

2017

**State of Utah, Plaintiff/Appellee, v. Zachary Rigby Defendant/
Appellant**

Utah Court of Appeals

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UTAH SUPREME COURT

STATE OF UTAH,

Plaintiff/Appellee,

v.

Zachary Rigby

Defendant/Appellant.

Supreme Court No.20160261-SC

Appellate Court No. 20140553-CA

District Court No. 135100370

On Review from the judgment entered by the
Utah Court of Appeals in
State v. Rigby, 2016 UT App 42
Before Judges Roth, Oreme, and Senior Judge Davis.

Reply Brief of the Appellant Zachary Rigby

Defendant is not presently incarcerated

This is not an Anders Brief

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CLARIFICATION

I. Clarification regarding District Court's Order Denying Motion to Suppress.

The State has noted in its brief, that two orders were signed by the court in this matter. Res.Brf. 8. The first order, submitted November 8, 2013, and signed December 23rd 2013, and The second order submitted November 26th, 2013, and signed December 5th, 2013. The correct order as agreed between both parties is the second order submitted November 26th. and Signed December 5th 2013. see Addendum 1. The Court ordered the First order to be stricken, the notes by the court clerk in the minutes struck the first order signed instead of the first order submitted. R-90. As it relates to the State's "independent grounds" argument the language in both orders is the same. Thus, the Court of Appeals and this Court should continue to rely on the order signed December 5th. This order is found in the Record on page 78, and reproduced here as Addendum 2.

ARGUMENT

I. Removal of an unnecessary exception does not change the rule of law.

At its core this case is about a rule or law. Out of necessity there exist exceptions to this rule. The question in this case is what to do when the necessity for those exceptions no longer exists. The State argues that this court should change its interpretation of the law in order to maintain the exception and system of behaviors that have grown out of it. However, Mr. Rigby requests this Court acknowledge that when the justification for an exception is gone, so is the exception and the rule remains.

Utah Citizens have a right to be free from "unreasonable searches and Seizures". UT Const. Art. I, § 14. This law leads to the rule that a "warrantless search [is] per se

unreasonable." *State v. Larocco* 794 P.2d 460, 470(Utah 1990). Due to the exigent circumstances involved in obtaining a warrant to search a mobile vehicle or vessel, exceptions have been made to this rule. see Res.Brf 31 - 36. All of the exceptions listed in Respondent's Brief are based on the fact that mobile vehicles and vessels could leave the jurisdiction if an officer was required to obtain a warrant. The Courts had to balance the rule requiring warrants with officers ability to do their job. Thus they created exceptions to the rule based on the exigent circumstances. Such exigent circumstances have been greatly reduced as technology allows officers to have real time communication with a judge while remaining with the vehicle or vessel. Thus the circumstances that justified a blanket exception to the rule are gone and we are left again with the rule that a warrantless search is per se unreasonable.

II. Federal Court's reducing Federal protections is not the same as Utah Court's increasing Utah protections, although the results are the same.

While informative, the State's history of the Utah Constitution is unnecessary. The Defendant agrees that the Founders intended UT Const. Art. I, § 14, to provide the same protection as the Fourth Amendment of the Federal Constitution. It is the Defendant's stated position that until the *Labron* case in 1996 these protections and the rules around them were the same. *Pennsylvania v. Labron*, 518 U.S. 938(1996). The same position was stated and held by this court in *Anderson*, and *Watts*. *State v. Watts*, 750 P.2d 1219 at 1221(Utah 1988). *State v. Anderson*, 910 p.2d 1229 (Utah 1996). The Defendant is not asking this Court to increase the protection afforded by the Utah Constitution. The Defendant's position is that the protections afforded by the Utah

Constitution are the same as they always have been, but since the level of protection afforded by the Federal Constitution was reduced and Utah's was not, Utah now provides a greater level of protection. If in the alternative Utah's protections were reduced when the Federal protections were reduced, then UT Const. Art. I, § 14 is would be meaningless. Thus this Court should continue to require warrant's prior to a search unless there are exigent circumstances to justify the search.

III. The Defendant appealed the warrantless search of his vehicle under the Utah Constitution not the exception to it.

The Defendant's motion and appeal were brought under the general rule stated above that a warrantless search is per se unreasonable. The District Court found that "the search was reasonable under the circumstances and such evidence was lawfully obtained under the automobile exception to the warrant requirement" R80. Although the court states two reasons for denying the motion, it is not possible to separate the reasonableness finding from the Automobile exception since the exception is a necessary condition for the reasonableness. Thus these reasons are not independent and the Constitutional Question must still go forward.

The State further argues that the search would be reasonable outside of the Automobile Exception based on the holding in *Arizona v. Gant*. 556 U.S. 332 (2009). The *Gant* case is under the Fourth Amendment not the Utah Constitution. It has been repeatedly stated by Defendant that this search would be lawful under the reduced protections of the Fourth Amendment. Finding another case that leads to the same result is not persuasive. Second the *Gant* holding is limited to the search of a vehicle after an

arrest. Thus the states reliance on the justification under *Gant* would have to be based on a hypothetical set of circumstances where the defendant was arrested prior to the search instead of the actual facts where the search was performed prior to any arrest being made.

R61. As stated by the Respondent, it is not "proper for the Court to opine on issue that are not dispositive" Res.Br7. The search was not made in connection with a drug arrest, the drug arrest was made in connection with the illegal search. Thus there is no independent grounds for the search under *Gant*.

CONCLUSION

The rules and protections granted by UT Const. Art. I, § 14, are the same as they ever have been. The Utah Constitution requires a warrant to justify a search absent exigent circumstances. When the necessity for an exception is gone, the law remains. Therefore Mr. Rigby requests this Court reverse the Court of Appeals, find that the Utah Constitution does exist separate and apart from the Federal Constitution, and that its protections have not been reduced. Mr. Rigby further requests this court find that based on the stipulated facts there is no exception to the rule requiring a warrant to search his car.

DATED: February 6th 2017

The Law Offices of Brandon J. Smith LLC



Brandon J. Smith
Attorney for Appellant

CERTIFICATE OF COMPLIANCE
WITH RULE 24(F)(1)

1. This brief complies with the type-volume limitation of UTAH R. APP. P. 24(f)(1) because according to the word processing program used to prepare this brief (Word 2007), this brief contains 1,285 words, excluding the parts of the brief exempted by UTAH R. APP. P. 24(f)(1)(B).

2. This brief complies with the typeface requirements of UTAH R. APP. P. 27(b) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in a 13-point Times New Roman font.

Dated: February 6th 2017



BRANDON J. SMITH
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 6th 2017, I served two copies of the Brief of Appellant Zachary Rigby, on the following by U.S. Mail, postage prepaid, addressed to the following:

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- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile
- Electronic Notice



Brandon J Smith

Addendum 1

Brandon Smith

From: Tony Baird [tbaird@cacheattorney.org]
Sent: Friday, November 22, 2013 1:31 PM
To: Anne Winn; brandon@dtsattorneys.com
Subject: Re: Order
Attachments: 20131122 Rigby Suppression Order word.doc; _Certification_.htm

Brandon,

See attached.

On Wed, Nov 20, 2013 at 12:27 PM, Tony's Work <tbaird@cacheattorney.org> wrote:
Brandon,

My email address is tbaird@cacheattorney.org. I will look at the hearing again and get back to you.

Tony C Baird
Sent from my iPhone 5

On Nov 20, 2013, at 11:25 AM, Anne Winn <awinn@cacheattorney.org> wrote:

Sorry, I meant Brandon sent it to the wrong address when he sent it to you and I just noticed it.

----- Forwarded message -----

From: **Brandon J Smith** <brandon@dtsattorneys.com>
Date: Thu, Nov 14, 2013 at 10:33 AM
Subject: RE: Order
To: Anne Winn <awinn@cacheattorney.org>, tony.baird@cacheattorney.org

I have a problem with the first full paragraph of page three, my notes indicate that although the judge denied the motion he did not find any exigent circumstances. I can get a copy of the hearing to confirm, or we can just eliminate that paragraph. Please let me know.

Brandon J. Smith

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Addendum 2

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2013 NOV 26 AM 10: 03

IN THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY

STATE OF UTAH

<p>STATE OF UTAH, Plaintiff, vs. ZACHARY RIGBY, Defendant.</p>	<p>ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS Case No. 135100370 Judge Clint S. Judkins</p>
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THIS MATTER comes before the Court on Defendant's Motion to Suppress. Having reviewed said motion with accompanying memorandum, the State's memorandum in opposition, and having conducted a hearing on the matter, the Court finds the following:

Defendant and the State have stipulated to certain facts of the case. On or about March 28, 2013, Defendant was arrested after a search of his vehicle revealed marijuana and drug paraphernalia, including a urine sample that tested positive for THC marijuana. Defendant was initially stopped for a stop sign violation. After contacting the Defendant (driver), the responding officer could immediately detect the odor of both burnt and fresh

marijuana coming from the vehicle. The Officer could also detect other physical indicators of recent marijuana use. A short time later a canine unit arrived and the canine positively indicated on the vehicle. Subsequently, a warrantless search was conducted, wherein drugs and drug paraphernalia were located inside the vehicle.

Defendant concedes that prior to the warrantless search of his vehicle, probable cause existed to believe that Defendant was in possession of controlled substances due to the odor observed by the officer as well as the hit on the car by the canine. Defendant also stipulates that Defendant was lawfully stopped pursuant to a traffic violation. Defendant argues that despite the existence of probable cause, the State has failed to establish that exigency existed to justify the officers in using the automobile exception to the warrant requirement as a means to search the vehicle.

Defendant argues that according to *State v. Larocco*, 794 P.2d 460, (Utah 1990), the State has not met its burden to show that exigent circumstances existed because at the scene of the search there were multiple officers present, the occupants of the vehicle including Defendant were cooperative, and the officers had the technological capability in their police cruisers to quickly obtain a warrant at the scene prior to the search, thereby creating circumstances that were not exigent in nature.

The State however relies on *State v. Anderson*, 910 P.2d 1229, (Utah 1996), wherein the facts are analogous to the present case. In *Anderson* the defendant's vehicle was stopped and probable cause and exigent circumstances existed and the subsequent search was found to be lawful. The Utah Supreme Court "has ruled that exigent circumstances exist when the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained." *Id.* at 1237.

Despite the availability of equipment in the police cruisers at the scene, probable cause existed to search the vehicle as a matter of fact. The officers could smell marijuana, the canine unit hit on the vehicle, which further established probable cause, and because there was probable cause for a valid stop of the vehicle and taken with the other indications of illegal activity, there was probable cause for an arrest. Therefore, the search of the vehicle was reasonable under the circumstances regardless of whether exigent circumstances existed.

This Court also finds that as probable cause existed to question and search the Defendant for illegal drugs, the vehicle is a natural extension of the person of the Defendant. This Court also finds that although the arresting officer had the technological means to attempt to obtain a warrant prior to the search of the vehicle, this Court will not burden officers with using their mobile technology just because it exists in their vehicles. This Court further finds that under the totality of the circumstances and in balancing the interests of the State and the Defendant's privacy, the search of the vehicle in this matter was reasonable and was therefore lawful and valid.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

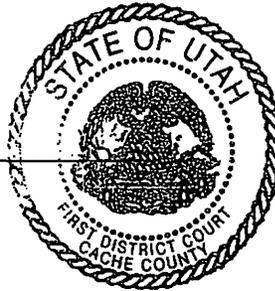
Defendant's motion to suppress is denied as to the evidence obtained by law enforcement officers during the warrantless search of defendant's vehicle, as the search was reasonable under the circumstances and such evidence was lawfully obtained under the automobile exception to the warrant requirement.

DATED this 5 day of DEC., 2013

BY THE COURT



Honorable
District Court Judge



CERTIFICATE OF DELIVERY

I hereby certify that I electronically sent a true and correct copy of the foregoing
Order to Brandon J. Smith, attorney for the Defendant, to his email address of:
brandon@dtsattorneys.com.

DATED this 22nd day of Nov, 2013.



Legal Assistant