2008

Utah v. Tripp : Brief of Appellee

Utah Supreme Court

Ronald J. Yengich; Elizabeth Hunt; Yengich, Rich & Xaiz; Counsel for Respondent.
Jeffrey S. Gray; Assistant Attorney General; Counsel for Petitioner.

IN THE UTAH SUPREME COURT

STATE OF UTAH,	:	
APPELLEE/PETITIONER,	:	Case No. 20081068
v.	:	
SUSAN TRIPP,	:	(not incarcerated)
APPELLANT/RESPONDENT.	:	

BRIEF OF RESPONDENT OPPOSING WRIT OF CERTIORARI

This is the brief of respondent opposing the issuance of a writ of certiorari to the Utah Court of Appeals upon its reversal of the trial court's order denying Tripp's motion to suppress.

JEFFREY S. GRAY
ASSISTANT ATTORNEY GENERAL
160 EAST 300 SOUTH, 6TH FLOOR
P.O. BOX 140854
SALT LAKE CITY, UTAH 84114-0854

ATTORNEY FOR STATE OF UTAH

RONALD J. YENGICH, #3580
ELIZABETH HUNT, #5292
YENGICH, RICH & XAIZ
175 EAST 400 SOUTH, SUITE 400
SALT LAKE CITY, UTAH 84111
TELEPHONE: (801)355-0320
ATTORNEYS FOR SUSAN TRIPP

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TELEPHONE: (801)355-0320
ATTORNEYS FOR SUSAN TRIPP

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SUPREME COURT JURISDICTION

Article VIII § of the Constitution of Utah and Utah Code Ann. § 78A-3-102(3)(a) and (5) provide this Court's jurisdiction over the State's timely filed petition.[1]

ISSUES, STANDARDS OF REVIEW, AND PRESERVATION

1. Did the court of appeals apply the correct legal standard in assessing voluntariness of consent?

On certiorari, this Court reviews the court of appeals' decision without deference for correctness. See, e.g., Newman v. White Water Whirlpool, 2008 UT 79, ¶6, 197 P.3d 654.

This issue was addressed in pages 10-13 of the State's petition for certiorari.

[1] The court of appeals filed the Tripp opinion on October 30, 2008. This Court granted the State's motion to extend the time for filing its certiorari petition to December 31, 2008. The State filed its petition on December 31, 2008.

2. If necessary, should this Court affirm the court of appeals' consent analysis on the alternative bases that the trial court's factual findings were clearly erroneous and incomplete and legal conclusions were incorrect, and/or on the alternative basis that any consent was tainted by Tripp's illegal arrest?

On certiorari, this Court reviews the court of appeals' decision without deference for correctness. See, e.g., Newman v. White Water Whirlpool, 2008 UT 79, ¶6, 197 P.3d 654.

Tripp raised the underlying arguments in the court of appeals. See, e.g., Opening Brief of Appellant at 7-23, Reply Brief of Appellant at 1-10. On certiorari, this Court has full authority to affirm the court of appeals on alternative grounds. See, e.g., State v. Stubbs, 2005 UT 65, ¶ 18, 123 P.3d 407.

3. Did the court of appeals err in assessing probable cause in addressing the State's argument that exigent circumstances justified the warrantless blood draw?

On certiorari, this Court reviews the court of appeals' decision without deference for correctness. See, e.g., Newman v. White Water Whirlpool, 2008 UT 79, ¶6, 197 P.3d 654.

This issue was addressed in pages 13-15 of the State's petition for certiorari.

_____4. Did the court of appeals err in its assessment of the State's inevitable discovery argument?

On certiorari, this Court reviews the court of appeals' decision without deference for correctness. See, e.g., Newman v. White Water Whirlpool, 2008 UT 79, ¶6, 197 P.3d

654.

This issue was addressed in pages 15-17 of the State's petition for certiorari.

CONTROLLING CONSTITUTIONAL PROVISIONS

Copies of the Fourth Amendment and Article I § 14 of the Utah Constitution are in the addendum to this brief.

STATEMENT OF THE CASE

NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION

The State charged Tripp with automobile homicide, a third degree felony, in violation of Utah Code Ann. § 76-5-207(1), and with failure to yield the right of way, a class C misdemeanor, in violation of Utah Code Ann. § 41-6-72.10(3) (R. 2-3). The magistrate presided over the preliminary hearing and ordered Tripp bound over as charged (R. 32-33).

Tripp moved to suppress evidence, the State opposed the motion, and Tripp replied (R. 36-58; 65-125; 126-44). Judge Kennedy presided over an evidentiary hearing and heard oral argument before denying the motion to suppress (R. 157-62).

Following the trial, the jury convicted Tripp as charged (R. 299). Judge Kennedy sentenced Tripp to concurrent terms of zero to five years in prison and ninety days in jail, but then suspended that sentence and required her to serve three hundred and sixty days in

jail as a condition of probation (R. 397-400, 403).

Tripp filed a timely notice of appeal (R. 409). The court of appeals reversed the trial court's denial of the motion to suppress and remanded for a new trial or other proceedings. State v. Tripp, 2008 UT App 388, 197 P.3d 99.

The State petitioned for certiorari and Tripp opposed the petition. This Court granted the petition.

RELEVANT FACTS[2]

Tripp stopped at the stop sign on the Old Bingham Highway and was driving her truck across U-111 at the intersection, when a motorcycle driven by Daniel Pracht, which was headed south on U-111, slid underneath and into the rear end of her truck (R. 525: 346).[3] Pracht later died from his injuries sustained in the crash (R. 533: 9). The road Pracht was driving on is hilly, and dips three eights of a mile prior to the intersection (R. 533: 59-60). The road configuration or Tripp's own doorpost could have blocked her view of Pracht's motorcycle as she entered the intersection (R. 533: 60).

At the time of the collision, Pracht may have been speeding, and this may have

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[2]These facts include those about the circumstances of the accident and the potential causes thereof, as they pertain to the issue of probable cause underlying the exigent circumstances and inevitable discovery analysis.

[3]The State's assertion that Tripp pulled out and collided with Pracht may inadvertently give the incorrect impression that she hit him with the front of her car. See State's brief at 4.

been the cause of the accident. As the trial court recognized, the State's evidence conflicted regarding whether he should have been driving fifty or sixty miles an hour (T. 526: 563, 696, R; 527: 705, State's Exhibit 30). Tripp had the right to assume that Pracht was going the speed limit (R. 533: 60-61). The State's accident reconstructionist conceded that, due to a lack of underlying data from the police investigation, he would not purchase stock if his decision were based on information of the same quality as he had to work with in Tripp's case (R. 526: 516). Nonetheless, he estimated that Pracht was driving at least 59 miles an hour, and may have been going faster than that (R. 526: 505, 514). He testified that if Pracht had been going fifty miles an hour, Tripp would have cleared the intersection before Pracht came through, and that there would have been no accident (R. 526: 516).

Pracht's braking error may have caused the accident. The point of impact between his motorcycle and the rear end of Tripp's truck appeared to be within three feet of either side of the center line on U-111, the road Pracht was driving on at the time of the crash (R. 526: 509). The physical evidence showed that prior to the collision, Pracht was applying only his rear brake (R. 526: 475), and that he skidded for some forty-four feet prior to sliding underneath and hitting Tripp's truck (R. 525: 355-56, 358, R. 526: 465). Applying only the rear brake on a motorcycle routinely causes them to lose control and slide (R. 526: 410, 415). Had Pracht been braking properly, he could have stopped or steered around Tripp's truck, rather than sliding underneath and colliding with it as he did

(R. 532: 37-39).

The police were called immediately to the scene, at 6:53 p.m. (R. 526: 449). The police did not ask Tripp to perform field sobriety tests (R. 533: 25). Officer Saunders, who was trained to detect signs of impairment, testified at trial that he performed no field sobriety tests because he had no reasonable suspicion that Tripp was impaired, but sought a blood draw from her as a matter of course, as he does with people in all serious accidents (R. 525: 350, 377).[4]

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[4]The State's brief notes that the victim's advocate, Budd, detected the odor of alcohol from the car Tripp was in prior to being moved to the police car, and then detected the odor of alcohol from Tripp's person when Tripp was in the police car. State's brief at 6. The State's brief alleges that Budd informed the police that she smelled the alcohol, without clarifying that Budd's testimony was that she informed the police of the odor in the family car Tripp and other adults were in (R. 533: 84). There is no testimony that she informed the police of the smell she detected coming from Tripp, no testimony that she informed the police of the odor from the family car at the scene or later. The State's brief also notes that the blood tech smelled an odor of alcohol from Tripp (his testimony was that the odor was slight R. 53: 97). There is no evidence that he detected the odor prior to drawing her blood, or that the police were informed of the odor.

The State's brief alleges that Budd noticed that Tripp slurred her words. State's brief at 6, citing R 533: 84. This assertion is erroneous. Page 84 of the transcript reflects this testimony:

Q Was she able to speak lucidly?
A Yeah, she was speaking.
Q I mean, she wasn't slurring her words?
A I'm not familiar how she speaks but that day I spoke to her, yeah.

(R. 533: 84).

Assuming *arguendo* that this testimony is fairly read as an indication that Tripp was slurring her speech, there is no evidence that Budd informed the police. In order to establish reasonable suspicion or probable cause to support Fourth Amendment intrusions by the police, the facts must be known to the police. See, e.g., United States v. Stewart, 867 F.2d 581 (10th Cir. 1989)(considering facts known by the police in assessing lawfulness of search). Cf., e.g., State v. Applegate, 2008 UT 63, ¶17, 194 P.3d 925

The police officers who demanded and ordered that Tripp's blood be drawn believed that they had a right to do so in that absence of probable cause. Officer Saunders, who initially ordered Detective Roberts to obtain Tripp's blood, routinely took blood samples in cases involving serious accidents and believed that this was a lawful demand for him to make (R. 533: 10, 25, 55). At the time of the blood draw, Detective Roberts believed that he had the legal right to demand a blood sample from Tripp as a result of the implied consent statute (R. 532: 23, 533: 33-34).

Tripp consented to undergo a urine test, but adamantly refused to submit to a blood test because she is phobic of needles (R. 533: 65). The police isolated her from her friends and family, informed her she was in custody and/or under arrest, and demanded that she submit to the blood test, telling her that they would get a warrant and take her blood by force if she did not submit (R. 532: 23-27, R. 533: 28, 35, 71-72).

Perhaps the best indicator of the illegal nature of the arrest is the testimony of Officer Monson, who frankly conceded that he did not know of a basis for Tripp's arrest (R. 525: 350, 377; R. 533: 73).

The victim's advocate tried unsuccessfully to calm Tripp and assuage her fear of needles, and the blood tech also tried to calm her and paraphrased the DUI admonitions, mentioning her rights to silence, to counsel, and her right to refuse the test (R. 525: 268, R. 533: 102).

(reasonableness of detention turns on objective analysis of facts known to the police).

During the blood draw, Tripp was in a police car with a police officer outside the car door and covering Tripp's eyes, a victim's advocate kneeling in front of her holding one of her hands, and the blood tech right outside the car door holding her other arm behind her (R. 533: 67, R. 525: 270). While she did extend her arm to the blood tech prior to the test, this was in response to his telling her that he was going to put the tourniquet on and see if there was a spot where it would be easy to draw blood (R. 533: 95). The blood tech felt that Tripp did not know that he had his other equipment ready to draw her blood when she extended her arm (R. 533: 95). He testified that once he found a spot to draw the blood, he told her he had found an easy site and told her "we can just go ahead and take care of this," and as the victim advocate continued reassuring Tripp, he stuck the needle in (R. 533: 95). During the blood draw, Tripp was described as terrified, petrified, crying, and panicked (R. 533: 67, 71, 95). She was pulling away and crying as they secured her (R. 533: 67, R. 525: 271).

Tripp's blood, which was drawn at 9:25 (R. 525: 257), showed metabolite of cocaine and blood alcohol levels of .085 and .089 (R. 525: 305, 309, 319). There was no scientific means to assess when Tripp took the cocaine or whether the cocaine metabolite had any impairing effect on Tripp (R. 525: 306, 309). The equipment used to assess blood alcohol levels is only within six percent of accuracy ninety-six percent of the time (R. 525: 324).

After denying Tripp's motion to suppress, the trial court admitted the test result on

the theory that Tripp's blood draw was voluntary and consensual (R. 157-60). The trial court instructed the jury that Pracht's negligence could not be considered as a superseding cause (R. 336).

On appeal, the court of appeals reversed the trial court's denial of the motion to suppress, holding that the blood draw was not consensual. Tripp, 2008 UT App 388, ¶¶ 14-17. The court found that the blood draw was not justified by exigent circumstances, given the absence of probable cause. Id. at ¶¶ 18-22. The court also found that the blood draw was not exempted from the exclusionary rule by the inevitable discovery doctrine, because the lack of probable cause did not support the necessary showing that a warrant would inevitably have issued. Id. at ¶¶ 23-25. Because the court found the blood draw involuntary, it saw no need to address Tripp's claim that the blood draw was also tainted by her illegal arrest. Id. at ¶ 15. The court did not address Tripp's claims that the trial court's findings of fact were clearly erroneous and incomplete, and conclusions of law were incorrect. The court of appeals did not address the merits of Tripp's contention that the trial court erred in failing to instruct the jury on the law of superceding cause. Id. at ¶ 12 n.5.

SUMMARY OF ARGUMENTS

The Tripp decision does not elevate the government's burden of proof of consent, or advocate a presumption against consent. Standard Fourth Amendment law requires the government to prove by a preponderance of the evidence "clear and positive testimony that the consent was unequivocal and freely given." The Tripp decision correctly applied the law to the evidence, which indicates that the warrantless blood draw was coerced, and was legally involuntary.

In the event it is necessary to do so, this Court may affirm the conclusion that the government did not prove consent on the alternative bases of arguments raised by Tripp in the court of appeals. The trial court's clearly erroneous findings of fact and incorrect legal conclusions, and/or the taint of Tripp's illegal arrest on any purported consent, would independently or jointly support a conclusion that there was no legal consent to the blood draw.

The court of appeals properly assessed the evidence showing the absence of probable cause to justify a blood draw. Given the absence of probable cause, the court of appeals correctly ruled that the warrantless blood draw was not sustainable under the exigent circumstance doctrine. The court similarly correctly recognized that the absence of probable cause defeated an argument under the inevitable discovery doctrine, because in the absence of probable cause, no warrant inevitably would have been obtained by the police. The court's inevitable discovery analysis was correct.

ARGUMENTS

I. THE COURT OF APPEALS' ANALYSIS OF CONSENT WAS CORRECT.

A. The Court of Appeals' Legal Standard Was Correct.

The State argues that in assessing the voluntariness of consent, the court of appeals applied the incorrect Ham/Villano test,[5] which test was overruled in State v. Hansen, 2002 UT 125, 63 P.3d 650 and United States v. Price, 925 F.2d 1268 (10th Cir. 1991). State's brief at 13-16. The Ham test had three prongs:

> (1) There must be clear and positive testimony that the consent was 'unequivocal and specific' and 'freely and intelligently given'; (2) the government must prove consent was given without duress or coercion, express or implied; and (3) [when evaluating these first two standards, we] indulge every reasonable presumption against the waiver of fundamental constitutional rights and there must be convincing evidence that such rights were waived.

State v. Ham, 910 P.2d 433, 439 (Utah Ct.App.1996) (citations omitted), abrogated, State v. Hansen, 2002 UT 125, 63 P.3d 650, rejected, State v. Bisner, 2001 UT 99, 37 P.3d 1073. The Villano test was essentially the same.[6]

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[5]See State v. Ham, 910 P.2d 433, 439 (Utah Ct.App.1996) (citations omitted), abrogated, State v. Hansen, 2002 UT 125, 63 P.3d 650, rejected, State v. Bisner, 2001 UT 99, 37 P.3d 1073, and Villano v. United States, 310 F.2d 680, 684 (10th Cir. 1962), abrogated United States v. Price, 925 F.2d 1268 (10th Cir. 1991).

[6]The Villano test was:
"The government must prove that consent was given. It must show that there was no duress or coercion, express or implied. The consent must be 'unequivocal and specific' and 'freely and intelligently given.' There must be convincing evidence that defendant has waived his rights.... ' Courts indulge every reasonable presumption against waiver' of fundamental

In Hansen, this Court disapproved of the use of the word "intelligently" in the first prong of the Ham test, because it implied that the prosecution had the burden to prove that the person knew of the right to refuse consent. This is not an essential element of proof for the State, but is merely one factor courts may consider. See Hansen, 2002 UT 125, ¶ 54. The Hansen Court rejected the third prong of the Ham test, because there are no presumptions against waivers of Fourth Amendment rights. Hansen, 2002 UT 125, ¶ 55. Similarly, in Price, in overruling Villano, the Tenth Circuit held that the presumption against waiver would no longer apply in light of the Supreme Court's guidance in Schneckcloth v. Bustamonte, 412 U.S. 218 (1973), that such presumptions are not appropriate in the Fourth Amendment context. Price, 925 F.2d at 1271. Just as this Court's Hansen decision limited only part of the Ham analysis, in Price, the court expressly indicated that the entire Tenth Circuit was in agreement that the remaining Villano analysis was still relevant in the voluntariness of consent inquiry. Id. at 1271 and n.3.

The language in Tripp to which the State objects, which requires the State to prove "clear and positive testimony that the consent was unequivocal and freely given," is the same essential test applied by the Tenth Circuit repeatedly since Price. See, e.g., United States v. Butler, 966 F.2d 559, 562 (10th Cir. 1992); United States v. McNeely, 6 F.3d

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constitutional rights."
310 F.2d at 684.

1447, 1453 (10th Cir. 1993); United States v. Winningham, 120 F.3d 1328, 1331 (10th Cir. 1998); United States v. Zubia-Melendez, 263 F.3d 1155, 1162 (10th Cir. 2001); United States v. Guerrero, 472 F.3d 784, 789 (10th Cir. 2007); United States v. Lyons, 510 F.3d 1225, 1239 (10th Cir. 2007). It is also the same language applied by state courts in post-Schneckcloth opinions. See, e.g., State v. Thompson, 166 P.3d 1015, 776 (Kan. 2007); and State v. Harris, 642 A.2d 1242, 1247 n.8 (Del. Super. 1993).

The State argues as if the Tripp opinion's language which requires the State to prove "clear and positive testimony that the consent was unequivocal and freely given" incorrectly elevates the State's burden from a preponderance to a clear and convincing standard of proof. State's brief at 15. The case upon which the argument relies, A.C. Aukerman Co. v. R.L. Chaides Construction Co., 960 F.2d 1020, 1045 (Fed. Cir. 1992) (*en banc*), is a patent suit involving issues of laches and estoppel. In its discussion of quantum of proof, the court distinguished between the preponderance of the evidence standard and the clear and convincing standard. The latter standard applies in cases where there is a danger of deception, where there is an "important individual interest" at stake, where a claim is disfavored as a matter of policy, and in certain patent cases. Id. at 1045. In discussing how both standards of proof are at times applied in estoppel cases by various courts, the court explained that confusion about the applicable standard likely was attributable to the courts' failure to distinguish between the quantum of proof required and the substance of the evidence to be proved by that standard – the facts underlying the

estoppel claim. As the court explained,

> [T]he disagreement over the appropriate standard may be more apparent than real, "because of the failure to distinguish between the quantum or weight of the evidence and the substance or implication of the evidence required to establish an equitable estoppel; that is to say, while the facts relied upon to establish an equitable estoppel must be clear, positive, and unequivocal in their implication, these facts need not be established by any more than a fair preponderance of the evidence."

Aukerman, at 1045-46, quoting 28 Am Jur.2d Estoppel and Waiver, § 148, 830-31 (1966).

The State's concern regarding the Tripp court's purported elevation of its burden of proof beyond a preponderance is resolved by distinguishing between the quantum of proof required, preponderance of the evidence, and the substance of the evidence to be shown by that standard - clear, positive and unequivocal evidence of consent. See, e.g., United States v. Arrington, 2008 WL 4459378 at * 3 ("The Government must show, by a preponderance of the evidence, that the consent was unequivocal, specifically and intentionally given, and uncontaminated by any duress or coercion."); United States v. Romero, 247 Fed. Appx. 955 (10th Cir. 2007) ("The government bears the burden of proving, by a preponderance of the evidence, that unequivocal and specific consent was obtained.").[7]

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[7]Copies of these unpublished decisions are in the addendum. The vast majority of published cases are like Tripp, in identifying the proof the government must show regarding consent, without specifically identifying the preponderance standard. See e.g., cases cited on pages 12-13 of this brief, *supra*.

Contrary to the State's contentions, the court of appeals did not apply the portions of the Ham/Villano test which were rejected in Hansen and Price, but instead applied the Hansen test, while mentioning the valid portions of the Ham/Villano test which are consistent with portions of Hansen. The court of appeals explained,

> We start with consideration of whether Tripp consented voluntarily to the blood draw. "[C]onsent which is not voluntarily given is invalid." The appropriate standard to determine whether consent is voluntary "is the totality of the circumstances test." State v. Hansen, 2002 UT 125, ¶ 56, 63 P.3d 650. "Under the totality of the circumstances test, a court should carefully scrutinize both the details of the detention, and the characteristics of the defendant." Id. "Consent is not voluntary if it is obtained as 'the product of duress or coercion, express or implied.' " '[W]e further look to see if there is clear and positive testimony that the consent was unequivocal and freely given.' "Bredehoft, 966 P.2d at 293 (citation omitted). In other words, a person's will cannot be overborne, nor may his 'capacity for self-determination [be] critically impaired.' " Hansen, 2002 UT 125, ¶ 57, 63 P.3d 650 (alteration in original) (citation omitted). The State, of course, has the burden of establishing that consent was validly given.

Tripp, 2008 UT App 388 ¶ 14 (citations omitted). Particularly when it is read in context, where it is tied directly to Hansen, the Tripp court's reference to "clear and positive testimony that the consent was unequivocal and freely given" is not reasonably read as applying a presumption against waiver. The opinion does not elevate the State's burden of proof above the preponderance of the evidence standard. Rather, Tripp's analysis is consistent with standard Fourth Amendment jurisprudence discussed above.

B. The Court of Appeals' Correctly Concluded that the State Failed to Prove Voluntary Consent.

The State contends that the court of appeals should not have found that the purported consent was obtained by trickery, because the evidence supported the trial court's finding 15 that Tripp voluntarily extended her arm when the blood tech asked if she would consent to the blood draw. State's brief at 16-17.

The court of appeals' factual analysis as to trickery is correct. When asked if Tripp consented to the blood draw, the blood tech testified that Tripp extended her arm to him prior to the test in response to his telling her that he was going to put the tourniquet on and see if there was a spot where it would be easy to draw blood (R. 533: 94-95). The blood tech felt at that time that Tripp did not know that he had his other equipment ready to draw her blood when she extended her arm (R. 533: 95). He testified that once he found a spot to draw the blood, he told her he had found an easy site and told her "we can just go ahead and take care of this," and as the victim advocate continued reassuring Tripp, he stuck the needle in (R. 533: 95). In contrast, the trial court's finding 15 is clearly erroneous in reflecting that Tripp extended her arm to the blood tech in response to his asking if she would consent to the blood draw, and there is no evidence to marshal in support of this finding.[8]

[8]In the court of appeals, Tripp challenged the trial court's finding to that effect as being clearly erroneous, because there is no evidence to support it. The State never contested the argument by identifying one scintilla of evidence to support the finding. See State's brief in the court of appeals at 12 n.3 (acknowledging Tripp's challenge and

The State contends that the Tripp opinion suggests that Tripp tried to pull her arm away to prevent the blood from being taken. The State posits that the court of appeals instead should have affirmed the trial court's finding that Tripp "never tried to withdraw her arm and ... never said 'no' or 'stop.'" State's brief at 17.

The Tripp opinion does not suggest that Tripp tried to pull her arm away, but instead indicates:

> The State contends that Tripp's failure to immediately withdraw her arm must be taken as a clear indication of her consent. We cannot agree. During the blood draw, Tripp was surrounded by people working for the State-she was in a police car with an officer outside the door covering her eyes, a victims' advocate kneeling in front of her holding one of her hands, and the blood technician outside the car holding her arm where she could not see it. All the while Tripp was, according to the witnesses, terrified, crying, and panicked. Given the context of the threat of a forced blood draw, her arrest by the police, and the presence and participation of the State's many actors during the blood draw, we cannot say that Tripp voluntarily consented to have her blood drawn simply because she failed to retract her arm in the instant between when Davis said "we can go ahead and [take] care of this"-an ambiguous comment as concerns the timing of the intended blood draw in any event-and when he inserted the needle. Indeed, Officer Monson, the officer who witnessed the draw, testified that although Tripp initially offered her arm to Davis, "[s]he was pulling away," and "[s]he was crying. I tried to shield her eyes so [she] wouldn't look at the needle." The State argues that this is a natural response from someone who fears needles. We think, however, that given the context of her continuous refusals to submit to a blood draw, her expressed fear of needles, her arrest, the threat that she would be forced to provide the blood as soon as a warrant was obtained, and her crying and pulling away during the blood draw, the State has failed to meet its burden and to demonstrate that Tripp voluntarily gave consent under the totality of the circumstances.

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indicating it will address them in its discussion of the blood draw) and *passim* (failing to identify any evidence which supports the finding).

Id. at ¶ 17.

The trial court's finding that Tripp "never tried to withdraw her arm and ... never said 'no' or 'stop'" is only partially supportable by the evidence from the blood tech that to his recollection she did not ask him to stop during the draw (R. 533: 95).[9] The finding is incomplete in failing to account for the State's witnesses' testimony that during the blood draw, Tripp was terrified, petrified, crying, panicked and pulling away as they secured her (R. 533: 67, 71, 95). The finding is incomplete in failing to account for the blood tech's testimony that he could not remember if she said to stop during the blood draw, but that she was definitely panicked and upset about it (R. 533: 67, 95). Indeed, in the court of appeals, the State's own brief acknowledged that Tripp was pulling away during the blood draw. State's brief in the court of appeals at 20.

The State's argues that the court of appeals suggested in paragraph 17, *supra*, that Tripp's consent came in response to the police threat to obtain a warrant, despite the evidence purportedly establishing that the police officer's indication that he would get a warrant was not a means used to obtain Tripp's consent. State's brief at 17. The "threat of a forced blood draw" was one fact in the totality of circumstances upon which the court of appeals relied in rejecting the State's claim that Tripp's failure to withdraw her arm established voluntary consent. Tripp at ¶ 17, *supra*. The evidence squares with the court

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[9]The marshaling requirement would be futile if applied to incomplete findings, and thus does not apply when findings are incomplete. See Woodward v. Fazzio, 823 P.2d 474, 477-478 (Utah App. 1991).

of appeals' presentation of the facts, in demonstrating that the police isolated Tripp from her friends and family, informed her she was in custody, and demanded that she submit to the blood test, telling her that they would get a warrant and take her blood by force if she did not submit (R. 532: 23-27, R. 533: 28, 35, 71-72). The State's argument that the threat to obtain a warrant was not a "means used to obtain consent" is apparently a reference to Tripp's failure to immediately agree to a blood draw upon hearing this threat. The threat, however, was then followed by the police placing her under arrest and in the police car, and surrounding her with an officer outside the car door and covering Tripp's eyes, a victim's advocate kneeling in front of her holding one of her hands, and the blood tech right outside the car door holding her other arm behind her as he took her blood without her permission after leading her to believe that he was only checking for a good vein (R. 533: 67, R. 525: 270). The court of appeals properly considered the threat to obtain a warrant in its totality of the circumstances analysis of whether the blood draw was the product of coercion or consent. See Hansen, *supra*.

The State complains of the court of appeals' failure to rely on the fact that the blood technician reviewed the DUI admonition, and mentioned Tripp's rights to silence, counsel and to refuse the test prior to the blood draw (R. 533: 102). State's brief at 17-18.

Appellate courts are not required to detail in writing each fact considered by the courts prior to the issuance of any opinion. See, e.g., State v. Allen, 839 P.2d 291, 303 (Utah 1992). Particularly in the "totality of the circumstances" analysis, facts are not to

be considered in isolation, but are to be considered in their totality. Cf., e.g., United States v. Arvisu, 534 U.S. 266, 274-75 (2002) (in assessing totality of circumstances supporting reasonable suspicion, courts should not "divide and conquer" each individual fact in isolation, but should assess the inferences to be drawn by considering the facts as a whole).

The blood tech's discussion undoubtedly rang rather hollow to Tripp, and did nothing to contribute to a finding of voluntary consent, given that it came from a blood tech and occurred after the police had already informed Tripp that she was in custody, not free to leave, and under arrest (R. 532: 27; R. 533: 16, 31-32, 73). The legal advice, coming from a blood tech after the police demanded that she take the test, asserted that she could not refuse to submit to the blood draw, and threatened to get a warrant and take her blood by force if she did not comply (R. 532: 23-27, R. 533: 28, 35, 71-72), had no legal effect in the circumstances of this case. The advice was then followed by the blood draw, which occurred when Tripp was being touched and restrained in a police car by a police officer and two other state actors, who took her blood without her permission as she was crying, panicked and pulling away (R. 533: 67, R. 525: 270). The advice of the blood tech did nothing to establish that the blood draw was voluntary or consensual. See, e.g., Schneckcloth v. Bustamonte, 412 U.S. 218, 233 (1973) ("Conversely, if under all the circumstances it has appeared that the consent was not given voluntarily-that it was coerced by threats or force, or granted only in submission to a claim of lawful

authority-then we have found the consent invalid and the search unreasonable. ").

As is detailed further herein, the State did not and could not meet its burden to prove voluntary consent. Because the court of appeals' legal standard is correct, and was properly applied to the facts of Tripp's case, this Court should affirm the Tripp decision.

II. IF NECESSARY, THIS COURT SHOULD AFFIRM THE COURT OF APPEALS' CONSENT ANALYSIS ON ALTERNATIVE GROUNDS.

On certiorari, this Court has full authority to affirm the court of appeals on alternative grounds. See, e.g., State v. Stubbs, 2005 UT 65, ¶ 18, 123 P.3d 407. The trial court's clearly erroneous factual findings and conclusions of law, and the taint of the unlawful arrest of Tripp on any purported consent provide ample alternative bases for affirmance.

A. The Trial Court's Ruling on the Motion to Suppress Was Clearly Erroneous and Legally Incorrect.

1. The Findings of Fact Were Clearly Erroneous and Materially Incomplete.[10]

The trial court's findings on the motion to suppress now follow, with emphasis

[10]The marshaling requirement would be futile if applied to incomplete findings, and thus does not apply when findings are incomplete. See Woodward v. Fazzio, 823 P.2d 474, 477-478 (Utah App. 1991).

added to those findings that were challenged on appeal. The challenges follow the quotation of the court's findings.

FINDINGS OF FACT

1. The defendant was involved in an auto-motorcycle accident, which resulted in the death of Daniel Pracht.

2. The defendant was asked to submit to a chemical test and stated that officers could test her blood if they did not use a needle.

3. The defendant's initial refusal to take a blood test was based solely on her fear of needles.

4. When speaking with Officer Saunders, the defendant denied using alcohol or drugs and expressed her fear of needles.

5. Detective Roberts talked with the defendant multiple times. The more he spoke with the victim, the more concerned he became that she was impaired by something.

6. Detective Roberts based his assessment on the fact that the redness of the defendant's eyes did not dissipate with time, she was nervous, she appeared to lack concern for the victim, and she was smoking heavily.

7. No officer detected the odor of alcohol on the defendant, nor did they observe any obvious signs of impairment, such as poor balance or slurred speech.

8. The victim advocate, Cecilia Budd, detected an odor of alcohol on the defendant while the defendant was seated in a family car.

9. The defendant was eventually placed in Detective Roberts un-marked vehicle and secluded from her family and friends because they were interfering with the investigation.

10. At the time of the blood draw, the defendant was seated in Detective Roberts' unmarked vehicle. The defendant was seated halfway in the vehicle, with the door open and her legs outside the vehicle.

11. At the time of the blood draw, the defendant was not handcuffed or shackled.

12. At the time of the blood draw, Mr. Davis and Cecilia Budd were present, and neither was in uniform or armed. Officer Monson was also nearby, but he was not in uniform.

13. Mr. Davis, the blood technician, spoke to the defendant about a blood draw and Mr. Davis could detect an odor of alcohol from the defendant.

14. Mr. Davis reviewed with the defendant her right to remain silent, her right to counsel, and her right to refuse the test.

15. When asked by Mr. Davis if she would consent to the blood draw, the defendant voluntarily extended her arm.

16. When Mr. Davis drew the defendant's blood, she never tried to withdraw her arm and she never said "no" or "stop."

17. When the blood draw was over, the defendant was immediately calm and stated that the experience was not as bad as she thought it would be.

(R. 157-159)(emphasis added).

The trial court's findings are incomplete in failing to acknowledge from the outset that Officer Saunders, who initially ordered Detective Roberts to obtain Tripp's blood, routinely took blood samples in cases involving serious accidents and believed that this was a lawful demand for him to make (R. 533: 10, 25, 55), and that at the time of the blood draw, Detective Roberts believed that he had the legal right to demand a blood sample from Tripp as a result of the implied consent statute (R. 532: 23, 533: 33-34).The police officers' mis-perception that they were not required to obtain Tripp's consent or a warrant, and the fact that the officers made no effort to obtain a warrant, are clearly relevant to the assessment of the legality of the blood draw. See State v. Rodriguez, 2007 UT 15, ¶¶ 53-54, 156 P.3d 711 (recognizing relevance of, and expressing dismay concerning, officer's failure to know that a warrant should be obtained prior to a blood draw).

Tripp does not contest the factual accuracy of the trial court's sixth factual finding,

that "Detective Roberts based his assessment on the fact that the redness of the defendant's eyes did not dissipate with time, she was nervous, she appeared to lack concern for the victim, and she was smoking heavily." He testified that her appearance when he approached her was "unusual" because her eyes were red, because she was shaking, and because she seemed nervous (R. 533: 11). He later testified that the more he talked with Tripp, the more he became concerned that she was impaired because she appeared to lack concern for Daniel Pracht, because the redness in her eyes was not dissipating, and because she was constantly smoking (R. 533: 14).

However, the finding is incomplete because it does not account for Detective Roberts' acknowledgment that shakiness and nervousness would be normal for someone involved in a fatal car accident (R. 533: 27), the testimony of the State's own witnesses that Tripp was very upset by the accident and continued crying up to and throughout the blood draw (R. 532: 44, 48, R. 533: 67, 77, 82) and that her red eyes were caused by her crying (R. 533: 70, 77), and the testimony of the victim's advocate that Tripp was smoking that night in an effort to calm herself (R. 533: 77).

Finding 8 is clearly erroneous in indicating that the victim advocate detected an odor of alcohol on Tripp when Tripp was in a family car, and there is no evidence to marshal in support of it. The victim advocate testified that she thought the odor of alcohol in the family car came from Tripp, but did not know Tripp smelled of alcohol until Tripp was under arrest and in Detective Roberts' police car, and then did not know if

the smell came from Tripp's clothing or her mouth (R. 525: 221, 224, R. 533: 76, 78, 86-87).[11]

Finding 9 is correct in noting that Tripps' family and friends were interfering with the police investigation, because police testimony reflects that they were telling Tripp she did not have to submit to a blood draw, and were walking through the accident site (R. 533: 73-74). However, the finding is incomplete in failing to recognize that Tripp was not just moved to the police car, but was told she was in custody, not free to leave and was arrested at that juncture after she adamantly refused to submit to the blood test (R. 532: 27; R. 533: 16, 31-32, 73). These facts are key to the issue of the lawfulness of her arrest and the subsequent blood draw, particularly in light of the testimony of Officer Saunders that there was no reasonable suspicion that Tripp was impaired, and the testimony of Officer Monson that he did not know of a basis for Tripp's arrest (R. 525: 350, 377; R. 533: 73).

Findings 11 and 12 are accurate in indicating that Tripp was not handcuffed or shackled, that the blood tech and the victim advocate were present, that Officer Monson was nearby, and that none of these people was in uniform (e.g. R. 533: 67, R. 525: 270). However, the findings are incomplete in failing to recognize that these people were

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[11]In the court of appeals, the State did not contest the clearly erroneous nature of the trial court's finding of fact 8. Compare Tripp's opening brief at 8-13 with State's brief at 12 n.3 (acknowledging Tripp's challenges and indicating it will address them in its discussion of the blood draw) and *passim* (failing to identify any evidence which supports the findings).

physically restraining Tripp during the blood draw. During the blood draw, Officer Monson was outside the car door and covering Tripp's eyes, while the victim's advocate was kneeling in front of her holding one of her hands, and the blood tech was right outside the car door holding her other arm behind her (R. 533: 67, R. 525: 270). She was pulling away and crying as they secured her (R. 533: 67, R. 525: 271).

Finding 14 is accurate in reflecting that the blood tech reviewed with Tripp her right to remain silent, her right to counsel, and her right to review the test, because he did testify that he went over the DUI admonition discussing these rights (R. 533: 102). However, the finding is incomplete in failing to recognize that this discussion occurred after the police informed Tripp that she was in custody, not free to leave, and under arrest (R. 532: 27; R. 533: 16, 31-32, 73). The finding is incomplete in failing to account for police testimony that prior to the blood tech's discussion of the DUI admonition, the police demanded that she take the test and told her that she could not refuse to submit to the blood draw, and that the police would get a warrant and take her blood by force if she did not comply (R. 532: 23-27, R. 533: 28, 35, 71-72).

Finding 15 is clearly erroneous in reflecting that Tripp extended her arm to the blood tech in response to his asking if she would consent to the blood draw, and there is no evidence to marshal in support of this finding. When asked if Tripp consented to the blood draw, the blood tech testified that Tripp extended her arm to him prior to the test in response to his telling her that he was going to put the tourniquet on and see if there was a

spot where it would be easy to draw blood (R. 533: 94-95). The blood tech felt at that time that Tripp did not know that he had his other equipment ready to draw her blood when she extended her arm (R. 533: 95). He testified that once he found a spot to draw the blood, he told her he had found an easy site and told her "we can just go ahead and take care of this," and as the victim advocate continued reassuring Tripp, he stuck the needle in (R. 533: 95).[12]

Finding 16 indicates that during the blood draw, Tripp never tried to withdraw her arm and never said "no" or "stop." The finding is supported by the evidence from the blood tech that she did not ask him to stop during the draw (R. 533: 95). However, it is incomplete in failing to account for the State's witnesses' testimony that during the blood draw, Tripp was terrified, petrified, crying, panicked and pulling away as they secured her (R. 533: 67, 71, 95). The finding is incomplete in failing to account for the blood tech's testimony that he could not remember if she said to stop during the blood draw, but that she was definitely panicked and upset about it (R. 533: 67, 95).

2. The Trial Court's Legal Conclusions Were Incorrect and Materially Incomplete.

[12]In the court of appeals, the State did not contest the clearly erroneous nature of the trial court's finding of fact 15. Compare Tripp's opening brief at 8-13 with State's brief at 12 n.3 (acknowledging Tripp's challenges and indicating it will address them in its discussion of the blood draw) and *passim* (failing to identify any evidence which supports the findings).

The trial court made the following three conclusions of law:

> 1. The defendant's initial refusal was based solely on her fear of needles, and the evidence demonstrates that at the time of the blood draw the defendant's fear was resolved.
> 2. The defendant voluntarily consented to a blood draw.
> 3. The evidence obtained as a result of the blood draw is admissible.

(R. 157-160).

To the extent that the conclusions encompass factual findings, they are clearly erroneous, because there is no evidence that Tripp's fear of needles was resolved at the time of the blood draw, or that she voluntarily consented to the blood draw. Rather, the evidence demonstrates that during the blood draw, Tripp was terrified, petrified, crying, panicked and pulling away as the blood tech, victim's advocate and police officer secured her (R. 533: 67, 71, 95). There is no evidence that Tripp ever gave consent to the draw. Rather, the evidence demonstrates that the blood draw followed the police officers' telling Tripp that she was in custody, not free to leave, and under arrest (R. 532: 27; R. 533: 16, 31-32, 73), demanding that she take the test, and instructing her that she could not refuse to submit to the blood draw, and that the police would get a warrant and take her blood by force if she did not comply (R. 532: 23-27, R. 533: 28, 35, 71-72).[13]

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[13]In the court of appeals, the State did not contest the clearly erroneous nature of the trial court's finding of fact encompassed in its conclusions of law. Compare Tripp's opening brief at 8-13 with State's brief at 12 n.3 (acknowledging Tripp's challenges and indicating it will address them in its discussion of the blood draw) and *passim* (failing to identify any evidence which supports the findings).

As the following discussion of law demonstrates, a person's submission to government threats and physical force does not amount to consent as a matter of law, particularly when any purported consent follows an illegal arrest.

B. The Illegal Arrest Tainted Any Purported Consent.

1. The Arrest and Blood Draw Were Unsupported by Probable Cause.

"The Fourth and Fourteenth Amendments protect the 'right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures.'" United States v. Stone, 866 F.2d 359, 362 (10th Cir. 1989).

Article I § 14 of the Utah Constitution provides protection which is at least co-extensive with that of the federal counterpart, in forbidding "sweeping, dragnet-type detentions of ordinary people engaged in peaceful, ordinary activities. Under both constitutions, the general rule is that "specific and articulable facts ··· taken together with rational inferences from those facts, [must] reasonably warrant the particular intrusion." State v. DeBooy, 996 P.2d 546, 549 (Utah 2000). See also id. 996 P.2d at 552 (recognizing that Article I § 14 and numerous provisions of the Utah Declaration of Rights, consistent with the history of the founders of this State, are concerned with "all purpose criminal investigation without individualized suspicion.").

In order to justify a warrantless arrest, the government must establish probable

cause. See, e.g., State v. Hansen, 2002 UT 125, ¶¶ 34-36, 63 P.3d 650 (police must have probable cause to arrest); United States v. Valenzuela, 365 F.3d 892, 901 (10th Cir. 2004)(government must prove probable cause to justify arrest). Probable cause is established if the facts known to the officer and the fair inferences from those facts would lead a reasonable and prudent person to believe that the suspect had committed a crime. State v Cole, 674 P.2d 119, 125 (Utah 1983). Similarly, in order to justify the warrantless search involved in the blood draw, the government must establish, *inter alia,* a clear indication that evidence would be found in the blood draw. See, e.g., State v. Alvarez, 2005 UT App 145, ¶ 16, 111 P.3d 808 (to justify a warrantless blood draw or other government search, the government must prove by at least a preponderance of the evidence "'(A) "a clear indication that evidence would be found"; (B) "exigent circumstances that justified the warrantless bodily intrusion"; and (C) "that the method chosen was a reasonable one, performed in a reasonable manner.'") (citation omitted).

In the instant matter, the police had no probable cause, but instead arrested Tripp after she adamantly refused to submit to a blood draw (R. 533: 16, 31-32). They did this while acting under the incorrect belief that blood draws are routinely taken in serious accidents (R. 533: 10, 25), and that the police had the legal right to demand a blood sample from Tripp as a result of the implied consent statute (R. 532: 23, 533: 33-34).

Officer Saunders conceded that he had no reasonable suspicion that Tripp was impaired or intoxicated, and testified that he sought a blood draw because the accident

was serious, and he routinely seeks blood draws in such cases and believed he could make the demand (R. 525: 350, 377). Tripp exhibited no signs of intoxication or impairment (e.g. R. 525: 387). See Trial Court's finding 7 ("No officer detected the odor of alcohol on the defendant, nor did they observe any obvious signs of impairment, such as poor balance or slurred speech."). Her red eyes, crying, smoking and nervousness were all consistent with the facts that she had just been involved in a fatal traffic accident and had been informed by the police that she had just killed a man and could not refuse their demand that she submit to a blood draw, which they would force if necessary, despite her profound fear of needles (e.g. R. 533: 11, 27, 121, 133). Her prolonged crying refutes the notion that she did not feel bad about the accident (e.g. R. 532: 14, R. 525: 225, 229). The fact that she was willing to submit to urinalysis counters the notion that her refusal to submit to the blood test indicated intoxication (R. 532: 14).

At the time of the arrest and blood draw, the police did not know if Pracht had been speeding when he ran into the back of Tripp's truck – Detective Roberts conceded that Pracht may have been going ninety miles an hour (R. 525: 373, R. 532: 32-35). From Pracht's skid marks, it appeared that he had braked improperly, in a manner known to cause the sliding which preceded his collision with Tripp's truck (R. 532: 17, 37). It appeared from the evidence at the scene that had he not done this, there was ample room for him to steer around Tripp's truck in the intersection or to stop before colliding with the truck (R. 532: 37, 58-59).

Perhaps the best indicator of the illegal nature of the arrest is the testimony of Officer Monson, who frankly conceded that he did not know of a basis for Tripp's arrest (R. 525: 350, 377; R. 533: 73).

The foregoing facts of this case did not establish probable cause to justify Tripp's arrest, and failed to establish a clear indication that evidence would be found to justify the blood draw. Compare State v. Worwood, 2007 UT 47, ¶¶ 26-36, 164 P.3d 397 (Court found reasonable suspicion but no probable cause that Worwood was driving under the influence, given his odor of alcohol, slurred speech, and bloodshot eyes, and proximity to crushed beer can, cooler, and large water spot on the road, because his walking and balance were steady); State v. Rodriguez, 2007 UT 15, ¶¶ 3, 57, 59, 156 P.3d 711 (police had probable cause to justify a warrantless blood draw, where driver made an abrupt left turn in front of an oncoming school bus, accident was likely to be fatal, defendant had bloodshot eyes and slurred speech, and vodka bottle was found at the scene of the accident); and People v. Roybal, 655 P.2d 410 (Colo. 1982) (odor of alcohol emanating from defendant and collision did not give rise to probable cause, absent evidence that defendant was responsible for collision).

Because there was no probable cause to justify Tripp's arrest, the arrest violated the Fourth Amendment and Article I §14, and suppression of all evidence flowing therefrom is required. See Wong Sun v. United States, 371 U.S. 471, 484-488 (1963) (Fourth Amendment violations require suppression). Suppression is also a necessary

consequence of the violation of Article I § 14. See State v. Larocco, 794 P.2d 460, 465-71 (Utah 1990)(*plurality*).[14] Because there was no justification for the blood draw, see, e.g., Alvarez, *supra*, the blood test results are independently subject to suppression under Wong Sun and Larocco, *supra*.

2. Particularly Because the Unlawful Arrest Tainted the Blood Draw, the Warrantless Blood Draw Cannot be Justified on the Theory of Consent.

The blood draw constituted a search under federal and therefore state constitutional law. See, e.g., Schmerber v. California, 384 U.S. 757, 767-68 (1966), Larocco, *supra*. Because there was no warrant, the government bears the burden to justify the search. See, e.g, State v. Morck, 821 P.2d 1190, 1993 (Utah App. 1991) (government bears burden to justify warrantless search). In order to justify the warrantless search of Tripp on the theory of consent, the government must show that the purported consent was voluntary, and was not the product of the unlawful arrest. E.g., State v. Thurman, 846 P.2d 1256, 1262 (Utah 1993).

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[14]While Larocco is a plurality opinion, it is routinely applied as governing law in this state. See State v. Thompson, 810 P.2d 415, 416-20 (Utah 1991) (majority of the Court recognized privacy interest in bank records under Article I § 14, held in accordance with Larocco that exclusion is a necessary consequence of a violation of Article I § 14, and that no exceptions had been recognized to the Utah exclusionary rule); State v. DeBooy, 996 P.2d 546, 554 (Utah 2000) (finding exclusion of illegal checkpoint stop to be a necessary consequence of Article I § 14); State v. Ziegelman, 905 P.2d 883, 887 (Utah App. 1995) (finding that violation of Fourth Amendment during traffic stop required suppression under Larocco).

Utah law consistently recognizes that where purported consent follows an illegality, the government's burden is substantial. Two factors determine whether consent to a search is lawfully obtained following police action that violates the Fourth Amendment, such as the unlawful arrest here: (1) the consent must be voluntary in fact; and (2) the consent must not be obtained by police exploitation of the prior illegality. E.g., Thurman, *supra*. Both tests must be met in order for evidence obtained in searches following police illegality to be admissible. Id.

Subsection B of Point I of this brief demonstrates that the court of appeals correctly held that the blood draw was not consensual. See id. See also Florida v. Royer, 460 U.S. 491, 497 (1983)(plurality)("[W]here the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority."); Bumper v. North Carolina, 391 U.S. 543 (1968)("Where there is coercion there cannot be consent."); State v. Whittenback, 621 P.2d 103, 106-107 (Utah 1980), *supra*. Cf. State v. Kelly, 718 P.2d 385, 389 (Utah 1986) (contrasting Bumper and stating, "Nor was defendant's consent mere acquiescence to perceived police authority.").

The government bears a particularly heavy burden in seeking to establish consent following a preceding illegality. See Brown v. Illinois, 422 U.S. 590, 603-04 (1975). In assessing the government's proof on this issue, the Court should consider "the totality of

the circumstances surrounding the defendant's consent, focusing on: the temporal proximity of the illegal detention and the consent, any intervening circumstances, and particularly, the purpose and flagrancy of the officer's unlawful conduct." United States v. Walker, 933 F.2d 812, 818 (10th Cir.), cert. denied, 502 U.S. 1093 (1992). Whether the officer informed the suspect of her right to refuse consent or to leave are significant factors in the equation. United States v. Fernandez, 18 F.3d 874, 882 (10th Cir. 1994). Where only minutes pass between the illegal police activity and the purported consent, and where there are no intervening circumstances, a finding of voluntary consent is generally not appropriate. See id. at 883. See also United States v. McSwain, 29 F.3d 558, 562 (10th Cir. 1994)(government must prove both that consent was voluntary, and that there was a break in the events between the consent and the preceding illegality; finding that failure to inform defendant of rights to leave and rights to refuse consent point to involuntary consent).

Assuming *arguendo* that the government could prove that Tripp's consent were voluntary, the consent was temporally proximate to and part of her illegal arrest and continuing detention. The only arguably attenuating factor was the blood tech's reviewing the DUI admonition, and mentioning Tripp's rights to silence, counsel and to refuse the test (R. 533: 102). This discussion, coming from the blood tech, undoubtedly rang rather hollow to Tripp, given that the discussion occurred after the police informed Tripp that she was in custody, not free to leave, and under arrest (R. 532: 27; R. 533: 16,

31-32, 73), and that the discussion followed the police demand that she take the test and telling her that she could not refuse to submit to the blood draw, and that the police would get a warrant and take her blood by force if she did not comply (R. 532: 23-27, R. 533: 28, 35, 71-72). Particularly where the blood was drawn when Tripp was physically surrounded and restrained by the police and their agents, after the blood tech tricked her into surrendering her arm on the pretense that he would only check to see if there were a suitable vein (R. 533: 95), his admonition to her did not attenuate the blood draw from the preceding illegalities, but rather, aggravated them. Tripp was not informed that she was free to leave, but was instead informed that she was in custody, not free to leave and under arrest, and that the police would take her blood by force and get a warrant if she did not submit (R. 532: 23-27, R. 533: 28, 35, 71-72). The police were not acting in an effort to comply with the Fourth Amendment, but instead, were flagrantly intent on violating it, by taking Tripp's blood by force, trickery or any other means necessary (R. 525: 10, 25, R. 532: 23, R. 533: 33-34). These facts demonstrate that any purported consent by Tripp was tainted by and part of the ongoing violations of Tripp's constitutional privacy rights. See, e.g., Brown and Fernandez, *supra*.

Because the warrantless search cannot be justified under the theory of consent, suppression is required by Wong Sun and Larocco, *supra*.

III. THE COURT OF APPEALS' HOLDING THAT THERE WAS NO PROBABLE CAUSE ESTABLISHING EXIGENT CIRCUMSTANCES FOR THE BLOOD DRAW WAS CORRECT.

A. There was No Probable Cause to Establish Exigent Circumstances, or to Demonstrate that a Warrant Inevitably Would Have Been Discovered.

The State claims that the court of appeals erred in its factual assessment of probable cause by reviewing only those facts which undermined, rather than supported, probable cause. State's brief at 23. Appellate courts are not required to detail in writing each fact considered by the courts prior to the issuance of any opinion. See, e.g., State v. Allen, 839 P.2d 291, 303 (Utah 1992). Particularly in the "totality of the circumstances" analysis, facts are not to be considered in isolation, but are to be considered in their totality. Cf., e.g., United States v. Arvisu, 534 U.S. 266, 274-75 (2002) (in assessing totality of circumstances supporting reasonable suspicion, courts should not "divide and conquer" each individual fact in isolation, but should assess the inferences to be drawn by considering the facts as a whole).

The State first attempts to minimize the involvement of Officers Monson and Saunders, who testified that they observed no evidence that Tripp was under the influence. State's brief at 24. Monson spoke to Tripp from a distance of two feet and noticed no odor of alcohol, was present when Detective Roberts was discussing the blood draw with her, and tried to shield her eyes as she was terrified and pulling away during the blood draw (R. 525: 199 205, R. 533: 67). He saw nothing unusual in the way she

spoke and saw no balance problems or other indicia of impairment as she walked from the family car to the police car (R. 525: 206-07, R. 533: 69-70). He did not request any field sobriety tests (R. 525: 207-08).

Officer Saunders was the officer who took Tripp's license and talked with her for a couple of minutes about the fact that she was the driver in the accident and about how she did not see Pracht until she saw him sliding in her rear view mirror (R. 525: 334). He was standing two feet from her and asked her if she had consumed any drugs or alcohol, and after she said no, he did not suspect otherwise or request field sobriety tests because he saw no evidence that she was under the influence (R. 525: 335-336, 376-78, 387). He asked her if she would submit to a blood test to rule out the possibility, and she declined, saying she was afraid of needles (R. 533: 45). He then asked her to submit to a UA, and she agreed to do that (R. 533: 45). He explained to her that he wanted the test to confirm that she had not consumed anything, and to rule out that possibility (R. 533: 47). He also gave her some forms to complete later (R. 533: 46), but could not recall having done so at the time of trial (R. 525: 337-38). After assessing the physical evidence from the accident, which indicated that Tripp had pulled out in front of Pracht, Saunders testified that he had no reasonable suspicion that Tripp was under the influence of anything (R. 525: 350). He testified that nothing he saw or heard led him to believe she had consumed anything, and that she was not slurring her words (R. 533: 46, 53). He told Officer Roberts that he did not see or smell anything (R. 533: 52). The State's efforts to

minimize the opportunities these officers had and took to observe Tripp should be rejected on the basis of the record discussed above.

The State complains of the court of appeal's failure to account for Detective Roberts' testimony that he became progressively more concerned that Tripp was impaired as his investigation proceeded, and the trial court's sixth finding:

> 6. Detective Roberts based his assessment on the fact that the redness of the defendant's eyes did not dissipate with time, she was nervous, she appeared to lack concern for the victim, and she was smoking heavily.

See State's brief at 24-26.

As an initial matter, finding 6 is incomplete because it does not account for Detective Roberts' acknowledgment that shakiness and nervousness would be normal for someone involved in a fatal car accident (R. 533: 27), the testimony of the State's own witnesses that Tripp was very upset by the accident and continued crying up to and throughout the blood draw (R. 532: 44, 48, R. 533: 67, 77, 82), that her red eyes were caused by her crying (R. 533: 70, 77), and that Tripp was smoking that night in an effort to calm herself (R. 533: 77).

Of central importance here, the court of appeals did address the facts encompassed in finding 6, but reasonably held, on the basis of the trial court's finding that the police detected no obvious signs of impairment, that there was no probable cause for the blood draw. In discussing the interchange between Roberts and Tripp regarding the blood

draw, paragraph 6 of Tripp states the relevant facts:

> During this exchange, Detective Roberts observed that Tripp appeared nervous, was shaking, and had red eyes without any tears. Detective Roberts testified that he began to believe that Tripp was impaired, based on her apparent lack of concern for the victim, her continual smoking, and the fact that the redness in her eyes was not dissipating. He also acknowledged that it was normal for an individual involved in a serious accident to be shaky and nervous.

Paragraph 22 of Tripp explains the court's application of the law to the decisive facts, stating,

> On the record before us, we cannot say that the totality of the circumstances established probable cause to search Tripp's body for incriminating evidence, i.e., to effect the blood draw. Officer Saunders testified that he did not have a reasonable suspicion or belief that Tripp was intoxicated or under the influence of drugs or alcohol. Detective Roberts testified that he was only asked by Officer Saunders to help obtain consent and that he was not given any information that rose to the level of probable cause. Detective Roberts further testified that while he observed that Tripp had red eyes, possibly from crying, and that she was nervous and shaking, he did not observe slurred speech, smell the odor of alcohol, or conduct any field sobriety tests. Officer Monson testified that he did not smell alcohol or observe any signs of impairment. Significantly, in its findings of fact, the trial court found that "[n]o officer detected the odor of alcohol on the defendant, nor did they observe any obvious signs of impairment, such as poor balance or slurred speech."

The court of appeals' analysis squared with the relevant law and facts in the record.

The State argues that the court of appeals failed to account for the inference that Tripp was driving under the influence, which purportedly arose from her pulling into the intersection despite having an unobstructed view of Pracht. State's brief at 26. The

physical evidence which remained after the accident counters the State's argument, because the road Pracht was driving on is hilly and dips three eights of a mile prior to the intersection (R. 533: 59-60). The road configuration or Tripp's own doorpost could have blocked her view of Pracht's motorcycle as she entered the intersection (R. 533: 60).

At the time of the collision, Pracht may have been speeding, and this may have been the cause of the accident. As the trial court recognized, the State's evidence conflicted regarding whether he should have been driving fifty or sixty miles an hour (T. 526: 563, 696, R; 527: 705, State's Exhibit 30). Tripp had the right to assume that Pracht was going the speed limit (R. 533: 60-61). The State's accident reconstructionist conceded that, due to a lack of underlying data from the police investigation, he would not purchase stock if his decision were based on information of the same quality as he had to work with in Tripp's case (R. 526: 516). Nonetheless, he estimated that Pracht was driving at least 59 miles an hour, and may have been going faster than that (R. 526: 505, 514). He testified that if Pracht had been going fifty miles an hour, Tripp would have cleared the intersection before Pracht came through, and that there would have been no accident (R. 526: 516).

Pracht's braking error may have caused the accident. The point of impact between his motorcycle and the rear end of Tripp's truck appeared to be within three feet of either side of the center line on U-111, the road Pracht was driving on at the time of the crash (R. 526: 509). The physical evidence showed that prior to the collision, Pracht was

applying only his rear brake (R. 526: 475), and that he skidded for some forty-four feet prior to sliding underneath and hitting Tripp's truck (R. 525: 355-56, 358, R. 526: 465). Applying only the rear brake on a motorcycle routinely causes them to lose control and slide (R. 526: 410, 415). Had Pracht been braking properly, he could have stopped or steered around Tripp's truck, rather than sliding underneath and colliding with it as he did (R. 532: 37-39). The officers at the scene did not have the benefit of an accident reconstructionist, but were left to interpret the physical evidence, which did not indicate that Tripp was the cause of the accident, let alone that she was under the influence when it occurred. Detective Roberts conceded that Pracht may have been going ninety miles an hour (R. 525: 373, R. 532: 32-35).

On the facts of this case, as accurately stated by the court of appeals, the evidence did not establish probable cause of any offense by Tripp. Compare State v. Worwood, 2007 UT 47, ¶¶ 26-36, 164 P.3d 397 (Court found reasonable suspicion but no probable cause that Worwood was driving under the influence, given his odor of alcohol, slurred speech, and bloodshot eyes, and proximity to crushed beer can, cooler, and large water spot on the road, because his walking and balance were steady), with State v. Rodriguez, 2007 UT 15, ¶¶ 3, 57, 59, 156 P.3d 711 (police had probable cause to justify a warrantless blood draw, where driver made an abrupt left turn in front of an oncoming school bus, accident was likely to be fatal, defendant had bloodshot eyes and slurred speech, and vodka bottle was found at the scene of the accident) and People v. Roybal, 655 P.2d 410

(Colo. 1982) (odor of alcohol emanating from defendant and collision did not give rise to probable cause, absent evidence that defendant was responsible for collision).

The State argues that the court of appeals ignored the weightiest evidence in the probable cause equation, discussed in the trial court's eighth finding:

> 8. The victim advocate, Cecilia Budd, detected an odor of alcohol on the defendant while the defendant was seated in a family car.

See State's brief at 26-27.[15] The State also relies on the testimony of the blood tech that he detected an odor of alcohol on Tripp as they spoke, and alleges that the victim advocate, Cecelia Budd, noticed that Tripp slurred her words. State's brief at 6, citing R 533: 84.[16]

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[15]Finding 8 is clearly erroneous in indicating that the victim advocate detected an odor of alcohol on Tripp when Tripp was in a family car, and there is no evidence to marshal in support of it. The victim advocate testified that she thought the odor of alcohol in the family car came from Tripp, but did not know Tripp smelled of alcohol until Tripp was under arrest and in Detective Roberts' police car, and then did not know if the smell came from Tripp's clothing or her mouth (R. 525: 221, 224, R. 533: 76, 78, 86-87). Tripp made this argument in the court of appeals and the State did not contest it. Compare Tripp's opening brief at 8-13 with State's brief at 12 n.3 (acknowledging Tripp's challenge and indicating it will address them in its discussion of the blood draw) and *passim* (failing to identify any evidence which supports the finding).

[16] The assertion regarding purported slurred speech is erroneous. Page 84 of the transcript reflects this testimony:

> Q Was she able to speak lucidly?
> A Yeah, she was speaking.
> Q I mean, she wasn't slurring her words?
> A I'm not familiar how she speaks but that day I spoke to her, yeah.

(R. 533: 84). In this testimony, Budd is agreeing with counsel that Tripp was not slurring her words. Assuming *arguendo* that this testimony is fairly read as an indication that Tripp was slurring her speech, there is no evidence that Budd informed the police of any such observation.

The court of appeals' focus on factors other than odors and speech observed by non-police actors, in the absence of any evidence that their observations were conveyed to the police prior to the blood draw, is correct. This is because in order to support reasonable suspicion or probable cause to support Fourth Amendment intrusions by the police, the facts at issue must be known to the police. See, e.g., United States v. Stewart, 867 F.2d 581 (10th Cir. 1989)(considering facts known by the police in assessing lawfulness of search). Cf., e.g., State v. Applegate, 2008 UT 63, ¶17, 194 P.3d 925 (reasonableness of detention turns on objective analysis of facts known to the police). Because the police never detected an odor of alcohol or slurred speech, and because there is no evidence that they were informed of an odor of alcohol or slurred speech prior to the blood draw, these factors would not have been proper to include in the objective analysis of the facts known to the police which might establish probable cause. See, e.g., Stewart and Applegate, *supra*.

The court of appeals correctly found that there was no probable cause to justify the blood draw, and hence, the warrantless search of Tripp was not justified on the theory of exigent circumstances, which requires proof of probable cause. See Tripp, 2008 UT App 388, ¶¶ 18-22. The court of appeals also correctly recognized that the absence of probable cause defeats the claim that the evidence was salvageable from exclusion under the inevitable discovery doctrine, because in the absence of probable cause, the police would not inevitably have obtained a warrant and thereby obtained the blood sample. See

id at ¶ 25. Accordingly, on certiorari, this Court should affirm the court of appeals's decision.

B. The Court Should Reject the Claim of Exigent Circumstances.

The State asks this Court to address the exigent circumstances on certiorari, rather than remand to the court of appeals. State's brief at 27-28. In arguing exigent circumstances, the State relies on the testimony of Officer Roberts that it would take him a couple of hours to obtain a warrant, because he would "have to review all the information with the officers at the scene, ... call another detective to come and help [him] draft the warrant and go with [him] to review the warrant with the district attorney and then have it signed by a district court judge." The State notes that the accident occurred at 7:00 on a Friday night, and argues that the courts would be closed at that time.

This testimony does not square with the advances in technology and in our law, which permitted telephonic warrants at the time of Tripp's blood draw, and which make warrants available to the police from magistrates regardless of court hours, in very short amounts of time. See State v. Rodriguez, 2007 UT 15, ¶¶ 37-48, 156 P.3d 771 (in rejecting State's claim of *per se* exigent circumstances in dissipating alcohol cases, the Court canvassed the legal developments whereby police may obtain warrants by a number of very efficient means, which should take between fifteen minutes and an hour). Courts are not obliged to accept claims of exigent circumstances which are created by the police.

See, e.g., State v. Beavers, 859 P.2d 9, 17 (Utah App. 1993).

The absence of probable cause that Tripp was impaired by alcohol is dispositive of the exigent circumstances claim in any event. Compare Rodriguez, 2007 UT 15, ¶ 59 (finding that compelling evidence and probable cause that driver was impaired in apparently fatal accident created exigent circumstance to justify warrantless blood draw). Accordingly, this Court should affirm the court of appeals' analysis of exigent circumstances.

IV. THE COURT OF APPEALS' INEVITABLE DISCOVERY ANALYSIS WAS CORRECT.

The State contends that the court of appeals misunderstood its burden under the inevitable discovery doctrine set forth in State v. Topanotes, 2003 UT 30, 76 P.3d 1159, and ignored pertinent evidence. State's Brief at 29-32. By reviewing the Tripp decision, the Court may readily confirm the correctness of the court of appeals' articulation of the State's burden under Topanotes to provide persuasive evidence that the police would have obtained the same evidence through means independent from police illegalities. See Tripp, 2008 UT App 388, ¶¶ 23-24. Accord Topanotes, 2003 UT 30, ¶ 16.

Because there was no probable cause to justify the issuance of the warrant which would have been essential to obtaining the evidence through the independent means of a warrant, see Point III of this brief, *supra*, the court of appeals correctly declined to apply the inevitable discovery doctrine. See Tripp, 2008 UT App 388, ¶ 25.

The State suggests that the court of appeals failed to consider the evidence that Detective Roberts told the blood tech that he would call him back in a couple of hours after he got a warrant, as proof that the blood inevitably would have been drawn. State's Brief at 30. The court of appeals did consider this testimony in noting that the evidentiary content of the blood would be dissipating during the time it would take him to apply for a warrant he should not have been able to obtain for lack of probable cause in any event. Tripp, 2008 UT App 388, ¶ 24 n.10, and ¶25. His statement to the blood tech about how long it would take to get a warrant, which was made while Tripp was being held in a police car, may well have been part of his campaign to compel Tripp to submit to a test under threat of a warrant. It is no substitute for proof that he actually would have sought a warrant, particularly given the undisputed evidence that given that the police believed they did not need a warrant and could forcibly take Tripp's blood, given the seriousness of the accident (R. 525: 10, 25, R. 532: 23, R. 533: 33-34).

The court of appeals did not misunderstand or unfairly augment the State's burden under the inevitable discovery doctrine. Rather, the court correctly found that the doctrine does not apply on the facts of Tripp's case, because the absence of probable cause to draw the blood would not inevitably have resulted in the issuance of a warrant. See id.

CONCLUSION

This Court should affirm the Tripp decision. Alternatively, the Court should remand the matter to the court of appeals for its consideration of the issues left unaddressed by the Tripp decision.

Respectfully submitted this _____ day of July, 2009.

YENGICH, RICH & XAIZ
Attorneys for Appellant

By: _____
RONALD J. YENGICH
ELIZABETH HUNT

CERTIFICATE OF MAILING

I hereby certify that I caused to be delivered two true and correct copies of the foregoing, and a copy of the brief in PDF on disk to Assistant Attorney General Jeff Gray, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this _____ day of July, 2009.

_____

ADDENDUM

COURT OF APPEALS' DECISION

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE TRIAL COURT

CONTROLLING CONSTITUTIONAL PROVISIONS

Constitution of Utah, Article I § 14

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

United States Constitution, Amendment IV

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

United States v. Arrington, 2008 WL 4459378
(unpublished decision)

United States v. Romero, 247 Fed. Appx. 955 (10th Cir. 2007)
(unpublished decision)