

1990

Louie E. Sims v. Collection Division of the Utah State Tax Commission : Brief of Petitioner

Utah Supreme Court

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IN THE UTAH SUPREME COURT

LOUIE E. SIMS,	:	Case No. 900324
Petitioner/Appellant,	:	OPENING BRIEF
	:	OF PETITIONER
v.	:	
COLLECTION DIVISION OF THE	:	
UTAH STATE TAX COMMISSION,	:	
Respondent/Appellee.	:	

PETITION FOR REVIEW OF THE ADMINISTRATIVE
ACTION TAKEN BY THE UTAH STATE TAX COMMISSION

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DEC 15 1990

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UTAH STATE TAX COMMISSION,	:	
	:	
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STATEMENT OF JURISDICTION

This appeal is taken pursuant to Rule 14 of the Utah Rules of Appellate Procedure and Utah Code Annotated §63-46b-16 (1953 as amended). This court has appellate jurisdiction in this case pursuant to Utah Code Annotated §78-2-2(3)(e)(ii) (1953 as amended).

NATURE OF THE PROCEEDINGS

This is a petition for review of administrative action of the Utah State Tax Commission in affirming the tax and penalty assessed against petitioner for his failure to comply with Utah Code Annotated §59-37-101 et. seq. (1953 as amended), the Illegal Drug Stamp Tax Act.

STATEMENT OF ISSUES PRESENTED FOR APPEAL

Does the exclusionary rule of the Fourth Amendment of the United States Constitution and Article I, Section 14 of the Constitution of Utah apply to proceedings involving the illegal drug stamp tax act before the Utah State Tax Commission?

Did the roadblock stop of petitioner's vehicle, which resulted in the discovery of controlled substances, violate petitioner's right to be free from warrantless and unreasonable searches and seizures as described in Article I, Section 14 of the Constitution of Utah.

Did that same roadblock stop violate petitioner's right to be free from warrantless and unreasonable searches and seizures as described in the Fourth Amendment to the United States Constitution?

Was the consent to search petitioner's vehicle gained as a result of the initial illegal roadblock stop.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 14 of the Constitution of Utah:

The rights 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.

The Fourth Amendment to the Constitution of the United States:

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.

Utah Code Annotated §41-1-17(a) through (d) (1953 as amended):

The Commission¹, and such officers and inspectors of the department as it shall designate, peace officers, state patrolmen, and others duly authorized by the department or by law shall have power and it shall be their duty:

(a) To enforce the provision of this act and all of the laws regulating the registration or operation of vehicles or the use of the highways.

(b) To make arrests upon view and without warrant to any violation committed in their presence of any of the provisions of this act or other law regulating the operation of vehicles or the use of the highways.

(c) When on duty, upon reasonable belief that any vehicle is being operated in violation of any provision of this act or of any other law regulating the operation of vehicles to require the driver thereof to stop, exhibit his driver's license and submit to an inspection of such vehicle, the registration plates and registration card thereon.

(d) To inspect any vehicle of a type required to be registered hereunder in any public garage or repair shop or in any place where such vehicles are held for sale or wrecking, for the purpose of locating stolen vehicles and investigating the title and registration thereof.

Utah Code Annotated §77-7-15 (1953 as amended):

¹ "The Commission" refers to the State Tax Commission, Utah Code Annotated §41-1-1(d) (1953 as amended).

A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions.

Utah Code Annotated §59-19-102(2) (1953 as amended):

"Dealer" means a person, who in violation of Utah law, manufactures, produces, ships, transports, or imports into Utah or in any manner acquires or possesses more than 42½ grams of marihuana, or seven or more grams of any controlled substance, or ten or more dosage unites of any controlled substance which is not sold by weight.

Utah Code Annotated §59-19-104(2) (1953 as amended):

A dealer may not possess any marihuana or controlled substance upon which a tax is imposed by this chapter, unless the tax has been paid on the marihuana or other controlled substance as evidenced by a stamp or other official indicia.

Utah Code Annotated §59-19-105(1) and (6) (1953 as amended):

(1) When a dealer purchases, acquires, transports, or imports into this state marihuana or controlled substances, he shall permanently affix the official indicia on the marijuana or controlled substances evidencing the payment of the tax required under this chapter. A stamp or other official indicia may not be used more than once.

. . .

(6) (a) The commission shall collect all taxes imposed under this chapter. Amounts collected under this chapter, whether characterized as taxes, interest, or penalties, shall be deposited in the Drug Stamp Tax Fund as a dedicated credit and shall be applied and distributed under Section 68-38-9 of the Budgetary Procedures Act as follows:

(i) forty percent to the commission for administrative costs of recovery; and

(ii) sixty percent to the law enforcement agency conducting the controlled substance investigation, to be used and applied by the agency in the continued enforcement of controlled substance laws.

(b) If there is more than one participating law enforcement agency, the 60% under Subsection (6)(a)(ii) shall be divided equitably and distributed among the agencies by the administrative law judge conducting the hearing to determine taxpayer liability. The distribution shall be based upon the extent of agency participation as appears from evidence submitted by each agency relative to actual time and expense incurred in the investigation.

(c) If no law enforcement agency is involved in the collection of a specific amount under this chapter, the entire amount collected shall be applied under Subsection (6)(a)(i) to administrative costs of recovery.

(7) (a) If property in kind obtained from the taxpayer is of use or benefit to the commission in the enforcement of this chapter or is of use or benefit to the participating law enforcement agency in the continued enforcement of controlled substance laws, either the commission or the law enforcement agency may apply to the administrative law judge for the award of the property. If the administrative law judge finds the property is of use or benefit either to the commission or the law enforcement agency, the property shall be awarded accordingly.

(b) Before an award under this subsection is ordered, the property shall be appraised by a court appointed appraiser and the appraised value shall be credited to the taxpayer. If the taxpayer objects to the results of the court-appointed appraisal, he may obtain his own appraisal at his own expense within ten days of the court-appointed

appraisal. The decision of the administrative law judge as to value is controlling.

(c) The value of any property in kind awarded to the commission or to the participating law enforcement agency shall be counted as a portion of its percentage share under Subsection (6).

(8) Property of the taxpayer otherwise subject to forfeiture under Section 58-37-13 is not affected by this chapter if there is compliance with Section 58-37-13 regarding the forfeiture and the proceeds and property seized and forfeited are accordingly divided and distributed.

Utah Code Annotated §59-19-106 (1953 as amended):

(1) Any dealer violating this chapter is subject to a penalty of 100% of the tax in addition to the tax imposed by Section 59-19-103. The penalty shall be collected as part of the tax.

(2) In addition to the tax penalty imposed, a dealer distributing or possessing marijuana or controlled substances without affixing the appropriate stamps, labels, or other indicia is guilty of a third degree felony.

(3) An information, indictment, or complaint may be filed upon any criminal offense under this chapter within six years after the commission of the offense. This subsection supersedes any provisions to the contrary.

(4) Any tax and penalties assessed by the commission are presumed to be valid and correct. The burden is on the taxpayer to show their incorrectness or invalidity.

STATEMENT OF THE CASE

On August 30, 1988 petitioner was served with a notice and demand for payment of illegal drug stamp tax and penalty. (R. 257-258) The tax related to the seizure of 985 grams of cocaine and 106 grams of marijuana from petitioner's vehicle on July 27, 1988. (R. 258) Petitioner filed a petition for

redetermination (R. 32) and an amended petition for redetermination. (R. 41) Among the issues raised by petitioner was the legality of the roadblock search of his vehicle. (R. 42-43) After a proceeding before a hearing officer, the Utah State Tax Commission entered Findings of Fact, Conclusions of Law and a Final Decision. (R. 8-12) The Commission did not address the merits of the issue of the search of petitioner's vehicle. Rather, the Commission found that the exclusionary rule of the Fourth Amendment of the United States Constitution and Article I, Section 14 of the Utah Constitution does not apply to proceedings involving the Illegal Drug Stamp Tax Act before the Utah State Tax Commission. (R. 11-12)

Petitioner was also charged by information with the offense of Possession of a Controlled Substance with Intent to Distribute, a violation of Utah Code Annotated §58-37-8(1)(a)(i) (1953 as amended). Prior to trial, a motion to suppress the evidence was made. Petitioner alleged that evidence was seized in violation of Article I, Section 14 of the Constitution of Utah and the Fourth Amendment to the United States Constitution. That motion was denied after an evidentiary hearing. (R. 246-254) Petitioner requested that the trial court reconsider its ruling as that court had not specifically addressed the issues relating to the Utah Constitution. That motion was also denied. (R. 255-256) Petitioner waived his right to trial by jury and the case was tried to the trial judge based upon stipulated facts. These facts included the evidence admitted at the hearing on the motion

to suppress. Petitioner was convicted as charged. The appeal of that judgment and commitment is currently pending before the Utah Court of Appeals in Case Number 890463 CA.

On Wednesday, July 27, 1988, Utah Highway Patrol Troopers and sheriff deputies from Utah and Juab County conducted a roadblock on Interstate 15 in Juab County. (R. 151, 193) The purpose of the roadblock was to detect criminal, motor vehicle registration, equipment and driver's license violations. (R. 151, 165, 196) The roadblock was located between mile posts 220 and 222 on Interstate 15, about two miles south of Nephi, Utah. (R. 151, 166) The roadblock was conducted under the supervision of Sergeant Paul Mangelson of the Utah Highway Patrol. (R. 192-193) Sergeant Mangelson had received verbal permission to conduct the roadblock from his immediate superior, Lieutenant James Utley. No evidence was introduced by the State to indicate why that particular time, date or location was selected for the roadblock.

Notice that the roadblock would be conducted was announced in the Juab County Times News. That was published two to four weeks prior to July 27, 1988. (R. 152, 179) A patrolman assigned to the roadblock testified that he was unsure if that particular newspaper was distributed outside of Juab County. (R. 179) Interstate 15 is the primary north-south highway in Utah and is also the primary route of motor vehicle travel from Salt Lake City to Los Angeles, California. (R. 179) There was no indication that the Juab County Times News would be available to the majority of the people who would be subject to the roadblock.

Motorists driving on the interstate were given notice of the roadblock by three signs. (R. 152, 194, 201-202) Those signs were about four feet square, orange in color with black lettering. (R. 194) The first sign was placed within one-half mile of the roadblock (R. 201) and pictured a silhouette of a flagman. (R. 194, 201) The second sign was about two hundred yards from the roadblock (R. 201) and read "Prepare to Stop." (R. 194, 201) The last sign was right at the roadblock (R. 201) and read "All Vehicles Must Stop." (R. 194, 202) Sergeant Mangelson testified that all of these signs were similar to signs used at road construction zones. (R. 200) None of the signs indicated that motorists were to be detained by law enforcement agents at a roadblock. (R. 201) The speed limit in this area is posted at 65 miles per hour. (R. 166) A motorist travelling at or around the speed limit would be given less than one-half minute of notice before being stopped and detained.

After the third sign, cones were set in the roadway directing the traffic to the right. (R. 194) About ten officers were in position to receive the vehicles. (R. 194) Sergeant Mangelson gave verbal instructions to each of the officers as they arrived. (R. 162, 202) Mangelson testified that he had never received any written memorandum or policies for conducting roadblocks from either the Utah Highway Patrol or the State Department of Public Safety. (R. 206-207) In describing the only instructions he received, Sergeant Mangelson testified, "I was told the signs met the regulation." (R. 207)

Sergeant Mangelson also testified that he instructed the officers manning the roadblock that they were to look for driver's license, liquor and drug violations. (R. 203) He also told them not to stop any large trucks. (R. 203) Initially, the officers were to inspect drivers' licenses and vehicle registrations. If the officers noticed anything that they may consider to be unusual, they had the discretion to have the driver pull over so that further investigation could be conducted. (R. 208-209) Trooper Carl Howard, who worked at this roadblock, testified that if he noticed a problem while inspecting the registration and driver's license it was within his discretion to determine if a motorist should be further detained or allowed to leave. (R. 173) The trooper also indicated it was within his discretion to determine what investigative procedures could be taken. (R. 173) Officers had the discretion to interview the motorists, radio the dispatcher to run a warrants or stolen vehicle check, or request to search the vehicle. (R. 170-175)

At about 9:00 a.m. on July 27, 1988, petitioner was stopped at the roadblock. (R. 153) Other than the roadblock, the troopers had no articulable suspicion or reason to believe that petitioner was involved in the commission of any crime. (R. 176-177) Trooper Howard initially contacted the defendant and requested to inspect petitioner's driver's license and registration. (R. 154) Petitioner produced a Georgia State driver's license and vehicle registration that indicated he

resided in Utah. (R. 154) At that time, Trooper Howard detected an odor of alcohol inside the vehicle and on petitioner's breath. (R. 154) Trooper Howard also noticed an open bottle of liquor on the rear seat. (R. 154) The trooper asked petitioner about the odor of alcohol and petitioner indicated that he had not been drinking that morning, but had been drinking the previous night. (R. 155) Trooper Howard requested that the petitioner and the passenger, Dorsey Thompson, exit the vehicle. (R. 156) They complied with this request. The trooper then requested permission to search the vehicle and petitioner acquiesced. (R. 156) Trooper Howard searched the driver's side of the vehicle and Mangelson searched the passenger side. (R. 156-157, 196)

During the search of the ashtray located in the rear passenger side door of the vehicle, Mangelson discovered remnants of marijuana cigarettes. (R. 158, 184, 196) Trooper Howard then instructed petitioner to open the trunk of the vehicle and petitioner complied. (R. 158) Numerous items were removed. A briefcase and suitcase were opened and searched. Relatively small bags of marijuana were located in those containers. (R. 159, 198) Trooper Howard had previously requested that petitioner perform field sobriety tests. Those tests were conducted as Mangelson searched the trunk of petitioner's vehicle. (R. 159, 185-186, 197)

During those tests, petitioner requested that Mangelson stop searching the vehicle. (R. 186, 199) Mangelson responded, stating that based on the discovery of the marijuana in the

ashtray, he had probable cause to search the entire vehicle. (R. 187, 205) Eventually, Mangelson located a package in the spare tire compartment of the trunk. The package was in a plastic sack and covered with wrapping paper. On the outside, the word "Toyota" was written in large letters. The package was found to contain approximately one kilogram of cocaine. (R. 197) Petitioner and Thompson were then arrested and booked into the Juab County jail. (R. 162)

SUMMARY OF ARGUMENTS

The exclusionary rules of the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Utah Constitution are applicable to proceedings before the Utah State Tax Commission involving the Illegal Drug Stamp Tax. The purposes of the exclusionary rule are advanced by applying it to such proceedings. This is because the arresting agency stands to reap substantial material gains if the rule is not applied to proceedings involving the illegal drug stamp tax. Furthermore, such proceedings are quasi-criminal in nature. Consequently, the deterrent effect of the exclusionary rule outweighs the cost to society in applying it to Illegal Drug Stamp Tax proceedings.

The stop of petitioner at the Juab County roadblock violated his right to be free from warrantless and unreasonable searches and seizures as described in Article I, Section 14 of the Constitution of Utah. The officers had no statutory authority to stop petitioner. The officers lacked any individualized suspicion that petitioner had committed any

criminal offense. The State failed to show that the roadblock significantly advanced the public interest in law enforcement and that there were less intrusive means available to advance that interest. Consequently, the evidence seized as a result of this constitutional violation should have been suppressed.

The stop of petitioner at the Juab County roadblock violated his right to be free from warrantless and unreasonable searches and seizures as described in the Fourth Amendment to the United States Constitution. The roadblock in question was conducted without authority of law. Furthermore, the procedures employed by the officers failed to limit the discretion of those officers conducting the roadblock. This was not a sobriety checkpoint at a known problem area, but was a multipurpose roadblock. The roadblock stop of petitioner was unreasonable, thus requiring that the evidence seized be suppressed.

Any consent that was obtained to search petitioner's vehicle was the result of the exploitation of the roadblock search. The purported consent was closely related in the time to the stop and there were no intervening circumstances between the stop and any consent. Consequently, the discovery of evidence resulting from petitioner's acquiescence to the trooper's request to search is inadmissible in the tax stamp proceeding.

ARGUMENT

Point I

THE TAX COMMISSION COMMITTED ERROR IN REFUSING TO APPLY THE EXCLUSIONARY RULE TO PROCEEDINGS INVOLVING THE ILLEGAL DRUG STAMP TAX ACT.

The Tax Commission ruled that the Fourth Amendment exclusionary rule was inapplicable to proceedings before that body to contest the tax and penalty assessed as a result of failing to comply with the illegal drug stamp tax act, Utah Code Annotated §59-19-101 et. seq. (1953 as amended). In reaching that conclusion, the commission purported to employ the balancing test required in United States v. Janis, 428 U.S. 433 (1976) and I.N.S. v. Lopez-Mendoza, 468 U.S. 1032 (1984). The commission concluded that there was no showing that the application of the exclusionary rule in tax commission proceedings would meet the purposes of that rule. The commission also noted that the application of the exclusionary rule to tax commission proceedings may result in findings inconsistent with the rulings of the district courts hearing the related criminal cases. Finally, the commission concluded that the societal interest in deterring police conduct did not outweigh the societal interest in facilitating the fact finding process.

The relief sought below was to apply the exclusionary rule only to proceedings involving the illegal drug stamp tax act. In not limiting its decision to such proceedings the commission disregarded the unique penal nature of the tax stamp proceedings. The commission also disregarded the statute that required local law enforcement to share in the receipts of taxes and penalties assessed under the illegal drug stamp tax act.

In determining if the Fourth Amendment exclusionary rule applies to a particular proceeding, the Supreme Court has

employed a balancing test. In United States v. Janis, supra, the Court held that the exclusionary rule does not apply to the actions of state law enforcement officers in a federal IRS civil proceeding. In reaching this conclusion, several factors were balanced: the purpose of the exclusionary rule, the type of proceeding involved, empirical data on the specific deterrent effect of the rule and the negative effect on the fact finding process.

In I.N.S. v. Lopez-Mendoza, supra, the balancing test from Janis was employed. The court determined that the exclusionary rule should not be applied to civil deportation proceedings. In reaching that conclusion the Court emphasized the nature of the proceeding and the violation that was involved. The Court noted that such proceedings were utilized in a high volume of immigration cases, most of which were handled by a voluntary return to the country of origin. Such cases required a simple hearing. The I.N.S. arrests were made by officers who specialized in such violations. The officers were given specific departmental policies to follow. Finally, with respect to the nature of the proceedings, the Court emphasized that deportation involved a status offense--being an illegal alien. A dismissal of a case on Fourth Amendment grounds and release of the defendant allowed him to continue to violate the law. The Court concluded that application of the exclusionary rule in civil deportation proceedings would have little or no deterrent effect on law enforcement officers. The Court also found that the

application of the rule in those proceedings would result in a substantial cost to society. Consequently, the Court refused to employ the exclusionary rule in civil deportation proceedings.

The final case that addressed this issue is One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965). In that case the Court held that the exclusionary rule does apply to civil forfeiture proceedings. The Court focussed on the nature of the proceedings. Forfeiture proceedings were characterized as "quasi-criminal" because the object of the proceeding was to impose a penalty for the commission of a crime. The court noted that it would be anomalous to hold that in a criminal proceeding the evidence would be excludable, but in the forfeiture proceeding, requiring the determination that the law has been violated, the evidence would be admissible.

To determine whether the exclusionary rule is applicable to tax commission proceedings relative to the illegal drug stamp tax act, an analysis of the act is necessary. The act requires that dealers² purchase and affix the illegal drug stamps to any marijuana or other controlled substances that are possessed³, or purchased, acquired, transported or imported into the state.⁴ A failure to comply with the statute will result in

² "Dealer" is defined, in Utah Code Annotated §59-19-102(2) (1953 as amended).

³ Utah Code Annotated §59-19-104(2) (1953 as amended).

⁴ Utah Code Annotated §59-19-105(1) (1953 as amended).

the imposition of the tax and a 100% penalty.⁵ Furthermore, it is a felony to violate the act.⁶

The proceedings before the tax commission enforcing the tax stamp assessments and penalties are indistinguishable from civil forfeiture proceedings. In the stamp tax proceedings, the state must prove that the subject committed a crime. That would be either the third degree felony for failing to affix the stamps to the controlled substances, or a violation of the controlled substances act. There is a substantial tax and a 100% penalty involved. In this case, the tax and penalty totalled \$394,106.00. The maximum fine and assessment for the criminal conviction of possession of a controlled substance with intent to distribute⁷ is \$12,500.⁸ This is distinguishable from the proceeding in Janis where the issue to be determined was the income tax owed on profits of a gambling operation. Likewise, these tax stamp proceedings have no similarity to the civil deportation proceedings discussed in Lopez-Mendoza. In Lopez-Mendoza simple proceedings were at issue. Those proceedings were to determine an individual's immigration status. The proceedings also afforded an illegal alien the opportunity to voluntarily

⁵ Utah Code Annotated §59-19-106(1) (1953 as amended).

⁶ Utah Code Annotated §59-19-106(2) (1953 as amended).

⁷ A violation of Utah Code Annotated §58-37-5 (1953 as amended).

⁸ The maximum fine is \$10,000 and a 25% surcharge may be assessed on any fine.

return to his country of origin. Here, the proceedings involve proof that a crime had been committed and the propriety of substantial monetary penalties based on that proof.

The next issue is to discuss the deterrent effect that the exclusionary rule would have in the tax stamp proceedings. The key to the determination of this issue is in Utah Code Annotated §59-19-105 (1953 as amended). That statute requires that the investigating agency receive sixty percent of the proceeds of the taxes and penalties collected or sixty percent of the property seized (based on the value of the property) for its own use and benefit. If the exclusionary rule did not apply in these proceedings, the investigating agency could disregard the requirements of the Fourth Amendment and lose the criminal case because the evidence seized is ordered suppressed. However, that same agency could still receive substantial monetary benefits as a result of the illegal actions of its agents. Such a procedure creates a substantial financial incentive to investigative agencies to engage in practices that violate the Fourth Amendment. The statute has the potential of allowing agencies who investigate narcotics violations to receive financing through illegal conduct.

Requiring that tax proceeds be shared with an investigative agency distinguishes these illegal drug tax stamp proceedings from other proceedings before the tax commission. The only other statute that allows the investigating agency to

share in the proceeds of a seizure is the forfeiture statute.⁹ As previously noted, the exclusionary rule does apply to forfeiture proceedings. One 1958 Plymouth Sedan v. Pennsylvania, supra. There is a substantial deterrent effect in applying the exclusionary rule to the illegal drug stamp tax proceedings: it prevents investigative agencies from profiting from Fourth Amendment violations. The exclusionary rule does undermine the fact finding process in these proceedings. However, what is at issue is an additional penalty for a violation of the law rather than a determination of one's income tax or immigration status. The punitive nature of the tax and penalty and the need to prevent agencies from receiving financial benefits for Fourth Amendment violations outweigh the negative effect on the fact finding process. The exclusionary rule should be applied to the illegal drug stamp tax proceedings before the state tax commission.

POINT II

ARTICLE I, SECTION 14 OF THE CONSTITUTION OF UTAH PRECLUDES THE USE OF ROADBLOCKS. ANY EVIDENCE SEIZED AT SUCH A STOP MUST BE SUPPRESSED.

This court has expressed concern with the Fourth Amendment rulings of the federal courts in vehicle search cases. As an alternative, counsel has been encouraged to litigate these issues under Article I, Section 14 of the Constitution of Utah.

⁹ See: Utah Code Annotated §58-37-13(8)(a) (1953 as amended).

State v. Earl, 716 P.2d 803 (Utah, 1986)¹⁰ In Michigan v. Long, 463 U.S. 1032 (1983), Justice O'Connor encouraged state courts to decide search and seizure issues on state constitutional provisions rather than resorting to a Fourth Amendment analysis. Furthermore, two judges of this court have held that Article I, Section 14 of the Utah State Constitution provides greater protections to individuals than does the Fourth Amendment to the United States Constitution, State v. Larocco, 794 P.2d 460 (Utah 1990).¹¹

In State v. Earl, supra, this court suggested that the analysis described in State v. Jewett, 500 A.2d 233 (Vt. 1985), be applied to an interpretation of Article I, Section 14 of the Utah Constitution. The most appropriate form of analysis to apply to the roadblock issue is to look to the rulings of other state courts on similar constitutional provisions.¹² This is because the texts of both Article I, Section 14 of the Utah Constitution and the Fourth Amendment are nearly identical. However, a number of other states have held that roadblocks are unreasonable seizures of the person on state constitutional

¹⁰ For an extensive discussion of the background of this issue see: Davis and Wallentine, A Model for Analyzing the Constitutionality of Sobriety Roadblock Stops in Utah, 3 B.Y.U. J. of Pub. Law 357 (1989).

¹¹ See footnote 1.

¹² This is the analysis employed in the plurality opinion in State v. Lorocco, supra.

grounds.¹³ There are three basic reasons given by these courts for this result: First, law enforcement agents lack statutory authority to conduct a roadblock. Second, an individual cannot be detained without a showing that the officer has an individualized suspicion that a crime has been committed. Third, a balancing of the interests involved indicates that roadblock stops are unreasonable seizures of the person.

A.

THE ROADBLOCK IN THIS CASE WAS CONDUCTED
WITHOUT AUTHORITY OF LAW.

Several state appellate courts have specifically addressed the need for statutory authority to enable law enforcement agents to conduct a roadblock. The Supreme Court of Oregon addressed this issue in the context of a civil suit for damages by a plaintiff who was stopped at a roadblock, Nelson v. Lane County, 304 Or. 97, 743 P.2d 692 (Or. 1987). Two other criminal cases involving similar roadblocks were addressed by that court at that time: State v. Boyanovsky, 304 Or. 131, 743 P.2d 711 (Or. 1987), and State v. Anderson, 304 Or. 139, 743 P.2d 715 (Or. 1987). In Nelson v. Lane County, supra, the state sought to uphold the use of a roadblock on the basis that such a seizure was constitutionally authorized.

In Nelson, the state maintained that it had statutory authority to conduct a roadblock under a general statute that

¹³ See Points II A, B and C, infra.

gave law enforcement agencies the authority to enforce the criminal law. The state claimed that the statute implicitly authorized roadblocks and that the roadblock in question was conducted in accordance with "The Oregon State Police Patrol Manual." In rejecting this argument, the court reasoned,

By and large, agencies of the executive branch are free to carry out their assigned responsibilities in ways of their own choosing. Making explicit the manner in which any agency is to accomplish its task falls to the agency head or that official's designee to instruct or sub-delegate to subordinated officials.

However, some procedures may invade the personal freedoms protected from government interference by the constitution. Roadblocks are seizures of the person, possibly to be followed by a search of the person or the person's effects. For this reason, the authority to conduct roadblocks cannot be implied. Before they search or seize, executive agencies must have explicit authority from outside the executive branch.

743 P.2d at 695.

Similarly, in State v. Henderson, 114 Ida. 293, 756 P.2d 1057 (Ida. 1988), the Supreme Court of Idaho held that its constitutional provision prohibiting warrantless and unreasonable searches and seizures required express legislative authority to conduct a roadblock. The Oklahoma Court of Criminal Appeals found roadblocks to be unreasonable under similar provisions of the Oklahoma Constitution. One of the bases for that court's decision was that officers lacked statutory authority to make such stops. State v. Smith, 674 P.2d 562 (Okla. 1984).

In Utah there is no express statutory authority that allows law enforcement agents to conduct a roadblock. Before a vehicle may be stopped to investigate a violation of the motor vehicle code, the Utah statute specifically requires an officer to have a reasonable belief that there has been a violation of the law.¹⁴ To conduct a seizure of the person to investigate for any other criminal violation, the Utah statute mandates that the officer have at the very least a reasonable suspicion that a crime has been committed.¹⁵ In this case, vehicles were stopped on the interstate. The only reason for the stop was that the vehicles were using that roadway. There is no statutory authority that allows law enforcement agents to employ such a procedure. Due to the lack of legal authority, the stop of appellant's vehicle and resulting search were unreasonable. The stop and search in this case violates Article I, Section 14 of the Constitution of Utah.¹⁶

B.

ARTICLE I, SECTION 14 OF THE CONSTITUTION OF
UTAH REQUIRES INDIVIDUALIZED SUSPICION TO
JUSTIFY A SEIZURE OF APPELLANT'S PERSON.

¹⁴ Utah Code Annotated §41-1-17(c) (1953 as amended).

¹⁵ Utah Code Annotated §77-7-15 (1953 as amended).

¹⁶ Davis and Wallentine, A Model for Analyzing the Constitutionality of Sobriety Roadblock Stops, supra, also concludes that there is no legal authority in Utah to conduct roadblock stops. A roadblock stop, the authors further conclude, would be unconstitutional.

In Commonwealth v. Tarbert, 502 A.2d 221 (Pa. Super. 1985), the Superior Court of Pennsylvania discussed the propriety of roadblock stops under the Pennsylvania Constitution. The Pennsylvania legislature had previously enacted a statute allowing law enforcement agencies to utilize roadblock stops for the purpose of checking vehicles, drivers or documents. The defendant in Tarbert had been convicted of driving under the influence as a result of a roadblock stop. The court reviewed the cases upholding the constitutionality of roadblocks. The court then noted:

Courts upholding the constitutionality of roadblocks are not unmindful of their intrusiveness, but rather, stress that careful control and absence of discretion can bring the use of the roadblock within the Fourth Amendment.

Commonwealth v. Tarbert, supra, at 225. With respect to this reasoning the court then held:

While the arguments supporting the constitutionality of systematic roadblocks are persuasive, the rationale supporting them is flawed. No amount of control or limited discretion can justify the "seizure" that takes place in the complete absence of probable cause or reasonable suspicion that a motor vehicle violation has occurred. Certainly, the Constitution of our Commonwealth affords its citizens the right to be free from intrusions where one has a reasonable expectation of privacy.

Ib. at 225-226. The court ultimately held that the Pennsylvania Constitution is violated when roadblock stops are based on neither probable cause nor a reasonable suspicion that a crime has been committed.

The holding in State v. Henderson, supra, has previously been discussed with respect to the effect of the lack of statutory authority to conduct a roadblock. The Idaho Supreme Court went further and held that under the Idaho Constitution, law enforcement officers are required to have individualized suspicion of criminal wrongdoing before a stop of a vehicle may be made. The Supreme Court of Oregon reached the same conclusion in State v. Boyanovsky, supra. That case was the companion case to Nelson v. Lane County, supra. It addressed a roadblock search resulting in a criminal conviction rather than a civil action against law enforcement authorities. The Supreme Court of Louisiana also concluded that there was a need for individualized suspicion to invade one's privacy under that state's constitution. Consequently, a roadblock stop was held to be unconstitutional in Louisiana. State v. Parms, 523 So.2d 1293 (La. 1988).

By statute, officers in Utah are required to have individualized suspicion of criminal activity before violating a citizen's privacy interest.¹⁷ Both the Utah Supreme Court and the court of appeals have required such individualized suspicion in addressing Fourth Amendment issues; State v. Mendoza, 748 P.2d 181 (Utah 1987); State v. Sierra, 754 P.2d 972 (Utah App. 1988). The same requirement for individualized suspicion was found to be applicable to Article I, Section 14, of the Utah Constitution in State v. Larocco, supra.

¹⁷ See discussion in Point I, A., supra.

In Larocco, the court addressed the issue of whether the inspection of a vehicle identification number (VIN) violated the Fourth Amendment and Article I, Section 14 of the Constitution of Utah. The court of appeals held that the opening of the vehicle door to look at the VIN did not implicate any Fourth Amendment interests. State v. Larocco, 742 P.2d 89 (Utah Ct. App. 1987). On certiorari, Justice Durham authored an opinion that was joined by Justice Zimmerman. In that opinion, Justice Durham found that the VIN inspection violated Article I, Section 14 of the Utah Constitution.

In Larocco, Justice Durham held that Article I, Section 14 of the Constitution of Utah required the State to show that there was both probable cause and exigent circumstances to justify a warrantless vehicle search. The basis of this holding was a need to simplify the rules regarding warrantless vehicle stops. Justice Durham reviewed the Supreme Court's Fourth Amendment rulings on such stops and found them to be inconsistent. The inconsistencies were noted to be a result of the Court's misapplication of the doctrine relating to the reasonable expectation of privacy as it affected the warrant requirement of the Fourth Amendment.

Justice Durham noted that the expectation of privacy doctrine was originally employed to determine standing (if the Fourth Amendment was implicated in a search or seizure). However, in recent cases the Supreme Court has used the level of the claimant's expectation of privacy to determine if a warrant

is required.¹⁸ This has resulted in the warrant clause of the Fourth Amendment improperly being read as part of the reasonableness clause of that amendment. In Larocco, Justice Durham's position was that the question of the privacy interest is a threshold issue to determine if Article I, Section 14 of the Utah Constitution is implicated.

Justice Durham then found that Article I, Section 14 contains two separate requirements and both must be satisfied to find a warrantless search valid. There must be a showing that the search was reasonable (based on probable cause). There must also be a showing that a warrant was obtained or there were exigent circumstances that prevented the officers from obtaining a warrant. With respect to exigent circumstances, Justice Durham stated ". . .warrantless searches will be permitted only where they satisfy their traditional justification, namely, to protect the safety of police or the public or to prevent the destruction of evidence." 794 P.2d at 469-470.

In Larocco, Justice Durham found that the officers had probable cause to believe the vehicle in question was stolen. However, there were no exigent circumstances to justify the warrantless opening of the vehicle door to check the VIN. With roadblocks, there is neither a warrant, exigent circumstances, nor individualized suspicion that a crime has been committed.

¹⁸ See Cardwell v. Lewis, 417 U.S. 583 (1974), and California v. Carney, 471 U.S. 386 (1985).

Consequently, a roadblock stop fails to meet both requirements of Justice Durham's Larocco standard. On this basis, the roadblock stop violates Article I, Section 14 of the Constitution of Utah.

This conclusion is reinforced when the rationale used to justify a roadblock is considered. In Michigan Department of Public Safety v. Sitz, ____ U.S. ____, 110 S.Ct. 2481 (1990), a balancing test was employed to determine if a sobriety roadblock violated the Fourth Amendment. The State's interest is balanced against the effectiveness of the action taken to achieve that interest and the intrusion to an individual's privacy. This reasoning was expressly rejected in Larocco because the requirements of the warrant clause must be met. Furthermore, Sitz would involve a misapplication of the analysis of privacy interests as interpreted in Article I, Section 14.

In this case Trooper Howard testified that the only reason for the stop of petitioner's vehicle was the roadblock. The trooper candidly admitted that there was no probable cause to believe that petitioner was engaged in any criminal conduct prior to the stop. Likewise, the trooper also admitted that he could not articulate any facts or circumstances to indicate that petitioner was involved in any criminal conduct prior to the stop. For this reason, the stop of petitioner's vehicle violated Article I, Section 14 of the Constitution of Utah.

C.

A BALANCING OF INTERESTS RESULTS IN THE CONCLUSION THAT THE ROADBLOCK STOP IN THIS CASE WAS UNREASONABLE. CONSEQUENTLY, THE

STOP VIOLATES ARTICLE I, SECTION 14 OF THE
CONSTITUTION OF UTAH.

In determining the reasonableness of police action in relation to an interference with a privacy interest courts may apply a balancing test. State v. Koppel, 499 A.2d 977 (N.H. 1985). In that case the propriety of a roadblock to investigate drunk driving under the New Hampshire Constitution was addressed. The court required that the following test be met:

To justify the search or seizure of a motor vehicle, absent probable cause or even a reasonable suspicion that a criminal offense is being committed, the State must prove that its conduct significantly advances the public interest in a manner that outweighs the accompanying intrusion on individual rights. It must further prove that no less intrusive means are available to accomplish the State's goals.

499 A.2d at 981.

In applying that test, the court held that a roadblock is not an effective means of detecting or deterring drunk driving. The court described the significant number of vehicles stopped, the number of officers deployed at the roadblock and the very few arrests that were actually made. The court concluded that the public interest in deterring drunk driving offenses was not significantly outweighed by the intrusions caused by a roadblock. This is because the court found from the statistics introduced at trial that highly visible roving patrols made more arrests than were effected at the roadblock. The patrols involved about the same number of officers as were deployed at the roadblock. Consequently, such patrols provided a less intrusive means to accomplish the State's goals.

The Supreme Court of Idaho reached the same conclusion in State v. Henderson, supra. In that case the evidence indicated that officers on patrol would make more arrests than that number of officers deployed at a roadblock. The court concluded:

Thus, the testimony of the two police officials most responsible for the roadblock show unequivocally that these warrantless searches conducted without any suspicion of criminal wrongdoing are less efficient than the normal stops based on probable cause. Therefore, roadblocks are an inefficient and unnecessary constraint on a person's right to remain free of search or seizure absent probable cause.

[emphasis in the original] 756 P.2d at 1061.

In this case, there was no evidence introduced that would demonstrate the effectiveness of a roadblock as opposed to other less intrusive means of investigation. However, the conclusion that can be reached from the case law is that roadblocks are not an effective means of law enforcement. The roadblock is not an efficient use of police manpower. Likewise, a roadblock creates a highly intrusive and inconvenient situation for the travelling public.¹⁹ For these reasons, a roadblock does not pass the balancing test employed by other state courts to determine the reasonableness of a stop that is based on

¹⁹ See also, State v. Barcia, 549 A.2d 491 (N.J. Super. 1988) where a roadblock on the New Jersey side of the George Washington bridge caused a traffic jam in New York City involving over one million of motor vehicles, and taking over four hours to unravel. The Court described the situation as a "traffic morass of monumental proportions." 549 A.2d 497.

neither probable cause nor reasonable suspicion of criminal activity. The State failed to produce any evidence tending to show how effective this particular roadblock was. The state cannot meet the requirements of the balancing test employed in Henderson and Koppel. The only conclusion that can be reached is that the roadblock stop of appellant was unreasonable and thus violated Article I, Section 14 of the Constitution of Utah.

D.

SUPPRESSION OF EVIDENCE SEIZED IS THE PROPER
REMEDY FOR A VIOLATION OF ARTICLE I, SECTION
14 OF THE UTAH CONSTITUTION.

In State v. Larocco, supra, Justice Durham held in her plurality opinion that there are some eighteen states that have found that the exclusionary rule applies to violations of their respective state search and seizure provisions.²⁰ Based on the actions of these courts and the application of the exclusionary rule to Fourth Amendment violations, Justices Durham and Zimmerman held that violations of Article I, Section 14 require application of the exclusionary rule. With respect to illegal drug tax stamp proceedings, a balancing of the interests requires the application of the exclusionary rule.²¹

The evidence that was seized in the stop at issue in this case, one kilogram of cocaine, was the only evidence that established the tax and penalty assessed by the tax commission.

²⁰ See State v. Larocco, supra, at 472 fn. 3.

²¹ See Point I, supra.

The officers' violation of petitioner's right to be free from warrantless and unreasonable searches and seizures as described in Article I, Section 14 of the Constitution of Utah requires suppression of the cocaine which was seized. This would require that the petitioner's liability for the tax and penalty resulting from the violation of the illegal drug stamp tax act be discharged.

POINT III

A ROADBLOCK FOR THE GENERAL PURPOSE OF CRIME DETECTION VIOLATES THE FOURTH AMENDMENT.

In Michigan Department of State Police v. Sitz, *supra*, the Supreme Court held that the use of a sobriety checkpoint or roadblock to curb the problem of drunk driving on the highways did not violate the Fourth Amendment. In determining that such roadblocks do not violate the Fourth Amendment, the Court employed the balancing test described in Brown v. Texas, 443 U.S. 47 (1979). Brown requires courts to balance the state's interests against both the effectiveness of the state's action in achieving that interest and the intrusion on the individual's privacy.

In applying this balancing test to the sobriety checkpoint in Sitz, the Court gave substantial weight to the problem of drunk driving in this country and the carnage that has resulted from the alcohol related traffic accidents. The roadblock in Sitz was established in accordance with guidelines promulgated by a "Sobriety Checkpoint Advisory Committee." The

guidelines set procedures governing checkpoint operations, site selection and publicity. The committee was comprised of representatives of state and local police, prosecutors and the University of Michigan Transportation Research Institute.

The roadblock at issue in this case was not limited to one particular state interest that was a substantial public problem, such as drunk driving. Sergeant Mangelson testified that the purpose of the roadblock was to detect any criminal or traffic violation. The time and place of the roadblock were not governed by any guidelines to limit the potential interference with travelers. There was virtually no notice to the traveling public that they may be involved in a roadblock. The only publicity of the roadblock was given in a Juab County newspaper. The signs gave no notice that motorists were entering a law enforcement roadblock. At this roadblock, the officers had unlimited discretion in the investigative actions they deemed to be appropriate.

In Sitz the drunk driving problem was balanced against the effectiveness of the roadblock procedure and the nature of the Fourth Amendment intrusion. The Court focused on the minimal objective intrusion to law abiding citizens caused at the roadblock. In doing so, the Court rejected the Michigan court's emphasis on the roadblock's subjective intrusion caused to motorists. The Court then noted that the analysis of the degree to which the seizure advances the public interest "was not meant to transfer from politically accountable officials to the courts

the decision as to which among reasonable law enforcement techniques should be employed to deal with a serious public danger." Id. at 2483. The court found that the checkpoint resulted in the DUI arrests of 1.5 percent of the drivers stopped. This was greater than the percentage of arrests made at the permanent border checkpoint that was upheld in United States v. Martinez-Fuente, 428 U.S. 543 (1976).

The nature of the stop and length of the intrusion for the general motoring public involved in the roadblock at issue in the instant case was significant. However, there was no particular reason to establish that roadblock. Consequently, the effectiveness of the intrusion cannot be factored into the balancing equation. The only factor that carries any weight is the Fourth Amendment intrusion. Therefore, in balancing the interests in this case, the only conclusion that can be reached is that the Fourth Amendment was violated. When an intrusion is not made to solve a particular and significant law enforcement concern, the stop is indistinguishable from that conducted in Brown v. Texas, supra.²² Such a stop is also closely analogous to the roving random vehicle stops for traffic violations which Delaware v. Prouse, 440 U.S. 684 (1979), prohibited.

The Court in Sitz did not allow roadblocks to be used for general crime detection. The Court held that a very

²² In that case a statute that required individuals to provide police officers with identification when stopped was found to violate the Fourth Amendment.

substantial problem of drunk driving justified the minimal intrusion of the roadblock. In this case, the general need to detect crime cannot be used to justify seizures that are not based on any showing of individualized suspicion. If that were allowed, the Fourth Amendment would be meaningless. The roadblock in this case fails to pass the balancing test employed in Sitz. Consequently, the roadblock stop violated the Fourth Amendment. The evidence seized from petitioner's vehicle as a result of that stop must be ordered suppressed.

POINT IV

THE EVIDENCE SEIZED AS A RESULT OF THE STOP
OF PETITIONER IS INADMISSIBLE UNLESS THE
STATE SHOWS THAT ANY CONSENT WAS NOT OBTAINED
THROUGH THE EXPLOITATION OF THE ILLEGAL STOP.

In State v. Arroyo, 796 P.2d 684 (Utah 1990), this court reversed the Court of Appeals' holding that a voluntary consent in and of itself alleviates the taint of a prior illegal stop or search.²³ This court held that there must be a two part analysis to determine the legal effect of a consent following an unlawful stop. First, there must be a voluntary consent. Second, the consent must not have been obtained through police exploitation of the primary or antecedent police illegality. To be admissible, the State must show the evidence was obtained by means sufficiently distinguishable from the illegal stop to be purged of the primary taint.

²³ See State v. Arroyo, 770 P.2d 153 (Utah App. 1989, revised 796 P.2d 684 (Utah, 1990)).

This court went on to note in Arroyo that the basis of the second part of this analysis is found in the "fruit of the poisonous tree" doctrine established in Wong Sun v. United States, 371 U.S. 471 (1963). With respect to the manner in which this doctrine related to consent searches, the court stated, "The 'fruit of the poisonous tree' doctrine has been extended to invalidate consents which, despite being voluntary, are nonetheless the exploitation of a prior illegality." 796 P.2d at 690. The court then cited with approval cases that reached that same conclusion.

The legal authority for the lower court's decision in Arroyo was the Tenth Circuit case of United States v. Carson, 793 F.2d 1141 (10th Cir.), cert. den. 479 U.S. 914 (1986). However, this court found that the decision in Carson failed to provide adequate protections to Fourth Amendment interests, stating, "Police should not be permitted to ratify their own illegal conduct by merely obtaining a consent after the illegality has occurred." Id. at 689. It was then found that the Carson rule failed to effectuate either of the two purposes of the exclusionary rule. First, police are not deterred for violating the Fourth Amendment. Second, the courts were made a party to the prior illegal conduct of the police officers. This court found that the Carson rule simply ignored the police illegality.

To analyze the exploitation of the primary illegality this court indicated that the test from Brown v. Illinois, 422 U.S. 590 (1975), should be followed. In that case the Court held

that a confession was the fruit of a prior illegal arrest. The factors that were considered by the Court in reaching this conclusion were the "temporal proximity of the arrest and the confession, the presence of intervening circumstances [and] the purpose and flagrancy of the official misconduct." 422 U.S. at 603-604.

In applying the factors described in Brown v. Illinois, supra, to a consent search, a number of circumstances have been discussed in the case law. With respect to the temporal proximity of the unlawful detention to the consent, the courts have generally held that when the consent is closely related in time to the detention, the taint of the detention remains. United States v. Delquadillo-Velasquez, 856 F.2d 1292 (9th Cir. 1988); United States v. Miller, 821 F.2d 546 (11th Cir. 1987); United States v. Thompson, 712 F.2d 1356 (11th Cir. 1983); United States v. Recalde, 761 F.2d 1448 (10th Cir. 1985); C.f. Juarez v. State, 708 S.W.2d 772 (Tex. Crim. App. 1988).

Intervening circumstances have been found to include release from custody, an appearance before the magistrate, discussions with a lawyer, or a conviction on an unrelated charge, United States v. Delquadillo-Velasquez, supra. Other intervening circumstances that may establish sufficient attenuation between the unlawful detention and the voluntary consent have been described in the case law: giving of the Miranda warning and allowing the defendant to consult with a passenger, United States v. Berry, 670 F.2d 583 (5th Cir. 1983),

Juarez v. State, supra, telling the defendant that he did not have to consent to the search, Reyes v. State, 741 S.W.2d 414 (Tex. Crim. App. 1987), developing probable cause from independent sources to justify the detention United State v. Cherry, 794 F.2d 201 (5th Cir. 1986), and whether the consent was volunteered or requested, People v. Borges, 69 N.Y.2d 1031, 511 N.E.2d 58 (1987).

Circumstances relating to the purpose or flagrancy of the violation have included: the use of firearms to effect the arrest, People v. Odom, 83 Ill. App. 3d 1022, 404 N.E.2d 997 (1980); a manner of arrest or detention that causes confusion, surprise or fright, United States v. Delquadillo-Velasquez, supra; a complete lack of suspicion or information about criminal activity by the defendant, United States v. Thompson, supra, State v. Zielman, 384 So.2d 359 (La. 1980); the circumstances of the detention reflect that officers were on an expedition to find evidence, Reyes v. State, supra; or the use of threats or physical force, United States v. Perez-Esparza, 609 F.2d 1284 (9th Cir. 1980).

In the instant case, the purported consent occurred during the unlawful detention. There were no intervening circumstances between the detention and the consent. Finally, the actions of the officers were purposeful and flagrant in relation to the Fourth Amendment violation. Petitioner was stopped on Interstate 15 at a roadblock. (R. 153) The lack of legal authority to engage in such a procedure has previously been

discussed.²⁴ Likewise, troopers had unlimited discretion in how the roadblock would be conducted. After appellant was stopped, Trooper Howard requested that petitioner produce his driver's license and vehicle registration. (R. 154) The registration indicated the vehicle belonged to petitioner's wife (R. 154) and the driver's license was from Georgia. (R. 154) The trooper confronted petitioner about these matters and also about the odor of alcohol that petitioner had about him. (R. 155) The trooper then asked petitioner if he was in possession of any alcohol, firearms or drugs. Petitioner then produced an open bottle of liquor. (R. 155) The trooper ordered petitioner out of the vehicle and requested his consent to search the vehicle. (R. 156) Petitioner acquiesced to that request. (R. 156)

As can be seen, any consent given was inseparable from the unlawful detention. There was no substantial passage of time to allow petitioner to reflect on whether or not he would grant his consent to search. There were no intervening circumstances that would eliminate the taint of the continuing detention. The stated purpose of the roadblock was to discover evidence of criminal violations. The procedures used in conducting the roadblock did nothing to dissipate fear or confusion on the part of petitioner. Finally, the questioning during the detention took on an accusatory nature. Petitioner and the passenger were ordered out of the vehicle and petitioner merely acquiesced to

²⁴ See: Points II and III, supra.

the request to search the vehicle. Any consent given by petitioner was obtained as a result of the exploitation of the initial unlawful detention. The evidence seized is the fruit of that initial detention and must be ordered suppressed.

CONCLUSION

The exclusionary rule of Article I, Section 14 of the Constitution of Utah and the Fourth Amendment to the United States Constitution should apply to illegal drug stamp tax proceedings before the State Tax Commission. The roadblock stop of petitioner's vehicle violated both Article I, Section 14 of the Constitution of Utah and the Fourth Amendment to the United States Constitution. Any consent that was obtained from petitioner to allow his vehicle to be searched was gained through the exploitation of this illegal roadblock. The evidence seized as a result of the stop and search of petitioner's vehicle should not have been introduced in the illegal drug tax stamp proceedings before the state tax commission. The decision of the tax commission should be reversed and a new hearing ordered without the use of the evidence seized from the search of petitioner's vehicle.

DATED this _____ day of December, 1990.

G. FRED METOS
Attorney for Petitioner/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of December, 1990, I mailed/delivered a true and correct copy of the foregoing to John McCarrey, Assistant Attorney General, at 236 State Capitol Building, Salt Lake City, Utah, 84114.

ADDENDUM

BEFORE THE UTAH STATE TAX COMMISSION

LOUIE E. SIMS,)	
	:	
Petitioner,)	
	:	FINDINGS OF FACT,
v.)	CONCLUSIONS OF LAW
	:	AND FINAL DECISION
COLLECTION DIVISION OF THE)	
UTAH STATE TAX COMMISSION,	:	Appeal No. 88-2547
)	
	:	
Respondent.)	

STATEMENT OF CASE

This matter came before the Utah State Tax Commission for a formal hearing on February 13, 1990. Paul F. Iwasaki, Presiding Officer, heard the matter for and in behalf of the Commission. Present and representing the Petitioner was G. Fred Metos, Attorney at Law. Present and representing the Respondent was L. A. Dever, Assistant Attorney General.

Based upon the memoranda submitted and oral arguments of the parties, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. The tax in question is the illegal drug stamp tax.
2. The date in question is July 27, 1988.

3. As a result of a search conducted of the motor vehicle driven by the Petitioner, members of the Juab County Sheriff's Office and Utah Highway Patrol seized 15 grams of marijuana and 985 grams of cocaine.

4. No drug stamps were affixed to the controlled substances.

5. A tax deficiency in the amount of \$197,053 and a penalty in an equal amount were assessed for the failure to have the required drug stamps affixed to the controlled substances.

6. As a result of criminal charges arising out of the possession of the controlled substances, the District Court ruled that the search of the Petitioner's vehicle was lawful.

7. Individuals who purchase the drug stamps are not required to identify themselves by name, social security number, nor address when purchasing the stamps.

8. No evidence was presented which would indicate that the information obtained from the individuals purchasing the drug stamps is provided to law enforcement agencies.

CONCLUSIONS OF LAW

A tax of \$3.50 per gram of marijuana and a tax upon cocaine at \$200 per gram is imposed pursuant to the Illegal Drug Stamp Tax Act. (Utah Code Ann. §59-19-103.)

The evidence of tax paid is a stamp affixed to the controlled substance. (Utah Code Ann. §59-19-104.)

Failure to affix the stamp shall result in the assessment of a tax plus a 100% civil penalty. (Utah Code Ann.

§59-19-106.)

The Tax Commission is not a judicial body established under the Constitution of the State of Utah, nor is it empowered nor authorized to determine the legality or constitutionality of legislative enactments. (Shay v. Utah State Tax Commission, 120 P.2d 274 (Utah 1941); State Tax Commission v. Wright, 596 P.2d 634 (Utah 1979); and Belco Petroleum Corporation v. State Board of Equalization, 587 P.2d 204 (Wyoming 1978).

DECISION AND ORDER

The Petitioner has presented four issues to be decided by the Commission:

1. Does the Illegal Drug Stamp Tax Act violate the Petitioner's right against self-incrimination?
2. Does the Exclusionary Rule apply in proceedings before the Tax Commission?
3. Does the assessment of taxes under the Act violate the Petitioner's right to procedural due process under the Fourteenth Amendment of the United States Constitution and Article I, Section 7 of the Utah Constitution?
4. Is the Act void because it is impermissibly vague under the due process clause of the Fourteenth Amendment of the United States Constitution and Article I, Section 7 of the Utah Constitution?

Taking the above listed issues in reverse order, the Tax Commission finds that with respect to issue numbers 3 and 4, the Tax Commission is not a court of law empowered to

determine the constitutionality of the statute. Therefore, the Tax Commission must assume the constitutional validity of the Illegal Drug Stamp Tax Act.

With respect to the first issue, the Utah Court of Appeals in the case of State of Utah v. Davis, (case number 89-0009-CA, Court of Appeals, February 17, 1990) directly addressed the issue of whether the Act violated a person's right against self-incrimination. The Court of Appeals held that it did not.

The Court found that by construing the Act to prohibit the use of any information gained as a result of a purchaser's compliance with the Act to establish a link in the chain of evidence in a subsequent drug prosecution provides the same protections provided by the Fifth Amendment, thus upholding the Acts constitutionality. In the present case, there was no showing that any information obtained by the Tax Commission regarding the purchase of the drug stamps was provided to law enforcement agencies or became a link in the chain of evidence in subsequent criminal proceedings.

The remaining issue, the applicability of the Exclusionary Rule to proceedings before the Tax Commission, is one of first impression.

In holding that the Exclusionary Rule does not apply in proceedings before this body, the Tax Commission adopts the balancing test set forth by the U. S. Supreme Court in the cases of United States v. Janis, 428 U.S. 433 (1976) and INS v. Lopez-Mendoza, 468 U.S. 1032 (1984). That test requires the weighing of the benefits in deterring unlawful police conduct


against the loss of probative evidence and the secondary costs that flow from the less accurate adjudication that therefore occurs.

The primary purpose of the Exclusionary Rule is to deter unlawful police conduct. There is no showing that application of the Exclusionary Rule in Tax Commission proceedings would serve to meet that purpose. Additionally, if the Tax Commission were to apply the Exclusionary Rule in its proceedings, inconsistent results could be found between those hearings and criminal proceedings in the District Court. Therefore, the societal interest in deterring police conduct in these cases does not outweigh the societal interests in facilitating the accuracy of the fact finding process in these hearings.

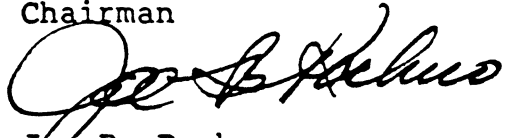
Based upon the foregoing, the Tax Commission finds that the determination of the Collection Division's assessment against the Petitioner for tax and penalties per the Illegal Drug Stamp Tax Act is affirmed. It is so ordered.

DATED this 20 day of June, 1990.

BY ORDER OF THE UTAH STATE TAX COMMISSION


R.H. Hansen
Chairman


Roger O. Tew
Commissioner


Joe B. Pacheco
Commissioner

ABSENT

G. Blaine Davis
Commissioner

NOTICE: You have ten (10) days after the date of the final order to file a request for reconsideration or thirty (30) days after the date of final order to file in Supreme Court petition for judicial review. Utah Code Ann. §§ 63-46b-13, 63-46b-14(2)(a).



MAILING CERTIFICATE

I hereby certify that I mailed a copy of the foregoing
Decision to the following:

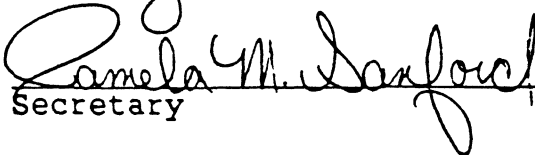
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Lee Dever
Assistant Attorney General
State Capitol Building
Salt Lake City, UT 84114

DATED this 21 day of June, 1990.


Secretary