

1992

# Utah v. Wagstaff : Brief of Appellant

Utah Court of Appeals

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Paul Van Dam; Attorney General; David B. Thompson.

Edwin T. Peterson; Edwin T. Peterson, P.C.; Attorney for Appellant.

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IN THE COURT OF APPEALS FOR THE STATE OF UTAH

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STATE OF UTAH

Plaintiff/Appellee

vs

WADE WAGSTAFF,

Defendant/Appellant

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:  
: Case No. 920142-CA  
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:  
: Argument Priority (b) (11)  
:  
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Brief of Appellant

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Appeal from Final Order Denying  
Motion to Suppress  
entered by the First District Court  
Cache County, Utah

Honorable Gordon J. Low

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JUN 30 1992

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	:	Case No. 920142-CA
Plaintiff/Appellee	:	
	:	
vs.	:	
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	:	Category No.
Defendant/Appellant	:	

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Brief of Appellant

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JURISDICTION

This Court has jurisdiction to hear this appeal pursuant to Utah Code Annotated 78-2a-3(2)(e and f), as the appeal is from an interlocutory order of the First District Court in a criminal case.

NATURE OF PROCEEDINGS

Appeal is taken from the order of the First District Court, Cache County, entered pursuant to Memoranda Decision dated February 26, 1992. (Attached as Addendum 1, hereto)

Appellant's Petition for Permission to Appeal from an Interlocutory Order pursuant to Rule 5 of the Utah Rules of Appellate Procedure, which was submitted to this Court on March 9, 1992, was granted by Order of this Court on March 27, 1992.

This appeal is from the final order of the First District Court, the Honorable Gordon Low presiding, denying Defendant-Appellant's Motion to Suppress illegally obtained evidence.

### STATEMENT OF ISSUES

Can an item which is illegally obtained in violation of an individual's constitutional rights under the Fourth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the Utah Constitution be the subject and basis for the second degree felony of tampering with evidence under Utah Code Annotated, Section 76-8-510(1).

### DETERMINATIVE PROVISIONS OF LAW

Determinative statutes in this matter are the Fourth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the Utah Constitution and Section 76-8-510(1) of the Utah Code Annotated.

### STATEMENT OF THE CASE

Defendant/Appellant was the invited guest in a home which was the subject of an illegal search. As enumerated by the hearing judge, the surveillance prior to warrant, the warrant itself, the time of entry, the actual entry, the search of Defendant/Appellant and the taking of the property were stipulated to be illegal for purposes of the Motion to Suppress (Transcript [hereinafter T] page [hereinafter p] 16, Line [hereinafter L] 8-17; T, p.18, L.18-23; T, p.23, L.6-8.) Counsel for the State was ordered, pursuant to the court's Memorandum Decision, to prepare an order in conformance with the Memorandum Decision. The State in its proposed order (attached hereto as Addendum 2) adopted the language of the Memorandum Decision which stated in relevant part: "The State was willing for purposes of this Motion only, to stipulate that the



presence of the officers and the seizure of the property from the Defendant was unlawful." The trial court held that the unlawful conduct did not vitiate the prosecution of the charge of tampering with evidence, though the evidence was the subject of the illegal seizure. In the suppression hearing the State claimed that "there isn't any requirement under the law that evidence be seized legally or lawfully." (T, p.6, L.16-17). The hearing court denied Defendant/Appellant's Motion to Suppress. Defendant/Appellant filed Petition to appeal the interlocutory order, which this Court granted.

#### STANDARD OF REVIEW

The standard of appellate review which is applicable herein, as stated in State v. Palmer, 803 P.2d 1249 (Utah App. 1990), is a "correction of error standard" all relevant facts having been stipulated by the State.

#### STATEMENT OF FACTS

By stipulation and adoption of the Memorandum Decision of the Court Order, the State radically reduced the factual basis which this Court must concern itself. Defendant/Appellant's obligations to marshall the facts pursuant to State v. Moore, 802 P.2d 732 (Utah App. 1990) therefore has been distilled to a brief recitation. The relevant facts before the Court on the narrow issue presented are:

1. Defendant/Appellant was the subject of an illegal search of his person and seizure of his person and property by Logan City

Police officers (See Memorandum Decision, p.1; T, p.16, L.8-17; T, p.18, L.18-23; T, p.23, L.6-8).

2. The police illegally seized "something" from the Defendant/Appellant and placed it on a table (See Memorandum Decision, p.1; T, p.20, L.17-19; T, p.21, L.7-10)

3. Defendant/Appellant re-acquired the item which had been taken from him and did something with it. (See Memorandum Decision, p. 1; T, p.20, L.17-19; T, p.20, L. 7-10.)

A full statement of facts is proffered to aid the court in understanding the circumstances surrounding the stipulated facts.

1. On or about 12 September, 1991 elements of the Logan City Police Department were conducting a surveillance operation, without prior court authorization or warrant, within the confines of Logan City for unknown purposes.

2. The above-mentioned elements employed an electronic devise referred to in the affidavit for search warrant as a "portable phone scanner."

3. The above-referenced elements knowingly and intentionally intercepted private telephonic communication between two unidentified individuals who were unaware of the interception of the private communication.

4. The above-referenced elements evidently tape recorded a telephonic communication.

5. Based upon what is referred to in the Affidavit for Search Warrant as "interception" of the telephonic communication

the above-referenced elements requested a warrant to search a private residence.

6. The Affidavit requested a warrant to be issued for search of a specific residence with no acceptable justification.

7. The Affidavit further requested the warrant be allowed to be executed in a no-knock fashion with no acceptable justification.

8. The Affidavit further requested the warrant be served in the nighttime with no acceptable justification.

9. The Affidavit further requested the search of specified and unspecified persons at the residence with no acceptable justification.

10. The Affidavit purported to identify the house to be searched by statements by one of the parties concerning his anticipation of purchasing another house.

11. No other identification was offered in the Affidavit of either of the parties to the illegally intercepted telephonic communication.

12. The Affidavit assumed that a Robert Evans was one of the parties to the illegally intercepted telephonic communication.

13. The Affidavit prepared by the above-referenced individuals stated assumptions which were unfounded in fact.

14. Based upon the above-mentioned Affidavit, Circuit Court Judge Judkins issued a warrant for search.

15. The Warrant was authorized for immediate search day or night.

16. The warrant was authorized to be served without notice to the residence located at 1036 South Park Avenue or 1063 Park Avenue on all persons in the home.

17. On or about 13 September, 1991 at 20:45 hours, elements of the Logan City Police Department served without notice a Search Warrant at 2063 South Park Ave., Logan, Utah upon all persons therein.

18. At no time during the search were the elements of the Logan City Police Department threatened by force or weapons.

19. All persons at the residence were forced in a single room where they were restrained.

20. Defendant/Appellant who was an invited guest of the residents of the dwelling was handcuffed and segregated from the other persons and taken to the kitchen area.

21. Police officers searched the Defendant/Appellant by removing items from his pockets.

22. The officers executing the search warrant thereafter questioned Defendant/Appellant if "he had anything else."

23. The police officers did not have reasonable suspicion to believe Defendant/Appellant was armed with any weapon.

24. Thereafter Defendant/Appellant was subjected to a second search of his pants pockets.

25. The above-referenced elements removed a small plastic bag from Defendant/Appellant's front pants pockets and placed it on a table.

26. The above-referenced elements thereafter unhandcuffed Defendant/Appellant.

27. Allegedly, Defendant/Appellant thereafter took the plastic bag from the table and attempted to tamper with it.

28. Defendant/Appellant was thereafter physically brutalized by the above-referenced elements and subjected to a third "body cavity" search.

29. Defendant/Appellant was thereafter formally arrested.

30. Defendant/Appellant has been charged with the second degree felony of tampering with evidence.

The State, for purposes of the Motion to Suppress, stipulated that the officers' presence in the house and the search of the Defendant/Appellant was in violation of the Fourth and Fourteenth Amendments of the United States Constitution and Article I, Section 14 of the Utah Constitution and was therefore illegal.

The District court in its Memorandum Decision determined that thorough the search of the residence and the seizure and search of the Defendant/Appellant was illegal that property so obtained might still be the subject of, and basis for the charge of evidence tampering and denied Defendant/Appellant's Motion to Suppress.

#### SUMMARY OF ARGUMENTS

1. The illegally obtained evidence in question could not be used in a proceeding or investigation.

2. The state cannot claim jurisdiction over illegally obtained evidence.

3. Under the circumstances in this case, the charge of tampering with evidence under U.C.A. 76-8-510(1) cannot be based upon the fruit of the poisonous tree.

#### ARGUMENT

##### Point I

#### THE ILLEGALLY OBTAINED EVIDENCE IN QUESTION CANNOT BE USED IN A PROCEEDING OR INVESTIGATION

Defendant/Appellant was originally charged with three criminal counts: (1) tampering with evidence; (2) unlawful possession of controlled substance; and (3) interference with an arresting officer. Based upon the suppression motion hearing, the state acquiesced the impact of the illegal search and seizure as being fatal to both the possession and interference charges by dismissing with prejudice counts 2 and 3. (T, p.18, L.18-22) (attached hereto as Addendum 3). It is unclear from the record why both possession and interference would be tainted by the illegal conduct while tampering would not. The charge of interference being more closely analogous to an independent act (such as assault on a police officer) than tampering. An illegality fatal to interference must also be fatal to the charge of tampering with evidence. This appeal is concerned only with Count 1, tampering with evidence in violation of U.C.A. 76-8-510(1). In relevant part the statute states:

A person commits a felony of the second degree if, believing that an official proceeding or investigation is pending or about to be instituted, he:

(1) Alters, destroys, conceals or removes anything with a purpose to

impair its verity or availability in  
the proceeding or investigation.

The language of the statute which is most significant to this case is "to impair its verity or availability in the proceeding or investigation." The subject of the statute entitled "tampering with evidence" is an object the language of the text refers to as "anything." That term, used in the text as it is, must be construed as "anything which might be used by the state as evidence," or the statute would be inherently overbroad and therefore in violation of the due process clause of the Fourteenth Amendment and unconstitutional on its face. For instance, if a person took and hid a chair in which the police wished to sit an accused for interrogation, that person would have concealed something [anything] and impaired its use in the investigation. The chair was certainly not evidence and the person certainly would not be in violation of U.C.A. 76-8-510.

The "anything" (hereinafter referred to as Evidence) which is the subject of this case was stipulated to be an item which was taken from Defendant/Appellant's pocket and placed on a table (See Memorandum Decision, p.1; T, p.20, L.16-19). The Evidence was obtained pursuant to an illegal search and seizure (See Memorandum Decision, p.1; T, p.16, L.8-17; T, p.18, L.18-23; T, p.23, L.6-8).

The obvious question is: Based upon the foregoing analysis what legitimate purpose could the state possibly use the illegally obtained evidence for, in a proceeding or investigation?

Defendant/Appellant would suggest that no legitimate use can be made of Evidence the law requires excluded. The hearing court recognized that status of the Evidence by stating:

THE COURT: I don't think there's any question that the whatever was on the table was the fruit of the poisonous tree given the stipulation by the State. (T, p.23, L.23-25)

Utah law is clear as to the disposition of evidence so obtained. Illegally obtained evidence must be excluded. The Supreme Court of Utah in State v. Thompson, 810 P.2d 415 (Utah 1991) stated:

[E]xclusion of illegally obtained evidence is a necessary consequence of police violations of article I, section 14.

State v. Larocco, 794 P.2d at 472 (Utah 1990); see also State v. Bolt, 142, Ariz. 260, 689 P.2d 519, 524 (1984).

The Supreme Court of Utah in State v. Ramirez, 817 P.2d 774 (Utah 1991) clearly enunciated the relevant law of exclusion. The Court in Ramirez, supra, stated:

If a seizure occurs and the police are unable to point to the specific and articulable facts that justified that seizure, the seizure violates the fourth amendment of the United States Constitution, and evidence obtained as a result of the illegal seizure must be excluded. Terry, 392 U.S. at 15. The exclusionary rule applies not only to evidence obtained directly as a result of the illegal seizure, but also to evidence obtained by exploitation of the illegality, unless the evidence was obtained by means "sufficiently distinguishable to be purged of the primary taint." Wong Sun v. United States, 371 U.S. 471, 488 (1963) (quoting Maguire, Evidence of Guilt 221 (1956)); Arroyo, 796 P.2d at 690 (quoting Wong Sun, 371 U.S. at 488).

The Court in commenting on the scope of its discussion stated:

The parties have not argued for a separate analysis under article 1, Section 14 of the Utah Constitution, and



therefore, we address the issue only under the federal constitution. See State v. Fulton, 742 P.2d 1208, 1211 n. 2 (Utah 1987), cert. denied, 484 U.S. 1044 (1988); State v. Earl, 716 P.2d 803, 805-07 (Utah 1986). However, that is not to suggest that a separate state constitutional analysis might not be appropriate. See State v. Larocco, 794 P.2d 460, 469-71 (Utah 1990).

The Court in Ramirez discussed the failure of the trial judge to suppress illegally obtained evidence stating:

. . .this is a situation where the trial judge permitted the evidence of the stop and seizure and the fruits of the stop, including the eyewitness identification into evidence without determining its constitutional admissibility. This was error. (Emphasis added).

Defendant/Appellant has claimed the protection of Article 1, Section 14 of Utah's Constitution as well as the Federal Constitutional provisions discussed by the Court in Ramirez, supra.

If the Evidence which was seized has no other use in the proceeding or investigation but to incriminate the Defendant/Appellant, and it must be excluded, Evidence so obtained cannot be the critical element of the charge of "tampering with evidence" under U.C.A. 76-8-510(1).

## Point II

### JURISDICTIONAL CONSIDERATIONS

The Utah Supreme Court has addressed the issue of the jurisdiction of the State to maintain an action involving illegally obtained property. In Davis v. State, 813 P.2d 1178 (Utah 1991) the Court stated:

[6] We now turn to the effect that the invalid seizure had on the forfeiture proceeding. Utah Liquor Commission v. Wooras, 97 Utah 351, 364 93 P.2d 455, 461 (1939), held that "before a court can lawfully determine any rights it must not only be a court empowered by law to determine such rights, but it must have acquired jurisdiction or control over the subject of the parti-

cular action." In forfeiture actions, "where the proceeding is essentially against the property as such, the res itself must be brought before the court by and through such process as the law has decreed to place it within the power and control of the court. . . . And where there is no jurisdiction acquired the judgment is void." 97 Utah at 364-65, 93 P.2d at 461-62 (citations omitted).

The Court in Wooras, supra, stated the question of jurisdiction as:

Seizure of the property is necessary to give jurisdiction over it. Lutz v. Kelly, 47 Iowa 307, 309; Drake on Attach., sec. 436, 437; Darrance v. Preston, 18 Iowa 396.

Since the power of authority of the court to proceed is predicated upon a seizure which brings the property within the possession and control of the court, it follows as of course that such control and possession of the court must be a lawful one. A lawful possession of the property of another cannot be predicated or based upon an unlawful taking or acquiring of such possession. The seizure in this case being wrongful and unlawful, the court would have no jurisdiction to forfeit or confiscate the property, because the property was not in its lawful possession and control, so as to be subject to its orders and judgments of forfeiture.

Defendant/Appellant concedes that both Davis and Wooras, supra, deal with forfeiture cases in which the state wrongfully seized property of citizens and attempted to permanently deprive the citizens of that property. These forfeiture cases are analogous to this case because the basic question of jurisdiction is always relevant. Tampering with evidence is essentially a charge which alleges conduct amounting to depriving the government of "something" which it could use in a proceeding or investigation. If the government has illegally obtained that "something," it would not have grounds to complain of any act against it because of the

nature of its possession of the item. The government by wrongfully obtaining the item has no lawful jurisdiction over it. For the state to claim an item has achieved the status of "evidence" for purposes of U.C.A. 76-8-510(1) the Court must first find the State was lawfully in possession of that thing prior to exercising jurisdiction over it before allowing the State to use it in an "investigation or proceeding." Based on the foregoing analysis, it stands to reason that the State does not have jurisdiction to prosecute this matter. The prosecution's claim that "there isn't any requirement under the law that evidence be seized legally or lawfully" (T, p.6, L.16-17) is totally incorrect.

#### Point III

UNDER THE CIRCUMSTANCES IN THIS CASE, THE CHARGE OF  
TAMPERING WITH EVIDENCE UNDER U.C.A 76-8-510(1)  
CANNOT BE BASED UPON THE FRUIT OF THE POISONOUS TREE

Defendant/Appellant concedes that in a different factual scenario, theoretically something which was illegally seized from one person (Party A) might be used as evidence against another person (Party B) who did not have standing to complain of the unconstitutional act. Under that factual scenario if Party A did something to the item which could be used as legitimate evidence against Party B, then tampering might arguably be an appropriate charge, the taint of the original illegal act being purged as it concerned Party B. The case at hand does not lend itself to that scenario, the "something" involved only having connection and relevance to Defendant/Appellant, the subject of the illegal search and seizure.

Other jurisdictions have considered the issue of the impact of illegal police conduct in search and seizure scenarios as it impacts the charge of "tampering with evidence." In the case of Jones v. State, 681 P.2d 364 (Al. App. 1984) the Court of Appeals of Alaska considered the issue of a defective warrant on the charge of evidence tampering under AS 11.56.610 (attached hereto as Addendum 4), a statute similar to U.C.A. 76-8-510. The court stated the case as:

Casey Jones was convicted of possession of cocaine, AS 17.10.010, and tampering with physical evidence, AS 11.56.610.a(4). He appeals, contending that the evidence against him was obtained by an illegal search and seizure in violation of his rights under the Fourth Amendment to the United States Constitution and comparable provisions of our state constitution. He reasons that the search was pursuant to a warrant which was not based upon a sufficient showing of probable cause. We agree and reverse.

In Jones, supra, the Court concluded:

In summary, the magistrate simply did not have sufficient information in the affidavit to make a reasoned decision regarding issuance of the search warrant. Consequently, the warrant was improperly issued and the fruits of the search must be suppressed.

The Supreme Court of Alaska in State v. Jones, 706 P.2d 317 (Alaska 1985) on appeal thoroughly considered the validity of the search warrant. After determining the warrant was invalid and the search illegal the Court simply concluded,

In this case, the magistrate did not have sufficient information in the affidavit to make a reasoned decision to issue the search warrant. Consequently, the warrant was improperly issued and the fruits of the search must be suppressed.

The decision of the court of appeals reversing the superior court is hereby AFFIRMED on the basis of the Alaska Constitution.

The issue in both State v. Jones, supra, decisions was the issue of the search and seizure. Once decided on search and seizure the Court's directive in State v. Jones, supra, was automatic suppression.

In Sites v. Florida, 582 So.2d 813 (Fla. App. 4 Dist. 1991) a Florida Court of Appeals considered the application of FCA 918.13 (attached hereto as Addendum 5) a statute similar to U.C.A.76-8-510 a factual scenario similar to the case at hand. In Sites, the case was stated by the Court as:

. . .an appeal from the denial of a motion to suppress and a judgment and sentence. We reverse and remand.

The court reviewed the following facts:

Appellant was asleep in his car, which was lawfully parked along a road near a bridge about 10:00 or 11:00 p.m. Officer Touchberry, having been with the Vero Beach Police Department for a year and a half, noticed the car and thought it was fire-gutted. When he approached the car, he realized it was not, but rather tape around the rear window gave it that appearance. He was curious about the car being parked there, so he approached the car, saw the appellant asleep across the two front bucket seats and woke him up.

Appellant sat up at the officer's request and begun to look for his wallet to produce identification, again at the officer's request. The officer saw in appellant's front t-shirt pocket a package of Winston cigarettes and a pack of Zig-Zag rolling papers. The officer's experience was that such papers were used more commonly for marijuana than regular tobacco. The car did not smell of marijuana.

The officer asked appellant to empty the contents of his pockets on the hood of the car. Appellant reached in his pockets and fumbled and then pulled out was the officer thought appeared to be a marijuana cigarette.

Appellant put the cigarette into his mouth and the officer attempted to retrieve it. The officer grabbed appellant's neck and his hands. Appellant swallowed the cigarette.

The Court in reviewing the case history stated:

Appellant was charged by information with tampering with evidence, resisting an officer without violence and possession of drug paraphernalia. The state nolle prossed the resisting count. Appellant moved to suppress the evidence as resulting from an unlawful search/seizure, which motion the trial court denied after a hearing. A jury found appellant not guilty of possession of drug paraphernalia and guilty of tampering with evidence as charged. He was adjudicated guilty and sentenced to twenty-two months incarceration. His appeal of the order denying his motion to suppress and his appeal of his judgment and sentence were consolidated by this court.

The Court ruled that:

Nothing in the circumstances of appellant sleeping in his legally parked car suggested any illegal activity was taking place. Legally parked cars do not give police officers a basis for detaining or searching persons therein.

As referenced above, the Court in Sites, supra, reversed the conviction for tampering with evidence based upon the illegal acts of the police. As in the Jones case, supra, the Court, after making the determination that the relevant constitutional provisions were violated automatically reversed the lower courts refusal to suppress the illegally obtained evidence and set aside the conviction of Sites and Jones for tampering with evidence. In the case now before the Court, the State has saved the Court the trouble of analyzing the search and seizure issue by stipulation. Evidence which is illegally obtained by police in violation of the Constitution of the United States, Fourth and Fourteenth Amendments

and Article 1 Section 14 of the Utah Constitution cannot be the basis for charges under U.C.A. 76-8-501(1) unless the evidence would be independently admissible, or as stated in Ramirez, supra, quoting Wongsun, "sufficiently distinguishable to be purged of the primary taint."

The facts in this case illustrate that the only person against which the Evidence could be used was Defendant/Appellant. Because it was stipulated the Defendant/Appellant's state and federal constitutional rights were violated, the Evidence cannot be purged of the taint of unconstitutional conduct and consequently cannot be used. The lower court's failure to suppress the evidence and to dismiss the charge of tampering with evidence was error and should be reversed.

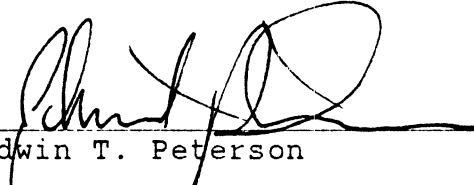
#### CONCLUSION

The prosecutor defined the issue of the case as succinctly as possible in saying "there isn't any requirement under the law that evidence be seized legally or lawfully" (T, p.6, L.16-17). Luckily for the citizens of Utah, the great weight of decisions from this Court, the Utah Supreme Court and other jurisdictions on the subject of exclusion of illegally obtained evidence directly contradict the prosecutors analysis. Because the object in question was illegally obtained no jurisdiction exists over it and it may not be used in an investigation or proceeding. U.C.A. 76-8-510(1) cannot be charged against Defendant/Appellant in this factual scenario. To be relevant in a criminal proceeding or investigation under this factual scenario in this case, the

evidence would have to be obtained in a manner which would be admissible. The lower court erred in refusing to exclude by suppression evidence it recognized as being fruit of the poisonous tree (T, p.23, L.23-25). Because the exclusionary rule prohibits the introduction of evidence which is illegally obtained, the charges against Defendant/Appellant must be dismissed.

Respectfully submitted this 30<sup>th</sup> day of June, 1992.

EDWIN T. PETERSON, P.C.



---

Edwin T. Peterson

CERTIFICATE OF SERVICE

This is to certify that four (4) true and correct copies of the foregoing Brief of Appellant were mailed, postage prepaid to Paul Van Dam, Attorney General, David B. Thompson, Appeals Division, 236 State Capital Building, Salt Lake City, Utah 84114, on this 30<sup>th</sup> day of June, 1992.



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## ADDENDUM 1

[illegible]

An analogy was made at the hearing as to whether the same argument could be made that if during this (unlawful) search or arrest, the Defendant had assaulted a police officer. Could

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BY Q

then the evidence of that assault likewise be precluded because whatever was observed would be inadmissible, again being a result of an illegal entry or presence by police officer.

The issue may turn on the definition of evidence. Evidence to be admitted into the trial is in fact not evidence until it is received. On the other hand evidence under Section 76-8-510, U.C.A., is actually defined as "anything" which may be used in a proceeding or investigation. The Defense would have the court suppress "anything", any action, observation, or item, as "evidence" which came about, which was creatively used or involved in a criminal investigation which was unlawful. That interpretation would then give license to anyone involved in an arrest, seizure, confinement or otherwise believing it to be unlawful to commit any crime he or she desired to on the basis that evidence of such a crime could not be later used. If a person were falsely arrested and placed in incarceration, then under this theory he or she could destroy the jail, assault inmates, or commit other crimes, and evidence of that could not be used because all of the evidence thereof would be obtained during his or her unlawful confinement.

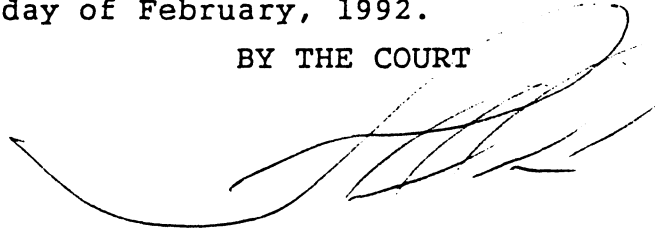
The reasonable conclusion can only be that the Fourth Amendment application cannot be used to suppress evidence of the witness tampering charge. The Motion as to that charge then is denied. The balance of the Motion may still be addressable as to Counts 2 and 3, but the State has indicated that it would likely dismiss those charges therefore obviate the need to continue with the Motion and a hearing relative thereto.

Counsel for the State is direct to prepare a formal Order in conformance herewith.

State vs. Wagstaff  
#911000106  
Page 3

Dated this 26th day of February, 1992.

BY THE COURT



Gordon J. Low  
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the forgoing MEMORANDUM DECISION, postage prepaid, to the attached list of attorneys at the addresses set forth, this 26 day of FEB, 1992, at LOGAN, UTAH.

Sharon L. Hancey  
DISTRICT COURT CLERK

BY: L. Danks  
Deputy Clerk

CERTIFICATE OF MAILING

I HEREBY CERTIFY THAT I MAILED A TRUE AND CORRECT COPY OF THE  
ATTACHED NOTICE, BY FIRST CLASS MAIL, POSTAGE PREPAID,  
TO THE FOLLOWING:

NOLAN, PATRICK B.  
ATTORNEY FOR PLAINTIFF  
110 NORTH 100 WEST  
LOGAN UT 84321

PETERSON, EDWIN T.  
ATTORNEY FOR DEFENDANT  
P.O. BOX 57206  
MURRAY UT 84157

DATED THIS 20 DAY OF FEB 19 92

L. Danks  
Deputy Clerk

## ADDENDUM 2

FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY

STATE OF UTAH

-----  
THE STATE OF UTAH, )  
 )  
Plaintiff, ) ORDER ON DEFENDANT'S MOTION  
 ) TO SUPPRESS  
vs. )  
 )  
WADE WAGSTAFF, ) Case No.: 911000106 FS  
 )  
Defendant. )  
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This matter came before the Court upon Defendant's motion to suppress after hearing on the 20th day of February, 1992 and the Court having entered its Memorandum Decision, IT IS NOW THEREFORE ORDERED that the Defendant's motion be and the same hereby is denied.

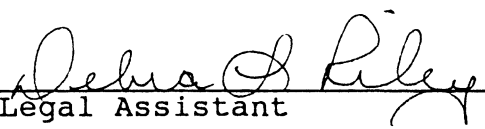
DATED this 20<sup>th</sup> day of February, 1992.

  
\_\_\_\_\_  
DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above was mailed this date to Edwin T. Peterson, Attorney for Defendant, at P. O. Box 57206, Murray, Utah 84157.

DATED this 2<sup>nd</sup> day of ~~February~~ <sup>March</sup>, 1992.

  
\_\_\_\_\_  
Legal Assistant

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FILED #12  
MAR 2 1992  
BY ed

## ADDENDUM 3



JAMES C. JENKINS  
Deputy Cache County Attorney  
110 North 100 West  
Logan, Utah 84321  
(801) 752-8920

FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY

## STATE OF UTAH

THE STATE OF UTAH,

Plaintiff,

**vs.**

**WADE WAGSTAFF,**


**Defendant.**

**STATE'S MOTION TO DISMISS  
MISDEMEANOR'S OFFENSES**

**Case No.: 911000106 FS**

Comes now the State of Utah by and through James C. Jenkins, Deputy Cache County Attorney, and in accordance with the representations made to the Court on the 20th day of February, 1992 and the findings of the Court in Memorandum Decision of February 26, 1992 now moves the Court to dismiss with prejudice Counts 2 and 3 of the Amended Information (Misdemeanor charges) against the Defendant herein.

Respectfully submitted this 2nd day of March, 1992.

  
JAMES C. JENKINS  
Deputy Cache County Attorney

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above was mailed this date to Edwin T. Peterson, Attorney for Defendant, at P. O. Box 57206, Murray, Utah 84157.

DATED this 2<sup>nd</sup> day of March, 1992.

  
Legal Assistant

## ADDENDUM 4

**Sec. 11.56.610. Tampering with physical evidence.** (a) A person commits the crime of tampering with physical evidence if the person

(1) destroys, mutilates, alters, suppresses, conceals, or removes physical evidence with intent to impair its verity or availability in an official proceeding or a criminal investigation;

(2) makes, presents, or uses physical evidence, knowing it to be false, with intent to mislead a juror who is engaged in an official proceeding or a public servant who is engaged in an official proceeding or a criminal investigation;

(3) prevents the production of physical evidence in an official proceeding or a criminal investigation by the use of force, threat, or deception against anyone; or

(4) does any act described by (1), (2), or (3) of this subsection with intent to prevent the institution of an official proceeding.

(b) Tampering with physical evidence is a class C felony. (§ 6 ch 166 SLA 1978)

#### NOTES TO DECISIONS

**Defense attorney's holding evidence in inaccessible place.** — While statutes which address the concealing of evidence are generally construed to require an affirmative act of concealment in addition to the failure to disclose information to the authorities, a defense attorney's taking possession of evidence from a nonclient third party and holding the evidence in a place not accessible to investigating authorities would seem to fall within the statute's ambit. *Morrell v. State*, 575 P.2d 1200 (Alaska 1978). (Decided under former AS 11.30.315.)

**Analogy to AS 28.35.032(f).** — This section was held to be sufficiently analogous to AS 28.35.032(f), which makes refusal to submit to a chemical test of breath authorized by AS 28.35.031 a class A misdemeanor, to protect AS 28.35.032(f) from a due process challenge. *Jensen v. State*, 667 P.2d 188 (Alaska Ct. App. 1983).

**Paragraph (a)(4) simply provides alternative mens rea for other three subsections.** Where only one act of tampering is alleged by the state, a defendant

cannot be convicted of two counts merely because he may have simultaneously entertained both of the alternative mental states. *Williamson v. State*, 692 P.2d 965 (Alaska Ct. App. 1984).

**Applied in *State v. Huggins***, 659 P.2d 613 (Alaska Ct. App. 1982); *State v. Williams*, 653 P.2d 1067 (Alaska Ct. App. 1982).

**Conviction reversed where search warrant improperly issued.** — See *State v. Jones*, 706 P.2d 317 (Alaska 1985).

**Consecutive sentence vacated.** — Trial court should not have imposed a five-year sentence for tampering with physical evidence consecutively to a 99-year sentence for murder, where the record would not support the conclusion that defendant must be incarcerated for the remainder of his life without any possibility of parole. *Thompson v. State*, 768 P.2d 127 (Alaska Ct. App. 1989).

**Stated in *Brown v. State***, 739 P.2d 182 (Alaska Ct. App. 1987).

**Cited in *Jones v. State***, 681 P.2d 364 (Alaska Ct. App. 1984).

## ADDENDUM 5

investigation by a duly constituted prosecuting authority, law enforcement agency, grand jury or legislative committee of this state is pending or is about to be instituted, shall:

(a) Alter, destroy, conceal, or remove any record, document, or thing with the purpose to impair its verity or availability in such proceeding or investigation; or

(b) Make, present, or use any record, document, or thing, knowing it to be false.

(2) Any person who violates any provision of this section shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083 or s. 775.084.

#### Historical Note

#### Derivation:

Laws 1972, c. 72-315, § 2.

#### Cross References

Racketeering, see § 895.02.

Tampering with witness, victim or informant, see § 914.22.

#### Library References

Obstructing Justice ⇨6.

C.J.S. Obstructing Justice or Governmental Administration §§ 3, 4, 18, 19.

#### Notes of Decisions

In general 2  
Construction with other laws 3  
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Validity 1

##### 1. Validity

This section making it a crime to tamper with evidence is clear and concise enough for common understanding and is thus not unconstitutionally vague or overly broad. *Smigiel v. State*, App. 5 Dist., 439 So.2d 239 (1983) review denied 447 So.2d 888.

##### 2. In general

This section which proscribes impairing verity or availability of evidence in criminal trial or proceeding or investigation cannot be extended in application to persons, things, or acts not within its descriptive terms, that is, proscribed act or acts must be done with specified purpose. *McNeil v. State*, App. 1 Dist., 438 So.2d 960 (1983).

##### 3. Construction with other laws

Purpose of the Florida Security of Communications Act was to protect victims of

illegal intercepts, not those who perpetrate them, and thus newspaper whose reporter made illegal intercepts lacked standing to assert, when charged with destruction of evidence, that the illegal tape recordings would have been inadmissible in evidence, and such circumstances would not preclude prosecution for destruction of evidence. *State v. News-Press Pub. Co.*, App., 338 So.2d 1313 (1976).

##### 4. Defenses

Though mere fact that a person was following a standard policy would not necessarily be a defense to a charge of destruction of evidence, where newspaper reporter, after preparing her news stories, destroyed tape recordings of conversations with person who had contacted her about a homicide, pursuant to the standard business practice of the newspaper to erase tapes so that they could be reused, before the State had made any overtures to the reporter concerning its investigation of the murder, it could not be presumed that she had the purpose to destroy evidence, and in absence of any evidence pointing to an improper purpose in destroying the tapes, in order to impair their availability in the State's investigation, indictment charging destruction of

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evidence was properly dismissed. *State v. News-Press Pub. Co.*, App., 338 So.2d 1313 (1976).

##### 5. Evidence

Evidence, including magnetic tape eraser seized from defendant's law office, was legally sufficient to support his conviction of tampering with evidence based upon erasure of tapes which incriminated defendant's client. *Smigiel v. State*, App. 5 Dist., 439 So.2d 239 (1983) review denied 447 So.2d 888.

In order to punish defendant for act associated with constitutional right not to bear witness against himself, proof beyond reasonable doubt was required that defendant harbored proscribed intent in tearing up waiver of rights form to impair its availability as proof in criminal proceeding or investigation, and since all evidence as consistent with reasonable hypothesis of innocence, conviction for tampering with evidence had to be reversed. *McNeil v. State*, App. 1 Dist., 438 So.2d 960 (1983).

Jury in tampering with evidence prosecution could not properly have found beyond reasonable doubt that defendant's specific purpose in shredding waiver of rights form he had signed was to impair its availability as proof in criminal proceeding where it could not be assumed that defendant knew evidentiary value of document, and if defendant had wanted to destroy evidence, he would have destroyed receipt which showed true ownership of tires he had allegedly

The third-degree felony of tampering with evidence was not established where, aside from fact that State never explained the discrepancy between the \$18,000 which allegedly represented the proceeds of a larceny and the \$15,000 which the defendant admitted to having in his home, the State never proved that the \$15,000 taken from the defendant's home was the proceeds of the larceny; it was uncontested that the money was deposited in a normal business fashion in an account with a nationally recognized brokerage house and, since it was not until after the money was deposited that police asked the defendant to turn it over, the State could not possibly show that the defendant concealed the money for the purpose of impairing its availability in a criminal trial. *Rader v. State*, App., 420 So.2d 110 (1982).

##### 6. Presumptions

Shredding of signed waiver of rights form by defendant under investigation did not of itself raise presumption that shredding was done with purpose to impair verity or availability of form in criminal trial or proceeding or investigation. *McNeil v. State*, App. 1 Dist., 438 So.2d 960 (1983).

##### 7. Sentence

Where defendant was charged and convicted of official misconduct and of tampering with physical evidence arising out of the same acts, but was given a single, general