

2016

**State of Utah. Plaintiff/ Appellee, vs. Chance Aric Navarro,
Defendant/ Appellant.**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

vs.

CHANCE ARIC NAVARRO,

Defendant/Appellant.

Case No. 20150832-CA

BRIEF OF APPELLANT

APPEAL FROM CONVICTION OF TWO COUNTS OF POSSESSION OF FIREARM
BY RESTRICTED PERSON, A 3RD DEGREE FELONY, IN VIOLATION OF UTAH
CODE ANN. § 76-10-503(3)(a), AND ONE COUNT OF USE OR POSSESSION OF
DRUG PARAPHERNALIA, A CLASS B MISDEMEANOR, IN VIOLATION OF
UTAH CODE ANN. § 58-37a-5(1), IN THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR WASHINGTON COUNTY
HONORABLE JOHN J. WALTON PRESIDING

Gary W. Pendleton (USB No. 02564)
301 East Tabernacle, Suite 207
St. George, Utah 84770
Telephone: (435) 628-7086
Attorney for Defendant/Appellant

Laura B. Dupaix (USB No. 05195)
Utah Attorney General, Appeals Division
160 East 300 South, 6th Flr.
P.O. Box 140854
Salt Lake City, UT 84114-0854
Attorney for Plaintiff/Appellee

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St. George, Utah 84770
Telephone: (435) 628-7086
Attorney for Defendant/Appellant

Laura B. Dupaix (USB No. 05195)
Utah Attorney General, Appeals Division
160 East 300 South, 6th Flr.
P.O. Box 140854
Salt Lake City, UT 84114-0854
Attorney for Plaintiff/Appellee

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BRIEF OF APPELLANT

APPELLATE JURISDICTION

Jurisdiction to hear this appeal is conferred upon the court of appeals by provision of UTAH CODE ANN. § 78A-4-103(2)(e).

ISSUES PRESENTED AND STANDARDS OF REVIEW

Issue: Did police impermissibly exploit the traffic stop for the purpose of investigating suspicions unrelated to the circumstances which rendered the initiation of the traffic stop permissible?

Standard of review: On review of criminal proceedings, the court of appeals accepts the trial court's findings of fact unless they are clearly erroneous. However, the appellate court reviews the trial court's ruling on a motion to suppress for correctness, without deference to the trial court's application of the law to the facts. *State v. Baker*, 2008 UT App 115, ¶ 8, 182 P.3d 935.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Photocopies of the district court's handwritten ruling and the Findings, Conclusions, and Order on Defendant's Motion to Suppress are included in the ADDENDUM.

STATEMENT OF THE CASE

Nature of the Case. This appeal is from a final judgment and order of the Fifth Judicial District Court, in and for Washington County, John J. Walton presiding. R 128-134. The only issue on appeal concerns whether or not the district court erred in denying defendant's motion to suppress evidence obtained as a result of a warrantless search of defendant's vehicle.

Proceedings in the Lower Court. Defendant was charged with two counts of POSSESSION OF FIREARM BY RESTRICTED PERSON, a 3rd degree felony, in violation of UTAH CODE ANN. § 76-10-503(3)(a); one count of POSSESSION OR USE OF A CONTROLLED SUBSTANCE, a 3rd degree felony, in violation of UTAH CODE ANN. § 58-37-8(2)(a)(i); one count of USE OR POSSESSION OF DRUG PARAPHERNALIA, a class B misdemeanor, in violation of UTAH CODE ANN. § 58-37a-5(1); and one count of ILLEGAL WINDOW TINTING, a class C misdemeanor, in violation of UTAH CODE ANN. § 41-6a-1635. R 1-2. Defendant moved the district court to suppress the alleged controlled substance and drug paraphernalia, as well as the

two firearms in question. R 19-20, 43-53. The district court denied Defendant's motion and the matter was tried to a jury. R 59-60.

Disposition in the Trial Court. At trial, the State failed to present evidence supporting the charge of POSSESSION OR USE OF A CONTROLLED SUBSTANCE and abandoned the charge of ILLEGAL WINDOW TINTING. Those charges were not submitted to the jury. R 87-107. The two counts of POSSESSION OF FIREARM BY RESTRICTED PERSON were sent to the jury on the theory that the defendant was a restricted person because he was an unlawful user of a controlled substance. *See* Jury Instruction Nos. 12A and 12C. R 98, 100. The jury returned guilty verdicts on the two counts of POSSESSION OF FIREARM BY RESTRICTED PERSON and the single count of USE OR POSSESSION OF DRUG PARAPHERNALIA. R 108-109.

Defendant was sentenced to two indeterminate terms not to exceed five years in the Utah State Prison and pay a fine in the amount of \$5,000.00, plus a 90% surcharge, and a court security fee of \$33.00 on each of the felony convictions. He was sentenced to 180 days in the Washington County Purgatory Correctional Facility and pay a fine in the amount of \$1,000.00, plus a 90% surcharge, and a court security fee of \$33.00 on the misdemeanor conviction. The district court stayed the execution of these sentences and placed Defendant on supervised probation for a period of 36 months upon terms and conditions which included 60 days incarceration in the Washington County Purgatory Correctional Facility with credit for 30 days previously served. R 128-132.

Statement of Facts. At approximately 10:00 p.m. on the evening of August 1, 2013, detectives with the Washington County Drug Task Force began conducting surveillance of a business known as Young's Tire Service located at 405 Park Street in St. George, Utah. R 137, at 5, 7, 8-9, 35. The officers were attempting to locate one Travis Farnsworth for whom they had recently obtained an arrest warrant. R 137, at 4-5, 8, 35.

Sergeant Jared Parry observed one Daniel Cooney working in a garage on the business premises. R 137, at 9, 11. During the surveillance, several other individuals arrived or were already on the premises. R 137, at 9, 19, 25-26. However, Travis Farnsworth was never observed on the premises on the evening in question. R 137, at 35-36.

Another member of the task force, Detective Jason Jarvey, observed the defendant arrive in a green Chevrolet Tahoe and enter the business. R 137, at 10, 72-73. Defendant was not a target of the investigation and officers were not looking for him on the evening in question. R 137, at 5.

At about 10:55 p.m., Sergeant Parry observed Daniel Cooney put what appeared to be a white pipe to his mouth and smoke from it. Cooney exhaled "white-colored smoke", paused briefly, and then exhaled again. Based upon his training and experience, Parry suspected that Cooney was smoking "some kind of illegal substance." R 137, at 9, 14-15.

Later, Sergeant Parry observed the defendant exit the business and approach the green Tahoe. R 137, at 11. Parry testified that he was using binoculars and recognized

the defendant and further testified that he was “very confident” that the tint on defendant’s window exceeded the legal limit. R 137, at 11, 16-18.

At approximately 11:20 p.m., the defendant again approached the Tahoe, opened the driver’s side rear door, retrieved a pair of binoculars, and scanned the area around the business. R 137, at 19-20. Shortly thereafter, the defendant opened the rear hatch of the Tahoe and began to rummage through the contents. With the hatch open, Sergeant Parry could see what appeared to be a rifle case in the rear compartment. R 137, at 20-21.

Sergeant Parry had been involved in the investigation and prosecution of a case against the defendant several years earlier that had “involved a decent amount of marijuana as well as a handgun.” R 137, at 22. He had personal knowledge that the defendant pled guilty to a felony charge in that case. R 137, at 21-22, 43-44. Sergeant Parry thought that if what appeared to him to be a rifle case actually contained a firearm, the defendant may be violating the law that denies a felon the right to possess a firearm. R 137, at 21-22, 43-44.

At 11:39 p.m., the defendant backed the Tahoe out of the Young’s Tire Service parking lot, and together with three other vehicles, left the area traveling toward 350 North. R 137, at 25-26, 46. Sergeant Parry radioed his observations regarding defendant’s illegal window tint. R 137, at 27. Under questioning by the State’s prosecutor, Sergeant Parry testified that the task force had “detectives who were mobile in

cars waiting to apprehend” the individuals who were leaving the business premises. R

137, at 26-27. In Sergeant Parry’s words:

Q [BY DEFENSE COUNSEL] Basically the only thing that you identified for fellow officers that you believed would be the basis for a stop was the window tint violation; is that a fair statement? And you told them to use caution.

A [BY SERGEANT PARRY] As far as -- to answer your question, I mean, I believe this investigation was very pretextual. There’s other information involved. The window tint violation certainly played into it. It would be a valid reason to make a traffic stop given the firearms case or any other reason, I mean, setting that all aside.

R 137, at 44-45.

Detectives Jim Jessop and Nick Nuccitelli, who were working with the drug task force, heard Sergeant Parry state over the radio that caution should be used in approaching the defendant because the defendant had allegedly made statements to some informant suggesting that the defendant was armed and prepared to resist the police with deadly force. R 137, at 27-28. Parry further cautioned fellow officers that the defendant possibly had a rifle case in his vehicle. R 137, at 40, 73.

Detectives Jessop and Nuccitelli observed the four vehicles turn into the parking lot of the Wendy’s restaurant on 1000 East. R 137, at 75. The detectives parked across the street in the Denny’s parking lot. They observed one of the vehicles go through the Wendy’s drive-thru and meet back up with the other three vehicles. R 137, at 75-76. The defendant’s vehicle and a black passenger car then traveled from the Wendy’s to the Denny’s parking lot about a block north, where they parked side-by-side. R 137, at 76-79.

Detective Jessop, who was one of the officers that initiated the stop, identified the window tint violation as the legal basis for stopping the defendant. R 137, at 73. Jessop and Nuccitelli confirmed, by their own observations, that the tint on the driver's window of the defendant's vehicle clearly appeared to exceed the legal limit. R 137, at 77-78. Under questioning by the State's prosecutor, Detective Jessop testified as follows:

Q [BY THE STATE'S PROSECUTOR] Was it even a close call for you whether that was too dark?

A [BY DETECTIVE JESSOP] Not even borderline. Once in a while you run -- I've ran into situations where I feel like it's probably borderline, and that's not one of those situations.

R 137, at 78.

Detective Jessop testified that it was Detective Nuccitelli who actually activated the red and blue lights, but Jessop understood that "we were trying to make a stop on all of the vehicles." R 137, at 78-79.

When the driver of the black passenger car exited her vehicle and began "quickly walking towards Denny's," the detectives approached her and ordered her to get on the ground. R 137, at 79. They then approached the defendant's vehicle with their service weapons drawn. R 137, at 97-98. Detective Jessop approached on the passenger's side and ordered him to show his hands. R 137, at 80-81. The defendant's right hand was visible, but his left hand was out of view. Detective Nuccitelli, who had approached on the driver's side of the defendant's vehicle, also ordered the defendant to show his hands. The defendant took approximately five seconds to comply. R 137, at 98.

It is apparent that the “traffic stop” in question was initiated sometime between 11:42 p.m. and 11:45 p.m.¹

The detectives opened defendant’s car door, ordered him out of the vehicle, and frisked him for weapons. R 137, at 82. The defendant said he had a knife, and the detectives recovered a fixed blade knife in a sheath from his person. R 137, at 82-83. They sat the defendant on the ground away from his vehicle. Detective Jessop never advised dispatch that he was out on a traffic stop. R 137, at 89. After the officers had the defendant in handcuffs, Jessop “mentioned to him ... that his windows were dark, and they were too dark.” R 137, at 83-84. Jessop did not ask the defendant to produce a driver license, vehicle registration, or proof of insurance. R 137, at 89-92, 98-99. In fact, Detective Jessop testified that at no time during the entire course of the “traffic stop” did he ascertain whether or not defendant’s vehicle was registered or insured. R 137, at 98-99.

Detective Nuccitelli never advised dispatch that he was out on a traffic stop. R 137, at 115. Nuccitelli testified that he did not remember if he or any other officer had ever asked the defendant for a driver license, vehicle registration, or proof of insurance. R

¹The dispatch log does not pinpoint the time because apparently none of the officers advised dispatch that the drug task force was out with a member of the public. R 137, at 62-63. We know that the defendant left Young’s Tire Service at 11:39 p.m. R 137, at 25-26. The Denny’s parking lot was about “three or four blocks” from Young’s Tire Service. R 137, at 29. When asked if he recalled how long it was from the time he observed the defendant leave Young’s Tire Service until he was advised by radio that officers had stopped the defendant, Sergeant Parry testified that he did not keep track of those times. The prosecutor then asked if it was “[l]ike three or four minutes, five or six minutes,” Parry testified: “You know, it would be a guess. It was a few minutes.” R 137, at 28.

137, at 116-17. Nuccitelli did not call for a window tint meter and did not remember when a tint meter arrived on scene. R 137, at 118-19.

Police officers stopped three of the four vehicles that had left Young's Tire Service and, with the task force's drug-sniffing dog, descended upon the vehicles, one after another. R 137, at 46-48.

When Sergeant Parry arrived at the Denny's parking lot, he advised the defendant that he had been stopped for a window tint violation. R 137, at 29. Upon approaching the defendant following the stop, the window tint violation was the only public offense that Parry identified as a basis for stopping the defendant's vehicle. R 137, at 61. Parry did not contact dispatch to make them aware that officers were out on a traffic stop. R 137, at 61. He did not know if any other officer had advised dispatch. R 137, at 61-62. He could not testify, based upon anything he saw or heard, that any police officer ever contacted dispatch to advise them that the drug task force was out with a member of the public.² R 137, at 62-63. Parry further testified that, to his knowledge, no law enforcement officer ever asked the defendant to produce a driver license, vehicle registration, or proof of insurance. R 137, at 63-64.

Sergeant Parry testified that "during that stop at some point ... Lieutenant Feldner ... had either a laptop computer or something" and officers "were able to run his

²The police radio log, that was admitted into evidence as Defendant's Exhibit No. 1, contains no entry suggesting that any one of the task force officers had ever radioed the dispatcher.

criminal history, and at that point in time I found that [the defendant] wasn't a felon." R 137, at 65.

Sergeant Parry testified that he called Detective Matt Schuman, the task force K-9 handler, at 12:03 a.m. R 137, at 32-34. On the other hand, Parry could not remember if he ever requested a tint meter. R 137, at 30.

Q [BY THE STATE'S PROSECUTOR] And while you were with Mr. Navarro, you said you talked to him about the window tint violation. Did you request a tint meter to be brought to the location?

A [BY SERGEANT PARRY] I can't remember if it was me that requested it or not. One did come. Somebody had requested one. It very well could have been me. It would make sense.

R 137, at 29-30.

While no officer made any inquiry concerning the defendant's driver license, vehicle registration, or insurance, a tint meter would eventually be brought to the location. R 137, at 84-85. When Sergeant Parry was asked what time the tint meter arrived on the scene, the following exchange takes place:

Q [BY DEFENSE COUNSEL] At what point in time did the tint meter arrive on scene?

A [BY SERGEANT PARRY] Sometime before midnight twelve. I'm not sure what time. I will have no way of knowing.

THE COURT: How about in relation to when the K-9 unit arrived? Do you remember which arrived first?

THE WITNESS: I don't. I don't. However -- I don't. I'm not sure.

R 137, at 69.

Detective Jim Jessop testified that “Sergeant Sprigg is the one that showed up with the tint meter.” R 137, at 84-85. Jessop testified that he remembered that the tint meter arrived “after the dog,” but he could not identify the officer who called for the tint meter and did not indicate at what point in time the meter was requested. R 137, at 96-97.

After Detective Schuman arrived, a K-9 sniff was conducted on the exterior of the defendant’s vehicle. R 137, at 48-49. When the K-9 allegedly alerted on defendant’s vehicle, a search of the defendant’s vehicle was conducted. R 137, at 34-35, 49.

In the course of that warrantless search, police allegedly seized a small quantity of suspected methamphetamine and two firearms which lead to the charges herein. R 1-2. After being bound over for trial, the defendant moved the court for an order suppressing the evidence obtained as a result of the warrantless search on the grounds that the police had impermissibly exploited the traffic stop. R 19-20, 43-53. The district court denied defendant’s motion, concluding that “the stop of defendant’s vehicle for a window tint violation was constitutional at its inception” and that “both a tint meter and a K-9 unit were requested shortly after the stop, and that the tint meter did not arrive until after the arrival of the K-9 unit.” R 59-60. Finally, the district court concluded: “Once the K-9 alerted on the defendant’s vehicle, the detectives had reasonable suspicion of additional serious criminal activity, and could appropriately expand the investigative scope of the initial stop.” R 59-60.

SUMMARY OF ARGUMENT

The only legal basis for the stop in question was the observation of an equipment violation. The police did nothing typically associated with conducting a routine traffic stop. The evidence that the State offered in support of this warrantless search fails to demonstrate that task force officers took any measures to clear the traffic stop before embarking upon their narcotics investigation. Indeed, the record does not demonstrate that officers took any measures to clear the traffic stop before *concluding* their narcotics investigation.

ARGUMENT

POINT I

DEFENDANT CONCEDES THAT POLICE OFFICERS' SUBJECTIVE MOTIVES IN INITIATING A TRAFFIC STOP ARE IRRELEVANT.

“A traffic stop is justified at its inception if an officer has (1) probable cause to believe a traffic violation has occurred, or (2) a reasonable articulable suspicion that a particular motorist has violated any of the traffic or equipment regulations of the jurisdiction.” *United States v. Winder*, 557 F.3d 1129, 1134 (10th Cir.2009). “[T]he government need not show a violation actually occurred to justify an initial traffic stop.” *United States v. Hunnicutt*, 135 F.3d 1345, 1348 (10th Cir.1998). The courts look only at whether the stop was objectively justified. *United States v. Botero-Ospina*, 71 F.3d 783, 787 (10th Cir. 1995) (en banc).

In *State v. Lopez*, 873 P.2d 1127 (Utah 1994), the Utah Supreme Court held that, if reasonable in scope and duration, a traffic stop based upon reasonable suspicion that the driver has violated any applicable traffic or equipment regulation does not violate the Fourth Amendment, even if the stop is in fact undertaken as a pretext for the investigation of some other offense unrelated to the observed violation. *Lopez*, 873 P.2d at 1132.³

In rejecting the pretext stop doctrine, the Utah Supreme Court recognized the fact that if the police, by simply articulating some legitimate basis for initiating the stop, were going to be permitted to initiate traffic stops in the interest of investigating subjective suspicions, the Fourth Amendment prohibition against unreasonable seizures could only be enforced by prohibiting any detention that is longer than necessary to effectuate the legitimate purpose of the stop and by making certain that both the length and the scope of the detention are “‘strictly tied to and justified by’ the circumstances which rendered its *initiation* permissible.” *Id.*, emphasis added.

³In the years preceding the *Lopez* decision, the Utah Court of Appeals had adopted what was commonly referred to as the “pretext doctrine” which was applied in cases where police claimed to have stopped a vehicle for a minor traffic violation, but where the court determined the stop was actually motivated by a desire to investigate something concerning which there was no reasonable suspicion. See *State v. Grovier*, 808 P.2d 133, 135-37 (Utah App.1991); *State v. Marshall*, 791 P.2d 880, 882-83 (Utah App.), *cert. denied*, 800 P.2d 1105 (Utah 1990); *State v. Baird*, 763 P.2d 1214, 1216-17 (Utah App.1988); *State v. Sierra*, 754 P.2d 972, 977-80 (Utah App.1988).

POINT II

DRUG TASK FORCE OFFICERS IMPERMISSIBLY EXPLOITED THE TRAFFIC STOP.

Traffic Stops and Dog Sniffs in General. In *Illinois v. Caballes*, 543 U.S. 405, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005), the United State Supreme Court held that a dog sniff conducted during a lawful traffic stop does not violate the Fourth Amendment's proscription of unreasonable seizures. However, in *Rodriguez v. United States*, ___ U.S. ___, 135 S.Ct. 1609, 191 L.Ed.2d 492 (2015), the Supreme Court held that a traffic stop that "exceed[s] the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures" and that "[a] seizure justified only by a police-observed traffic violation, therefore, 'become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission' of issuing a ticket for the violation." *Rodriguez*, 191 L.Ed.2d at 496 (*quoting Caballes*, 543 U.S. at 407). *Cf. State v. Lopez*, 873 P.2d at 1132 (requiring that both the length and the scope of the detention be "'strictly tied to and justified by' the circumstances which rendered its initiation permissible.").

Rodriguez explained that a "dog sniff is not fairly characterized as part of the officer's traffic mission." 191 L.Ed.2d at 499. A dog sniff that prolongs the stop beyond the time reasonably required to complete the mission of issuing a ticket for the traffic offense violates the Constitution's shield against unreasonable seizures unless the officer has independent reasonable suspicion to support such a prolongation. *Id.* at 496.

Rodriguez held "'the Government's endeavor to detect crime in general or drug trafficking

in particular” cannot justify prolonging an ordinary traffic stop to conduct a canine narcotics investigation. *Id.* at 500. Such “[o]n-scene investigation into other crimes . . . detours” from an officer’s traffic mission. *Id.*

In the instant case, the State contends that the K-9 sniff did not extend the defendant’s detention because police had not completed the “mission” of the traffic stop prior to the K-9 sniff, contending that the tint meter had not been brought to the location of the traffic stop when the drug-sniffing dog arrived on scene.

Task Force Officers Never Treated the Subject Encounter as a Traffic Stop. From its outset, task force officers treated the so-called traffic stop as a felony stop. The officers approached the defendant’s vehicle with their service weapons drawn. R 137, at 97-98. They opened defendant’s car door, ordered him out of the vehicle, and frisked him for weapons. R 137, at 82. They sat the defendant on the ground away from his vehicle.

Sergeant Parry acknowledged that he was familiar with traffic-stop protocol taught as part of the Peace Officer Standards and Training course and agreed that the protocol includes advising the dispatcher that the officer is out with a civilian. R 137, at 54. Parry conceded that this part of the established routine was for officer safety and that it also advised the dispatcher that the officer is out of his vehicle and in contact with a member of the public. R 137, at 54. Sergeant Parry further acknowledged that, in initiating a traffic stop, an officer has the right and a duty to identify the driver by driver’s license. R 137, at 57-58. Parry also agreed that part of the protocol was to request vehicle

registration and proof of insurance. R 137, at 58. Detective Jessop likewise testified that he was familiar with this protocol. R 137, at 89.

We know that the stop was initiated at approximately 11:45 p.m. R 137, at 25-26, 28-29, 62-63. None of the officers advised the dispatcher upon the initiation of the stop. R 137, at 61-63, 89, 115. None of the officers asked the defendant to produce his driver license, vehicle registration, or proof of insurance. R 137, at 61-64, 89-92, 98-99, 115-117.

Police Reports Document Only Events Associated with the Narcotics Investigation.

Sergeant Parry called for the K-9 unit at 12:03 a.m. R 137, at 32-34. We know that the K-9 unit arrived and had finished the sniff by 12:12 a.m. R 137, at 33-34. On the other hand, while we know that a tint meter was eventually brought to the location of the stop, we do not know who, if anyone, requested it. R 137, at 30. More importantly, we do not know when it was requested. Indeed, the only evidence that sheds any light on the question of whether a tint meter was requested before the officers were “detoured” by the activities associated with the advancement of their narcotics investigation was Sergeant Parry’s testimony suggesting that the tint meter *arrived* on scene at “[s]ometime before midnight twelve,” which would have been at least three minutes before the K-9 was even summoned. R 137, at 69.

Assuming that one of the task force officers actually called for a tint meter, it is not clear that the call was made before Sergeant Parry called for the K-9 unit or even that the call for a tint meter was made before the task force had completed its narcotics

investigation. R 137, at 29-30, 69, 96-97, 118-119. On the other hand, it is undisputed that during the time intervening between the stop and summoning of the K-9 unit, no officer did anything typically associated with the clearing of a traffic stop. R 137, at 61-64, 89-92, 98-99, 115-117. Indeed, there is no evidence that any officer, at anytime during the entire encounter, ever required the defendant to produce a driver license, vehicle registration, or proof of insurance.

Nothing about the Pretext Stop Resembled a Traffic Stop. Defendant contends that if the police are going to be able to conduct pretext stops, the pretense of making a traffic stop must extend beyond the initiation of the stop and the encounter must, on some level, resemble a traffic stop.

Defendant further contends that if the police are going to be able to advance the argument that they did not extend the duration of the defendant's detention because a tint meter was not brought to the scene until after their drug investigation had developed probable cause to search the defendant's vehicle, they must, at a minimum, be required to demonstrate that they took reasonable measures to prosecute the investigation of the traffic violation before they embarked upon the detour into the investigation of the suspicions that actually motivated the stop. In other words, even if the tint meter did not arrive on scene until after the K-9 sniff, that fact would really mean nothing without evidence demonstrating that a tint meter was at least requested before task force officers were "detoured" by their desire to investigate their subjective suspicions.

In the instant case, there is no evidence that any call for a tint meter was made before the K-9 unit was summoned. Indeed, it is not clear that any call for a tint meter was made before task force officers had concluded their narcotics investigation. R 137, at 29-30, 69, 96-97, 118-119.

Defendant acknowledges that the district court made a finding that “both a tint meter and a K-9 unit were requested shortly after the stop, and that the tint meter did not arrive until after the arrival of the K-9 unit.” R 59-60. Defendant concedes that it was within the district court’s prerogative to reject Sergeant Parry’s recollection concerning the time of the arrival of the tint meter in relationship to the arrival of the K-9 unit (R 137, at 69) and to embrace Detective Jessop’s memory of those events (R 137, at 96-97). However, the finding that “both a tint meter and a K-9 unit were requested shortly after the stop” is not supported by evidence.

The best evidence concerning when and whether officers call for a tint meter is found in the prosecutor’s direct examination of Sergeant Parry:

Q [BY THE STATE’S PROSECUTOR] And while you were with Mr. Navarro, you said you talked to him about the window tint violation. Did you request a tint meter to be brought to the location?

A [BY SERGEANT PARRY] I can’t remember if it was me that requested it or not. One did come. Somebody had requested one. It very well could have been me. It would make sense.

R 137, at 29-30.

The K-9 unit was requested about 18 minutes after the stop. *See* R 137, at 25-26, 28-29, 32-34, 62-63. The district court's finding suggests that a tint meter was requested within the same time frame. "[B]oth ... were requested shortly after the stop." R 59-60. However, the officers did not document when the tint meter was requested or who requested it.

Even if we assume that both a tint meter and a K-9 unit were requested during roughly the same time frame, it is not clear why officers would have waited 18 minutes to request a tint meter, particularly in light of the fact that they were not busy checking the defendant's license, registration, or insurance or running a warrants check. It is apparent that they spent some of this time running the defendant's criminal history in an attempt to determine if he was a convicted felon. R 137, at 65.

There is nothing in the record that suggests that, prior to conducting the K-9 sniff, the officers saw, heard, or smelled anything that would have warranted any extension of the traffic stop. Accordingly, the State contends that the officers did not extend the traffic stop because they were still waiting for the arrival of a tint meter when the K-9 arrived. The tint meter was apparently requested at about the same time that the officers called for the K-9 unit,⁴ some 18 minutes after making the stop. None of this time was spent in following traffic stop protocol, but was apparently consumed in concluding that the officers were not going to be able to arrest the defendant for being a felon in possession of a firearm.

⁴At least the district court's findings identify no distinction between the time in summoning one as opposed to the other. R 59-60.

The task force officers documented everything they did in connection with their narcotics investigation but failed to document the one thing they claim to have done in the interest of advancing the investigation of the only legitimate reason for initiating the stop—the window tint violation. While there is evidence that the K-9 unit was requested about 18 minutes after the stop, the record does not establish when a tint meter was requested or that one was requested during that time frame. R 137, at 29-30, 69, 96-97, 118-119. However, the record clearly establishes that, prior to calling for the K-9 unit, none of the task force officers asked the defendant to produce a driver's license, vehicle registration, or proof of insurance. Moreover, the record contains no evidence that establishes that, prior to calling for the K-9 unit, any of the task force officers did anything to clear the traffic stop. R 137, at 61-64, 89-92, 98-99, 115-117.

Although it is apparent that the officers had ample reason to stop defendant's vehicle for a window tint violation, it is obvious that the equipment violation was a pretext for initiating the stop. Sergeant Parry seems to concede as much. R 137, at 44-45. While this fact is not fatal to the State's position, the fact that the drug task force did nothing to perpetuate the pretense of a traffic stop after the defendant was detained is problematic. It is telling that the officers documented the fact and time of their requesting the K-9 unit and the time when the drug sniff was concluded, but did not document the time of the stop by contacting the dispatcher, never asked the defendant to produce a driver's license, vehicle registration, or proof of insurance, and cannot identify who called for the tint meter, when the call was made, or the time the tint meter arrived on scene.

If the evidence that the State has produced in support of the warrantless search in the instant case is deemed satisfactory, the protection that the Utah Supreme Court attempted to preserve when it abolished the pretext stop doctrine in *State v. Lopez*, *supra*, will be rendered an unenforceable illusion.

POINT III

POLICE DID NOT HAVE REASONABLE SUSPICION TO INITIATE A STOP OR EXTEND DEFENDANT'S DETENTION FOR THE PURPOSE OF INVESTIGATING A WEAPONS VIOLATION.

Although the district court limited its analysis to the window tint violation, the defendant notes that, in the lower court, the State had also contended that, in addition to probable cause to detain the defendant for a traffic violation, the detectives also had reasonable suspicion to stop and detain the defendant for the purpose of investigating a weapons violation. In the district court, the State argued:

In this case, the task force received a tip that the defendant claimed that he "had guns" and, if stopped by police, would "shoot it out with them." This is a highly reliable tip because it came from a known, uncompensated, citizen informant. This information became highly relevant to the detectives when the defendant showed up unexpectedly during surveillance of a business property late at night.

R 37.

The State went on to argue:

Even if the Court determines that detectives did not have sufficient reasonable suspicion to detain the defendant for a weapons violation at the inception of the traffic stop, detectives certainly had reasonable suspicion of a weapons

violation when the defendant admitted there was a firearm in the vehicle in response to Detective Nuccitelli's questioning during the initial contact.

R 37-38.

This argument is clearly without merit. Defendant's admission that there was a firearm in the vehicle did not raise reasonable suspicion of a weapons violation because the police did not have a reasonable basis for concluding that the defendant was a restricted person. Sergeant Parry's knowledge that the defendant had been convicted of a felony some years earlier did not establish reasonable suspicion that he was still a restricted person. *See State v. Houston*, 2011 UT App 350, 263 P.3d 1226 (officer reasonably relied upon information from state trooper, where trooper had knowledge that defendant's driver license had been revoked until 2012, and therefore had reasonable suspicion that the defendant, who the trooper observed driving in November 2008, was doing so in violation of the law, particularly, where the trooper, "just a few days before," had "verified in a Driver License Division computer database that [defendant's] license was still revoked.").

While Sergeant Parry, at some point in time, had been under the mistaken impression that the defendant was a restricted person as a result of a felony conviction, he did not suggest that his fellow officers initiate a stop on this basis. R 137, at 27-28, 44-45. Indeed, Detectives Jessop and Nuccitelli initiated the stop based upon the window tint violation. R 137, at 73, 77-78.

Even if the stop could somehow be justified on the basis of information that the task force had received prior to the evening in question, this information did not provide a legal basis for extending the defendant's detention. After the defendant was stopped and told Detective Nuccitelli that he had a firearm in his vehicle, the police did not arrest him or seize the weapon on the theory that he was a restricted person, apparently because by that point in time they knew that the defendant's conviction had been reduced or expunged. R 137, at 65. At that juncture, there are was no other basis for believing that the defendant was a restricted person or that his possession of a firearm was prohibited by law.

CONCLUSION

The evidence that the State offered in support of this warrantless search fails to demonstrate that task force officers took any measures to clear the traffic stop before embarking upon their narcotics investigation. In the final analysis, the record does not demonstrate that officers took any measures to clear the traffic stop before concluding their narcotics investigation.

RESPECTFULLY SUBMITTED this 18th day of March, 2016.

Gary W. Pendleton
Attorney for Defendant/Appellant

CERTIFICATE OF COMPLIANCE

I, Gary W. Pendleton, as the Defendant and Appellant's attorney of record and pursuant to Rule 24(f)(1)(C), hereby certify that the Appellant's Brief is printed in 13-point Times New Roman and contains 6,067 words and 549 lines of text. This representation is based upon information obtained through the use of the word count function of the WordPerfect program that was used in preparing the brief.

DATED this 18th day of March, 2016.

Gary W. Pendleton
Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

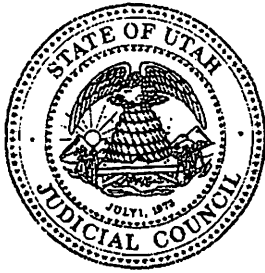
I do hereby certify that on this 18th day of March, 2016, I did personally mail or cause to be mailed, U.S. Mail, postage prepaid, two (2) true and correct copies of the above and foregoing **BRIEF OF APPELLANT** to Laura B. Dupaix, Utah Attorney General, Criminal Appeals Division, 160 East 300 South, 6th Flr., P.O. Box 140854, Salt Lake City, UT 84114-0854.

Gary W. Pendleton
Attorney for Defendant/Appellant

ADDENDA

District Court's Handwritten Ruling

Findings, Conclusions, and Order on
Defendant's Motion to Suppress



FILED 6/9/14
 Date
 FIFTH DISTRICT COURT
 WASHINGTON COUNTY

IN THE FIFTH JUDICIAL DISTRICT COURT
 IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

TO: Judge John J. Walton

RE: CASE # 1315 01328

Plaintiff: State of Utah

VS.

Defendant: Chance Aric Navarro

On the 23 day of May, 2013, a Request to Submit for Decision for ruling was filed by [Attorney for Plaintiff] [Attorney for Defendant] Other: _____

The following motions are submitted for decision:

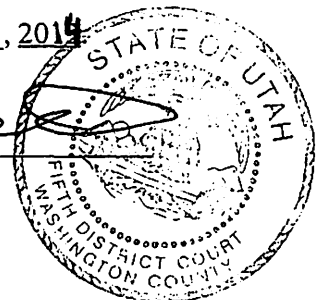
☐ PLA's ☐ DEF's Motion for Summary Judgement
☐ PLA's ☐ DEF's Motion for Judgement on the Pleadings
☐ PLA's ☐ DEF's Motion to: ☐ Dismiss ☐ Compel ☐ Continue
☐ PLA's ☒ DEF's Other: Motion to Suppress Evidence

COURT'S RULING: _____ Set Hearing Approximate Length: _____

Other: Motion to Suppress Denied - Court finds that window tint violation was the basis of an appropriate stop... and that both a tint meter and K-9 were requested quickly after stop and the tint meter did not move until after K-9.
Mr. Gentry to prepare Findings & Conclusions & Order.

Dated this 5 day of June, 2014


 District Court Judge
 John J. Walton



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 131501328 by the method and on the date specified.

BY HAND: ERIC R GENTRY
BY HAND: GARY W PENDLETON

Date: 06/09/2014

/s/ TIPPY LASTOWSKI

Deputy Court Clerk



Brock R. Belnap #6179

Washington County Attorney
Eric R. Gentry #9580
Deputy Washington County Attorney
33 North 100 West #200
St. George, Utah 84770
(435) 634-5723

FIFTH DISTRICT COURT
WASHINGTON COUNTY, STATE OF UTAH

STATE OF UTAH,
Plaintiff,

vs.

CHANCE ARIC NAVARRO,
Defendant.

FINDINGS, CONCLUSIONS AND ORDER
ON DEFENDANT'S MOTION TO
SUPPRESS

Criminal No. 131501328

Judge John J. Walton

The Court, having considered Defendant's Motion to Suppress and counsels' memoranda in support thereof and in opposition thereto, and being fully advised in the premises, hereby makes the following findings, conclusions and order:

The Court finds that the stop of defendant's vehicle for a window tint violation was constitutional at its inception. The Court further finds that both a tint meter and a K-9 unit were requested shortly after the stop, and that the tint meter did not arrive until after the arrival of the K-9 unit. Once the K-9 alerted on the defendant's vehicle, the detectives had reasonable suspicion of additional serious criminal activity, and could appropriately expand the investigative scope of the initial stop.

Based upon the foregoing, the Court concludes that the detectives did not act unconstitutionally in the initial detention of defendant for an equipment violation, nor did they act unconstitutionally in the expanded investigation of defendant for additional serious criminal activity.

The Court therefore denies the defendant's motion to suppress.

-----END OF ORDER-----