1984

The State of Utah v. Dennis A. Heap : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Respondent	:	
vs.	:	
DENNIS A. HEAPS,	:	Case No. 19254
Defendant/Appellant	:	

BRIEF OF APPELLANT

Appeal from a conviction and judgment of Possession of a Dangerous Weapon by a Restricted Person, a Second Degree Felony, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Ernest F. Baldwin, Judge, presiding.

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STATEMENT OF THE NATURE OF THE CASE

Appellant, Dennis A. Heaps, appeals from the judgment and conviction by the Court sitting without a jury in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Ernest F. Baldwin, Jr., Judge, presiding, of Possession of a Dangerous Weapon by a Restricted Person, a Felony in the Second Degree.

DISPOSITION IN THE LOWER COURT

Appellant was convicted on April 25, 1983 and was sentenced to the Utah State Prison for the indeterminate term of one to fifteen years, concurrent.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of his conviction of Possession of a Dangerous Weapon by a Restricted Person, a Second Degree Felony, in the Court below.

STATEMENT OF FACTS

On January 25, 1983, Salt Lake City police officer Henry Huish stopped a truck and, at gunpoint, required all of the occupants to exit the vehicle with their hands raised; then he handcuffed all the occupants immediately (Tr.37,46,58,68,84, 85), but did not tell them they were under arrest, although he told them they were subject to arrest (Tr.67,68,70). Officer Huish then searched the vehicle and found a firearm under the passenger side of the truck's bench seat, approximately 12 to 18 inches from the passenger side door (Tr.59,60).

Officer Huish subsequently questioned each of the occupants about who the gun belonged to, how it got there, and what it was doing there (Tr.62). He talked first to David McCoy, the owner and driver of the truck; he spoke with Mike Perry second, with a juvenile girl third, and with appellant last (Tr.62).

David McCoy was the only witness who testified that the gun was in appellant's possession (Tr.35,45). Mike Perry, another occupant of the truck, testified that he told Officer Huish that he had not seen the gun before (Tr.87), and that he did not tell Officer Huish that the gun was in appellant's possession (Tr.100,101). Appellant testified that he knew nothing about the gun and that he so told Officer Huish on the day he was arrested (Tr.114,124,125).

At the time of appellant's arrest for this offense, David McCoy was on felony probation; McCoy thought that a conviction, especially for possession of a firearm, would very likely cause

a revocation of his probation and would cause him to be sent to prison (Tr.52,53,54,55).

At appellant's trial in this case, David McCoy testified that appellant had the gun in his possession (Tr.35,45). Mike Perry testified that, after all the occupants of the truck except appellant were released, David McCoy made a statement to Perry regarding who had possession of the gun (Tr.90-98). The Court would not allow Perry to testify about the contents of McCoy's statement as it kept sustaining the prosecution's hearsay objection (Tr.90-98). It is clear, however, from a reading of that portion of the transcript that McCoy's prior statement, made at the scene of the arrest, was inconsistent with his testimony at trial.

Also, at appellant's trial Officer Huish testified that "one reason" for his stopping the truck was that he observed an improper lane change; he never articulated any other reasons for the stop, if there were any (Tr.58,65). Officer Huish further testified that he never gave McCoy or anyone a citation for the traffic violation (Tr.64,65), and McCoy confirmed that (Tr.51).

ARGUMENT

POINT I

THE COURT ERRED IN REFUSING TO ADMIT INTO EVIDENCE A WITNESS' PRIOR INCONSISTENT STATEMENT REGARDING POSSESSION OF THE FIREARM.

The trial in this case took place on April 25, 1983. As

the new Utah Rules of Evidence were not in effect until September 1, 1983, the applicable rule at the time of trial was Utah Rule of Evidence 63(1)(a), as contained in Utah Code Ann. (1953). That rule states:

> RULE 63
>
> HEARSAY EVIDENCE EXCLUDED--EXCEPTIONS
>
> Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:
>
> (1) Prior Statements of Witnesses. A prior statement of a witness, if the judge finds that the witness had an adequate opportunity to perceive the event or condition which his statement narrates, describes or explains, provided that (a) it is inconsistent with his present testimony. . ..

Witness David McCoy testified that appellant showed him the gun while they were in the truck, and that appellant had the gun tucked in the waistband of his pants. Later in the trial, Mike Perry, another occupant of the truck, testified as follows, in relevant part:

> A. . . . David McCoy crawled out of the police officer's car and came over and stood next to me.
>
> I kind of grabbed him by the elbow and pushed him to the side and said, "Hey, what is going on here?" You indicated to me that was not Dennis Heaps' gun." (Tr.90). . .

Q. Did you ask him whose gun it was?
A. Yes, more or less indicated. Yes. (Tr.91). . .

Q. Did he say it was Mr. Heaps' gun?
A. No, he did not. (Tr.91). . .

Q. Did he give you a name as to who the gun belonged to?
A. He didn't have to. It was just me and him standing there.
Q. And was that Mr. Heaps?
A. No. (Tr.97)

Although this testimony of Mike Perry's regarding McCoy's prior statements were reported in the transcript, they were all objected to as hearsay by the prosecution, and the objections were sustained by the trial court. Thus the trier of fact, in this case Judge Baldwin, could not consider those statements in reaching his verdict. In addition, Perry was never allowed to testify to the exact contents of McCoy's prior statement. Nonetheless, it is clear from Perry's testimony that McCoy's prior statement did not agree with the testimony that McCoy had given earlier in the trial.

The language of the applicable Utah Rule of Evidence 63(a)(1) carves out an exception to the general hearsay rule. Although under this rule a prior inconsistent statement is hearsay (as opposed to the new rule on the same subject, Rule 801(d)(1)(A), which states that a prior inconsistent statement is not hearsay), it is an exception to the general rule that hearsay is not admissible.

Most or all jurisdictions, including Utah, have rules allowing

the admission of a witness's prior inconsistent statement. E.g., United States v. Murphy, 696 F.2d 282 (4th Cir. 1982); United States v. Coran, 589 F.2d 70 (1st Cir. 1978); United States v. Plum, 558 F.2d 568 (10th Cir. 1977); United States v. Champion International Corporation, 557 F.2d 1270 (9th Cir. 1977); United States v. Morgan, 555 F.2d 238 (9th Cir. 1977); State v. Acree, 121 Ariz. 94, 588 P.2d 836 (1978). Although the jurisdictions are not in agreement as to whether the prior statement can be admitted substantively or for impeachment only, Utah admits the statement substantively, both under the new and the old rules. As stated in the Committee Note to Rule 801 which follows the new Utah Rule of Evidence 801:

> Subdivision (d)(1) is similar to Rule 63(1), Utah Rules of Evidence (1971). It deviates from the federal Rule in that it allows use of prior statements as substantive evidence if (1) inconsistent or (2) the witness has forgotten, and does not require the prior statement to have been given under oath or subject to perjury. The former Utah Rules admitted such statements as an exception to the hearsay rule. (Emphasis added).

The policy behind such an exception (or exclusion from the definition of hearsay) is to protect a party from a "turncoat" witness, one who changes his story at trial. E.g., United States v. Murphy, 696 F.2d 282,284. The trier of fact could decide to believe the prior statement rather than the witness's testimony at trial. The rule also allows the trier of fact to use the witness's inconsistency to help judge the witness's credibil-

Thus based on the inconsistency, the trier of fact could decide that the witness is wholly or partially unworthy of belief.

In the present case, the contents of McCoy's statement could well have caused a vital difference in appellant's case. If, as seems likely, McCoy had stated to Perry at the scene of appellant's arrest that appellant did not ever possess the gun and/or that the gun was actually in his (McCoy's) possession, the prior statement would have corroborated both appellant's testimony at trial and his statement to Officer Huish at the scene of the arrest. McCoy's prior statement would, no doubt, also have cast grave doubt on the veracity of McCoy's testimony at trial in which he stated that the appellant had possession of the gun while they were in the truck prior to the stopping of the truck.

McCoy's prior inconsistent statements, therefore, should have been admitted as an exception to the hearsay rule, and it certainly cannot be deemed harmless error.

POINT II

THE COURT ERRED IN ADMITTING THE GUN INTO EVIDENCE AS IT IS THE FRUIT OF APPELLANT'S ILLEGAL ARREST.

When Officer Huish stopped the truck in which appellant was a passenger, he drew his gun and immediately required all the occupants to exit the truck. He then handcuffed all of them and kept them all restrained in that way while he searched the truck. During his search he found a gun under the bench seat of

the truck. Officer Huish testified that he did not tell the handcuffed persons that they were under arrest at this time, although he testified he told them they were subject to arrest. The restraint of appellant, and the other occupants continued while Officer Huish questioned each one of them separately regarding the gun. He eventually released everyone but appellant who he took to jail and booked for Possession of a Dangerous Weapon by a Restricted Person.

When questioned at trial about his reasons for stopping the truck, Officer Huish responded that a traffic violation he observed the driver of the truck, McCoy, commit was "one reason." However, he never said what reasons, other than McCoy traffic violation, existed.

A. THE STOP AND SEARCH WAS NOT A TERRY STOP AND SEARCH

An arrest is generally defined as a deprivation of a person's liberty by legal authority. BLACK'S LAW DICTIONARY, 140(rev. 4th ed. 1968). There is, of course, a distinction between an arrest and a Terry stop. The United States Supreme Court first established the legality of a stop which is less intrusive than an arrest in Terry v. Ohio, 392 U.S. 1 (1968). In that case, the Supreme Court held that a police officer can stop a person or a vehicle for a short period of time to make reasonable inquiries and to conduct a limited frisk of the person for weapons if the officer has observed unusual conduct which leads him to reasonably conclude that criminal

activity may be afoot.

A Terry stop, therefore, is something much less severe than an arrest. Although a police officer may clearly detain a person for a brief period of time to question the person, the detention must be of a minimal nature. As the United States Supreme Court recently said in explaining why an ordinary traffic stop is analagous to a Terry stop:

> Under the Fourth Amendment, we have held, a policeman who lacks probable cause but whose "observations lead him reasonably to suspect" that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to "investigate the circumstances that provoke suspicion." Unted States v. Brignoni-Ponce, 422 U.S. 873,881 (1975). "[T]he stop and inquiry must be "reasonably related in scope to the justificaion for their initiation." Ibid. (quoting Terry v. Ohio, supra, at 29.) Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond. And, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released. The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinion that Terry stops are subject to the dictates of Miranda. The similarly noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not "in custody" for the purposes of Miranda.

Berkemer v. McCarty, 35 Criminal Law Reporter (CCH), 3192 (1984).

In addition, although the officer may conduct a search for

weapons for his own safety, that search may not be extensive; it may only extend to a search of the outside of the person's clothing. Terry v. Ohio, supra; Pirri v. State, 428 So.2d 285 (Fla. 1983).

The distinction between a Terry stop and frisk situation and an arrest must be made on a case by case basis as there is no clear-cut factor which distinguishes one from the other. However, the United States Supreme Court has further clarified the distinction in several cases it decided after Terry. See United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Dunaway v. New York, 442 U.S. 200 (1979); Florida v. Royer, ____ U.S. _____, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983).

In the Dunaway case, supra, police officers took the defendant into custody, upon less than probable cause, in connection with an attempted robbery and homicide; the defendant was taken to the police station and questioned. The defendant was never told he was under arrest, but officers admitted they would have physically restrained him had he tried to leave the station. The Court held that the police conduct in this case constituted an arrest of the defendant even if he was never so advised, and that it clearly exceeded the confines of a Terry stop. Since the police lacked probable cause to effect the arrest, the Court held the arrest illegal and the evidence obtained pursuant to the arrest inadmissible.

The more recent United States Supreme Court case, Florida

v. Royer, supra, further clarified the distinction between arrest and a Terry stop and frisk. In Royer, the suspicions of drug officers were aroused when they spotted the defendant who fit the "drug courier profile" (the characteristics which apparently fit the profile were nervousness, a cash purchase of an airline ticket under an assumed name, heavy luggage, the 25-35 year age and the casual dress of the defendant.) Upon the request of the officers, the defendant produced for them his airline ticket and driver's license. At this point, the officers identified themselves, told the defendant they suspected him of carrying drugs, and asked him to accompany them to a small room forty feet away. One officer, using the defendant's luggage claimcheck, retrieved his luggage and brought it back to the small room. When asked if he would consent to a search of the luggage, the defendant produced the luggage key which opened one suitecase and did not object when the officers forcibly opened the second.

Based upon this set of facts, the Court ruled that, although the activities began as an investigative Terry-type detention, it became an arrest when the defendant was brought to the nearby room; as the officers lacked probable cause at that point, the arrest was illegal. Since the defendant's consent to the search was tainted by the illegal arrest, the search was also invalid and the evidence seized should have been suppressed by the trial court, the Supreme Court ruled.

In making this decision, the Royer court made it clear that the police may not carry out a full search of a person, car, or other effects as part of a Terry investigatory search, that a Terry search must be carefully tailored and limited, and that a Terry detention must be temporary and last no longer than necessary.

Other courts dealing with this issue have also held that a person can be considered to be under arrest, rather than stopped for a Terry investigation, even without being brought to the police station for questioning. See People v. Hazelhurst, 662 P.2d 1081 (Colo. 1983); United States v. Chamberlain, 644 F. 1262 (9th Cir. 1980). Whether or not a person is brought to the police station, therefore, is not the determining factor.

As stated by the court in Gonzales v. City of Peoria, 722 F.2d 468 (9th Cir. 1983):

> "Detention" defines a special category of Fourth Amendment seizures that are substantially less intrusive than arrests (citation omitted). Because detention represents only a limited intrusion, it can be justified by a reasonable suspicion of criminal activity (citation omitted). However, that suspicion justifies only a brief stop and interrogation and, under proper circumstances, a brief check for weapons (citation omitted). If the seizure involves anything more than the brief and narrowly-defined intrusion authorized by Terry it must be justified by probable cause (citation omitted).

Gonzales, 722 F.2d at 477.

The use of the handcuffs and gun by Officer Huish on

appellant are certainly important factors to be considered in deciding whehter Huish's actions constituted an arrest or a Terry stop. In Burns v. State, 595 P.2d 801 (Okla. 1979), the Court ruled that a fact situation similar to the present case was an arrest, not a Terry stop. The Court commented, "This Court has previously upheld the legality of investigatory stops by police officers. . . .. However, investigatory stops are not made at gunpoint," (emphasis added). Burns, 595 P.2d at 803.

In the present case, the officer's stop and subsequent search of the vehicle were both clearly far beyond the permissible scope allowed in a Terry stop and search. In this case, appellant and other occupants of the truck were ordered out of the truck by the officer at gunpoint and were immediately handcuffed. The officer kept appellant and the others detained in this manner while he searched the vehicle and then went back and forth between them questioning each indivually about the gun he found in the search. Such a detention cannot be considered a Terry stop since appellant's liberty was so severely restricted and the restriction was for a substantial period of time.

The search of the vehicle, too, clearly exceeded the parameters of a Terry search in that the officer searched not only appellant's person but also searched the truck.

A search that went beyond a pat-down of the outer clothing of a person detained for a valid Terry stop was held illegal for exceeding the scope of such an investigaroty detention

in Pirri v. State, 428 So.2d 285 (Fla. 1983). That Court said: "The police officer could only conduct a carefully limited, self-protective search of the outer clothing of such a person to discover the presence of weapons" (emphasis added), Pirri, 428 So.2d at 286.

B. THE OFFICER'S CONDUCT HERE CONSTITUTED AN ARREST OF APPELLANT

Officer Huish testified that none of the occupants of the vehicle were under arrest when he pointed his gun at them and handcuffed them all. However, courts which have dealt with the question of when an arrest occurs have made it clear that the words, "You are under arrest" are not "magic" words without which an arrest cannot occur. State v. Harrington, 430 So.2d 394 (La. 1983); State v. Christian, 454 A. 2d 262, 189 Conn. 85 (1983); McCrory v. State, 643 S.W. 2d 725 (1982). On the contrary, the question of whether an arrest has occurred can only be determined by looking at all the circumstances surrounding the stop. The United States Supreme Court, in discussing whether a person stopped by an officer for a traffic violation was "in custody" for Miranda purposes even though the officer had already silently decided to arrest the person, said:

> Although Trooper Williams apparently decided as soon as respondent stepped out of his car that respondent would be taken into custody and charged with a traffic offense, Williams never communicated his intention to respondent. A policeman's unarticulared plan has no bearing on the question whether a suspect was "in custody" at a particular time; the only relevant inquiry is how

> a reasonable man in the suspect's position would have understood his situation (emphasis added).

Berkemer v. McCarty, 35 Criminal Law Reporter (CCH), 3192 (1984).

The same inquiry is the proper one in deciding when an arrest has occurred. McQurter v. City of Atlanta, 572 F. Supp. 1401 (N.D.Ga. 1983); State v. Waicelunas, 672 P.2d 968 (Ariz. 1983); People v. Pancoast, 659 P.2d 1348 (Colo. 1982); Redarte v. City of Riverton, 552 P.2d 1245 (Wyo. 1976). An arrest can take place regardless of whether an officer tells the person that he is under arrest, State v. Christian, 189 Conn. 35, 454 A.2d 262 (1983); State v. Harrington, 430 So.2d 394 (La. 1983); McCrory v. State, 643 S.W.2d 725 (1982), or whether the officer has even decided that he is going to arrest the person. People v. Pancoast, supra; State v. Waicelunas, supra.

> The subjective intent of the officer is not controlling on the issue whether an arrest has occurred; rather, the issue rests upon an evaluation of all the surrounding circumstances to determine whether a reasonable man innocent of any crime would have throught he was being arrested if he had been in defendant's shoes.

State v. Waicelunas, 672 P.2d at 970.

In this case, there can be very little question but that any reasonable person in appellant's position would have believed that he was under arrest when Officer Huish stopped the truck in which he was riding. The facts that support such a reasonable conclusion are that appellant was ordered out of the truck at

gunpoint, immediately handcuffed, and forced to remain in such a condition at the scene for quite some time while Officer Huish searched the truck and went back and forth among the various occupants of the truck to question each of them. Certainly, any reasonable person faced with these facts would believe he was under arrest.

C. APPELLANT'S ARREST WAS ILLEGAL BECAUSE THERE WAS NO PROBABLE CAUSE.

The Fourth Amendment to the United States Constitution provides that an arrest can only be effected if there is probabl cause to believe that a crime was committed and that the person arrested committed it. Draper v. United States, 358 U.S. 307 (1959). Although a lesser standard than probable cause is required for a Terry stop, there are no exceptions to the probab cause requriement when an arrest, rather than a Terry stop, has taken place. Dunaway v. New York, 442 U.S. 200 (1979).

The general definition of "probable cause" is: a reasonable ground of suspicion, supported by circumstances sufficientl strong in themselves to warrant a cautious person in believing the accused to be guilty. Carroll v. United States, 267 U.S. 132 (1925). Mere suspicion is not enough to constitute probable cause. Mallory v. United States, 354 U.S. 449 (1957).

In addition, probable cause must be based on reasonably reliable information. The facts leading to a determination tha probable cause for an arrest exists must be of such a character

that they would reasonably support a conclusion that probable cause exists. In other words, the officer making the arrest must have "reasonably trustworthy information." Draper v. United States, 358 U.S. 307 (1959). Certainly probable cause must be more than a "gut feeling" or a suspicion. Henry v. United States, 361 U.S. 98 (1959).

In the present case, appellant was arrested when he was ordered out of the truck and handcuffed; Officer Huish failed to articulate any reason for arresting appellant at that time. The only explanation he gave for any of his actions leading up to his finding of the gun in the truck was that an improper lane change was "one of the reasons" for his stop of the truck. His only articulated reason for suspicion, then, was the traffic violation he observed. As appellant was not driving the truck, he could not possibly be lawfully arrested for that. By implying that there were, perhaps, other reasons for the stop of the truck too does not satisfy the standard of probable cause.

D. EVEN IF APPELLANT'S DETENTION WERE CHARACTERIZED AS A TERRY STOP, IT WAS ILLEGAL BECAUSE THERE WAS NO REASONABLE SUSPICION THAT CRIMINAL ACTIVITY WAS AFOOT.

Appellant, as discussed in Point II, A, supra, contends that his detention on the day in question by far exceeded the limits on a Terry stop. However, even if the incident were characterized as a Terry stop, it must still be deemed unlawful because Officer Huish had no reasonable suspicion that criminal

activity was afoot. Terry v. Ohio, 392 U.S. 1 (1968).

As discussed in Point II, C, supra, Officer Huish's only articulated reason for stopping the truck was the traffic violation committed by David McCoy. Huish's statement that the traffic violation was "one of the reasons" for the stop does not rise even to the level required for a Terry stop.

E. THE GUN FOUND IN THE SEARCH OF THE TRUCK WAS THE POISONOUS FRUIT OF AN ILLEGAL ~~SEARCH.~~ ARREST.

It is well settled that, generally, evidence found as a consequence of an illegal act on the part of a police officer must be suppressed. Silverthorne Lumber Company v. United States, 251 U.S. 385 (1920); Wong Sun v. U.S., 371 U.S. 471 (1963); Brown v. Illinois, 422 U.S. 590 (1975). Such evidence may be admissible only if the knowledge or evidence is gained from a source independent from the illegal act, or if there has been such an attenuation between the original illegal act and the evidence that it cannot be considered a result of the illegality. Wong Sun v. United States, supra; United States v. Ceccolini, 435 U.S. 268 (1978).

In the present case, appellant was illegally arrested by Officer Huish as it was never established that he had probable cause for appellant's arrest, see Point II, C, supra, nor was it a proper Terry stop, see Point II, A, supra. Therefore, the search which Officer Huish conducted pursuant to this unlawful arrest was also illegal.

F. APPELLANT HAS STANDING TO RAISE THIS ISSUE.

Until 1978, the issue of whether one has standing to contest an illegal search was governed by Jones v. United States, 362 U.S. 257 (1960); that case ruled that for a defendant to have standing to make a motion to suppress, he must have been a victim of a search or seizure. Jones also ruled that one who was legitimately present on the premises searched or in the vehicle searched had standing to make the motion to suppress.

In 1978, however, the Supreme Court decided the case of Rakas v. Illinois, 439 U.S. 128 (1978), reh. den. 439 U.S. 1122. The Rakas decision changed significantly the law of standing to raise the issue of an illegal search. Rakas, however, did not completely overrule Jones, but rather altered the standard from the Jones inquiry into whether a person was legitimately on the premises searched to an inquiry of whether that person had a legitimate expectation of privacy in the place searched.

The Rakas decision, however, does not mandate that a passenger without a property interest in either the vehicle or the property seized be always denied standing to make a motion to suppress. There are still some circumstances in which a passenger has standing to make such a motion, despite Rakas. As stated in 3 Lafave, Search and Seizure, §11.3 (1984, Pocket Part), at 233:

> Does this mean that persons who are "merely passengers" (i.e., asserting neither a property nor a possessory

> interest in the vehicle, nor an interest in the property seized) will never have standing? Although Justice Rehnquist's opinion unfortunately does not even hint at a stopping point short of such an absolute rule, thus prompting some courts to give Rakas such an interpretation, it does not seem that Rakas goes this far. For one thing, it is important to note, as the concurring opinion in Rakas takes great pains to emphasize, that the "petitioners do not challenge the constitutionality of the police action in stopping the automobile in which they were riding; nor do they complain of being made to get out of the vehicle," so that the question before the Court was "a narrow one: Did the search of their friend's automobile after they had left it violate any Fourth Amendment right of the petitioners?" This would indicate, as two-thirds of the Court (the two concurring justices and the four dissenters) recognizes that a passenger does have standing to object to police conduct which intrudes upon his Fourth Amendment protection against unreasonable seizure of his person. If either the stopping of the car or the passenger's removal from it are unreasonable in a Fourth Amendment sense, then surely the passenger has standing to object to those constitutional violations and to have suppressed any evidence found in the car which is their fruit.

This reasoning has, in fact, been followed by some courts who have dealt with this issue since the Rakas decision came down. E.g., People v. Kunath, 99 Ill.App.3d 201, 425 N.E. 2d 486 (1981).

> Regardless of whether defendant had a legitimate expectation of privacy in the contents of the automobile so as to challenge successfully the search thereof, as a passenger he can challenge the stopping of the vehicle since his personal liberty and freedom were intruded upon by that act (citation omitted). The Fourth and Fourteenth

> Amendments of the United States Constitution forbids unreasonable searches and seizures (emphasis in original), and it is clear that stopping an automobile and detaining its occupants constitutes a "seizure" of those persons (citation omitted). And, for the evidence seized as a result of that stop to be admissible, the stop must not have been unreasonable.

People v. Kunath, 425 N.E. 2d at 489.

Although appellant here is contesting the legality of his arrest, rather than the stopping of the automobile, the same reasoning as is stated by the Kunath Court, above, applies.

In the case at bar, appellant is not prevented by the Rakas decision from asserting that the search of the truck in which he was riding was illegal. The reason that appellant may assert this issue despite Rakas is that he is contesting the search as being the fruit of an illegal arrest. See Point II,A,B,C and D, supra. As Rakas did not deal with such a situation and is, therefore, distinguishable and since dicta in Rakas, in fact, seems to preserve the right of a person to contest a search which is the fruit of an illegal arrest, appellant here has standing to raise this issue.

G. THE PROSECUTION HAD THE BURDEN OF ESTABLISHING PROBABLE CAUSE FOR THE ARREST.

The general rule governing searches is that a warrant is required. There are exceptions to that rule, however; thus, in certain well-defined instances, warrantless searches are proper.

In this case, Officer Huish's search of the truck in which appellant was riding at the time of his arrest was warrantless. Since appellant's arrest was illegal, then the search was also illegal. See Point II,A-D, supra.

Respondent may argue that there was, in fact, probable cause for the search but that Officer Huish simply failed to describe the basis for the probable cause at trial. The resolution of such an issue is dependent on whose burden it is to prove that the arrest was either justified by probable cause or that no probable cause existed to justify the arrest.

In cases where warrantless searches are conducted, the burden should be on the prosecution to prove that an exception to the warrant requirement exists.

> With respect to the issue which is usually central in a motion to suppress hearing--the reasonableness of the challenged search or seizure--most states follow the rule which is utilized in the federal courts: if the search or seizure was pursuant to a warrant, the defendant has the burden of proof, but if the police acted without a warrant the burden of proof is on the prosecution. The warrant--no warrant dichotomy is typically explained on the ground that when the police have acted with a warrant "an independent determination on the issue of probable cause has already been made by a magistrate, thereby giving rise to a presumption of legality," while when they have acted without a warrant "the evidence comprising probable cause is particularly within the knowledge and control of the arresting agencies." [Malcom v. U.S., 332 A.2d 917 (D.C.App. 1975)] Morever, it is said that "[w]ithout such a rule there would be little reason for law enforcement

> agencies to bother with the formality of a warrant (Id.).

3 LaFave, Search and Seizure, §11.2, Vol. 3, p. 500 (1978).

Not all jurisdictions follow this rule, however; some courts uniformly place the burden of proof on the prosecution for the reason that the state is the party which seeks to use the evidence and thus should be required to prove that it was obtained lawfully. See State v. Heald, 314 A.2d 820 (Ore. 1973); Canning v. State, 226 So. 2d 747 (Miss. 1969). Other jurisdictions place the burden uniformly on the defendant, see People v. Ikerd, 26 Ill. 2d 573, 188 N.E. 2d 12 (1963); State v. Holt, 415 S.W. 2d 761 (Mo. 1967), for reasons such as that the burden should be on the moving party, there is a presumption of regularity regarding the actions of law enforcement agencies, evidence is considered admissible and exceptions to admissibility should be justified by the one claiming the exception, and that such a practice will deter frivolous claims.

As stated in 3 LaFave, Search and Seizure, §11.2 (1978) at 500:

> Placing the burden upon the defendant even in the no warrant situation would seem to place him in a most disadvantageous position. As one commentator has noted, "it would be impossible for a defendant to prove a lack of probable cause in the abstract," for he "cannot be expected to prove a lack of some item until he knows on what the government bases its claim of its existence." [Citing Symposium, 25 Ohio St.L.J. 501, 528 (1964).]

One of the most important policy concerns which must be considered when the burden of proof is allocated on this issue is which party has greater access to the relevant facts. It is certainly more efficient to, thus, require the prosecution to carry the burden of proving that the police validly proceeded without a warrant, for the officer(s) involved in the search know the facts that might establish such an exception. To put the burden on the defendant would only result in "fishing expeditions" by the defense since it would be trying to negate the legality of all the possible valid grounds for the warrantless search without having the kind of access to the police officers that the prosection has. See Commonwealth v. Antobenedetto, 366 Mass. 51, 315 N.E.2d 530 (1974).

It was, therefore, up to the prosecution to require Officer Huish to articulate any proable cause he may have had to arrest appellant. At no time did Officer Huish state any probable cause, if any existed, for the arrest of appellant. As the burden was on the prosecution to produce any such evidence and it failed to do so, it cannot now argue that there was probable cause for the arrest after all.

H. THIS ISSUE IS PRESERVED BY DEFENSE COUNSEL'S OBJECTION.

At the time the prosecution moved for the admission into evidence of the gun found in the search, defense counsel made an objection.

> Mr. Valdez: I would object at this time, Your Honor. I don't think there's any probable cause on which to pull the vehicle over. Certainly no probable cause to make an extended search of the vehicle. I would object to that (the gun) as being introduced into evidence at this time. (Tr.73).

The Court denied the objection and received the gun into evidence. The issue of the validity of the search was clearly preserved by the above-quoted objection by defense counsel. At the very least, when defense counsel objected the Court should have required the prosecution to inquire further into Officer Huish's reasons for stopping the truck and arresting appellant.

POINT III

THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A FINDING OF GUILTY.

Appellant was found guilty of Possession of a Dangerous Weapon by a Restricted Person. Although several witnesses testified at appellant's trial, only one witness, David McCoy, testified that appellant had possession of the gun in question. As having possession is one of the essential elements of the offense in question, it is necessary that sufficient evidence exist to establish the fact that appellant did, in fact, possess the gun.

The standard for reversal of a conviction for insufficiency of the evidence is whether, after reveiwing all the evidence and drawing all inferences which may reasonably be drawn from

it in the light most favorable to the verdict, the evidence "is sufficiently inconclusive or inherently improbable (so that) reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." State v. Petree, 659 P.2d 443 (Utah 1983).

Since David McCoy was the only witness who testified that the gun was in appellant's possession, his testimony must be examined carefully. If McCoy's testimony does not establish the element of possession, then the evidence cannot be said to be sufficient to uphold the verdict in this case.

Several courts have examined the evidence to determine its sufficiency when a conviction is based on the testimony of one witness whose credibility is drawn into question because of the witness's bias or lack of truthfulness. Those courts have ruled that such testimony must be looked at very carefully so that a defendant will not be unfairly convicted by evidence given by a witness who is not credible.

In Gaddis v. State, 251 N.E.2d 658 (Ind. 1969), the defendant's robbery conviction was based upon the testimony of one witness. That witness admitted that he had been told he would go to prison if he did not testify against the defendant. Also the witness's testimony kept changing regarding how positive he was in identifying the defendant. In reversing defendant's conviction for insufficient evidence, the court stated:

> This court must be particularly vigilant where a conviction is supported by the

> testimony of one eyewitness. Testimonial errors resulting from imperfect recollection, defective perception or suggestion have been shown to occur and we would be careful not to implement a miscarriage of justice in such a situation where that testimony is the only testimony of appellant's guilt. Where the evidence merely tends to support a conclusion of guilt it is not enough; it must support such a conclusion beyond a reasonable doubt (citation omitted). To hold otherwise would violate the presumption of innocence until guilt is proven.

Gaddis v. State, 251 N.E.2d at 662.

The court in People v. Williams, 357 N.E.2d 525 (Ill. 1976), reversed the defendant's murder conviction becuase the testimony of the two supposed eyewitnesses, Jones and Robinson, were both tainted by their own interests. Robinson had never mentioned any involvement by the defendant in the crime until he was informed that he was going to be charged with the crime. Jones also had an interest in that he was promised by the State that he would be released from prison if he testified against the defendant. In addition, the testimony of Robinson at trial was inconsistent in many instances from his testimony at prior hearings. In explaining its reasoning for reversing the conviction, the Court stated:

> Robinson agreed to make a statement only after the police informed him that he would be charged with the murder of the cab driver. Robinson was an interested person, therefore, who did have a motive to implicate the defendant in the murder. Considering this fact, together with the inconsistent testimony given by Robinson, we find that Robinson's testimony was entitled to little weight.

> The State relied primarily upon the testimony of Larry Jones to corroborate Robinson. Jones' credibility was severely limited, however, by the revelation that he had agreed to testify only after being promised by the State that his immediate release from prison would be arranged. Jones, who had served a little over two years of a 15-to-30-year prison sentence, had much to gain by testifying for the State. While that fact alone did not necessarily destroy Jones' credibility, we have held that when it appears that a witness has hopes of a reward from the prosecution, his testimony should not be accepted unless it carries with it an absolute conviction of its truth.

People v. Williams, 357 N.E.2d at 529-30.

The facts of the present case are very similar to the facts of Gaddis v. State, supra, and People v. Williams, supra, in regard to the testimony against appellant by David McCoy. The gun which appellant was accused of possessing was found in the truck owned and being driven by McCoy. McCoy had a very definite interest in not being thought by Officer Huish to have possessed the gun himself since he was on felony probation at the time.

McCoy indicated that while testifying, that his probation would likely be revoked and he would go to prison if he were to be convicted of Possession of a Dangerous Weapon by a Restricted Person. McCoy, then, was most certainly an interested witness, one who had a great deal to gain if someone riding in his truck on the day in question, other than himself, were found to be in possession of the gun Officer Huish found. McCoy

interest is closely analagous to the interest of the witnesses in the Gaddis and Williams cases, supra, where the witnesses were all interested in not being themselves charged with a crime or in getting out of prison.

In both Gaddis and Williams, supra, the testimony of the witnesses contained inconsistencies which further brought their testimony into question. McCoy's testimony, too, was inconsistent with his prior statement to Mike Perry at the time appellant was arrested. McCoy apparently told Mike Perry something about the possession of the gun which differed greatly from his testimony at trial, although we do not know precisely what his statement was because the court would not allow Perry to testify about the contents of McCoy's statement. See Point I, supra.

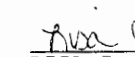
Given these serious weaknesses in McCoy's testimony, his clear interest in seeing that appellant was convicted, and the inconsistency between his trial testimony and his prior statement to Perry regarding the essence of this offense, i.e., whether appellant had possession of the gun, his testimony can be given little or no weight. As McCoy was the only witness who placed the gun in appellant's possession, the prosecution did not meet its burden of proof beyond a reasonable doubt.

CONCLUSION

For the reasons that are discussed above, appellant respectfully requests that the Court reverse the conviciton and judgment entered against him in the Court below.

DATED this 11th day of September, 1984.

Respectfully submitted,



LISA J. REMAL
Attorney for Appellant

DELIVERED two copies of the foregoing Brief of Appellant to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah 84114, this ____ day of September, 1984.