

1992

# State of Utah v. Lamonte J. Bagley : Brief of Appellee

Utah Court of Appeals

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## Recommended Citation

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :  
Plaintiff/Appellee, : Case No. 920191-CA  
v. : Priority No. 2  
LAMONTE J. BAGLEY, :  
Defendant/Appellant.:  
:

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BRIEF OF APPELLEE  
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THIS IS AN APPEAL FROM A CONVICTION OF POSSESSION OF A CONTROLLED SUBSTANCE, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37-8(2)(a)(i) (Supp. 1992), IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR JUAB COUNTY, STATE OF UTAH, THE HONORABLE GEORGE E. BALLIF, PRESIDING.

UTAH COURT OF APPEALS  
BRIEF

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BRIEF OF APPELLEE  
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JUAB COUNTY, STATE OF UTAH, THE HONORABLE  
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Defendant/Appellant.:

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BRIEF OF APPELLEE  
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JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction of possession of a controlled substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (Supp. 1992), in the Fourth Judicial District Court in and for Juab County, State of Utah, the Honorable George E. Ballif, presiding. This Court has jurisdiction to hear the appeal pursuant to Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1992).

STATEMENT OF THE ISSUE PRESENTED  
AND STANDARD OF APPELLATE REVIEW

The sole issue presented on appeal is whether the trial court properly denied defendant's motion to suppress evidence. Defendant has failed to provide this Court with a transcript of the hearing on defendant's motion to suppress. In the absence of a transcript of the hearing below, this Court will assume regularity of the proceedings below. State v. Robbins, 709 P.2d 771, 773 (Utah 1985).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Any relevant text of constitutional provisions, statutes and rules pertinent to the resolution of the issue presented on appeal is contained in the body of this brief.

STATEMENT OF THE CASE

Defendant was charged with possession of a controlled substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (1990) (R. 1). Defendant filed a motion to suppress, which the trial court denied (R. 26, 27-40, 44-58, 74-75).

Following a jury trial, defendant was found guilty as charged in the information. The trial court sentenced defendant to an indeterminate term of zero to five years in the Utah State Prison. The court stayed execution of the sentence and placed defendant on probation (R. 146, 147, 154, 158-160; T. 193-94).

Defendant subsequently violated the terms of his probation. The trial court revoked defendant's probation and ordered that his original sentence be executed (R. 178-81). Defendant is presently incarcerated.

STATEMENT OF THE FACTS

Because of defendant's failure to provide a transcript of the hearing on defendant's motion to suppress, the State is unable to recite the facts that were before the trial court when it denied defendant's motion to suppress. However, it should be noted that the only witness to testify at the suppression hearing was the arresting officer (R. 74). In contrast, defendant's

Statement of Facts is based on the testimony adduced from several witnesses at defendant's trial, including defendant himself. That evidence was not before the trial court at the time it denied defendant's motion to suppress.

#### SUMMARY OF THE ARGUMENT

This Court should uphold the trial court's denial of defendant's motion to suppress because defendant has failed to provide a transcript of the hearing on that motion. State v. Robbins, 709 P.2d 771, 773 (Utah 1985) (where a defendant fails to provide a reviewing court with a transcript on appeal, the reviewing court will assume regularity of the proceedings below). This Court should therefore affirm defendant's conviction.

#### ARGUMENT

**THIS COURT SHOULD ASSUME THAT THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS BECAUSE DEFENDANT HAS FAILED TO PROVIDE A TRANSCRIPT OF THE SUPPRESSION HEARING**

Defendant has failed to provide this Court with a transcript of the hearing on defendant's motion to suppress. Numerous decisions from both this Court and the Utah Supreme Court have made it clear that when a party fails to supply a transcript on appeal, the court will assume regularity of the proceedings below. See State v. Garza, 820 P.2d 937, 938 (Utah App. 1991), and cases cited therein. This Court should likewise assume that the trial court properly denied defendant's motion to suppress, and affirm defendant's conviction.

As this Court noted in Garza, this may seem like a



"harsh result." Id. However, it is an appropriate result because defendant's failure to supply a transcript makes it "impossible" for this Court to verify even the most rudimentary assertions made by defendant. Id. Consequently, this Court must, as it did in Garza, "assume, as a matter of law, that the trial court's decision to deny [defendant's] motion was not erroneous." Id. (citing Jolivet v. Cook, 784 P.2d 1148, 1150 (Utah 1989), cert. denied, 493 U.S. 1033, 110 S.Ct. 751 (1990) (court assumes regularity of proceedings below where appellant fails to provide adequate record on appeal)).<sup>1</sup>

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<sup>1</sup> Even if this Court were to accept defendant's Statement of the Facts, defendant's conviction should still be affirmed. According to defendant, the arresting officer testified at trial that he could smell the odor of marijuana emanating from defendant's vehicle and that when he asked for consent to search the vehicle, defendant and his passenger not only agreed, but were indeed very cooperative. (Br. of Appellant at 3).

Assuming the officer's testimony at the suppression hearing was the same as it was at trial -- and recognizing that the officer was the only witness to testify at the suppression hearing (R. 74), then the officer's testimony provided the trial court with uncontroverted evidence to support findings of probable cause and voluntary consent to search. See State v. Naisbitt, 827 P.2d 969, 972-73 (Utah App. 1992) (where officer smelled marijuana the trial court's finding of probable cause was proper under the "plain smell" doctrine) (citations omitted); State v. Grovier, 808 P.2d 133, 136-37 (Utah App. 1991) (consent to search was voluntary). Under these circumstances, the trial court properly denied defendant's motion to suppress.

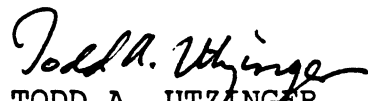
With respect to defendant's second claim, that the trial should have carefully weighed the conflicting testimony regarding consent, as noted above, the officer's testimony at the suppression hearing was uncontroverted (R. 74). Defendant's second point therefore lacks merits because it is predicated on the mistaken belief that the trial court's ruling on his motion to suppress should have been based on the evidence presented at his jury trial instead of the evidence presented at the suppression hearing.

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's denial of defendant's motion to suppress evidence.

RESPECTFULLY SUBMITTED this 3<sup>rd</sup> day of December, 1992.

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TODD A. UTZINGER  
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CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing brief of appellee was mailed, postage prepaid, to Milton T. Harmon, attorney for appellant, P.O. Box 97, Nephi, Utah 84648, this 3<sup>rd</sup> day of December, 1992.

