

2002

# Utah v. Marc W.Schumacher : Brief of Appellant

Utah Court of Appeals

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Paul Bittmenn; Attorney for Appellee.

Marc W. Schumacher; Appellant pro se.

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IN THE UTAH COURT OF APPEALS



\_\_\_\_\_  
STATE OF UTAH,

Plaintiff/Appellee

Case No. 20020478-CA

vs.

MARC W. SCHUMACHER,

Defendant/Appellant

\_\_\_\_\_  
BRIEF OF APPELLANT  
\_\_\_\_\_

APPEAL FROM THE CIRCUIT COURT OF IRON COUNTY  
5<sup>th</sup> DISTRICT  
HON. J. PHILIP EVES, JUDGE

Marc W. Schumacher  
PO Box 287  
1782 East 2900 North  
Paragonah, UT 84760  
435-559-7172

Appellant, pro se

Paul Bittmenn  
Assistant Prosecuting Attorney  
PO Box 421  
Cedar City, UT 84721

Attorney for Appellee  
\_\_\_\_\_

**FILED**  
Utah Court of Appeals

JUL 12 2002

Paulette Stagg  
Clerk of the Court

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

State of Utah, )  
 )  
Plaintiff and Appellee, )  
 )  
v. )  
 )  
Marc William Schumacher, )  
 )  
Defendant and Appellant. )

ORDER

Case No. 20020478-CA

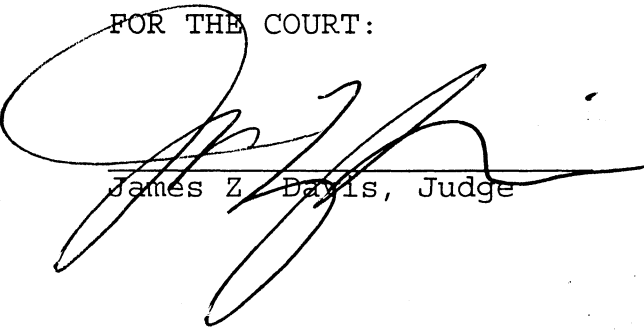
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This case is before the court on the State's motion for summary disposition pursuant to rule 10(a)(2) of the Utah Rules of Appellate Procedure. The State did not cite any legal authority or file a memorandum of law in support of the motion.

IT IS HEREBY ORDERED that the State's motion for summary disposition is denied and deferred pending plenary presentation and consideration of the appeal.

DATED this 11 day of July, 2002.

FOR THE COURT:

  
James Z. Davis, Judge

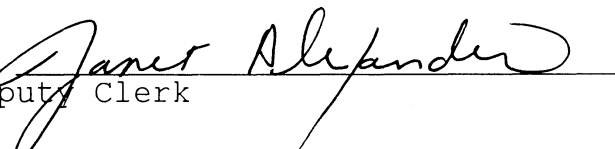
CERTIFICATE OF MAILING

I hereby certify that on July 12, 2002, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

SCOTT M. BURNS  
IRON COUNTY ATTORNEY'S OFFICE  
97 N MAIN STE 1  
CEDAR CITY UT 84720

MARC W. SCHUMACHER  
PO BOX 257  
PARAGONAH UT 84760

Dated this July 12, 2002.

By   
Deputy Clerk

Case No. 20020478

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### **STATEMENT OF JURISDICTION**

This Court has jurisdiction under UCA Section 78-2a-3 and Rule 5, Rules of the Utah Court of Appeals.

### **NATURE OF THE PROCEEDINGS**

Defendant/Appellant's Motion to Suppress was denied in the trial court. As part of the Defendant/Appellant's plea, the issue of the validity of the stop by the police officer has been preserved for appeal and is now taken.

### **ISSUE**

Can a police officer, who hears about a vehicle running a stop sign but does not personally observe it, legally stop that vehicle and conduct an investigation without reasonable suspicion of criminal activity?

Appellant answers: "NO"

Appellee answers: "YES"

The standard of review is correctness.

## **DETERMINATIVE CONSTITUTIONAL AND**

### **STATUTORY PROVISIONS**

The following constitutional and statutory provisions are determinative of the issue presented for appeal in this cause:

#### **AMENDMENT IV, CONSTITUTION OF THE UNITED 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.

#### **ARTICLE I, SECTION 14, CONSTITUTION OF UTAH**

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

#### **UCA Section 77-7-15**

A peace officer may stop any person in a public place when he has 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.



### **NATURE OF THE CASE**

Appellant was charged with "DUI" and "Open Container" in the Iron County Circuit Court. The evidence available to the State to support prosecution was discovered as a result of a traffic stop and subsequent investigation and search of the vehicle. Appellant claims the stop was unconstitutional and all evidence gathered therefrom should be excluded.

### **COURSE OF PROCEEDINGS**

The Appellant filed a Motion to Suppress which was denied on November 29, 2001. On April 29, 2002, Appellant pled "no contest" to the DUI with the right to appeal the legality of the stop.

### **RELEVANT FACTS**

Brent Dunlap, an undercover Narcotics Task Force Officer working in his own vehicle (T. page 17, lines 1-6), responded to a radio communication from Dispatch which received a call reporting "suspicious activity" in a parking lot involving an older green pick-up truck. Agent Dunlap saw Appellant in the parking lot in front of his green truck with the truck's hood up. The officer observed Appellant close the hood and get into his truck.

Agent Dunlap testified that there was nothing suspicious or unusual about Appellant's behavior (T. page 18, lines 16-21).

Appellant then drove out of the parking lot at an unknown rate of speed with Agent Dunlap in his unmarked vehicle following. There was no testimony that Appellant was speeding; according to the Officer: "I wasn't able to get a good pace on him" (T. page 19, line 19).

As Appellant approached a stop sign at the corner of Sage Drive and 600 South "...the vehicle did slow down but it failed to make a complete stop at the stop sign." (T. page 19, line 20).

The Appellant continued eastbound on 600 South for approximately one mile where he was pulled over and arrested by a different officer; Officer Mike Russell, of the Cedar City Police Department.

The arresting officer, Mike Russell, testified that he did not observe the failure to stop at the sign (T. page 8, lines 22-25) yet he is the one who stopped Appellant's vehicle. He testified that he was the one who stopped the Appellant and he made the stop because he heard over the radio that a green pick-up truck had run a stop sign (T. page 9, lines 1-4). After he stopped Appellant and conducted an investigation, Officer Russell issued a citation for DUI and "open container".

There was no testimony from either officer that Appellant was weaving, driving erratically, or even driving at an excessive speed. There was no testimony of any suspicious activity. There was no testimony of any suspected criminal activity.

### **SUMMARY OF ARGUMENT**

The only testimony elicited from either officer which would give rise to the issuance of *any* citation was the failure to come to a complete stop.

An officer may not stop a vehicle for a traffic violation unless he personally witnessed that violation. Absent a personal observation of a traffic violation, a vehicle may not be stopped unless there is “reasonable suspicion” of criminal activity.

Here, Officer Russell did not witness the failure to stop at the stop sign and there was no suspicion at all, let alone “reasonable suspicion”, of criminal activity.

Consequently, the stop was a 4<sup>th</sup> Amendment violation and the evidence gathered therefrom must be excluded.

### **DETAIL OF ARGUMENT**

A brief stop of a citizen by a law enforcement officer, even though the detention is brief and the purpose merely investigatory, to be lawful, requires that the officer have “specific, articulable facts” that reasonably

warrant suspicion that a crime has occurred or is being committed; United States v. Brignoni-Ponce, 422 US 873 (1975).

This “reasonable suspicion” standard is ground in the Fourth Amendment, Constitution of the United States, and Article I, Section 14, Constitution of Utah: State v. Trujillo, Utah, 739 P. 2<sup>nd</sup> 85; and, State v. Mendenhall, 446 US 544, (1980). Brief, public, and investigatory stops, which fall short of traditional arrest, are governed by this standard: Terry v. Ohio, 392 US 1 (1968). No distinction in such an investigatory stop is made between that of a pedestrian and the stop of a vehicle: Delaware v. Prouse, 440 US 649 (1979); and, State v. Sierra, 754 P. 2<sup>nd</sup> 972 (Utah App.1988); State v. Marshall, 791 P. 2<sup>nd</sup> 880 (Utah App. 1990); State v. Talbot, 792 P. 2<sup>nd</sup> 489 (Utah App. 1990); and, State v. Lopez, 873 P. 2<sup>nd</sup> 1127 (Utah 1994).

Recently, the 10<sup>th</sup> Federal Circuit Court reiterated the rule that the constitutionally mandated prerequisite for investigative detention is a reasonable suspicion of **criminal activity**: Oliver v. Woods, 209 F. 3<sup>rd</sup> 1179 (10<sup>th</sup> Circuit, 2000).

The trial Court agreed with the State’s argument that there was in fact “reasonable suspicion” for the stop because the informant who observ-

ed the failure to stop was a member of a drug task force operation and was thus "reliable." The informant's reliability is immaterial inasmuch as the case law cited by the State applies only to crimes - specifically each and every case cited by Respondent involves felonies. The standard for the stop of a felony is entirely different from the standard required for the stop of someone who has been observed doing something that does not even rise to a misdemeanor. **Each and every applicable Utah case states that a stop for a non-criminal traffic infraction is justified only if the officer personally observed the traffic violation:** State v. Hansen, 17 P. 3<sup>rd</sup> 1135 (Utah App. (2000)); Sandy City v. Thorsness, 778 P. 2<sup>nd</sup> 1011 (Utah App. 1989); Lopez, supra; Talbot, supra; Sierra, supra; and Marshall, supra.

In addition to the felony case law, the trial court relied on Utah Criminal Code 77-7-15 to support its decision. However, Utah Criminal Code section 77-7-15 does not apply to running a stop sign (the informant's only observed infraction, according to the testimony); it applies only to criminal infractions.

**There is not a single Utah case** which even suggests that the procedures and rules promulgated in Chapter 7, specifically 77-7-15 apply to non-criminal infractions. On the contrary, each and every case

interpreting this law indicates that it applies **only to crimes**:

*The reasonable, articulable suspicion contemplated in this section (77-7-15) must be based on objective facts suggesting the individual may be **involved in criminal activity**." State v. Menke, 787 P. 2<sup>nd</sup> 537 (1990).*

*In order to conclude that there was reasonable suspicion to justify stopping defendant, an officer must be able to articulate some unlawful or suspicious behavior connecting the detainee to the suspected **criminal activity**. State v. Potter, 863 P. 2<sup>nd</sup> 40 (1993).*

See also: Sierra, supra.

The language of 77-7-15 uses the term "a public offense". This terminology can only mean criminal activity, to wit:

*While standing on Main Street waiting for a parade, an officer hears a man make an off-color joke in a normal voice but loud enough that women and youngsters could hear it. Someone may be offended by the joke, and it was made on a public street. The man leaves and gets into a older green truck. The officer, being from another jurisdiction or otherwise unable or unwilling to act, telephones the local police describing the truck. The police send a cruiser in pursuit.*

Clearly the cruiser would not be able to constitutionally stop the truck. The driver committed a "public offense" but he did not commit a crime.

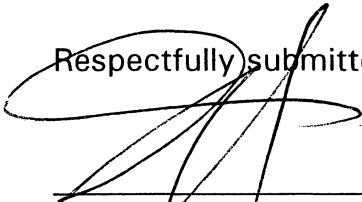
If the term "public offense" in 77-7-15 was interpreted literally and construed to mean any behavior which someone might deem offensive, save for criminal behavior, the language is overly broad and therefore unconstitutional.

### CONCLUSION AND RELIEF SOUGHT

Simply put, there was nothing for the Arresting officer to investigate - he did not witness the traffic violation and he had no suspicion of any criminal activity. Without something to investigate, his stop, investigation and search were illegal and the fruits therefrom should be excluded.

Consequently, the Appellee prays for an order suppressing all evidence gathered from the illegal search and dismissal of the charges of "DUI" and "Open Container".

Respectfully submitted,

  
\_\_\_\_\_  
MARC W. SCHUMACHER  
P. O. BOX 287  
1752 East 2900 North  
Paragonah, Utah 84760  
435-559-7172

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#### **Acknowledgment of Service:**

On August 23, 2002, I received a copy of Appellant's Appeal Brief on behalf of the attorney whose name and address appear below.

Signature: \_\_\_\_\_

Name: \_\_\_\_\_

Paul Bittmenn, Attorney for Plaintiff/Appellee  
Box 428  
97 North Main Street - Suite #1  
Cedar City, Utah 84720

## ADDENDUM



**FILED**

5th DISTRICT COURT  
IRON COUNTY  
DEPUTY CLERK \_\_\_\_\_

Defendant.

CASE NO. 015501427

TRANSCRIBED BY: Russel D. Morgan

**COPY**

1 BY MR. BITTMENN:

2 Q Okay. So you were around Cedar High?

3 A Correct. I was westbound on 600 South towards Cinema  
4 8.

5 Q And what drew your attention to the defendant's  
6 vehicle?

7 A Two things. One was the radio transmission from Agent  
8 Dunlap, who was behind the suspect vehicle giving me reports on  
9 direction of travel, that type of thing. The second thing was  
10 the truck matched the description that the dispatch had given  
11 out.

12 Q Okay. Is there a stop sign on any corner around there?

13 A Not on -- not by Cedar High School, no.

14 Q Did you see him run the stop sign?

15 A I did not.

16 Q You didn't see him run the stop sign?

17 A I did not.

18 Q Okay. How about 600 South and Sage Drive; did he run a  
19 stop sign there?

20 A According to Agent Dunlap's testimony, he would testify  
21 to that.

22 Q Okay. So you didn't see him run a stop sign?

23 A I did not. That was information from Agent Dunlap.

24 Q Did you pull him over?

25 A I did.

1 Q Was it communicated to you that he had run a stop sign?  
2 A It was.  
3 Q How?  
4 A By radio transmission.  
5 Q Okay. And -- excuse me -- when you saw him, did you  
6 turn your -- were you in a police cruiser?  
7 A I was.  
8 Q And did you turn your lights and sirens on?  
9 A I did. I made a U-turn on 600 South to follow the  
10 vehicle and initiated the stop. I turned on my overhead  
11 lights.  
12 Q Okay. How far did you have to follow him?  
13 A We had just passed Cedar High School. I believe Mr.  
14 Schumacher did not pull his vehicle over until pretty much the  
15 stop sign at 300 West 600 South. I don't know how far that  
16 would be.  
17 Q Okay.  
18 A Maybe a couple hundred yards.  
19 Q So, not very far?  
20 A No.  
21 Q Did you make contact with Mr. Schumacher?  
22 A I did at that time.  
23 Q Was he driving?  
24 A He was.  
25 Q How did you contact him, driver's side or passenger

A It's a Ford F250 extended cab, or heavy duty F250 four-wheel drive, undercover, unmarked.

Q You are an undercover agent for the task force, aren't you?

A Yes. I'm currently assigned to the Southern Utah Regional Office through the State Bureau of Investigations.

Q So wherever you go, you are in your vehicle?

A Basically, yes. I'm on-call 24 hours a day. Basically, I'm in the vehicle most of the time.

Q Okay. Do you remember seeing the defendant in his vehicle on that date?

A Yes, I do.

Q Where was that?

A First I noticed the vehicle is in the Cinema 8 Theater's parking lot. Dispatch had just put out an attempt to locate on a suspicious vehicle at, inside the parking lot at the Cinema 8 Theaters. The information we received is a person called in, stating that the truck had been there -- an older green pickup truck --

DEFENDANT SCHUMACHER: Objection, Your Honor. This is an area that's gone beyond the scope of the question. The question was, when did you first observe the defendant.

THE COURT: Sustained.

BY MR. BITTMENN:

Q Okay. So you saw him at the Cinema 8, right?

1           A    Correct.

2           Q    Okay.  Why were you at Cinema 8?

3           A    Cedar Dispatch put out an attempt to locate on a  
4                suspicious person sitting in an older green pickup.  The  
5                reporting party informed Cedar Dispatch that the truck had been  
6                there since approximately 3 p.m.  And it was shortly after  
7                9 p.m. at the time of the phone call.

8           Q    Okay.  And how far away were you when you got the call  
9                over dispatch?

10          A    I was taking exit 57, the northbound off ramp which is  
11                on the south end of Cedar City.

12          Q    So you were right there?

13          A    Yeah, within a mile or two.

14          Q    And when you got to the Cinema 8 Theaters, what did you  
15                see?

16          A    I entered the parking lot on the south end, drove  
17                through the parking lot.  Mr. Schumacher's vehicle was the only  
18                older green pickup I saw.  It was over in the northwest area of  
19                the parking lot at the time.  His hood was up.  And there was  
20                another car parked next to him.

21          Q    Okay.  Anything unusual there?

22          A    No.

23          Q    Okay.  What drew your attention to him?

24          A    It was the only older green pickup in the parking lot.

25          Q    Okay.  Could you observe him for a while?

1 A As I was pulling through the parking lot, I saw he was  
2 just shutting the hood of his vehicle. He entered his vehicle  
3 and drove out of the parking lot. As he was exiting the  
4 parking lot, he spun his tires a little bit, came out onto Sage  
5 Drive headed northbound.

6 Q Which road is sage Drive?

7 A Pardon?

8 Q Which road is Sage Drive?

9 A It's the one on the east side of the theaters but on  
10 the west side of I-15. It goes between the theaters and I-15  
11 itself. Be the west side frontage road, basically.

12 Q Okay. So he spun his tires. He started going which  
13 way?

14 A Northbound.

15 Q On Sage Drive?

16 A On Sage Drive.

17 Q Okay.

18 A It appeared that he increased his speed. I wasn't able  
19 to get a good pace on him. As we approached the intersection  
20 of 600 South Sage Drive, the vehicle did slow down, but it  
21 failed to make a complete stop at the stop sign.

22 Q Is that the one up on the hill?

23 A Correct.

24 Q So he didn't make a stop?

25 A Correct.