

1991

Utah v. Louie Edwin Sims : Brief of Petitioner

Utah Supreme Court

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G. Fred Metos; attorney for respondent.

Jan Graham; attorney general; David B. Thompson; assistant attorney general; attorneys for petitioner.

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910218

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
	:	
Plaintiff-Petitioner	:	Case No. 910218
and Cross-Respondent,	:	Ct. of App. No. 890463-CA
	:	
v.	:	
	:	
LOUIE EDWIN SIMS,	:	Category No. 13
	:	
Defendant-Respondent	:	
and Cross-Petitioner.	:	

BRIEF OF PETITIONER

ON WRIT OF CERTIORARI TO
TO THE UTAH COURT OF APPEALS

JAN GRAHAM (3312)
Attorney General
DAVID B. THOMPSON (4159) 
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Petitioner and
Cross-Respondent

G. FRED METOS (2250)
72 East Fourth South
Salt Lake City, Utah 84111

Attorney for Respondent and
Cross-Petitioner

FILED

MAY 6 1993

CLERK SUPREME COURT

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Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Petitioner and
Cross-Respondent

G. FRED METOS (2250)
72 East Fourth South
Salt Lake City, Utah 84111

Attorney for Respondent and
Cross-Petitioner

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JURISDICTION AND NATURE OF PROCEEDINGS

This case is before the Court on a writ of certiorari to the Utah Court of Appeals for review of State v. Sims, 808 P.2d 141 (Utah App.), cert. granted, ____ P.2d ____ (Utah 1993) (a copy of which is attached as an addendum). This Court has jurisdiction to hear the case under Utah Code Ann. § 78-2-2(3)(a) (Supp. 1992).

STATEMENT OF ISSUES PRESENTED

AND STANDARDS OF REVIEW

Two issues are presented for review:

1. Did the court of appeals erroneously conclude that the roadblock stop of defendant was per se unconstitutional under the Utah Constitution because it was not expressly authorized by statute?

Interpretation of the Utah Constitution is a question of law; thus, this Court reviews the court of appeals' legal conclusion without deference. See City of Monticello v.

Christensen, 788 P.2d 513, 516 (Utah), cert. denied, 489 U.S. 841 (1990).

2. Did the court of appeals properly apply this Court's decision in State v. Arroyo, 796 P.2d 684 (Utah 1990), in holding that defendant's consent to search was not valid and that the evidence seized from his vehicle pursuant to his consent was therefore not admissible?

This also presents a question of law, and therefore the Court owes no deference to the court of appeals' application of Arroyo. See State v. Thurman, 846 P.2d 1256, 1271-72 (Utah 1993).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Article I, section 14 of the Utah Constitution provides:

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.

STATEMENT OF THE CASE

Defendant, Louie Edwin Sims, was charged with possession of a controlled substance with intent to distribute, a second degree felony, under Utah Code Ann. § 58-37-8(1)(a)(i) (Supp. 1988) (R. 7).

Prior to trial, defendant filed a motion to suppress the contraband seized from his car by the police during a roadblock stop (R. 12, 22-56). An evidentiary hearing

established that defendant was stopped, along with numerous other vehicles, at a roadblock set up by the police for the purpose of "detect[ing] driver's license, automobile registration, and equipment violations, as well as liquor and drug violations." State v. Sims, 808 P.2d 141, 142 (Utah App. 1991), cert. granted, ____ P.2d ____ (Utah 1993). After being stopped at the roadblock, defendant consented to a search of his vehicle, including the trunk, which revealed small amounts of marijuana and a kilogram brick of cocaine. Ibid.

The trial court denied defendant's motion to suppress, ruling that "(1) the roadblock stop did not violate the Utah or federal constitutions; (2) [defendant] voluntarily consented to the search of the vehicle, including the trunk; and (3) [the officer who conducted the search] had probable cause to continue searching the trunk after [defendant]'s withdrawal of consent." Id. at 143.

Subsequently, defendant was convicted of the charged offense after a bench trial based on stipulated facts (R. 142-45). The court sentenced him to a term of one to fifteen years at the Utah State Prison and ordered him to pay a fine of \$1,250 and an additional \$312.50 to the Victim's Reparation Fund (Id.). The court then suspended the prison term and placed defendant on eighteen months' probation (Id.).

Defendant appealed his conviction to the Utah Court of Appeals, alleging that the stop of his vehicle at the police roadblock constituted an unreasonable seizure under the federal

and state constitutions, and therefore the contraband seized from his vehicle pursuant to his consent should have been suppressed. The court of appeals held that the roadblock violated the Fourth Amendment under Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990), and that it also violated article I, section 14 of the Utah Constitution because the roadblock was not expressly authorized by statute. State v. Sims, 808 P.2d at 145-50. It further held that, under State v. Arroyo, 796 P.2d 684 (Utah 1990), defendant's consent to the search of his vehicle was not sufficiently attenuated from the unlawful roadblock stop to avoid the taint of that initial illegality, and therefore the consent was invalid. Id. at 150-52.

This Court granted certiorari. State v. Sims, No. 910218 (Utah Feb. 5, 1993).

STATEMENT OF FACTS

This Court accurately summarized the facts of this case in a related tax case involving the same defendant and the same incident:

On July 27, 1988, the Utah Highway Patrol and the Juab County Sheriff's Department set up a roadblock on Interstate Highway 15 approximately two miles outside of Nephi, Utah. When Sims' car was stopped at the roadblock, the officers observed an open container of alcohol in the back seat area. Sims was asked to exit the car, at which time he consented to a search of the interior. There, the officers discovered the remnants of one or two marijuana cigarettes. Sims then consented to a search of the trunk. When the latter search revealed two small plastic bags containing marijuana, Sims stated that he wanted the search stopped. Asserting that they had probable cause to continue, the officers inspected the spare tire well, uncovering a kilogram brick of

cocaine. Sims was then arrested for driving under the influence of alcohol and possession of a controlled substance with intent to distribute.

Sims v. State Traffic Commission, 841 P.2d 6, 7 (Utah 1992). The roadblock was set up "to detect driver's license, vehicle registration, and equipment violations, as well as liquor and drug violations." State v. Sims, 808 P.2d at 142.¹

SUMMARY OF ARGUMENT

Although the court of appeals correctly ruled that the roadblock in this case violated the Fourth Amendment, it erroneously concluded that the roadblock was per se unconstitutional ^{under the state constitution} because it was not expressly authorized by statute. The better reasoned view is that the police had implied statutory authority to set up the roadblock and the absence of express statutory authority did not render the device per se unconstitutional under article I, section 14 of the Utah Constitution.

Contrary to the court of appeals' approach, express statutory authorization is not a prerequisite to a determination that a particular law enforcement practice is constitutional. Because the court of appeals' novel state constitutional holding has far reaching implications for Utah's search and seizure law, this Court should reverse that holding.

The court of appeals' additional holding that defendant's consent to the search of his car was not valid under

¹ Specifically, one of the supervising officers "instructed officers to inspect driver's licenses and vehicle registration of the stopped motorists; while doing this, they were to watch for signs of liquor and drug violations." Sims, 808 P.2d at 143.

the exploitation prong of the test set forth in State v. Arroyo, 796 P.2d 684 (Utah 1990), is inconsistent with this Court's clarification of the Arroyo test in State v. Thurman, 846 P.2d 1256 (Utah 1993). This Court's similar holding in Sims v. State Tax Comm'n, 841 P.2d 6 (Utah 1992), is also inconsistent with Thurman.

Because the roadblock stop of defendant did not constitute flagrant or purposeful police misconduct, the absence of a significant time period or intervening circumstances between the illegal stop and defendant's consent to search is not critical. In short, under Thurman's analysis of Arroyo's exploitation prong, defendant's consent was not obtained through exploitation of the illegal stop. That consent was valid, and therefore the evidence seized either directly or indirectly pursuant to the consent was admissible.

Accordingly, this Court should reverse the court of appeals' contrary holding and overrule its own contrary holding in Sims v. State Tax Comm'n.

ARGUMENT

POINT I

THE COURT OF APPEALS ERRONEOUSLY CONCLUDED
THAT THE ROADBLOCK WAS PER SE
UNCONSTITUTIONAL UNDER THE UTAH CONSTITUTION
BECAUSE THERE WAS NO EXPRESS STATUTORY
AUTHORIZATION FOR ROADBLOCKS

After the court of appeals ruled that the roadblock in this case violated the Fourth Amendment under Sitz, a ruling the State does not challenge, it then held that the roadblock was per se unconstitutional under article I, section 14 of the Utah Constitution because there was no express statutory authority for

such roadblocks. Sims, 808 P.2d at 149. The court did not resolve the question of whether the officers had implied authority to conduct the roadblock, even though it appears that authority could be inferred from the statutes that pertain to the general authority of law enforcement officers. See Utah Code Ann. §§ 10-3-914(1) (Supp. 1992), 17-22-2 (1991), 27-10-4(a) & (b) (1989), 41-1-17 (1988). But see Sims v. State Tax Comm'n, 841 P.2d at 9 (where two Justices "decline to infer authority for suspicionless investigatory stops from broad statutory directives").

Although the legislature has since enacted statutes authorizing roadblocks of the type used in this case, Utah Code Ann. § 77-23-101 through -105 (Supp. 1992), this Court should nevertheless review the court of appeals' novel interpretation of the state constitution. The court of appeals' holding amounts to a broad conclusion that certain warrantless law enforcement techniques require express legislative authorization before they can be constitutional under the Utah Constitution. Left intact, this conclusion has the potential to fundamentally alter the law of search and seizure in this state.

In holding that the roadblock here violated the state constitution, the court of appeals reasoned that this Court's emphasis on the warrant requirement under article I, section 14, coupled with the legislature's independent action in authorizing ports of entry and fish and game checkpoints, required that the legislature expressly authorize suspicionless, investigatory roadblocks before they could be constitutional under the state

constitution. Sims, 808 P.2d at 148-49. The court made the rather remarkable observation that "in authorizing [ports of entry and fish and game checkpoints], our legislature has, presumably, weighed the need for such suspicionless inspections against their intrusion upon individual liberty, a process analogous to that performed by a magistrate in the issuance of a warrant." Id. at 149 (emphasis added).

The fundamental flaw in this latter statement is that when considering an application for a warrant, a magistrate is concerned only with whether there is probable cause; he or she does not engage in weighing the need for a warrant against the intrusion upon individual liberty. A warrant and the attendant intrusion upon an individual's liberty are constitutional if supported by probable cause; the magistrate's determination of whether a search is constitutionally justified does not go beyond the probable cause determination.

The legislature, on the other hand, while obviously concerned with the constitutionality of its enactments, does not determine the constitutionality of a particular police practice. Although it may prohibit certain police practices that the courts consider constitutional, such a statutory prohibition does not render the police practice unconstitutional; rather, the practice is merely illegal -- that is, prohibited by statute. Likewise, the legislature does not render a police practice constitutional simply because it authorizes the practice by statute. Nor is there any logical basis for the proposition that legislative approval is a prerequisite to a judicial determination that a

certain police conduct is constitutional.

In short, the court of appeals incorrectly concluded that the legislature performs a judicial function, akin to that of a magistrate or an appellate court, in determining the constitutionality of a particular police practice. See Sims, 808 P.2d at 152 (Orme, J., concurring specially). Whether police conduct is constitutional is ultimately a question for the courts, not the legislature.

Although the court of appeals finds support for its novel view in Nelson v. Lane County, 304 Or. 97, 743 P.2d 692 (1987), and State v. Smith, 674 P.2d 562 (Okl. Cr. 1984)², the better reasoned position is that adopted by the Appellate Court of Illinois in a case upholding a vehicle safety equipment checkpoint:

Criminal statutes do contain an implied right of police to enforce them. While there are state and federal constitutional limitations on the means of enforcement, these limits are constitutional and not inherent in every criminal statute. The State has passed laws requiring safety equipment. Absent evidence of some contrary intent, the police should be able to enforce those laws in a constitutional manner.

. . . .

We are loath to say that the State has anything but a strong interest in seeing that all motor vehicles are safe, and given the

² The court of appeals also cited State v. Henderson, 114 Idaho 293, 756 P.2d 1057 (1988), in support of its position. That case is distinguishable from Nelson and Smith, in that the Idaho Legislature had explicitly limited the use of roadblocks to situations where officers desired to "apprehend[] persons reasonably believed by such officers to be wanted for a violation of the laws of this state, of any other state, or of the United States[.]" Id. at 1061 (quoting Idaho Code § 19-621).

absence of any intent to provide otherwise, the safety equipment statutes carry with them an implied right of the officers to inspect autos in any constitutional manner.

People v. Estrada, 68 Ill.App.3d 272, 386 N.E.2d 128, 133-34, cert. denied, 444 U.S. 968 (1979). Other courts have concluded that roadblocks are constitutional in the absence of explicit statutory authority. Davis v. Kansas Dept. of Revenue, 843 P.2d 260 (Kan. 1992); Orr v. People, 803 P.2d 509, 512 (Colo. 1990); Ingersoll v. Palmer, 743 P.2d 1299, 1318 (Cal. 1987).

There are numerous law enforcement practices involving suspicionless and warrantless searches or seizures which this Court has recognized as constitutionally permissible and otherwise proper even though there is no explicit statutory authority. For example, there is no explicit statutory authority for searches incident to arrest or inventory searches, both of which may be conducted without suspicion or a warrant. See, e.g., State v. Banks, 720 P.2d 1380, 1384 (Utah 1986) (recognizing search incident to arrest exception to the Fourth Amendment's warrant and probable cause requirements); State v. Hygh, 711 P.2d 264, 267 (Utah 1985) (holding that suspicionless and warrantless inventory searches are permitted under the Fourth Amendment and article I, section 14 of the Utah Constitution). The court of appeals' state constitutional analysis casts doubt on the propriety of these police practices.

Contrary to the court of appeals' approach, the appropriate initial inquiry with respect to any law enforcement practice is to ask whether it is constitutional, not whether it is explicitly authorized by statute. While the particular

practice must impliedly be within the statutory authority of a peace officer, explicit authority is not required for it^{to}_^ be constitutional.

In Sims v. State Tax Comm'n, Justice Durham's lead opinion, in which only Justice Zimmerman joined, essentially adopted all of the court of appeals' reasoning in State v. Sims concerning the requirement of explicit statutory authority for roadblocks before they could be constitutional under article I, section 14. 841 P.2d at 8-9. Relying heavily on the "court's commitment to the warrant approach under our state constitution," as expressed in the two Justice lead opinion in State v. Larocco, 794 P.2d 460, 470 (Utah 1990) (Durham, J., joined by Zimmerman, J.), Justice Durham concluded that "as a matter of law, the roadblock stop [of defendant] was unconstitutional under the Utah Constitution." Sims v. State Tax Comm'n, 841 P.2d at 8. Suspicionless, investigatory roadblocks were neither implicitly nor explicitly authorized by statute. Id. at 9. Furthermore, neither probable cause nor exigent circumstances supported the warrantless roadblock at which defendant was stopped. Id. at 8-9.

Justice Durham's analysis was specifically limited to a "suspicionless, investigatory, nonemergency roadblock," and did not extend to "emergency roadblocks that might be used, for example, to apprehend a fleeing felon," "any existing authority to conduct roadblocks for traffic control purposes," or "port of entry or fish and game roadblocks conducted pursuant to statute." Id. at 8 n.3.

However, concurring in the result, Justice Stewart severely criticized Justice Durham, observing that "her sweeping opinion represents the views of only two justices of this Court and is therefore not the law of the state." Id. at 15 (Stewart, J., concurring in result)³. He also noted that "her opinion raises more difficult issues than it settles with respect to the legality of roadblocks." Ibid.

Specifically, Justice Stewart concluded that the roadblock was clearly unconstitutional under federal law, Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990), and thus Justice Durham's conclusion that the roadblock violated the Utah Constitution is dictum. He further suggested that Justice Durham's opinion "would make all preplanned, suspicionless roadblocks illegal, including roadblocks intended to remove intoxicated drivers from the highways or to enforce automobile safety measures." Id. at 16.

Thus, the lead opinion in Sims v. State Tax Comm'n does not represent the view of a majority of this Court. Insofar as that opinion endorses the court of appeals' view that a roadblock is per se unconstitutional under the state constitution unless there is express legislative authorization for the roadblock, it should be rejected. As previously argued, explicit legislative authorization is not a prerequisite to a determination that certain warrantless law enforcement activity is constitutional.

³ Associate Chief Justice Howe, joined by the Chief Justice, dissented on the ground that the exclusionary rule should not apply in a proceeding before the Tax Commission. 841 P.2d at 16-21 (Howe, A.C.J., dissenting).

To summarize, the notion that certain law enforcement techniques must have explicit legislative authorization before they can be constitutional under the state constitution erroneously places in the hands of the legislature the primary role of declaring the constitutionality of police conduct. Ultimate questions concerning the constitutionality of government action are reserved for the courts, not the legislature. Therefore, the Court should reverse the court of appeals' state constitutional holding on the ground that the absence of express statutory authorization for a particular law enforcement practice does not render that practice per se unconstitutional under article I, section 14.

POINT II

THE COURT OF APPEALS' APPLICATION OF STATE V. ARROYO AND THIS COURT'S APPLICATION OF ARROYO TO THE SAME DEFENDANT AND THE SAME FACTS IN SIMS V. STATE TAX COMM'N ARE INCONSISTENT WITH THE ANALYSIS SET FORTH IN STATE V. THURMAN

The court of appeals held that defendant's consent to the search of his car lacked attenuation from the initial, illegal roadblock stop, and therefore the evidence seized pursuant to that consent was inadmissible under State v. Arroyo, 796 P.2d 684 (Utah 1990). A majority of this Court reached the same conclusion in Sims v. State Tax Comm'n, 841 P.2d at 10 (Durham, J., joined by Zimmerman, J.), 15 (Stewart, J., concurring in the result), a drug stamp tax case involving this defendant and the same incident. Thus, the Court has resolved the exclusion issue against the State. However, the Court may wish to reexamine that issue because the Court's holding is at

odds with the attenuation analysis set forth in State v. Thurman, 846 P.2d 1256 (Utah 1993).

A. Clarification of Arroyo Test in Thurman

In Arroyo, the Court "held that a defendant's consent to a search following illegal police activity is valid under the Fourth Amendment only if both of the following tests are met:

(i) The consent was given voluntarily, and (ii) the consent was not obtained by police exploitation of the prior illegality."

Thurman, 846 P.2d at 1262 (citing Arroyo, 796 P.2d at 688). In Thurman, the Court clarified how the exploitation (attenuation) prong of the Arroyo test is to be applied.

Thurman began by stating that "Arroyo's primary goal was to deter the police from engaging in illegal conduct even though that conduct may be followed by a voluntary consent to the subsequent search." 846 P.2d at 1263. Having identified the deterrent purpose of the exclusionary rule as the basis for Arroyo's exploitation prong, the Court reiterated the factors to be considered in assessing the validity of a consent to search that follows illegal police conduct: "[(1)] 'the purpose and flagrancy of the official misconduct,' [(2)] the 'temporal proximity' of the illegality and the consent, and [(3)] 'the presence of intervening circumstances.'" Ibid. (citations omitted). The Court then discussed each factor, emphasizing the deterrent purpose of the exclusionary rule.

The Court made clear that the "purpose and flagrancy" factor is the most significant of the three because it "directly relates to the deterrent value of suppression." Ibid. (citations

omitted). Therefore, the first task under the exploitation prong is to determine the nature and degree of the police illegality based on a continuum of "flagrancy" or "purpose."

To put the continuum in perspective, it must first be recognized that "[t]he deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right." Ibid. (quoting Brown v. Illinois, 422 U.S. 590, 612 (Powell, J., concurring), in turn quoting Michigan v. Tucker, 417 U.S. 433, 447 (1974)). Thus, at one end of the continuum is police misconduct that is "flagrantly abusive, [such that] there is greater likelihood that the police engaged in the conduct as a pretext for collateral objectives," or instances where "the purpose of the misconduct was to achieve the consent." Id. (citations omitted). In such cases, "suppressing the resulting evidence will have a greater likelihood of deterring similar misconduct in the future." Ibid. (citation and footnote omitted).

At the other extreme are instances where "the police had no 'purpose' in engaging in the misconduct[.] [F]or example, if the illegality arose because [a court] later invalidated a statute on which the police had relied in good faith[,], suppression would have no deterrent value." Ibid. (citations omitted).

With this continuum in mind, Thurman then described the relationship between the flagrancy factor and the other two factors, temporal proximity and intervening circumstances.

Specifically, "the exploitation analysis requires a balancing of the *relative* egregiousness of the misconduct against the time and circumstances that intervene before the consent is given." Ibid. (emphasis added). The Court explained:

The nature and degree of the illegality will usually be inversely related to the effectiveness of time and intervening events to dissipate the presumed taint. Where the misconduct is extreme, we will require a clean break in the chain of events between the misconduct and the consent to find the consent valid. . . . Conversely, where it appears that the illegality arose as the result of negligence, the lapse of time between the misconduct and the consent and the presence of intervening events become less critical to the dissipation of the taint.

Ibid. (citation omitted).

Thurman's clarification of how the nature and degree of the illegality are balanced against the intervening time and circumstances stands in marked contrast to this Court's and the court of appeals' application of the exploitation prong to the facts of the instant case. At the time the roadblock was set up, no decision from either the Utah appellate courts or the United States Supreme Court had directly ruled on the legality of such roadblocks. See generally Sims, 808 P.2d at 142-50. In fact, the Tenth Circuit Court of Appeals had held that police roadblocks for the purpose of checking driver's license and vehicle registration were constitutional. United States v. Corral, 823 F.2d 1389, 1392 (10th Cir. 1987), cert. denied, 486 U.S. 1054 (1988). It was not until Sitz, State v. Sims, and Sims v. State Tax Comm'n were issued that it became clear the roadblock at issue here was unconstitutional under the Fourth

Amendment and article I, section 14. Thus, the roadblock could not fairly be characterized as a flagrant violation of the federal or state constitution.

While it is not clear that the Sims panel actually concluded that the police misconduct was flagrant, it seemed to suggest that the roadblock constituted a flagrant constitutional violation because (1) "[t]he troopers each had years of law enforcement experience, and [could] properly be charged with awareness that their action was not authorized by law," and (2) "[u]sing ten to twelve law officers to staff the roadblock may have left distant parts of the largely rural jurisdiction with delayed police assistance in the event of need." 808 P.2d at 151.

As noted, no state or federal decision on the books at the time of the roadblock in this case would have made clear to the officers that it was unconstitutional. To require of the officers the clairvoyance necessary to anticipate Sitz and the court of appeals' unique state constitutional holding is unreasonable. Furthermore, the court of appeals' criticism of the use of law enforcement resources, beyond being speculative and outside any particular expertise of the judiciary, does not form a basis for concluding that the officers were guilty of a flagrant or purposeful *constitutional* violation.

In concluding that the defendant's "consent to search his vehicle was arrived at by exploitation of the illegal roadblock," the court of appeals relied most heavily on two factors: (1) "the consent was obtained within minutes of the

illegal stop, and not even under our clear error standard of review could the trial court find enough time between the stop and the grant of consent to attenuate the relationship between the two"; and (2) "the record reveal[ed] no possibility of intervening circumstances between the illegal stop and the grant of consent to the search." Sims, 808 P.2d at 150-51.

Given Arroyo's ambiguous discussion of the exploitation prong, it was not unreasonable for the court of appeals to interpret Arroyo as requiring a clean break in the chain of events between a prior police illegality (whether or not flagrant) and the subsequent consent for the consent to be valid. However, Thurman clearly rejected this approach.

It is not clear why in Sims v. State Tax Comm'n, which was issued less than three months before Thurman, the Court did not apply Thurman's analysis. It simply devoted but one sentence to the flagrancy factor: "The purpose of the roadblock was to obtain evidence of criminal violations, a purpose that does nothing to reduce the 'flagrancy' of the constitutional violation it precipitated." Sims v. State Tax Comm'n, 841 P.2d at 10. The Court never explained why the roadblock constituted a "flagrant" violation in the first place, given that there was at least one decision from the Tenth Circuit Court of Appeals that apparently approved such roadblocks and no decision from a Utah appellate court or the United States Supreme Court holding such roadblocks unconstitutional.

Insofar as the court of appeals held that a consent search is automatically invalidated if the voluntary consent is

closely connected in time and by circumstance to the prior police illegality, it is wrong. The same is true of this Court's similar holding in Sims v. State Tax Comm'n. As Thurman makes clear, if the violation by the police is not flagrant or purposeful, temporal proximity or the absence of intervening circumstances between the illegality and the consent is not significant.

In sum, police exploitation of the illegal roadblock stop is not made out in this case. The court of appeals' and this Court's conclusion to the contrary is simply inconsistent with Thurman. In that defendant does not challenge the voluntariness of his consent, Sims v. State Tax Comm'n, 841 P.2d at 9 n.8, that consent was valid under the Arroyo two-part test as clarified by Thurman. Thus, the incriminating evidence, which was obtained either directly or indirectly pursuant to that consent⁴, was admissible. No deterrent purpose would be served by excluding the evidence. Accordingly, the court of appeals' contrary holding should be reversed and this Court's contrary holding in Sims v. State Tax Comm'n overruled.

CONCLUSION

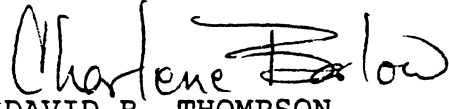
Based on the foregoing arguments, this Court should

⁴ Once defendant had withdrawn his consent for the search of the trunk, the searching officer, who by then had discovered two small bags of marijuana in the trunk, obviously had probable cause to continue his search under the automobile exception to the Fourth Amendment warrant requirement. See State v. Dorsey, 731 P.2d 1085, 1087 (Utah 1986) (discussing the automobile exception).

reverse the court of appeals and affirm defendant's conviction.

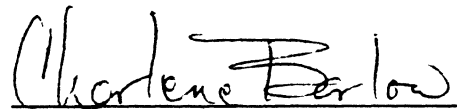
RESPECTFULLY submitted this 6th day of May, 1993.

JAN GRAHAM
Attorney General


For DAVID B. THOMPSON
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Petition were mailed, postage prepaid, to G. Fred Metos, Attorney for Defendant, 72 East 400 South #330, Salt Lake City, Utah 84111, this 6th day of May, 1993.


For David B. Thompson

ADDENDUM

STATE of Utah, Plaintiff and Appellee,

v.

Louie Edwin SIMS, Defendant
and Appellant.

No. 890463-CA.

Court of Appeals of Utah.

March 15, 1991.

Defendant was convicted in the Fourth District Court, Juab County, George E. Ballif, J., of possession of a controlled substance with intent to distribute for value, and he appealed. The Court of Appeals, Greenwood, J., held that: (1) roadblock at which defendant's vehicle was stopped violated both Fourth Amendment and Utah Constitution, and (2) defendant's consent to search his vehicle, made after vehicle was stopped at illegal roadblock, was arrived at by exploitation of roadblock, and was invalid.

Reversed and remanded.

Orme, J., filed specially concurring opinion.

1. Criminal Law ¶1031(1)

Issue of whether roadblock conducted by police violated Federal and State Constitutions was properly preserved for appeal, although State admitted that roadblock was unconstitutional for sake of argument, where defendant argued unconstitutionality of roadblock throughout proceeding and there was ample factual record from which issue could be assessed. Const. Art. 1, § 14; U.S.C.A. Const.Amend. 4.

2. Searches and Seizures ¶18

Roadblock or motorist "checkpoint" is "seizure" under Fourth Amendment and Utah Constitution. Const. Art. 1, § 14; U.S.C.A. Const.Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

3. Searches and Seizures ¶60

Utah statutes governing vehicle inspections, regulation of traffic, and stops

based on reasonable suspicion did not apply in determining whether suspicionless investigatory roadblocks were permissible. Const. Art. 1, § 14; U.S.C.A. Const. Amends. 4, 14; U.C.A.1953, 23-20-19, 27-10-4(1)(b), 27-12-19, 41-1-17(c), 77-7-15.

4. Searches and Seizures ¶60

Suspicionless, investigatory roadblock in which vehicles and drivers were screened for possible violations of law violated Fourth Amendment; no explicit plan, beyond determination that all vehicles other than large trucks were to be stopped, governed roadblock, officers who authorized roadblock were not politically accountable officials, and there was no indication that authorization process involved balancing Fourth Amendment interests and law enforcement interest or assessment of effectiveness of roadblock in meeting those interests. U.S.C.A. Const.Amend. 4.

5. Searches and Seizures ¶11, 23

Fourth Amendment balancing test applies to warrantless seizures that, if not based upon articulable suspicion of individual, must be carried out pursuant to plan embodying explicit, neutral limitations on conduct of individual officers; additionally, such plan should be developed by politically accountable officials with unique understanding of and responsibility for, limited public resources, including finite number of police officers. U.S.C.A. Const.Amend. 4.

6. Searches and Seizures ¶60

Politically accountable officials, not the courts, are responsible for performing initial balancing between Fourth Amendment and interests served by plan authorizing roadblock. U.S.C.A. Const.Amend. 4.

7. Searches and Seizures ¶60

Suspicionless, investigatory motor vehicle roadblocks, conducted without legislative authorization, are per se unconstitutional under search and seizure provision of Utah Constitution. Const. Art. 1, § 14.

8. Criminal Law ¶394.6(2)

Unless ground for suppression is unknown or unavailable to defendant at time suppression motion is filed, right to challenge admission of evidence on that ground

is waived. U.C.A.1953, 77-35-12 (Repealed).

9. Criminal Law ¶1031(1)

Defendant's failure to argue at trial that there was insufficient attenuation between his consent to search of his automobile and initial illegal stop of vehicle at roadblock did not preclude consideration of issue on appeal, where, because of then-standing decisions effectively holding that noncoerced consent to search, by itself, purged the taint of primary illegality, nonattenuation argument was unavailable at trial. U.C.A.1953, 77-35-12 (Repealed).

10. Searches and Seizures ¶184

Defendant's consent to search of his vehicle, made after vehicle was stopped at illegal roadblock, was arrived at by exploitation of roadblock, and was invalid; consent was obtained within minutes of illegal stop, and defendant did not spontaneously volunteer his consent. Const. Art. 1, § 14; U.S.C.A. Const.Amend. 4.

G. Fred Metos (Argued), Yengich, Rich, Xaiz & Metos, Salt Lake City, for defendant and appellant.

R. Paul Van Dam, Atty. Gen., Dan R. Larsen (Argued), Asst. Atty. Gen., Salt Lake City, for plaintiff and appellee.

Before GREENWOOD, JACKSON and ORME, JJ.

OPINION

GREENWOOD, Judge:

Louie Edwin Sims appeals his conviction of possession of a controlled substance with intent to distribute for value, Utah Code Ann. § 58-37-8(1)(a)(i) (Supp.1988), a second degree felony. Sims claims the

stop of his vehicle in a roadblock conducted by the Utah Highway Patrol was an unreasonable seizure under the fourth amendment to the United States Constitution and under article I, section 14 of the Utah Constitution.

Following oral argument, three cases relevant to the issues presented in this appeal were decided. Those cases are *Michigan Dep't of State Police v. Sitz*, — U.S. —, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990); *State v. Larocco*, 794 P.2d 460 (Utah 1990); and *State v. Arroyo*, 796 P.2d 684 (Utah 1990). Accordingly, we granted Sims' motion for supplemental briefing. Having considered the supplemental briefs, we now reverse his conviction, and remand for a new trial in which evidence seized from Sims' vehicle is to be suppressed.

FACTS

On the morning of July 27, 1988, officers from the Utah Highway Patrol and Juab County Sheriff's Office conducted a roadblock on Interstate Highway 15 approximately two miles south of Nephi, Utah. The roadblock was planned and supervised by Utah Highway Patrol Sergeant Paul Mangelson.¹ Its purpose was to detect driver's license, automobile registration, and equipment violations, as well as liquor and drug violations. Notice that the roadblock would take place was published in the Juab County Times News two to four weeks prior to the roadblock. There was no evidence that the News was distributed outside of Juab County. Interstate 15 is a major north-south route and link between Salt Lake City, Utah and Los Angeles, California.

According to Mangelson, no written policy, from the Highway Patrol or from any

1. Sergeant Mangelson's efforts to thwart illegal drug trafficking are well known in Utah's appellate courts. See, e.g., *Arroyo*, 796 P.2d 684 (reversing *State v. Arroyo*, 770 P.2d 153 (Utah Ct. App.1989)); *State v. Earl*, 716 P.2d 803 (Utah 1986); *State v. Baird*, 763 P.2d 1214 (Utah Ct. App.1988); *State v. Aguilar*, 758 P.2d 457 (Utah Ct.App.1988). See also *United States v. Corral*, 899 F.2d 991 (10th Cir.1990). Besides the present case, at least one other case involving an automobile search by Sergeant Mangelson is

pending in this court. *State v. Kitchen*, No. 900307-CA. As a central player in at least five published search and seizure scenarios to date, the redoubtable trooper's notoriety is approaching that of Max 25, a narcotics detection dog whose nose for crime has figured in at least seven published federal cases in the District of Columbia Circuit. See *United States v. Colyer*, 878 F.2d 469, 471 and n. 2 (D.C.Cir.1989), and cases cited therein.

other source, existed to guide the conduct of the roadblock in question. Mangelson indicated that his supervising lieutenant had given him permission to conduct the roadblock.

The roadblock was staffed by about ten uniformed officers. A series of three signs within a one-half mile distance directed drivers to the roadblock, marked by orange cones. Large trucks were not stopped, because stopping them might cause hazardous traffic congestion. Sergeant Mangelson instructed officers to inspect driver's licenses and vehicle registration of the stopped motorists; while doing this, they were to watch for signs of liquor and drug violations. Officers could hold vehicles for further investigation if the initial contact raised questions. One of the officers, Trooper Carl Howard, indicated that his practice also included asking all drivers, regardless of suspicion, if they had alcohol, weapons, or contraband in their vehicles.²

At approximately 9:00 a.m., Sims' vehicle, a Chrysler sedan, was stopped at the roadblock. Trooper Howard, the first officer to contact Sims, saw nothing to cause him to suspect a violation of the law as Sims' vehicle approached.³ Howard asked for Sims' driver's license and vehicle registration. Sims produced a valid Georgia driver's license and a Utah registration in his name. In response to the trooper's question, Sims stated that he was en route from Los Angeles to Salt Lake City. While talking with Sims, Trooper Howard smelled alcohol inside the sedan and saw an "open" liquor bottle in the back seat area. He asked Sims if there were any alcohol, weapons, or drugs in the vehicle. Sims admitted that there was alcohol in the vehicle, but denied carrying drugs or weapons.

2. As indicated by the following exchange at the suppression hearing, an affirmative answer to this question could prompt Trooper Howard to then seek consent to search automobiles without any other suspicion of wrongdoing:

Q (Mr. Metos): Just out of curiosity, did anybody answer "yes" [to query about alcohol, weapons, or contraband] when everything appeared in order so you would have to conduct a further search?

Howard then asked Sims to exit the sedan, and asked for consent to look inside. Sims consented. Sergeant Mangelson approached and helped Howard search the car's interior. They discovered the remnants of one or two marijuana cigarettes in the right rear passenger door ashtray. Howard then asked Sims if he would mind if they searched the trunk of the sedan. Sims agreed and opened the trunk. Mangelson searched the trunk while Howard conducted field sobriety tests on Sims nearby.

In a suitcase in the trunk, Mangelson discovered two small plastic bags containing marijuana. Sims, becoming visibly nervous, then stated that he wanted the search stopped. Mangelson told Sims that, based on the discovery of marijuana, he had probable cause to continue searching the trunk. Looking in the spare tire well, Mangelson found a kilogram brick of cocaine. Sims was then arrested for driving under the influence of alcohol and possession of a controlled substance.

Before trial, Sims filed a motion to suppress all evidence seized from his vehicle, contending that the roadblock stop was an unlawful seizure under the Utah and federal constitutions and that the officers lacked probable cause to search the trunk. Following an evidentiary hearing, the trial court denied Sims' motion. The court determined that (1) the roadblock stop did not violate the Utah or federal constitutions; (2) Sims voluntarily consented to the search of the vehicle, including the trunk; and (3) Sergeant Mangelson had probable cause to continue searching the trunk after Sims' withdrawal of consent. Based on the evidence presented at the suppression hearing and on the parties' written stipulation to the evidence, the trial court found Sims

A (Trooper Howard): Yes. I've had several people do that.

3. Re-cross examination of Trooper Howard by defense counsel included the following exchange:

Q: You had no reason to believe [Sims] was doing anything wrong as he entered the roadblock or breaking any law; is that correct?
A: That's correct.

guilty of possession of a controlled substance with intent to distribute.

ISSUES

On appeal, Sims argues that (1) the roadblock stop of his vehicle violated his right to be free from unreasonable searches and seizures under article I, section 14 of the Utah Constitution and the fourth amendment to the United States Constitution; and (2) there was insufficient attenuation between the unlawful detention and any consent to overcome the illegality of the roadblock.

CONSTITUTIONALITY OF ROADBLOCK

Sims' first point on appeal deals solely with the permissibility of the roadblock itself. Because it is undisputed that the roadblock was conducted with neither a warrant nor suspicion of wrongdoing by Sims, and that no emergency situation necessitated it, the question of whether the roadblock was improper is reduced to one of law, and we review it without deference to the trial court. *Scharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985); *State v. Serpente*, 768 P.2d 994, 995 (Utah Ct.App. 1989).

The State neither contests nor accepts Sims' arguments that the roadblock violated the fourth amendment to the United States Constitution and article I, section 14 of the Utah Constitution. Rather, the State invites us to decide this case solely on the basis of the attenuation issue. That is, we are to "assum[e] arguendo that the stop was illegal," and remand this case for fact finding on whether Sims' consent to search his vehicle was obtained through exploitation of the stop.

[1] We believe it inappropriate in this case, however, to simply assume that the roadblock was unconstitutional, without analysis. Sims has steadfastly and thor-

oughly argued the unconstitutionality of the roadblock, on both federal and state grounds, throughout these proceedings.⁴ The transcript of the suppression hearing and the trial court's written findings on the issue provide an ample factual record from which we can assess the constitutionality of this roadblock. The issue, therefore, has been properly preserved and squarely presented on appeal.

We are aware of the rule that we should avoid addressing constitutional issues unless required to do so. *State v. Anderson*, 701 P.2d 1099, 1103 (Utah 1985). This roadblock, however, was not an isolated incident, and our police may continue to use suspicionless roadblocks as a law enforcement tool.⁵ This makes all Utah motorists subject to closer police scrutiny than they might expect or, arguably, be legitimately required to encounter.

[2] The right of citizens to be secure from unreasonable seizures "shall not be violated." U.S. Const. amend. IV; Utah Const. art. I, § 14 (emphasis added). A roadblock or motorist "checkpoint" is a seizure under the fourth amendment, *Michigan Dep't of State Police v. Sitz*, — U.S. —, 110 S.Ct. 2481, 2485, 110 L.Ed.2d 412 (1990); *State v. Talbot*, 792 P.2d 489, 491 (Utah Ct.App.1990); there is no reason to hold otherwise with respect to our state constitution. For the benefit of our citizens, as well as that of police charged with enforcing our laws, it behooves us to decide whether the roadblock that netted Sims was constitutionally permissible. We hold that it was not.

Statutory Authority to Conduct Roadblocks.

[3] A prelude to the constitutional analysis per se is a determination of whether any statutory authority either permits or prohibits roadblocks of the sort conducted here, that is, a suspicionless, investigatory roadblock in which vehicles and drivers are

4. By thoroughly briefing state constitutional concerns in his argument, Sims has answered calls by Utah's appellate courts for a state constitutional analysis of search and seizure issues. See, e.g., *Earl*, 716 P.2d at 805-06; *State v.*

Shamblin, 763 P.2d 425, 426 n. 2 (Utah Ct.App. 1988) (citing cases).

5. See, e.g., *State v. Talbot*, 792 P.2d 489 (Utah Ct.App.1990).

screened for possible violations of law.⁶ We note several statutes of interest, but none apply here.

The Utah Department of Transportation operates ports of entry at which all large vehicles and vehicles transporting livestock are stopped and inspected for, among other things, driver qualifications, registration, tax payments, size and weight, and safety. Utah Code Ann. § 27-12-19 (Supp.1990). Our fish and game laws give the Division of Wildlife authority to conduct roadblocks or game checking stations under Utah Code Ann. § 23-20-19 (1984), which makes it unlawful to fail to stop at such stations. These provisions are obviously inapplicable here.

We also note that the Utah Highway Patrol is charged with the duty of "regulat[ing] traffic on all highways and roads of the state." Utah Code Ann. § 27-10-4(1)(b) (1989). This provision might authorize roadblock-type operations at, for example, accident scenes, or where hazardous road or traffic conditions require extra control. However, because this section in no way implies authority to conduct investigatory operations, it does not apply here.

Utah Code Ann. § 77-7-15 (1990) allows a peace officer to "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."⁷ Similarly, Utah Code Ann. § 41-1-17(c) (1988) requires officers to stop a vehicle for driver's license, registration,

and general inspection "upon reasonable belief that any vehicle is being operated in violation of any provision of this act or of any other law regulating the operation of vehicles...." These codifications of the familiar "reasonable suspicion" standard of *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), were clearly not enacted with roadblock-type stops in mind; rather, they apply to the singling out of particular individuals or vehicles by the police, based on particularized suspicion.

We find nothing in the Utah code that specifically prohibits the roadblock that was conducted here, however. Therefore, we query whether the roadblock was constitutionally prohibited.

Fourth Amendment.

[4] In *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), the United States Supreme Court implied that roadblock stops for the purpose of checking driver's licenses and vehicle registrations might be constitutionally permitted. Holding that a routine stop of an individual vehicle for such purpose, without articulable individualized suspicion of wrongdoing, was impermissible under the fourth amendment, the Court commented that "[t]his holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative." *Id.* at 663, 99 S.Ct. at 1401.

6. Under our characterization of this roadblock, it does not fit into the traditional "three levels" of police stops, that have been described as follows:

(1) an officer may approach a citizen at [any time] 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 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.

State v. Deitman, 739 P.2d 616, 617-18 (Utah 1987) (*per curiam*) (quoting *United States v. Merritt*, 736 F.2d 223, 230 (5th Cir.1984), *cert. denied*, 476 U.S. 1142, 106 S.Ct. 2250, 90 L.Ed.2d 696 (1986)). The level of individualized suspicion, i.e., none, is the same as with a level one stop. However, since drivers were required to stop and had no opportunity to decline to participate, the roadblock stop went well beyond a level one encounter. It did not, however, qualify as a level two or three stop, since no individualized suspicion prompted the stop.

7. This provision has been characterized as a legislatively enacted version of the so-called level two stop. See *State v. Menke*, 787 P.2d 537, 541 (Utah Ct.App.1990); note 6 *supra*.

The *Prouse* dictum fell on receptive ears, and in *Sitz*, the Court considered an investigatory roadblock, a "sobriety checkpoint," operated by the Michigan State Police Department. The checkpoint was operated under guidelines created by a special state advisory committee composed of law enforcement officials and transportation researchers from the University of Michigan. Those guidelines governed checkpoint publicity, site selection, and police procedure at the checkpoint itself. *Sitz*, 110 S.Ct. at 2483-84.

Under the guidelines, all motorists traveling through the checkpoint were stopped and briefly checked for intoxication. Only if the initial examination revealed signs of intoxication would a motorist be directed out of the traffic flow for a driver's license and registration check and further sobriety tests. The *Sitz* checkpoint was maintained for one hour and fifteen minutes. During that time, 126 vehicles were stopped for an average of twenty-five seconds each. The checkpoint yielded two arrests—approximately one and one-half percent of stopped drivers—for driving under the influence. *Id.* at 2484.

Utilizing a balancing test developed in *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976) and *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979), the Supreme Court held that Michigan's sobriety checkpoint passed fourth amendment muster. The brief detention of motorists at the checkpoint was found to be only a "slight" infringement of their fourth amendment interests. *Sitz*, 110 S.Ct. at 2486. Outweighing this infringement were "the magnitude of the drunken driving problem [and] the States' interest in eradicating it," *id.* at 2485, along with the Court's assessment that the one and one-half percent drunk driver arrest rate demonstrated that the checkpoint adequately advanced that interest. *Id.* at 2487-88; see also *Brown*, 443 U.S. at 50-51, 99 S.Ct. at 2640 and cases cited therein (permissibility of non-ar-

rest seizure requires weighing public interest served thereby, degree to which it serves the interest, and severity of interference with individual liberty).

According to the testimony of Sergeant Mangelson and Trooper Howard, the roadblock in the present case was of an "all-purpose" variety. All vehicles except trucks were checked for licenses, registration, equipment problems, driver sobriety, and signs of illicit drugs, without any suspicion of wrongdoing. The trial court, focusing on the last purpose, performed a balancing test as described above. It held that "a history of escalating drug traffic along this stretch of Interstate 15 as a result of other arrests, tends to legitimize the public interest in predetermined checkpoints, systematically pursued by officers to minimize the burden to individual citizens without discretion to engage in random roving stops."⁸ Without passing judgment on the accuracy of the trial court's balancing, we believe that analysis was premature and therefore erroneous.

[5,6] As we read *Sitz*, *Martinez-Fuerte*, and *Brown*, a fourth amendment balancing test applies to warrantless seizures that, if not based upon articulable suspicion of an individual, "must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Brown*, 443 U.S. at 51, 99 S.Ct. at 2640 (emphasis added). Additionally, such a plan should be developed by "politically accountable officials" with a "unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers." *Sitz*, 110 S.Ct. at 2487. Those officials, and not the courts, are responsible for performing the initial balancing between the fourth amendment and the interests served by the plan. *Id.* While the *Sitz* sobriety checkpoint met these requirements, the roadblock used here did not.

No explicit plan, beyond a determination that all vehicles other than large trucks

8. The court's definition of the public interest pursued, i.e., detection of illegal drug trafficking, appears to be contrary to testimony about the generalized purposes of the roadblock.

There was no finding as to the actual efficacy of the roadblock in meeting the public purposes described by the officers or the more specific purposes identified by the court.

were to be stopped, governed this roadblock.⁹ Nor does it appear that Sergeant Mangelson or the lieutenant who gave him permission to conduct the roadblock are politically accountable officials as contemplated in *Sitz*.¹⁰ The process by which the roadblock was authorized also lacked features of political accountability that were arguably present in *Sitz*: the *Sitz* roadblock was authorized pursuant to careful advance study that included non-police public officials, while authority for this roadblock arose solely within a police agency. Finally, there is no indication that the authorization process here involved any balancing of fourth amendment interests and law enforcement interests, or an assessment of the effectiveness of the roadblock in meeting those interests. Instead, the lack of any written guidelines arising from the authorization process strongly suggests that no such analysis took place.

The requirement of explicit guidelines, developed in a politically accountable manner that includes balancing of the relevant concerns, is, under *Sitz*, a prerequisite to any judicial balancing analysis of a suspicionless roadblock.¹¹ After-the-fact judicial balancing of the interests implicated by

such a roadblock cannot make it constitutionally proper. Therefore, we hold that the roadblock in which Sims was detained violated the fourth amendment to the United States Constitution.¹²

Utah Constitution Article I, Section 14.

The *Sitz* emphasis on roadblock guidelines stresses the principle that when police operations interfere with fourth amendment interests, "the discretion of the official in the field [must] be circumscribed, at least to some extent." *Delaware v. Prouse*, 440 U.S. 648, 661, 99 S.Ct. 1391, 1400, 59 L.Ed.2d 660 (1979) (citations omitted). *Sitz* implicitly places both guideline development and the decision to utilize suspicionless roadblocks in the first place in the hands of "politically accountable" officials. We view roadblock authorization and guideline development as separate steps, however. The initial decision to permit suspicionless roadblocks is especially critical, and requires a higher degree of political accountability than the guideline development step. Sims argues that the lack of statutory authority renders suspicionless roadblocks improper under the

9. While we understand that allowing large trucks to bypass the roadblock may be necessary for safety's sake, we wonder about the implications of this procedure for effective drug interdiction. The procedure seems to invite drug traffickers to transport their contraband in large trucks, and possibly relatively massive quantities, to avoid detection.

10. Compare *United States v. Corral*, 823 F.2d 1389 (10th Cir.1987), upholding the constitutionality of a roadblock for the purpose of checking driver's licenses, vehicle registration, and insurance, pursuant only to the permission of a state police supervisor. *Corral* does not cite *Brown's* requirement, adopted in *Sitz*, of a plan explicitly limiting officer discretion. In view of the reiteration of that requirement we find in *Sitz*, we do not accept *Corral's* implication that supervisory permission to conduct a roadblock constitutes an adequate "plan."

Corral was cited in *United States v. McFayden*, 865 F.2d 1306 (D.C.Cir.1989), which, in turn, was relied on by the trial court in holding the roadblock in this case constitutional. *McFayden* involved "traffic control" roadblocks set up to deal with traffic congestion associated with street level drug trafficking. The *McFayden* roadblocks were found to pass the reasonableness balancing test of *Brown*. Those road-

blocks, again in contrast to the present situation, were carried out pursuant to a coordinated plan developed by five District of Columbia police districts.

11. A similar conclusion might well be reached by viewing the roadblock as an "administrative search." Supreme Court cases dealing with such searches have focused on the balance between the need for such searches and the fourth amendment values implicated by such searches. However, the cases also involved situations where the challenged search was, at least arguably, authorized by statute or ordinance. See *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970) (federal statute); *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967) (city housing code); *See v. City of Seattle*, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967) (city building code).

12. Our uncritical treatment of *Sitz* and other federal cases should not be taken as approval of the analysis employed, or result reached, in these cases. We merely accede to the preeminent position of the United States Supreme Court in construing the United States Constitution.

Utah Constitution. As regards the initial authority to permit such roadblocks, we agree.

Article I, section 14 of the Utah Constitution is virtually identical to the fourth amendment. Like its federal counterpart, it consists of a "reasonableness" clause and a "warrant" clause:

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.

In *State v. Larocco*, 794 P.2d 460 (Utah 1990), the Utah Supreme Court, decrying the United States Supreme Court's "vacillation between the warrant approach and the reasonableness approach" regarding automobile searches, *id.* at 469, reaffirmed its commitment to the warrant approach under our constitution, stating that "[w]arrantless searches and seizures are per se unreasonable unless exigent circumstances require action before a warrant can be obtained." *Id.* at 470 (quoting *State v. Christensen*, 676 P.2d 408, 411 (Utah 1984)).

In *Larocco*, a car theft suspect's expectation of privacy in the interior of the subject car, parked unattended and unlocked on a public street, triggered the application of article I, section 14. 794 P.2d at 468-69. Police officers' warrantless opening of the car's door to view the vehicle identification number on the doorjamb was found to constitute a search subject to the fourth amendment's warrant requirement. The search was then held improper under article I, section 14, because there was no threat that the car would disappear before

a warrant could be obtained to look inside it. The court held that such "exigent circumstances" to support a warrantless search did not exist where the car was not en route away from the officers' jurisdiction and the suspect had not been alerted to police interest in it. *Id.* at 470-71.

Under article I, section 14 our supreme court applies a "warrants whenever possible" policy to motor vehicle searches and seizures. *Id.* This policy is consistent with one fundamental purpose of constitutional search and seizure limits: the interposition of neutral authority between police seeking evidence of crimes and the citizens from whom such evidence is sought.¹³

In the usual non-exigent circumstances search and seizure scenario, the judicial branch, through a magistrate, serves as the neutral authority that issues or denies a warrant to perform a search or seizure. The warrant is issued only when probable cause exists. U.S. Const. amend. IV; Utah Const. art. I, § 14. Our state legislature, however, has also served as a neutral authority between our police and our citizens, in authorizing certain seizures upon less than probable cause.

As already noted, our legislature has followed the courts' lead in authorizing brief warrantless stops of individuals and motor vehicles based on reasonable suspicion.¹⁴ Also as noted, the legislature has acted independently in authorizing ports of entry, as well as fish and game checkpoints. These operations, supported by neither warrants nor any level of individualized suspicion, clearly implicate article I, section 14 of our constitution.

From an operational standpoint, ports of entry and fish and game checkpoints closely resemble the roadblock that was con-

verdict for Utah roadblocks is, therefore, unknown.

13. Our analysis under the Utah Constitution is limited to the need for legislative authorization. We note, however, that Justice Durham's opinion in *Larocco*, requires both probable cause and exigent circumstances to justify a warrantless search and seizure under article I, section 14, which would seem to prohibit this roadblock and others. However, *Larocco* was a divided decision, with Justice Zimmerman concurring, Justice Stewart concurring in result only, and Justices Hall and Howe dissenting. The final

14. Arguably, legislative enactment of Utah Code Ann. §§ 77-7-15 (1990) and 41-1-17(c) (1988) may reflect a determination by our legislature to not simply ratify judicial expansion of police power by silent acquiescence, but to determine through the political process whether such expansion is to become a part of Utah's law.

ducted in this case, in that all large trucks, or all vehicles used by hunters, respectively, are submitted to official inspections. However, in authorizing these operations, our legislature has, presumably, weighed the need for such suspicionless inspections against their intrusion upon individual liberty,¹⁵ a process analogous to that performed by a magistrate in the issuance of a warrant. A high degree of political accountability for the institution of these practices can also be presumed, in that representatives of truckers, hunters, law enforcement, and the citizenry at large all very likely played a part in passing the relevant statutes.

In each case of legislation authorizing specific types of checkpoints or stops of persons or vehicles, with or without individualized suspicion of wrongdoing, the citizens of this state have acted through their elected representatives. Therefore, the collective will of the people is expressed and, furthermore, the people have notice of duly authorized police activity.

In stark contrast, the roadblock conducted in this case was authorized solely by police officers, the very people whose behavior article I, section 14 is intended to limit. No non-law enforcement officials took part in the decision to set up the roadblock. Leaving the initial decision to conduct such operations in police hands creates a scheme that is both unrealistic and constitutionally untenable.

[7] We believe that legislative authorization of ports of entry and fish and game checkpoints, like the issuance of a judicial warrant, triggers at least some presumption that these law enforcement practices are constitutionally permissible. Because the roadblock in this case had neither form

of authorization, it was entitled to no such presumption. Both warrants and statutes originate outside the executive branch, serving to check abuses of that branch's law enforcement power. Consistent with our supreme court's emphasis on the warrant requirement, then, we hold that suspicionless, investigatory motor vehicle roadblocks, conducted without legislative authorization, are per se unconstitutional under article I, section 14 of the Utah Constitution.

In requiring legislative authority as a prerequisite to the use of suspicionless investigatory roadblocks, we join two other western states that have similarly construed their constitutions. *See, e.g., State v. Henderson*, 114 Idaho 293, 756 P.2d 1057 (1988); *Nelson v. Lane County*, 304 Or. 97, 743 P.2d 692 (1987).¹⁶ At least one other state has established the same standard under the fourth amendment. *State v. Smith*, 674 P.2d 562 (Okla.App.1984). This approach is particularly appropriate where a proposed police practice will, as here, affect everyone traveling our state's highways. Because of its close ties to the citizens whose rights will be affected, the minimum necessary political accountability for such practices lies, at the outset, with our legislature.

Our holding that article I, section 14 prohibits suspicionless investigative roadblocks without legislative authority, in effect, requires the legislature to perform the *Sitz*-type balancing function if and when it decides to consider the authorization of such roadblocks. Judicial balancing of the interests implicated by such roadblocks, then, will need to occur only if and when the legislature, upon performing such balancing itself, decides to authorize them.¹⁷

15. Indeed, in the case of port of entry stops, the legislature appears to have weighed liberty concerns with some care. Vehicles normally subject to these stops are exempted from stopping if doing so would increase their one-way trip distance by more than three miles or five percent. Utah Code Ann. § 27-12-19.4(1) and (3) (Supp. 1990).

16. In *Pimental v. Dep't of Transp.*, 561 A.2d 1348 (R.I.1989), and *Commonwealth v. Tarbert*, 348 Pa.Super. 306, 502 A.2d 221 (1985), the Rhode

Island Supreme Court and the Superior Court of Pennsylvania held sobriety checkpoints unconstitutional under their state constitutions without considering whether such practices could be valid if statutorily authorized.

17. We note that the factors to be considered in performing such balancing are myriad, complex, and subject to debate. *See, e.g., Sitz* and dissenting opinions of Brennan and Stevens, JJ.; *Nelson v. Lane County*, 743 P.2d at 710-11 (appendix); *see also Davis & Wallentine, A Model*

We, unlike our colleague in his concurring opinion, prefer that the legislature announce its view of public policy and the philosophy of Utah's citizenry as regards roadblocks, prior to the court applying constitutional analysis to the legislature's product.¹⁸

We also emphasize that our holding on the state constitutionality of the roadblock in which Sims was stopped is limited in its application to similar, non-emergency situations. It is not intended to apply to emergency roadblocks that might, for example, be used to apprehend a fleeing felon. Nor do we intend to impede any existing authority to conduct roadblocks for traffic control purposes. Any constitutional challenge to these types of traffic stops awaits another day. It is the suspicionless, investigative, non-emergency roadblock, conducted in the absence of legislative authority, that we hold to be unconstitutional.

ATTENUATION OF CONSENT FROM ILLEGAL ROADBLOCK

Sims argues that there was insufficient attenuation between his detention and the consent he gave to search his vehicle to purge the taint of the illegality of the detention. He does not claim that his consent was coerced from him and was therefore involuntary. Rather, he argues that because there were no intervening circumstances between the detention and the consent, the consent was the fruit of the illegal detention, and, therefore, evidence seized pursuant to his consent should have been ordered suppressed. Sims did not make this argument in the trial court.

[8,9] Normally, "where a defendant fails to assert a particular ground for suppressing unlawfully obtained evidence in the trial court, an appellate court will not

consider that ground on appeal." *State v. Carter*, 707 P.2d 656, 660 (Utah 1985); see also *State v. Webb*, 790 P.2d 65, 71 n. 2 (Utah Ct.App.1990); Utah R.Crim.P. 12. Unless a ground for suppression is "unknown or unavailable" to a defendant at the time a suppression motion is filed, the right to challenge the admission of evidence on that ground is waived. *State v. Lee*, 633 P.2d 48, 53 (Utah 1981). Here, however, because our then-standing decisions effectively held that a non-coerced search consent, by itself, purged the taint of a primary illegality, Sims' non-attenuation argument was unavailable to him in the trial court and would have been pointless to assert. See *State v. Sierra*, 754 P.2d 972, 980 (Utah Ct.App.1988). Therefore, it is proper to address that argument now.

In *State v. Arroyo*, 796 P.2d 684 (Utah 1990), the Utah Supreme Court, reversing this court's holding in *State v. Arroyo*, 770 P.2d 153, 155-56 (Utah Ct.App.1989), held that, to be constitutionally valid, a search consent following illegal police behavior must be both non-coerced and not arrived at by exploitation of the primary police illegality. Factors used to evaluate the non-exploitation or attenuation element are derived from *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), which involved a confession obtained from a criminal suspect after his illegal arrest. They include the temporal proximity of the primary illegality and the granting of consent, the presence or absence of intervening circumstances, and the purpose and flagrancy of the illegal police conduct. *Arroyo*, 796 P.2d at 690-91 n. 4 (citing *Brown*, 422 U.S. at 603-04, 95 S.Ct. at 2261-62, and 3 W. LaFave, *Search and Seizure* § 8.2(d), at 193-94 (2d ed. 1987)).

for Analyzing the Constitutionality of Sobriety Roadblock Stops in Utah, 3 B.Y.U.J.Pub.L. 357 (1989). Political and economic considerations that are the particular province of the legislature may also come into play: Utah's economy benefits greatly from tourism, and the state is also currently attempting to attract the Winter Olympic Games. Our legislators may well wish to consider the possible impact of suspicionless roadblocks upon visitors to our state.

18. It may be that lifestyle in the western states promotes a greater expectation of privacy in our automobiles than in other states or in the United States Supreme Court's enunciation of the "automobile exception" under the fourth amendment. See *California v. Carney*, 471 U.S. 386, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985).

[10] The *Arroyo* case was remanded to the trial court for fact finding on the issue of whether the defendant's consent to search his vehicle was attenuated from or an exploitation of his illegal stop. Because the burden is on the State to show that evidence obtained following illegal police conduct is attenuated from the illegality, *Brown*, 422 U.S. at 604, 95 S.Ct. at 2262, and because the attenuation issue was not presented to the trial court, a remand to examine the attenuation factors has been suggested here. We find, however, that the record now before us contains "sufficient detail and depth" to allow us to determine the issue as a matter of law. See *id.*

Regarding the temporal proximity factor, the record demonstrates a very short time span between Sims' stop in the roadblock and Trooper Howard's request to search his automobile. The trooper had but a brief conversation with Sims, regarding his license and registration, his trip itinerary, and possession of alcohol, guns, or contraband, before asking for consent to search his car. The consent was obtained within minutes of the illegal stop, and not even under our clear error standard of review could the trial court find enough time between the stop and the grant of consent to attenuate the relationship between the two.¹⁹

Nor does the record reveal any possibility of intervening circumstances between the illegal stop and Sims' grant of consent to the search. Such circumstances must be independent of the primary illegality. *Arroyo*, 796 P.2d at 690-91. Here, Trooper Howard's request for consent to search Sims' sedan was based upon the smell of alcohol, the sight of the open liquor bottle in the sedan, and Sims' admission, uneventful since the bottle was in obvious view, that he was carrying alcohol. Howard's opportunity to make these observa-

tions and to question Sims, however, depended entirely on the illegal roadblock. Neither Sims' driving nor the external appearance of his vehicle justified stopping him. Nothing occurred which could have reasonably made him feel free to proceed on his journey at any time between the moment of his stop and the discoveries that prompted the trooper's request for consent to search his vehicle.²⁰ Sims did not spontaneously volunteer his consent, but gave it only when asked. Sims' consent, then, arose from an unbroken chain of events that began with the illegal roadblock.

The final factor in the attenuation analysis is an examination of the purpose and flagrancy of the primary police illegality. Here, this factor, unlike the first two, appears unrelated to the question of whether a search consent flowed from, i.e., was an exploitation of, the illegal police conduct.²¹ Instead, it appears to be an alternative approach, inviting us to overlook unconstitutional police conduct that serves good purposes and is not too flagrant.

Troopers Howard and Mangelson testified at some length about their expertise in drug interdiction, and the trial court treated the roadblock as if that was its primary purpose. However noble this purpose might be, it was pursued by an unauthorized means. The troopers each had years of law enforcement experience, and can properly be charged with awareness that their action was not authorized by law. "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead v. United States*, 277 U.S. 438, 479, 48 S.Ct. 564, 573, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting). Using ten to twelve law officers to staff the roadblock may have also left distant parts of the largely rural jurisdiction with delayed police assistance in the event of need. Thus,

was, in fact, not free to leave, but was subject to citation and to field sobriety testing.

19. We note that in *Brown*, an interval of less than two hours between an illegal arrest and the obtaining of an incriminating statement from the arrestee was viewed as insufficient to attenuate the statement from the arrest. 422 U.S. at 604, 95 S.Ct. at 2262.

20. Additionally, Trooper Howard testified that, once the open container was discovered, Sims

21. By contrast, in *Brown v. Illinois*, the Supreme Court seems to have regarded an illegal arrest, that appeared "calculated to cause surprise, fright, and confusion," 422 U.S. at 605, 95 S.Ct. at 2262, as a causative factor producing the arrestee's subsequent incriminating statements.

although it does not appear that the officers behaved abusively toward those stopped at the roadblock, this does not correct the constitutional violation.

In sum, the record demonstrates that Sims' consent to search his vehicle was arrived at by exploitation of the illegal roadblock. Accordingly, that consent was invalid. Because the exclusionary rule applies to violations of both the fourth amendment and article I, section 14 of the Utah Constitution, *State v. Larocco*, 794 P.2d 460, 471-73 (Utah 1990), all evidence obtained under that consent must be suppressed.

PROBABLE CAUSE TO CONTINUE SEARCH

Troopers Howard and Mangelson believed that the discovery of marijuana in Sims' sedan under the consent search gave them probable cause to continue searching after consent was withdrawn. However, because the initial consent was invalid, any probable cause found while searching under that consent was also invalid. Absent probable cause to search the sedan without Sims' consent, we need not reach the issue of whether exigent circumstances existed to make the warrant requirement inapplicable.

CONCLUSION

Sims' conviction for possession of a controlled substance with intent to distribute is reversed, and the case is remanded to the trial court for proceedings in accord with this opinion.

JACKSON, J., concurs.

ORME, Judge (concurring specially):

While I otherwise concur fully in the court's opinion, I have two difficulties with the discussion treating the roadblock under article I, section 14, of the Utah Constitution. First, if the roadblock cannot even be validated under the questionable "balancing" approach of *Michigan v. Sitz*, — U.S. —, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990), *see, e.g., id.* at 2490-99 (Stevens, J., dissenting), we have no need to examine

whether it might be additionally invalid under the state constitution. Second, and more importantly, I am not enthusiastic about suggesting that the legislature, any more than the courts or the police, should be about the business of balancing away important constitutional protections that safeguard all of us so that law enforcement can more readily catch an occasional law-breaker. The citizen's right to be free from police intrusion in the total absence of even the least suspicion of wrong-doing should simply not be at the mercy of the legislature's determination of how tourism or our hopes for the Olympics might somehow be adversely impacted by one law enforcement technique or another.

If it were necessary to reach the state constitutional issue in this case, i.e., if the roadblock passed muster under the federal constitution, I would be more inclined to solidify long-standing constitutional precepts as at the core of article I, section 14, than to borrow the troublesome "balancing" approach embraced in *Sitz*, adopt some variation of that approach, and begin a journey down that nebulous path. *Cf. State v. Larocco*, 794 P.2d 460, 469 (Utah 1990) (state constitutional analysis employed "to simplify . . . the search and seizure rules so that they can be more easily followed by the police and the courts and, at the same time, provide the public with consistent and predictable protection against unreasonable searches and seizures"). I would probably prefer to hold that the rule of *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), uniformly applied by Utah courts, is a matter of Utah constitutional law that simply may not be balanced away by any branch of our government and that is not amenable to a roadblock exception.

Under established Utah decisional law, in the absence of *any* individualized suspicion, only a level one stop is permitted. *E.g., State v. Jackson*, 805 P.2d 765, 766 (Utah Ct.App.1990); *State v. Menke*, 787 P.2d 537, 570 (Utah Ct.App.1990); *State v. Trujillo*, 739 P.2d 85, 87-88 (Utah Ct.App. 1987). A level one stop is a purely voluntary encounter. *Id.* And one does not lose

the right to decline to participate in a level one encounter simply because one chooses to drive rather than to walk. See *State v. Smith*, 781 P.2d 879, 881 (Utah Ct.App. 1989); *State v. Johnson*, 771 P.2d 326, 328 (Utah Ct.App.1989), *rev'd on other grounds*, 805 P.2d 761 (Utah 1991). See also, *Delaware v. Prowse*, 440 U.S. 648, 663, 99 S.Ct. 1391, 1401, 59 L.Ed.2d 660 (1979) (persons do not lose the protections of fourth amendment "when they step from the sidewalk into their automobiles"); *State v. Talbot*, 792 P.2d 489, 491, 494 (Utah Ct.App.1990).

If, as seems clear, the police cannot *require* every pedestrian on a stretch of sidewalk to stop and answer police inquiries, I am hard-pressed to see how they can stop every car on a stretch of the interstate highway and require the driver to answer inquiries. In my view, the only roadblock that is sure to pass state constitutional muster is one which would qualify as a level-one stop. Cf. *Little v. State*, 300 Md. 485, 479 A.2d 903, 906 (1989) (roadblock upheld where motorists avoiding roadblock or otherwise refusing to cooperate not detained). I see no constitutional problem with a roadside police checkpoint announced by a sign on the freeway, "Police Roadblock Next Exit. Your Cooperation in Answering Police Inquiries Appreciated." Most drivers would stop, even though they could not be required to, just as most pedestrians will stop and respond to police inquiries on the sidewalk. But on neither medium of travel can one suspected of nothing illegal whatsoever be compelled to do so.



Burt A. GOTTFREDSON, Petitioner,

v.

UTAH STATE RETIREMENT
BOARD, Respondent.

No. 900255-CA.

Court of Appeals of Utah.

March 20, 1991.

Worker's petition to withdraw his retirement application was denied by the State Retirement Board, and worker appealed. The Court of Appeals, Garff, J., held that: (1) worker's request to cancel his application was untimely, and (2) Board had no affirmative duty to inform worker of proposed legislation which, if passed, could substantially affect his benefits.

Affirmed.

1. Administrative Law and Procedure ⌘800

Standard of review on appeal from final agency action dealing with statutory interpretation presents issue of law, and Court of Appeals therefore applies correction-of-error standard, in which it extends no deference to agency's conclusions.

2. States ⌘64.1(3)

Where worker established on his retirement application his retirement date, which date also determined when his benefits would start to accrue, no alteration, addition, or cancellation of his benefits could be made after that date; thus, because his request to cancel his application was not made until after that date, his request was properly refused. U.C.A.1953, 49-1-603(1).

3. States ⌘64.1(3)

Retirement Board had no affirmative duty to inform worker, who had filed his retirement application, of proposed legislation which, if passed, could substantially affect his benefits. U.C.A.1953, 49-1-603(1).