period of time does not, in itself, require that the evidence be suppressed for want of sufficient attenuation"). As stated in Arroyo, "'all evidence is [not] 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police.'" 796 P.2d at 688 (quoting Wong Sun, 371 U.S. at 487-88) (citation omitted).

A fundamental problem with Sims and Park is that they fail to acknowledge that the Arroyo court chose to remand to the trial court for a determination of the exploitation issue under nearly identical facts (i.e., an illegal vehicle stop which was followed shortly thereafter by the defendant's consent to a search of the vehicle). 796 P.2d at 692. Had the supreme court considered the close temporal proximity between the illegal stop and the consent, coupled with the absence of any intervening circumstances, to be dispositive of the exploitation question, as Sims and Park concluded, it would not have remanded for a determination of that question by the trial court. In ordering a remand, Arroyo implicitly rejected the mechanical approach to the exploitation analysis employed in Sims and Park.

The contrary approach to the exploitation inquiry, which focuses primarily on the possible effect of the police misconduct on the voluntariness of the consent, appears to be most consistent with Florida v. Royer, 460 U.S. 491 (1983), identified in Arroyo as an example of the application of the

exploitation prong in a consent search case. 796 P.2d at 690. In Royer, the police stopped the defendant at an airport based on a drug courier profile and ultimately obtained his consent to a search of his luggage, in which narcotics were found.⁷ Royer moved to suppress the contraband seized from his luggage. The trial court denied the motion, ruling that Royer's consent to the search was "freely and voluntarily" given. 460 U.S. at 495. The intermediate appellate court of Florida reversed, holding that Royer's detention was unlawful and that the unlawful detention tainted Royer's consent to search. Ibid. That decision was affirmed by the Supreme Court in a plurality opinion. 460 U.S. at 493-508. Although, as noted in Arroyo, 796 P.2d at 690, the plurality never directly questioned the trial court's finding that Royer's consent was "freely and voluntarily" given, it

⁷ The Court recounted Royer's consent as follows:

[After the detectives had removed Royer to a small room and retrieved his luggage from the airline], Royer was asked if he would consent to a search of the suitcases. Without orally responding to this request, Royer produced a key and unlocked one of the suitcases, which one detective then opened without seeking further assent from Royer. Marihuana was found in that suitcase. According to Detective Johnson, Royer stated that he did not know the combination to the lock on the second suitcase. When asked if he objected to the detective opening the second suitcase, Royer said "[n]o, go ahead," and did not object when the detective explained that the suitcase might have to be broken open. The suitcase was pried open by the officers and more marihuana was found. . . .

460 U.S. at 494-95.

nevertheless appears to have been primarily concerned with the coercive circumstances under which the consent was obtained and the effect those circumstances had on the voluntariness of the consent. This is evident from Justice Powell's concurrence, in which he wrote: "I agree with the plurality that . . . [the defendant's] surrender of the luggage key to the officers cannot be viewed as consensual." 460 U.S. at 509 (Powell, J., concurring).

In Arroyo, the Utah Supreme Court rejected an exploitation analysis that focuses *solely* on voluntariness, declining to adopt the reasoning of United States v. Carson, 793 F.2d 1141 (10th Cir.), cert. denied, 479 U.S. 914 (1986). There, the Tenth Circuit Court of Appeals held:

[I]n a case in which evidence is obtained pursuant to consent granted subsequent to illegal police actions, the "exploitation" issue under Wong Sun is resolved simply by determining whether or not defendant's *grant* of consent was voluntary under the circumstances. . . . When defendant's grant of consent is voluntary, then there is no exploitation; . . . the findings of voluntary consent and "exploitation" are mutually exclusive.

793 F.2d at 1149 (emphasis in original). However, the court's rejection of Carson must be considered in connection with its reliance on Royer. In this light, Arroyo is most reasonably read as adopting an exploitation analysis that focuses primarily, but not solely, on the voluntariness of the consent to search. Under such an approach, the Brown v. Illinois factors are more easily and logically applied.

In Brown, the United States Supreme Court had before it the narrow question of whether "the Illinois courts were in error in assuming that the Miranda warnings, by themselves, under Wong Sun always purge the taint of an illegal arrest." 422 U.S. at 605. Brown had been arrested without probable cause and without a warrant; and, while in custody and after being given Miranda warnings, he made two inculpatory statements concerning a murder. Id. at 591, 594-95. The Illinois Supreme Court ruled that, although Brown's arrest was illegal, the giving of Miranda warnings "'served to break the causal connection between the illegal arrest and the giving of the statements, and that defendant's act in making the statements was 'sufficiently an act of free will to purge the primary taint of the unlawful invasion.'" (Wong Sun v. United States, 371 U.S. 471, at 486.)' "Id. at 597 (quoting People v. Brown, 56 Ill.2d 312, 307 N.E.2d 356, 358 (Ill. 1974)). At bottom, the state court held that "the Miranda warnings in and of themselves broke the causal chain so that any subsequent statement, even one induced by the continuing effects of unconstitutional custody, was admissible so long as, in the traditional sense, it was voluntary and not coerced in violation of the Fifth and Fourteenth Amendments." Ibid. The Supreme Court granted certiorari to address the implication of its holding in Wong Sun to the facts of Brown's case. Ibid.

The Court began by reviewing its holding in Wong Sun, where the issue was "whether statements and other evidence obtained after an illegal arrest or search should be excluded."

Id. at 597. The statements were obtained from two defendants, Toy and Wong Sun. Toy's statement was obtained immediately after he was pursued and arrested by six agents. It apparently was a spontaneous response to a question asked him in the frenzy of that event, and the agents apparently made no attempt to advise him of his right to remain silent. Wong Sun's statement, on the other hand, was not given until after he was arraigned and released on his own recognizance. He voluntarily returned to the station a few days after his arrest for questioning, and his statement came after he had been advised of his right to remain silent and to have counsel present. Id. at 607-08 (Powell, J., concurring in part). Under these facts, the Wong Sun Court ruled that Toy's statement should not have been admitted as evidence against him, holding that "the statement did not result from 'an intervening independent act of a free will,' and that it was not 'sufficiently an act of free will to purge the primary taint of the unlawful invasion.'" Id. at 598 (quoting Wong Sun, 371 U.S. at 486). However, with respect to Wong Sun's confession, the Court ruled that it was admissible because "the connection between his unlawful arrest and the statement 'had become so attenuated as to dissipate the taint.'" Ibid. (quoting Wong Sun, 371 U.S. at 491) (citation omitted).

The Brown Court then made clear that "[t]he exclusionary rule . . . was applied in Wong Sun primarily to protect Fourth Amendment rights. Protection of the Fifth Amendment right against self-incrimination was not the Court's

paramount concern there." Id. at 599 (emphasis in original). In short, the Court's foremost concern was to apply the fourth amendment exclusionary rule where it would serve its primary purpose of deterring illegal conduct by the police -- and thus the different rulings regarding Toy's statement and Wong Sun's statement. As Justice Powell admonished in his concurring opinion, "the Wong Sun inquiry always should be conducted with the deterrent purpose of the Fourth Amendment exclusionary rule sharply in focus." Id. at 612 (Powell, J., concurring in part) (citation omitted).

It was against this backdrop that the Brown Court rejected the *per se* rule of admission adopted by the Illinois courts and also declined to adopt an alternative *per se* or "but for" rule of exclusion. Instead, the Court concluded that "[t]he question whether a confession is the product of a free will under Wong Sun must be answered on the facts of each case[,] [and] no single fact is dispositive." Id. at 603. It made clear that the presence of Miranda warnings does not control the determination of whether a confession that has followed a fourth amendment violation is admissible. While that factor is important in determining whether the confession is obtained by exploitation of the fourth amendment violation, other relevant factors are to be considered, including: "[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct." Id. at 603-04 (footnotes and citations omitted).

It is with this understanding of Wong Sun and Brown that Arroyo must be read. As previously discussed, Arroyo specifically relied on Royer as an example of the application of the exploitation analysis to a case where evidence was seized pursuant to a consent to search which followed an initial fourth amendment violation. The Royer plurality's primary concern appears to have been the voluntariness of the consent to search. Thus, Arroyo's reference to the Brown factors, coupled with its reliance on Royer and its rejection of Carson, is most reasonably interpreted as an adoption of an exploitation analysis which (1) focuses primarily, but not solely, on the voluntariness of the consent, (2) applies the Brown factors to determine whether the voluntariness of the consent was in fact affected by the prior police illegality, and (3) considers whether the police misconduct was sufficiently flagrant or purposeful that the evidence should be excluded even though the consent to search was entirely voluntary. The inquiry would proceed as follows: (1) Was the consent in fact rendered involuntary by the temporal proximity between the fourth amendment violation and the consent, the absence of any intervening circumstances, or flagrant police misconduct?⁸ (2) Even if it is determined that the consent was voluntary after consideration of the possible effect of all three

⁸ Consideration of voluntariness under the exploitation prong of the Arroyo test may overlap to some degree with the voluntariness inquiry which has already occurred under the first prong of that test. However, under the exploitation prong, particular attention is paid to the police illegality and its possible effect on voluntariness.

Brown factors on voluntariness, was the police misconduct purposeful or flagrant such that the evidence should be excluded in order to deter that level of police misconduct? With respect to this second question, if there is a purposeful or flagrant violation of the fourth amendment, then the first two Brown factors (temporal proximity and intervening circumstances) are considered to determine if there is sufficient "attenuation" to remove the "taint" from the flagrant violation which would naturally flow under the "fruit of the poisonous tree" doctrine. In his concurring opinion in Brown, Justice Powell illustrated this process in the confession context:

I would require the clearest indication of attenuation in cases in which official conduct was flagrantly abusive of Fourth Amendment rights. . . . In such cases the deterrent value of the exclusionary rule is most likely to be effective, and the corresponding mandate to preserve judicial integrity most clearly demands that the fruits of the official misconduct be denied. I thus would require some demonstrably effective break in the chain of events leading from the illegal arrest to the statement, such as actual consultation with counsel or the accused's presentation before a magistrate for a determination of probable cause, before the taint can be deemed removed.

422 U.S. at 610-11 (citations omitted). A similar analysis would be made in the consent to search case, and the first two Brown factors would determine whether the consent was sufficiently

attenuated in terms of time and circumstance to be free of the taint of the flagrant police misconduct.⁹

This approach recognizes both that "in some circumstances strict adherence to the Fourth Amendment exclusionary rule imposes greater cost on legitimate demands of law enforcement than can be justified by the rule's deterrent purposes," and that in cases of flagrant police misconduct "the deterrent value of the exclusionary rule is most likely to be effective." Brown, 422 U.S. at 608-09, 611 (Powell, J., concurring in part).

Thus, assuming a remand of this case for consideration of the exploitation prong of the Arroyo test, this Court should direct the trial court to employ the foregoing analysis, rather than the different approach adopted in Sims and Park which, as previously discussed, is not consistent with either Royer or the remand ordered in Arroyo.

⁹ Had the officers' conduct in Sims actually been flagrant, which it was not, the panel would have been correct in excluding the evidence on the basis that there was no significant lapse of time or intervening circumstances between the consent to search and the illegality. But in the absence of flagrant conduct, the approach followed in Sims was incorrect for the reasons already discussed.

CONCLUSION

Based on the foregoing arguments, this Court should remand this case to the trial court for a determination of whether defendant's consent to search was valid under Arroyo.

RESPECTFULLY SUBMITTED this 19th day of November, 1991.

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CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing brief of appellee was mailed, postage prepaid, to G. Fred Metos and Stephen R. McCaughey, attorneys for appellant, 72 East 400 South, Suite 330, Salt Lake City, Utah 84111, this 19th day of November, 1991.

Marian Decker

ADDENDUM

1 Ind. Q. To F. 7/27/89

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

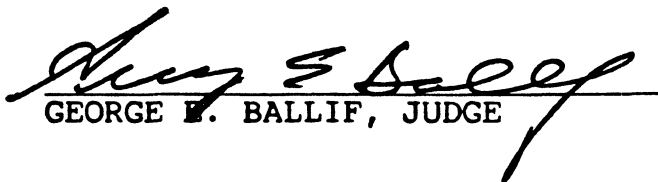
light during the check that created a reasonable suspicion that the occupants were engaged in some criminal activity (Carner). The uncontroverted testimony is that the defendants were properly advised of their rights before further attempts at questioning.

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