

2001

Utah v. Tracy Manuel Valdez : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellant,

vs.

TRACY MANUEL VALDEZ,

Defendant/Appellant.

Case No. 20010772-CA

Priority No. 2

BRIEF OF APPELLEE

APPEAL FROM THE FOURTH DISTRICT JUDICIAL COURT, UTAH COUNTY,
STATE OF UTAH, FROM AN ORDER OF SUPPRESSION
AND DISMISSAL OF THE CHARGES,
BEFORE THE HONORABLE RAY M. HARDING

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Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellant,

vs.

TRACY MANUEL VALDEZ,

Defendant/Appellee.

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Case No. 20010772-CA

Priority No. 2

JURISDICTION OF THE UTAH COURT OF APPEALS

This Court has appellate jurisdiction in this matter pursuant to the provisions of Utah Code Annotated § 78-18a-1(2)(a) and 78-2a-3(2)(j) (Supp. 2001).

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Whether the trial court correctly concluded as a matter of fact and law that defendant was unlawfully detained by officers who had validly executed an arrest warrant for another individual.

A “bifurcated” review standard applies to this issue. Underlying factual findings are deferentially, and reversed only for “clear error.” The court’s conclusions of law, however, are reviewed for correctness, allowing some “measure of discretion” as regards the application of legal standards to the facts. State v. Pena, 869 P.2d 932, 935-40 (Utah 1994).

CONTROLLING STATUTORY PROVISIONS

The following constitutional provision is determinative of this issue:

United States Constitution, Amendment IV

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.

STATEMENT OF THE CASE

A. Nature of the Case

The State of Utah appeals from the order of dismissal and order of suppression of the Honorable Ray M. Harding, Fourth District Court.

B. Trial Court Proceedings and Disposition

Defendant, Tracy Manuel Valdez, was charged with possession of methamphetamine in a drug free zone with a prior conviction, possession of paraphernalia in a drug free zone, and giving false personal information to a peace officer. (R. 14). Following a preliminary hearing, defendant was bound over on all charges. (R. 16-17). The trial court granted defendant's motion to suppress evidence and dismissed the case. (R. 51-54, 56-57). The State timely appealed the trial court's ruling. (R. 62). The Utah Supreme Court transferred the case to this Court. (R. 70).

STATEMENT OF RELEVANT FACTS

1. On February 26, 2001, Officer Bryan Robinson, accompanied by a fellow officer, went to the home of Monique Young on Thornberry Avenue in Pleasant Grove to carry out a valid warrant for her arrest. (R. 71:5, 7).

2. Officer Robinson knocked on the door. Monique Young answered, and Officer Robinson informed her that she was under arrest. Because she was wearing boxer shorts at the time, she asked to be allowed to put on a pair of pants, which were back in her bedroom. Officer Robinson agreed, and escorted her with another officer to the bedroom. (R. 71: 5-7).

3. Once in the bedroom, Officer Robinson noticed a male lying face down on the bed, covered with blankets or a coat. (R. 71: 6). Officer Robinson assumed the male was sleeping. (R. 71: 15-16). Officer Robinson couldn't see the male's hands because they were covered by his body or by a blanket or by a coat while he slept. (R. 71: 15). Officer Robinson yelled at the male to "Wake up. Let me see your hands." (R. 71: 6, 15-16). When the male did not awake, Officer Robinson shook the male and the bed yelling, "Wake up. I need to see your hands." (R. 71: 6). Officer Robinson testified "At that point he [the male] kind of gets up and wakes up I would say." (R. 71: 6).

4. After the male was awake, Officer Robinson asked for identification, which the man stated he did not have. (R. 71: 7). He then asked for the man's name and birth date, to which the man responded with the name of Sean Tracy Michaels and a date of birth of December 4, 1961. (R. 71: 7). Officer Robinson ran the warrants and an NCI check on that individual. (R. 71: 7). During that time, Officer Robinson overheard Monique Young whispering to the assisting officer that the man's true name was Tracy Valdez so Officer Robinson then advised dispatch Tracy Valdez with the date of birth he gave him. (R. 71: 7, 8). Dispatch came back with a valid statewide warrant for Tracy Valdez with a different date of birth of December 3, 1961 instead of December 4, 1961. (R. 71: 8).

5. Officer Robinson at that point again asked the man for identification to which the man responded by producing a Utah identification card bearing the name of Tracy Manuel Valdez. (R. 71: 8).

6. Valdez was handcuffed and placed under arrest and led out to a patrol car where he was patted down, searched, whereby Officer Robinson discovered the methamphetamine and paraphernalia hidden in his belt. (R. 71: 8, 9).

SUMMARY OF ARGUMENT

The trial court correctly concluded, based on the evidence and reasonable inferences that can be drawn therefrom, that Officer Robinson's encounter with Defendant was a level two encounter, and that the officer's actions in asking for defendant's identification, name and date of birth and then running a warrants check *after* any fears for officer safety, if any existed, had dissipated, exceeded the permissible length and scope of detention and was therefore violative of Defendant's Fourth Amendment right to be free from unreasonable searches and seizures.

Further, because this Court can affirm on any ground presented to the trial court, this Court can and should conclude that under the circumstances, that of a solitary male, asleep on a bed with two officers accompanying another individual under arrest while she retrieved an item of clothing, that any fears the officers had that Defendant might be armed and dangerous were unjustified and therefore the level two detention of Defendant was per se unreasonable and cannot be justified.

ARGUMENT

POINT I

**THE STATE FAILS TO SHOW THAT WHEN VIEWING
THE EVIDENCE AND ALL THE REASONABLE INFERENCES
THAT CAN BE DRAWN THEREFROM IN A LIGHT MOST
FAVORABLE TO THE TRIAL COURT'S RULING,
THAT THE EVIDENCE IS INSUFFICIENT TO SUPPORT
THE TRIAL COURT'S FINDINGS**

The trial court correctly concluded, based on the evidence and reasonable inferences that can be drawn therefrom, that any fears Officer Robinson may have reasonably had regarding officer safety had dissipated and therefore his actions of asking for defendant's identification, name and date of birth and then running a warrants check *after* were beyond the permissible length and scope of detention and were therefore violative of defendant's Fourth Amendment rights.

The State seeks to have the trial courts factual findings reversed on this point asserting that they are clearly erroneous. In making this assertion, however, the State fails to adequately marshall the evidence and to consider it and all the reasonable inferences that can be drawn from it in a light most favorable to the trial court's ruling. Pertinent case law provides that "a trial court's factual findings will not be reversed absent clear error." State v. Widdison, 2001 UT 60, ¶60 28 P.3d 1278. Further, to adequately demonstrate that a finding of fact is a "clear error," the complaining party "must first marshal all the evidence that supports the trial court's findings. After marshaling the supportive evidence, the appellant then must show that, even when viewing the evidence in a light most favorable to the trial court's ruling, the evidence is insufficient to support the trial court's findings." State v. Gamblin, 2000 UT 44, ¶17 n.2.3d 1108.

The trial court found that “[a]fter the officers could see Defendant’s hands and [k]new they were in no danger, the detention should have ended.” (R. 52). The preliminary hearing testimony on this point between Officer Robinson and the State on direct examination reads:

Q: You went back to a bedroom and you say you saw a male on the bed?

A: Correct.

Q: Describe what you saw?

A: There was a male laying face down. I can’t remember if it was a coat or blankets that were over him. I couldn’t see his hands. That was a concern for me. So I yelled at him, you know, “Wake up. Let me see your hands.” He wasn’t responsive. I remember shaking him and shaking the bed. “Wake up. I need to see your hands.” At that point he kind of gets up and wakes up I would say.

Mr. Buhman: Did you place him into custody?

Officer Robinson: Not at that time.

Mr. Buhman: Who was that male?

Officer Robinson: I asked him if he had any identification on him. He stated that he did not. I asked him for his name. He gave the name of Sean Tracy Michaels.

(R. 71: 6, 7).

The State asserts that based on this evidence that trial court’s finding that the officers could see defendant’s hands was clearly erroneous. However, reading the above dialogue, and considering the reasonable inferences that can be drawn from it and the totality of the circumstances, indicate that the trial court’s finding was reasonable and not “clear error.”

It was reasonable for the court to infer from the testimony and circumstances that defendant’s hands were either visible to the officers and/or that any concerns they had about their safety should have dissipated when defendant “kind of gets up and wakes up.”

(R. 71: 6). Defendant's actions of waking up and getting up were in response to the officer's yelling for him to show his hands multiple times and shaking him and the bed. The court therefore likely and reasonably inferred that when the officer testified that defendant "kind of gets up and wakes up I would say," that his hands had then become visible. When a person wakes up and gets up he/she customarily will sit and/or stand up thus making his/her hands visible.

It is also reasonable for the court to infer that because the officer said nothing further about defendant's hands not being visible after being so adamant on that point, that the opposite was true. There is no testimony elicited from the State or volunteered by Officer Robinson that after defendant "gets up and wakes up" that his hands were still not visible as would have been expected and reasonable had that been the case.

Therefore, considering the totality of the circumstances and the reasonable inferences that the court could draw from the evidence, the finding that the officers could see defendant's hands and knew they were in no danger was likely correct and at the very least certainly not "clear error."

POINT II

THE TRIAL COURT CORRECTLY CONCLUDED THAT THE CONTINUED DETENTION AND SUBSEQUENT SEARCH OF DEFENDANT AFTER HIS HANDS WERE VISIBLE EXCEEDED ANY PERMISSIBLE LENGTH AND SCOPE OF DETENTION AND WAS THEREFORE VIOLATIVE OF DEFENDANT'S FOURTH AMENDMENT RIGHTS

The trial court correctly concluded that after the officers could see defendant's hands and knew they were in no danger, the detention should have ended. It is well-established that a police officer may detain and question an individual "when the officer has reasonable, articulable suspicion that the person has been, is, or is about to be engaged in criminal activity." State v. Pena, 869 P.2d 932, 940 (Utah 1994). It is also

well-established that any detention of a person after an initial lawful stop must be “strictly tied to and justified by the circumstances which rendered its initiation permissible.” State v. Johnson, 805 P.2d 761, 762 (Utah 1991).

In the case at bar the trial court correctly concluded that the continued detention of defendant for questioning exceeded the permissible scope and was therefore violative of Fourth Amendment rights. The trial court concluded that the officers were justified, because of officer safety concerns, to awaken defendant to view his hands when they encountered him sleeping in the room where a third party currently under arrest was retrieving an item of clothing. The trial court also concluded that the actions of waking the defendant in a private residence by shaking him and the bed in which he slept amounted to a level two encounter.¹

Based on these conclusions, the court’s reasoned that because defendant was detained for the limited purpose of ensuring officer safety, and because it amounted to a level two detention, once the defendant woke up and got up and his hands were likely visible, any safety concerns of the officers should have been alleviated and the detention of defendant should have ended. The officers were only to be present in the room for what should have been a very short period of time to allow an arrested third party to retrieve some pants. (R. 71: 6). There were two officers present with no indication the third party was not being cooperative and the situation was apparently well in hand. (R. 71: 6, 7). The defendant they found in the room was found and assumed by Officer Robinson to be sleeping. (R. 71: 15, 16). The officer’s only apparent concern was not being able to see defendant’s hands because they were covered by his body or by a

¹ It should be noted that the State does not challenge the trial court’s conclusion that the officer’s actions and surrounding circumstances constitute a level two detention.

blanket or a coat. (R. 71: 15). Rather than allowing the defendant to peacefully sleep during the presumably minute or two it would have taken for the cooperative arrested individual to retrieve her pants, the officer decided to likely prolong the time in the room by waking the defendant to see his hands.

The trial court found, as discussed in Point I above, that once defendant awake and got up, that his hands were likely visible and therefore any concerns the officers may have had for their safety should have dissipated. It was not necessary and exceeded the permissible scope of detention, as the trial court concluded, for the officer to continue to detain defendant for any questioning as the only possible reasonable fear the officers entertained was not being able to view defendant's hands. Once the hands were visible, further questioning was nothing more than a fishing expedition unsupported by any remaining fear for officer safety and certainly not supported by any reasonable suspicion of criminal activity.

The State also contends that the trial court's note, "that the officers also ran a warrant check on the name Defendant gave them, although the check would not reveal any information that would establish Defendant's identity" was clearly erroneous. (R. 52). The record does not support this contention. The exchange between the State and Officer Robinson on this point during direct examination was as follows:

Q. He gave you that name, what did you do with that information?

A. I also asked -- he gave the date of birth of December 4th, '61. I ran the warrants and an NCI check on that individual.

Q. Was he in custody when you did that?

A. He was not.

Q. Go on.

A. When he gave that name, I overheard my -- the person who I had in custody, Monique Young, whisper to another office[r] who was assisting me, stating that was not his name, that his name was Tracy Valdez. I then advised to dispatch to check Tracy Valdez with the date of birth that he gave me. They came back with a valid statewide warrant for Tracy Valdez with a different date of birth of 12-3 of '61 instead of 12-4 of '61.

(R. 71: 7, 8).

It seems clear and reasonably likely based on this testimony, that of Officer Robinson stating that he ran the warrants and NCI check on the individual with the December 4th, '61 birth rate and stating he then advised to dispatch to check Tracy Valdez after hearing Ms. Young whisper to the other officer, that two warrants checks were performed and/or requested. The trial court's note that the officers ran a warrant check that would not reveal any information that would establish Defendant's identity is likely correct. At the worst the testimony is somewhat ambiguous regarding whether two warrants checks were requested and but suggests the reasonable inference the court made that this was the case and therefore this finding, if was in fact a pertinent one, was not "clear error" and therefore should not be disturbed on appeal.

The State also cites cases attempting to support their proposition that the officer's questioning defendant about his name, identification, etc. is an inherent part of an officer safety investigative detention. These cases carry little if any precedential value and/or can be factually distinguished from the case at bar in that many of them involved defendants who were being investigated for criminal activity or that involved actual reports or some evidence that the defendants were armed and dangerous *previous* to any initiated *Terry* stop.

Additionally, the citation to LaFave, Search and Seizure: A Treatise on the Fourth Amendment S. 9.5(g)(3rd ed. 1996) is unpersuasive because it concerns the situations where an individual is suspected of committing a crime or crimes and his identification

could prove useful if more evidence becomes available implicating him as the perpetrator of that or a similar crime. In the case at hand the defendant was not a suspect in any crime nor was there nor does the State claim there was any reasonable suspicion that he had committed or was about to commit a crime. This was not an ongoing investigation of any crime, but rather what should have been at worst no more than a momentary inconvenience for the defendant to show his hands.

Similarly, the Utah Code Annotated § 77-7-15 which reads “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,” is not probative because there was no reasonable suspicion that defendant was engaged in or going to be engaged in any public offense, and the officers and defendant were not in a private residence not a public place.

This case should also be distinguished from Michigan v. Summers, 452 U.S. 692, 101 S.Ct. 2587 (1981), where the Court held that a search warrant for a house carries with it the authority to detain its occupants until the search is completed because in this case the officers were not executing a search warrant but rather an arrest warrant. Their entry into the home was not necessary and they had already effected the arrest warrant by arresting the wanted individual who was cooperative. Therefore there was not need to disturb defendant’s sleep or to obtain his name/identification because the officers had already effected the warrant they had set out to execute.

POINT III

IF NECESSARY THIS COURT CAN AND SHOULD CONCLUDE THAT AN ALTERNATIVE BASIS FOR AFFIRMING THE TRIAL COURT'S RULING EXISTS IN THAT THE INITIATION OF A LEVEL TWO ENCOUNTER WITH DEFENDANT WAS NOT A JUSTIFIED OFFICER SAFETY EXCEPTION TO THE FOURTH AMENDMENT'S WARRANT REQUIREMENT

Defendant urges this court to review and if necessary as an alternative basis for affirming the trial court's ruling below, to find that the level two detention initiated by Officer Robinson was not justified under an officer safety exception to the Fourth Amendment's warrant requirement or constitutionally permissible under any other exception. This court has the authority to "affirm on any ground presented to the trial court." State v. Montoya, 937 P.2d 145, 149 (Utah App. 1997). Defendant argued below through his counsel in his Memorandum of Points and Authorities in Support of Motion to Suppress and during the suppression hearing that Officer's Robinson's actions of initiating a level two encounter could not be justified under any exception to the warrant requirement. (R. 38; 72).

In Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968), the United States Supreme Court "established a narrowly drawn exception to the Fourth Amendment requirement that police obtain a warrant for all searches. Where a police officer validly stops an individual for investigatory or other purposes *and reasonably believes that the individual may be armed and dangerous*, the officer may conduct a "frisk" or "pat-down" search of the individual to discover weapons that might be used against him." State v. Warren, 2001 UT App 346, ¶13, 37 P.3d 270 (quoting State v. Carter, 707 P.2d 656, 659 (Utah 1985)). Further, "the State must present articulable facts that would reasonably lead an objective officer to conclude that the suspect may be armed" and "a mere unparticularized suspicion or hunch is not sufficient." ' Warren, 2001 UT App. at ¶14 (quoting Carter, 707 P.2d at 659).

The Utah Court of Appeals has recognized two basic scenarios that may warrant a *Terry* frisk. In the first scenario “facts and circumstances unique to the particular suspect and/or factual context may give rise to a reasonable suspicion the suspect may be armed, such as a suspect with a bulge in his clothing that appears to be a weapon or a suspect who is hesitant in denying that he is armed and aggressively approaches the officer immediately upon being stopped.” *Id.* at ¶15.

In the second scenario, “it is not so much the peculiarities of the suspect and circumstances as it is the inherent nature of the crime being investigated that leads to the reasonable suspicion that the suspect may be armed.” *Id.* at ¶15. Elaborating, the Court recognized that crimes such as robbery, burglary, rape, assault with weapons, homicide, and dealing in large quantities of drugs are by their nature suggestive of the presence of weapons, but that for other types of crimes such as possession of marijuana, illegal possession of liquor, minor assaults without weapons, *underage drinking*, driving under the influence and lesser traffic offenses “there must be particular facts which lead the officer to believe that a suspect is armed.” *Id.* at ¶15. (emphasis added).

In the case at hand there was nothing “inherent in the nature of the crime being investigated that would lead to reasonable suspicion that the suspect may be armed” for there was no crime being investigated and no suspect to investigate. Rather, officers had simply executed an arrest warrant for a third party and were present with her while she retrieved one item of clothing.

Additionally, in the case at hand there were not sufficient “articulable facts that would reasonably lead an objective officer to conclude that the suspect may be armed.” *Warren*, 2001 UT App 346 at ¶14 (quoting *Carter* 707 P.2d at 659). The officers went to the home to effect an arrest warrant of another individual. (R. 71: 5). After having arrested said individual without any apparent problems, two officers accompanied her to

a bedroom for her to retrieve some pants. (R. 71: 6, 7). In the room they found the defendant they found on the bed and assumed by Officer Robinson to be sleeping. (R. 71: 15, 16). The officer's only apparent concern was not being able to see defendant's hands because they were covered by his body or by a blanket or a coat. (R. 71: 15). Rather than allowing the defendant to peacefully sleep during the presumably minute or two it would have taken for the cooperative arrested individual to retrieve her pants, even with two officers present, one to watch each individual, the officer decided to likely prolong the time in the room by waking the defendant to see his hands. There was nothing about the defendant other than his presence and his sleeping with his arms under blankets or a coat that would have raised any reasonable suspicion that he was armed and dangerous. These circumstances coupled with the fact that the defendant was not being investigated for any crime and was not in public but sleeping in a private residence support the argument that the officers had no reasonable, articulable suspicions that defendant was presently armed and dangerous sufficient to justify initiating a level two detention.


Therefore, Defendant urges this court to find that the officers lacked justification to detain him under the circumstances and to affirm the decision of the trial court on this alternative ground if necessary.²

² The State also asserts that even if the officers unreasonably believed defendant to be armed and dangerous, that the request for defendant's name was a justifiable minimal intrusion. The argument lacks merit in this case because the trial court found, and it is not challenged here, that defendant was subjected to a level two detention which must necessarily be supported by either reasonable suspicion of criminal activity or other justification. If the officer safety justification is not applicable, there is no justification for the level two detention and therefore defendant's Fourth Amendments rights were violated at the inception of the level two detention.

CONCLUSION AND PRECISE RELIEF SOUGHT

For the foregoing reasons, Defendant asks that this Court affirm the decision of the trial court suppressing the evidence and dismissing the charges against him because either the police exceeded the scope of their permissible seizure of him without legal justification or that the officers lacked legal justification for initiating a level two detention of him.

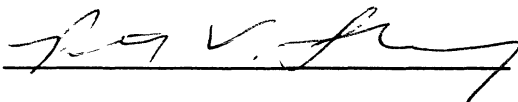
RESPECTFULLY SUBMITTED this 14th day of June, 2002 .


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CERTIFICATE OF MAILING

I hereby certify that I delivered two (2) true and correct copies of the foregoing Brief Of Appellee to Kenneth A. Bronston, Assistant Attorney General, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, UT 84114-0854 this 14th day of June, 2002.



ADDENDA

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

7-31-01 sec Deputy

STATE OF UTAH, Plaintiff, v. TRACY MANUEL VALDEZ, Defendant.	RULING Case No. 011400986 Judge Ray M. Harding
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This matter comes before the Court on Defendant's Motion to Suppress. The Court has reviewed the file, considered the memoranda filed by the parties, heard oral arguments, and being fully advised in the premises, issues the following:

RULING

On February 26, 2001, Officer Bryan Robinson went to the home of Monique Young in Pleasant Grove with a valid warrant for her arrest. She answered the door wearing boxer shorts and asked to put on a pair of pants. The officer agreed and escorted her back to the bedroom. There the officer noticed a male lying face down on the bed. The man was evidently asleep because Officer Robinson had to shake him and yell at him for the man to wake up. Officer Robinson was concerned that he could not see the man's hands. After the man awoke, Officer Robinson asked him for his identification, which the man stated he did not have. The officer then asked the man for his name and birth date. The man responded with the name of Sean Tracy Michaels. Officer Robinson ran a warrants and an NCI check on that name. Officer Robinson had also overheard Monique Young whispering to the assisting officer after the Defendant had given the name of Sean Tracy Michaels that the man's true name was Tracy Valdez. Officer

Robinson ran a warrants check on that name as well. The warrants checks turned up a valid warrant for Tracy Valdez. A search incident to arrest turned up methamphetamine on the person of the Defendant.

Defendant argues that this situation is similar to the one faced by the passenger-defendant in *State v. Johnson*, 805 P.2d 761 (Utah 1991). In *Johnson*, an officer pulled over a car with faulty brake lights. The officer noticed that the name on license was not that of the registered owner. Suspecting the car might be stolen, the officer asked for the name and birth date of the passenger and then ran a warrants check on the driver and passenger. The Court ruled that

the leap from asking for the passenger's name and date of birth to running a warrants check on her severed the chain of rational inference from specific articulable facts and degenerated into an attempt to support an as yet "inchoate and unparticularized suspicion or 'hunch.'"

Id. at 764.

The State here argues that this case is distinguishable in that *Johnson* was a level two stop and the current Defendant was only subjected to a level one encounter until reasonable suspicion to detain him had arisen. This Court disagrees.

There are generally three levels of constitutionally permissible encounters between law enforcement officers and the public:

"(1) an officer may approach a citizen at anytime [sic] and pose questions so long as the citizen is not detained against his will; (2) 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) an officer may arrest a suspect if the officer has probable cause to believe an offense has been committed or is being committed."

A level one encounter "is a voluntary encounter where a citizen may respond to an officer's inquiries but is free to leave at any time." *State v. Jackson*, 805 P.2d 765, 767 (Utah Ct. App. 1990); accord *Bean*, 869 P.2d at 986 ("[A] seizure within the meaning of the fourth amendment does not occur when a police officer merely approaches an individual on the street and questions him, if the person is willing to listen.") (citation omitted). "As long as the person 'remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification.'"

With a level two stop, however, the person is seized for purposes of the Fourth Amendment, "when the officer "by means of physical force or show of authority has in some way restrained the liberty" of a person." Hence, a level one encounter becomes a level two stop and "a seizure under the fourth amendment occurs when a reasonable person, in view of all the circumstances, would believe he or she is not free to leave." This is true "even if the purpose of the stop is limited and the resulting detention brief."

"Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."

Salt Lake City v. Ray, 998 P.2d 274, 277 (Utah App. 2000) (citations omitted).

In the present case, the officers had exceeded a level one encounter before the questioning began. The testimony was that the Defendant was shouted at and physically shaken by an officer before any questioning began. The encounter occurred not on a public street but in a private bedroom with two officers present. The officers already had someone in custody. A reasonable person in that situation would not have felt at liberty to disregard the officer's question or walk away.

After the officers could see Defendants hands and new they were in no danger, the detention should have ended.

The length and scope of the detention must be "'strictly tied to and justified by' the circumstances which rendered its initiation permissible."

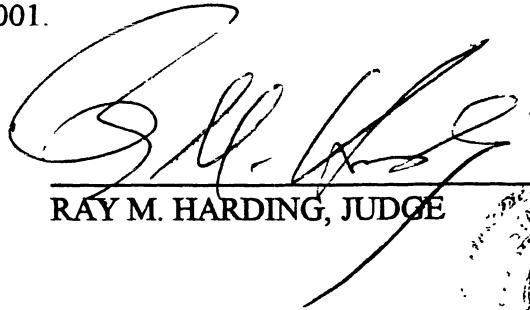
State v. Johnson, 805 P.2d 761, 762 (Utah 1991). While Monique Young's statement may have given rise to an articulable suspicion that Defendant had given the officers false information, the Defendant had already been improperly detained at that point. It is worthy of note that the officers also ran a warrant check on the name Defendant gave them, although the check would not reveal any information that would establish Defendant's identity.

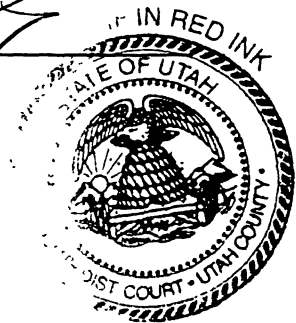
CONCLUSION

For the above reasons, the Court hereby rules that:

1. Defendant's Motion to Suppress is GRANTED.

DATED this 31st day of July, 2001.


RAY M. HARDING, JUDGE

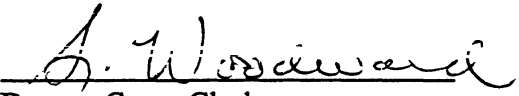


MAILING CERTIFICATE

I hereby certify that on the 31st day of July, 2001, I mailed a true and correct copy of the foregoing to the following, with postage prepaid thereon.

Richard P Gale, 245 North University Avenue, Provo, UT 84601

Kay Bryson / Jeffrey R. Buhman, 100 East Center Street, Suite 2100, Provo, UT 84606


Deputy Court Clerk

IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR UTAH COUNTY, STATE OF UTAH

15 17:11:57
3

STATE OF UTAH,

Plaintiff,

VS.

TRACY MANUEL VALDEZ,

Defendant.

CASE NO. 011400986

ORIGINAL

BEFORE THE HONORABLE LYNN W. DAVIS

FOURTH DISTRICT COURT

125 NORTH 100 WEST

PROVO, UTAH 84601

REPORTER'S TRANSCRIPT OF PROCEEDINGS

PRELIMINARY HEARING

APRIL 2, 2001

REPORTED BY: Tasha Taylor, RPR, CSR

FILED

NOV 20 2001

COURT OF APPEALS

20010772 CH

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A P P E A R A N C E S

FOR THE PLAINTIFF:

JEFFREY BUHMAN
UTAH COUNTY ATTORNEY
100 E. Center #2100
Provo, UT 84606

FOR THE DEFENDANT:

RICHARD GALE
UTAH COUNTY PUBLIC DEFENDER
40 South 100 West #200
Provo, Utah 84601

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I N D E X

<u>WITNESS</u>	<u>PAGE NO.</u>
BRYAN ROBINSON	
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Cross-Examination by Mr. Gale.....	13
Redirect Examination by Mr. Buhman.....	18

E X H I B I T

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PLAINTIFF'S EXHIBIT NO. 1	9
PLAINTIFF'S EXHIBIT NO. 2	11
PLAINTIFF'S EXHIBIT NO. 3	13

1 Provo, Utah; April 2, 2001

2 P R O C E E D I N G S

3 THE COURT: We are back on the record now on the
4 preliminary hearing on the case of State of Utah vs. Tracy
5 Manuel Valdez, case No. 001400986.

6 Is the State prepared to proceed?

7 MR. BUHMAN: We are, Your Honor. We'd call Officer
8 Robinson.

9 THE COURT: Tracy Valdez is present. Richard Gale
10 is here in his behalf. Call your first witness.

11 MR. GALE: Judge, we'd move to exclude any witnesses
12 who are going to testify who are in the courtroom at this
13 time.

14 MR. BUHMAN: He's the only one.

15 THE COURT: Okay.

16
17 BRYAN ROBINSON

18 called by the Plaintiff, having been duly
19 sworn, was examined and testified as follows:

20 THE CLERK: You do solemnly swear that the testimony
21 you are about to give in the case now before the Court will
22 be the truth, the whole truth and nothing but the truth, so
23 help you God?

24 THE WITNESS: I do.

25 THE COURT: Be seated to my left. Respond to

1 questions from counsel. You may proceed.

2

3

DIRECT EXAMINATION

4

BY MR. BUHMAN:

5

Q. Officer, please state your name and spell your last
6 name.

7

A. Bryan J. Robinson, R-O-B-I-N-S-O-N.

8

Q. And back in February of this year, by whom were you
9 employed?

10

A. Pleasant Grove Department of Public Safety.

11

Q. As a police officer?

12

A. Correct.

13

Q. And on that date, February 26th, did you respond to
14 a home on Thornberry Avenue in Pleasant Grove to affect an
15 arrest warrant?

16

A. I did.

17

Q. Describe what happened, please?

18

A. I went there to arrest Monique Young. She had a
19 valid warrant out of our city. I knocked on the door. We
20 could hear people in there in the house. It was sometime
21 before they answered the door. Finally the door was opened.
22 Monique Young, who I knew to be Monique Young, answered the
23 door. I advised her that she had a warrant for her arrest
24 and advised her she was under arrest.

25

Q. What happened?

1 A. She had, like, some boxer type shorts, or some
2 shorts on. She requested that she be allowed to put on some
3 pants. I allowed her to do that. She said they were back in
4 her bedroom. I escorted her back to her bedroom where there
5 was a male individual laying on a bed face down.

6 Q. Why did you escort her back to the bedroom?

7 A. Custody, personal safety reasons. She was under
8 arrest. I wasn't going to allow her to leave my sight.

9 Q. You already told her she was under arrest?

10 A. I advised she was under arrest.

11 Q. You went back to a bedroom and you say you saw a
12 male on the bed?

13 A. Correct.

14 Q. Describe what you saw?

15 A. There was a male laying face down. I can't remember
16 if it was a coat or blankets that were over him. I couldn't
17 see his hands. That was a concern for me. So I yelled at
18 him, you know, "Wake up. Let me see your hands." He wasn't
19 responsive. I remember shaking him and shaking the bed.
20 "Wake up. I need to see your hands." At that point he kind
21 of gets up and wakes up I would say.

22 Q. Did you place him into custody?

23 A. Not at that time.

24 Q. Who was that male?

25 A. I asked him if he had any identification on him. He

1 stated that he did not. I asked him for his name. He gave
2 the name of Sean Tracy Michaels.

3 Q. Sean Tracy Michaels?

4 A. Correct.

5 Q. Is that person here in the courtroom today who
6 identified himself with that name?

7 A. He is.

8 Q. Would you identify him?

9 A. He is the defendant in the green shirt.

10 MR. BUHMAN: Your Honor, may the record reflect that
11 he identified Mr. Valdez?

12 THE COURT: It may.

13 BY MR. BUHMAN:

14 Q. He gave you that name, what did you do with that
15 information?

16 A. I also asked -- he gave the date of birth of
17 December 4th, '61. I ran the warrants and an NCI check on
18 that individual.

19 Q. Was he in custody when you did that?

20 A. He was not.

21 Q. Go on.

22 A. When he gave that name, I overheard my -- the person
23 who I had in custody, Monique Young, whisper to another
24 office who was assisting me, stating that was not his name,
25 that his name was Tracy Valdez. I then advised to dispatch

1 to check Tracy Valdez with the date of birth that he gave me.
2 They came back with a valid statewide warrant for Tracy
3 Valdez with a different date of birth of 12-3 of '61 instead
4 of 12-4 of '61.

5 Q. Go on.

6 A. At that point I asked the defendant if he had any
7 identification. At that point he produced a Utah
8 identification card from his right rear pocket. The name on
9 the card was Tracy Manuel Valdez with a date of birth of 12-3
10 of '61.

11 Q. You said that under the name on the identification
12 card there was a valid statewide warrant?

13 A. Correct.

14 Q. And so what did you do?

15 A. I then placed him under arrest for the valid
16 statewide warrant, and for false personal information.

17 Q. Go on.

18 A. I secured him in handcuffs. I led him out to my
19 patrol vehicle, while the other officer led out the other in
20 custody out to his patrol vehicle. I patted him down for
21 weapons. I searched his person, lifted up his shirt. He had
22 a big black trench coat on. I removed that to make sure that
23 it didn't have any weapons in it or items of contraband. In
24 his belt, on the right side of his belt he had several small
25 plastic baggies in his possession. They were kind of hidden

1 in his belt.

2 MR. BUHMAN: May I approach the witness?

3 THE COURT: You may.

4 BY MR. BUHMAN:

5 Q. I'm handing you a plastic baggy marked State's
6 Exhibit No. 1. What is that?

7 A. These are the bags that were in his waistband or
8 belt.

9 Q. In your experience, what are those baggies used for?

10 A. They usually contain items of contraband, controlled
11 substances, methamphetamine, marijuana, various items like
12 that.

13 MR. BUHMAN: Move to admit Exhibit No. 1.

14 THE COURT: Any objection, Counsel, for the purpose
15 of this hearing?

16 MR. GALE: No objection.

17 THE COURT: They may be received. Thank you.

18 (Plaintiff's Exhibit No. 1 was received into
19 evidence.)

20 MR. BUHMAN: Go ahead and pass that up to the Judge.

21 BY MR. BUHMAN:

22 Q. Officer Robinson, did you continue searching him?

23 A. I did. I noticed there was on his zipper, fastened
24 to his zipper on his pants, fastened to a chain --

25 Q. A fly zipper?

1 A. Yes. There was like a metal vial, like -- I asked
2 him what was in it. He said it was medicine, pills.

3 Q. Let me back up. From his zipper, there was a chain?

4 A. I have something similar to it if that will help.
5 It's like one of those type of things, but it was much
6 bigger, and it was fastened like with a key chain to his
7 zipper on his pants.

8 Q. So there's a metal vial with a chain attached to the
9 zipper; is that correct?

10 A. Correct.

11 Q. And did you search that container?

12 A. I did.

13 Q. What did you find?

14 A. There was a white crystal substance in it that --
15 that was in it. It later field tested positive for
16 methamphetamine.

17 Q. Officer, we spoke earlier. You indicated that that
18 substance is not here in the courtroom today. Do you know
19 where it is?

20 A. It's at the Utah State Crime Lab.

21 Q. It's still at the Crime Lab?

22 A. Correct.

23 Q. Did you send that up for testing?

24 A. I did.

25 MR. BUHMAN: May I approach?

1 THE COURT: You may.

2 BY MR. BUHMAN:

3 Q. This is State's No. 2, a document. Is that the
4 results from the Crime Lab's test of what you sent up in that
5 vial?

6 A. It is.

7 Q. And what are the results of that test?

8 A. On the second page it states that item one
9 methamphetamine was identified in the white crystal residue
10 in the metal tube.

11 MR. BUHMAN: Move to admit Exhibit No. 2.

12 THE COURT: Any objection, Counselor, for the
13 purpose of this hearing?

14 MR. GALE: No objection.

15 THE COURT: It may be received.

16 (Plaintiff's Exhibit No. 2 was received into
17 evidence.)

18 BY MR. BUHMAN:

19 Q. And the place where this arrest occurred, did it
20 occur within a thousand feet of any day care centers?

21 A. It did.

22 Q. Which day care center?

23 A. I'm not sure the name. It's kind of part of the
24 complex, that Thornberry Apartments. There's several
25 apartment buildings and it's adjacent in the same parking lot

1 as the Thornberry Apartments.

2 Q. Easily within a thousand feet?

3 A. Easily.

4 Q. Is there also a post office there?

5 A. Correct.

6 Q. Within a thousand feet?

7 A. Easily.

8 Q. Is there public parking at that post office?

9 A. There is.

10 MR. BUHMAN: Your Honor, for the purpose of today's
11 hearing, I had the -- I don't know her last name. I had
12 Sharon --

13 THE COURT: Sharon Jones.

14 MR. BUHMAN: -- print off two prior convictions.

15 These are just the minutes. We don't have the certified
16 judgments. We're asking the Court to consider these for
17 today's hearing. May I approach so Your Honor can examine
18 them?

19 THE COURT: Let Counsel examine them first of all.

20 MR. BUHMAN: He has, Your Honor.

21 THE COURT: Very well.

22 MR. BUHMAN: One of them we will need to do further
23 research. Do you want me to mark them, Your Honor?

24 THE COURT: I would think so, if you're going to
25 rely on them having been previously convicted of unlawful

1 possession or use of a controlled substance.

2 (Counsel confer off the record.)

3 MR. BUHMAN: Your Honor, this is State's Exhibit
4 No. 3, which I proffer shows a conviction for possession,
5 distribution of a controlled substance within a thousand feet
6 of a school or public place, a third degree felony.

7 THE COURT: Any objection, Counsel?

8 MR. GALE: No, Your Honor.

9 THE COURT: For the purposes of this hearing, it may
10 be received.

11 (Plaintiff's Exhibit No. 3 was received into
12 evidence.)

13 MR. BUHMAN: Your Honor, just for -- I don't mean to
14 make any argument at this point, but because the drugs are at
15 the crime laboratory, if there were an issue of admissibility
16 today or the weight of the evidence, for that particular item
17 we would move for a continuance to admit those as evidence in
18 the preliminary hearing pursuant to Rule 1102 of the Rules of
19 Evidence.

20 MR. GALE: I have no objection, Judge.

21 THE COURT: Okay. You may cross-examine.

22

23 CROSS-EXAMINATION

24 BY MR. GALE:

25 Q. Officer Robinson, you said that you went to the

1 apartment in Pleasant Grove to arrest Monique Young; is that
2 right?

3 A. Correct.

4 Q. You knew that Monique Young was at that apartment?

5 A. Correct.

6 Q. And when you knocked on the door, ~~then~~ you said you
7 heard some noise inside the apartment; is that right?

8 A. There was people -- you could tell there was people
9 walking around in there. You knew that there was somebody in
10 there.

11 Q. So you knew somebody was in there, and then Monique
12 Young actually answered the door; is that right?

13 A. Correct.

14 Q. At that time you knew she was Monique Young?

15 A. Correct.

16 Q. You told her that she was under arrest and that you
17 were going to take her to jail, didn't you?

18 A. Correct.

19 Q. And at that point she asked if she could put on some
20 pants over her shorts; is that correct?

21 A. Correct.

22 Q. At that point you had completed the purpose for
23 which you had gone to the apartment, hadn't you?

24 A. To arrest Monique Young, yes.

25 Q. And so your only purpose going back any further into

1 the apartment was to get pants for her; is that correct?

2 A. I wasn't the one getting the pants for her. I was
3 allowing her to go back there to get the pants and I escorted
4 her back there.

5 Q. That was the only reason you went back there; is
6 that right?

7 A. It's for my officer safety, and to allow her to go
8 back and get the pants. Yes, that's the only reason I went
9 back.

10 Q. So when you went back there into the room to get the
11 pants, you said that you saw a male laying face down on the
12 bed; is that right?

13 A. Correct.

14 Q. And that male, you testified that you had to yell at
15 him and sort of shake him to wake him up?

16 A. Correct.

17 Q. So this person was actually asleep when you got in
18 the room, wasn't he?

19 A. I would assume so.

20 Q. And so since this person was asleep, while he was
21 asleep, he certainly didn't pose any kind of threat to
22 officer safety?

23 A. I couldn't see his hands. His hands were concealed
24 either by his body or by a blanket or by a coat. I could not
25 see his hands.

1 Q. But you thought he was asleep, didn't you?

2 A. I would assume, yeah.

3 Q. And certainly he didn't do anything that was
4 suspicious at that point, did he?

5 A. It took quite a bit to get him awake. I became more
6 suspicious that he would be feigning that he was actually
7 asleep and just was laying there face down hoping I'd go
8 away.

9 Q. So the only suspicious thing was that he wouldn't
10 wake up, not anything else?

11 A. And that I couldn't see his hands.

12 Q. You couldn't see his hands because they were under a
13 coat or blanket or something on the bed?

14 A. Correct.

15 Q. And then it was after you woke this individual up
16 that you asked for ID and for the individual's name; is that
17 right?

18 A. Correct.

19 Q. And it was after you asked -- after you asked the
20 question of what his name was and asked for ID that Monique
21 whispered that his name was Tracy Valdez; is that right?

22 A. Correct.

23 Q. So you didn't suspect him of giving any false
24 information until after you had already asked him what his
25 name was and for his ID; is that right?

1 A. Before that point, no, I did not.

2 Q. Now, after you found out what his name was, you said
3 that you did a Terry frisk for weapons; is that right?

4 A. I don't know if I testified to that. I can't
5 remember if I frisked him in the apartment or not. Is that
6 what you are asking?

7 Q. Yes. At some point after you found out his name,
8 you performed a frisk; is that right?

9 A. After he was in custody. I know for sure that I did
10 frisk him.

11 Q. At that point you were frisking him to determine
12 whether he had any weapons?

13 A. Correct. He was in custody at that time.

14 Q. And so you -- when you were frisking him to see if
15 he had any weapons, then you saw these plastic bags on his
16 belt; is that right?

17 A. Correct.

18 Q. You knew those weren't weapons; correct?

19 A. Correct.

20 Q. And then you saw these little vials on his zipper
21 chain; is that correct?

22 A. Yes.

23 Q. Now, you said you have a little vial there, you said
24 this vial was a little bigger than yours?

25 A. His vial was a little bigger than the one that I

1 have.

2 Q. How much bigger was his vial?

3 A. This is, what, probably a quarter inch in diameter.
4 I'd say his is closer to maybe a half inch in diameter.

5 Q. A half inch in diameter, how long?

6 A. Probably the same length, about an inch, inch and a
7 half, two inches.

8 Q. Now, you didn't suspect that that vial had weapons
9 or anything in it, did you?

10 A. No.

11 MR. GALE: I don't have anything further, Your
12 Honor.

13 THE COURT: Any redirect?

14 MR. BUHMAN: Just briefly.

15

16 REDIRECT EXAMINATION

17 BY MR. BUHMAN:

18 Q. When you entered the apartment, you saw Mr. Valdez
19 asleep on the bed. Did you know that he was asleep?

20 A. No, I did not know that he was asleep.

21 Q. Do you recall approximately what time of night it
22 was?

23 A. It was in the day time. It was the middle of the
24 day.

25 Q. That's all right. Did you ask for his

1 identification first or just ask for his name first?

2 A. I asked if he had any ID first.

3 Q. Did you do anything to place him in custody at that
4 time?

5 A. I did not.

6 Q. Did you frisk him at that point?

7 A. Not that I remember.

8 Q. Did you tell him he was under arrest?

9 A. Did not.

10 Q. You indicated earlier that you searched his belt
11 area and you found baggies and a vial. Did that occur before
12 or after you arrested him?

13 A. It was after he was arrested and taken from the
14 bedroom down to my patrol vehicle.

15 MR. BUHMAN: Thank you.

16 THE COURT: Mr. Gale, any further questions?

17 MR. GALE: No, Your Honor.

18 THE COURT: Very well. You may step down.

19 State rest?

20 MR. BUHMAN: If I didn't, I'd move to admit all my
21 evidence. If I haven't, I'd move to admit them and I rest.

22 THE COURT: I think you already have, Counsel, and
23 there's -- at least for the purposes of this hearing, there's
24 been no objection to the Court receiving State's Exhibits 1,
25 2 and 3.

1 Mr. Gale?

2 MR. GALE: Judge, I don't have anything. I've
3 advised Mr. Valdez of his right to testify. I believe he's
4 going to take my advice and not testify at today's hearing.
5 And so we'd just submit the case.

6 THE COURT: I'm going to find that there is probably
7 cause that the offenses were committed, and probable cause
8 that Tracy Manuel Valdez committed the offenses. Is he
9 prepared then to enter a plea, Counsel, to these charges, and
10 you can then set it for trial?

11 MR. GALE: Judge, he'd enter a plea of not guilty at
12 this point.

13 THE COURT: I'll show an entry of not guilty pleas
14 to all three charges. How long will this take from the
15 State's perspective to hear?

16 MR. BUHMAN: One day, Your Honor.

17 MR. GALE: Judge, we anticipate a suppression --
18 filing a suppression motion, and having a -- possibly having
19 a hearing. I guess I'm going to need to request the
20 transcript, look at the case law, and determine whether we'd
21 request a hearing or just submit it on the preliminary
22 hearing transcript.

23 THE COURT: Do so within what period of time, 20
24 days?

25 MR. GALE: That would be great, Judge.

1 THE COURT: Give the State ten days to respond.
2 Let's set the next hearing. Well, you don't know whether
3 you're going to request a formal hearing.

4 MR. GALE: Judge, why don't we set up a hearing.
5 Because even if I don't request a formal hearing, I would
6 like to argue it, even if we don't have an evidentiary
7 hearing.

8 MR. BUHMAN: Are we going to have the transcript
9 that quickly?

10 (A discussion was held off the record.)

11 THE COURT: I'll give you 30 days, Counsel, and 10
12 days for the State to respond. Let's set it subsequent to
13 that time.

14 THE CLERK: How about May 21st, 1:30.

15 MR. BUHMAN: I'm scheduled to be in trial that day.

16 THE CLERK: June 4th at 1:30.

17 MR. BUHMAN: Fine with me.

18 MR. GALE: I'm going to be out of town that week.

19 THE CLERK: June 11th.

20 MR. GALE: I'm available then.

21 MR. BUHMAN: That's fine.

22 THE COURT: June 11th, 1:30. Counsel, will you make
23 a motion to withdraw your exhibits?

24 MR. BUHMAN: I'll make the motion.

25 THE COURT: I'll grant you motion. The record will

1 reflect that I'm providing back to Mr. Buhman State's
2 Exhibits 1, 2, and 3. Thank you.

3 MR. GALE: Judge, we have one other issue we'd like
4 to address. Mr. Valdez previously, as you know, was given a
5 one year commitment and allowed work release after the first
6 three months. On this case, I believe he has some bail, but
7 is not going to get out of custody. What I would request,
8 Judge, is perhaps that rather than have this bail, that the
9 Court release him on this case so that he would be able to
10 get into work release when that's available for him.

11 Judge, he's going to -- as you know, he's going to
12 be held for the next nine months, at least. I don't know if
13 it was even three months ago that he was given the one year
14 commitment.

15 THE COURT: Let's revisit it when the time arrives.
16 I don't think it's ripe at this point in time.

17 MR. GALE: Judge, I think he has a month and a half,
18 and he needs to get on to the waiting list to get into work
19 release. They won't even do that until he is -- he's able
20 for work release. So he's not -- at this point because he's
21 being held on this case with the bail, he's not even able to
22 put his name on the waiting list.

23 THE COURT: But didn't I allowed on the one year
24 commitment the last ninety days he could go ---

25 MR. GALE: After the first ninety days you allowed

1 him -- he could go into work release. I believe that was
2 probably a month ago or so.

3 THE COURT: State want to be heard?

4 MR. BUHMAN: I'm not very familiar with the other
5 case. In this case -- has he received any drug treatment in
6 the jail?

7 THE DEFENDANT: I'm in the kitchen. I signed up for
8 the drug treatment, but they won't let me go through that
9 unless I'm court ordered because all the court ordered people
10 they have to shove them through.

11 THE COURT: But the other case is a sexual case, as
12 I -- contributing to the delinquency of a minor.

13 MR. GALE: It's a Class A misdemeanor. I forgot
14 what the term is.

15 THE DEFENDANT: It wasn't a sexual case.

16 THE COURT: Distribution of sexually explicit
17 material to a minor.

18 MR. GALE: Where one of his kids had access to a
19 magazine.

20 MR. BUHMAN: I believe there's also two warrants
21 that are still outstanding. That's what they said today.

22 MR. GALE: If they are, Judge, I think those are
23 misdemeanor warrants, like Pleasant Grove --

24 MR. BUHMAN: One's a Judge Backlund and the other
25 one is out of Sandy.

REPORTER'S CERTIFICATE

STATE OF UTAH)
 : SS.
County of Utah)

I, Tasha Taylor, do certify that I am an Official
Court Reporter in and for the State of Utah.

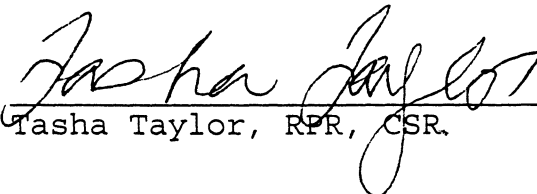
That as such reporter, I reported the occasion of
the proceedings of the above-entitled matter at the aforesaid
time and place.

That the proceeding was reported by me in stenotype
using computer-aided transcription consisting of pages 4
through 24 inclusive;

That the same constitutes a true and correct
transcription of the said proceedings;

That I am not of kin or otherwise associated with
any of the parties herein or their counsel, and that I am not
interested in the events thereof.

WITNESS my hand at Provo, Utah, this 16th day of
April, 2001.


Tasha Taylor, RPR, CSR.