

2015

**State of Utah, Plaintiff/Appellee v. Timothy Joseph Adams,
Defendant/Appellant**

Utah Court of Appeals

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Case No. 20150565

**IN THE
UTAH COURT OF APPEALS**
FROM THE SIXTH JUDICIAL DISTRICT COURT OF KANE COUNTY,
STATE OF UTAH

STATE OF UTAH,
Plaintiff/Appellee

v.

TIMOTHY JOSEPH ADAMS,
Defendant/Appellant

Brief of Appellant
From Conditional Plea Agreement

Appeal from convictions of Production of a Controlled Substance and
Possession of a Controlled Substance with Intent to Distribute resulting from a
Conditional Plea Agreement and Judgment and Sentence in the Sixth Judicial
District Court, Kane County, the Honorable Marvin D. Bagley presiding.

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UTAH APPELLATE COURTS

NOV 13 2015

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IN THE UTAH COURT OF APPEALS
FROM THE SIXTH JUDICIAL DISTRICT COURT OF KANE COUNTY
STATE OF UTAH

THE STATE OF UTAH,
Plaintiff and
APPELLEE,
v.

TIMOTHY JOSEPH ADAMS,
Defendant and
APPELLANT.

BRIEF OF APPELLANT
FROM
CONDITIONAL PLEA
AGREEMENT

District Court #131600036

Appeals Case No. 20150565

BRIEF OF APPELLANT TIMOTHY JOSEPH ADAMS

This is an appeal from the Conditional Plea Agreement and Judgment and Sentence entered on July 2, 2015 in the Sixth Judicial District Court of Kane County, State of Utah. Judge Marvin D. Bagley presided over the entry of the plea and issued the Judgment and Sentence. Appellant, Mr. Adams, is not incarcerated. This brief is not an Anders brief.

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JURISDICTION OF THE COURT

While jurisdiction over this appeal originates in the Utah Supreme Court, pursuant to Utah Code Annotated, §78A-3-203(2)(i) (1953 as amended), in that it involves an appeal from a court of record in a criminal case not involving a charge of a first degree or capital felony, the case was directly filed to the Utah Court of Appeals pursuant to Utah Code Annotated §78A-4-103(2)(j) (1953 as amended).

ISSUE PRESENTED FOR REVIEW

Whether or not the trial court was correct when it denied Defendant's Pre-Trial Motion to Suppress Evidence determining that Utah law sufficiently provides for an emergency aid doctrine¹ exception to the warrant requirements, and that under the facts of this case, the exception applied.

¹ As set forth in *Salt Lake City v. Davidson*, 2000 UT App 12, ¶12-13, 994 P.2d

STANDARD OF REVIEW FOR THE ISSUE PRESENTED

The standard of review is one of “review for correctness” because this is a criminal case and poses a mixed question of law and fact. *See State v. Richards*, 2009 UT App 397, ¶ 7, 224 P.3d 733; *State v. Morris*, 2009 UT App 181, ¶ 5, 214 P.3d 883 (providing that a trial court’s decision to deny a motion to suppress evidence presents a mixed question of law and fact: appellate court reviews factual findings for clear error and its legal conclusion, including its application of the legal standard to the facts, non-deferentially for correctness); *State v. Wilkinson*, 2008 UT App 395, ¶ 5, 197 P.3d 96 (providing that challenges to suppression rulings present questions of law reviewed for correctness without deference to the trial court’s application of law to facts); *State v. Baker*, 2008 UT App 115, ¶ 8, 182 P.3d 935; *State v. Martinez*, 2008 UT App 90, ¶ 3, 182 P.3d 585 (providing that appellate courts give no deference to trial court’s application of law to the facts); *State v. Weaver*, 2007 UT App 292, ¶ 8, 169 P.3d 760 (stating that suppression issue presents mixed question of law and fact); *State v. Adams*, 2007 UT App 117 ¶ 7, 158 P.3d 1134 (stating that appellate courts review a ruling on a motion to suppress for correctness, without deference to the district court’s application of the law to the facts).

CITATION TO RECORD PRESERVING ISSUE IN TRIAL COURT

Mr. Anderson first addressed the issue of the suppression of evidence when his counsel filed the Motion to Suppress Evidence. Record at Page 57-60. The Motion was thereafter amended. Record at Page 70-75. Ultimately the Court ruled on the motion denying it by Memorandum Decision. Record at Page 312-318.

STATEMENT OF GROUNDS SEEKING REVIEW OF AN ISSUE NOT PRESERVED IN THE TRIAL COURT

The issue that is the focus of this appeal was preserved in the trial court record. Appellant does not seek review of an issue not preserved in the trial court record.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment IV.	15
Utah Code Ann., §58-37-8(1)(a)(i)	5
Utah Code Ann., §58-37-(8)(a)(iii).	6
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Utah Code Annotated §78A-4-103(2)(j) (1953 as amended).	7

STATEMENT OF THE CASE

On or about May 8, 2015 in the Sixth Judicial District Court in Kane County, Utah, Defendant/Appellant was convicted by his admission contained in the Conditional Plea Agreement and Statement of Defendant. Record at page 335-340. His conviction by conditional plea was to the offenses of Count 1 of the Information: **PRODUCTION OF A CONTROLLED SUBSTANCE in a Drug Free Zone**, a Second Degree Felony in violation of Utah Code Ann., §58-37-

8(1)(a)(i); and Count 2 of the Information: **POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE in a Drug Free Zone**, a Second Degree Felony in violation of Utah Code Ann., §58-37-8(1)(a)(iii). Record at page 335-340. Judgment and sentence were entered July 2, 2015. Record at page 344-346. Notice of Appeal was timely filed on July 9, 2015. Record at page 352-353. This appeal follows.

This appeal is from the finding of “guilty” pursuant to the Conditional Plea Agreement and Statement of Defendant. Record at page 335-340. The focus of the appeal is whether the court properly denied a motion to suppress evidence.

This is an appeal from the final judgment in the Sixth District Court of Kane County, State of Utah, sentencing the Defendant to: Count 1 (of the Information) a term of 1-15 years in the Utah State Prison, with a fine including statutory surcharge and court security fee in the amount of \$19,033.00; and Count 2 (of the Information) a term of 1-15 years in the Utah State Prison with a fine including the statutory surcharge and the court security fee in the amount of \$19,033.00. The Court suspended the prison sentence and all but \$750.00 of the fine, and placed the Defendant on probation for 36 months subject to terms and conditions. Record at page 344-351.

While jurisdiction over this appeal originates in the Utah Supreme Court, pursuant to Utah Code Annotated, §78A-3-203(2)(i) (1953 as amended), in that it

involves an appeal from a court of record in a criminal case not involving a charge of a first degree or capital felony the case was directly filed to the Utah Court of Appeals pursuant to Utah Code Annotated §78A-4-103(2)(j) (1953 as amended).

The Notice of Appeal was timely filed on July 9, 2015. Record at page 352-353.

STATEMENT OF THE FACTS²

At the Preliminary Hearing the investigating officer testified that at the time of the event, Mr. Adams, the Defendant, was living alone in the residence. *Prelim Transcript*³ at page 16 lines 13-16.

Mr. Adams' mother notified law enforcement that she had not heard from the Defendant for four days. *Prelim* at page 24 lines 19-21. She requested a welfare check on her son. The officer was contacted by dispatch to perform the welfare check at approximately the evening.

On March 2, 2013, Defendant's mother, Lynn Clark, called Kane County Dispatch and requested that an officer check on her son at his home in Big Water, Utah. Ms. Clark reported that she had not heard from her son in three days, that he has ongoing health issues and that she was very worried. In response, Kane

² The facts are recited largely from the Memorandum Decision issued by the trial court. In so doing the Appellant takes no issue with the recited facts. Since those facts support the trial court's decision they are appropriately stated. *Davidson*, (Citation omitted.)

³ References to the transcript of the preliminary hearing will hereafter be stated as "*Prelim.*"

County Dispatch contacted Marshall Russell Johnson of the Big Water Marshall's Office and informed him of the request for a welfare check. Because Marshall Johnson was leaving town at the time, he asked Dispatch to contact Deputy Rob Johnson of the Kane County Sheriff's Office and ask him to perform the welfare check

Deputy Johnson proceeded to Defendant's home to perform the welfare check. He knocked on the front door but no one answered. He found evidence around the home suggesting someone had recently been repairing leaky pipes under the home and working on the top of the house. There was an extension cord that powered a light running from an open window to a crawl space under the home. There were tools on top of the roof near an air conditioning unit and the area near the crawl space was moist. There were no vehicles present on the property. *Prelim* at pages 38-45.

Deputy Johnson yelled into the home but no one answered. Defendant's neighbors told the Deputy that they had not seen the Defendant for two or three days.⁴

Deputy Johnson observed there was a light on in the living room but could not see anything in the home from outside. Deputy Johnson called Defendant's mother to discuss the situation with her. Defendant's mother relayed her previous

⁴ This is a period of time less than the officer stated at the preliminary hearing.

concerns about her son to Deputy Johnson and asked him to "use whatever means necessary" to enter the home to ascertain that her son was okay.

Deputy Johnson entered the home using the open living room window. Upon entering, Deputy Johnson immediately saw what he described as several marijuana plants and a plant light. He looked around the home in places where the Defendant might have been, but could not locate him and left.

Approximately a week later, the Defendant was seen in his front yard. On March 12, 2013, the Marshall filed an affidavit and obtained a search warrant to search the home for marijuana plants. On March 12, 2013 the Marshall in company with the investigating Deputy and others executed the warrant.⁵

SUMMARY OF ARGUMENT

Appellant had apparently not phoned his mother for four days. She became concerned for his welfare and notified law enforcement of her concern. The officers attempted to make a welfare check but got no response when they knocked on the door of his residence. They could not see the Defendant inside when they looked through a window. Neighbors reported that they had not seen the Defendant in two or three days. At the further urging of the Appellant's mother, officers entered the home without a warrant through an unlocked window.

Once inside, the officers observed what they considered to be growing

⁵ This rendition of facts is largely quoted from the Memorandum Decision, Record at page 312-318.

marijuana plants. After observing the plants, and failing to find the Defendant inside the residence, they left. Ten days later they secured and served a warrant to search the residence.

A Motion to Suppress the evidence was submitted to the Court on the basis that the warrantless search was not excused by the known exceptions to the warrant requirements under 4th Amendment jurisprudence. The Court, however, ruled that the facts of this case did qualify as an 'emergency aid doctrine' exception to the warrant requirements and denied the motion. The court was mistaken.

ARGUMENT

When police enter a private residence, they must do so with a warrant unless the entry is supported by both probable cause and exigent circumstances. *State v. Yoder*, 935 P.2d 534, 540 (Utah App. 1997). The burden to establish both probable cause and exigent circumstances is heavy particularly because of the heightened expectation of privacy enjoyed by citizens in their own homes. *State v. Larocco*, 794 P.2d 460, 470 (Utah 1990). In lieu of probable cause and exigent circumstances, our courts have recognized the emergency aid doctrine as an exception to the warrant requirements. But to protect the privacy expectation in one's home, the exceptions are strictly limited in application or availability. The elements of the emergency aid doctrine exception are clear.

In *Davidson*, the Utah Supreme Court established the three prong test for the

authorization of the emergency aid doctrine. Pursuant to that test, a warrantless search is lawful under the emergency aid doctrine only if the following requirements are met:

- (1) Police have an objectively reasonable basis to believe that an emergency exists and believe there is an immediate need for their assistance for the protection of life.
- (2) The search is not primarily motivated by intent to arrest and seize evidence.
- (3) There is some reasonable basis to associate the emergency with the area or place to be searched. That is, there must be a connection with the area to be searched and the emergency. *Davidson*, at ¶12.

The court discusses the distinctions between probable cause and the substituted 'reasonable basis' stated in the third prong of the emergency aid doctrine test. "In general, '[p]robable cause means a "fair probability that contraband or evidence of a crime will be found." (Citations omitted). The third prong of the emergency aid doctrine, on the other hand, "asks whether there was some reasonable basis to associate the place searched with the emergency. (Citations omitted.) Thus, the search "of one individual is undertaken for the purpose of facilitating efforts to tend to the possible health needs of others." (Citation omitted.) The difference between exigent circumstances and emergency aid situations is that in the former there is probable cause but no warrant, while in the latter there is no probable cause to justify a warrant and the purpose is not to

arrest, search, or gather evidence. (Citation Omitted.) Because this reasonable basis must approximate probable cause and is used to justify abrogation of Fourth Amendment rights, emergency aid searches should be "'strictly circumscribed by [circumstances] which justify its initiation." (Emphasis added.) (Citations omitted.)

One may reasonably conclude that unless the evidence establishes the elements required for the applicability of an exception, evidence obtained without following the requirements must be suppressed. *State v. Humphrey*, 138 P. 3d 590, 594 (Utah App. 2006).

The burden of proof at the suppression hearing stage of the proceedings is generally preponderance of the evidence. *State v. Rynhart*, 2005 UT 84, 10. In this case, although the legal burden of proof is the lowest legal standard, the trial court erred in applying that standard. The weight of the evidence in the record clearly preponderates against the State's evidence.

This case turns on the question of whether an exception to the warrant requirements can be applied if the police did have 1) an objectively reasonable basis to believe that an emergency exists, and a belief that there is an immediate need⁶ for their assistance for the protection of life.⁷ 2) Their search must not be

⁶ This prong of the exception is arguably the equivalent of exigent circumstance.

⁷ This prong of the exception raises the level of exigent circumstance to exclusively the protection of life as opposed to the dissipation of evidence of a crime. This is

primarily motivated by intent to arrest and seize evidence. 3) There must be some reasonable basis to associate the emergency with the area or place to be searched. That is, there must be a connection with the area to be searched and the emergency. *Davidson*, at ¶12-13.

The mother's concern that her adult son had not contacted her in four days did not raise to the level of an emergency as contemplated by law. Although she reported her son's ongoing health issues, the record does not support her statements with evidence explaining the basis for her opinion and report regarding those issues. The neighbors had not seen the Defendant for two or three days, but none had called law enforcement for a welfare check. There was recent activity around the home including moist dirt, an extension cord, activity on the roof of the home and a light on inside the home. There was no reported sign of injury such as blood etc. No vehicles were present on the property. Objectively observing, no one was home.

The officer did not have an objectively reasonable basis to believe that an emergency existed or that there was an immediate need for assistance for the protection of life. *Prelim* at pages 38-45. The record of the officer's testimony also does not disclose any particular health issue that might have afflicted the Defendant justifying a conclusion that his life was or could have been in danger.

so because the exception is permitting the intrusion into the home of our citizenry.

There was no objective information that suggests that there was an immediate need for assistance to protect life.

The officers did not have a reasonable basis to associate the emergency with the area or place they searched. They did not observe the Defendant lying on the floor inside, nor was there any indication that there was distress or foul play.

There was no indication that there was trouble within the residence. There was silence when the officer knocked – no response from inside. Because there were no sounds inside and evidence of emergency of foul play and no vehicles present on the property, the reasonable conclusion is that no one was home. There is insufficient evidence to conclude otherwise when considering the totality of the circumstances.

It is conceded by Appellant that the officers' motivation in entering the home was not primarily motivated by intent to arrest and seize evidence. They were surprised to observe the plants and equipment within the home. There is nothing in the record of any concern or suspicion of illegal activity at the residence. They were urged to enter the home by the mother of the Appellant. It was her concern that they were addressing, not their own and not those of Appellant's immediate neighbors.

The Fourth Amendment to the United States Constitution protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against

unreasonable searches and seizures.’” *State v. Friesen*, 1999 UT App 262, 263. Utah likewise recognizes the importance of the 4th Amendment protections. The Supreme Court of the United States has stated: “The touchstone of our analysis under the Fourth Amendment is always ‘the reasonableness in all the circumstances of the particular government invasion of a citizen’s personal security.’” *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968)).

When officers entered the Appellant’s home, they did so outside the protections of the Fourth Amendment and outside the established emergency aid doctrine exception. Their entry, without a warrant, violated his privilege to be secure in his home.

MARSHALLING THE EVIDENCE

The testimony of Officer Rob Johnson at the evidentiary hearing for the Motions to Suppress and to Quash held January 9, 2014 establishes that the officers who responded to the welfare check had no authorization to enter the home. Transcript of Evidentiary Hearing page 11. The following exchange occurred starting at line 7:

Q. . . .With respect to the welfare check, nobody who lived in the home gave you permission to enter the home, did they?

A. No.

...

Q. You crawled through a window, didn't you, to get into the home at that point?

A. Yes.

Q. You didn't have a warrant, did you?

A. No.

Q. Nobody let you inside the home, did they?

A. No.

Q. Nobody opened the door for you to come into the home, did they?

A. No.

Q. There was nobody home, was there?

A. No.

Q. You looked through the windows prior to entering the home, didn't you?

A. Tried. They were pretty well covered. You couldn't see much.

Q. So you really didn't see anything?

A. You could see, yeah, just the light was on in the front room that I ended up crawling through, and really couldn't see anything through it. (Emphasis added.)

Comment: Then the officer testifies that he saw no over-turned furniture or

anything like that; no broken glass; no signs of a break in; no signs that a fight had taken place. Then continuing:

Q. You really didn't see anything that concerned you at that point, did you?

A. Well, yes and no, nothing that I found to be exclusively by itself concerning, but like I mentioned before, there was a light on underneath the home, like an extension cord and a light ran underneath the crawl space. There was some tools there. It looked like somebody had been working on maybe a leaky pipe or something. Then there was a ladder laying against the house, and I did crawl up that ladder and look on top to make sure Mr. Adams wasn't on the roof working on something. There was some tools laying around the AC unit, but they had rust on them, didn't look like anybody had used those tools for quite some time. . . .So no, in and of itself, there was nothing there that I found specifically concerning, no.

Comment: The officer then testifies that he did not smell anything outside the home that concerned him; did not see any signs of forced entry; there were no sounds of distress or any sounds coming from the house. The officer then explains that there were no vehicles at the residence including a motorcycle that the officer believed the Appellant owned.⁸ Continuing at page 15 line 3:

Q. Didn't all the physical evidence you observed prior to entering Mr. Adam's home indicate that nobody was home?

⁸ See *Prelim* at pages 38-45.

A. Yeah. I had no indication that said that he was there.

Q. No one answered the door, did they?

A. No.

...

Q. There was no blood or other indication of any injury?

A. No. Well, the indication was just that his mother and the Big Water Marshal had both stated that he was in poor health, and the mother was used to hearing from him frequently every day or every other day, and hadn't heard from him for several days.

In addition to the testimony evidence, marshaling also includes the recitation of the facts and other content in the Memorandum Decision.

END OF MARSHALLING THE EVIDENCE

ARGUMENT CONTINUED

The testimony preserved in the hearings in this case as well as the rendition of the facts made by the court in denying the Motion to Suppress demonstrates that the investigating officer entered the residence without permission, without observing information that would lead him to be concerned about the preservation of life, and without a warrant. To the officer on the scene, there was no emergency. His actions were based on him being urged by a mistaken third party.

Two of the elements stated in the *Davidson* case are not satisfied. When the

two elements remain unsatisfied, the exception to the warrant requirements known as the 'emergency aid doctrine' is not available to preclude the need to follow the warrant requirements. There was no reason to circumvent getting a warrant. There was no objective evidence of an emergency that required intrusion into the home without a warrant. To believe otherwise would be tantamount to believing that when a citizen is away on vacation or grocery shopping and away from home or angry with one's mother and not calling frequently enough for her, the State should have the exception to the warrant requirement available. The entry of the residence by the officer was not lawful. The evidence obtained through the unlawful entry, should have been suppressed by the trial court.

The 10th Circuit Court of Appeals has stated "[a] warrantless search of a home is presumptively unreasonable, and evidence obtained from such a search is inadmissible, subject only to a few carefully established exceptions." *U.S. v. Harrison*, 639 F3d 1273, 1278 (10th Cir. 2011). In the instant case, the exception fails.

CONCLUSION


Because the court below erred in denying the Motion to Suppress Evidence in this case, the Defendant/Appellant has been wrongfully convicted of a crime in this State. His conviction by conditional plea should be reversed.

Because the evidence from the first warrantless entry must be suppressed, it

cannot be used as a basis to find probable cause for the resulting search warrants.


The convictions based on evidence obtained during the initial improper search and resulting warrants should be reversed.

DATED this 5th day of November 2015.


Dale W. Sessions, Esq.
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(f)(1), Utah R. App. P., this brief contains 5,851 words, including the table of contents, table of authorities and addenda. I further certify that in compliance with rule 27(b), Utah R. App. P., this brief has been prepared in a proportionally spaced typeface using Microsoft Word in New York Times 14 point font.


Dale W. Sessions, Esq.
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on the 5th day of November 2015, a copy of the foregoing

BRIEF OF APPELLANT was mailed to:

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by first class postage pre-paid.

Also, in accordance with Utah Supreme Court Standing Order No. 8, and Rule 26, Utah R. App. P., a courtesy brief in searchable portable document format (pdf) was filed with the Court of Appeals and served on Appellee.


Dale W. Sessions, Esq.

NOV 13 2015


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IN THE UTAH COURT OF APPEALS
FROM THE SIXTH JUDICIAL DISTRICT COURT OF KANE COUNTY
STATE OF UTAH

<p>THE STATE OF UTAH,</p> <p>Plaintiff and APPELLEE, v.</p> <p>TIMOTHY JOSEPH ADAMS, Defendant and APPELLANT.</p>	<p>CERTIFICATE THAT NO ADDENDUM IS REQUIRED IN THIS CASE</p> <p>Appeals Case No. 20150565</p>
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COMES NOW, the Appellant, TIMOTHY JOSEPH ADAMS, by and through his public defender attorney on appeal, DALE W. SESSIONS, and Certifies that no Addendum is being submitted with this brief, none being required.

Dated this 10th day of November, 2015


Dale W. Sessions, Attorney for Appellant

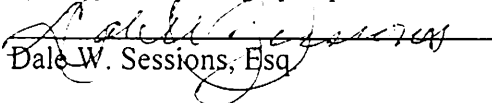
MAILING CERTIFICATE

I certify that on the 10th day of November, 2015, a copy of the foregoing Certificate that No Addendum is Required in this case was mailed to:

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Salt Lake City, UT 84114-0230

Laura Dupaiz, Esq., Assistant Attorney General
PO BOX 140485
Salt Lake City, UT 84114-0485

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Dale W. Sessions, Esq.