1992

State of Utah v. Dave Ortiz : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Priority No. 2
v.	:	
DAVE ORTIZ, Defendant-Appellant.	:	Case No. 920563-CA

BRIEF OF APPELLANT

Appeal for a judgment and conviction of one count of Driving Under the Influence of Alcohol, a class B misdemeanor, in violation of Salt Lake City Code, Section 12-24-100, in the Third Circuit Court in and for Salt Lake County, State of Utah, the Honorable Floyd H. Gowans, Judge, presiding.

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JURISDICTIONAL STATEMENT

Jurisdiction is conferred on the court pursuant to Utah Code Ann. § 78-2a-3(2)(d)(Supp. 1991), whereby the defendant in a circuit court criminal action may take an appeal to the Court of Appeals from a final order on a misdemeanor offense. In this case the Honorable Floyd Gowans, Judge, Third Circuit Court, in and for Salt Lake County, State of Utah, rendered final judgment and conviction for Driving Under the Influence of Alcohol.

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

The pertinent parts of the following rules, statutes and constitutional provisions are provided in Addendum A:

Utah Code Ann. § 77-7-2 (1953 as amended);
Amendment IV, United States Constitution
Article I, §§ 7 and 14, Utah Constitution
Utah Rules of Evidence 601, 701
Salt Lake City Code § 12.36.040

STATEMENT OF THE ISSUE AND STANDARD OF REVIEW

I. Did the officer stop Mr. Ortiz based on an illegal pretext to search for evidence of a more serious crime.

Standard of Review: "Whether a traffic stop was an unconstitutional "pretext" stop requires a legal conclusion--thus we review it for "correctness." State v. Lopez, 831 P.2d 1040, 1044 (Utah App. 1992)

II. Did the officer have reasonable suspicion to stop Mr. Ortiz.

> Standard of Review: The determination as to whether probable cause to arrest exists is a question of law which this Court reviews for correctness. The factual determinations underlying the legal conclusions are given deference and subject to a "clearly erroneous" standard of review. See State v. Carter, 812 P.2d 460, 465 (Utah App. 1991); Beck v. Ohio, 379 U.S. 89, 92-3, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964).

STATEMENT OF CASE AND NATURE OF THE PROCEEDINGS

On July 15, 1992 Judge Floyd H. Gowans heard Dave C. Ortiz' (hereafter Ortiz) motion to suppress evidence obtained following his stop by a Salt Lake City police officer. See Motion to Suppress Transcript (hereafter Tr.) Ortiz argued that the stop was pretextual and the detention was without reasonable suspicion. Tr. 20 The trial court denied the motion. (A copy of the trial judge's oral findings and conclusions are attached as addendum B). On July 23, 1992 Mr. Ortiz entered a conditional guilty plea, pursuant to State v. Sery, 758 P.2d 935 (Utah App. 1988), reserving the right to appeal the issues raised at the suppression hearing.

STATEMENT OF FACTS

On the evening of February 28, 1992 at approximately 8:45 p.m., Officer Michael Beasley stopped two individuals of Mexican descent in a 1983 Buick LeSabre. (Tr. 1, 2, 12, 13). In addition to the officer, Calvin Sandoval, a passenger in Mr. Ortiz's car, testified at the motion to suppress hearing. Mr. Sandoval, testified that on the evening in question he and Mr. Ortiz left Mr. Ortiz' home and proceeded immediately to the area of arrest (Westbound on 100 South) and at no time did they entered the 76

club parking lot or pulled out of that parking lot. (Tr. 9-10, 13). As they turned left into a 45 degree angle parking space at the side of the road, across the street from the 76 Club, Mr. Ortiz reduced his rate of speed and signaled. At the time Mr. Ortiz executed the turn his car was the only vehicle on the road. (Tr. 11, 12, 14). Just prior to turning into the parking space Mr. Sandoval noticed that across the street behind the 76 club was the reflection from a motorcycle headlight. (Tr. 11, 14, 16) Only after their vehicle was stopped in the parking place did the officer approach the car with his motorcycle. (Tr. 11) Mr. Sandoval was familiar with the area, having lived in the immediate vicinity for 6 months and driven through the intersection at which the stop occurred more than once a week during that time. (Tr. 11, 12) Mr. Sandoval had only 1 beer on the evening in question. (Tr. 14).

Officer Beasley testified that he stopped Mr. Ortiz for impeding traffic, however, no citation was issued and he could not remember if he might have told Mr. Ortiz that he was stopping him for making a U turn. (Tr. 7, 8) His testimony regarding Mr. Ortiz' driving pattern, which constituted the offense for which the stop occurred was varied and contradictory. Specifically the officer stated: "Mr. Ortiz pulled across the street southbound, blew across 100 South southbound," "Mr. Ortiz' vehicle was had stopped in the lane, the travel lane of which I was in," "he was backing...just backing slowly," "I just saw him in motion slowly driving across the roadway," and finally, the officer conceded that Mr. Ortiz had

not been backing across the street at all, but rather pulling foreword across the street. (Tr. 2, 4, 5, 6, 8, 18). The officer indicated that he did not see Mr. Ortiz exit the 76 Club parking area and after reviewing his report changed his testimony to say that he had seen Mr. Ortiz exit the parking area (Tr. 6-7). The officer's testimony was further inconsistent in that he testified that Mr. Ortiz told him he was coming from the 76 club and later conceded that Mr. Ortiz had in fact told him that he was coming from his home. (Tr. 6-7). The officer arrested Mr. Ortiz based on information obtained following the stop. (Tr. 19)

SUMMARY OF THE ARGUMENT

Officer Beasley used the allegation that Mr. Ortiz was impeding traffic as a pretext to stop and search for evidence of a more serious crime, specifically that Mr. Ortiz was driving under the influence of alcohol. This stop was in violation of the Fourth Amendment of the United States Constitution and Article I §§7 and 14 of the Utah Constitution.

The trial court's finding that Officer Beasley's reasonable suspicion that Mr. Ortiz was impeding traffic was clearly erroneous. The officer's testimony was internally inconsistent and contradicted by that of witness Calvin Sandoval. Therefore, the officer lacked reasonable suspicion that Mr. Ortiz was engage in a criminal act and the stop of his vehicle was in violation of his Article I, §§ 7 and 14 of the Utah Constitution, the fourth amendment of the United States Constitution and Utah Code Ann. 77-7-2 (1953 as amended).

ARGUMENT

POINT I. The officer stopped Mr. Ortiz based on an illegal pretext to search for evidence of a more serious crime, thus violating the Fourth Amendment of the United States Constitution and Article I §§ 7 and 14 of the Utah Constitution.

The stop of a vehicle and detention of its occupants is a seizure within the definition of the fourth and fourteenth amendments to the United States Constitution and Article I §14 of the Utah Constitution, giving rise to the right to be free from unreasonable search and seizure. Delaware v. Prouse, 440 U.S. 648, 653 (1979); Lopez, 831 P.2d 1040, 1043 (Ut. App. 1992) Therefore, a stop of a vehicle "must comport with the constitutional protection afforded by the fourth amendment" as well as those of Article I §§14 and 7 of the Utah Constitution, an officer must have reasonable suspicion that a crime was or had occurred prior to a traffic stop. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); State v. Sierra, 754 P.2d 972, 975 (Utah App. 1988); See also, State v. Larocco, 794 P.2d 460 (Utah 1990); State v. Ramirez, 817 P.2d 774 (Utah 1991); Utah Code Ann. 77-7-2 (1952 as amended). The determination of whether an officer had reasonable suspicion to stop an individual is based on the "totality of the circumstances confronting the officer at the time of the seizure....the officer is entitled to assess the facts facing him (or her) in light of his experience. (citations omitted) Sierra, at 975.

An officer may stop an individual for a traffic code violation, however, he may not use such a violation as a pretext to

search for evidence of a more serious crime. State v. Parker, 834 P.2d 592 (1992), Sierra, 754 P.2d at 977.

> In Utah, the pretext doctrine applies in cases where an officer claims to have stopped a vehicle for a minor traffic violation, but where the court determines the stop was not made because of the traffic violation but rather due to an unconstitutional motivation and, therefore, the officer has deviated from the normal course of action expected of a reasonable officer.

Lopez, 831 P.2d at 1043, See also, United States v. Guzman, 864 P.2d 1512, 1515 (10th Cir. 1988). This doctrine prevents abuse of exceptions to the fourth amendment's warrant requirement, protects citizens from arbitrary actions by police officers, supports the fourth amendment's requirement of objective reasonableness to support any invasion by law enforcement, See Maryland v. Macon, 472 U.S. 463, 470-71, 105 S.Ct. 2778, 2783 (1985); Scott v. United States, 436 U.S. 128, 137-38, 98 S.Ct. 1717, 1723 (1978) and requires courts to focus on the realities of police practices --not pretenses-- thus protecting the integrity of the courts. See United States v. Keller, 499 F.Supp. 415, 418 (N.D. Ill. 1980), State v. Arroyo, 796 P.2d 684, 689 (Utah 1990). "Allowing police officers to stop vehicles for any minor violation when the officer in fact is pursuing a hunch would allow officers to seize almost any individual on the basis of otherwise unconstitutional objectives..... To permit police officers to use any minor traffic violation as a pretext to stop a vehicle encourages the selective enforcement of traffic regulations against minorities..." Lopez, 831 P.2d at 1045, 1046.

This court has held that the standard for determinations of

reasonable suspicion is "the totality of the circumstances." Sierra, 754 P.2d at 977. The subjective intent of the officer is irrelevant in making these determinations. Id. The only question is "...whether a reasonable officer would have made the seizure in the absence of illegitimate motivation." Id. at 978 (quoting United States v. Smith, 799 F.2d 704, 708 (11th Cir. 1986). This standard "provides [for] meaningful judicial review of discretionary police action." Guzman, 864 P.2d at 1517.

In the present case two Mexican individuals in a mid-size car on the West side of Salt Lake City near a bar were stopped at approximately 8:45 p.m. for allegedly impeding traffic when the car stopped slowly crossed the street into a 45 degree angle parking space on the side of the road. The only traffic was the officer conducting the stop. (Tr. 1, 2, 12, 13).[1]

Utah's appellate courts have on three occasions held that reasonable suspicion was not present in cases in which a slow rate of speed by the suspect's vehicle was an element of the officers reasonable suspicion to stop the defendant. State v. Carpena, 714 P.2d 674 (Utah 1986)(a slow moving car with out-of- state plates driving through an area where frequent burglaries occurred at 3 a.m. was not sufficient grounds for reasonable suspicion); State v. Sierra, 754 P.2d 972 (Utah App. 1988) (officer stopped a vehicle

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[1] The race of Mr. Ortiz and Mr. Sandoval is relevant in the present case because, as this court has noted "many pretext stop cases involve minorities...We are mindful that law enforcement officials often use racial characteristics as a basis for "hunch" criminal profiles in pretextual traffic stops." Lopez, 831 P.2d at 1046, See also Arroyo, 770 P.2d at 155.

for violating Utah law requiring slower vehicles in the left lane to yield to traffic approaching from behind was not sufficient basis for reasonable suspicion to stop.); State v. Thorsness, 778 P.2d 1011 (stopping a vehicle traveling 20 mph in a 40 mph zone late at night did not constitute reasonable suspicion that a crime was occurring. While impeding traffic was not specific alleged in any of the above cases, in each case the vehicles were traveling slower that the approaching officer thus, the driving patterns were similar and logical consequence of driving slowly would be impeding traffic. The court's must avoid placing form over substance and look to the actual facts of the case and not the label placed on the driving pattern by an officer who is trained to providing the proper label to justify a stop. As in Thorsness, Carpena, Sierra, Mr. Ortiz was merely driving slowly and approaching a parking place with caution. See Supra 12.

The totality of the circumstances in the present case indicate that the officer's allegation of impeding traffic was a pretext in which the officer could use to investigate whether two Hispanic individuals on the westside of Salt Lake City, in the vicinity of a bar, late at night were driving while under the influence of alcohol.

POINT II: Mr. Ortiz' detention by the officer was not supported by reasonable suspicion violating the Fourth Amendment of the United States Constitution and Article I §§ 7 and 14 of the Utah Constitution.

At the conclusion of the suppression hearing the trial court found that the officer testified "that a vehicle whether it's backing, moving in a forward direction or making a turn or coming

straight out of a parking lot any of those maneuvers would be legal assuming that there's no traffic on the road with which it would interfere." (Tr. 24) The trail judge went on to state,

> "we're looking at questions of fact, but a vehicle stopping in that position as has been testified to by the officer certainly would be far more than probable cause. The officer would be derelict in his duty if he did not investigate to see what was wrong. It has nothing to do with whether the individual is intoxicated. It may be a serious ill person, it may be an incompetent driver, it may be a person who doesn't know how to drive. There's many reasons why a vehicle would pull into a position like that and then stop and so looking at the testimony from the officer's position he would have been derelict in his duty had he not investigated[2]....Now opposing that is Mr. I'm sorry I've forgotten the gentleman's name but the witness, his testimony that they came from a different direction, that they were performing a different maneuver and that the officer wasn't driving down the street. That's a question of fact and therefore the motion to suppress is denied."

(Tr.25)[3] These brief findings neglect to address the officer's

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[2] The trail judge found that there were many reasons that a vehicle would stop in the road as the officer alleged that Mr. Ortiz did, all requiring that an officer stop and investigate. However, absent reasonable suspicion that a crime has been committed or an emergency an officer has no right to stop a vehicle. Lopez, 831 P.2d at 1043. In the present case there was no evidence that the officer suspected that there was an emergency situation or an incompetent driver.

[3] In the case of State v. Ramirez, 817 P.2d 774, 787-789 (Utah 1991) the Utah Supreme Court remanded the case to the trial court for more detailed findings regarding the conflict in testimony concerning the seizure of a defendant. As the Supreme Court noted issues of search and seizure are highly fact sensitive and detailed findings "are necessary to enable this court to meaningfully review the issues on appeal." Id, at 789. In the present case the trial court made no factual findings regarding the conflicting testimony of Mr. Sandoval and the officer. The extent of the trial court's ruling on this matter consisted of the following, "Now opposing that is Mr. I'm sorry I've forgotten the gentleman's name but the witness, his testimony that they came form a different direction that they were performing a different maneuver and that the officer wasn't driving down the street. That's a question of fact and therefore the motion to suppress is

frequent internal inconsistencies in his testimony and ongoing correction of his testimony to bring it in line with the statements documented in his police report. In contrast to the officer's testimony Mr. Sandoval's testimony had no inconsistencies, was presented in a clear manner, he did not refer to any written notes to correct his testimony, was unwavering in his presentation of the facts and testified that he had only one beer, thus, it is unlikely that his perception of the evenings events was not impaired by alcohol.

Testimony of an officer concerning facts within the realm of common knowledge to the average individual, such as where the officer's vehicle was in relation to Mr. Ortiz' car, should not be given more weight based on the mere fact that the witness is an officer. It is true that on the issue of reasonable suspicion the officer's testimony as to what a reasonable officer is to be given weight over that of a lay witness, but this deference does not extend to facts that are within realm of a lay witness. See, Sierra, 754 P.2d at 977; Utah Rules of Evidence 601, 701.

The officer's changing testimony[4] indicates that the officer

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denied." It appears that the trial court did not consider any conflict because the issue is factual and not legal. However, issues of reasonable suspicion and pretext doctrine are highly fact sensitive questions in which the trial court must make determination of fact on which to base the legal conclusion. Id. 789. For these reasons of it is appropriate that this Court remand this case for specific factual findings.

[4] Specific examples of the officer changing and contradictory testimony include that fact that Mr. Ortiz was stopped for impeding traffic, however, no citation was issued and the officer could not remember if he might have told Mr. Ortiz that he was stopping him for making a U turn. (Tr. 7, 8) In discussing

was merely looking for a valid legal reason to substantiate the stop after the fact. In light of the apparent failure to consider or give the testimony of Mr. Sandoval due weight the trial court's finding that the officer stopped Mr. Ortiz because he was impeding traffic, specifically himself is clearly erroneous.

The testimony presented at suppression hearing supports Mr. Ortiz' position that the officer alleged the impeding violation only after making the stop and determining that Mr. Ortiz was intoxicated. Specifically, Mr. Ortiz was not charge with impeding traffic, however, the charge of Driving Under the Influence of Alcohol the officer charged him with the lesser offense of having an Open Container of Alcohol in a Vehicle. (Information) Supporting the premiss that the officer did not merely give Mr. Ortiz a break by citing him only with the principle offense.

A search of Utah case law revealed no cases addressing the issue of reasonable suspicion to stop a vehicle based on impeding traffic, however, in Sandy City v. Thorsness, 778 P.2d 1011 (Utah App. 1989) this court held that stopping a vehicle for driving at

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Mr. Ortiz' driving pattern the officer testified: "Mr. Ortiz pulled across the street southbound, blew across 100 South southbound," "Mr. Ortiz' vehicle was had stopped in the lane, the travel lane of which I was in," "he was backing...just backing slowly," "I just saw him in motion slowly driving across the roadway," and finally, the officer conceded that Mr. Ortiz had not been backing across the street at all, but rather pulling foreword across the street. (Tr. 2, 4, 5, 6, 8, 18). He also indicated that he did not see Mr. Ortiz exit the 76 Club parking area and after reviewing his report changed his testimony to say that he had seen Mr. Ortiz exit the parking area (Tr. 6-7). Finally, the officer was inconsistent in first testifying that Mr. Ortiz told him he was coming from the 76 club and later conceded that Mr. Ortiz had in fact told him that he was coming from his home. (Tr. 6-7).

a slow rate of speed was insufficient basis for to stop a vehicle. See Supra 12. In Thorsness the vehicle in question proceeded at twenty miles per hour in a forty mile per hour zone. In that case this court noted, "Defendant did not commit any traffic violations and traffic was not impeded as there was none in the area at that hour." Thorsness, 778 P.2d at 1012. At first appearance the present case appears to be distinguishable from Thorsness based on the finding that no traffic was impeded. However, if the specific facts of each case are considered and not the labels given the driving patterns by the testifying officers the similarities are striking. As in Thorsness the only vehicles on the road were defendant's and the officer's, it was late evening in both cases and both cars were proceeding at a slow rate of speed. The difference in the two cases lies in the labeling of the facts by Officer Beasley thus, clouding the issue of whether a reasonable officer would have stopped Mr. Ortiz for impeding traffic. As in Thorsness, Mr. Ortiz was merely proceeding at a slow rate of speed, however, he had the logical explanation that he was attempting to park his vehicle. In Thorsness this court found no reasonable suspicion to stop the defendant even absent an explanation for his driving pattern, for these reasons there was no legitimate basis for the stop of Mr. Ortiz' vehicle.

Assuming, arguendo, that the officer was in fact stopped in the roadway while Mr. Ortiz executed his turn into the 45 degree angle parking space for several seconds, this still does not raise to the level of a traffic violation. (Tr. 2, 11-12). Salt Lake

City Code §12.36.040 provides,

> No person shall drive a motor vehicle at such slow speed as to impede or block the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or to comply with law.(Emphasis added)

In the present case Mr. Ortiz was merely operating his vehicle within the exception to the code section, "when... necessary for safe operation." It is unrealistic and unsafe to assume that an individual pulling off a roadway and into a 45 degree angle parking space at the side of the road would not substantially slow the speed of the vehicle. Even the officer conceded that this would be an appropriate action. (Tr. 19).

The allegation of impeding traffic when only the officer is on the street creates a catchall traffic violation in which an officer can allege any time he has a hunch and wishes to further investigate an individual, opening the door for the officers use of his discretionary power to violate individuals constitutional rights.

CONCLUSION

Appellant respectfully requests that this Court reverse his conviction and remand this case for a new trial absent the illegally seized evidence.

RESPECTFULLY SUBMITTED this 7 day of January, 1993.

Deborah Kreeck Mendez

DEBORAH KREECK MENDEZ

CERTIFICATE OF DELIVERY

I, DEBORAH KREECK MENDEZ, hereby certify that I have caused eight copies of the foregoing to be delivered to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102, and four copies to the Salt Lake City Prosecutor's Office, 451 South 200 East, Salt Lake City, Utah 84111, this 7 day of January, 1993.

Deborah Kreeck Mendez
DEBORAH KREECK MENDEZ

DELIVERED/MAILED this _____ day of January, 1993.

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ADDENDUM A

UNITED STATES CONSTITUTION

AMENDMENT IV

[Unreasonable searches and seizures.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

CONSTITUTION OF UTAH

Sec. 7. [Due process of law.]
No person shall be deprived of life, liberty or property, without due process of law. 1896

Sec. 14. [Unreasonable searches forbidden — Issuance of warrant.]
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 warrant shall issue but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized. 1896

UTAH RULES OF EVIDENCE

ARTICLE VI. WITNESSES.

Rule 601. General rule of competency.

(a) **General rule of competency.** Every person is competent to be a witness except as otherwise provided in these rules.

(b) **Statement of declarant in action for his wrongful death.** Evidence of a statement by the deceased is not made inadmissible by the hearsay rule if offered against the plaintiff in an action for wrongful death.

(c) **Statement of decedent offered in action against his estate.**

(1) Evidence of a statement is not made inadmissible by the hearsay rule when offered in an action upon a claim or demand against the estate of the declarant if the statement was made upon the personal knowledge of the declarant at a time when the matter had been recently perceived by him and while his recollection was clear.

(2) Evidence of a statement is inadmissible under this section if the statement was made under circumstances such as to indicate its lack of trustworthiness.

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY.

Rule 701. Opinion testimony by lay witnesses.
If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is lim-

UTAH CODE OF CRIMINAL PROCEDURE

77-7-2. By peace officers.

A peace officer may make an arrest under authority of a warrant or may, without warrant, arrest a person:

(1) for any public offense committed or attempted in the presence of any peace officer; "presence" includes all of the physical senses or any device that enhances the acuity, sensitivity, or range of any physical sense, or records the observations of any of the physical senses;

(2) when he has reasonable cause to believe a felony has been committed and has reasonable cause to believe that the person arrested has committed it;

(3) when he has reasonable cause to believe the person has committed a public offense, and there is reasonable cause for believing the person may:

(a) flee or conceal himself to avoid arrest;

(b) destroy or conceal evidence of the commission of the offense; or

(c) injure another person or damage property belonging to another person. 1986

SALT LAKE CITY TRAFFIC CODE

12.36.030 DRIVING TOO SLOW.

No person shall drive a motor vehicle at such slow speed as to impede or block the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or to comply with law.

ADDENDUM B

fact this motorcycle parks in that neighborhood never west of 9th west as the officer testified to. What we really have to look at is did the officer have an articulable reason to stop this vehicle. The answer is yes. This car stopped in front of him. Stayed there for several seconds by his testimony. Where Ms. Mendez is getting the sketchy elements from this report confuses me because the report is very clear. It doesn't talk about backing. Officer Beasley did make that mistake in his testimony. It does talk about this car pulling slowly across the lane of traffic, impeding his progress to the extent that he had to come to a complete stop and wait while the pulled out of the way. That's all that's required for him to go up and begin his conversation with him. At that point we'll take that up at the court or at the trial, but up to that point he has every reason and every reasonable officer would be expected to make contact who has just stopped and caused traffic to stop.

JUDGE: What we have here is obviously a question of fact. The officer has testified and our standard in this proceeding is probable cause. The officer's testified that a vehicle

ATD: Excuse me your honor, I believe that the standard would be a reasonable suspicion to stop. I'm not challenging the arrest but rather the stop.

ATP: That is correct which is a lower standard.

ATD: I just want the record to be accurate.

ATP: And I believe that is correct. The standard in Utah right now is reasonable suspicion to stop.

JUDGE: Or probable cause.

ATP: Or probable cause to arrest.

JUDGE: Ya, that's what I said. He has testified that a vehicle whether it's backing, moving in a forward direction or making a turn or coming straight out of a parking lot any of those maneuvers would be legal assuming that there's no traffic on the road with which it would interfere. He has testified that when it gets into his lane of traffic that the vehicle stops and sits there. He pulls up and stops. The vehicle then either backs or goes forward again onto the curb. Now certainly a vehicle stopping in that position again, as I've said, we're looking at questions of fact, but a vehicle stopping in that position as has been testified to by the officer certainly would be far more than probable cause. The officer would be derelict in his duty if he did not investigate to see what was wrong. It has nothing to do with whether the individual is intoxicated. It may be a serious ill person, it may be an incompetent drive, it may be a person who doesn't know how to drive. There's many reasons why a vehicle would pull into a position like that and then stop and so looking at the testimony from the officer's position he would have been derelict in his duty had he not investigated. And of course the Parker case is not applicable because obviously a DUI arrest and looking for a burglary suspect are two different matters. The officer becomes aware in most cases of a DUI offense when he approaches the driver and finds out the driver's condition. That's something entirely different than in a burglary case. And so at the time of the stop it's not

,xpected necessarily that you will escalate a matter into a DUI offense. That happens just from further observations. Now opposing that is Mr. I'm sorry I've forgotten the gentleman's name but the witness, his testimony that they came from a different direction that they were performing a different maneuver and that the officer wasn't driving down the street. That's a question of fact and therefore the motion to suppress is denied.