

2000

Utah v. Merlen : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

vs.

MARK ANTHONY MERLEN,

Defendant/Appellant.

Case No. 20000589-CA

Priority No. 2

BRIEF OF APPELLEE

AN APPEAL FROM A JUDGMENT OF CONVICTION FOR UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37-8(2)(A) (SUPP. 1999), IN THE SEVENTH JUDICIAL DISTRICT COURT OF UTAH, CARBON COUNTY, THE HONORABLE SCOTT N. JOHANSEN PRESIDING

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

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vs.

MARK ANTHONY MERLEN,

Defendant/Appellant.

Case No. 20000589-CA

Priority No. 2

BRIEF OF APPELLEE

* * *

STATEMENT OF JURISDICTION

Defendant appeals from a judgment of conviction for unlawful possession of a controlled substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a) (Supp. 1999). This Court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(e) (1996).

STATEMENT OF THE ISSUE

The sole issue on appeal is whether the trial court properly denied defendant's motion to suppress where the officer merely investigated a solitary vehicle in an empty parking lot which, upon illuminating the scene, the officer immediately recognized as a truck he observed just a few days earlier with expired California license plates.

Standard of Review. The trial court's factual findings on a motion to suppress are reviewed for clear error and its conclusions of law are reviewed for correctness. *State v. Swink*, 2000 UT App 262, ¶ 6, 11 P.3d 299; *State v. Galli*, 967 P.2d 930, 933 (Utah 1998).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The Fourth Amendment to the United States Constitution is relevant to a determination of this case. That amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

U.S. Const. amend. IV.

STATEMENT OF THE CASE

SUMMARY OF PROCEEDINGS BELOW

Defendant was charged with one count of unlawful possession of a controlled substance in a drug free zone, a second degree felony, one count of unlawful possession of a controlled substance, a class A misdemeanor, and one count of possession of drug paraphernalia, a class B misdemeanor. R. 1. Defendant filed a motion to suppress the evidence seized in a search of his person incident to arrest. R. 15. After an evidentiary hearing, the trial court denied the motion. R. 51: 47.¹ Defendant subsequently entered a guilty plea to a reduced charge of unlawful possession of a controlled substance, a third degree felony, and the court dismissed the remaining counts. *See* R. 27-38. In entering the guilty plea, defendant reserved the right to appeal the trial court's ruling on defendant's

¹A transcript of the trial court's ruling at the evidentiary hearing is reproduced in Addendum A.

motion to suppress. R. 27. Defendant was sentenced to an indeterminate prison term of zero-to-five years, running concurrently with a prison term on another matter he was then serving. R. 36. Defendant timely appealed. R. 42-43.

SUMMARY OF FACTS

Officer Tracy Allred of the Price City Police Department was on patrol on Christmas Eve 1999. *See* R. 51:8. Some time after midnight, now Christmas morning, Officer Allred performed a security check of the north ballpark complex. R. 51: 9, 19. Officers were instructed to perform the security check because of incidents of criminal mischief, drug usage, and underage drinking. R. 51: 9. As he did so, Officer Allred observed a truck backed into a parking stall in the main parking lot east of the complex. R. 51: 9, 20. Officer Allred made a left turn, checked the west end of the complex, and turned around. R. 51: 9. As he again passed the east side of the complex, the truck was still there. R. 51: 9.

The presence of the lone truck in the parking lot at that early hour raised the officer's concerns. R. 51: 10. He had prior experience with juveniles drinking and smoking marijuana at that particular location. R. 51: 10. He was also concerned given the increased incidents of suicide during the holiday season. R. 51: 10. Prompted by these concerns, Officer Allred pulled into the parking lot, and, for safety reasons, stopped his patrol car at a 45 degree angle facing the truck—the right front of the officer's car at the right front of defendant's truck. R. 51: 10, 20. The officer activated his flood lights, but did not block the

truck. R. 51: 10, 21-22, 25.² When he stopped, Officer Allred recognized the truck as one that he had seen a few days earlier bearing a California licence plate with an expired 1997 registration. R. 51: 10. Officer Allred then notified dispatch of his location and requested a check of the license plate number. *See* R. 51: 10-11. As he did so, he noticed defendant sitting in the passenger side of the truck making a lot of movement with his hands as if he were putting something down in front of his pants or down his pants. R. 51: 11. Officer Allred also noticed that the truck engine was running. R. 51: 11.

Officer Allred exited his patrol car and walked up to the passenger window. R. 51: 11. As he did so, he observed some beer cartons and empty beer cans in the back of the truck. R. 51: 11. Officer Allred asked defendant through the open truck window “what was goin’ on.” R. 51: 11, 19. Defendant told him that he had “just c[ome] into town relaxing.” R. 51: 12. Officer Allred pointed to the beer cartons in the back of the truck and asked him if he had been drinking. R. 51: 12. Defendant responded in the negative, explaining that the beer cartons were from his work. R. 51: 12. During this conversation, Officer Allred’s initial concerns that defendant may have been impaired or using illicit drugs were dispelled. R. 51: 23-24. He did not smell any alcohol or observe any evidence of impairment, drug use, or other criminal activity. R. 51: 12, 22-24.

Because Officer Allred “wanted to talk to [defendant] more, [he] asked him to shut the engine off.” R. 51: 12, 22. After defendant complied with the request, Officer Allred

²The flood lights, which Officer Allred referred to as “take down lights,” are used to shine into a vehicle’s window so the officer can observe the vehicle’s occupants. *See* R. 51: 22, 25.

asked him “why he was movin’ around like he was hidin’ something.” R. 51: 12. Defendant explained that he was “just zippin’ up the zipper of his pants.” R. 51: 12. Officer Allred then told defendant the reason he came over to speak with him—that it was suspicious for him to be there at one o’clock early Christmas morning. R. 51: 12. Officer Allred asked defendant for his driver’s license, whereupon defendant produced a Utah driver’s license. R. 51: 12-13, 19. Defendant explained that he and his brother were from Utah, but they had been working in California and Salt Lake City. R. 51: 13. He admitted that the registration had expired, but claimed he bought a temporary sticker. R. 51: 13, 23. However, Officer Allred could not confirm the validity of the temporary sticker because it was too faded to read. R. 51: 13.

Officer Allred asked dispatch for a warrants check, but before he received a response from dispatch, defendant admitted that he had an outstanding warrant. R. 51: 13. Dispatch subsequently confirmed that defendant had an outstanding warrant for his arrest out of Draper. R. 51: 13-14. After confirming again the existence of the warrant, Officer Allred told defendant to step out of the truck. R. 51: 14. After removing the ignition keys, defendant exited the truck. R. 51: 14. Officer Allred handcuffed defendant, searched him, and placed him under arrest. R. 51: 14. By this time, a second officer arrived at the scene. R. 51: 14. When given the option of having the truck impounded for safekeeping or leaving it there at the parking lot, defendant asked that it be left in the parking lot. R. 51: 14. Officer Allred transported defendant to the jail and the second officer remained at the scene to secure the truck. R. 51: 14-15.

At the jail, Officer Allred searched defendant, finding a small ziplock bag containing methamphetamine in the front pocket of defendant's jacket. *See* R. 51: 15. When Officer Allred left to speak with dispatch, another officer stayed with defendant. R. 51: 15. That officer found marijuana and paraphernalia on defendant's person. *See* R. 1, 51: 15.³

SUMMARY OF ARGUMENT

Officer Allred's initial approach to defendant's truck did not constitute a seizure. He approached the truck openly late at night. He did not block the truck, nor did he otherwise display a show of authority. Activation of his patrol car's flood lights was for the purpose of illuminating the area. A reasonable person would not believe, under the circumstances of the late hour and empty parking lot, that he or she was being detained. Once the officer recognized the truck as one he had seen just a few days earlier with expired California license plates, he had reasonable suspicion to make an investigative stop. The warrants check verified defendant's admission that he had an outstanding warrant and justified the arrest and subsequent search.

ARGUMENT

DEFENDANT WAS NOT SEIZED IN VIOLATION OF THE FOURTH AMENDMENT

After taking evidence, the trial court denied defendant's motion to suppress. R. 51: 47. The trial court concluded that neither the manner in which Officer Allred parked his car,

³What that officer found was not disclosed at the suppression hearing because it was not necessary to a determination of the motion. *See* R. 51: 15-18. The information indicates, however, that marijuana and drug paraphernalia were found. *See* R. 1.

nor his use of flood lights rendered the encounter a seizure. R. 51: 41-42. The court further concluded that reasonable suspicion justified a stop as soon as Officer Allred recognized the truck as one he had seen just a few days earlier with expired California license plates. R. 51: 42. A review of the applicable law reveals that the trial court's conclusions were correct.

A. CITIZEN-POLICE ENCOUNTERS.

Three levels of police encounters with the public are constitutionally permissible:

“(1) an officer may approach a citizen at anytime [sic] and pose questions so long as the citizen is not detained against his will; (2) an officer may seize a person if the officer has an ‘articulable suspicion’ that the person has committed or is about to commit a crime; however, the detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop; (3) an officer may arrest a suspect if the officer has probable cause to believe an offense has been committed or is being committed.”

State v. Deitman, 739 P.2d 616, 617-18 (Utah 1987) (*quoting United States v. Merritt*, 736 F.2d 223, 230 (5th Cir. 1984)) (other internal quotations omitted); *accord Salt Lake City v. Ray*, 2000 UT App 55, ¶ 10, 998 P.2d 274. “Characterization of the encounter . . . must be determined by examining the totality of the circumstances.” *State v. Smith*, 781 P.2d 879, 881 (Utah App. 1989); *accord Ray*, 2000 UT App 55, at ¶ 13.

Consensual Encounters. A level-one encounter involves “situations where an officer approaches an individual and poses questions to the individual, so long as the individual is not detained against his will.” *State v. Carter*, 812 P.2d 460, 463 (Utah App. 1991), *cert. denied*, 836 P.2d 1383 (Utah 1992); *accord Florida v. Bostick*, 501 U.S. 429, 434, 111 S.Ct. 2382, 2386 (1991). In other words, “mere police questioning does not constitute a seizure.” *Bostick*, 501 U.S. at 434, 111 S.Ct. at 2386. Level-one encounters “are not seizures subject

to Fourth Amendment protection.” *State v. Bean*, 869 P.2d 984, 986 (Utah App. 1994); accord *Bostick*, 501 U.S. at 434, 111 S.Ct. at 2386 (holding that a voluntary citizen-police encounter “will not trigger Fourth Amendment scrutiny unless it loses its consensual nature”).

Investigatory Stops. “In contrast, a level two stop, or a seizure within the meaning of the Fourth Amendment, occurs when the officer ‘by means of physical force or show of authority has in some way restrained the liberty’ of a person.” *Bean*, 869 P.2d at 986. (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16, 88 S.Ct. 1868, 1899 n.16 (1968)) (other internal quotes omitted). These seizures are permissible under the Fourth Amendment so long as the officer can “point to specific, articulable facts which, together with rational inferences drawn from those facts, would lead a reasonable person to conclude [the defendant] had committed or was about to commit a crime.” *State v. Trujillo*, 739 P.2d 85, 88 (Utah App. 1987) (citations omitted).

“Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.” *United States v. Mendenhall*, 446 U.S. 544, 555-56, 100 S.Ct. 1870, 1877 (1980). Other circumstances that might indicate a seizure include the blocking of a person’s egress, see *State v. Struhs*, 940 P.2d 1225, 1228 (Utah App. 1997), retention of the person’s identification, see *Ray*, 2000 UT App 55, at ¶ 13, activation of the officer’s overhead

emergency lights, *see Smith*, 781 P.2d at 881-82, or removal of the person to a private area, *see Carter*, 812 P.2d at 463. However, the presence of any one of these factors is not dispositive, but must be examined in the context of all the circumstances. *See United States v. Glass*, 128 F.3d 1398, 1406 (10th Cir. 1997). “[T]he crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would ‘have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.’” *Bostick*, 501 U.S. at 437, 111 S.Ct. at 2387 (*quoting Michigan v. Chesternut*, 486 U.S. 567, 569, 108 S.Ct. 1975, 1977 (1988)).

Arrests. “[A] level-two stop evolves into a level-three de facto arrest when, in view of all the circumstances, a reasonable, innocent person in the suspect’s place would believe himself to be under arrest.” *State v. Leonard*, 825 P.2d 664, 674 (Utah App. 1991), *cert. denied*, 843 P.2d 1042 (Utah 1992). These seizures are justified only if there is “probable cause for the officer to believe that a crime has been or is about to be committed.” *Salt Lake City v. Smoot*, 921 P.2d 1003, 1006 (Utah App.), *cert. denied*, 925 P.2d 963 (Utah 1996).

B. ANALYSIS.

A review of the encounter between defendant and Officer Allred reveals no impermissible search or seizure. No seizure occurred until, at the very earliest, Officer Allred asked defendant to turn off the engine. Long before then reasonable suspicion existed justifying a level-two detention.

1. The Officer's Initial Approach Was a Level-One Encounter.

The circumstances surrounding Officer Allred's encounter with defendant did not evidence a seizure. The truck was already parked when Officer Allred approached. *See* R. 51: 9, 20. He did not park so as to block defendant's egress, nor did he activate his red and blue flashing lights. *See* R. 51: 10, 20-22, 25. He turned on his take down lights to illuminate the area. *See* R. 51: 21-22, 25. Nothing suggests that he displayed his weapon or commanded defendant to remain. No other officers appeared on the scene until later. R. 51: 14. In these circumstances, a reasonable person would not believe that his or her liberty was restrained, but instead would believe that the officer is simply stopping to check a solitary vehicle in an empty parking lot. *See Bean*, 869 P.2d at 986. The encounter remained consensual even after Officer Allred recognized the truck and spoke with defendant, at least until the officer asked defendant to turn the engine off, if not later.⁴

In support of his claim that he was seized from the moment Officer Allred approached him, defendant points to this Court's decision in *State v. Struhs*, 940 P.2d 1225 (Utah App. 1997), contending that the circumstances here are nearly identical to those in *Struhs*. *Aplt. Brf.* at 10-12. In *Struhs*, an officer and her partner observed the defendant drive his pickup truck into a construction area, turn around, back up, parking next to a sign that read, "Road Closed," and turn off his lights. *Struhs*, 940 P.2d at 1226. In response, the officers "drove down the road with their lights off, stopped about one car length away from defendant's

⁴The State does not concede that a seizure occurred at that point, but that issue need not be addressed because, as explained below, reasonable suspicion existed prior to that time.

vehicle nose-to-nose, and turned on the police vehicle's high beam headlights and the [] white 'takedown' light." *Id.* at 1226-27. While some similarities exist between the two cases, the differences between the two cases are significant.

Positioning of Patrol Car. Defendant primarily relies on the positioning of Officer Allred's patrol car in support of his claim that he was seized from the moment Officer Allred approached him. Attempting to characterize the encounter in a manner similar to *Struhs*, defendant contends that Officer Allred parked his patrol car "nose-to-nose" with his truck, but at an angle so "that the right front of [the officer's] car was near the left front of [defendant's] truck." Aplt. Brf. at 9. Thus, defendant argues, his "car was very nearly blocked in by the officer's patrol car." Aplt. Brf. at 10. This contention is not supported by the record.

Officer Allred testified that he parked in front of defendant "at about a 45 degree angle" with the right front of his patrol car to the *right* front of defendant's truck, not to the left front of the truck. R. 51: 20. Officer Allred further testified that he "did not" block the truck in. R. 51: 10. No testimony or other evidence was introduced contradicting that testimony. *See* R. 51. Accordingly, defendant's contention that "his path was clearly blocked to a significant degree" lacks merit and is not supported by the record. *See* Aplt. Brf. at 11. The circumstances here, therefore, were unlike those in *Struhs* where the officers parked in front of the defendant's vehicle "nose-to-nose." *Struhs*, 940 P.2d at 1226.

The Approach. The manner and circumstances in which Officer Allred approached defendant's truck is also distinguishable. In *Struhs*, the officers made a "stealthy approach"

to the defendant with their headlights turned off after observing the defendant drive into the area. *Struhs*, 940 P.2d at 1228. As soon as they had parked “nose-to-nose” with the defendant’s vehicle, they turned on their *high beam* headlights and the take down light. *Id.* at 1227-28. In contrast, Officer Allred simply drove into the parking lot and up to the truck. R. 51: 10, 20. Once there, he turned on the white lights so that he could readily see the truck. *See* R. 51: 22, 25. In other words, unlike the case in *Struhs*, Officer Allred’s approach of defendant was *not* confrontational. *See Struhs*, 940 P.2d at 1228. Nothing suggests that he attempted to conceal his approach or that he activated his high beam headlights. In fact, not until Officer Allred had parked and called in the plates to dispatch did he even notice that anyone was in the truck. *See* R. 51: 11.

Moreover, whereas the officers in *Struhs* approached the defendant’s vehicle almost immediately after it had driven into the construction area and parked, defendant’s car in this case had been parked for a considerable time before Officer Allred approached it. Officer Allred did not observe defendant drive into the parking lot, but first noticed the parked truck as he performed a security check at the ballpark complex. R. 51: 9, 20. He did not approach the truck immediately, but continued his security check. R. 51: 9. Not until he completed his check of the complex did he drive into the parking lot to check the truck. R. 51: 9-10, 20.

Flood Lights. Nor did use of the white take down lights render the encounter a seizure. Although the term “take down” lights may conjure up images of a seizure, their actual purpose and use does not. As Officer Allred explained, “take down lights are the lights in the light bar that are like big flood lights.” R. 51: 25. They thus illuminate an area

when it is dark. For example, they are typically used to “shine on the back window of a car to watch the occupants.” R. 51: 25. Indeed, Officer Allred did not even know that someone was in the truck until after he turned them on. *See* R. 51: 10-11, 21-22. Flood lights are not akin to a patrol vehicle’s red and blue flashing lights that are typically understood as a signal to stop. *See, e.g., McChesney v. State*, 988 P.2d 1071, 1075 (Wyo.1999) (holding that motorist not free to leave after police officer activated red and blue flashing lights on police car); *Lawson v. State*, 707 A.2d 947, 951 (Md. App.1998) (holding that officer’s use of flashing emergency lights “was a show of authority that constituted a seizure within the contemplation of the Fourth Amendment because it communicated to a reasonable person that there was an intent to intrude upon [defendant’s] freedom of movement”); *see also* Utah Code Ann. § 41-6-13.5(1)(a) (1998) (requiring compliance with an officer’s “visual or audible signal . . . to bring [the] vehicle to a stop”).

While use of flood lights may be a factor in finding a seizure depending on the other attendant circumstances and the manner in which they are used, *see, e.g., Struhs*, 940 P.2d at 1228, they do not necessarily indicate a seizure. The use of flood lights to assist the officer in viewing an area at night when approaching a vehicle is not the same as the use of red and blue lights to indicate to a driver that he must comply with the officer’s request to stop his vehicle. In a situation like this one, where an officer approaches a parked vehicle at midnight in a deserted parking lot, not even knowing that there are any occupants in the vehicle, it is certainly reasonable for the officer to illuminate the scene while assessing the situation during his initial inquiry. A reasonable person in defendant’s position would not understand

the encounter to be a stop, but rather a reasonable inquiry of a solitary vehicle in an empty parking lot.

2. The Expired Registration Supplied Reasonable Suspicion.

As noted above, once Officer Allred parked his car and turned on the flood lights to illuminate the area, he recognized the truck as one he had seen a few days earlier bearing a California license plate with an expired 1997 registration. R. 51: 10. At this point, Officer Allred had reasonable suspicion to believe at least that the owner was in violation of the State's registration laws. *See State v. Lopez*, 873 P.2d 1127, 1132 (Utah 1994) (holding that "[a]n observed traffic violation gives the officer 'at the least, probable cause to believe the citizen had committed a traffic a traffic offense'"). The Motor Vehicle Act provides that "a person may not operate and an owner may not give another person permission to operate a motor vehicle . . . in this state unless it has been registered" in Utah. Utah Code Ann. § 41-1a-201 (1998). While an exemption exists for vehicles "registered in another state and owned by a nonresident of the state," Utah Code Ann. § 41-1a-202(2)(a) (1998), the registration sticker on the plate indicated that it had not been registered in California since 1997, some two years previous to the encounter here, R. 51: 10. The Act also requires Utah registration "within 60 days of the owner establishing residency in this state." Utah Code Ann. § 41-1a-202(3) (1998).

Defendant argues that Officer Allred testified that the only basis for the continued detention was to verify the safety of anyone inside and to check for juvenile drinking or drug usage, not to verify the registration. Aplt. Brf. at 14. Undoubtedly, that was the initial

purpose of the officer's inquiry, but his subsequent actions clearly evidence his decision to investigate the registration issue as well. As soon as he recognized the truck, he called in the license plate number to dispatch. R. 51: 10-11. He dispelled his initial concerns once he spoke with defendant, but then asked defendant to turn off the engine because he "wanted to talk to him more." R. 51: 11-12, 23-24. In the ensuing conversation, defendant admitted that the "license plates were expired," but claimed he had bought a temporary sticker. R. 51: 13. When the officer checked the back plate for a temporary sticker, he could not determine whether or not it was still valid because it was too faded. R. 51: 13. His suspicion that the vehicle was not properly registered thus remained.

Defendant also contends that reasonable suspicion could not exist based on the officer's observation on a prior occasion. Aplt. Brf. at 14. Had it been several weeks or months since that observation, defendant's argument may have carried some weight. However, Officer Allred testified that it was only a "few days" earlier. R. 51: 10. It was thus reasonable for him to believe that the vehicle was yet unregistered in California. *See Lopez*, 873 P.2d at 1132 (holding that "as long as an officer suspects that the 'driver is violating any one of the multitude of applicable traffic and equipment regulations,' the police officer may legally stop the vehicle) (*citing Delaware v. Prouse*, 440 U.S. 648, 661, 99 S.Ct. 1391, 1400 (1979)).⁵

⁵Defendant's furtive movements in the truck, together with the incidents of drug usage in that area, also created reasonable suspicion for Officer Allred to investigate the purpose of defendant's presence at that location and time.

3. The Outstanding Warrant Justified the Arrest and Search.

During the encounter, Officer Allred initiated a warrants check. *See* R. 51: 13. While awaiting the check, defendant admitted that he had an outstanding warrant. R. 51: 13. Dispatch subsequently confirmed the outstanding warrant justifying defendant's arrest. R. 51: 14. Nothing suggests that the warrants check "significantly extend[ed] the period of detention beyond that reasonably necessary to request a driver's license and valid registration and to issue a citation." *Lopez*, 873 P.2d at 1133. Indeed, the officer still had not resolved the registration issue when defendant admitted to the outstanding warrant. *See* R. 51: 13. Accordingly, no Fourth Amendment violation occurred. *See Lopez*, 873 P.2d at 1133. Finally, the subsequent search of defendant which revealed the contraband was justified under the search incident to arrest exception to the warrant requirement. *See State v. Ayala*, 762 P.2d 1107, 1111-12 (Utah App. 1988), *cert. denied*, 773 P.2d 45 (Utah 1989).

* * *

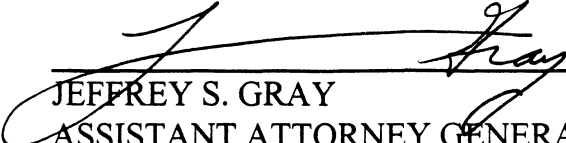
The trial court, therefore, correctly concluded that no seizure occurred when Officer Allred first approached defendant's truck. *See* R. 51: 41-42. The trial court also correctly concluded that reasonable suspicion existed once the officer "recognized that vehicle as being one with expired plates." R. 51: 45. The officer's subsequent actions, whether or not a seizure actually occurred, were justified under the Fourth Amendment.

CONCLUSION

For the foregoing reasons, the State respectfully requests the Court to affirm defendant's conviction.

Respectfully submitted this 24th day of September, 2001.

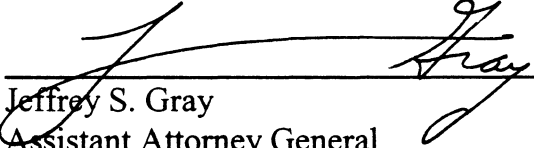
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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of September, 2001, I served two copies of the attached Brief of Appellee upon the defendant/appellant, Mark Anthony Merlen, by causing them to be delivered via first class mail, postage prepaid, to his counsel of record, as follows:

David Allred
26 East Main Street
Castle Dale, UT 84513


Jeffrey S. Gray
Assistant Attorney General

ADDENDA

Addendum A

1 him, "that I have a new sticker". The officer walks around to
2 investigate that, which is he should do. And from there he
3 finds out that there's a warrant by the defendant's own
4 admission. Clearly this can be divisional from Struhs and the
5 officer did nothing wrong in this instance, Your Honor. We'd
6 ask that the motion to suppress be denied.

7 THE COURT: Anything further?

8 All right. Give me a second here.

9 COURT ORDER AND FINDINGS

10 THE COURT: All right. This is the way I see it.
11 The officer sees a truck where a truck would not normally be.
12 Arguably you could use the Struhs' language and say in a high
13 crime area late at night, just stopped. The specific, it's
14 out to the fair ground on Christmas morning at 12:40 a.m.,
15 which is not a logical place for a vehicle to be, and I think
16 that the law's pretty clear that all of that added up is not
17 reasonable suspicion to make a Level-2 stop when the officer
18 just sees it.

19 So the next step is that he drives up to the truck
20 on a 45 degree angle and illuminates the--what they call the
21 take down lights which are the bright lights that illuminate
22 the area, rather than the flashing lights that indicate that,
23 ah, that an officer is displaying his authority. Um, seems to
24 me that activating the lights and being parked at a 45 degree
25 angle in and of itself does not make a Level-2 stop at that

1 point, but the minute--and that might be moot because the
2 instant that the officer drives up, he recognizes the vehicle
3 and knows he's got a violation. He's got a license violation.
4 Yeah. He saw the California plates. He remembered it from
5 before and he knew that this vehicle had expired plates. So
6 while I'm finding that that's a Level-1 stop at that point,
7 I'm also finding that if it were a Level-2 stop, he had
8 reasonable suspicion because he knew that that vehicle was,
9 ah, operating, it was running, and that it was expired--had
10 expired plates. That's the way I understand the facts.
11 That's what he just told me on the stand.

12 MR. ALLRED: But he hadn't--the testimony also was
13 that he hadn't checked that. He hadn't verified it. He
14 doesn't know--

15 THE COURT: That's right.

16 MR. ALLRED: --he doesn't know that that's true.

17 THE COURT: That's correct. He remembers it from
18 before that this vehicle had expired plates and of course, he
19 has an obligation to check that. But that's reasonable
20 suspicion to allow him to check it. So I'm finding that at
21 the point he drove up, it's still a Level-1 stop, and I'm also
22 finding that if it were a Level-2 stop, the fact that he knew
23 the instant he drove up that this is a vehicle which (1) is
24 operating, it's running, and (2) it's--it had expired plates
25 the last he knew, and I think he's entitled to use all of

1 these other things, these other factors which the court has
2 been very clear are not enough, in and of themselves.

3 So he steps out and talks to the defendant and he
4 investigates what should logically be investigated. That is
5 do we have a suicide problem here? Do we have an alcohol
6 problem here? And he answers no. He doesn't have any of
7 those. It's reasonable for him to inquire, um, even if you
8 determine, which I am not, that the defendant was not free to
9 leave at that point.

10 Then, if I have the chronology right, at that point
11 he asks the defendant to shut off his vehicle. That begins to
12 move from a Level-1 to a Level-2 stop. However, if it were a
13 legitimate Level-2 stop, the officer would have either got the
14 defendant out of the vehicle or else he would have taken the
15 keys. I mean that's just standard operating procedure. You
16 don't--don't leave a guy in the--anyway it seems to me that my
17 point here is it's not clear that it's a Level-2 stop.

18 The subjective reason for asking the defendant to
19 shut off the vehicle was so that he wouldn't leave. The
20 officer said that in the prelim. Today he said it was because
21 it was noisy. But I think he's--

22 MR. HARMOND: I think he did say so he couldn't
23 leave, on cross examination, Your Honor. He admitted that
24 today.

25 THE COURT: So he could--cause he could hear it--so

1 he could hear.

2 MR. HARMOND: No. I--I thought his testimony was
3 that he--he said, "I didn't want him to leave. I wanted to
4 talk to him."

5 THE COURT: Yeah. And I'm--I'm assuming that either
6 one or the both of those are the subjective reasons of this
7 officer for having doing so--having required or requested, I
8 guess is the right verb, the defendant shut off the vehicle.

9 We're getting closer to a Level-2 stop, but again
10 we've got reasonable suspicion that this is a vehicle which
11 has expired plates on it, so I don't really think it matters
12 at this point. Absent that, I think we'd have a problem.

13 So then he checks the plates. I think that's
14 reasonable either under Level-1 or Level-2. And the result of
15 that is inconclusive. He didn't know. So then he goes back
16 to check the warrant; runs a warrant check. That is likewise
17 reasonable. Now I assume that he asked for the drivers
18 license at that point and when he has--and I'll put this in
19 the form of a question--when the officer takes the drivers
20 license to his car to check it where it's a Level-2; right?
21 Cause you can't drive away without your drivers license.

22 MR. HARMOND: I think that's correct.

23 THE COURT: So I think that at that point, at least,
24 ah, if not--

25 MR. HARMOND: Defendant doesn't appear to be free to

1 leave at that point.

2 THE COURT: Yeah. That's--that's my point. So at
3 that--at-the latest, we got to Level-2 when he asked for his
4 drivers license and went to run a check. I think the totality
5 of the circumstances with all of the things that we've talked
6 about, but the salient factor being the one that the officer
7 already knew that this vehicle had, ah, expired plates,
8 justify a Level-2 warrants check at that point. Now while
9 he's still waiting for the warrants check to come back, the
10 defendant volunteers that he's got a warrant that's later
11 verified and at that point I would say the volunteering--well
12 the volunteering is probably probable cause to arrest for past
13 reasonable suspicion. But certainly to the check coming back
14 as having a valid warrant is probable cause to arrest.

15 Then we get into the search--I mean an arrest and a
16 search incident to arrest and the defense has said that that's
17 not the issue anyway. The issue is when did we go from
18 Level-1 to Level-2? And I think I've covered that. So based
19 on that, I'm going to deny the motion to suppress and find
20 that this was a, ah, Level-1 stop up until requesting the
21 drivers license and that it became a Level-2 stop at that
22 point. I'm also going to find that there was reasonable
23 suspicion from the point that the officer drove up to the car
24 and recognized that vehicle as being one with expired plates
25 and that therefore it is moot whether it's Level-1 or Level-2

1 because the reasonable suspicion existed to do everything the
2 officer did up until the point of running the warrants check
3 and at that point it turns to probable cause and the officer
4 is justified to going to Level-3. Any questions on the
5 ruling?

6 MR. ALLRED: I do, Your Honor.

7 THE COURT: Yes.

8 MR. ALLRED: If I could have--make sure I have a
9 finding just to--to clarify. You're making a finding then
10 that the--the fact that the officer had seen the vehicle some
11 time ago previously that the plates were expired, that that's
12 reasonable articulable suspicion to go further.

13 THE COURT: Yes. That--that--I'll make this pretty
14 clear. That alone is enough, and that, coupled with these
15 other factors, 12:40 a.m. Christmas morning out to the, ah,
16 rodeo grounds and all of that. Without all of that Struhs
17 stuff, it's still reasonable suspicion.

18 MR. ALLRED: And asking to turn off the vehicle with
19 the take down lights on and all the other factors that the
20 Court's identified is not a Level-2 stop.

21 THE COURT: I'm making that finding; and I'm also
22 making a finding that the reasonable suspicion on the vehicle
23 registration makes that point moot anyway. I'm making both
24 findings. Any other questions?

25 MR. ALLRED: No.

1 MR. HARMOND: Nothing, Your Honor.

2 THE COURT: The motion to suppress is denied. Where
3 does that put us here?

4 MR. ALLRED: If we can set--

5 MR. HARMOND: This is Judge Halliday's case, Your
6 Honor. We need to set it on his next calendar to set a trial.

7 MR. ALLRED: Pleas, Your Honor.

8 THE COURT: Put it on for trial setting.

9 MR. HARMOND: I guess for an arraignment.

10 THE COURT: Oh, is that what it is?

11 MR. ALLRED: Yeah.

12 THE COURT: Put it on for arraignment.

13 MR. ALLRED: He would have had to have been
14 arraigned to do the--

15 MR. HARMOND: He had a preliminary hearing. He was
16 bound over and then you indicated that you wanted to set a
17 motion to suppress.

18 MR. ALLRED: Great. Yeah. If we could have an
19 arraignment, that would be great.

20 MR. HARMOND: It doesn't have a trial setting
21 agreement. That's all.

22 MR. ALLRED: Whatever.

23 THE COURT: What's the day?

24 MR. ALLRED: I show Judge Halliday's next date as
25 June 12th?

1 CLERK: June the 8th. June the 8th?

2 MR. ALLRED: Yeah.

3 MR. HARMOND: I think that's right.

4 THE COURT: Whichever.

5 CLERK: Okay. It's June the 8th.

6 MR. ALLRED: Well June--I show June 8 as a--as a
7 Thursday.

8 CLERK: June? Oh, I'm in '88--'98. Sorry.

9 THE COURT: Let's not do that.

10 MR. HARMOND: Maybe June 5th?

11 MR. HARMOND: I think it's the 12th then, Your
12 Honor.

13 THE COURT: June 12th at what time? 1:00 o'clock?
14 Is that when the--

15 MR. ALLRED: Yes, Your Honor.

16 THE COURT: Okay.

17 MR. ALLRED: May I make one additional request? The
18 defendant has a hold on him from the State Prison, Your Honor,
19 for a parole hold I guess is what you'd call it. May the
20 defendant remain, pending that date?

21 THE COURT: Any objection, Mr. Harmond, to having
22 him--

23 MR. HARMOND: I'm sorry?

24 THE COURT: Any objection to having him remain in
25 Carbon County, rather than going back to the prison?