2001

# The State of Utah v. Gerald Doug Fridleifson : Brief of Appellant

Utah Court of Appeals


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IN THE UTAH COURT OF APPEALS

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| THE STATE OF UTAH, | : | |
| Plaintiff/Appellee, | : | |
| v. | : | |
| GERALD DOUG FRIDLEIFSON, | : | Case No. 20010392-CA |
| Defendant/Appellant. | : | Priority No. 2 |

# BRIEF OF APPELLANT

Appeal from a judgment of conviction for illegal possession of a controlled substance, a third degree felony offense in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (1998), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Timothy R. Hanson, Judge, presiding.

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## JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2a-3(2)(e) (1996), whereby the defendant in a district court criminal action may take an appeal to the Court of Appeals from a final order for anything other than a first degree or capital felony. Appellant Gerald Fridleifson was convicted of unlawful possession of a controlled substance, a third-degree-felony offense in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (1998). A copy of the judgment is attached as Addendum A.

## STATEMENT OF THE ISSUE AND STANDARD OF REVIEW

The issue presented for review is as follows: Whether the trial court erred in denying Fridleifson's motion to suppress evidence, where officers engaged in a level two seizure without reasonable articulable suspicion.

Standard of Review: The applicable standard is bifurcated. "The factual findings of a trial court that underlie its decision to grant or deny a motion to suppress will not be disturbed on appeal unless clearly erroneous." State v. Davis, 821 P.2d 9, 11 (Utah Ct.

App. 1991); Salt Lake City v. Ray, 2000 UT App 55, ¶8, 998 P.2d 274. The trial court's legal conclusions are reviewed for correctness, where "the appellate court decides the matter for itself and does not defer in any degree to the trial judge's determination of law." State v. Pena, 869 P.2d 932, 936 (Utah 1994), abrogated in part by Campbell v. State Farm Mut. Auto Ins., Co., 2001 UT 89, ¶13, 432 Utah Adv. Rep. 44.

## PRESERVATION OF ARGUMENT

Fridleifson's request for suppression of the evidence was preserved in the record ("R.") at 17-19, 26-48,197, and the trial court ruled on the matter at R. 49-55 and 65-67.

## RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

The following provisions will be determinative of the issue on appeal: U.S. Constitution, amend. IV; Utah Code Ann. § 77-7-15 (1999). The text of those provisions is contained in Addendum B.

## STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings, Disposition in the Court Below.

On February 12, 1999, the state charged Fridleifson with unlawful possession of a controlled substance, a third-degree-felony offense. (R. 2-3.) On May 5, 1999, Fridleifson filed a motion to suppress evidence obtained during an unlawful detention. (R. 17-18.) On May 17, 1999, the trial court conducted a hearing on the motion, wherein the state called Matt Larson to testify, and the defense called Fridleifson. (R. 20-21, 197.)

On July 21, 1999, the trial court issued a written memorandum decision in the

matter, denying the motion to suppress (a copy of which is attached hereto as Addendum C), and on August 19, the court entered Findings of Fact and Conclusions of Law (a copy of the Findings and Conclusions is attached hereto as Addendum D).[1]

On January 11, 2000, a two-day jury trial commenced in the matter. (R. 102-03, 125-27.) At the conclusion of trial, the jury found Fridleifson guilty as charged (R. 150), and on April 13, 2001, the trial judge sentenced Fridleifson to an indeterminate prison term not to exceed five years. The trial judge suspended the prison term and ordered Fridleifson to serve a jail sentence and 6 months probation. (See Addendum A, hereto.)

## STATEMENT OF FACTS

On May 17, 1999, a motion to suppress hearing was held in the above-entitled case. During the hearing, the state presented the following evidence.

On January 11, 1999, Officers Matt Larson and James Washington were in the area of 342 South Post Street, Salt Lake, on the suspicion that an apartment at that address was a "drug house." (R. 197:4-5.) Larson and Washington kept surveillance on the apartment from an alley. (R. 197:5.)

According to Larson, he had prior dealings with the suspect residence. In the months preceding the events in this case, he made three to five arrests of persons coming out of the house. (R. 197:5-6, 10.) Larson could not say whether each of the arrested

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1 On July 30, 1999, the defense filed a motion to reconsider. (R. 58-60.) The trial court denied that motion and ruled that the Findings of Fact and Conclusions of Law would "continue to stand in this matter in relation to the Motion to Suppress." (R. 74-75.)

persons bought drugs at the apartment, "but some [] of them did." (R. 197:13.) Larson also disclosed that at some point, he attempted to secure a warrant for the residence, but was unsuccessful (R. 197:13), and the occupants eventually moved out. (R. 197:14.)

On January 11, 1999, Larson and Washington were "monitoring the short[] stay traffic" at the Post Street residence. (R. 197:6.) They observed four people go in or out of the house, and the persons stayed around "five minutes, usually less." (R. 197:6.)

At approximately 2:00 or 3:00 in the afternoon, the officers arrested a person who had been inside the apartment. During the arrest, the officers observed Fridleifson in the area. The officers told Fridleifson they "were investigating drug activity there and that if he was there to purchase drugs now would be probably a good time for him to leave." Officer Larson believed Fridleifson said "thank you," and he left. (R. 197:7-8.)

Later that night, the officers saw Fridleifson again in the area. It was dark and they were watching the residence from a nearby alley. (R. 197:8.) The officers watched Fridleifson walk down the stairwell, but they could not see from their position whether Fridleifson made contact with anyone at the apartment or even went inside.

According to Larson, Fridleifson "came back out" from the stairwell "less than five minutes later." (R. 197:8, 26.) Larson testified that Fridleifson was not breaking any laws. (R. 197:26.) As Fridleifson walked toward his truck, the officers began to approach him. Larson could not say whether Fridleifson knew that the officers were there. (R. 197:27.)

When Fridleifson got to the truck, he began to walk around to the driver's side. At that point, as he continued to make his way around the truck, Washington stated, "we need to talk to you, can we talk to you?" (R. 197:50-52; 197:8; 197:28-33; 197:37-38 (when Fridleifson got to the truck, he turned to approach the driver's side door; the officers also continued to approach and they called out to Fridleifson, while Fridleifson was walking toward the officers and around the truck).)[2]

Although the officers "want[ed] to be identifiable [to Fridleifson at that point] as police officers," (R. 197:39), Larson testified that they did not identify themselves as such in the dark. (R. 197:28-33.) Also, according to Larson, Fridleifson was in a position to acknowledge the officers, yet he did not turn around or look at them. (R. 197:27; 197:33-34; 197:37-38; 197:41-43.)

Indeed, Fridleifson did not "do anything" when the officers spoke to him. (R. 197:53.) He simply "continued to walk" toward the truck. (R. 197:54.) When the prosecutor asked Larson whether Fridleifson "increased his pace," Larson testified that he did not recall "anything like that." (R. 197:54.) When the prosecutor asked that question a second time, Larson testified that Fridleifson "*might* have gone *a little bit faster*, but no,

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2 Larson initially testified that the officers said, "Police, we need to talk to you, or something to that effect. That's not an exact quote, but something like police, stop or police we need to talk to you." (R. 197:8; see also 197:28.) Thereafter, Larson corrected himself. He testified that the officers specifically did not identify themselves. They did not use the word "police" or anything of that nature as they approached Fridleifson. (R. 197:28-33.) Larson ultimately testified that the officers used permissive language to initiate the contact, where Washington said, "[C]an we talk to you." (R. 197:50-51.)

he wasn't running." Larson did not indicate any relevant change in Fridleifson's manner as he continued to the truck. (R. 197:54 (emphasis added).)

In fact, Fridleifson did not run, he did not "appear to be startled," he did not "jump," and he did not act nervous. (R. 197:54.) Fridleifson simply continued to walk toward the truck. (R. 197:34-35; see also 197:44; 197:53-54.)

Larson testified that because Fridleifson did not stop, the *officers* "approached at a faster pace" (R. 197:8, 54, 60). Larson grabbed Fridleifson (R. 197:8; 197:34; 197:44; 197:54, 60), pushed him face-down against the truck, and said "Police, don't move." (See R. 197:44; 197:60.) As Fridleifson was being forced against the truck, he began to thrash his elbows (R. 197:44), and he threw an object that officers later found in the dirt and identified as a cocaine twist. (R. 197:8-9 (during the struggle Fridleifson threw a white object); 197:44-46; 197:59-60 (Larson pushed Fridleifson against the truck; Fridleifson began to thrash and threw an object).)

Officer Larson punched Fridleifson in the mouth, placed handcuffs on him, and put him face-down on the ground. (R. 197:44-45; 197:47.) The officers also secured a passenger in Fridleifson's truck. (R. 197:47-48.)[3]

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3 During the motion to suppress hearing, references were made to a preliminary hearing transcript that was prepared by the legal defenders office. (See e.g. R. 197:1-2; 197:50.) There is no indication in the record that the judge relied on that transcript in ruling on the motion to suppress. (See record in general.) Nevertheless, Fridleifson asked this Court to supplement the record with the transcript in order that the state may be able to review it in connection with this appeal. Pursuant to the stipulated request for supplementation and this Court's order, the transcript is contained in the record at 199.

After Larson testified, Fridleifson took the witness stand. He denied throwing anything. (R. 197:63.) Fridleifson stated that he worked on a car for a friend and went to the Post Street apartment to collect the money for his work. (R. 197:64.) The first time Fridleifson arrived at the apartment, the officers told him that if he was there to buy drugs he should leave. Fridleifson told the officers he was there to collect money for a job, and he left. (R. 197:67-68.) Later that night, after Fridleifson went back to the apartment and was returning to his truck, he heard someone call out, but he was not paying attention to the person and did not know who it was. (R. 197:69.) The officers grabbed Fridleifson, punched him, handcuffed him, and arrested him. (R. 197:44-47.)

After the evidentiary hearing, the trial judge denied the motion to suppress. The case went to trial and the jury convicted Fridleifson of drug possession as charged. (R. 150.) Additional facts relating to the issue on appeal are set forth below.

## SUMMARY OF THE ARGUMENT

An officer may detain or seize a person for limited investigative purposes if the officer is able to articulate a reasonable suspicion that the person has or is engaged in criminal activity. If an officer observes a person in a high crime area, that is not enough by itself to support reasonable suspicion.

In this case, Officers Larson and Washington observed Fridleifson on the afternoon of January 11, 1999, near an apartment where they were arresting a suspect, who had just visited the apartment. The officers suspected that individuals at the

apartment were selling drugs. They referred to the apartment as a "known drug house." The officers told Fridleifson that if he was there to buy drugs, now would be a good time to leave. Fridleifson thanked the officers and left.

Hours later, Fridleifson returned to the area and walked down the stairwell leading to the apartment. The officers were unable to see Fridleifson. They could not see whether he spoke with anyone at the apartment or whether he went inside. After Fridleifson came back up the stairwell, the officers asked if they could talk to him. Fridleifson did not respond to the officers. He did not increase his pace, and he did not appear startled or jumpy. He simply continued about his business.

It is unclear from the evidence whether Fridleifson would have been able to identify Larson and Washington in the dark as officers.

As Fridleifson continued to his truck, Larson rushed up to him, grabbed him, and pushed him against his truck. Fridleifson began to trash his elbows, and he threw an object that officers later retrieved and identified as a cocaine twist.

Fridleifson was charged with drug possession. He challenged the seizure in a motion to suppress. The trial court denied the motion. The trial court was in error. The total circumstances in this case fail to support reasonable articulable suspicion. The officers were not justified in detaining Fridleifson. The evidence they discovered in connection with the unlawful detention must be suppressed.

## ARGUMENT

### THE STATE FAILED TO ESTABLISH REASONABLE ARTICULABLE SUSPICION FOR THE LEVEL-TWO DETENTION.

The Fourth Amendment to the United States Constitution provides the following:

> 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.

U.S. Const. amend. IV. In Terry v. Ohio, 392 U.S. 1 (1968), the United States Supreme Court set forth an exception to the "probable cause" standard. Terry and its progeny permit an officer to detain a person for limited questioning if the officer is able to articulate objective facts to support a reasonable suspicion that the person has committed a crime. See Terry, 392 U.S. at 20-22. Such a detention is identified as a level-two encounter, as follows:

> (1) [Under a level-one encounter] an officer may approach a citizen at [any time] and pose questions so long as the citizen is not detained against his will; (2) [***under a level-two encounter] an officer may seize a person if the officer has an "articulable suspicion" that the person has committed or is about to commit a crime; however, the "detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop"***; (3) [and under a level-three encounter] an officer may arrest a suspect if the officer has probable cause to believe an offense has been committed or is being committed.

State v. Deitman, 739 P.2d 616, 617-18 (Utah 1987) (emphasis added) (citing U. S. v. Merritt, 736 F.2d 223, 230 (5th Cir. 1984)); see also Salt Lake City v. Smoot, 921 P.2d 1003, 1006 (Utah Ct. App. 1996) (citing State v. Munsen, 821 P.2d 13, 15 n.1 (Utah Ct.

App. 1991)), cert. denied, 925 P.2d 963 (Utah 1996). The "reasonable suspicion" standard is codified at Utah Code Ann. § 77-7-15 (1999).

The state bears the burden of proving that an officer had reasonable suspicion to justify a level-two encounter. See State v. Christensen, 676 P.2d 408, 411 (Utah 1984). In this case, the trial judge ruled that the state sustained its burden of proof.

As set forth below, the trial court erred in its ruling.

A. THE FINDINGS, THE MARSHALED EVIDENCE, AND THE DETAILED FACTS: THE TRIAL COURT'S FINDINGS IN PART ARE INSUPPORTABLE. IN ADDITION, THE TRIAL COURT DID NOT GIVE PROPER CONSIDERATION TO SPECIFIC AND PARTICULAR FACTS OF RECORD.

In considering search and seizure issues, this Court will not disturb the trial court's findings unless they are clearly erroneous. Davis, 821 P.2d at 11. While the facts will be construed in the light most favorable to the findings, this Court nevertheless will "review the facts in detail." State v. Jackson, 805 P.2d 765, 766 (Utah Ct. App. 1990), cert. denied, 815 P.2d 241 (Utah 1991). Also, "[a] finding not supported by substantial, competent evidence must be rejected." State v. Arroyo, 796 P.2d 684, 687 (Utah 1990). If the evidence does not support a finding, the finding is clearly erroneous. Id.

In this case, the trial court ruled that officers had reasonable articulable suspicion to justify the seizure. (R. 49-55, 65-67.)

Fridleifson challenges the trial court ruling on the basis that the trial court's findings are insupportable in relevant part, the trial court failed to give proper consideration

to specific and particular matters, and the trial court misapplied the law to the facts.

To begin, the marshaled evidence fails to support the trial court's findings in relevant part. Where the findings are insupportable, they must be rejected. Arroyo,796 P.2d at 687. The findings and the marshaled evidence reflected the following:

First, the court found that officers observed Fridleifson "behind an apartment, known to law enforcement as a 'known drug house.'" (R. 65 ¶1.) That finding apparently relates to the officers' first encounter with Fridleifson on January 11, 1999, where they observed him "in the small parking lot behind the house or to the west of the house." (R. 197:7.) The term "drug house" as used in this case and as set forth in the findings was not defined. Apparently, Officer Larson believed individuals were buying drugs from a resident or residents at the house. (See R. 197:6,7.) In the months preceding the incident in this case, Larson was involved in arresting 3 to 5 people who may have purchased drugs from someone at the house. (R. 197:10-13.)

Second, the court found that officers first encountered Fridleifson while they were "arrest[ing] an individual *inside* the apartment for a drug offense." (R. 65, ¶2 (emphasis added).) According to Larson, the officers first encountered Fridleifson while they were involved in arresting a person *outside* the apartment. The officers "believed that [the] individual had [purchased] drugs inside the house." (R. 197:7, 23-25 (arrest was made in the alley after the person left the apartment).) That finding in part is inaccurate.

Third, the trial court found that when officers first encountered Fridleifson in the

area, they told him that if he was there to buy drugs, he should leave. Fridleifson thanked the officers and left. (R. 66, ¶3.)

Fourth, the trial court found that officers later observed Fridleifson again in the area. Fridleifson walked down the stairwell to the apartment. After less than five minutes, Fridleifson walked back up the stairs and toward his truck. (See R. 66, ¶¶4-5.) As Fridleifson proceeded to his truck, the officers asked if they could talk to him.[4] According to the trial court findings, Fridleifson continued to the truck "at a rapid pace." (See id. at ¶¶6-7.) The officers "then stopped the Defendant, who threw an object into the air, which later turned out to be a twist of cocaine." (Id. at ¶8.)

Fridleifson takes issue with the court's characterization of the matter. Specifically, the marshaled evidence fails to support that after officers asked to speak with Fridleifson, he continued to the truck "at a rapid pace." As further discussed below, the record lacks "substantial, competent evidence" (Arroyo, 796 P.2d at 687) to support that finding. See infra pages 14-15, below. Further, the trial court's findings fail to recognize that the officers "stopped" Fridleifson by physically grabbing him and pushing him against the truck. (R. 197:34-35, 44.) Thereafter, Fridleifson began to trash his elbows and he threw an object. (R. 197:44-47.) Those facts are not in dispute.

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4 The trial court found that as the officers approached Fridleifson, they "told him to stop." (R. 66, ¶6.) That finding is inaccurate. Larson testified that the officers used permissive language when they called out to Fridleifson. They said, "can we talk to you." (R. 197:50-51.) When Fridleifson did not respond, Larson rushed up to Fridleifson, grabbed him, and said, "Police, don't move." (R. 197:60.) Those facts are not in dispute.

Next, in a Memorandum Decision, the trial judge made additional representations about the facts. The additional representations are not included in the trial court's formal Findings of Fact and Conclusions of Law. (Compare R. 49-55 with 65-67; see also supra, note 1, herein.) Nevertheless, some of the representations warrant discussion since they are incorrect and they apparently served as a basis for the judge's decision in the case.

In the Memorandum Decision, the judge determined that "defendant was first observed at the house with another individual who was subsequently arrested for drug possession." (R. 53.) That is insupportable. Fridleifson was not "with" any person who was subsequently arrested. (See generally, R. 197.) That representation must be disregarded.

Also, the trial court determined that "when Officer Larson told the defendant to leave if he was there to buy drugs, the defendant responded by thanking the officer and leaving, all indicative that the defendant was indeed there to purchase drugs." (R. 53.) With that assertion, the trial court has drawn a conclusion based on the evidence. The conclusion is incorrect. Fridleifson was *not required* or compelled to explain himself to the officers. See Utah Code Ann. § 77-7-15 (1999) (if the evidence supports reasonable suspicion, an officer may stop a person and demand an explanation of his actions). Thus, the fact that Fridleifson "responded by thanking the officer and leaving" simply supports that he did as directed by the officers. He left in order that they could complete their business as it related to the apartment.

The trial court also determined that "defendant's action of going back to the house

a second time [that day] for only a brief period conformed to the patterns of a drug purchase." (R. 53.) That determination is insupportable. Although Officer Larson testified to the "patterns" of residential drug trafficking (R. 197:4-5), he did not indicate that in his experience and training, a second visit in the same day was indicative of criminal activity in general or a drug purchase in specific, particularly since officers dissuaded Fridleifson from visiting the apartment earlier while they were engaged in law enforcement activities there.

Since Fridleifson was discouraged by officers from going to the apartment earlier that day, it is reasonable that he would return after a period of time had elapsed, so that his visit would not interfere with the officers' activities.

The trial court next determined that "defendant left the drug house [the second time] in a hurried manner and, when police officers called out to him, [he] exhibited nervous behavior and apparently attempted to flee to his truck." (R. 53.) Those representations are insupportable and they disregard the overwhelming evidence of record.

According to Officer Larson, Fridleifson proceeded to his truck in a normal manner. When officers asked to speak with him, Fridleifson did not "do anything." (R. 197:53; see also 197:33, 44, 54.) He did not increase his pace or "anything like that." He did not appear nervous, he did not seem jumpy, and he did not "appear to be startled." (R. 197:53-54.) The evidence overwhelmingly supports that Fridleifson simply continued to his truck without any change in his demeanor.

In the event the trial court's determination regarding "a hurried manner," "nervous behavior" and an "attempt[] to flee" (R. 53) was based on Larson's statement that Fridleifson "*might* have gone *a little bit faster*," when officers called out (R. 197:54), such a determination was improper. Larson's use of the term *"might"* expressed a "lesser degree of possibility," see Webster's New World College Dictionary, 912-13 (4th ed. 1999), while his description of "a little bit faster" reflected an unwillingness to attribute such conduct to Fridleifson. Larson apparently used the equivocal phrase -- "*might* have gone *a little bit faster*" -- deliberately to express doubt or uncertainty, since that testimony was in direct conflict with Larson's earlier, repeated and clear statements that Fridleifson did not react *in any noticeable way* to the officers' request to talk; he simply continued to his truck. (R. 197:33, 44, 53-54.)

In the face of the overwhelming, clear, unequivocal testimony to the contrary, the court's determination that Fridleifson was hurried, nervous, or attempting to flee cannot be sustained. It is not supported by "*substantial, competent* evidence" of record. Arroyo, 796 P.2d at 687 (emphasis added).

Finally, the trial court's findings fail to recognize the following, relevant, uncontested facts: the officers *did not observe* Fridleifson make contact with anyone at the apartment; the officers had no information as to what Fridleifson may have discussed if he did make contact with an apartment resident; and the officers had no information to support that Fridleifson was involved in any way with drugs or drug trafficking. Indeed,

since the officers had no way to link Fridleifson with drugs or any particular activity at the apartment, the officers were acting on a mere hunch.

In sum, the marshaled facts and inferences reflect that officers identified the apartment as a "drug house" because they believed individuals at the house were selling drugs. (R. 65, ¶1; 197:5-6.) The officers first encountered Fridleifson when they were involved in arresting a person near the home. (R. 65, ¶¶1-2; 197:7-8, 23-25.) Officers told Fridleifson that if he was there to buy drugs, he should leave. (R. 66, ¶3.) Fridleifson thanked the officers and left. (Id.)

Later that evening, officers saw Fridleifson again in the area. He walked down the stairwell to the apartment, and after less than five minutes, he walked up and toward his truck. (See R. 66, ¶¶4-5; 197:8.) Officers did not have any information to support that Fridleifson was involved with drugs, they did not see Fridleifson make contact with anyone at the apartment, and they did not observe Fridleifson carry anything. (See R. 197:26.)

As Fridleifson walked to his truck, Larson and Washington asked if they could talk to him. Fridleifson did not respond. He did not increase his pace, he did not act nervous or jumpy, and he did not appear startled. (R. 197:53-54; see also 197:44.)

According to the evidence, at some point en route to the truck, Fridleifson was walking toward Washington and Larson; he may have been in a position to see them. However, there is no evidence to support that he did see them, and no evidence to support

that he necessarily would have known who they were. According to the facts, it was dark, the officers wore jackets that may or may not have said "police" on the front, and Washington and Larson did not identify themselves. (See R. 197: 27-28, 42-43, 57-58.)

Indeed, rather than identify themselves, Larson and Washington rushed up to Fridleifson. Larson grabbed Fridleifson and pushed him face-down against the truck. At that point, Fridleifson began to trash his elbows and he threw something that officers later retrieved and identified as a twist of cocaine. (R. 197:59-60.)

The facts and inferences in this case fail to support reasonable suspicion for the seizure, as further set forth below.

B. IN ORDER TO JUSTIFY A LEVEL-TWO DETENTION, LARSON WAS REQUIRED TO ARTICULATE REASONABLE SUSPICION AS IT RELATED TO FRIDLEIFSON.

Under a level-two encounter, an officer may detain a citizen and ask limited questions if the officer has a "reasonable suspicion, based on objective facts," to support that "the individual is involved in criminal activity." State v. Steward, 806 P.2d 213, 215 (Utah Ct. App. 1991) (quoting State v. Swanigan, 699 P.2d 718, 719 (1985)); see United States v. Place, 462 U.S. 696, 706 (1983); State v. Trujillo, 739 P.2d 85, 88 (Utah Ct. App. 1987); Utah Code Ann. § 77-7-15 (1999) (officer must have reasonable suspicion to stop person in a public place and request name, address and explanation of actions).

> There is no bright line test for what is, or is not, reasonable suspicion. *Id.* Whether the officer had reasonable suspicion depends on the "totality of the circumstances." *Id.* (citations omitted). The "totality of the circumstances"

> analysis must be based upon all the circumstances and must "raise a suspicion that *the particular individual being stopped* is engaged in wrongdoing." *United States v. Cortez,* 449 U.S. 411, 418, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981) (emphasis added). Put differently, the officers must have a "particularized and objective basis for suspecting criminal activity by the particular person detained." *State v. Sery,* 758 P.2d 935, 941 (Utah Ct.App.1988) (citing *Cortez,* 449 U.S. at 417-18, 101 S.Ct. at 694-95).

Steward, 806 P.2d at 215-16; see State v. Sykes, 840 P.2d 825, 827 (Utah Ct. App. 1992).

The "reasonable articulable suspicion" test requires the police officer "to point to 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion.'" State v. Sery, 758 P.2d 935, 940 (Utah Ct. App. 1988) (quoting Terry, 392 U.S. at 21); State v. Lopez, 873 P.2d 1127, 1132 (Utah 1994) (reasonable suspicion must be based on specific, articulable facts from the total circumstances facing the officer at the time of the stop). The officer's subjective belief regarding the matter is irrelevant. Lopez, 873 P.2d at 1136-37 (an officer's state of mind is irrelevant); see State v. Patefield, 927 P.2d 655, 659 (Utah App. 1996); State v. Barnes, 978 P.2d 1131, 1135 (Wash. Ct. App. 1999) (officer's subjective belief is immaterial).

"In the case before us, the trial court and both parties treated the matter as a level two encounter." Steward, 806 P.2d at 215. Where the trial court in this case ruled that Officers Larson and Washington had reasonable suspicion to justify the seizure, its ruling was in conflict with Utah and United States Supreme Court precedent.

In State v. Steward, 806 P.2d 213, the police were executing search warrants for methamphetamine labs and controlled substances on three of six houses in a cul-de-sac

area. Officers found a functional lab and packages of marijuana in one house, chemicals for methamphetamine production in another house, and weapons in all three houses. Id. at 214. Officers were positioned near the entrance to the cul-de-sac to stop vehicles and to determine the destination of the occupants. If an individual indicated that his destination was one of the involved homes, officers detained that individual for further questioning. The officers were dressed in camouflage uniforms with patches and helmets which identified them as police. Id.

During the police investigation of the area, defendant pulled up in a truck. Officers approached the vehicle and ordered him to stop. Defendant stopped and put his vehicle in reverse. An officer opened the driver's side door and again ordered defendant to stop. According to one officer, defendant "looked 'kind of panicky or startled.'" Id. at 214. When officers asked where defendant was going, he responded to visit a friend who lived in one of the suspect houses. Defendant was ordered out of his truck, at which time he was patted down and the truck was searched for weapons. Officers discovered bags of marijuana in an open gym bag in the truck. After defendant was arrested, the officers found more controlled substances and more than $5000 in cash. Id. at 214. The trial judge refused to suppress the evidence, and after a trial, which resulted in a conviction, defendant appealed. Id. at 215.

This Court reversed the trial court's ruling on the motion to suppress. It recognized that under the law, "the mere presence of a person in a neighborhood

frequented by drug users does not give rise to a reasonable suspicion that such person is involved in criminal conduct." Id. at 216 (citing Brown v. Texas, 443 U.S. 47 (1979); State v. Carpena, 714 P.2d 674, 675 (Utah 1986) (per curiam) (a slow moving car with out-of-state plates in a neighborhood where a number of burglaries occurred, without more, may not support reasonable suspicion)). Id. Likewise, an individual's presence in a high-crime area at a late hour will not support a reasonable suspicion that *the individual* is engaged in criminal activity. Id. (citing Trujillo, 739 P.2d 85).

In Steward, this Court was not persuaded that defendant's desire to engage in a late night association with a person in a drug house could support reasonable suspicion that defendant was involved in criminal activity. At the center of the matter was the fact that officers did not "observe[] Steward engage[] in any unlawful or suspicious activity." Id. at 216. That is also at the center of Fridleifson's case.

Here, although Officer Larson identified the residence in question as a "drug house," he did not have a search warrant to support or verify that claim. See Steward, 806 P.2d at 214. In addition, officers did not testify that Fridleifson was nervous, "panicky or startled." Id. In this case, Officer Larson testified that after the officers requested to speak with Fridleifson, he simply continued to his truck. He did not appear started, nervous or jumpy. (R. 197:53-54.)

Fridleifson does not claim that the officers were required to ignore the fact that the residence under surveillance was a "known drug house." Those facts support the officers'

presence in the neighborhood. However, those facts do not support that *Fridleifson* was involved in wrongdoing. In that regard, the officers were entitled only to engage in a level-one encounter and Fridleifson was entitled to ignore the officers' requests and go on about his business. According to the law, the officers interfered with Fridleifson's constitutional rights when they grabbed him and pushed him against the truck.

Next, in State v. Potter, 863 P.2d 40 (Utah Ct. App. 1993), several officers were attempting to obtain a search warrant and conducting surveillance of a trailer home for drug activity, when defendant drove up to and entered the home. Id. at 40-41. The defendant stayed inside the residence for about three minutes, then walked out and drove away. An officer subsequently stopped defendant's truck and recognized defendant as someone he knew. The officer was aware that defendant had been arrested previously on a drug crime and he believed defendant to be dangerous. The officer directed defendant and his passenger out of the car and had them empty their pockets. When defendant produced a weapon, the officer arrested him and searched him incident thereto. The officer discovered controlled substances. Id. at 41. Defendant was charged, and he moved to suppress the evidence discovered during the search on the basis that the officer lacked reasonable suspicion to stop him in the first place.

The trial court granted defendant's motion, and this Court upheld that ruling on appeal. This Court determined that the record failed to support a reasonable suspicion that defendant was involved in criminal activity. Id. at 43.

Again, that is the central issue in Fridleifson's case. The primary difference between the evidence here and the evidence in Potter is that officers observed Potter enter the residence under surveillance, and they ultimately obtained a warrant to search that residence. Those facts do not exist in this case. Prior to the seizure, the officers had no information as to whether Fridleifson entered the residence or made contact with anyone at the apartment. Thus, the evidence in this case must be suppressed.

In State v. Sykes, 840 P.2d 825, an officer was conducting surveillance on a house suspected of drug activity. During the surveillance, "defendant drove up, parked, and entered the house. Approximately three minutes later, defendant returned to her car and drove off." Id. at 826. The officer followed the car, initiated a stop, and conducted a computer check where he discovered several warrants outstanding for the defendant's arrest. The officer asked defendant to accompany him to his car where he questioned her about drug activity. During the questioning, "[d]efendant denied having any knowledge about narcotics trafficking at the home." Id. at 826.

Defendant Sykes was arrested on the outstanding warrants, and the officer searched her car, discovering a white powdery substance in a folded receipt under the front seat. Id. In the trial court, the defendant moved to suppress the evidence. The trial court denied the motion, and this Court reversed the trial court's ruling on appeal.

In reviewing the matter, this Court applied the totality of the circumstances analysis and recognized that "police officers, by virtue of their specialized experience,

can sometimes recognize illegal activity where ordinary citizens would not." Id. at 827 (citing State v. Miller, 740 P.2d 1363, 1366 n.2 (Utah Ct. App), cert. denied, 765 P.2d 1277 (Utah 1987)); see also United States v. Arvizu, 122 S.Ct. 744, 748-49 (2002). Under that analysis, there was no indication in the evidence of any wrongdoing on the part of defendant. Sykes, 840 P.2d at 828.

> At the time of the arrest, ***any connection between defendant and illegal activity was purely speculation.*** The police did not know the identity of either the owner or occupants of the house, and they did not know defendant. At that point, they had no positive evidence linking the house to illegal activity. Further, ***defendant's mere presence in an area suspected to harbor drug activity does not give rise to reasonable suspicion that she was engaged in such activity.*** *Brown v. Texas,* 443 U.S. 47, 52, 99 S.Ct. 2637, 2641, 61 L.Ed.2d 357 (1979). Defendant's single visit does not link her to any drug dealers. She could have as easily been at the house to visit someone who was not there, and so left quickly. In fact, Deputy Stephen's testimony indicates that defendant told him she was looking for her boyfriend.

Sykes, 840 P.2d at 828-29 (footnote omitted) (emphasis added).

In Fridleifson's case, Fridleifson's trial counsel admitted that evidence of a "drug house" presented at the motion to suppress hearing was similar to evidence presented in Sykes. (See R. 197:75 (counsel did not dispute state's evidence of a "drug house"); 33, 44-45 (counsel clarified earlier comments regarding the "drug house," stating that the facts in evidence here were similar to facts in Sykes, 840 P.2d at 828-29, where the court ruled that the officers "had no positive evidence linking the house to illegal activity").) Officers in Sykes and officers here suspected individuals in the residence were selling drugs. Notwithstanding the "drug house" label, the facts here are insufficient to establish

a link between Fridleifson and criminal activity.

Indeed, the facts linking Fridleifson to such activity are more tenuous in this case than they were in Sykes. Larson admitted that he did not see Fridleifson talk to or make contact with anyone at the apartment, he did not see Fridleifson enter the residence, and he did not have information as to what Fridleifson may have discussed with anyone at the apartment. "[H]e could have easily been at the house to visit someone who was not there, and so left quickly." Sykes, 840 P.2d at 829.

Likewise, the officers did not know Fridleifson, they did not observe him carry anything to or from the apartment, and they did not conduct any sort of computer check on Fridleifson's truck to determine if he had connections to drugs, or if the truck was registered to anyone with such connections. The record lacks objective particular facts to support a reasonable suspicion that Fridleifson was involved in wrongdoing. The officers here seized Fridleifson based on a hunch. That was unconstitutional.

In Lemon v. State, 580 So.2d 292 (Fla. Dist. Ct. App. 1991), an officer was patrolling a high crime area at night when he observed defendant driving slowly down the street. Defendant stopped in front of an apartment complex known for drug activity, got out of his car and went inside. Defendant returned to his car a few minutes later and drove away. Id. at 293. The officer followed defendant and initiated a traffic stop when he noticed a broken taillight on defendant's car. During the traffic stop, the officer engaged in a pat-down search and discovered a gun in defendant's jacket. The officer

arrested defendant for a firearms violation, and defendant subsequently moved to suppress the evidence on the basis that "entering a known 'drug hole' is not grounds for a stop." Id. at 293. The trial court denied defendant's motion, and he appealed.

In analyzing the matter, the Florida Court of Appeals ruled that the circumstances in the case did not amount to "reasonable suspicion," but supported only a "bare suspicion of illegal activity." Id. Those facts were insufficient to justify the stop. The remaining analysis in the Florida case is not relevant to this matter, since the court then assessed the "pretextual" nature of the stop and the basis for the search under Florida law.

Next, in Brown v. Texas, 443 U.S. 47 (1979), the United States Supreme Court ruled that officers failed to articulate reasonable suspicion to justify a seizure, when they observed defendant and another man walking away from one another in an alley which had a high incidence of drug trafficking. The officers in Brown did not know what, if anything, transpired between the men. See id. at 49.

The United States Supreme Court ruled the evidence was insufficient to justify the intrusion by the officers, even for the limited purpose of determining why defendant was in the alley. The Court reiterated that in order for a seizure to be lawful, the officers must articulate "reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." Id. at 51. "The flaw in the State's case" was that officers failed to identify a basis for suspecting that defendant was involved in criminal conduct. Id. at 52. While the high incidence of drug trafficking in the area supported the desire to have a

police presence, it did not support detaining and interfering with defendant. Id.

In Illinois v. Wardlow, 528 U.S. 119 (2000), officers in a four-car caravan were patrolling "an area known for heavy narcotics trafficking" in Chicago. They were investigating drug transactions and expected to find crowds of people there to serve as "lookout" and to buy drugs. Id. at 121. As the last car in the caravan drove along West Van Buren, an officer "observed respondent Wardlow standing next to the building holding an opaque bag. Respondent looked in the direction of the officers and fled," running through "the gangway and an alley" before police cornered him. Id. at 121-22. The officers discovered a handgun with ammunition in the bag and they arrested Wardlow. Id.

On appeal, Wardlow challenged the basis for the stop. In reviewing the matter, the United States Supreme Court reiterated that an officer's reasonable suspicion must be based on objective and particular facts. It also specified that "[a]n individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime." Id. at 124 (citing Brown, 443 U.S. 47). While that fact is a "relevant contextual consideration" in the analysis, the officers' suspicions in Wardlow were aroused because of Wardlow's "unprovoked flight upon noticing the police." Id. at 124.

The Court further reiterated that when an officer, without reasonable suspicion or probable cause, approaches an individual, that individual has the right to ignore the officer and go on about his business. Id. at 125; Brown, 443 U.S. at 47 (recognizing

defendant has right to ignore officers). In that instance,

> [the individual's] "refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." Florida v. Bostick 501 U.S. 429, 437, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991). But unprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not "going about one's business"; in fact, it is just the opposite.

Wardlow, 528 U.S. at 125. In sum, a person's presence in an area of "heavy narcotics trafficking," without more, will not give rise to reasonable suspicion.

Under Wardlow, the evidence here fails to support reasonable suspicion.

While the "drug house" is a relevant consideration in the analysis, it is not enough to justify the seizure. Wardlow, 528 U.S. at 124 (individuals presence alone in a heavy narcotics area is not enough). That is, in order to justify the officers' conduct, the state was required to present additional, objective facts concerning *Fridleifson's* involvement in criminal activity. In this case, the state failed to present such facts.

First, Larson testified that when officers called out to Fridleifson after he came up the stairwell, Fridleifson was near the truck, it was dark, the officers were wearing jackets that may or may not have identified them as police, and they specifically did not identify themselves to Fridleifson. (See R. 66, ¶6.) Fridleifson did not respond to the officers. He continued to walk toward his truck. He did not appear jumpy, startled or nervous, and he did not change his manner. He simply continued about his business. (R. 197:53-54.)

Fridleifson's conduct was appropriate under Wardlow. It did not give rise to reasonable articulable suspicion. Fridleifson was "going about his business," which he

was entitled to do. Any other conclusion would allow an officer to seize a person both when the officer observed that person in unprovoked flight (Wardlow, 528 U.S. at 124-25), and when the officer observed that person going about his lawful business. The law does not allow a seizure under the latter scenario.

Second, where the respondent in Wardlow was observed by officers to be in an "area known for heavy narcotics trafficking," id. at 121, the officers in this case were not in a position to observe whether Fridleifson went inside the "drug house" or made contact with anyone in the residence. (See R. 197:26.) That distinction further supports that the officers in Fridleifson's case did not have a sufficient basis to justify the seizure.

Third, the additional facts and circumstances in this case do not tip the scales in favor of reasonable suspicion. Specifically, Fridleifson was in the area earlier that day. When he first arrived, officers were involved in arresting a person who apparently had been in the apartment. The officers told Fridleifson that if he was there to buy drugs he should leave. The officers' conduct and their statements would have communicated to Fridleifson that they were involved in an investigation relating to the apartment. A reasonable person would have thanked the officers and left to allow them to complete their investigation. That evidence does not support reasonable suspicion. It does not suggest that Fridleifson was a frequent short-term visitor of the apartment, and it does not support flight or evasive conduct on his part. Rather, the additional and total circumstances reflect the opposite.

Once a reasonable amount of time elapsed for the officers to complete their business at the apartment, Fridleifson returned. That does not suggest criminal activity on Fridleifson's part since the officers dissuaded Fridleifson from going to the door the first time he was there. The officers did not see Fridleifson enter the apartment or make contact with anyone at the apartment. They had no basis for suspecting criminal conduct on Fridleifson's part.

In short, the officers here were acting on a hunch. They had no information to suggest that Fridleifson used drugs or was a frequent short-term visitor of the residence. There was no evidence to support that officers observed anything unusual about Fridleifson's behavior as he approached or left the apartment. There was no evidence to support that Fridleifson was carrying anything from the apartment of a suspicious nature. There was no evidence that Fridleifson tried to evade the officers. There was no evidence linking Fridleifson to any criminal activity, whether the activity related to the apartment or otherwise.

In this matter, officers were entitled only to approach Fridleifson and to ask if he would talk to them. See Deitman, 739 P.2d at 617-18 (during a level-one encounter an officer may approach a citizen and ask questions so long as the citizen is not detained against his will). When Fridleifson ignored the officers, they were not entitled to grab, seize or detain him. The facts in this case fail to support reasonable suspicion for the level-two detention.

Utah courts have repeatedly ruled that evidence discovered under similar circumstances must be suppressed. Steward, 806 P.2d at 216 (ruling that motion to suppress evidence should have been granted); Sykes, 840 P.2d at 829; Potter, 863 P.2d at 44 (affirming trial court's suppression of the evidence). In this case, Fridleifson is entitled to have the evidence discovered by officers in connection with the unlawful seizure suppressed. See Arroyo, 796 P.2d at 688-89 (police illegality will poison the evidence).

C. IN CONNECTION WITH REVERSING THE TRIAL COURT'S RULING ON THE MOTION TO SUPPRESS, FRIDLEIFSON IS ENTITLED TO AN ORDER DISMISSING THE CHARGE, OR IN THE ALTERNATIVE, HE IS ENTITLED TO A NEW TRIAL ABSENT THE UNLAWFULLY SEIZED EVIDENCE.

In the event the cocaine is suppressed as a result of the unlawful level-two detention, Fridleifson may be entitled to the entry of an order dismissing the possession charge for insufficient evidence. In the alternative, Fridleifson is entitled to a new trial, absent the evidence relating to the unlawful seizure.

In considering prejudice, this Court will review the state's trial evidence, absent the evidence relating to the unlawful seizure, to determine whether there is a likelihood of a more favorable outcome for Fridleifson. See State v. Rimmasch, 775 P.2d 388, 407 (Utah 1989) (if, in the absence of the evidentiary error, there is a likelihood of a more favorable outcome for the defendant, "we must reverse the conviction"); State v. Mitchell, 779 P.2d 1116, 1122 (Utah 1989) (in assessing prejudice, this Court will consider the case

absent the evidence that was wrongfully admitted). Stated another way, this Court will assess that which is left of the state's evidence to support a conviction for drug possession under Utah Code Ann. § 58-37-8(2)(a)(i) (1998).

In this matter, after the trial judge ruled on the motion to suppress, the state presented its case to a jury. Pursuant to Section 58-37-8(2)(a)(i), the state was required to establish the following to support the possession charge: "[t]hat on or about the 11th day of January, 1999, in Salt Lake County, State of Utah, the defendant Gerald D. Fridleifson, possessed Cocaine." (See R. 141); Utah Code Ann. § 58-37-8(2)(a)(i) (1998). The trial judge instructed the jury that possession was defined as follows: "to have physical possession of or to exercise dominion or control over tangible property, in this case Cocaine." (R. 143.)

At trial, the state presented evidence of the cocaine twist that officers recovered on January 11 during the unlawful seizure. (See R. 195:4-5, 27-28, 113-114, 116-17, 126-130.) The remaining evidence from the state consisted of testimony from Washington and Larson that they watched the suspect house on occasion and arrested suspects, and they observed Fridleifson in the area during their surveillance on January 11, 1999. (R. 195:14-149.) The only evidence presented by the state to support drug possession as it related to Fridleifson was the unlawfully seized cocaine.

The state did not present other evidence to support that Fridleifson was in possession of an illegal substance; the state did not present other evidence to support that

Fridleifson exercised dominion or control over an illegal substance; and the state did not present evidence to support that Fridleifson made any contact with any person at the "known drug house" for the purpose of possessing drugs. (See R. 195, in general.)

The state presented no other evidence to support "possession" as charged. (See R. 195, 196.) Indeed, Officer Washington admitted that the officers did not observe Fridleifson engage in unlawful activity on January 11, 1999. (R. 195:53.)

Fridleifson has established harm in this case. He was prejudiced by the state's presentation of the unlawfully seized evidence at trial. If the substance discovered in connection with the illegal seizure had been suppressed, the result in this case would have been more favorable to Fridleifson. He would have been acquitted of the charge. See Mitchell, 779 P.2d at 1122. This case should be remanded for dismissal of the charge, or in the alternative, for a new trial without the unlawfully seized evidence.

## CONCLUSION

For the reasons set forth herein, Fridleifson respectfully requests that this Court reverse the trial court's ruling on the motion to suppress, and remand this case to the trial court for dismissal of the charge or a new trial.

SUBMITTED this 7th day of March, 2002.

LINDA M. JONES
OTIS STERLING, III
Counsel for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, LINDA M. JONES, hereby certify that I have caused to be hand delivered an original and 7 copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, 140230, Salt Lake City, Utah 84114-0230 and 4 copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, this 7th day of March, 2002.

LINDA M. JONES

DELIVERED to the Utah Attorney General's Office and the Utah Court of Appeals Court as indicated above this __ day of _____, 2002.

_____

# ADDENDA

# ADDENDUM A

THIRD DISTRICT COURT SALT LAKE COURT
SALT LAKE COUNTY, STATE OF UTAH

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| | | |
|---|---|---|
| STATE OF UTAH,<br>Plaintiff, | : | MINUTES<br>SENTENCE, JUDGMENT, COMMITMENT |
| vs. | : | Case No: 991903218 FS |
| GERALD DOUG FRIDLEIFSON,<br>Defendant. | : | Judge: TIMOTHY R. HANSON<br>Date: April 13, 2001 |

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PRESENT
Clerk: evelynt
Prosecutor: TAYLOR, LANA
Defendant
Defendant's Attorney(s): STERLING, OTIS

DEFENDANT INFORMATION
Date of birth: September 10, 1948
Video
Tape Number: 4/13/01 Tape Count: 11:51/12:03

CHARGES

1. ILLEGAL POSS/USE OF CONTROLLED SUBSTANCE - 3rd Degree Felony
Plea: Guilty - Disposition: 01/12/2000 {Guilty Plea}

SENTENCE PRISON

Based on the defendant's conviction of ILLEGAL POSS/USE OF CONTROLLED SUBSTANCE a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.
The prison term is suspended.

Case No: 991903218
Date: Apr 13, 2001

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SENTENCE FINE

Charge # 1 Fine: $5000.00
Suspended: $5000.00
Due: $0.00

Total Fine: $5000.00
Total Suspended: $5000.00
Total Surcharge: $0
Total Principal Due: $0
Plus Interest

ORDER OF PROBATION

The defendant is placed on probation for 6 month(s).
Probation is to be supervised by THIRD DISTRICT COURT DIV. II.
Defendant is to pay a fine of 0

PROBATION CONDITIONS

Violate no laws.
Court supervised probation for 6 months.
Serve 6 months in the Salt Lake County Jail new time, No early release. Commitment forthwith

Dated this 13 day of April, 2001

TIMOTHY R. HANSON
District Court Judge

# ADDENDUM B

CONSTITUTION OF THE UNITED STATES

# AMENDMENT IV

## [Unreasonable searches and seizures.]

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.

### 77-7-15. Authority of peace officer to stop and question suspect — Grounds.

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.

# ADDENDUM C

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT**

**IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

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| | | |
|---|---|---|
| **THE STATE OF UTAH,** | : | **MEMORANDUM DECISION** |
| **Plaintiff,** | : | **CASE NO. 991903218** |
| **vs.** | : | |
| **GERALD D. FRIDLEIFSON,** | : | |
| **Defendant.** | : | |



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Before the Court is the defendant's Motion to Suppress Evidence Seized Illegally. A hearing was held on this matter on May 17, 1999, at which time counsel for defendant and counsel for the State presented their respective positions. Following oral argument, the Court granted leave to the State to file a supplemental memorandum regarding the limited issue of whether State v. Sykes, 840 P.2d 821 (Utah App. 1992), applies to the present case. The Court then took the matter under advisement to further consider the written submissions.

The State filed a Bench Memorandum regarding Sykes on June 9, 1999. The defendant did not file a response to the Bench Memorandum. Since having taken the defendant's Motion under

advisement, the Court has had an opportunity to once again review the moving and responding legal Memoranda, as well as the Bench Memorandum. Being otherwise fully advised, the Court enters the following Memorandum Decision.

## FACTUAL BACKGROUND

The relevant facts established during the suppression hearing are as follows. On January 11, 1999, Officer Matt Larson observed the defendant at an apartment located at 350 South Post Street. Counsel for both the State and the defendant stipulated during the hearing that the apartment was a known drug house.

Officer Larson first observed the defendant at the apartment just after he arrested another individual at the apartment for possession of drugs. At that time, Officer Larson informed the defendant that if he intended to buy drugs at the apartment, then he should leave. The defendant remarked "thanks" and proceeded to leave the apartment.

Some time later, while Officer Larson was watching the apartment from a concealed position, he again observed the defendant enter the apartment and, after approximately five minutes, leave the apartment. At that point, Officer Larson, with the assistance of other officers, approached the defendant and

called out to him. The defendant did not stop, but rather continued to walk towards the driver's side of his truck in a rapid pace. The defendant was apprehended and arrested.

**LEGAL ANALYSIS**

Counsel has stipulated that a level two encounter occurred in this case, requiring reasonable, articulable suspicion, based on objective facts, that the defendant has been or is about to be engaged in illegal conduct. Sykes, 840 P.2d at 827; See also, Utah Code Annotated §77-7-15. The Court therefore considers whether, under the totality of the circumstances, Officer Larson had a reasonable suspicion that the defendant had engaged in affirmative conduct indicating criminal activity, justifying his investigatory stop.

The defendant argues that the circumstances in this case are analogous to those in Sykes, where the Utah Court of Appeals held that the officer had no reasonable articulable suspicion to justify stopping Sykes. In that case, Deputy Keith Stephens was conducting surveillance of a house that was suspected of being a drug house. When he observed Sykes enter the house and leave after only three minutes, Deputy Stephens decided to follow her in

his car. After some distance, Sykes pulled over and Deputy Stephens approached her. A warrants check on Sykes revealed that she had several outstanding warrants. Deputy Stephens questioned Sykes about her drug activity at the house she had just left and then proceeded to arrest her for the outstanding warrants.

In determining that Deputy Stephens had no reasonable suspicion that Sykes was engaged in criminal activity, the court indicated that Sykes' "mere presence in an area **suspected** to harbor drug activity does not give rise to reasonable suspicion . . . . She could have easily been at the house to visit someone who was not there, and so left quickly." Id. (emphasis added). The court emphasized that the police officers "had no positive evidence linking the house to illegal activity." Id. at 828-29. Finding that any connection between Sykes and illegal activity was purely speculation, the court concluded that Sykes' detention was unconstitutional.

The defendant in this case argues that like Sykes, he was stopped only because he exited a suspected drug house. Were this actually the case, the Court might agree that there was insufficient basis to justify Officer Larson's stop. However, the record indicates that Officer Larson's decision to stop the

defendant was based on more than the defendant's mere presence at a suspected drug house. Instead, unlike Sykes, the defendant left a house which the parties have stipulated to have been identified as a drug house. The court in Sykes made it clear that the house from which Sykes exited was merely a reputed distribution point for drugs. Further, distinguishable from Sykes, the defendant's conduct was itself suspicious. The defendant was first observed at the house with another individual who was subsequently arrested for drug possession. On that occasion, when Officer Larson told the defendant to leave if he was there to buy drugs, the defendant responded by thanking the officer and leaving, all indicative that the defendant was indeed there to purchase drugs. Further, the defendant's action of going back to the house a second time for only a brief period conformed to the patterns of a drug purchase. Finally, the defendant left the drug house in a hurried manner and, when the police officers called out to him, exhibited nervous behavior and apparently attempted to flee to his truck. The Court finds these facts, taken altogether, constitute a sufficient basis for reasonably suspecting that the defendant was involved in criminal activity. Accordingly, the defendant's detention was not violative of the Fourth Amendment to the United States

Constitution. The Court therefore denies the defendant's Motion to Suppress.

Counsel for the State is to prepare an Order consistent with this Memorandum Decision and submit the same to the Court for review and signature.

Dated this 21 day of July, 1999.

TIMOTHY R. HANSON
DISTRICT COURT JUDGE

**MAILING CERTIFICATE**

**I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 21 day of July, 1999:**

**Lana Taylor**
**Deputy County Attorney**
**Attorney for Plaintiff**
**231 East 400 South, Lower Level**
**Salt Lake City, Utah 84111**

Placed in Mail Slot

**Otis Sterling, III**
**Attorney for Defendant**
**424 East 500 South, Suite 300**
**Salt Lake City, Utah 84111**

Evelyn Thompson

# ADDENDUM D

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**IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

| | | |
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| THE STATE OF UTAH,<br>Plaintiff, | ) | **FINDINGS OF FACT AND CONCLUSIONS OF LAW** |
| vs. | ) | |
| GERALD D. FRIDLEIFSON, | ) | Case No. 991903218 FS |
| Defendant. | ) | Honorable Timothy R. Hanson |

THE ABOVE-ENTITLED MATTER, HAVING COME BEFORE THE COURT for an Evidentiary Hearing for the Defendant's Motion to Suppress on May 17, 1999, at 2:00 p.m. The Honorable Timothy R. Hanson presiding. The Defendant was present and represented by Otis Sterling of the Legal Defenders Association. The State was represented by Lana Taylor, Deputy District Attorney for Salt Lake County. Based upon the testimony, arguments of counsel and evidence presented at the hearing, and for good cause shown, the Court now makes and enters the following:

## FINDINGS OF FACT

1. On January 11, 1999, Salt Lake City Police Officer Matt Larson, saw the Defendant behind an apartment, known to law enforcement as a "known drug house."

2. On that date, the Defendant was present when Officer Larson arrested an individual inside the apartment for a drug offense.

3. Officer Larson told the Defendant that he should leave if he was there to buy drugs. The Defendant thanked Officer Larson and left.

4. Later that same day, Officer Larson saw the Defendant park his truck down the street and walk down the stairs to the same apartment.

5. After five minutes the Defendant walked back up the stairs and started back to his truck.

6. Officer Larson and Officer Washington then approached the Defendant from the front, dressed in bright yellow jackets, and told him to stop.

7. The Defendant did not stop, but continued towards his truck at a rapid pace.

8. The Officers then stopped the Defendant, who threw an object into the air, which later turned out to be a twist of cocaine.

FROM THE FOREGOING FINDINGS OF FACT, THE COURT NOW MAKES AND ENTERS THE FOLLOWING:

## CONCLUSIONS OF LAW

1. Under the totality of the circumstances, Officer Larson had reasonable articulable suspicion, based upon objective facts, that the Defendant was engaged in unlawful drug activity when he stopped the Defendant.

2. Officer Larson effectuated a lawful Level II detention of the Defendant that did not violate his rights under either the United States Constitution or the Utah Constitution.

3. Officer Larson did not exceed the scope of the stop because he had probable cause

to effectuate an arrest after the Defendant threw the twist of cocaine into the air.

DATED this 19 day of August, 1999.

BY THE COURT

TIMOTHY R. HANSON
District Court Judge

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**IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT**
**IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

| | | |
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| THE STATE OF UTAH,<br>Plaintiff, | ) | **ORDER** |
| vs. | ) | |
| GERALD D. FRIDLEIFSON, | ) | Case No. 991903218 FS |
| Defendant. | ) | Honorable Timothy R. Hanson |

Based on the Finding of Fact and Conclusions of Law, and for good cause shown,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendant's Motion to Suppress Evidence Seized Illegally is denied.

DATED this 19 day of August, 1999.

BY THE COURT

TIMOTHY R. HANSON
District Court Judge

## CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the **Findings of Fact and Conclusions of Law** and **Order** to Otis Sterling, attorney for the defendant, at the Salt Lake Legal Defender Association, 424 East 500 South Suite 300, Salt Lake City, Utah 84111.

DATED this 30th day of August, 1999.