

2001

# Utah v. Damon and Misty Comer : Brief of Appellant

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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STATE OF UTAH

)

Plaintiff/Appellee

)

DAMON AND MISTY COMER

)

Case No. 20010323

Defendant/Appellant

)

Priority # 2

)

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**APPELLANTS' BRIEF**

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**Appeal from the First Judicial District Court, Box Elder County  
Honorable Ben H. Hadfield**

---

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**Request for Oral Argument**

**FILED**  
Utah Court of Appeals

**JUL 30 2001**

**Paulette Sugg  
Clerk of the Court**

**IN THE UTAH COURT OF APPEALS**

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STATE OF UTAH	)	
Plaintiff/Appellee	)	
	)	
DAMON AND MISTY COMER	)	Case No. 20010323
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Request for Oral Argument

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# **APPELLANT BRIEF**

## **JURISDICTION AND NATURE OF PROCEEDING**

This appeal is from the decision of the Honorable Judge Ben H. Hadfield denying Appellant's Motion to Suppress.

Jurisdiction to hear the above-entitled appeal is conferred upon the Utah Court of Appeals pursuant to Utah Code Annotated 78-2a-3(2)(c) (1953 as amended).

## **STATEMENT OF ISSUES ON APPEAL AND STANDARD OF REVIEW**

**POINT II** The Trial Court erred in not allowing Appellants' to use the video tape of the preliminary hearing to cross-examine the Officers at the suppression hearing.

### **Standard of Review**

[W]e review legal determinations for correctness.

852 P.2d 977, Hansen v. Heath, (Utah 1993)  
----- Excerpt from page 852 P.2d 979

**POINT I** The Officers did not have probable cause to enter Appellants' residence.

### **Standard of Review**

[W]e review legal determinations for correctness.

852 P.2d 977, Hansen v. Heath, (Utah 1993)  
----- Excerpt from page 852 P.2d 979

## **CONSTITUTIONAL PROVISIONS, STATUTES AND RULES**

**U. S. CONSTITUTION AMEND. XIV Section 1:** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

**UTAH CONSTITUTION ART. I Section 7:** No person shall be deprived of life, liberty, or property, without due process of law.

## **STATEMENT OF THE CASE WITH CITATION TO THE RECORD**

Appellants Damon and Misty Comer were charged with Possession of a Controlled Substance, a second degree felony on or about July 18, 2000. **R. 1**

A Motion to Suppress was filed by Appellants on December 12, 2001 by appointed counsel Justin C. Bond. **R. 49.** A response to the Motion to Suppress was filed by the State of Utah on December 20, 2001. **R. 53.** A hearing was held on January 16, 2001 on the Motion to Suppress. After hearing testimony and arguments, the Court denied Appellants' Motion to Dismiss. **R. 83.**

Appellant Misty Comer entered a guilty plea to Possession of a Controlled Substance, a second degree felony. Appellant preserved her right to appeal the suppression issue pursuant to plea negotiations with the State of Utah. **R. 106.** Appellant Misty Comer was sentenced on March 27, 2001.

Appellant Damon Comer entered into plea in abeyance agreement with the State of Utah. Pursuant to negotiations, Appellant Damon Comer preserved his right to appeal the suppression issue. **R. 103.** In the minutes of the sentencing hearing on March 27, 2001, the Court



specifically stated Appellant Damon Comer reserves his right to appeal on the search issue. **R. 103.** Further, in the Judgment and Order on Plea Held in Abeyance, Appellant Damon Comer preserved his right to appeal the search issue.

A notice of appeal was filed on March 28, 2001.

On January 16, 2001 a hearing was held on the motion to suppress filed by Appellants.

Officer Dickey testified for the State of Utah. On July 5, 2001 Officer Dickey responded to Appellants' residence on report of a family fight in progress. Officer Gerfen and Detective Vincent also arrived on the scene. Officer Dickey knocked on the front door of the residence. Appellant Misty Comer answered the door wearing only a light sleeping shirt. Officer Dickey stated Appellant opened the door less than one foot. Officer Dickey stated why he was there and asked Appellant Misty Comer if there was anyone else in the residence. Appellant Comer stated her husband was there and immediately turned and walked back into the residence.

Officer Dickey then stated he followed Appellant Misty Comer into the residence. Appellant Comer put her head inside of the doorway of the back bedroom and told Appellant Damon Comer the police were there. Appellant Comer exited the bedroom and closed the door behind him. **R. 125 P 4-6.**

Officer Dickey stated there was no evidence of a fight in the residence. **R. 125 P 6.**

Officer Dickey testified it appeared to him that when Appellant Misty Comer opened the door she was either concealing something or trying to prevent the officers from seeing inside. **R. 125 P 7.**

Officer Dickey testified he briefly scanned the room when he entered the residence. Counsel requested to show the video tape of the preliminary hearing as it evidenced Officer

Dickey's testimony was inconsistent with earlier testimony. **R. 125 P 9.**

Officer Dickey was asked when he first questioned Appellant Misty Comer if there was any evidence she might be armed. Officer Dickey stated he did not recall. **R. 125 P 11.**

Officer Dickey stated when Appellant answered the door, there was no sign she had been through a struggle. **R 125. 19.**

Officer Dickey stated that at the time Ms. Comer answered the door, he did not know one way or the other whether there was an emergency that he needed to react to inside the house. **R. 125. P. 20.** Officer Dickey further stated that there is not an emergency every time a family fight is reported. **R . 125 P. 20.**

Detective Vincent testified for the State of Utah. Detective Vincent stated he was with Officer Dickey when they went to Appellants' door. Detective Vincent stated Ms. Comer came out of the house onto the porch area. **R. 125 P. 22.** This is in direct contradiction to statements made by Officer Dickey.

Detective Vincent stated they asked Appellant Misty Comer if there was anyone else inside the residence. Ms. Comer stated her husband was inside the house. Both Officer Dickey and Detective Vincent followed Ms. Comer inside the residence. **R. 125. P. 22.** Detective Vincent stated there was no signs of a struggle at any time during the questioning of Ms. Comer.

Detective Vincent stated dispatch did not give any details about the family fight. **R. 125. P. 25.**

Detective Vincent testified a lot of times reports of a family fight turn out to be a mere argument. **R. 125 P. 25.**

Detective Vincent testified there was never a life threatening situation in this matter from

the time dispatch called to the time the investigation was finished. **R. 125 P. 26.**

Detective Vincent testified that at the beginning of this investigation, there was never any indication there had been a fight at the residence. **R. 125 P. 26**

At the end of the hearing, Appellants' counsel stated there was also an issue about the Officers proceeding into the house and back to the back bedroom. **R. 125 P 33.**

At the end of the hearing, Counsel for Appellant stated that Appellants wished to show the video tape of the preliminary hearing to verify Officer Dickey had made two inconsistent statements at the hearing to suppress. The Court declined to hear this evidence and stated that was not the critical issue. **R. 125 P. 31-32.**

### **ARGUMENTS**

**ISSUE 1: The Trial Court erred in not allowing Appellants' to use the video tape of the preliminary hearing to cross-examine the Officers at the suppression hearing.**

Officer Dickey testified he briefly scanned the room when he entered the residence. Counsel requested to show the video tape of the preliminary hearing as it evidenced Officer Dickey's testimony was inconsistent with earlier testimony. **R. 125 P 9.**

At the end of the hearing, Counsel for Appellant stated that Appellants wished to show the video tape of the preliminary hearing to verify Officer Dickey had made two inconsistent statements at the hearing to suppress. The Court declined to hear this evidence and stated that was not the critical issue. **R. 125 P. 31-32.**

Although not a major point in the present appeal, Appellants argue the Court did not

afford a fair hearing on the motion to suppress by not allowing Appellants to use the video tape of the preliminary hearing to cross-examine the witness. Appellants attempted to show the Officer Dickey's testimony was inconsistent from his testimony at the preliminary hearing.

Credibility is always an issue during testimony of witnesses. In essence, the only evidence the trial court has is the testimony of witnesses. If there is evidence a witness is testifying inconsistently, it may call into question the witnesses' entire testimony. The trial court should have allowed Appellants to present evidence to challenge the veracity of the witnesses statements.

Furthermore. Detective Vincent stated Appellant Misty Comer exited the residence and stood on the front porch. **R. 125 P. 22.** Officer Dickey testified Appellant Misty Comer did not exit the residence but merely opened the door 12 inches and peeked outside. R. 125 P. 7

Even the testimony from the two State witnesses was inconsistent. Appellants should have been allowed to explore this matter further.

**ISSUE 2: The Officers did not have probable cause to enter Appellants' residence.**

Appellant asserts a warrantless search of their residence violated both the Fourth Amendment to the United States Constitution and Article I Section 14 of the Utah Constitution.

In City of Orem v. Henrie, 868 P.2d 1384 (Utah App. 1994) this Court held

Under the Fourth Amendment, we employ a strong preference in favor of warrants, particularly when a person's residence is involved. Indeed, " 'physical entry of the home is the chief evil against which the ... Fourth Amendment is directed.' " > Welsh v. Wisconsin, 466 U.S. 740, 748, 104 S.Ct. 2091, 2097, 80 L.Ed.2d 732 (1984) (quoting > United States v. United States District Court, 407 U.S. 297, 313, 92 S.Ct. 2125, 2134, 32 L.Ed.2d 752 (1972)). As such, "searches and seizures inside a home without a warrant are presumptively unreasonable." >

Id. 466 U.S. at 749, 104 S.Ct. at 2097 (citing > Payton v. New York, 445 U.S. 573, 587, 100 S.Ct. 1371, 1380, 63 L.Ed.2d 639 (1980)); accord > State v. Christensen, 676 P.2d 408, 411 (Utah 1984); > State v. Beavers, 859 P.2d 9, 13 (Utah App.1993).

However, the presumption against warrantless searches is not without its exceptions which are " 'jealously and carefully drawn.' " > State v. Ashe, 745 P.2d 1255, 1258 (Utah 1987) (quoting > Jones v. United States, 357 U.S. 493, 499, 78 S.Ct. 1253, 1257, 2 L.Ed.2d 1514 (1958)). Where probable cause and exigent circumstances are proven, a warrantless search of a home is permissible. > Id. 745 P.2d at 1258-59. In the instant case, the City bears the burden of showing both probable cause and exigent circumstances, and "because entry into a home [is] involved, that burden is particularly heavy." > State v. Ramirez, 814 P.2d 1131, 1133 (Utah App.1991).

868 P.2d 1384, City of Orem v. Henrie, (Utah App. 1994)  
----- Excerpt from pages 868 P.2d 1387-868 P.2d 1388

The Trial Court, in essence ruled the requirements for the emergency circumstances doctrine have been met based on the following:

a. Misty Comer made a somewhat sudden and unexplained retreat into the house, in other words without saying why. Under those circumstances it is reasonable that the officers followed her into the house. Now, had she stayed out on the porch you have an entirely different set of circumstances.

b. The basis for the emergency was not only the call, but her behavior at the time and they followed her. There doesn't appear to be any evidence that following her they said, oh, let's follow her in, maybe we can find drugs. . . . There does seem to be a reasonable basis that the emergency is associated with the area they searched. **R. 125 P. 40.**

The Court is incorrect in the conclusion about the emergency circumstance doctrine and has stretched that doctrine unreasonably beyond its scope to fit these facts.

In Salt Lake City v. Davidson, 994 P.2d 1283 (Utah App 2000) this Court held

Under the Fourth Amendment to the United States Constitution, searches conducted without warrants " 'are per se unreasonable ... subject only to a few specifically established and well-delineated exceptions.' " > State v. Ashe, 745

P.2d 1255, 1258 (Utah 1987) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967)). > (FN4) One such exception to the warrant requirement recognized by both the United States Supreme Court and Utah's appellate courts is exigent circumstances. See > *Mincey v. Arizona*, 437 U.S. 385, 390, 98 S.Ct. 2408, 2413, 57 L.Ed.2d 290 (1978); > *State v. Genovesi*, 909 P.2d 916, 921 (Utah Ct.App.1995).

> [6] ¶ 10 The emergency aid doctrine, sometimes referred to as the medical emergency doctrine, is a variant of the exigent circumstances doctrine. See Tracy A. Bateman, Annotation, > Lawfulness of Search of Person or Personal Effects under Medical Emergency Exception to Warrant Requirement, 11 A.L.R. 5th 52, § 2[a] (1993). Bateman describes the emergency aid doctrine as follows:

The medical emergency exception will support a warrantless search of a person or personal effects when [a] person is found in an unconscious or semiconscious condition and the purpose of the search is to discover evidence of identification and other information that might enhance the prospect of administering appropriate medical assistance, and the rationale is that the need to protect life or avoid serious injury to another is paramount to the rights of privacy....

Id. Several courts have also applied the emergency aid doctrine when a person is missing and feared to be injured or dead. See, e.g., > *People v. Mitchell*, 39 N.Y.2d 173, 383 N.Y.S.2d 246, 347 N.E.2d 607 (1976). Whether an emergency exists is fact intensive and the state has the burden "to prove that the exigencies of the situation make the course imperative." Annotation, > 11 A.L.R. 5th, § 2[a] at 60.

The emergency aid doctrine has not been specifically adopted or applied by a majority opinion of either of Utah's appellate courts, but was endorsed in a concurring opinion in > *State v. Yoder*, 935 P.2d 534, 550 (Utah Ct.App.1997) (Greenwood, J., concurring in result). However, in > *Provo City v. Warden*, 844 P.2d 360, 364 (Utah Ct.App.1992), this court approved the closely related community caretaker doctrine under which a seizure does not violate the Fourth Amendment if certain criteria are satisfied. > (FN5) In that case, a police stop of an automobile was declared lawful because the officer reasonably believed the motorist was contemplating suicide. See > id. at 364-66. > (FN6) The community caretaker doctrine and the emergency aid doctrine are based on similar rationales, as noted by the Kansas Court of Appeals, which, in endorsing the emergency aid doctrine, stated that the doctrine "reflects a recognition that the police perform a community caretaking function which goes beyond fighting crime." > *State v. Jones*, 24 Kan.App.2d 405, 947 P.2d 1030, 1034 (1997).

In > *Yoder*, the concurring opinion advocated adopting a test for application of the

emergency aid doctrine similar to that set forth in > Mitchell, 383 N.Y.S.2d 246, 347 N.E.2d at 609. Pursuant to that test, a warrantless search is lawful under the emergency aid doctrine if the following requirements are met:

- (1) Police have an objectively reasonable basis to believe that an emergency exists and believe there is an immediate need for their assistance for the protection of life.
- (2) The search is not primarily motivated by intent to arrest and seize evidence.
- (3) There is some reasonable basis to associate the emergency with the area or place to be searched. That is, there must be a connection with the area to be searched and the emergency.

Yoder, 935 P.2d at 550 (Greenwood, J., concurring in result). The > Mitchell three-prong test has been followed by "[s]everal states, including Alaska, Arizona, Illinois, Nebraska, and North Dakota ... and it is often cited with approval by legal commentators." > Jones, 947 P.2d at 1037; see also > State v. Cheers, 79 Ohio App.3d 322, 607 N.E.2d 115, 117-18 (1992) (approving emergency doctrine but stating search illegal because no reasonable basis to believe emergency situation existed). . .

Because this reasonable basis must approximate probable cause and is used to justify abrogation of Fourth Amendment rights, emergency aid searches should be "strictly circumscribed by [circumstances] which justify its initiation." > Mincey v. Arizona, 437 U.S. at 393, 98 S.Ct. at 2413 (quoting > Terry v. Ohio, 392 U.S. 1, 25-26, 88 S.Ct. 1868, 1882, 20 L.Ed.2d 889 (1968)).

994 P.2d 1283, Salt Lake City v. Davidson, (Utah App. 2000)  
----- Excerpt from page 994 P.2d 1287

In the present action, the Trial Court ruled that coupled with the dispatch call of a reported family fight and the fact Appellant Misty Comer made a hasty retreat into the residence, the requirements of the emergency doctrine circumstances have been met.

First, the nature of the call should not even be taken into account. The testimony of both Officer Dickey and Detective Vincent verified there was no information about what the family

fight call entailed. The State's witnesses had no information about any situation other than there was a report of a family fight. This certainly cannot be the basis for reasonable suspicion. The policy reasons behind this are clear and apparently overlooked by the trial court. Basically, anyone could make a call about anything. According to the trial court, the officers then, without any other information other than the call itself, would be an automatic basis for reasonable suspicion.

Perhaps, if the facts had been different in this case, such as the dispatch reported indicated there were gunshots fired and a person made be injured, there may be a basis for reasonable suspicion. However, there is nothing in these facts to indicate there was any emergency at all. There was merely a call of a family fight. Both the State's witnesses testified there are times when family fight calls are merely arguments.

Second, Appellant Misty Comer's "hasty retreat" into the residence does not support reasonable suspicion either.

In State v. Wells, 928 P.2d 386 (Utah App. 1996) this Court held

In > State v. Beavers, 859 P.2d 9 (Utah App.1993), this court concluded "[t]he existence of exigent circumstances must be based on the reasonable belief of the police officer." > Id. at 18. The mere possibility that a suspect may have a weapon, > id. at 19, or that evidence might be destroyed, > Palmer, 803 P.2d at 1253, is insufficient. See also > United States v. Tarazon, 989 F.2d 1045, 1049 (9th Cir.1993) (stating police must have "reasonable belief" that exigent circumstances exist); > United States v. Roark, 36 F.3d 14, 17 (6th Cir.1994) (rejecting exigent circumstances claim based solely on "unsubstantiated suspicions" of police officer who feared removal of marijuana).

928 P.2d 386, State v. Wells, (Utah App. 1996)  
----- Excerpt from page 928 P.2d 389



The same is true in the present situation. The mere possibility there may be an emergency is insufficient. In the present action, that is exactly what the trial court held. This is insufficient to support reasonable suspicion.

In State v. Genovesi, 909 P.2d 916 (Utah App. 1995) this Court cited related cases of the emergency circumstances doctrine.

See also > State v. Geisler, 222 Conn. 672, 610 A.2d 1225, 1237 (1992) (even if police entry to give emergency aid was lawful, "once they ascertained that [occupant] was physically well they should have withdrawn"); > State v. Miller, 300 Or. 203, 709 P.2d 225, 244 (1985) (while initial warrantless entry based on emergency was lawful, "[a]fter the officer entered the room and found the victim dead, ... the emergency situation ceased"), cert. denied, > 475 U.S. 1141, 106 S.Ct. 1793, 90 L.Ed.2d 339 (1986); > State v. Beaumier, 480 A.2d 1367, 1373-74 (R.I.1984) (police could not remain on premises and investigate without warrant after injured party was arrested and removed from premises). Defendant contends the home could have been secured so that evidence would not be lost or destroyed while the police sought a search warrant from a magistrate.

909 P.2d 916, State v. Genovesi, (Utah App. 1995)  
----- Excerpt from page 909 P.2d 921

In the present action, the State witnesses verified there was no emergency after they entered the residence. The trial court ruled there was a basis for the arrest after the officers entered the residence. The trial court does not specifically rule that there permitted the officers to search the remainder of the residence; however, it can be inferred from the trial court's statements that the trial court attempted to respond to the ruling in State v. Genovesi. (which was quoted in Appellant's motion to suppress) ‘

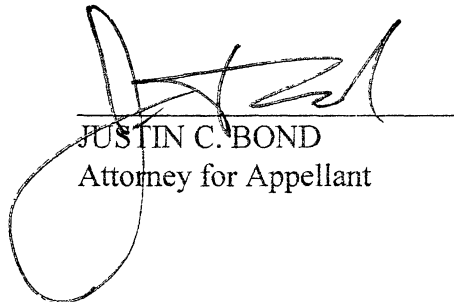
Basically, when the officers discovered there was no emergency circumstances, they should have withdrawn and got a warrant.

## CONCLUSION

Based on the above arguments, the trial court erred in denying Appellants' motion to suppress. Emergency circumstances did not exist which would allow a warrantless entry into Appellants' residence.

Respectfully submitted this 12 day of July, 2001.

Request for Oral Argument



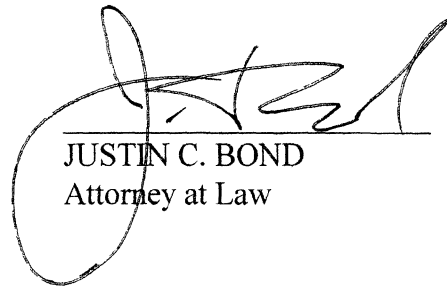
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## CERTIFICATE OF MAILING

I hereby certify I mailed a two true and correct copy of Appellant's Brief to the following:

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