2011

State of Utah v. Milo Simons : Reply Brief

Utah Court of Appeals

Jeff Gray; Assistant Attorney General; Mark Shurtleff; Utah Attorney General; Counsel for Respondent.
Douglas J. Thompson; Counsel for Petitioner.

IN THE UTAH SUPREME COURT

STATE OF UTAH, Respondent, **vs.** MILO SIMONS, Petitioner.	Case No: 20110842-SC

REPLY BRIEF OF PETITIONER UPON WRIT OF CERTIORARI

CERTIORARI REVIEW FROM A DECISION OF THE UTAH COURT OF APPEALS AFFIRMING DEFENDANT'S CONVICTION ON ONE COUNT OF POSSESSION OF A CONTROLLED SUBSTANCE, A THIRD DEGREE FELONY, FROM THE FOURTH DISTRICT COURT, HONORABLE JAMES R. TAYLOR PRESIDING

JEFF GRAY (5852)
Assistant Attorney General
MARK SHURTLEFF (4666)
Utah Attorney General
160 East 300 South, Sixth Floor
P.O. Box 140854
Salt Lake City, UT 84114

Counsel for Respondent

DOUGLAS J. THOMPSON (12690)
Utah County Public Defender Association
Appeals Division
51 South University Ave., Suite 206
Provo, UT 84601
Tel: (801) 852-1070

Counsel for Petitioner

Oral Argument Requested

Appellant is not currently incarcerated on this case

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ARGUMENT

THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S DENIAL OF DEFENDANT'S MOTION TO SUPPRESS

As a preliminary matter, Simons recognizes that this Court may affirm the trial court's ruling on the grounds initially held by the trial court (that the officer had reasonable suspicion to detain and investigate Simons as a passenger based on the evidence of paraphernalia found in the driver's door), rather than the grounds held by the Court of Appeals (that the officer's questioning of Simons did not measurably extend the detention). "It is well settled that an appellate court may affirm the judgment appealed from 'if it is sustainable on any legal ground or theory apparent on the record...'" *Bailey v. Bayles*, 2002 UT 58, ¶ 10, 52 P.3d 1158. The initial argument in the State's brief is directed at supporting the trial court's reasoning, and its second argument is directed at the argument underlying the holding of the Utah Court of Appeals. Simons disagrees

with both the decisions of the trial court and the court of appeals. However, even if this Court chooses to affirm the trial court based on a finding of reasonable suspicion to investigate Simons as a passenger (the trial court's finding), Simons asserts it is appropriate for this Court to address the holding of the Court of Appeals as well, where it deals with the scope and reasonableness of a Fourth Amendment detention/seizure, because of this Court's significant interest in establishing state-wide standards to guide law enforcement and prosecutorial officials in this area. *See State v. Baker*, 2010 UT 18, ¶ 7, 229 P.3d 650 ("there must be state-wide standards"); *State v. Brake*, 2004 UT 95, ¶ 14, 103 P.3d 699 (in consent search cases there should be uniform legal rules); *State v. Hansen,* 2002 UT 125, ¶ 25, 63 P.3d 650 (there should be state-wide standards in search and seizure cases to "help ensure different trial judges will reach the same legal conclusions in cases that have little factual difference."); *State v. Warren*, 2003 UT 36, P.3d 590. Therefore, Simons asks this Court to address the question of whether or not the police measurably extended the traffic stop even if the trial court's denial is affirmed on other grounds.

1. The police did not have reasonable suspicion that Simons, as a passenger, was involved in criminal activity to independently justify his detention

The first point in the State's brief is because Simons was in the car with the driver who was suspected of DUI and possession of drug paraphernalia the police had reasonable suspicion or even probable cause to detain or arrests Simons. Respondent's Brief at 10-17. The State claims that, because the degree of proof necessary for an investigative detention is "modest" (*United States v. Brignoni-Ponce,* 422 U.S. 873, 879-

80, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975)) and detention is "permissible if the officer's suspicion 'is supported by specific and articulable facts as well as any rational inferences drawn from those facts'" (*State v. Alverez,* 2006 UT 61, ¶14, 147 P.3d 425), the police here were justified in detaining and investigating Simons based on the evidence observed implicating the driver/co-defendant. Respondent's Brief at 11-12. The State cites several United States Supreme Court cases to support its claim that Deputy Luke was justified in investigating Simons based upon the evidence discovered in the driver's side door compartment. The most relevant of which are *Wyoming v. Houghton*, 526 U.S. 295, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999), *Maryland v. Pringle*, 540 U.S. 366, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003), and *United States v. Di Re*, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed 201 (1948). Respondent's Brief at 14-17. Simons now responds to the State's position with a closer examination of those cases and asserts that factual differences make this case distinguishable.

The State argues that under *Pringle*, because Simons "and his companion were in a relatively small automobile, not a public tavern" the police were justified in making the inference that "the passenger is engaged in a common enterprise with the driver, and [that both] have the same interest in concealing the fruits or the evidence of their wrongdoing." Respondent's Brief at 16-17 (citation omitted). The State argues if "discovery of contraband in the backseat of a car satisfies the probable cause burden for arresting a front seat passenger", as it did in *Pringle*, then "Deputy Luke's discovery of chewed paraphernalia in the driver's door certainly satisfies" the less demanding requirement of reasonable suspicion. Respondent's Brief at 17. The State suggests that the quantitative

difference between proof necessary for probable cause and proof necessary for reasonable suspicion should require that the evidence here satisfies the lower threshold. However, a comparison of the facts in *Pringle* to the facts in this case reveals a qualitative difference between the evidence, and that qualitative difference suggests the police here had neither probable cause nor reasonable suspicion to suspect Simons was involved in any criminal activity and was merely in close proximity to a person who was.

In *Pringle* the police stopped a passenger vehicle, occupied by three men, for speeding. "The officer asked [the driver] for his license and registration" and when he "opened the glove compartment to retrieve the vehicle registration, the officer observed a large amount of rolled-up money in the glove compartment." *Pringle*, 540 U.S. at 368. After the driver's information did not return any outstanding violations the "officer returned to the stopped car, had [the driver] get out, and issued him an oral warning." *Pringle*, at 386. A second officer then asked if the driver "had any weapons or narcotics in the vehicle" and the driver "indicated that he did not" and "consented to a search of the vehicle." *Id.*, at 386. "The search yielded $763 from the glove compartment and five plastic baggies containing cocaine from behind the back-seat armrest." *Id.*

The police "questioned all three men about the ownership of the drugs and money" but the "men offered no information" and all three were placed under arrest and transported to the police station. *Id.*, at 368-69. The defendant, the front seat passenger, moved to suppress a confession he later made arguing it was "the fruit of an illegal arrest" but the motion was denied because the trial court found there was probable cause to arrest him. *Id.*, at 369. The Maryland Court of Appeals reversed his conviction

"holding that, absent specific facts tending to show Pringle's knowledge and dominion or control over the drugs, 'the mere finding of cocaine in the back armrest when Pringle was a front seat passenger in a car being driven by its owner is insufficient to establish probable cause for an arrest for possession.'" *Id.*, at 369 (*citing Pringle*, 370 Md. 525, 545, 805 A.2d 1016, 1027 (Md. 2002)).

The United States Supreme Court granted cert. "It [was] uncontested... that the officer, upon recovering the five plastic glassine baggies containing suspected cocaine, had probable cause to believe a felony had been committed... The sole question [before the Court was] whether the officer had probable cause to believe Pringle", the front seat passenger, "committed that crime." *Id.*, at 370. "To determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause..." *Id.*, at 371 (*citing Ornelas v. United States*, 517 U.S. 690, 696, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996)).

The Court concluded "it an entirely reasonable inference... that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine" based on the fact that there was $763 in cash in the glove box directly in front of the defendant and there was five bags of cocaine behind the backseat armrest and accessible to all three men. *Id.*, at 372. Additionally, the Court noted that *Pringle*, like *Houghton* and unlike *Ybarra*, involved individuals riding together in a car so it "was reasonable for the officer to infer a common enterprise among the three men" because the nature of the enterprise (drug dealing) is one "which a dealer would be unlikely to admit an innocent

person with the potential to furnish evidence against him." *Id.*, at 373. The Court noted that unlike the facts in *Ybarra*, where patrons of a bar were not allowed to be searched based on "mere propinquity to others independently suspected of criminal activity" "absent individualized suspicion", the fact that *Pringle* was in the car with large quantities of drugs and cash gave the police reason to believe he was involved. *Id.*, at 373. The Court also noted, unlike *Di Re* where there was "no information implicating" the defendant other than presence in the vehicle with a suspect who had been identified, neither of Pringle's companions were singled out by the evidence and therefore each of them were as likely to have been attached to the contraband. *Id.*, at 373-34. Quoting *Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979), the Court said "[w]here the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another..." *Pringle*, at 372-73.

Although this is not a case where probable cause was required, the principle is the same, when a person is being investigated (as opposed to a place) reasonable suspicion must be particularized with respect to that person.[1]

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[1] "Under the Fourth Amendment, government officials may conduct an investigatory stop of a vehicle if they possess 'reasonable suspicion: a particularized and objective basis for suspecting that particular person stopped of criminal activity... Such reasonable suspicion 'requires specific, articulable facts which, together with objective and reasonable inferences, form a basis for suspecting that a particular person is engaged in criminal conduct.'" *United States v. Twilley*, 222 F.3d 1092, 1095 (9th Cir. 2000) (*citing United States v. Thomas*, 211 F.Ed. 1186, 1189 (9th Cir. 2000)).

The qualitative factual distinctions between *Pringle* and this case significantly weaken the State's position. First, the evidence discovered in *Pringle* was either closer to or as close to the passenger defendant as it was the other vehicle occupants. But the evidence here, the paraphernalia in the driver's door compartment, was solely within the driver's reach and likely only within the drivers knowledge. In *Pringle* the money evidence was in the glove compartment, directly in front of the defendant as the front seat passenger (*Pringle*, at 368, 372), and the drug evidence was found behind the upright armrest in the back-seat, "accessible to all three men" (*Pringle*, at 368, 372) including the defendant. But here the evidence of intoxication was limited to the driver and the paraphernalia evidence was discovered in the driver's side door compartment (R.48, R.92: 6, 8, 23, 24, 25), well away from the reach, view, and control of the front seat passenger. The officer testified that it only came into view after the driver's door was opened even though that same officer had already looked into the vehicle from the passenger window, suggesting that Simons could not have seen it with from the passenger seat. R.92: 5-7.

Next, the evidence in *Pringle* suggested the crime was drug dealing, (*Pringle*, at 373 ("[t]he quantity of drugs and cash in the car indicated a likelihood of drug dealing")), while the evidence here suggested DUI, possession of paraphernalia and possibly prior use of a controlled substance (R.92: 6 (driver had bloodshot eyes, rapid speech and movement), 92: 8 (baggies commonly used to store drugs), 92: 8 (powder and crystal residue in the bags). The important distinction from *Pringle* is that drug dealing was found to be "an enterprise to which a dealer would be unlikely to admit an innocent

person with the potential to furnish evidence against him" (i.e. large amounts of cash and drugs), which leads to the inference that someone in the presence of such evidence is likely to be involved, while the evidence of DUI, paraphernalia, and prior use should not generate the same inference. *Pringle*, at 374.

Thus, the evidence in *Pringle*, which created a legitimate inference of criminal activity to all of the passengers in the vehicle, is qualitatively different from the evidence discovered in this case. Had the paraphernalia in this case been in plain view in the console between Sorenson and Simons, or had the officers reported similar evidence of impairment in Simons then such an inference may be warranted. But where all the evidence pointed only to, and directly to, the driver the police did not have any specific and articulable suspicion, objective or otherwise, to support a belief that Simons was engaged in criminal activity.

The State argues that under *Houghton* "it is reasonable in such cases to believe that the passenger is 'engaged in a common enterprise with the driver, and [that both] have the same interest in concealing the fruits or the evidence of their wrongdoing.'" Respondent's Brief at 17 (*citing Houghton*, 526 U.S. 295, at 304-05). The State asserts under *Houghton* "Deputy Luke's discovery of chewed paraphernalia in the driver's door certainly satisfies the 'less demanding' reasonable suspicion burden... that is required for making the much 'less intrusive' investigative query..." Respondent's Brief at 17 (internal cites omitted). The State claims "Deputy Luke would have been justified in searching any belongings that Petitioner may have had in the car" and presumably, therefore the police could also have detained Simons under the lower standard.

Respondent's Brief at 17. This argument also ignores the qualitative differences between the facts in *Houghton* and the facts in this case.

In *Houghton* the police stopped a vehicle "for speeding and driving with a faulty brake light." *Houghton*, 526 U.S. 295, 297. The police noticed an item of drug paraphernalia in the shirt pocket of the driver and ordered the passengers out of the car, asked them for identification, and then began searching the car for contraband. *Houghton*, 526 U.S. at 298. The defendant moved to suppress the evidence discovered in her purse "as the fruit of a violation of the Fourth and Fourteenth Amendments" and the trial court "held that the officer had probable cause to search the car for contraband, and, by extension, any containers therein that could hold such contraband." *Id.*, at 298-99. She claimed the police did not have probable cause to search her purse based on the evidence of paraphernalia found in the driver's pocket.

Up to the point at which the car was searched, the factual circumstances in *Houghton* were similar to this case because Simons' companion was pulled over for a traffic matter and paraphernalia was discovered in plain sight during that investigation. However, the similarities stop there. In *Houghton* the officers then performed a search of the vehicle for contraband, justified by probable cause based on the paraphernalia, and found a purse, which the defendant claimed was hers. Eventually the police discovered drug paraphernalia and methamphetamine inside the purse. Here the police did not continue to investigate their suspicion of DUI or paraphernalia, they stopped that investigation in order to investigate Simons.

In *Houghton* the Wyoming Supreme Court reversed the conviction by finding that

when the police are searching a vehicle based on probable cause, "if the officer knows or should know that a container is the personal effect of a passenger who is not suspected of criminal activity, then the container is outside the scope of the search unless someone had the opportunity to conceal the contraband within the personal effect to avoid detection." *Id.*, at 299 (*citing Houghton*, 956 P.2d 363, 372 (WY. 1998)). Because the officer ""knew or should have known that the purse did not belong to the driver, but to one of the passengers,' and because 'there was no probable cause to search the passengers' personal effects and no reason to believe that contraband had been placed within the purse'" the search was illegal. *Id.*

The U.S. Supreme Court examined whether it mattered that the purse did not belong to the driver. In reversing the Wyoming court, the Supreme Court noted that "[t]he critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." *Id.*, at 302 (*citing Zurcher v. Stanford Daily*, 436 U.S. 547, 566, 98 S.Ct. 1970, 56 L.Ed2d 525 (1978)). Thus, when the search is based on probable cause, it is not that the police have probable cause that a owner of the property has been involved with criminal activity and therefore evidence of that activity may be found on his property, rather it is that there is reason to suspect that evidence of criminal activity is likely to be discovered in a certain location, like inside a car. In support of its holding the Court noted that "a car passenger -- unlike the unwitting tavern patron in *Ybarra* -- will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the

evidence of their wrongdoing." *Id.*, at 304. The State's brief asserts that "Deputy Luke would have been justified in searching any belongings that [Simons] may have had in the car" under *Houghton* presumably to suggest that if the police had probable cause to search his containers then they certainly had reasonable suspicion to detain and investigate him. Respondent's Brief at 17. Under *Houghton* that appears to be correct. But here the police did not search the car or its contents as a result of discovering the driver's drug paraphernalia, rather they began to investigate Simons and his person.

The Court drew the line when the issue of searching a person was considered. Unlike a container belonging to a passenger inside a vehicle for which there is probable cause to search, "the heightened protection afforded against searches of one's person" prohibits the police from extending such searches to a passenger's body or clothing. *Houghton*, at 303. This is where the State's appeal to *Houghton* breaks down. Here Deputy Luke did not search the vehicle based on the evidence found on the driver, rather Luke approached Simons at the passenger door and began investigating Simons, asking him what he had on his person. The principle underlying *Ybarra* is important even though it involved mere presence in a bar and this case involves mere presence in a vehicle. The principle in *Ybarra* is that, when the search warrant was issued, there was no reason to believe (besides proximity) that anyone else at the tavern would be violating the law. The same cannot be said for *Pringle*, when probable cause was established, the police had reasons beyond proximity to believe the defendant was involved in criminal activity related to the evidence they had discovered. And in *Houghton*, the defendant's person was not being investigated, only her property (which does not enjoy the same

elevated level of protection) and the property's proximity to the driver created a probability that contraband was hidden therein gave reason to suspect evidence of criminal activity would be found there. But here, evidence of the driver's impairment and paraphernalia is not in any way (beside proximity) evidence of criminal activity on the part of Simons and it could not have given the police reasonable suspicion to believe Simons had committed a crime.

In *Pringle* the nature of the suspected criminal conduct, dealing drugs, combined with the proximity of the contraband *to the defendant* justified an inference and created suspicion beyond a mere hunch that the defendant was likely involved in criminal activity. In *Houghton* the nature of the search, a search of the vehicle and the containers found therein, allowed the police to search the defendant's purse even though the paraphernalia evidence justifying the search was limited to the driver. In *Ybarra* the nature of the suspected criminal conduct, possession of controlled substances, combined with the proximity of the defendant from the suspected contraband, in the same room as those reported to have drugs, did not justify an inference implicating the defendant and therefore did not create reasonable suspicion. And in *De Ri* the nature of the suspected criminal conduct, the driver and another passenger's possession of counterfeit gas ration coupons, combined with the proximity of the defendant from the suspects, in the same car, did not justify an inference implicating the defendant, especially where the informant only implicated the driver.

Under the totality of the evidence, we see no reason to suspect that Simons, as a passenger, had engaged in any criminal activity. The trial court found

> In this case Deputy Luke's initial suspicion of driving while impaired was quickly supplemented by his observation of drug paraphernalia in plain sight when the car door was properly opened to remove Mr. Sorenson to investigate the possible DUI charge. The baggies were not only strongly likely to be paraphernalia, the used condition implied use of the drugs they might have contained. That suspicion coupled with the signs of possible impairment lead to reasonable suspicion and concern about both occupants of the car. The tactics including a quick search of Mr. Sorenson's person and questioning Mr. Simons about drug possession or use, followed by a search of his person...[] were reasonably suggested by his concerns. Once it was confirmed that Mr. Simons was in possession of drug paraphernalia, arrest and a further, concurrent search of his person was justified. Consent of either Defendant to the search was irrelevant and the Court makes no finding on that point.

R. 47-46. The court found there was evidence the codefendant was driving impaired there was evidence that paraphernalia was in the car and that the bags may have contained drugs at an earlier time. The testimony supports each of these factual findings. See R. 92: 6 (Sorenson had "very watery eyes that were bloodshot", he had "very rapid speech and movement", he moved constantly, and blurted out "I'm not drunk"); 92: 8 (the baggies contained white powder and crystal residues).

The relevant legal conclusion is that, based on the driver's signs of impairment, the discovery of the baggies in the driver's door, and the used condition of the baggies, Officer Luke had reasonable suspicion to detain and investigate both the driver and Simons. The problem is that none of the facts observed and reported by the officer were particularized to Simons and the trial court's conclusion that the police had "reasonable suspicion and concern about both occupants of the car" ignores the requirement that the evidence be particularized to the individual the police detain and investigate. R.47. Here, the nature of the observed criminal activity, the driver's possible DUI and paraphernalia,

combined with the proximity of Simons to the driver and his contraband does not justify the inference implicating Simons in any criminal conduct and thus did not create reasonable suspicion to independently detain or investigate Simons. The trial court's conclusion was erroneous and the State's arguments are incorrect. This Court should not affirm the trial court's denial on this ground.

2. The police unlawfully extended the scope of the investigation because the detention was measurably extended

The State understandably titles its second section "the deputy's question to Petitioner did not **unreasonably delay the investigation**", likely to avoid the 'measurably extend' language of the controlling cases because the State cannot confront the plain meaning of the controlling cases. Respondent's Brief at 18 (emphasis added). Instead of arguing that the police did not measurably extend the stop the State redirects the Court to more favorable search and seizure language. The State notes that traffic stops must not be "unnecessarily prolong[ed]" (*Sharpe*...), and that "the Fourth Amendment's ultimate touchstone is reasonableness" (*Brigham City V. Stuart*, 547 U.S. 389, 389, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006)). The State then contends that under the totality of the circumstances the duration of the stop was not unreasonable and therefore, everything within the stop was reasonable, regardless of whether it was related or whether any extension was measurable. See Respondent's Brief at 18-24, specifically at 21 (*citing Muehler v. Mena*, 544 U.S. 93, 125 S. Ct. 1465, 161 L.Ed.2d 299 (2005),

and *Illinois v. Caballes*, 543 U.S. 405, 125 S. Ct. 834, 160 L.Ed.2d 842 (2005)).[2] But the State's redirection misses the point of Simon's claims and the State's argument allows for individual constitutional violations to go unprotected so long as, at a distance, the complete picture looks like the detention did not last an unreasonable amount of time. This cannot be the rule.

The State's brief fails to address the real contention of this case, which is whether the police can completely avoid the requirements of *Hansen*, *Baker*, and *Johnson*, by prolonging, or delaying the conclusion of, an otherwise justified stop in order to perform investigations that would be unlawful if performed after the justified purpose was concluded. In other words the State avoids the crucial questions: Could the officer in *Hansen* have delayed releasing the defendant with a warning in order to question him about "alcohol, drugs, or weapons"? *State v. Hansen*, 2002 UT 125, ¶ 13, 63 P.3d 650. Was it illegal only because it occurred after he should have been free to leave? Could the officers in *Baker* have delayed arresting the driver in order to conduct an unjustified investigation of the passengers? Could the police in *Johnson*, rather than questioning the passengers simultaneous with the driver, have delayed investigating the driver in order to

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[2] In *Mena* the additional immigration questioning did not measurably extend the duration of the defendant's detention during the execution of a search warrant because she was being detained and questioned "[w]hile the search proceeded" by other officers. *Mena*, 544 U.S. 93, 96. Had the police stopped the search to interrogate her then the outcome would be different.
In *Caballes* the deployment of the K9 unit did not measurably extend the duration of a level 2 detention because the dog sniff was conducted "[w]hile [the officer] was in the process of writing a warning ticket." *Caballes*, 543 U.S. 405, 406. Had the police stopped the process of administering the ticket in order to run the dog around the vehicle then the outcome would have been different.

investigate and search the passengers? *Arizona v. Johnson*, 555 U.S. 323, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009).

Simons asserts that these questions are critical and that the answer to all these questions must be a clear NO, because regardless of whether it occurs before or after the conclusion of the justified stop, an additional investigation that "is not reasonably related in scope to the circumstances that justified the inference in the first place..." (*Hansen*, 2002 UT 125, ¶ 29 (*citing State v. Lopez*, 873 P.2d 1127, 1131-32 (Utah 1994))), nor by any additional evidence observed during the course of the stop is not justified and unreasonable. To extend the detention in order to engage in unjustified investigation violates the spirit of each of these cases, even if extension is brief. To focus, as the State does, on the brevity of the extension is a tactic used to distract from the crux of constitutional issues, which is whether the additional investigation is justified by reasonable suspicion. Further, the State's emphasis on the technical distinction, that the additional investigation occurs before the conclusion of the stop, is only determinative if the justified purpose of the stop is not interrupted by the additional investigation, as was the case in *Johnson* and *Caballes*, and *Mena*, and not the case here.

It is telling that the State's brief fails to address the fact that the additional detention that occurs when Deputy Luke stops investigating the driver, the person who is suspected of DUI and clearly guilty of possessing paraphernalia, and begins in investigating Simons, the person he has no reason to suspect has done anything illegal. Contrary to the State's assertion that the "unrelated question" to Simons occurred "while Deputy Luke 'continued to investigate [the driver's] sobriety' as well as the contraband

possession…", in fact this investigation had stopped. Luke had the other officer just wait with the driver while Luke went to investigate Simons, prior to field sobriety tests, prior to issuing of a citation, prior to the arrest. R.92: 25 (Luke "had the assisting officer just stand by with Mr. Sorenson."). Just standing by is not "a means of investigation that is likely to confirm or dispel their suspicions quickly." *State v. Lopez*, 873 P.2d 1127, 1132 (*quoting United States v. Sharpe*, 470 U.S. 675, 686, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985)).

The court of appeals decision strangely finds no measurable extension, no additional detention. *Simons*, 2011 UT App 251, ¶ 11 ("Under these circumstances, [the court was] convinced that the question did not measurably extend the length of the traffic stop…"). It is strange because the court describes the measurable extension in the sentences immediately preceding the finding, where Luke is shown to have "walked immediately from the driver's side to the passenger side and ask Simons if he had anything on his person…" *Id.* That period of time, although admittedly short, is measurable (like *Hansen* (two questions) and *Baker* (two minutes)), and unlike the facts in *Johnson*, *Caballes*, and *Mena*, did not occur during any other justified simultaneous police conduct.

The State also seems to suggest that the Utah cases of *Hansen* and *Chapman* have been overruled by the U.S. Supreme Court's holding in *Johnson*. Respondent's Brief at 24. But Simons asserts that the holdings in each of these cases are consistent with *Johnson* and, when combined with this Court's holding in *Baker*, demonstrate the precise principle that makes the detention in this case illegal. As argued in Simon's initial brief

(see Petitioner's Brief at 18-24), the police may detain passengers for the duration of the traffic stop and they must be released when the purpose of the stop concludes. If during the course of the stop the police begin to investigate the passengers without independent suspicion that investigation cannot measurably extend the duration of the stop, and a stop is not measurably extended if the additional investigation occurs simultaneous to the justified police conduct (*Johnson*). Once a stop is made the detention must not last longer than is necessary to effectuate the purpose of the stop (*State v. Chapman*, 921 P.2d 446 (Utah 1996)), and something as simple and quick as two questions can constitute and illegal extension (*Hansen*). These cases continue to accurately express the constitutional rules and are completely consistent with each other and with the holding in *Johnson*. Despite the State's assertion, *Johnson* does not create a de minimus exception to the measurably extend rule. Instead it demonstrates the same principles demonstrated in *Mena*, *Caballes*, and *Baker*, namely, extension is about the use of the time for which people are detained, not about the length. If the police use detention time to quickly and diligently address justified suspicions and simultaneously investigate other matters, no unauthorized extension occurs. But if the police have a person detained, justified by one purpose, and use that detention in order to go fishing for evidence of other crimes instead of dealing with the justified purpose and the detention lasts longer than necessary, then the extension to the detention is not justified and is unreasonable.

The State seems to be saying it is appropriate for the police to seize and investigate someone without particularized suspicion (i.e. unreasonably) if only takes a few extra seconds, as it did here, so long as that occurs before the justified purpose of the

stop is completed. Where that rationale fails is that it almost always only takes a few seconds for the police to obtain evidence against someone under circumstances that violate a person's constitutional rights. It may only take a few seconds for the police to discover contraband if they storm through your front door without a warrant. It may only takes a few seconds for the police to empty the contents of your pockets as you pass them on the street. Brevity is not a shield the State can hide behind in this context. Furthermore, if the State was correct the police would have an incentive to postpone concluding an arrest or citation and begin fishing for evidence of other crimes for which they have no reason to believe they will find just so long as they do it quickly. If the State is correct then the police in *Baker* could simply have postponed arresting the driver and have him "stand by" while they called the K9 in to complete the search even though it was unrelated and unjustified. This technical adjustment would not have saved the police in *Baker* and should not save the police here.

The State wants this Court affirm the court of appeals' decision and create a de minimus exception to the 'measurably extend' rule but doing so would be counter to the controlling cases and would betray the spirit of our constitutional protections. The fact that the overall length of the stop did not become unreasonable when Luke added his extra investigation and because it happened before he arrested Sorenson does not change the fact that the extra investigation was not supported by reasonable suspicion and it did not occur simultaneous to the investigation/arrest of the driver. The additional investigation therefore measurably extended the duration of the stop without any justification. That extension, even though it was only a few seconds, was unreasonable

and unauthorized under the constitution and this Court should not approve of such conduct.

CONCLUSION AND PRECISE RELIEF SOUGHT

In conclusion, the decision of the Utah Court of Appeals affirming the trial court's denial of the motion to suppress was an error because it created a de minimus exception to the measurable extension rule contrary to the case law of this Court and the United States Supreme Court. The holding also authorizes and incentivized the police to postpone the conclusion of otherwise legitimate detentions in order to go on fishing expeditions to investigate matters not supported by reasonable suspicion. The trial court's finding that the police had "reasonable suspicion and concern about both occupants of the car" is also erroneous because there were no specific articulable facts which would have linked Simons to criminal activity, thus the trial court should not be upheld on those grounds.

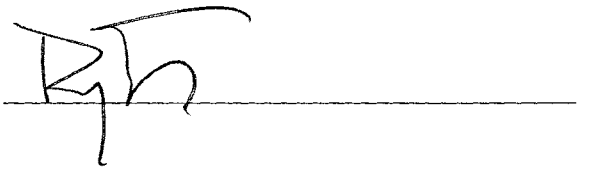
Petitioner now asks this Court to reverse the decision of the Utah Court of Appeals and remand this case to the District Court with order allowing Simons to withdraw his plea and an order suppressing any evidence discovered as a result of his illegal detention.

RESPECTFULLY SUBMITTED this 13TH day of August, 2012.

Douglas J. Thompson
Attorney for Petitioner/Defendant

CERTIFICATE OF MAILING

I herby certify that I mailed a true and correct copy of the foregoing Brief of Petitioner/Defendant postage prepaid to the Utah State Attorney General, Appeals Division, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114 on the 13TH day of AUGUST, 2012.



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