

2016

**State of Utah, Plaintiff and Appellee, v. Michael John Edgar,
Defendant and Appellant**

Utah Court of Appeals

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No. 20150597-CA

IN THE
COURT OF APPEALS OF THE STATE OF UTAH

State of Utah,
Plaintiff and Appellee,

v.

Michael John Edgar,
Defendant and Appellant.

REPLY BRIEF OF THE APPELLANT

On appeal from the Fourth Judicial District Court, Utah County,
Honorable Lynn W. Davis, District Court No. 141400828

Appellant Michael Edgar is currently incarcerated.

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ORAL ARGUMENT REQUESTED

Table of Contents

Argument.....	1
1. The police unconstitutionally prolonged the stop to wait for the drug-sniffing dog.....	1
2. The police had not reasonable suspicion that there were drugs in the car, and therefore could not lawfully prolong the stop to wait for a drug dog.....	8
3. The search incident to arrest and inevitably discovery doctrines do not apply.....	10
Conclusion.....	13

Table of Authorities

State Cases

<i>State v. Gurule</i> , 2013 UT 58, 321 P.3d 1039	8
<i>State v. Hogue</i> , 2007 UT App 86, 157 P.3d 826	7–8
<i>State v. Hurt</i> , 2010 UT App 33, 227 P.3d 271	6
<i>State v. Jones</i> , 280 P.3d 824 (2012), <i>aff’d</i> , 333 P.3d 886 (Kan. Ct. App. 2014).....	9
<i>State v. Kaleohano</i> , 56 P.3d 138 (Haw. 2002)	10
<i>State v. Ottenson</i> , 920 P.2d 183 (Utah Ct. App. 1996)	8
<i>State v. Juma</i> , 2012 UT App 27, 270 P.3d 564	8
<i>State v. Simons</i> , 2013 UT 3, 296 P.3d 721	7
<i>State v. Topanotes</i> , 2003 UT 30, 76 P.3d 1159	12

Federal Cases

<i>Arizona v. Gant</i> , 556 U.S. 332 (2009)	11
<i>United States v. \$167,070.00 in U.S. Currency</i> , No. 3:13-CV-00324-LRH, 2015 WL 3658069 (D. Nev. June 12, 2015)	6
<i>United States v. Hight</i> , No. 15-CR-00060-LTB, 2015 WL 4239003 (D. Colo. June 29, 2015)	6
<i>United States v. Stepp</i> , 680 F.3d 651 (6th Cir. 2012)	6

Argument

1. **The police unconstitutionally prolonged the stop to wait for the drug-sniffing dog.**

The sole issue in this case is whether the police unconstitutionally prolonged the stop by delaying the administration of field sobriety tests to wait for a drug dog to sniff Mr. Edgar's car, even though the police had no reason to believe that the car contained drugs.

This issue is heavily fact-dependent and turns on the dash-camera video entered into evidence and the police officers' trial testimony. The dash-camera video is particularly important; it requires careful observation because much of the significant information can only be heard (through the microphone on one of the officers) and not seen.

To aid the Court in its decision, Mr. Edgar provides the following detailed timeline of the stop. All the times are drawn from the dash camera video, which Mr. Edgar referred to as Trial Exhibit 4 in his opening brief and which the State kindly attached to its responsive brief. The timeline below lists the hour and minute, and where the actions or words are particularly important, the timeline lists the hour, minute, and second.

Time	Action
7:35	Original officer pulls over Mr. Edgar's car and questions occupants
7:38	Original officer returns to his police cruiser and calls for back-up and a K-9 unit

7:42	Original officer hears voice over his radio that says that K-9 unit would arrive at the scene in "15, maybe 10 minutes"
7:42	Backup officer arrives on the scene and discusses stop with original officer
7:44	Backup officer approaches Mr. Edgar's car and talks with Mr. Edgar (the driver)
7:47	Backup officer leaves Mr. Edgar's car and talks to stranded motorists
7:47	Officers discuss doing field sobriety tests and tell stranded drivers to step back
7:48	Original officer moves car so that backup officer can film field sobriety tests on his dash camera; another officer arrives on the scene
7:49	Dash camera view is blocked; original officer returns to Mr. Edgar's car
7:50	Original officer stands outside Mr. Edgar's car; backup officer moves from Mr. Edgar's car to his police cruiser, and then he returns to Mr. Edgar's car
7:51-52	Original officer walks around on sidewalk next to Mr. Edgar's car; backup officer is in front of his car and blocked from the dash camera's view
7:53	K-9 officer arrives and talks with original officer
7:53:59	Original officer tells the K-9 officers that he pulled over Mr. Edgar's car because the driver was driving "erratically"
7:54:20-38	Original officer tells the K-9 officer, "There's one other guy in the car. He's got gang involvement. I don't know if you want to leave them in or I can [inaudible]." The K-9 officer replied, "I prefer having them out if you guys want to [inaudible]." The original officer responded, "It's up to you; whatever your preference is."
7:55:11	Original officer informs the occupants to exit Mr. Edgar's car

7:55	The passenger is on the sidewalk
7:57:35	Mr. Edgar is on the sidewalk with the backup officer. The officers testified that Mr. Edgar was wearing khaki pants. (R. 276:95, 169.) The dash camera video shows a man with khaki pants by the street sign.
7:57:56	Mr. Edgar is doing the heel-toe-heel sobriety test
7:58:11	Drug dog approaches Mr. Edgar's car
7:58:45	Mr. Edgar stands on one leg to do another sobriety test; the drug dog barks at 7:58:48
8:00	Drug dog leaves Mr. Edgar's car
8:01:20-40	Original officer approaches Mr. Edgar and says that it is cold out and offers Mr. Edgar his coat; Mr. Edgar says that his coat is in the car, and the original officer volunteers to get it.
8:02	Original officer and backup officer discuss sobriety tests
8:02:35-40	Backup officer tells original officer: "He made it until about 12 seconds and then the dog came out."
8:02:45-8:03:04	Backup officer tells original officer: "He followed my eyes exactly . . . his eyes were jerky at the end but it was quite dark."
8:03:21-23	Original officer asks about the heel-toe-heel sobriety test and whether Mr. Edgar "broke heel contact." The backup officer responded, "Not during the [inaudible], but he wanted to back and start again."
8:04-8:06	Original officer performs one more sobriety test on Mr. Edgar

According to this timeline, the original officer commenced the stop at 7:35.

He spent approximately nine minutes talking with the car's occupants, processing information in his police cruiser, calling for backup and for a K-9 unit,

and talking with the backup officer. The original officer knew at 7:42 that it was going to take 10 to 15 minutes for the K-9 unit to arrive. The backup officer arrived, questioned Mr. Edgar for two minutes, and had formed reasonable suspicion that Mr. Edgar was driving impaired by 7:47; at that time, the officers had both formed reasonable suspicion and determined to do field sobriety tests. But the officers did not perform the field sobriety tests on Mr. Edgar until approximately 7:57, ten minutes later, when the drug dog arrived.¹

The State argues that the officers started administering the field sobriety tests at 7:50, but the record belies that contention. Because the original officer moved his car at 7:48, the dash camera does not have a clear view of Mr. Edgar's car. But what the dash camera does catch is the original officer's conversation with the K-9 officers at 7:54. In that conversation, the original officer tells the K-9 officer about the car's occupants and asks if the K-9 officer wants to leave the occupants in the car during the dog sniff. (Trial Ex. 4 at 7:54:20-38.) The K-9 officer responds, "I prefer having them out if you guys want to [inaudible]." (*Id.*)

The video then shows Mr. Edgar on the sidewalk at 7:57; he is doing the heel-toe-heel sobriety test at 7:57:56 and the one-leg stand at 7:58:45. The drug dog sniffs the car from 7:58 to 8:00. The backup officer, who performed Mr.

¹ Mr. Edgar revises his argument in his opening brief that the officers delayed the administration of the field sobriety tests by twelve minutes. Closer examination of the video reveals that the officers delayed the tests by ten minutes.

Edgar's sobriety tests, talked with the original officer about Mr. Edgar's tests around 8:02.

The backup officer told the original officer, "He made it until about 12 seconds and then the dog came out." (Trial Ex. 4 at 8:02:35-40.) This statement appears to refer to Mr. Edgar performing the one-leg stand test; the video shows him performing the one-leg stand at 7:58:45 and the drug dog barks at 7:58:48.

The backup officer also tells the original officer, "He followed my eyes exactly . . . his eyes were jerky at the end but it was quite dark." (*Id.* at 8:02:45-8:03:04.) The video shows that when the stop commenced, it was fairly light outside. (*Id.* at 7:35.) It is still fairly light around 7:50, but by 7:56, it is noticeably darker, and by 8:00 it is quite dark outside. (*Id.* at 7:50-8:00.) It is likely, then, that the backup officer performed the horizontal gaze nystagmus test after 7:56, and likely around 8:00, when it was dark outside.

The backup officer also reported to the original officer on Mr. Edgar's heel-toe test. The video shows Mr. Edgar performing the heel-toe test at 7:57:56.

The video, which shows Mr. Edgar performing the field sobriety tests after 7:57:56, comports with the original officer's trial testimony. The original officer testified, "While [the backup officer] was performing field sobriety tests, [the K-9 officer] ran the canine around the vehicle." (R. 267:128.)

In sum, the officers knew at 7:42 that it would take 10 to 15 minutes for a drug dog to arrive. They formed reasonable suspicion that Mr. Edgar was

driving impaired at 7:47, but they did not perform the field sobriety tests until 7:57, when they are shown on the video. This ten-minute delay unlawfully extended the stop. *See State v. Hurt*, 2010 UT App 33, ¶ 11–12, 227 P.3d 271 (reasoning that a 10- to 15-minute detention of passengers while waiting for a dog sniff was a substantial period); *United States v. Stepp*, 680 F.3d 651, 663–64 (6th Cir. 2012) (holding that an officer asking six minutes of extraneous questions and waiting for an additional three and a half minutes for a canine sniff unreasonably prolonged the stop, especially when there was insufficient evidence that the police were diligently pursuing their investigation); *United States v. Hight*, No. 15-CR-00060-LTB, 2015 WL 4239003, at *5 (D. Colo. June 29, 2015) (reasoning that an officer sitting in his car for 11 minutes, where most of his time was spent filling out forms and waiting for an officer to arrive to investigate an unrelated crime, unconstitutionally extended the duration of the stop); *United States v. \$167,070.00 in U.S. Currency*, No. 3:13-CV-00324-LRH, 2015 WL 3658069, at *9 (D. Nev. June 12, 2015) (reasoning that officers conducting redundant records checks to prolong stop to allow for a canine sniff without additional reasonable suspicion made the prolongation of the stop unreasonable).

Contrary to the State’s assertions, there is no evidence that the officers were diligently pursuing their investigation during the 10-minute time period. The original officer had already processed the passenger’s and Mr. Edgar’s information while he was in his police cruiser from 7:38 to 7:42 (*see* R. 276:162–

65); the officers offered no testimony at trial about what they did during that ten-minute period that progressed the investigation.

What the dash camera does show during that period is an officer moving his car, another officer arriving on the scene, the original officer standing outside Mr. Edgar's car and walking around on the sidewalk, the backup officer going to his cruiser, and the original officer talking to the K-9 officers. The record gives no reason for the ten-minute delay; in fact, given the fact that the original officer is wandering around on the sidewalk for a few minutes, it appears that the officers were waiting to administer the field sobriety tests. The officers did not "expediently investigate [their] new suspicion" or "diligently pursue a means of investigation that [was] likely to confirm or dispel their suspicions quickly." *State v. Simons*, 2013 UT 3, ¶ 17, 296 P.3d 721 (quotations omitted). In fact, it does not appear that the officers' conduct during the ten minutes, "viewed objectively and in its totality," was "reasonably directed toward the proper ends of the stop." *Id.* ¶ 33 (quotations omitted).

The cases relied on by the State do not change this result. In *State v. Morris*, 2011 UT 40, 259 P.3d 116, the Utah Supreme Court analyzed when it was reasonable for an officer to prolong a stop once he smelled alcohol inside the stopped vehicle; the Court did not address the effect of a purposeful delay in investigation to wait for a drug dog. Similarly, *State v. Hogue*, 2007 UT App 86,

157 P.3d 826, and *State v. Ottenson*, 920 P.2d 183 (Utah Ct. App. 1996), have no such discussion.

A careful review of the video, taken in conjunction with the officers' trial testimony, shows that the officers delayed the administration of the field sobriety tests until after 7:57:56, even though they had formed reasonable suspicion that Mr. Edgar was driving impaired at 7:47. The drug dog sniffed the car at 7:58, the same time that Mr. Edgar was performing the field sobriety tests. The record, then, fully supports Mr. Edgar's argument that the officers delayed the administration of the field sobriety tests ten minutes, until the drug dog sniffed the car.

2. The police had no reasonable suspicion that there were drugs in the car, and therefore could not lawfully prolong the stop to wait for a drug dog.

Officers may prolong a stop for the arrival of a drug-detection dog if the officers have reasonable suspicion that the occupants of the car are transporting drugs. See *State v. Juma*, 2012 UT App 27, ¶8, 270 P.3d 564. "[R]easonable suspicion must be supported by specific and articulable facts and rational inferences, and cannot be merely an inchoate and unparticularized suspicion or hunch." *State v. Gurule*, 2013 UT 58, ¶ 32, 321 P.3d 1039 (quotation omitted).

The State's argument that suspicion of impairment also creates suspicion of the existence of drugs in the car diminishes the reasonable suspicion standard.

A raspy voice, shaky hands, relaxed facial features, and constricted pupils do not constitute specific facts indicating that drugs are in the car; rather, all those factors point to is the possibility that the driver might have taken drugs. *See State v. Jones*, 280 P.3d 824, 831 (2012), *aff'd*, 333 P.3d 886 (Kan. Ct. App. 2014) (“The observation of slurred speech and ‘cotton mouth’ may – to an experienced officer – indicate that alcohol or drugs have been recently consumed. We have often found that slurred speech – coupled with other factors – may support reasonable suspicion that one is intoxicated or has been driving under the influence. . . . The State cites no caselaw, however, to suggest that either of these factors would tend to support a suspicion *that the vehicle is transporting controlled substances*. Our review of applicable caselaw has revealed only some indication that the factor of intoxication may be considered in determining probable cause the person may be possessing drugs *on his or her person*. We view this as distinct from a factor indicating transportation of drugs within the vehicle.” (citations omitted))

To hold otherwise would allow police officers to search vehicles for drugs of any person who exhibits any signs of impaired driving.

Moreover, the events in this case show that the officers had absolutely no specific facts from which to derive a reasonable suspicion that drugs were in the car. The officers here examined the front and back seats of the car with their

flashlights while talking to the car's occupants, and neither of them mentioned seeing any drugs, drug paraphernalia, or anything else that would suggest the presence of drugs in the vehicle. The police did not mention that Mr. Edgar or his passenger made any furtive gestures to hide drugs. The police did not smell anything. They did not indicate that a search of Mr. Edgar's and his passenger's names on the police database returned prior drug arrests or drug activity.² All the police knew was that Mr. Edgar was possibly impaired; they only had a hunch that drugs were in the car, nothing more. And a mere hunch cannot justify the extension of an investigatory stop.

3. The search incident to arrest and inevitably discovery doctrines do not apply.

The State argues that, alternatively, the dog sniff was justified as a search incident to arrest.

The search-incident-to-arrest doctrine allows police to search a vehicle incident to "a recent occupant's arrest only if the arrestee is within reaching

² Compare the facts in this case to those in *State v. Kaleohano*, 56 P.3d 138, 148 (Haw. 2002), where the Hawaii Supreme Court noted that an officer had reasonable suspicion that drugs were in the car when he realized "he was dealing with somebody who had prior arrests for drug possession and who was driving a vehicle in which drugs had previously been discovered, [and] he suspected the erratic driving pattern may have been due to Kaleohano's drug impairment or her attempt to hide drugs after spotting the police vehicle on the road behind her." None of the facts justifying the reasonable suspicion in *Kaleohano* that drugs were in the car exist in this case.

distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.”

Arizona v. Gant, 556 U.S. 332, 351 (2009).

The application of this doctrine to his case, however, is tenuous because the record suggests that Mr. Edgar was arrested *because* the police searched the car. The backup officer testified that Mr. Edgar was arrested because of “drugs that were found in the car as well as DUI,” therefore implying that the search that discovered the drugs came before the arrest. (R. 276:83.) The original officer also agreed that Mr. Edgar was arrested “after you guys found the heroin in the car.” (R. 276:151.) However, that officer also testified that that he placed Mr. Edgar under arrest after the dog “hit on the vehicle.” (R. 276:166.) The video is not conclusive on this point.

The weight of the evidence, however, suggests that the search of the vehicle occurred *before* Mr. Edgar was arrested. The search-incident-to-arrest doctrine presupposes that the search follow or be concurrent with the arrest. *See Gant*, 556 U.S. at 351. It therefore is inapplicable when the search occurs before and causes the arrest.

Furthermore, the inevitable discovery doctrine does not help the State’s argument. “A crucial element of inevitable discovery is independence; there must be some independent basis for discovery, and the investigation that

inevitably would have led to the evidence [must] be independent of the constitutional violation.” *State v. Topanotes*, 2003 UT 30, ¶ 16, 76 P.3d 1159 (quotations and citations omitted).

Here, there was “only one ongoing investigation” that led to Mr. Edgar’s arrest and the dog sniff of the car. *Id.* ¶ 19. The police unlawfully extended the stop by delaying the administration of sobriety tests to await the arrival of the drug-sniffing dog. The State’s argument forgets that the police searched the car because the dog alerted to the car, not because of any suspicion that evidence was in the car that related to Mr. Edgar’s possible impaired driving. (R. 276:129 (“[A]fter the canine officer came back he told me there was an indication on the vehicle; therefore, I started to search the vehicle.”).) The unlawful extension of the stop and the discovery of the drugs were inextricably intertwined.

Policy also weighs against the application of the inevitable discovery rule. “Allowing the evidence in this situation would provide no deterrent at all to future unlawful detentions.” *Topanotes*, 2003 UT 30, ¶ 19. In fact, it would encourage officers to routinely delay the administration of field sobriety tests to run a drug dog around a car even when the officers have no reasonable suspicion that the car contains drugs. Such a ruling would allow the inevitable discovery rule to swallow the protections of the Fourth Amendment.

Conclusion

The police violated Mr. Edgar's Fourth Amendment rights when they delayed the administration of field sobriety tests for ten minutes while waiting for the drug dog to sniff the car. Utah's law regarding reasonable suspicion and dog sniffs of cars is robust (and is cited extensively in the opening brief) and provided sufficient authority for Mr. Edgar's attorney to bring a successful motion to suppress.

Mr. Edgar's attorney did not, however, bring such a motion. His failure to bring the motion constitutes deficient performance, and Mr. Edgar was prejudiced thereby. If Mr. Edgar's attorney had moved to suppress the evidence in the car, the district court would have granted the motion, and none of the evidence in the car would have been admitted. That evidence alone formed basis for the charges against Mr. Edgar. Without that evidence, the State had no case against Mr. Edgar.

For these reasons, Mr. Edgar respectfully requests that this Court reverse his conviction.

DATED this 20th day of May, 2016.

EA

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Certificate of Compliance With Rule 24(f)(1)

I hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 3239 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2015 in 13-point Book Antiqua.

DATED this 20th day of May, 2016.



Certificate of Service

This is to certify that on May 23, 2016, I caused two true and correct copies of the Reply Brief of Appellant to be served on the following via first class mail, postage prepaid:

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Also, in accordance with Utah Supreme Court Standing Order No. 8, a courtesy brief on CD in searchable portable document format was also filed with the Court and served on Appellee.


