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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, Plaintiff/Appellee, v. MATTHEW JAMES HINMON, Defendant/Appellant.	Case No. 20150015-CA Apellant is not incarcerated.

APPELLANT'S REPLY BRIEF

Appeal from a judgment of conviction for Possession of a Controlled Substance, a third degree felony, in violation of Utah Code §58-37-8(2)(a)(i), (b)(ii), and Interference with Arresting Officer, a class B misdemeanor, in violation of Utah Code §76-8-305, in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Charlene Barlow presiding.

ALEXANDRA S. MCCALLUM (15198)
HEATHER J. CHESNUT (6934)
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Appellant

LINDSEY WHEELER (14519)
Assistant Attorney General
SEAN D. REYES (7969)
UTAH ATTORNEY GENERAL
Heber M. Wells Building
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114

Attorney for Appellee

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UTAH APPELLATE COURTS
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HEATHER J. CHESNUT (6934)
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Appellant

LINDSEY WHEELER (14519)
Assistant Attorney General
SEAN D. REYES (7969)
UTAH ATTORNEY GENERAL
Heber M. Wells Building
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114

Attorney for Appellee

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INTRODUCTION

As required by Utah Rule of Appellate Procedure 24(c), this reply brief is "limited to answering any new matter set forth in the opposing brief." The brief does not restate arguments from the opening brief or address matters that do not merit reply.

ARGUMENT

I. The Trial Court's Ruling Contains Four Clearly Erroneous Findings of Fact.

The State argues that "the evidence considered by the trial court was more than sufficient to support" the challenged findings of fact. Appellee's Br. 11-16. In doing so, it suggests that a trial court's findings are adequately supported and not clearly erroneous "when the record contains *some* evidence supporting them." Appellee's Br. 12, 15 (emphasis in original) (citing *State v. Clark*, 2001 UT 9, ¶ 13, 20 P.3d 300; *State v. Cecil*, 2012 UT App 280, ¶5, 288 P.3d 22). But this is an incorrect formulation of the clearly erroneous standard. Rather, overturning findings as clearly erroneous is required in cases

where "'although there is evidence to support it,'" *In re Z.D.*, 2006 UT 54, ¶38, 147 P.3d 401, the finding is "against the clear weight of the evidence" or the appellate court is left with "a definite and firm conviction that a mistake has been made." *Brown v. State*, 2013 UT 42, ¶37, 308 P.3d 486.

The State cites *Clark*, 2001 UT 9, ¶13, and *Cecil*, 2012 UT App 280, ¶5, to support the proposition that a finding is not clearly erroneous when the record includes "*some* evidence" supporting it. The discussions cited in these cases, however, concern the standard relevant to review of a trial court's denial of a motion to dismiss and a jury verdict—not a trial court's findings of fact. *See Clark*, 2001 UT 9, ¶13 ("We will uphold the trial court's decision to submit a case to the jury if, upon reviewing the evidence and all inferences that can be reasonably drawn from it, the court concludes that *some evidence* exists from which a reasonable jury could find that the elements of the crime had been proven beyond a reasonable doubt." (emphasis added) (internal quotation marks omitted)); *Cecil*, 2012 UT App 280, ¶5 (same). Indeed, "whether the findings were made by a judge or by a jury . . . [is a] distinction [that] matters." *In re Z.D.*, 2006 UT 54, ¶35. "An appellate court must indulge findings of fact made by a jury that support the verdict," but "[n]o such indulgence is required of findings made by a judge." *Id.*

> "[i]t is not accurate to say that the appellate court takes that view of the evidence that is most favorable to the appellee, that it assumes that all conflicts in the evidence were resolved in his favor, and that he must be given the benefit of all favorable inferences. All of this is true in reviewing a jury verdict. It is not true when it is findings of the court that are being reviewed."

Id. (internal quotation marks omitted).

Instead, when reviewing the trial court's factual findings, this Court looks to "the entire factual record." *Id.* ¶¶38-39. It determines that "'[a] finding is 'clearly erroneous' when *although there is evidence to support it*, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed,"' *Id.* ¶38 (emphasis added), or concludes that the finding is "against the clear weight of the evidence. " *Brown*, 2013 UT 42, ¶37. Thus, contrary to the State's suggestion, a trial court's factual finding may be clearly erroneous even if there is "some evidence" supporting it. And for the reasons outlined in the opening brief, the challenged findings were against the clear weight of the evidence and therefore, clearly erroneous even though "some evidence" might have been consistent with them. *See* Appellant's Br. 11-15; *see also, e.g.*, R.284:16, 20, 32-33; 285:6-8, 12-15; Appellant's Br. 13-15 ("the clear weight of the evidence shows that Matthew told the driver to "just drive" and "take off" and reached towards the gearshift *after* Loken reached into the car to restrain Matthew's hands" even though some of Worthington's evidentiary hearing testimony could be construed to support the trial court's finding to the contrary).[1]

[1] The State indicates in a footnote that "Officer Loken's witness statement, which was relied on by the trial court in its Ruling" is "[n]otably missing from the record." Appellee's Br. 3 n.1. Nevertheless, the State does not seem to take issue with the omission of this witness statement or rely on its absence to support any of its arguments. But even if it did, the trial court commented on the "brevity of Officer Loken's handwritten statement," finding that Loken's "testimony d[id] not 'conflict' with the written statement as much as it expand[ed] upon it." R.172-73. The trial court's finding indicates that Loken's witness statement was generally consistent with Loken's testimony, but did not provide details beyond what he testified to. In any event, Loken's witness statement, unlike the statements of Raines and Worthington, was never offered or received into evidence at the evidentiary hearing, and it was improper for the trial court to

II. Loken lacked reasonable suspicion when he performed an investigatory detention of Hinmon.

The State argues that Raines's tip gave Loken reasonable suspicion to detain Hinmon because Raines's status as an identified citizen informant rendered his report "highly reliable" along with the report's detail and timing. Appellee's Br. 22-24. It also maintains that Raines and Loken had a sufficient basis of knowledge for concluding that the balloons were associated with illegal drug activity. *Id.* at 24-27. Lastly, the State claims that the details of Raines's report were corroborated and "nothing Loken observed served to dispel [his] report."[2] *Id.* at 22-24. These arguments fail.

First, the State overemphasizes the importance of Raines's status as an identified citizen informant in determining the reliability of the tip in this case. This is because it fails to draw a distinction between two different types of citizen informant tips: (1) tips about criminal activity that is readily identifiable to the general public and (2) tips about criminal activity that does not "fall within the realm of knowledge common to members of the public." *State v. Lloyd*, 2011 UT App 323, ¶¶15-17, 263 P.3d 557. Without more, a citizen informant's tip concerning the latter is not as reliable as the former. *See id.*

For instance, in *Lloyd*, a tipster reported to the police that individuals parked in a green car behind her building were "smoking drugs." *Id.* at ¶2. Even though this Court

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independently rely on materials outside of the evidence. R.57-58; 284. Hence, the fact that Loken's witness statement is not part of the record is irrelevant to this appeal.

[2] The State argues that "[t]he reliability and veracity of Raines['s] tip alone created reasonable suspicion." Appellee's Br. 24. Although it claims that "Loken's own observations added to that suspicion," it does not point to any additional facts known to Loken that added to the information already provided in the tip. *See id.* 23-24.

found the tipster to be more akin to "a disinterested 'citizen-informant,'" it concluded that her report alone did not support reasonable suspicion. *Id.* at ¶¶16-17. In doing so, it distinguished between citizen informant tips about readily identifiable criminal activity and citizen informant tips about criminal activity that does not "fall within the realm of knowledge common to members of the public." *Id.* at ¶17.

This Court explained that a "citizen-informant's tip about a drunk driver is sufficient to give the police reasonable suspicion that the individual is engaged in criminal behavior, i.e., driving under the influence, even if the basis for the informant's conclusion is not fully explained." *Id.* But unlike criminal activities like drunk driving—which are readily observable and therefore, more reliable because the basis of the tipster's knowledge is apparent— "whether a person is 'smoking drugs' does not seem to fall within the realm of knowledge common to members of the public." *Id.* Because this Court lacked "enough information before [it] to determine whether the informant had a sufficient basis of knowledge for concluding that the occupants of the car were 'smoking drugs,'" it was "unable to conclude that the informant's tip, by itself, supported a reasonable suspicion or probable cause determination." *Id.*

Thus, if a report concerns criminal activity outside the public's common knowledge and an adequate basis for the tipster's conclusions is lacking, the report alone does not furnish reasonable suspicion—even if the tipster is a citizen informant. That was the case here.

Raines told Loken and Worthington that "he thought [there might be] a drug transaction . . . going on" in a vehicle in the parking lot. R.284:6, 29-30, 37; 285:3. He

said he stared at the vehicle's occupants because he thought they appeared suspicious and the passenger gave Raines a "'what are you looking at' kind of a look." R.177; 284:29; 285:4. Raines said he saw a towel on the passenger's lap with pink balloons on it and the passenger was "fiddling" with the balloons. R.177; 284:29.

Although Raines was an identified citizen informant, recognizing whether a drug transaction was occurring and making the association between balloons and drugs "does not seem to fall within the realm of knowledge common to members of the public." *Lloyd*, 2011 UT App 323, ¶17. And as argued in Hinmon's opening brief, Raines's report failed to reveal a sufficient basis of knowledge for concluding that the occupants of the car were engaged in drug activity; it did not contain any "indication . . . as to why" he believed that the balloons were associated with drugs "as opposed to" some other lawful purpose. *Id.*; Appellant's Br. 17-20. Thus, where the nature of the criminal activity fell outside the public's common knowledge and the record fails to demonstrate a sufficient basis of knowledge for Raines's conclusions, Raines's status as an identified citizen informant does not render his report "highly reliable" and supportive of reasonable suspicion.

Nonetheless, the State argues that Raines and Loken had a sufficient basis of knowledge for concluding that the balloons were associated with criminal activity. Appellee's Br. 24-27. First, it contends that Hinmon "failed to show" that Raines's previous citation for marijuana paraphernalia and his "'watching TV, court TV, anything like that'" "is not enough to support that he knew that he was witnessing a drug transaction." *Id.* at 24-25. However, it is not Hinmon's burden to demonstrate that

Raines's report, which law enforcement relied upon in carrying out the detention, revealed a sufficient basis of knowledge to support Raines's conclusions. Rather, "[i]t has long been the law that once a defendant adequately challenges a warrantless seizure, the State bears the burden of proving the reasonableness of law enforcement's action." *State v. Worwood*, 2007 UT 47, ¶39, 164 P.3d 397. Because Hinmon raised an adequate Fourth Amendment challenge, the burden falls on the State to demonstrate that law enforcement acted reasonably by relying on Raines's report. *See id.* (defendant satisfied his initial burden where he challenged the "constitutionality of the initial stop, as well as the scope of the stop, and supported that challenge with factual reference"); *see also* R.31-33, 64-77; 283:3-7 (arguments in support of motion to suppress).

In any event, Raines's evidentiary hearing testimony regarding his experience with drugs—a previous citation for marijuana paraphernalia and "watching TV, court TV, anything like that"—should not weigh into this Court's determination regarding the reliability of his tip. "[W]hether reasonable suspicion exists [is] based upon the facts known to the police officer *at the time* of the" detention. *State v. Applegate*, 2008 UT 63, ¶17, 194 P.3d 925 (emphasis added). However, nothing in the record indicates that Loken was aware of Raines's experience with drugs at the time of the detention. *C.f. State v. Chansamone*, 2003 UT App 107, ¶¶3, 13, 69 P.3d 293 (concluding that a tipster's report of "a baggie with white powder . . . that [he] believed to be drugs" was reliable where the record revealed that the tipster previously helped the arresting officer effectuate at least one drug arrest and had a history of giving reliable information to the officer). Thus, because this evidence was presented at an evidentiary hearing months "after the

[detention]," it "cannot be considered." *State v. Lopez*, 873 P.2d 1127, 1138 n.6 (Utah 1994); *see also Salt Lake City v. Street.*, 2011 UT App 111, ¶15 n.1, 251 P.3d 862; *Salt Lake City v. Bench*, 2008 UT App 30, ¶17 n.4, 177 P.3d 655.

The State also relies on the assumption that Loken and Raines, "would know that [heroin] is trafficked in balloons and would be able to identify that the circumstances here involved a drug deal" because it "is part of the main-stream popular culture." Appellee's Br. 26. And while the State acknowledges that "Loken did not specifically testify about his training and experience with drugs," it urges this Court to assume that his "veteran status" as a peace officer with the Division of Wildlife Resources and his completion of POST training furnished him with the experience to recognize that drugs were involved. *Id.* at 26-27. However, nothing in the record indicates that, at the time of the detention, Raines or Loken were aware that heroin is kept in balloons or that the balloon contained contraband. *See DeLao v. State*, 550 S.W.2d 289, 291 (Tex. Crim. App. 1977) (rejecting the State's contention that "it is a well known fact that heroin is kept in balloons" because the "burden was on the State to show facts authorizing the seizure" and the record did not contain "evidence that the officer knew what the State now alleges in its brief on appeal is a 'well known' fact."); *Reeves v. State*, 599 P.2d 727, 740-41 (Alaska 1979) (concluding that seizure and search was not supported by the probable cause required by the plain view exception where the "record simply d[id] not support a conclusion that the incriminating nature of the balloon was immediately apparent to the correctional officer prior to the seizure and search challenged").

The burden is on the State to show reasonableness "[a]nd a dearth of evidence

cannot be assumed to support the reasonableness of an officer's actions during an investigative detention." *Worwood*, 2007 UT 47, ¶40 "Such an assumption turns this well-established proof requirement on its head." *Id.* Thus, the State's assumptions regarding the ability of Raines and Loken to recognize drug activity must be rejected because the record fails to adequately support them.

Finally, the State argues that the reliability of Raines's report was supported by Loken's corroboration. Citing *Alabama v. White*, 496 U.S. 325 (1990), for the proposition that officer corroboration of innocent details may render a tip reliable, the State maintains that "[i]t is immaterial that Loken did not see the balloons" where he verified the innocent details supplied by Raines. Appellee's Br. 23-24. But the innocent details provided by the tipster in *White*, which were ultimately corroborated by the police, pertained to the defendant's future movements that the "general public would have had no way of knowing." *White*, 496 U.S. at 331-32. The court distinguished these details from those "[a]nyone could have 'predicted,'" explaining that "[w]hat was important" to the reliability calculation "was the caller's ability to predict respondent's *future behavior,* because it demonstrated inside information—a special familiarity with respondent's affairs." *Id.* at 332 (emphasis in original). In this case, however, Loken's corroboration contributed little, if anything, to the reliability of Raines's tip because the details he corroborated were innocent and did not relate to Hinmon's future behavior. *See id.*; *see also Lloyd*, 2011 UT App 323, ¶17 n.2 (concluding that the tip regarding drug activity did not provide reasonable suspicion where the record provided "no basis to conclude that [the tipster] was 'qualified to know' the smell of drugs," even though the officers

corroborated innocents details, such as the presence of "a small, green car containing three occupants" where the tipster described).

In short, the State's arguments are unpersuasive and fail to demonstrate that Loken acted with reasonable suspicion.

III. Loken lacked probable cause when he arrested Hinmon.

The State also fails to meet its burden of demonstrating that Loken acted with probable cause. According to the State, Loken's decision to arrest Hinmon was justified by: (1) the exigent circumstances exception (2) probable cause that Hinmon interfered with an arresting officer; and (3) probable cause that there was "a fair probability that contraband or evidence of a crime" would be in the car. Appellee's Br. 29-34. These arguments are unconvincing.

First, as a threshold matter, the State is incorrect in stating the evidence available to Loken at the time of the arrest. As argued, the trial court's finding that Hinmon reached for the gearshift and told the driver to "just drive" *before* Loken effected the arrest was clearly erroneous. Appellant's Br. 13-15; R.284:16, 20, 32-33; 285:6-8, 12-15; Defendant's Ex. B. This remains true even though "some evidence," i.e. Worthington's evidentiary hearing testimony, could be construed to support the trial court's finding; the clear weight of the evidence demonstrates that Hinmon told the driver to "just drive" and reached towards the gearshift *after* Loken reached into the car to restrain his hands. *See id.*; *supra* Part I. Thus, contrary to the State's suggestion, this Court should not consider Hinmon's comments to the driver to "just drive" and his reaching for the gearshift because these facts were not available to Loken at the time of the arrest. *See Lloyd*, 2011

UT App 323, ¶11 ("'[w]hether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest.'").

Moreover, the State's arguments fail to demonstrate that Loken was justified in effecting the arrest. First, the State claims that "Loken's actions were justified under the exigent circumstances exception," arguing that his "only option was to seize Defendant to prevent the destruction of evidence and flight of Defendant." Appellee's Br. 33-34. This argument presupposes that Loken had probable cause to arrest Hinmon. Indeed, in the automobile context, warrantless searches and seizures require a showing of both exigent circumstances *and* probable cause—the critical ingredient lacking in this case. *State v. Anderson*, 910 P.2d 1229, 1236-37 (Utah 1996); *State v. Christensen*, 676 P.2d 408, 411 (Utah 1984) ("the police must have probable cause to believe that the automobile contains either contraband or evidence of a crime and that they may be lost if not immediately seized"); *see also* Appellant's Br. 22-28.

Nevertheless, the State contends that Loken's arrest was supported by probable cause that Hinmon committed Interference with an Arresting Officer in violation of Utah Code § 76-8-305(2).[3] *See* Appellee's Br. 30-31. Pointing to *State v. Trane*, 2002 UT 97,

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[3] Under section 76-8-305(2), a person commits interference with an Arresting Officer if he has knowledge, or by the exercise of reasonable care should have knowledge, that a peace officer is seeking to effect a lawful arrest or detention of that person or another and interferes with the arrest or detention by . . .

(2) the arrested person's refusal to perform any act required by lawful order:

(a) necessary to effect the arrest or detention; and

(b) made by a peace officer involved in the arrest or detention.

57 P.3d 1052, it claims that Hinmon "interfer[ed] with a lawful detention" by disobeying Loken's order not to move and throwing the towel to the ground. Appellee's Br. 30-31. This argument fails.

Hinmon's act of passively pushing a towel from his lap to the floor after Loken ordered him not to move, in the absence of reasonable suspicion, did not give Loken probable cause to make an arrest. Because reasonable suspicion was lacking, *see* Appellant's Br. 16-22; *supra* Part II, Loken's order was not a lawful order, and Hinmon's peaceful noncompliance did not constitute a violation of the interfering statute that furnished probable cause. Although *Trane* explains that "the lawfulness of an officer's order or arrest is not determinative of whether an officer is authorized to arrest an individual under the interfering statute," the court was clear that its "opinion [wa]s limited to the facts of [that] case:" a defendant who was lawfully detained after he committed public intoxication in the officers' presence; a lawful order requesting that the defendant submit to a frisk; and a defendant who *physically resisted* that order. 2002 UT 97, ¶¶31, 35-36 & n.4. In support of its reasoning, the court emphasized that "in Utah there is no right to physically resist either an arrest or an order of the police, irrespective of the legality of the arrest or order, so long as the officers are within the scope of their authority." *Id.* at ¶33. However, it did not address whether a defendant's passive noncompliance with an officer's unlawful order justifies an arrest under the interfering statute. *See id.*

Courts in other jurisdictions have considered this issue. For instance, in *State v. Bishop*, the defendant "peacefully resisted the unlawful frisk by merely turning around

and telling [the officer] 'no.'" 203 P.3d 1203, 1220 (Idaho 2009). The Idaho Supreme Court rejected the State's argument that "'willful resistance, delay or obstruction to even an unlawful search or seizure constitutes an independent crime for which a defendant may be lawfully arrested.'" *Id.* at 1217 n.11. In its analysis, the court drew a distinction between forceful resistance and peaceful noncompliance, which "does not raise the same concerns for public safety." *Id.* at 1216-20 & n.16. It further explained:

> If individuals could be arrested for peacefully resisting an unlawful frisk, an officer could order anyone on the street to submit to a frisk and, if the person merely answered "no," the officer could arrest him or her for resisting and conduct a search incident to arrest. This would give officers an incentive to violate the constitution. It would also punish individuals for asserting their constitutional rights.

Id. at 1220 n.16.

Accordingly, the court held that because the execution of an unlawful frisk was outside the scope of the police officer's duties, the defendant's peaceful resistance to the frisk did not furnish "probable cause to arrest [the defendant] for obstructing an officer." *Id.* at 1220[4]; *see also, e.g.*, *Graves v. City of Coeur d'Alene*, 339 F.3d 828, 841 (9th

[4] The *Bishop* court's holding was unchanged by the fact that the defendant physically struggled with the officer when he was being handcuffed. The court explained that because "the struggle took place *after* [the officer] decided to arrest [the defendant] for resisting the frisk," it was "irrelevant in determining whether [the defendant's] resistance to the frisk was lawful." *Bishop*, 203 P.3d at 1220 n.17 (emphasis in original). Likewise, Hinmon's physical struggles after Loken restrained him should not be considered in the probable case determination or in determining the propriety of Hinmon's noncompliance with Loken's orders. *See Lloyd*, 2011 UT App 323, ¶11; *Lopez*, 873 P.2d 1127, 1138 n.6. And the State's arguments to the contrary should be rejected. *See* Appellee's Br. 31 (arguing that Hinmon's continued "resist[ance]" and attempts to eat the balloon "after Loken restrained [him]," were "facts [that] provided Loken further probable cause to arrest").

Cir.2003), *abrogated on other grounds by Hiibel v. Sixth Judicial Dist. Court of Nevada*, 542 U.S. 177 (2004).

Similar considerations and concerns warrant the same result here. Where Loken exceeded the scope of his authority by detaining Hinmon without reasonable suspicion, Hinmon did not violate the interfering statute by peacefully disobeying Loken's unlawful orders. Hinmon's act of pushing the towel to the ground after Loken told him not to move could not furnish probable cause because the detention he peacefully resisted was unlawful under the Fourth Amendment.

Additionally, the State maintains that "the totality of the circumstances establish[ed] probable cause [that Hinmon was engaged in illegal drug activity]: Raines's tip, Loken's observations, Defendant's immediate attempt to conceal the towel and its contents, Defendant's frantic reaction to Loken—yelling at the driver to 'just drive.'" Appellee's Br. 31-33. The State's view of the totality of the circumstances, however, is not confined to "the facts known to the police officer at the time of the" arrest. *Applegate*, 2008 UT 63, ¶17. As discussed, Hinmon reacted by trying to reach for the gearshift and telling the driver to "just drive" *after* Loken effected the arrest. Appellant's Br. 13-15; R.284:16, 20, 32-33; 285:6-8, 12-15; Defendant's Ex. B. Moreover Loken only witnessed Hinmon push the towel that was on his lap to the ground without observing any of "its contents." *See* R.284:16, 20, 32; 285:5-6. He did not observe the "contents" or what those contents were until after the arrest. *See id.*

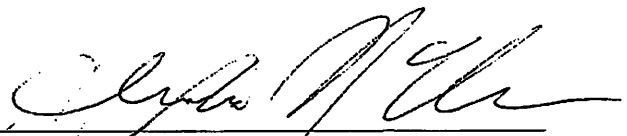
When the evidence is properly viewed along with the reasons stated in Hinmon's opening brief, the totality of the facts known to Loken at the time of the arrest—Raines

tip, Loken's own observations, and Hinmon's throwing the towel to the ground—did not furnish him with probable cause to believe that Hinmon was engaged in illegal drug activity. *See* Appellant's Br. 22-28; *see also supra* Part II. Thus, Loken's arrest of Hinmon was unlawful under the Fourth Amendment and the evidence seized pursuant to that unlawful arrest should have been suppressed.

CONCLUSION

For the reasons above and in the opening brief, Hinmon asks this Court to reverse and remand for further proceedings.

SUBMITTED this 2nd day of November, 2015.



ALEXANDRA S. MCCALLUM
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, ALEXANDRA S. MCCALLUM, hereby certify that I have caused to be hand-delivered the original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, P.O. Box 140230, Salt Lake City, Utah 84114-0230, and three copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 2nd day of November, 2015.

ALEXANDRA S. MCCALLUM

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 3,741 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R.App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in Times New Roman 13 point.

ALEXANDRA S. MCCALLUM

DELIVERED this 2nd day of November, 2015.