

1991

Mario Jose Valasquez v. State of Utah : Unknown

Utah Supreme Court

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Unknown.

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June 12, 1991

Geoffrey J. Butler
Clerk of the Court
Utah Supreme Court
332 State Capitol
Salt Lake City, Utah 84114

Re: Mario Jose Velasquez v. State of Utah
Case No. 910195

Dear Mr. Butler:

The respondent, State of Utah, hereby waives the right to file a brief in opposition to the petition for writ of certiorari in the above-referenced case pursuant to rule 50(d), Utah Rules of Appellate Procedure. This waiver does not constitute a stipulation that the petition should be granted, but rather, it is respondent's position that the petition should be denied based upon the legal analysis contained in the State's brief and the lower court's opinion, copies of which are attached to this letter. In the event that the Court deems an additional response by the State necessary to its determination, a brief in opposition will be provided.

Thank you for your consideration.

Sincerely,

MARIAN DECKER
Assistant Attorney General
Criminal Appeals Division

MD:jn

Enclosures

FILED

JUN 12 1991

CLERK SUPREME COURT,
UTAH

FILED

APR 1 1991
Mary Noonan
Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

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State of Utah,)	
)	MEMORANDUM DECISION
Plaintiff and Appellee,)	(Not For Publication)
)	
v.)	Case No. 900218-CA
)	
Mario Jose Valasquez,)	
)	F I L E D
Defendant and Appellant.)	(April 1, 1991)

Before Judges Orme, Garff, and Bench.

PER CURIAM:

Defendant appeals his conviction of possessing cocaine and heroin. He challenges denial of his motion to suppress evidence of the drugs seized in an inventory search of his vehicle, impounded for improper licensing and registration. He claims that the initial stop and subsequent inventory search were conducted as a pretext to search for drugs.

Although the denial of a pretrial motion to suppress is "fact-sensitive," State v. Smith, 781 P.2d 879, 880 (Utah Ct. App. 1989), defendant does not challenge the trial court's findings in its pretrial ruling. The arresting officer was the only witness to testify at the pretrial hearing. Consequently, we state the facts based upon the officer's testimony in the light most favorable to the trial court's ruling. State v. Booker, 709 P.2d 342, 345 (Utah 1985).

The officer testified that he first noted defendant's vehicle parked with different numbered license plates attached to the front and rear. A short time later, the officer observed defendant driving the same improperly licensed vehicle on the street. Because of the disparate license plates and apparent improper registration, the officer stopped defendant's vehicle. When requested by the officer, defendant could not produce a valid driver's license and said he did not have one. He did produce a copy of a prior traffic citation issued to a Jeff Martinez wherein he had been cited for driving without a driver's license. During this stop, the defendant gave different names to the officer. No evidence was offered at the hearing as to whether there was a valid registration card in the vehicle.

Based upon these events and defendant's admissions, the officer arrested defendant for driving without a license and giving false information to an officer. Because defendant was

alone, the car was on a public street and was improperly licensed, the automobile was impounded. The officer testified that police department procedures were followed in impounding the vehicle and conducting an inventory of its contents. During the inventory, an unlocked cash box was found on the floor by the driver's seat. The officer opened the box to ascertain its contents and found heroin and cocaine powder, along with drug paraphernalia. Defendant was booked for and charged with driving without a driver's license, giving false information to the police officer, and possessing the controlled substances.

Utah Code Ann. § 41-1-43(1) (1988) requires the issuance of "two identical registration plates" for every automobile. Plates issued for use on a vehicle may not be removed from the vehicle and used upon an other vehicle. Utah Code Ann. § 41-1-47 (1988) requires every automobile owner to attach one license plate to the front of the car and a matching license plate to the rear. The automobile driven by defendant at the time of the stop had different plates attached to the front and rear. Defendant clearly violated the law by operating this car on the public streets. The officer had both a right and duty to stop defendant's vehicle because of his significant registration violation. State v. Smith, 781 P.2d 879, 883 (Utah Ct. App. 1989).

The stop was a valid stop based upon objective facts and not a pretext based upon some subjective intent to search for drugs. The mere argument that he was stopped to search for drugs is speculation without support in the record. Defendant was stopped for violating the law in the officer's presence and there is no evidence that defendant was stopped for any other purpose.

When stopped, defendant could not produce a valid driver's license. He did produce a prior citation that he had previously been arrested for driving without a license. He also gave the officer different names. After defendant had given false information to the officer and had driven, even though recently ticketed for illegally driving, defendant's arrest was not an abuse of the officer's statutory discretion under Utah Code Ann. §§ 41-6-165 to -166 (1988), 77-7-2(1)(3) and 77-7-18 (1990). Obviously, defendant's prior ticket had not deterred him from driving without a license.

The impoundment of the vehicle was reasonably justified because defendant was alone, the vehicle had improperly registered license plates, and could not be left on the street. See State v. Hygh, 711 P.2d 264, 268 (Utah 1985).


Police are justified in inventorying such vehicles at the time of impoundment. South Dakota v. Opperman, 428 U.S. 364, 369 (1976); Cady v. Dombrowski, 413 U.S. 433, 441 (1973). Based upon the totality of the circumstances, the officer was justified in arresting defendant and impounding his car.

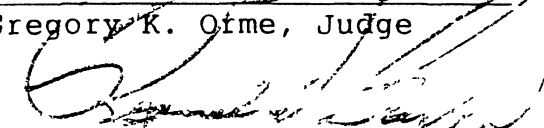
The officer testified that he followed departmental policy and procedures in the vehicle impoundment and in the subsequent inventory taken. Defendant produced no evidence to the contrary. Nor does defendant show that the departmental procedures followed by the officer in some manner offend either the federal or state constitutions. Defendant complains that the prosecution failed to introduce "documentation" to support the officer's testimony. Defendant does not say what "documentation" should have been produced or what its ultimate value was. Suffice it to say that defendant failed to challenge in any way the officer's testimony that he followed established policy. Having elicited unchallenged testimony of the officer's adherence to police department policy, the prosecutor was not required to produce at trial copies of the written policy or an inventory sheet. If defendant believes that these documents were of value to his defense, he should have asked for them and presented them to the trial court. Because defendant completely failed to factually challenge the officer's testimony, we see no need to remand the case for further findings, as the state suggests.

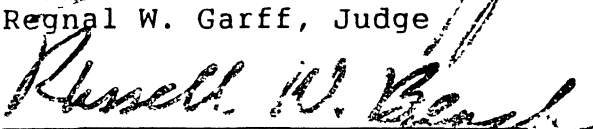
In State v. Sterger, 155 Utah Adv. Rep. 30, 32 (Utah Ct. App. 1991) this court approved the opening of closed containers in an inventory search when specifically required by search guidelines. In this case as in Sterger, evidence was uncontradicted that the officer followed standardized search procedures in conducting an inventory of the vehicle's contents.

We affirm the trial court's denial of defendant's motion to suppress. Defendant's conviction is affirmed.

ALL CONCUR:


Gregory K. Orme, Judge


Reginal W. Garff, Judge


Russell W. Bench, Judge

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff-Appellee, : Case No. 900218-CA
v. :
MARIO JOSE VELASQUEZ, : Priority No. 2
Defendant-Appellant. :

BRIEF OF APPELLEE

- - - - -

APPEAL FROM A CONVICTION OF POSSESSION OF A
CONTROLLED SUBSTANCE, A THIRD DEGREE FELONY,
IN VIOLATION OF UTAH CODE ANN. § 58-37-8
(1990), IN THE THIRD JUDICIAL DISTRICT COURT,
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE LEONARD H. RUSSON, JUDGE,
PRESIDING.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff-Appellee, : Case No. 900218-CA
v. :
MARIO JOSE VELASQUEZ, : Priority No. 2
Defendant-Appellant. :

BRIEF OF APPELLEE

- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction of possession a controlled substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8 (1990). This Court has jurisdiction to hear the appeal pursuant to Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1990).

STATEMENT OF ISSUES ON APPEAL AND STANDARDS OF REVIEW

The sole issue on appeal is whether the trial court correctly denied defendant's motion to suppress evidence, ruling that the stop was not pretextual. Because of the trial court's advantageous position in determining the factual basis for a motion to suppress, this Court will not reverse the trial court's factual evaluation unless its findings are clearly erroneous. State v. Johnson, 771 P.2d 326, 327 (Utah Ct. App.), cert. granted, ___ P.2d ___ (Utah 1989). However, in assessing the trial court's legal conclusions based upon its factual findings, this Court applies a correction of error standard. Id.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

U.S. Const. Amend. IV:

The right of 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

Defendant, Mario Jose Velasquez, was charged with two counts of possession of a controlled substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (1990) (Record [hereinafter "R."] at 8). Defendant filed a motion to suppress the evidence against him which was denied (R. 28). Defendant then entered a conditional guilty plea to count I, specifically preserving his right to appeal the trial court's denial of his motion to suppress pursuant to State v. Sery, 758 P.2d 935, 939 (Utah Ct. App. 1989) (R. 35, 43). The State moved to dismiss count II and sentencing was stayed pending appeal to this Court (R. 35, 43).

STATEMENT OF THE FACTS

On November 30, 1990, Officer Allen Hedenstrom's attention was drawn to a car with mismatched license plates¹ as he watched it park at approximately 9th South and State Street in Salt Lake City (Transcript of suppression hearing, March 20, 1990 [hereinafter "T."] at 4). When he observed the car a short while later, further east on 9th South, Officer Hedenstrom stopped the

¹ The front plate number read 398 BHC while the rear plate number read 114 DCF.

vehicle and approached defendant, the sole occupant and driver, to ask for his driver's license and registration (T. 4-5). Defendant replied that he had no driver's license and showed officer Hedenstrom a previous traffic citation for driving without a license, which had been issued to a Jeff Martinez, as identification (T. 5, 8). Defendant was then arrested for driving without a license (T. 6).² The car was impounded and inventoried in accordance with department policy, to avoid vandalization or other damage, because defendant had no license and there was no one else present to take his car (T. 6-7, 14). During the course of the inventory, Officer Hedenstrom opened an unlocked cash box located on the floor near the driver's seat in which he found substances later identified as cocaine and heroin (T. 7). Another officer transported defendant to the jail while Officer Hedenstrom remained with defendant's vehicle until it could be towed to the impound lot (T. 12).

In denying defendant's motion to suppress the evidence seized, the trial court issued written findings. (A copy of the court's Ruling on Motion to Suppress is attached hereto as Addendum A). The trial court specifically found that (1) the stop was based on a violation of law and was not pretextual; (2) defendant's arrest was justified by his failure to produce a driver's license, his prior citation for driving without a license, and his giving false information to a police officer; (3) the impound was justified to avoid leaving the vehicle

² Officer Hedenstrom could not recall whether defendant produced a valid registration for the vehicle (T. 5).

unattended; and (4) the inventory search was proper (R. 28).

SUMMARY OF ARGUMENT

By failing to precisely aver his allegations of pretext concerning the initial stop of his vehicle in the trial court, defendant has waived consideration of his argument on appeal to this Court. In his motion to suppress and at the hearing on that motion, defendant did nothing more than claim that the stop of his vehicle was pretextual. He did not argue that the hypothetical reasonable officer would not have made a stop under the circumstances, nor did he refer the court to any evidence produced by the State or by him to suggest that the hypothetical reasonable officer would not have stopped him in this case. Defendant also failed to precisely aver his arguments concerning the propriety of the subsequent impound and inventory search in the trial court; thus, consideration of these issues is similarly waived.

ARGUMENT

POINT I

THE TRIAL COURT'S DENIAL OF DEFENDANT'S
MOTION TO SUPPRESS WAS PROPER.

Defendant asserts that Officer Hedenstrom's stop of his vehicle for a traffic violation constituted an unconstitutional pretext stop, and, therefore, the trial court should have suppressed the cocaine and heroine subsequently seized pursuant to an inventory search of the impounded vehicle.

Under the fourth amendment, to lawfully stop a vehicle for investigatory purposes, an officer must have at least a reasonable suspicion that either the vehicle or an occupant has

violated or is about to violate the law (i.e., a traffic or equipment regulation, or any applicable criminal law). Delaware v. Prouse, 440 U.S. 648, 661, 663 (1979); State v. Gibson, 665 P.2d 1302, 1304 (Utah), cert. denied, 464 U.S. 894 (1983); State v. Holmes, 774 P.2d 506, 507 (Utah Ct. App. 1989). A stop of a vehicle is, of course, also justified when the officer has probable cause to believe that either the vehicle or an occupant has violated the law. Ibid. Defendant does not claim that the Delaware v. Prouse standard was not met when Officer Hedenstrom stopped his vehicle for having different license plates attached to the front and the rear of the vehicle. Rather, he claims that the stop was an unconstitutional pretext stop, which "occurs when the police use a legal justification to make the stop in order to search a person or place, or to interrogate a person, for an unrelated serious crime for which they do not have the reasonable suspicion necessary to support a stop." United States v. Guzman, 864 F.2d 1512, 1515 (10th Cir. 1988).

In State v. Sierra 754 P.2d 972 (Utah Ct. App. 1988), disavowed on other grounds, State v. Arroyo, 796 P.2d 684, 689 (Utah 1990), this Court set forth the standard for determining whether an unconstitutional pretext stop has occurred: "[I]f a hypothetical reasonable police officer would not have stopped the driver for the cited traffic offense, and the surrounding circumstances indicate the stop is a pretext, the stop is unconstitutional." Id. at 979. The test is an objective one, focusing on whether the reasonable officer would have made the stop under the circumstances, not whether the officer could have

made a stop. Id. at 977-78; Guzman, 864 F.2d at 1517. See 1 LaFave, Search and Seizure, §1.4(e) at 15 n.44.1 (Supp. 1991).³

³ On appeal, defendant challenges the continued viability of Sierra, asserting that under article I, Section 14 of the Utah Constitution, evidence of a police officer's subjective intent is a relevant consideration in evaluating pretext claims (Brief of Appellant [hereinafter "Br. of App."] at 9-17). However, because defendant did not raise or develop his argument in the trial court, the state constitutional question should not be addressed by this Court. State v. Johnson, 771 P.2d 326, 327-28 (Utah Ct. App.), cert. granted, ___ P.2d ___ (Utah 1989). Accordingly, the State does not address this question except to clarify that an objective standard is appropriate.

In support of his state constitutional argument under article I, Section 14, defendant notes that although this Court maintains that reference to the officer's subjective state of mind is inappropriate, in practice, the Court has referred to an officer's subjective state of mind in assessing allegations of pretext stops (Br. of App. 13). As examples, defendant cites State v. Marshall, 791 P.2d 880, 883 (Utah Ct. App. 1990); Sierra, 754 P.2d at 979-980; and State v. Lovegren, 798 P.2d 767, 768 n.3, 771 n.10 (Utah Ct. App. 1990). Defendant's observation has merit in so far as it points out an apparent inconsistency between the objective standard this Court purports to follow and its reference to evidence of the officer's subjective intent or motivation in evaluating allegations of pretext in the above cases. However, mere recognition of this past inconsistency does not, as suggested by defendant, require the conclusion that a subjective test is either necessary or appropriate in resolving allegations of pretext. See 1 LaFave, Search and Seizure, § 1.4(e) at 95 (1987).

As additional support for his argument defendant asserts that the United States Supreme Court has condoned the use of evidence of an officer's subjective intent and, as a result, federal case law on the subject is confusing (Br. of App. nn.8-9). However, defendant overconstrues the case law which either does not discuss the proposition for which it is cited or involves facts and circumstances which invoke concerns different from those which arise in connection with a pretextual vehicle stop. Moreover, in Maryland v. Macon, 472 U.S. 463, 470-71 (1985), the Supreme Court clearly set forth an objective standard for determining whether a fourth amendment violation has occurred. Specifically, the Court stated that the test turns on an assessment of the officer's conduct in light of the facts and circumstances confronting him at the time, and not on the officer's subjective intent or motivation. Id. (quoting Scott v. United States, 436 U.S. 128, 136 (1978)). See also Horton v. California, ___ U.S. ___, 110 S.Ct. 2301, 2308-09 (1990) (Court notes that evenhanded law enforcement is best achieved by the

A. Defendant Failed to Precisely Aver His Allegations of Pretext Surrounding the Initial Stop of His Vehicle in the Trial Court; Thus, He has Waived Consideration of the Issue on Appeal to this Court.⁴

In his motion to suppress and at the hearing on that motion, defendant did nothing more than claim that the stop of his vehicle was pretextual and cite Sierra to the court. He neither stated the "hypothetical reasonable officer" standard nor argued that the hypothetical reasonable officer would not have made a stop under the circumstances. Nor did he refer the court to any evidence produced by the State or by him to suggest that the hypothetical reasonable officer would not have stopped him in this case. See State v. Lovegren, 798 P.2d at 771 n.10. In short, he did not even suggest that police officers do not routinely stop vehicles for the particular traffic violation which provided the basis for the stop of his vehicle. See Ibid. The absence of any of these arguments to the trial court should preclude consideration of defendant's pretext argument on appeal. See State v. Carter, 707 P.2d 656, 660 (Utah 1985) ("[W]here a defendant fails to assert a particular ground for suppressing unlawfully obtained evidence in the trial court, an appellate court will not consider the ground on appeal."); State v. Johnson, 774 P.2d 1141, 1144 (Utah 1989) (because the grounds for objection raised on appeal were not specifically or distinctly

³ Cont. application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer).

⁴ Defendant does not attack the validity of his arrest for driving without a license and for giving false information.

stated to the trial court, those grounds were not preserved for appellate review). Defendant's conclusory allegation of pretext and passing reference to Sierra were simply insufficient to preserve the pretext issue he now presents on appeal. Indeed, the inadequacy of defendant's argument regarding pretext is reflected in the trial court's ruling, which does not analyze the pretext question in terms of the hypothetical reasonable officer but instead disposes of it on the ground the stop was legal because it was clearly based upon a reasonable suspicion of a violation of the law (R. 30; see Addendum A). This ruling is actually nothing more than a conclusion that the stop did not violate Delaware v. Prouse; it does not address the question of a permissible pretext stop, which necessarily presumes that the stop complies with Prouse⁵.

⁵ Insofar as Sierra suggests that the Prouse reasonable suspicion test and pretextual stop test are components of a single test upon which to evaluate the validity of a vehicle stop, it is incorrect. The Prouse standard and the pretext stop standard are two distinct standards to be applied independently. The former provides the basis upon which to evaluate the reasonableness of the initial seizure of the vehicle (which is usually for a misdemeanor traffic violation), while the latter is relevant to only the evidence of another crime (usually more serious than the traffic violation) discovered pursuant to the vehicle stop. This is made clear in United States v. Guzman, 864 F.2d 1512 (10th Cir. 1988), where the Tenth Circuit treated the government's objection to the court's adoption of a Sierra-type pretextual stop standard as follows:

Contrary to the Government's argument, our approach will not "severely" curtail "the ability of the New Mexico State Police . . . to enforce traffic laws." Brief of the Appellant--United States of America at 14. No prosecution for violation of a traffic regulation will be affected. Police officers may always issue appropriate citations to drivers who violate traffic regulations. Only evidence of a more serious crime

B. Defendant has Waived Consideration by this Court of the Propriety of the Impound and Inventory Search of his Vehicle by Not Precisely Avering These Issues as Grounds for Suppressing the Evidence Against Him in the Trial Court.

On appeal to this Court, defendant asserts there was no statutory authorization or other circumstances justifying the impoundment of his vehicle and that the subsequent inventory search was pretextual because it was not conducted in conformity with established reasonable procedures; therefore, the trial court should have suppressed the evidence seized pursuant to State v. Hygh, 711 P.2d 264 (Utah 1985) (Br. of App. 22).

However, because defendant failed to precisely aver these particular grounds for suppressing the evidence to the trial court, and because there is nothing in the record to indicate that the argument was "unavailable or unknown to defendant at the time he filed his motion to suppress," he has not preserved these issues for review by this Court. Carter, 707 P.2d at 660-61. See also Hansen v. Stewart, 761 P.2d 14, 16 (Utah 1988) (requirement of a specific objection on the record ensures that the trial court will understand the basis of the objections and have an opportunity to correct any errors as well as assure that the reviewing court will have a record of the grounds asserted below; thus, where the trial court has not been given a fair opportunity to avoid an error, the reviewing court will not usually consider any claim based on that error).

⁵ Cont. discovered pursuant to such a stop will be excluded if the stop was unconstitutionally pretextual.

Defendant's motion to suppress, which was not accompanied by a supporting memorandum, was narrowly focused on his allegation of a pretextual stop and did not address the propriety of the impound or inventory search (R. 25; a copy of defendant's Motion to Suppress is attached hereto as Addendum B). Furthermore, defense counsel failed to precisely aver the arguments he now raises on appeal in his argument at the motion to suppress hearing:

MR. VALDEZ: The leading constitutional cases, is the Opperman case and the Harris case, but the State case, I think, relevant is State v. Sierra. I would ask the Court to read that. I think Mr. Lemcke, you are aware of the State v. Sierra case. I have copies I would like to provide to the Court. Relevant page is 977 in the Sierra case, if I may approach the bench. I would ask that the Court read these and take the matter under advisement, and advise the attorneys as to whether or not -- what the Court's decision would be after the Court has read the decisions.

. . . .

MR. VALDEZ Opperman is the general case in terms of inventory searches, Judge. And I think if you read that . . . you will learn something about inventory searches.

The problem is, Judge, what we have here he says it was an inventory search. He also says it was a search incident to arrest. Now, which is it? In terms of the inventory search, there is no law against what items were taken out. None was provided in the police report. He says there is probably one somewhere, although that hasn't been produced by the State who has the burden of showing that it was a proper search.

In addition to that, Judge, the other thing is to, and you will see that in the State v. Sierra, they have indicated, yes, a police officer may however stop an automobile for a traffic violations committed in the officer's

presence. Well, it had two different plates on it, although it was properly registered.

But it goes on to say in Sierra on page 977: "It is impermissible for law enforcement officers to use a misdemeanor arrest as a pretext to search for evidence of a more serious crime."

It is our position that that is what occurred here, Judge, and the items that were found ought to be suppressed.

(T. 15, 17-18; a copy of counsel's argument before the trial court is attached hereto as Addendum C) (emphasis added).

Defense counsel's "conclusory allegations" and vague reference to the inventory search at the suppression hearing were simply insufficient to afford the trial court a "fair opportunity" to consider the propriety of the impound and inventory search in this case. Hansen v. Stewart, 761 P.2d at 16.

At least as much specificity should be required in a pretrial objection to the admissibility of evidence, i.e., a motion to suppress, as is required in an oral objection made during the course of a trial. In fact, even more specificity could reasonably be required because the pretrial objection can be researched and written under relatively calm circumstances, as distinguished from an extemporaneous objection made in the heat of trial.

Carter, 707 P.2d at 660-61 n.2 (quoting State v. Johnson, 16 Or. App. 560, 519 P.2d 1053 (1974)). Moreover, the trial court treated defense counsel's argument as a secondary challenge to the general validity of inventory searches, as is demonstrated by its reliance on South Dakota v. Opperman, 428 U.S. 328 (1976), in briefly finding that the impound was justified and that the

inventory search was proper (R. 31-32; see Addendum A).⁶

Therefore, this Court may properly decline to address these issues on appeal.⁷

⁶ The language from Opperman quoted in the trial court's ruling merely notes the necessity and validity of inventory searches conducted as a matter of course after police have properly impounded a vehicle. See Opperman, 428 U.S. at 369.

⁷ Should this Court determine that defense counsel marginally preserved the propriety of the impound and inventory search for review and that these issues are determinative, this case should be remanded for a rehearing on these issues. Defense counsel's argument at the motion to suppress hearing was simply inadequate to alert the State or the trial court that the propriety of the subsequent impound and inventory were at issue. Therefore, because neither of the parties focused on these issues at the motion to suppress hearing, the trial court was not able to make detailed findings of fact and the record before this Court is simply inadequate for meaningful review. State v. Marshall, 791 P.2d 880, 882 n.1, 887 (Utah Ct. App. 1990) (remand for rehearing where the parties and the trial judge did not focus on critical issues at suppression hearing). See Combs v. United States, 408 U.S. 224, 228 (1972) (remand appropriate where record before Court was "virtually barren of the facts necessary to determine whether petitioner had standing).

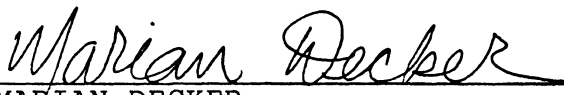
Notwithstanding the above, should this Court look past defendant's waiver to address the merits of this case based on the record currently before it, the State acknowledges that Officer Hedenstrom's conclusory testimony alone may be insufficient for this Court to determine whether the inventory was conducted pursuant to "established reasonable procedures." See Hygh 711 P.2d at 268 n.17 (procedural order setting forth police department standards was introduced in its entirety at trial; thus, on appeal, the Utah Supreme Court was able to compare the written policy with the officer's conduct). See also Ex Parte Boyd, 542 So.2d 1276, 1282-83 (Ala. 1989) (where officer's conclusory testimony that inventory was done in compliance with department regulations was held to be insufficient, court noted the record must sufficiently reflect what the policy is, describe the policy in such a way that its reasonableness can be reviewed, and present adequate evidence of what the employed criteria were); Rabadi v. State, 541 N.E.2d 271, 275 (Ind. 1989) (state must do more than offer the mere statement of a police detective that the search was conducted as a routine inventory to make required showing that its actions come within the inventory exception).

CONCLUSION

Based on the foregoing, the State respectfully submits that this Court should either affirm the ruling of the lower court or remand for rehearing on the issues of the propriety of the impound and inventory search.

RESPECTFULLY SUBMITTED this 31st day of December, 1990

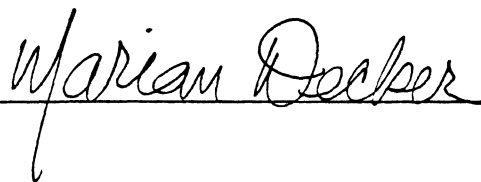
R. PAUL VAN DAM
Attorney General



MARIAN DECKER
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing Appellee's Brief was mailed, postage prepaid, to Elizabeth Holbrook, Attorney for Appellant, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111 this 31st day of December, 1990.



ADDENDA

ADDENDUM A

MAR 21 1990

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

THE STATE OF UTAH,	:	RULING ON MOTION TO SUPPRESS
Plaintiff,	:	CIVIL NO. 901900313 FS
vs.	:	
MARIO JOSE VELASQUEZ,	:	
Defendant.	:	

Defendant's Motion to Suppress came on for hearing on March 20, 1990. The defendant was present with counsel and interpreter, and the State was represented by its counsel. Evidence was received, the case argued, and authorities relied upon presented by both counsel. The Court took the matter under advisement.

The Court now rules as follows.

The only witness, the arresting officer, testified that the motor vehicle driven by the defendant had different license plates on the front and rear, therefore, he pulled it over. The driver could not produce a driver's license. He did produce a prior traffic citation wherein he had been cited for having no driver's license. During this stop, the defendant

gave different names to the officer. No evidence was offered as to whether or not there was a registration card in the vehicle.

Based upon the above, the officer arrested the defendant. Since he was alone, the automobile was impounded. Following police department procedures, an inventory was made of the automobile wherein a cash box was found on the floor by the driver's seat containing a substance believed to be a controlled substance, and paraphernalia in relationship to the same. Defendant was booked for driving without a driver's license, giving false information to the police officer, and possession of a controlled substance.

Defendant argues that the stop was a pretext to unreasonable search and seizure in violation of the Fourth Amendment to the Constitution of the United States and, therefore, the fruits of such illegal search should be suppressed.

The State argues that the stop was not a pretext for a search, but for violation of the law in the presence of the officer. The search that occurred was an inventory search in relationship to impounding the vehicle.

Section 41-1-43, Utah Code Ann., requires the issuance of "two identical registration plates" for every motor vehicle

other than a motorcycle, trailer, etc. The said Section further provides that the plates so issued may not be removed from the vehicle or used upon any other vehicle.

Section 41-1-48, Utah Code Ann., requires that every motor vehicle, except a motorcycle, trailer, etc., shall have attached to the front of the vehicle one license plate, and the other license plate to the rear.

The automobile driven by the defendant at the time of the stop had different license plates attached to the front and rear of the car. Therefore, operation of such car would be in violation of the law. The officer had a right, and a duty, to stop this motor vehicle because of this violation of law. Therefore, the stopping of this vehicle was a valid stop.

Upon further inquiry, the driver of the automobile could not produce a driver's license, but did produce a prior citation indicating he had previously been arrested for driving without a license. He also gave the officer different names.

Based upon all of the above, the officer was justified in arresting the defendant and booking him. The stopping of this vehicle was not a mere pretext to searching of the automobile. The stop was made for violation of the law in the presence of the officer. The subsequent arrest and booking were justified under the totality of the circumstances.

The impounding of the vehicle was justified since the defendant was alone and the vehicle could not be left on the streets. Police authorities are justified in making an inventory of such vehicles at the time of impounding. As stated in South Dakota v. Opperman, 428 U.S. 364, 49 L.Ed.2d 1000 (1976):

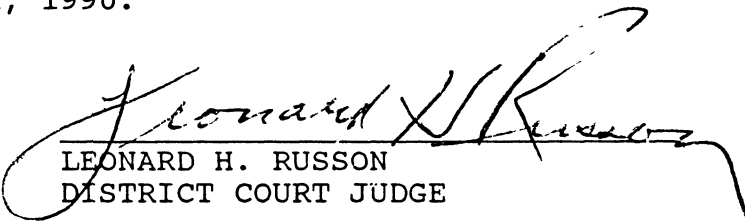
When vehicles are impounded, local police departments generally follow a routine practice of securing and inventorying the automobile's contents. These procedures developed in response to three distinct needs: the protection of the owner's property while it remains in police custody... the protection of the police against claims or disputes over lost or stolen property... and the protection of the police from potential danger.... The practice has been viewed as essential to respond to incidents of theft or vandalism.

The above court went on to state that such caretaking procedures have been uniformly upheld by state courts throughout the various jurisdictions, and that the majority of the federal courts of appeals have likewise "sustained inventory procedures as reasonable police intrusions." The United States Supreme Court upheld the police inventory of an impounded vehicle under the facts of that case.

We hold that the stop was valid, as was the arrest, and that the inventory by the police authorities of the automobile in this case was justified because the car was being impounded. The inventory was justified for the reasons stated above. The discovery of the suspected evidence was made during a legal search of this vehicle.

Based upon the above, defendant's Motion to Suppress the evidence taken during the inventory search is denied.

Dated this 21st day of March, 1990.



LEONARD H. RUSSON
DISTRICT COURT JUDGE

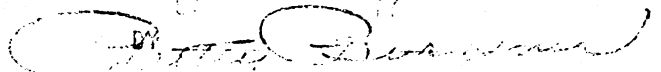
ADDENDUM B

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Attorney for Defendant
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
Telephone: 532-5444

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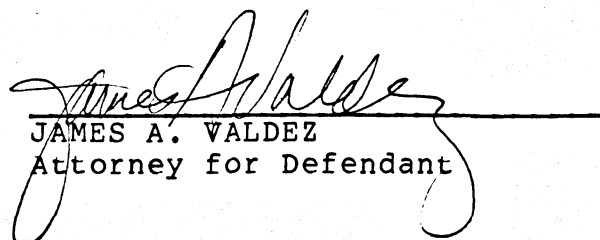
IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR STATE LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	MOTION TO SUPPRESS
Plaintiff	:	
v.	:	
MARIO JOSE VELASQUEZ,	:	Case No. 901900313FS
Defendant	:	JUDGE LEONARD H. RUSSON

The defendant, MARIO JOSE VELASQUEZ, by and through his attorney of record, JAMES A. VALDEZ, hereby moves the Court to suppress all evidence taken from the defendant in violation of the Fourth Amendment of the United States Constitution and Article I, Section 14 of the Utah Constitution and the following grounds:

- 1) Search of the vehicle should have been conducted pursuant search warrant.
- 2) No probable cause to stop.
- 3) There was a pretext stop and subsequent to arrest there was no crime in the presence of the officer for which defendant should of been arrested.

DATED this _____ day of March, 1990.



JAMES A. VALDEZ
Attorney for Defendant

NOTICE OF HEARING

TO THE COUNTY ATTORNEY AND THE CLERK OF THE COURT:

You and each of you please take notice that the above-entitled matter will come on regularly for a hearing on Tuesday, the 20th day of March, 1990, at the hour of 9:00 a.m. before the Honorable LEONARD H. RUSSON, Third District Court Judge. Please govern yourselves accordingly.

DATED this 5 day of March, 1990.

Leri Muir

DELIVERED a copy of the foregoing to the County Attorney's office, 231 East Fourth South, Salt Lake City, Utah this ____ day of March, 1990.

DELIVERED BY

MAR 06 1990

JOEY FINOCCHIO

ADDENDUM C

1 THE COURT: Okay, go ahead.

2 MR. VALDEZ: The leading constitutional cases,
3 is the Opperman case and the Harris case, but the State
4 case, I think, relevant is State vs. Sierra. I would ask
5 the Court to read that. I think Mr. Lemcke, you are
6 aware of the State vs. Sierra case. I have copies I
7 would like to provide to the Court. Relevant page is 977
8 in the Sierra case, if I may approach the bench. I would
9 ask that the Court read these and take the matter under
10 advisement, and advise the attorneys as to whether or
11 not -- what the Court's decision would be after the Court
12 has read the decisions.

13 THE COURT: Mr. Lemcke.

14 MR. LEMCKE: Your Honor, I think it is not
15 necessary to take it under advisement. I think that the
16 Court can see the contentions here of Mr. Valdez is that
17 it was a pretext search. It is clear there is no
18 evidence of that or a pretext style.

19 The search of the car was done pursuant to an
20 inventory, which is a regular police procedure and the
21 drugs were found then. There is no reason on the face of
22 the allegations why these particular findings should be
23 suppressed.

24 The allegations are a search of a vehicle
25 should have been conducted pursuant to a search warrant.

1 There were none pursuant to an inventory. At the time
2 there was no probable cause to go get a warrant. It was
3 merely procedural as a vehicle is inventoried before it
4 is taken to the impound lot.

5 Second, there is no probable cause to stop
6 there was probable cause "Here goes a vehicle down the
7 street with two different license plates," which is
8 certainly probable cause for the officers to find out
9 what is going on. And that there was a pretext stop, and
10 clearly the evidence does not support that.

11 I don't believe that there is any particular
12 need for the Judge, for the Court, rather, to read
13 Sierra, which is a pretext case.

14 THE COURT: If an officer stops one who is
15 breaking the law for speeding or doesn't have a license
16 plate, and decides that he will arrest him because no one
17 is present to take the car, therefore they are going to
18 impound the car, is it your position that then the police
19 have the right to search every part of the car, luggage,
20 and books and everything in it without a search warrant,
21 just simply because they have impounded the car and now
22 they have a right to an inventory search, to search
23 either for weapons or valuables?

24 MR. LEMCKE: Your Honor, I think they not only
25 have a right but a duty both to the owner of the vehicle

1 and themselves.

2 THE COURT: And what is your case that guides
3 me and tells me that?

4 MR. LEMCKE: Is the Opperman vs. South Dakota.

5 MR. VALDEZ: Opperman is the oldest United
6 States Supreme case.

7 MR. LEMCKE: It says that inventory search
8 protects the officer against allegations that they will
9 steal out of the car, as well as provides an inventory to
10 the owner of the car.

11 THE COURT: That is what I want is the case
12 that you rely on. I want the case the State relies on.

13 MR. LEMCKE: I believe that is Opperman vs.
14 South Dakota.

15 MR. VALDEZ: Opperman is the general case in
16 terms of inventory searches, Judge. And I think if you
17 read that --

18 THE COURT: Is that in here?

19 MR. VALDEZ: Yes, it is. You will learn
20 something about inventory searches.

21 The problem is, Judge, what we have here he
22 says it was an inventory search. He also says it was a
23 search incident to an arrest. Now, which is it? In
24 terms of the inventory search, there is no law against
25 what items were taken out. None was provided in the

1 police report. He says there is probably one somewhere,
2 although that hasn't been produced by the State who has
3 the burden of showing that it was a proper search.

4 In addition to that, Judge, the other thing is
5 to, and you will see that in the State vs. Sierra, they
6 have indicated, yes, a police officer may however stop an
7 automobile for a traffic violations committed in the
8 officer's presence. Well, it had two different plates on
9 it, although it was properly registered.

10 But it goes on to say in Sierra on page 977:
11 "It is impermissible for law enforcement officers to use
12 a misdemeanor arrest as a pretext to search for evidence
13 of a more serious crime."

14 It is our position that that is what occurred
15 here, Judge, and the items that were found ought to be
16 suppressed.

17 THE COURT: He was arrested simply because he
18 did not have a driver's license.

19 MR. LEMCKE: He was arrested because he not
20 only didn't have a driver's license, but he had already
21 been stopped and cited for that at one point.

22 MR. VALDEZ: Your Honor, the testimony --

23 MR. LEMCKE: Your Honor, if I may finish.

24 THE COURT: Let's hear one at a time. Mr.
25 Lemcke.

1 MR. LEMCKE: He had been cited for this one
2 time previous. The officer used his discretion, arrested
3 him. There was no one there to take the vehicle, the
4 vehicle was therefore impounded. Incident to an impound,
5 it is part of a procedure, the vehicle was searched. Mr.
6 Valdez will tell us, "Well, there is some question about
7 the scope of the search because it was there."

8 The officer testified that the vehicle was
9 searched and inventoried. Mr. Valdez asked him and, of
10 course, Mr. Valdez's questions are not evidence: "Well,
11 didn't you also do it as part of the search?" "Yes, his
12 person was searched as part of the search."

13 "Also the car?" "Yes, also the car." But the
14 officer told us before that --

15 THE COURT: Back up just a moment. I am just
16 saying, he was pulled over because there was a different
17 license plate on the front than he had on the rear. And
18 then when asked for his driver's license, he couldn't
19 produce one.

20 MR. LEMCKE: In fact, he stated he had none and
21 had previously been cited for it.

22 THE COURT: And based on that, it was decided
23 to arrest him.

24 MR. LEMCKE: That is correct.

25 THE COURT: And jail him.

1 MR. LEMCKE: That is correct. As to the
2 argument for pretext, I think if you will read Sierra
3 carefully, a pretext is where officers working with a
4 previous suspicion, or a previous desire to stop and
5 search, find a misdemeanor or traffic that they can now
6 stop someone for as a roost, as a pretext, as the word
7 indicates, to then search the person or the vehicle.
8 There is the underlying desires to search the vehicle,
9 search the person, rather than make a traffic stop on its
10 own face. That is not the case here and that is not the
11 evidence in front of the Court.

12 THE COURT: We have a car with different
13 license plates. We have the officer not remembering if
14 there was a registration or not. We have the defendant
15 without a driver's license, and so what would the
16 reasonable officer do if he pulls anyone over at that
17 point? I haven't heard anything. If he hadn't had a
18 registration, then it certainly would have been justified
19 to impound the car. You don't know if it is stolen, or
20 you don't know what the story is.

21 MR. LEMCKE: Or if the driver was under arrest,
22 Your Honor, and there was no one else there that could
23 drive the car away.

24 THE COURT: The problem I have with that, is
25 everyone that is driving a car without a driver's license

1 arrested and taken to jail? That is kind of -- Maybe
2 they ought to be, but I am kind of shocked why -- What's
3 the circumstances here? There has to be something
4 articulable.

5 MR. LEMCKE: I think that is before the Court.
6 The defendant stated, "Well, not only don't I have a
7 driver's license, but, look, here I have been cited for
8 it before and here I am back driving down the street
9 again." Citation didn't work.

10 THE COURT: Well, give me your best case before
11 noon, if you don't mind, and I will take this under
12 advisement.

13 MR. VALDEZ: Thank you, Judge.

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