1992

Utah v. Wayne Derron Potter : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Appellant,	:	Case No. 920614-CA
v.	:	Priority No. 15
WAYNE DERRON POTTER,	:	
Defendant-Appellee.	:	

OPENING BRIEF OF APPELLANT

PLAINTIFF'S APPEAL FROM AN ORDER OF DISMISSAL, FOLLOWING AN ORDER SUPPRESSING EVIDENCE IN A PROSECUTION FOR CARRYING A CONCEALED DANGEROUS WEAPON, A CLASS A MISDEMEANOR IN VIOLATION OF UTAH CODE ANN. § 76-10-504(1)(b) (1990), UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE (MARIJUANA), A THIRD DEGREE FELONY IN VIOLATION OF UTAH CODE ANN. § 58-37-8(2)(b)(iii) & -(2)(d) (1990), AND UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE (COCAINE), A SECOND DEGREE FELONY IN VIOLATION OF UTAH CODE ANN. § 58-37-8(2)(b)(ii) & -(2)(d) (1990). THE ORDERS WERE ENTERED BY THE SEVENTH DISTRICT COURT, IN AND FOR EMERY COUNTY, UTAH, THE HONORABLE BOYD BUNNELL, PRESIDING.

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JURISDICTION AND NATURE OF PROCEEDINGS

Plaintiff State of Utah appeals a trial court's final order of dismissal in a prosecution for carrying a concealed dangerous weapon, a class A misdemeanor in violation of Utah Code Ann. § 76-10-504(1)(b) (1990), unlawful possession of a controlled substance (marijuana), a third degree felony in violation of Utah Code Ann. § 58-37-8(2)(b)(iii) and -(2)(d) (1990), and unlawful possession of a controlled substance (cocaine), a second degree felony in violation of Utah Code Ann. § 58-37-8(2)(b)(ii) and -(2)(d) (1990). The dismissal order was entered upon defendant's motion, following the trial court's grant of his motion to suppress evidence supporting the charges.

The proceedings were held in the Seventh Judicial District Court, in and for Emery County, Utah, the Honorable Boyd Bunnell, presiding. This State's appeal is taken pursuant to Utah Code Ann. § 77-18a-1(2)(a) (Supp. 1992); this Court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1992).

ISSUE PRESENTED ON APPEAL AND STANDARD OF APPELLATE REVIEW

A single issue is presented: **Did the trial court erroneously conclude that defendant's detention by a police officer was not supported by reasonable suspicion, and was therefore constitutionally invalid at its inception?** Trial court rulings on reasonable suspicion to make an "investigative detention" are not reversed on appeal unless they are clearly erroneous. State v. Mendoza, 748 P.2d 181, 183 (Utah 1987); State v. Sykes, 198 Utah Adv. Rep. 35, 36 (main opinion), 43 (Jackson, J., concurring) (Utah App. Oct. 19, 1992). Accord State v. Rochell, No. 920309-CA, slip op. at 7-10 (Bench, J., concurring) (Utah App. April 1, 1993).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The fourth amendment to the United States Constitution states:

> 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.

Utah Code Ann. § 77-7-15 (1990), provides:

> A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions.

Any other constitutional provisions, statutes, or rules pertinent to the resolution of the issue on appeal are set forth as necessary in the body of this brief.

STATEMENT OF THE CASE

Defendant Wayne D. Potter was charged with unlawful possession of a concealed weapon, and with two counts of unlawful possession of a controlled substance. The physical evidence supporting those charges consists of a pistol, and quantities of marijuana and cocaine that were seized upon defendant's detention by a police officer.

Defendant moved to suppress the seized evidence. At a hearing on the motion, the detaining officer testified. Additionally, at the parties' stipulation, the trial court considered testimony taken in a companion case, State v. Devon Boyd Potter, involving the entry and search of the trailer home occupied by defendant's brother, at about the same time that defendant was stopped (R. 99). The entry and search of Devon Potter's home are the subject of another appeal now pending in this Court, No. 920579-CA.

After the hearing, the trial court granted defendant's motion in a written "Ruling on Motion to Suppress" (R. 78). Upon the State's motion to reconsider that ruling, the court reaffirmed itself in a written "Ruling on Motion to Reconsider" (R. 96). The court then issued written Findings of Fact and Conclusions of Law, and an Order on Motion to Suppress (R. 99-106). Subsequently, on defendant's motion, the prosecution was

dismissed and the State filed a notice of appeal from the dismissal (R. 107-114; all rulings are copied in the Appendix to this brief).

STATEMENT OF FACTS

The State's fact recitation tracks the trial court's findings of fact, (R. 99-102), as supported by testimony taken during the hearing of defendant's motion to suppress (R. 212-65). This fact recitation is also supplemented by testimony in the hearing of Devon Potter's motion to suppress (R. 123-211).[1]

Seizure of the Evidence

Defendant Wayne Potter's problems began late one evening, when an officer stopped Mr. Leon Sandstrom for driving under the influence, near Devon Potter's home. Quite spontaneously (and hoping for favorable treatment in his pending D.U.I. prosecution), the intoxicated Sandstrom pointed to Devon's home, which he had recently left, and blurted out that several men were smoking marijuana inside it (R. 100, 127-32).

A narcotics detective was therefore summoned (R. 133-34). To the detective, Sandstrom claimed that the occupants of Devon's home were rolling marijuana "joints" from "a bag of marijuana three fingers deep." Based upon the information from Sandstrom, plus other information from an already-pending investigation, the detective and the local county attorney began a search warrant application for Devon Potter's home (R. 169-70).

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[1]As in the trial court, the parties have stipulated to the supplementation of the appellate record with the Devon Potter hearing transcript (R. 120).

The detective told several officers to watch Devon's home pending issuance of the search warrant (R. 166-67). During this surveillance, officers saw persons within the home peering out through its window and door several times, apparently alerted by Sandstrom's nearby arrest (R. 136, 189-90). One officer saw a white Nissan drive to Devon's home. A person exited the Nissan, walked to the home, remained only briefly ("about two or three minutes"), and then drove away (R. 100, 141, 148, 218, 230).

The officers radioed their observations to the narcotics detective, who directed them to enter Devon Potter's home, and to secure it pending arrival of the search warrant.[2] He also directed them to detain and secure the departing white Nissan (R. 155-56). This latter task was assigned to an [illegible]sting highway patrolman, Trooper Horrocks (R. 101, 156).

Upon stopping the Nissan, Horrocks immediately recognized the driver, defendant Wayne Potter. Horrocks had known defendant for several years, and knew that he had been previously arrested for illegal drug possession (R. 219-20). Horrocks believed defendant to be dangerous, based upon "common knowledge among the law enforcement community" that defendant carried a hidden weapon. Trooper Horrocks also knew one of defendant's three passengers, a Jimmy Lee, as someone he had arrested twice before. Horrocks knew that Lee "has a short temper and he's very--he was very easy to aggravate into a

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[2]The propriety of this home entry is at issue in the State's appeal in the Devon Potter case. State v. Devon Boyd Potter, No. 920579-CA, Br. of Appellant at 10-14.

confrontation." Horrocks had previously had a physical confrontation with Lee (R. 101, 222-23).

Concerned for his safety, Trooper Horrocks asked defendant and his passengers whether they had any weapons. He then directed them to exit the Nissan and to empty their pockets on its trunk. Horrocks explained that he used this approach, rather than individual frisks, in order to better observe all the detainees at once: "To frisk them individually, you have to concentrate on the individual which you're frisking, and you lose contact or observation of the other individuals there." . . . "If you can't see them, you can't protect yourself against movement that they do, or an attack" (R. 101, 223-25).

Defendant did not fully comply with Horrocks's directions. After partially complying, defendant behaved evasively; according to Horrocks, he "wouldn't make eye contact with me, and he tried to avoid standing next to me, and he tried to hide behind Jimmy [Lee]." Horrocks then told defendant that "I didn't want him messing around with me, if he had something in his pockets, I wanted it out on the car." In response, defendant removed a pistol from his rear pocket, and placed it on the Nissan's trunk (R. 101, 225).

Horrocks arrested defendant for unlawful possession of a concealed weapon. Positioning defendant between himself and the Nissan's passengers, Horrocks then searched defendant incident to the arrest (R. 102, 228-29, 232-33). From defendant's pocket, Horrocks retrieved "[a] small plastic bag

containing a green leafy material that appeared to be marijuana . . .." He also retrieved a small Tupperware-type container, placed by defendant on the Nissan's trunk, that held a white powder residue (R. 102, 226-27). The pistol, leafy material, and white powder (apparently cocaine) comprised the physical evidence supporting the charges against defendant (R. 3-4).

Trial Court Disposition

The trial court determined that "[i]f there was reasonable cause to believe that illegal activity was going on inside [Devon Potter's home], there was [sic] no articulable facts connecting the Defendant with such activity other than his brief appearance on the premises" (R. 102). Therefore, the court ruled that defendant's initial detention was unconstitutional because "nothing" supported "reasonable suspicion of illegal conduct upon the part of the Defendant" (id.). The court also stated that "[t]here was a seizure of Defendant when he was detained by Officer Horrocks in that Defendant was technically under arrest since he was not free to leave" (R. 103).

The court held that "Officer Horrocks had good cause to search the Defendant after the Defendant was stopped" (R. 103). However, based upon its ruling that the detention was invalid at its inception, the court ordered suppression of the evidence seized from defendant (R. 103). The State challenges the ruling, underpinning the trial court's ultimate order of dismissal, that the detention of defendant by Trooper Horrocks was invalid at its inception.

SUMMARY OF ARGUMENT

The trial court's ruling that the initial detention was unsupported by reasonable suspicion was clearly erroneous, because it was induced by an erroneous view of the law. The court erroneously overstated the degree of proof necessary to show "reasonable suspicion" for a nonarrest detention. That error, apparent on the face of the trial court's ruling, equated reasonable suspicion with the higher degree of proof required for probable cause.

This Court should reaffirm that the degree of proof needed for reasonable suspicion is less than that for probable cause. It can then remand this case to the trial court for re-analysis under the correct, "minimal objective justification" standard. Alternatively, this Court may examine the established facts independently, and hold that based upon those facts, defendant's initial detention by Trooper Horrocks was proper.

ARGUMENT

BECAUSE THE TRIAL COURT INCORRECTLY EQUATED REASONABLE SUSPICION WITH PROBABLE CAUSE, ITS "NO REASONABLE SUSPICION" RULING WAS CLEARLY ERRONEOUS.

A trial court's ruling on the existence of reasonable suspicion to make an investigatory detention is reversed on appeal only if it is clearly erroneous. State v. Mendoza, 748 P.2d 181, 183 (Utah 1987); State v. Sykes, 198 Utah Adv. Rep. 35, 36 (main opinion), 43 (Jackson, J., concurring) (Utah App. Oct. 19, 1992). A ruling is clearly erroneous if it is "without adequate evidentiary support or induced by an erroneous view of

the law." State v. Walker, 743 P.2d 191, 193 (Utah 1987) (quoting Wright & Miller, Federal Practice and Procedure § 2585 (1971), with respect to factual findings). The trial court's "no reasonable suspicion" ruling in this case was induced by an erroneous view of the law--a view that overstated the degree of proof needed for reasonable suspicion.

A. The Degree of Proof Needed for Reasonable Suspicion is Less than that Needed for Probable Cause.

The trial court's ruling that "[d]efendant was technically under arrest since he was not free to leave" when stopped (emphasis added) reveals a fundamental misperception of the nature of defendant's initial detention by Trooper Horrocks. This misperception appears on the face of both the trial court's final conclusions of law and its earlier ruling denying the State's motion to reconsider. In that ruling, the court stated: "No matter how you consider the facts in this case, they do not establish reasonable cause to believe that the Defendant was committing any crime or had committed a public offense at this time and place that would justify his apprehension and detention" (R. 97, emphasis added).

While defendant was not free to leave at the moment when Horrocks stopped him, he was not "under arrest" either. Instead, as found by the trial court, and established by uncontested testimony, defendant was stopped in order to "secure" him and his vehicle, pending issuance of a warrant to search his brother's home (R. 101, 155-56, 219). Therefore, defendant's

encounter with Trooper Horrocks began as a temporary detention, not an arrest or "apprehension."[3]

By mischaracterizing the initial detention as an arrest, the trial court directed itself to the wrong provision of the Utah Code, governing warrantless arrests, rather than temporary detentions. The arrest provision, Utah Code Ann. § 77-7-2 (1990), requires probable or "reasonable cause"--the same term used by the trial court--for full custodial arrests. The trial court should have analyzed the detention under the less-strict "reasonable suspicion" standard of Utah Code Ann. § 77-7-15 (1990), which codifies the "investigatory detention" principle of Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968).

The trial court so erred even though the prosecutor, during argument of the motion to suppress, directed it to State v. Bruce, 779 P.2d 646 (Utah 1989) (R. 234). In Bruce, the Utah Supreme Court considered facts similar to this case: A robbery witness saw the robber disappear, on foot, into a housing complex. Moments later, the witness saw an orange car exit the complex, but could not see its occupants. Police were notified, and broadcast a description of the orange car; an officer who overheard the broadcast saw the car, and stopped it. Bruce, a passenger in the car, was then identified as the robber and arrested. 779 P.2d at 648. On appeal, the supreme court readily

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[3]See State v. Beckendorf, 79 Utah 360, 365-66, 10 P.2d 1073, 1075-76 (1932) (absent "actual restraint" and officer intent to take person into custody, there is no arrest; construing statutes now found at Utah Code Ann. § 77-7-1 (1990)).

upheld the initial stop, even though the police broadcast had added unverified information that the orange car was occupied by two black males. Even absent the information about the black males, the court held, the stop was supported by reasonable suspicion, and was therefore proper. Id. at 650-51.

Significantly, the defendant in Bruce had argued that his initial detention was unsupported by probable cause. 779 P.2d at 650. The supreme court, however, relying upon Terry and its own post-Terry caselaw--and, by implication, section 77-7-15, upheld the stop on the less strict, reasonable suspicion standard: "We have held that a brief investigatory stop of an individual by police officers is permissible when the officers have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." Bruce, 779 P.2d at 650 (quoting authorities; internal quotations omitted).[4]

Shortly before Bruce was issued, the United States Supreme Court reiterated that the degree of proof for reasonable suspicion is less than that required for probable cause:

> The officer, of course, must be able to articulate something more than an inchoate and unparticularized suspicion or "hunch." The Fourth Amendment requires "some minimal

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[4]In its original ruling granting the motion to suppress, the trial court cited Bruce, correctly stating that in a reasonable suspicion-based detention, an officer "can only stop the vehicle [or subject] briefly while attempting to obtain further information regarding those suspicions" (R. 82). The court may have then felt that Horrocks's stop of defendant, proper at its inception, exceeded its legitimate scope. However, in its final findings of fact and conclusions of law, the trial court squarely ruled that the stop, once effected, was legitimate in scope; it ruled the stop improper at its inception (R. 103).

> level of objective justification" for making the stop. That level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence. We have held that probable cause means "a fair probability that contraband or evidence of a crime will be found," and the level of suspicion required for a Terry stop is obviously less demanding than probable cause . . . .

United States v. Sokolow, 490 U.S. 1, 7, 109 S. Ct. 1581, 1585 (1989) (citations and some quotations omitted). Accord Terry, 392 U.S. at 30, 88 S. Ct. at 1884.

In the wake of Sokolow, this Court also recognized that reasonable suspicion requires less certainty than probable cause, by stating, in State v. Menke, 787 P.2d 537, 541 (Utah App. 1990), that reasonable suspicion "must be based on objective facts suggesting that the individual may be involved in criminal activity" (emphasis added). This comports with the fourth amendment's "minimal objective justification" standard for reasonable suspicion, set forth in Sokolow.[5]

The Menke-Sokolow definition of reasonable suspicion recognizes that limited, non-arrest detentions serve not merely to apprehend criminals, but also to dispel suspicion and prevent criminal activity. E.g., Terry, 392 U.S. at 22, 88 S. Ct. at 1880 (limited detentions supported by interest in "effective

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[5]Although the Utah Constitution's search and seizure provision, Article I, section 14, was mentioned in defendant's motion to suppress and in the trial court's rulings granting the motion (R. 75, 102), that provision was not alleged to provide greater protection than the fourth amendment. Accordingly, this appeal proceeds under a fourth amendment analysis. See State v. Bobo, 803 P.2d 1268, 1272-73 & n.5 (Utah App. 1990).

crime prevention and detection"); accord Sykes, 198 Utah Adv. Rep. at 45 n.1 (Bench, P.J., dissenting). That definition contemplates a very real likelihood that many such detentions will reveal no criminal evidence. That likelihood, however, does not erode the validity of acting upon facts that, at the moment in question, would warrant a person of "reasonable caution" in taking action. Terry, 392 U.S. at 22, 88 S. Ct. at 1880.

In sum, the trial court applied the wrong legal standard to its analysis of defendant's detention by Trooper Horrocks. Put differently, the court analyzed the detention within the wrong legal "field of inquiry." See State v. Richardson, 843 P.2d 517, 521-23 (Utah App. 1992) (Bench, P.J., concurring). By inquiring into probable cause to arrest, rather than "minimal objective justification" to effect an investigatory detention, the trial court committed clear error in ruling that the detention was improper at its inception.

B. Analyzed under the Correct "Minimal Objective Justification" Degree of Proof, the Initial Detention Was Supported by Reasonable Suspicion, and Was therefore Proper.

This Court may appropriately remand this case to the trial court, with instructions to re-analyze the propriety of defendant's initial detention under the legally correct degree of proof. However, the underlying "historical facts" surrounding this detention, cf. State v. Vigil, 815 P.2d 1296, 1300 (Utah App. 1991), appear settled, so far as the State is concerned. Therefore, this Court may choose to decide the detention's

propriety itself, under the "minimal objective justification" standard for reasonable suspicion.

In applying the foregoing fourth amendment standard, the State confines its analysis to the initial detention of this defendant. The State notes that questions regarding the "scope" of a detention, once properly initiated, involve a similar analysis. Recognizing the value of more concise briefing, however, the State will, in arguing that defendant's detention was supported by minimal objective justification, compare this case only to other cases that analyze initial detentions.

The following established facts constituted the necessary minimal objective justification for this detention: The spontaneous statements of the intoxicated driver, Sandstrom, prompted surveillance of Devon Potter's home, and the application for a warrant to search that home. During ongoing surveillance, pending arrival of the warrant, the home's occupants repeatedly peered outside, appearing to be concerned about the nearby police presence. Defendant then drove to the home, remained there only briefly, and departed.

There may have been wholly innocent explanations, and alternative inferences, to be gleaned from every one of the foregoing facts. This, however, has never been a proper basis for ruling that an investigative detention was invalid:

> We said in Reid v. Georgia, 448 U.S. 438, 100 S. Ct. 2752, [] (1980) (per curiam), "there could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot." . . . Indeed, Terry [v. Ohio] itself involved

> "a series of acts, each of them perhaps innocent" if viewed separately, "but which taken together warranted further investigation." 392 U.S., at 22, 88 S. Ct., at 1881.

Sokolow, 490 U.S. at 9-10, 109 S. Ct. at 1586-87. Accordingly, in Menke, this Court correctly held that the behavior of an individual outside a shopping mall, "although conceivably consistent with innocent--albeit highly eccentric--activity," were nevertheless also consistent with shoplifting. 787 P.2d at 541. Therefore, the detention of that individual by observing law officers was deemed reasonable. Id.

In this case, the trial court concluded that there were "no articulable facts" connecting defendant with possible illegal activity inside Devon Potter's home "other than his brief appearance on the premises" (R. 102). Certainly defendant could not be convicted of wrongdoing based upon this fact alone; certainly this fact alone could not support probable cause to arrest or search him. However, it is equally clear that under the "minimal objective justification" standard, there was reasonable suspicion to detain defendant.

Defendant's "brief appearance" at Devon Potter's home cannot be viewed in isolation, as the trial court apparently did here. Instead, the totality of the circumstances must be considered. State v. Mendoza, 748 P.2d 181, 183 (Utah 1987).

The circumstances surrounding defendant's appearance at the home included a chain of unusual events and "eccentric" behavior. The home's occupants, at least reasonably suspected of

possessing illicit drugs, showed great interest in the nearby police presence. It was reasonable to infer that, worried about a possible police investigation into their activities, the home's occupants might summon a friend to remove any incriminating evidence from the premises.[6] Defendant's brief visit, even though consistent with innocent behavior, was also consistent with this inference. There was, therefore, a minimal objective justification, and therefore reasonable suspicion, to allow Trooper Horrocks to detain defendant.

To be sure, there are cases wherein Utah appellate courts have condemned investigatory detentions based upon the detainees' mere presence near a crime scene, or mere proximity to other persons suspected of criminal behavior. See, e.g., State v. Carpena, 714 P.2d 674 (Utah 1986) (per curiam) (driving slowly through neighborhood that had experienced a "rash of burglaries" did not justify detention); State v. Swanigan, 699 P.2d 718 (Utah 1985) (per curiam) (walking in neighborhood of home burglarized several hours earlier did not justify detention); State v. Sykes, 198 Utah Adv. Rep. 35 (Utah App. Oct. 19, 1992) (defendant who left premises under general surveillance for suspected drug

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[6]In the trial court, the State made oral argument and filed a memorandum, arguing along the lines set forth in this brief (R. 92-95, 234-36, 254-57). The State specifically referred to "the lesser burden of establishing reasonable suspicion" (R. 94-95).

The concealment of criminal evidence constitutes one form of the offense of obstructing justice, Utah Code Ann. § 76-8-306 (Supp. 1992), and may also constitute tampering with evidence, Utah Code Ann. § 76-8-510 (1990). While not articulated by the State in the trial court, such loss of evidence was clearly a concern underlying this detention, and brought this detention within section 77-7-15's required suspicion of a "public offense."

activity was improperly detained); State v. Munsen, 821 P.2d 13 (Utah App. 1991) (woman was improperly detained as she approached a truck wherein suspicious behavior was observed), cert. denied, 843 P.2d 516 (Utah 1992); State v. Steward, 806 P.2d 213 (Utah App. 1991) (defendant was improperly detained while apparently approaching, but before reaching, premises that were being searched pursuant to warrant); State v. Trujillo, 739 P.2d 85 (Utah App. 1987) (defendant walking in area of recent "car prowls" was improperly detained; unclear whether detention began with initial encounter or when officer actually frisked defendant). Of those cases issued after the United States Supreme Court's Sokolow decision, however, not one cites the correct "minimal objective justification" standard for reasonable suspicion-based detentions.

Of the foregoing cases, the facts in Steward and Sykes most closely resemble the facts in this case. Although neither case cited the minimal objective justification standard, both appear to have been correctly decided under it. Both cases, like this one, involved stops of individuals near "suspect premises." Nevertheless, each is distinctive from this case in a key circumstance: In Steward, the defendant was stopped before even reaching the premises, which were then being searched pursuant to a warrant. The Court aptly observed that when the officers first effected the detention, they could not distinguish the defendant from any innocent person who might have been driving past on the public street. 806 P.2d at 216. In Sykes, no warrant had yet

been sought for the suspect premises; only preliminary surveillance was under way. Still lacking "positive evidence linking the house to illegal activity," an officer stopped defendant Sykes after she briefly visited it. This, the Court held, was improper. 198 Utah Adv. Rep. at 37-38.

Here, in contrast, defendant actually made contact with the occupants of Devon Potter's home, remaining there a short time--but long enough to retrieve the "bag of marijuana" said, by Sandstrom, to be present therein. Further, the home was no longer under preliminary surveillance. Instead, as a result of Sandstrom's report and other evidence tending to show probable cause, a search warrant application was then in progress. The surveilling officers had a legitimate interest in preventing the evidence that they hoped to find in the home from being spirited away before the warrant arrived. Defendant's appearance at the home, as they awaited the warrant, created minimally objective justification, or reasonable suspicion, to act against such an untoward possibility.

Once again, it was the possibility of evidence loss, not the certainty, and the objective facts tending to heighten that possibility, that justified this detention. The detention may have proven that the possibility had not been realized. In fact, this case can be approached as though it turned out that Officer Horrocks had stopped an entirely innocent individual--perhaps a door-to-door salesperson, or somebody merely stopping to ask directions. This, however, would not undercut the

validity of the detention, under the correct "minimal objective justification" standard for reasonable suspicion.

The trial court's condemnation of this detention is also troubling from a policy perspective. This was no instance of unbridled, arbitrary police action. Rather, the involved officers acted with appropriate restraint, watching Devon Potter's home while awaiting a warrant, rather than immediately barging in on the strength of Sandstrom's allegations alone. When they became concerned that the brief visit to the home by the white Nissan represented a threat to their wish to perform a successful search, they did not immediately pounce on the vehicle. Rather, they consulted with one another--and apparently with the county attorney as well, before deciding to detain it. Simply put, this is not the kind of police behavior that should be deterred through the harsh remedy of suppression. Instead, such self-restrained behavior should be upheld.

CONCLUSION

The trial court applied an incorrect legal standard in ruling that the detention of defendant was, at its outset, unsupported by reasonable suspicion. Accordingly, that ruling was clearly erroneous, and this Court should reverse it. This Court may then either remand this case, instructing the trial court to re-analyze the detention under the correct standard, or apply that standard itself and hold that the initial detention was proper.

RESPECTFULLY SUBMITTED this 06 day of April, 1993.

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CERTIFICATE OF MAILING

I certify that a true and accurate copy of the foregoing Opening Brief of Appellant was mailed, postage prepaid, to MARK T. ETHINGTON, DAY & BARNEY, Attorneys for Defendant-Appellee, 45 East Vine Street, Murray, Utah 84107, this 06 day of April, 1993.

APPENDIX

Trial Court Rulings and Orders

(in the order issued)

IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR EMERY COUNTY
STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. WAYNE DERRON POTTER, Defendant.	RULING ON MOTION TO SUPPRESS Criminal No. 1029

The Defendant's Motion to Suppress the evidence in this case came on for hearing before the Court on April 6, 1992. The attorneys were present and the Court heard testimony of Trooper Jeff Horrocks and, purusant to stipulation of the parties, considered the testimony of Officers of the Emery County Sheriff's Department by way of a transcript of hearing held on September 16, 1991, on a motion to suppress in the case of State v Devon Boyd Potter where the incidents leading up to the stop of the Defendant's vehicle were covered.

The Court finds that Officer Horrocks had good cause to search the Defendant after he stopped him in his vehicle. Although the officer did not know who was driving the vehicle until he approached it, he immediately recognized the defendant at that time and, by prior experience and general reputation, he knew that there may be some danger to himself if he carried out his intent to detain the Defendant without conducting a search for weapons.

The Officer stopped the vehicle with the intent to detain the occupants. Once this was done, the occupants were technically under arrest since they were not free to leave, and the officer has the right, under these circumstances, to search for weapons, which he did. In fact, he found a firearm concealed on the person of the Defendant in the search.

The question the Court must consider, however, is the legality of the stop of the vehicle and the detention of the Defendant. If this was done in violation of Defendant's constitutional rights, it follows that the evidence recovered from the search incident to that detention cannot be used as evidence.

There are several recent cases that have been considered by the Supreme Court and the Court of Appeals in Utah that analyze this question. They all conclude that "Thus, 'a stop can be justified only upon a showing of reasonable suspicion that defendant was committing a crime, or that he was stopped incident to a traffic offense'". (State v. Roth, 181 UAR 25)

In order to satisfy the reasonable suspicion inquiry, it must be determined if, from the facts apparent to Officer Horrocks, and the reasonable inference drawn therefrom, that he would reasonably suspect that the Defendant was committing, or had committed, a crime prior to the stop. This suspicion must be based upon articulated objective facts then apparent to the officer.

Officer Horrocks had a right to rely on the information given to him by other officers as a basis to support his reasonable suspicion, but only if the basis for the matters relayed were also based upon articulated facts. Officer Horrocks was told by Deputy Mangum that the trailer home that they were observing from about one-half block away was under surveilance while a search warrant was being secured. He further informed him that an informant, who had just previously been arrested for drunk driving, had told the officers that there was a pot party going on in the trailer and that marijuana was present.

Horrocks further stated that while observing the trailer he saw a person get out a car near the trailer, go to the trailer, and then go to the car, get into the car and begin to drive away. At that point, Officer Mangum instructed Officer Horrocks to stop the car and to detain the occupants pending the arrival of the search warrant.

Officer Horrocks followed these instructions and stopped the vehicle with the intent to detain its occupants pending the arrival of the search warrant, or pending further instructions. Without any other facts that would indicate any illegal activity on the part of the occupants of the car, the vehicle was stopped.

The Defendant was not in the house trailer when the officers entered it to secure the premises pending the receipt of a search warrant, and he was not identified to them by the imformant as being in the trailer when the informant said he observed marijuana or that a pot party was in progress.

If there was reasonable cause to believe that illegal activity was going on inside the trailer at that time, there were no articulatable facts connecting the Defendant with such activity other than his brief appearance on the premises. None of the officers knew who the occupants of the vehicle were until it was stopped by Officer Horrocks. Since they did not know that the Defendant personally was in the vehicle or that he personally was on the premises, the fact that they may have known that he was a convicted drug abuser is immaterial since this fact was not used by them informulating reasonable suspicion.

The attorney for the State in articulating facts states that Deputy Gayle Jensen personally observed defendant enter and exit the trailer. On review of Deputy Jensen's testimony (Transcript, page 32), he did not state that he saw the defendant enter and leave but only that he saw a little white car leave the trailer.

There was nothing in what Officer Horrocks knew or in what was conveyed to him that would create reasonable suspicion of illegal conduct upon the part of the Defendant. There was nothing at the time that any of the deputies of the Emery County Sheriff's Office could facutally articulate that would give rise to reasonable suspicion that the Defendant had committed or was committing a crime except his unidentified brief appearance on the premises as indicated.

The Courts have consistently held that this fact alone is not enough to create reasonable suspicion.

Even in cases where the officer has reasonable suspicion of illegal activity based upon direction from a dispatch officer or from other police officers, and he stops a vehicle, he can only stop the vehicle briefly while attempting to obtain further information regarding those suspicions. (See State v Bruce, 779 P2d 646)

Office Horrocks stated that he stopped the vehicle to detain the occupants pending further instructions or, the Court assumes, until the arrival of the search warrant for the trailer, and that his purpose was not to investigate or to make further inquiry relative to any suspicions of illegal activity.

For these reasons, THE COURT FINDS that the Defendant's constitutional rights were violated, and that the stop was not legally made, and that the Motion for Summary Judgment is granted.

The Attorney for the Defendant is directed to make formal Findings of Fact and an Order granting the Motion to Suppress.

DATED this 9th day of April, 1992.

BOYD BUNNELL, District Judge

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing RULING ON MOTION TO SUPPRESS by depositing the same in the United States Mail, postage prepaid, to the following:

Mark T. Ethington
DAY AND BARNEY
Attorneys at Law
45 East Vine Street
Murray UT 84107

Patricia Geary
Emery County Attorney
Post Office Box 1099
Castle Dale UT 84513

DATED this 9th day of April, 1992.

Barbara [signature]
Secretary

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
IN AND FOR EMERY COUNTY
STATE OF UTAH

STATE OF UTAH, Plaintiff, v. WAYNE DERRON POTTER, Defendant.	RULING ON MOTION TO RECONSIDER Criminal No. 91-2660

The State has filed a motion asking the Court to reconsider its previous ruling relative to the Defendant's Motion to Suppress the Evidence gathered against him.

In view of the fact that the Court missed the statement by Deputy Jensen found on page 37 of the transcript of his testimony, THE COURT WILL grant the Motion and will reconsider its previous ruling.

The statement of the Deputy contained at that page still leaves some doubt as to whether or not he recognized the Defendant at the time the Defendant left the trailer since his statement about seeing him leave came after he had talked to Officer Horrocks and the Defendant had been identified to him as the driver of the white car. No one whose testimony was used for the purpose of this hearing mentions the name of the Defendant at anytime prior to the stop and his identification being made known by Officer Horrocks.

The instructions to Officer Horrocks were to stop the white car and no mention was made relative to its occupants.

However, for the sake of this ruling we will assume that the Deputy recognized the Defendant as the person who left the trailer and drove away in the white car.

The i still remains that the Defendant was not in the trailer at the time the Officers entered, and he was not mentioned by the informant as being present at the alleged pot party.

On the contrary, Officer Horrocks said he observed the driver of the white car get out of the car, go to the trailer and return to the car and drive away.

No matter how you consider the facts in this case, they do not establish reasonable cause to believe that the Defendant was committing any crime or had committed a public offense at this time and place that would justify his apprehension and detention.

FOR THESE REASONS, the Court affirms its prior ruling that the Motion to Suppress be granted.

DATED this 28th day of April, 1992.

Boyd Bunnell, District Judge

0013mw

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing RULING ON MOTION TO RECONSIDER by depositing the same in the United States Mail, postage prepaid, to the following:

Mark T. Ethington
Attorney at Law
DAY AND BARNEY
45 East Vine Street
Murray, UT 84107

Patricia Geary
EMERY COUNTY ATTORNEY
P. O. Box 249
Castle Dale UT 84013

DATED this 28th day of April, 1992.

IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR EMERY COUNTY
STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. WAYNE DERRON POTTER, Defendant.	FINDINGS OF FACT AND CONCLUSIONS OF LAW Case No. 1029

The Defendant's Motion to Suppress, previously filed in this case, came on for hearing before the Court on April 6, 1992. After hearing the testimony of Tropper Jeff Horrocks and pursuant to stipulation of the parties, considering the testimony of various officers of Emery County as set forth in a transcript of a suppression hearing in the case of State v. Devon Boyd Potter where the incidents leading up to the stop of Defendant's vehicle are set forth, the Court now makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Officer Horrocks was told by Deputy Mangum that the trailer home that they were observing from about one-half block away was under suerveillance while a search warrant was being secured.

2. Deputy Mangum further informed Officer Horrocks that an informant, who had previously been arrested for drunk driving, had told the officers that there was a pot party going on in the trailer and that marijuana was present.

3. While observing the trailer, Officer Horrocks saw a person get out of a car near the trailer, go to the trailer and then come back to the car a short while later, get into the car and begin to drive away.

4. Officer Gayle Jensen (the officer who stopped the DUI suspect) observed the same vehicle leave the trailer.

5. The Defendant (who was subsequently discovered to be the driver of the vehicle) was not in the house trailer when the officers subsequently entered it to secure the premises pending receipt of a search warrant.

6. The Defendant was not identified by the informant as being in the trailer when the informant said he observed marijuana or that a pot party was in progress.

7. Deputy Jensen, who was on the premises being secured, recognized the Defendant as the person who was driving away in the car and knew that the Defendant had been previously convicted of a drug offense.

8. As the vehicle was leaving the trailer, Deputy Mangum, upon instruction from Deputy Jensen, requested Officer Horrocks to stop the vehicle and to detain the occupants pending arrival of the search warrant.

9. Without any other facts that would indicate any illegal activity on the part of any of the occupants of the car, Officer Horrocks then stopped the vehicle with the intent to detain the occupants until either the search warrant arrived or until further instructions. Officer Horrocks' purpose was not to investigate or to make further inquiry relative to any suspicions or illegal activity.

10. Although Officer Horrocks did not know who was driving the vehicle before the stop, upon approaching the vehicle he immediately recognized the Defendant as the driver of the vehicle, and, by prior experience and reputation, he knew that there may be some danger to himself if he carried out his intent to detain the Defendant without a search for weapons.

11. Officer Horrocks then conducted a search of the occupants, including the Defendant, by having them empty their pockets. A concealed firearm was discovered on the person of the Defendant during the course of this search.

12. Officer Horrocks then arrested the Defendant for carrying a concealed weapon, and then searched the Defendant incident to this arrest, and during this search he discovered some marijuana and some pills and a small container containing what was later analyzed as cocaine residue.

CONCLUSIONS OF LAW

1. If there was reasonable cause to believe that illegal activity was going on inside the trailer, there was no articulable facts connecting the Defendant with such activity other than his brief appearance on the premises.

2. There was nothing in what Officer Horrocks knew or in what was conveyed to him that would create reasonable suspicion of illegal conduct upon the part of the Defendant. There was nothing at the time that any of the deputies of the Emery County Sheriff's Office could factually articulate that would give rise to reasonable suspicion that the Defendant had committed or was committing a crime except his brief appearance on the premises.

3. Because there was no reasonable suspicion to stop Defendant's vehicle for the purpose of detaining him, the Defendant's constitutional rights as set forth in the Fourth and Fourteenth Amendments to the United States Constitution, and Aarticle I Section 14 of the Utah Constitution prohibiting unreasonable searches and seizures was violated, and Defendant's Motion to Suppress should be granted.

4. There was a seizure of Defendant when he was detained by Officer Horrocks in that Defendant was technically under arrest since he was not free to leave.

5. Officer Horrocks had good cause to search the Defendant after the Defendant was stopped. However, evidence discovered as a result of the search should be suppressed as a result of the prior illegal stop.

DATED this 7 day of May, 1992.

BOYD BUNNELL, District Judge

0015mw

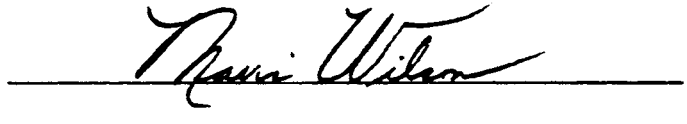
CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW by depositing the same in the United States Mail, postage prepaid, to the following:

Mark T. Ethington
DAY AND BARNEY
Attorneys at Law
45 East Vine Street
Murray UT 84107

Patricia Geary
Emery County Attorney
Post Office Box 1099
Castle Dale UT 84513

DATED this 7th day of May, 1992.



Mark T. Ethington (4828)
DAY & BARNEY
Attorneys for Defendant
45 E. Vine Street
Murray, Utah 84107
Telephone: (801)262-6800

IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR EMERY COUNTY

STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. WAYNE DERRON POTTER, Defendant.	: : : : :	ORDER ON MOTION TO SUPPRESS Case No. 1029 Judge Boyd Bunnell

The Defendant's Motion to Suppress, previously filed in this case, came on for hearing before the Court on April 6, 1992. After hearing the testimony of Trooper Jeff Horrocks and, pursuant to stipulation of the parties, considering the testimony of various officers of Emery County as set forth in a transcript of a suppression hearing in the case of State v. Devon Boyd Potter where the incidents leading up to the stop of Defendant's vehicle are set forth, and pursuant to the Findings of Fact and Conclusions of Law entered herewith, it is hereby,

ORDERED, ADJUDGED AND DECREED, that Defendant's Motion to Suppress is granted, and any and all evidence seized from the Defendant as a result of the stop and subsequent search in question, including but not limited to, a Titan 25 Caliber semi automatic

pistol serial number D823944, small plastic tuperware container allegedly containing cocaine residue, any alleged cocaine residue, marijuana, twelve Tylenol 3 tablets, and various other pills, shall be suppressed and not be allowed to be used as evidence against the Defendant.

Dated this 7 day of May, 1992.

Judge Boyd Bunnell

APPROVED AS TO FORM:

Patricia Geary
Emery County Attorney

Mark T. Ethington (4828)
DAY & BARNEY
Attorneys for Defendant
45 E. Vine Street
Murray, Utah 84107
Telephone: (801)262-6800

IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR EMERY COUNTY

STATE OF UTAH

STATE OF UTAH,	:	MOTION TO DISMISS
Plaintiff,	:	
vs.	:	
WAYNE D. POTTER,	:	Case No. 1029 Judge Boyd Bunnell
Defendant.	:	

COMES NOW the Defendant, by and through his attorney, and hereby respectfully moves this Court to dismiss with prejudice the Information herein for the following reasons. On April 6, 1992, a hearing was held before this Court on Defendant's Motion to Suppress all of the evidence seized from the Defendant at the time of his arrest in this matter. This Court took the matter under advisement at that time. On April 9, 1992, this Court entered a written Ruling on Motion to Suppress wherein Defendant's motion was granted. On April 21, 1992, the State of Utah filed a Motion to Reconsider or for Rehearing. On April 28, 1992, this Court entered a written Ruling on Motion to Reconsider wherein the State's motion was denied. On May 7, 1992, this Court entered an Order on Motion to Suppress along with Findings of Fact and Conclusions of Law wherein the Defendant's

Motion to Suppress was granted. A mailing certificate was attached to the Order indicating that a copy of the Order had been delivered to Patricia Geary, Emery County Attorney.

At least thirty (30) days have now elapsed since the filing of the Court's Order granting the motion to suppress, and the State has not filed an interlocutory appeal.

Because the State essentially can not make a prima facie case against the Defendant due to the granting of the motion to suppress, it would be fruitless and a waste of time and resources to proceed with a trial of this matter. Furthermore, it is unreasonable to continue to let the charges just sit without some type of action on them. This may constitute a violation of Defendant's Sixth Amendment right to a speedy trial.

Consequently, the Defendant respectfully requests that the Information herein be dismissed with prejudice.

Dated this 18 day of June, 1992.

Mark T. Ethington

CERTIFICATE OF MAILING

I certify that I am employed by the office of Day & Barney and that I mailed a true and correct copy of the foregoing Motion to Dismiss, postage pre-paid, to the following:

Patricia Geary
Emery County Attorney
P.O. Box 249
Castle Dale, Utah 84513-0249

on this 18th day of June, 1992.

Connie Carlson

MARK T. ETHINGTON (4828)
DAY & BARNEY
ATTORNEYS FOR DEFENDANT
45 EAST VINE STREET
MURRAY, UTAH 84107
TELEPHONE: (801) 262-6800

IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR

EMERY COUNTY, STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff,	:	NOTICE TO SUBMIT FOR DECISION
vs.	:	
WAYNE D. POTTER,	:	Civil No. 1029
Defendant.		Judge Boyd Bunnell

Plaintiff's Motion to Dismiss filed with the Court on the 18th day of June, 1992, by Mark T. Ethington, Attorney for Defendant, is now at issue and ready for decision of the Court.

DATED and SIGNED this 17 day of August, 1992.

Mark T. Ethington
Attorney for Defendant

CERTIFICATE OF MAILING

I certify that I am employed by the office of Day & Barney, and that I mailed a true and correct copy of the foregoing Notice to Submit for Decision, postage pre-paid, to:

Patricia Geary
Emery County Attorney
P.O. Box 249
Castle Dale, Utah 84513-0249

on this 13th day of August, 1992.

Connie Carlson

IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR EMERY COUNTY
STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. WAYNE D. POTTER, Defendant.	RULING ON MOTION TO DISMISS Criminal No. 1029

The Defendant has filed a motion to dismiss this action on the ground that the Court granted a motion to suppress the evidence in this case on May 7, 1992, and that the State has not proceeded to obtain a trial date, and on the further ground that the State has indicated that they have no other evidence of criminal activity on the part of the Defendant as alleged in the Information in this case.

The Plaintiff has filed no objection to the Motion.

THE COURT HEREBY GRANTS the Motion and Orders that this case be dismissed.

DATED this 1ST day of September, 1992.

BOYD BUNNELL, District Judge

9-3-92
Recorded in Judgment Record
V at Page 185
BRUCE C. FUNK, Clerk

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a true copy of the above entitled RULING ON MOTION TO DISMISS by depositing the same in the United States Mail, postage prepaid, to the following:

Mark T. Ethington
DAY AND BARNEY
Attorneys at Law
45 East Vine Street
Murray UT 84107

Patricia Geary
County Attorney for Emery County
Post Office Box 249
Castle Dale UT 84513

Dated this 1st day of September, 1992.

Secretary

R. PAUL VAN DAM (3312)
Attorney General
J. KEVIN MURPHY (5768)
Assistant Attorney General
Attorneys for Plaintiff/Appellant
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1021

IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR EMERY COUNTY

STATE OF UTAH

STATE OF UTAH,	:	NOTICE OF APPEAL
Plaintiff/Appellant,	:	Criminal No. 1029
v.	:	
WAYNE D. POTTER,	:	Judge Boyd Bunnell
Defendant/Appellee.	:	

The State of Utah appeals the trial court's final order of dismissal in the above-entitled case, entered September 1, 1992. This appeal is to the Utah Court of Appeals, and is filed pursuant to Utah Code Ann. §§ 77-18a-1(2)(a) and 78-2a-3(2)(f) (Supp. 1992).

DATED this 16 day of September, 1992.

J. KEVIN MURPHY
Assistant Attorney General

PATRICIA GEARY
Emery County Attorney

CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing Notice of Appeal was mailed, postage prepaid, to Mark T. Ethington, attorney for defendant/appellee, 45 East Vine Street, Murray, Utah 84107, this 16 day of September, 1992.