

1992

Utah v. Rochell : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 920309

IN THE UTAH COURT OF APPEALS

STATE OF UTAH)

Plaintiff and Appellee)

Case No. 920309-CA

vs.)

JEFFREY W. ROCHELL,)

Defendant and Appellant)

Priority Classification 16

BRIEF OF APPELLANT

Appeal from the District Court, Davis County,
State of Utah, the Honorable Douglas L.
Cornaby, District Court Judge

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FILED

AUG 2 1 1992

Mary T. Noonan
Clerk of the Court

IN THE UTAH COURT OF APPEALS

STATE OF UTAH)	
Plaintiff and Appellee)	Case No. <u>920309-CA</u>
vs.)	
JEFFREY W. ROCHELL,)	
Defendant and Appellant)	Priority Classification 16

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH)	
Plaintiff and Appellee)	Case No. <u>920309-CA</u>
vs.)	
JEFFREY W. ROCHELL,)	
Defendant and Appellant)	Priority Classification 16

BRIEF OF APPELLANT

STATEMENT SHOWING JURISDICTION OF COURT OF APPEALS

Section 78-2a-3(2)(f), Utah Code Annotated, as amended confers jurisdiction to the Utah Court of Appeals to decide the appeal in this case as this appeal is from a court of record, Davis County District Court, involving a criminal case, a third degree felony.

STATEMENT SHOWING NATURE OF PROCEEDINGS

This is a criminal case appealing a final Judgment of conviction and sentence of a third degree felony, Possession of a Controlled Substance, to wit: cocaine, from the District Court of Davis County, Utah.

STATEMENT OF THE ISSUES

1. Whether or not the evidence seized from the warrantless search of the defendant is admissible?
2. Whether or not Trooper Maycock's detention of the defendant exceeded the scope of the initial traffic stop and was not justified by a reasonable suspicion of criminal activity?
3. Whether or not seizure of cocaine from defendant and his motor vehicle was obtained by wrongful exploitation and therefore not admissible?
4. Whether or not Trooper Maycock had probable cause to search defendant's motor vehicle?

STANDARD OF APPELLATE REVIEW

The standard of review is the same for all issues presented by this appeal. In reviewing a trial court's decision to grant or deny a motion to suppress, findings of fact will not be disturbed

unless they are clearly erroneous. State v. Steward, 806 P. 2d 213, 215 (Utah App. 1991). However, in reviewing the trial court's conclusions of law, the appellate court applies a correction of error standard. Steward, 806 P. 2d at 215.

DETERMINATIVE CONSTITUTIONAL PROVISIONS,
STATUTES, ORDINANCES, AND RULES

1. Article I, Section 14 of the State of Utah Constitution
2. Fourth Amendment to the United States Constitution
3. Section 41-6-44.20(2) Utah Code Annotated, as amended
4. Section 77-7-16 Utah Code Annotated, as amended

STATEMENT OF THE CASE

1. Nature of the case. This is a criminal case involving an appeal from a final judgment of conviction and sentence of a third degree felony, Possession of a Controlled Substance, to wit: cocaine, of the District Court of Davis County, Utah.

2. Course of proceedings. The State of Utah filed on October 4, 1991 an Information charging defendant Jeffrey M. Rochell with Possession of a Controlled Substance with Intent to Distribute, a second degree felony; Unlawful Possession of Cocaine without Tax Stamps Affixed, a third degree felony; and speeding, a class C misdemeanor, all alleged to have occurred on June 5, 1991

in Davis County, Utah.

On February 24, 1992 defendant filed a Motion to Suppress, together with accompanying Memorandum of Law, seeking to suppress both baggies of cocaine seized by a state trooper. One baggie was seized from Defendant's person and the second baggie was taken from his motor vehicle.

A suppression hearing was held on March 18, 1992 before District Judge Douglas L. Cornaby. Utah Highway Patrol Trooper David V. Maycock was called as a witness by the plaintiff, State of Utah. At the conclusion of the hearing, the trial court made its findings of fact and concluded the trooper could search defendant prior to searching his vehicle. The trial court found it was reasonable that all evidence could be received into evidence and denied Defendant's Motion to Suppress. Written Findings of Fact and Conclusions of Law were later filed on June 12, 1992.

On April 14, 1992 defendant petitioned the trial court for a review of the trial court's decision arising out of the suppression hearing based on State v. Lovegren, 183 Utah Adv. Rep 81, (Utah App. 1992) published April 7, 1992. The trial court after reviewing Lovegren denied defendant's motion to reverse its ruling and refused to suppress the evidence pursuant to a written ruling filed April 15, 1992.

On April 15, 1992 Defendant Rochell entered a conditional guilty plea to Possession of a Controlled Substance, Cocaine, a third degree felony before District Judge Douglas L. Cornaby.

On May 12, 1992 Defendant Rochell was sentenced by District

Judge Douglas L. Cornaby to the Utah State Prison for an indeterminate term, not to exceed five (5) years. Defendant was granted a Stay of Execution, placed on probation upon the condition he serve thirty (30) days in the Davis County Jail, fined \$500 together with surcharge of \$467.50, and complete the usual and ordinary conditions required by the Department of Adult Probation and Parole. Judgment of the trial court was entered on June 2, 1992.

On May 14, 1992 defendant filed a Notice of Appeal with the Davis County Clerk's office appealing to the Utah Court of Appeals Defendant Rochell's conviction of a Third Degree felony, Possession of a Controlled Substance. Contemporaneous with filing the Notice of Appeal Defendant filed an Application for Certificate of Probable Cause and Certificate of Probable Cause. The Certificate of Probable Cause was signed by District Judge Douglas L. Cornaby on May 15, 1992 staying execution of Defendant's sentence pending Defendant's appeal.

On June 4, 1992 Defendant filed an Amended Notice of Appeal to properly perfect his appeal as Judgment was entered on June 2, 1992 with the Davis County Clerk's office.

3. Disposition at Trial Court. On March 18, 1992, District Judge Douglas L. Cornaby denied defendant's Motion to Suppress. On April 15, 1992 the trial court denied defendant's motion to review its prior ruling based on State v. Lovegren, 183 Utah Adv. Rep 81 (Utah App. 1992) published on April 7, 1992. On April 15, 1992 defendant entered a conditional guilty plea to the charge of

Possession of a Controlled Substance, a third degree felony. On May 12, 1992 Defendant was sentenced by District Judge Douglas L. Cornaby. On May 14, 1992 Defendant filed a Notice of Appeal and on June 4, 1992 filed an Amended Notice of Appeal.

4. Statement of Relevant Facts. On June 5, 1991 Defendant Rochell was observed by Trooper David V. Maycock driving a Mustang motor vehicle northbound on I-15 near the St. Joseph's area in North Salt Lake City (Tr. p.3). Trooper Maycock's visual observation indicated Defendant was travelling at 65 miles per hour (Tr. p.3). His visual observation was confirmed by radar which he locked in at 65 miles per hour (Tr. p.3). Defendant was traveling 10 miles per hour over the posted speed limited of 55 mph (Tr. p.6).

The offense took place at 8:15 p.m., it was a clear day and the sun was up (Tr. p.11). The driver, Jeffrey W. Rochell, acted in an appropriate manner when pulled over by Trooper Maycock (Tr. p.12). He did not attempt to elude, evade or otherwise flee (Tr. p. 12).

The Defendant upon stopping exited his vehicle and walked back toward the Trooper's vehicle (Tr. p.12). Defendant Rochell and Trooper Maycock met at a point between their vehicles (Tr. p.4). The Defendant did not appear angry, argumentative, or nervous (Tr. p.13). Defendant upon request produced a valid driver's license (Tr. p.13).

Trooper Maycock, standing approximately arm's length from defendant, detected the odor of alcohol about Defendant. (Tr. p.13,

14). Trooper Maycock requested Defendant to perform the horizontal gaze nystagmus field sobriety test (Tr. p.14). Trooper Maycock observed no clues as a result of the test that Defendant was intoxicated (Tr. p.4). As a result, Trooper Maycock did not cite Defendant for driving under the influence of alcohol. (Tr. p.15).

During the field sobriety test, Trooper Maycock stood at least an arm's length distance from Defendant in order to track the movement of Defendant's eyes (Tr. p.15). During the entire encounter with Defendant no suspicious or dangerous movements were made toward or observed by Trooper Maycock (Tr. p.16). Trooper Maycock, upon initially confronting Defendant, and at the time of the field sobriety test, did not frisk Defendant Rochell as he felt no need to do so (Tr. p.16).

Trooper Maycock asked Defendant to produce the registration for his vehicle (Tr. p.16). The registration was in the vehicle's glove box (Tr. p.17). Defendant walked from their location to his vehicle and reached into the glove box (Tr. p.17). Trooper Maycock did not search the glove box or vehicle prior to allowing Defendant to reach into the glove box (Tr. p. 17). The Defendant made no gestures that he might be reaching for a weapon (Tr. p.17, 18). Defendant produced a valid registration to his vehicle (Tr. p.18). Trooper Maycock later confirmed the validity of Defendant's license and registration and that there were no outstanding warrants for Defendant through his dispatcher (Tr. p.20, 21).

When Defendant Rochell opened the passenger door to obtain his registration a blue cup containing an alcoholic beverage fell onto

the ground (Tr. p.19). The passenger in the vehicle identified himself as Billy G. Miller, but had no identification on him (Tr. p.5). While confronting the passenger, Trooper Maycock looked inside the vehicle but did not observe any objects of concern to him (Tr. p.19). No second open container of alcohol was observed by Trooper Maycock (Tr. p.20).

Trooper Maycock asked Defendant if he understood Utah's open container law and received an affirmative reply (Tr. p.20). Defendant was asked to return to his vehicle, and Trooper Maycock took with him Defendant's driver's license and registration to his patrol car (Tr. p.20). Trooper Maycock wrote two citations, one to Defendant for speeding 65 mph in a 55 mph zone and no seat belt and the other citation to co-defendant Billy G. Miller for open container (Tr. p.21, 22). During this period of time, Defendant was detained and not free to leave (Tr. p.21). Approximately 15 minutes had elapsed to this point in time from when Defendant was stopped. (Tr. p.22).

After citing the Defendant and passenger, Trooper Maycock intended to search them and the vehicle (Tr. p.23, 24). After completing the citations Trooper Maycock approached Defendant's vehicle a second time (Tr. p.22). Trooper Maycock asked them both to step out of their vehicle and join him at the front of their vehicle (Tr. p.22).

Neither party had done anything to indicate to Trooper Maycock they were armed and dangerous (Tr. p.22). Trooper Maycock had formed the intent to search the driver's immediate area in the

vehicle for another open container (Tr. p.23). Trooper Maycock was not searching the vehicle for weapons or drugs (Tr. p.23, 24).

At the time Trooper Maycock asked Defendant Rochell and Billy G. Miller to join him at the front of their vehicle he had formed the intent to search their person (Tr. p.24). Nothing had alerted him to the fact that either may be armed and dangerous (Tr. p.24). Trooper Maycock asked them if they had any weapons on them. Both responded they did not (Tr. p.27). Billy G. Miller voluntarily opened his pockets and offered everything in his pockets and turned around to show Trooper Maycock his beltline to reveal no weapons (Tr. p.7).

Trooper Maycock directed his attention to Defendant (Tr. p.7). He noticed a bulge in Defendant's left front pocket of his shorts, a fairly large bulge (Tr. p.8). Trooper Maycock could not tell what the bulge was but it appeared to be 3 1/2 inches by 1 1/2 inches to 2 inches and 1 to 1 1/2 inches thick (Tr. p. 31, 34). Trooper Maycock could not tell what the object was only that it was hard after tapping it with his fingers (Tr. p.32, 8). Defendant put his hand in his front left pocket and pulled out a set of keys (Tr. p.8). Trooper Maycock observed there was still something in Defendant's pocket and tapped it again (Tr. p.8). Trooper Maycock asked the Defendant "What is that?" (Tr. p.32). Defendant reached into his pocket a second time and pulled out some change and in the course of doing that partially exposed a plastic baggie (Tr. p.32, 9). Trooper Maycock asked him "What's that baggie?" (Tr. p.9). Defendant put his hand back into his pocket, rustled around again,

pulled his hand out of his pocket and put it behind his back (Tr. p.9). At that time, Officer Garrido, North Salt Lake Police, approaching defendant from the rear, reached out and grabbed the baggy containing a white powdery substance (Tr. p.9, 10). Officer Garrido had radioed Trooper Maycock, while Trooper Maycock was writing out the citations in his patrol car, to determine his location in order to return Trooper Maycock's handcuffs (Tr. p.6).

Defendant Rochell was arrested by Trooper Maycock after Officer Garrido took the baggie from him (Tr. p.10). After mirandizing Defendant inquiry was made if there was any other dope in the vehicle (Tr. p.10). Trooper Maycock found a second baggie between the cushions of the passenger seat where the riser meets the runner (Tr. p.33). Trooper Maycock admitted discovery of the first baggie from Defendant led to discovery of the second baggie in the vehicle (Tr. p. 32).

When asked why Trooper Maycock simply did not request Officer Garrido to watch Defendant and his passenger while he searched the vehicle Trooper Maycock responded he did not want any assisting officer to be hurt (Tr. p.29).

Trooper Maycock also admitted he could have cited Defendant Rochell for open container in addition to speeding and no seat belt as Defendant allowed a passenger to have an open container in his vehicle (Tr. p.30). Trooper Maycock responded that legally he could have issued Defendant a citation for an open container but morally he did not feel it was correct unless Defendant Rochell actually had an open container (Tr. p.30, 31).

No second open container was located after search of defendant's motor vehicle by Trooper Maycock and Officer Garrido (Tr. p.25).

Trooper Maycock testified his probable cause to search defendant's vehicle for a second open container was that he detected the driver and passenger to both have an odor of alcohol on their breath but he had only observed one open container of alcohol in the vehicle; i.e, the blue cup that fell to the ground (Tr. p.24, 25).

The trial court estimated approximately 15 to 25 minutes had elapsed from the time Defendant's vehicle was stopped until defendant was searched (Tr. p.46).

SUMMARY OF THE ARGUMENT

A peace officer may frisk a person for dangerous weapons if he reasonably believes he or any other person is in danger. This is a narrowly drawn exception to the constitutional protection that all warrantless searches are per se unreasonable. A peace officer may pat down an individual to neutralize the threat of harm when he possesses specific, articulable facts that such person may be armed and dangerous. Anything beyond such a brief intrusion to check for weapons constitutes a de facto arrest and probable cause to search is required.

Trooper Maycock did not initially frisk Defendant evidencing no fear or suspicion Defendant was armed and dangerous. After the

citation was prepared, and 15 to 25 minutes had elapsed, Trooper Maycock ordered defendant from his vehicle to search him prior to searching his vehicle for a open container of alcohol. Neither Defendant nor his passenger had done anything to indicate to Trooper Maycock they were armed or dangerous prior to his search of Defendant (Tr. p.22). Therefore, the frisk of Defendant Rochell prior to searching the vehicle was not for dangerous weapons based upon a reasonable belief or suspicion and therefore not permitted by Terry v. Ohio or section 77-7-16 U.C.A., as amended. Secondly, Trooper Maycock's detention of Defendant Rochell after preparing the traffic citations exceeded the scope of the initial traffic stop and was not further justified by a reasonable suspicion of serious criminal activity. A peace officer's stop of a motor vehicle is a seizure subject to constitutional protection. A traffic stop is a limited seizure and is more like an investigative detention than a custodial arrest. The issue of whether the investigative detention was reasonable, as governed by Terry v. Ohio, involves two tests:

- (1) Was Trooper Maycock's action justified initially?, and
- (2) Was Trooper Maycock's action reasonably related in scope to the circumstances which justified his initial stop?

Trooper Maycock properly stopped Defendant Rochell for speeding 65 mph in a 55 mph zone. However, observation of one open container with both occupants of the vehicle with alcohol on their breath does not justify nor give Trooper Maycock reasonable articulable suspicion of serious criminal activity beyond the

initial traffic offense justifying further detention of defendant and his later arrest.

Third, seizure of the controlled substance from Defendant's motor vehicle was obtained by illegal exploitation and therefore not lawfully seized. Defendant Rochell's admission and disclosure of a second baggie of cocaine in his vehicle was unlawfully obtained following Trooper Maycock's illegal seizure of cocaine from Defendant. The State of Utah must show Defendant's consent to search his vehicle was (1) voluntary and (2) not obtained by exploitation of the prior illegality. Evidence obtained in searches following police illegality must meet both tests to be admissible. Defendant's consent to search was sufficiently tainted from the illegal seizure of the controlled substance from his pocket. The consent occurred during an ongoing illegal seizure, thus no time factor nor other intervening factors separated the illegality from the consent. Defendant's consent to search was the result of the exploitation of his illegal detention and illegal search of his person.

Finally, Trooper Maycock did not have reasonable articulable suspicion or probable cause to search Defendant or his motor vehicle. Trooper Maycock did not have reasonable articulable suspicion of serious criminal activity or probable cause justifying further detention of Defendant after preparation of the citations for speeding, no seat belt and open container. The fact that Defendant may have been hesitant in his responses to Trooper Maycock's questioning when standing in front of his vehicle does

not support a reasonable suspicion of serious criminal activity or probable cause. Nor does the fact that the Trooper discovered only one open container of alcohol. The Trooper's hunch, without more, does not raise a reasonable articulable suspicion. The fact that both occupants had alcohol on their breath does not indicate there is other alcohol in the vehicle. Trooper Maycock could have cited Defendant Rochell for an open container violation but chose to search his vehicle for other evidence.

ARGUMENT

POINT ONE: THE WARRANTLESS SEARCH OF DEFENDANT ROCHELL WAS UNLAWFUL AS THERE EXISTED NO REASONABLE BASIS TO BELIEVE DEFENDANT WAS ARMED AND PRESENTLY DANGEROUS WHEN HE WAS FRISKED

A peace officer, pursuant to section 77-7-16, U.C.A., as amended may frisk a person for dangerous weapons if he reasonably believes he or any other person is in danger. State v. Roybol, 716 P.2d 291, 292 (Utah 1986). The Utah statute is subject to and interpreted in light of the constitutional requirements of Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed. 2d 889 (1968). In Terry, the Supreme Court established a narrowly drawn exception to the requirement that police obtain a warrant for all searches. Warrantless searches are per se unreasonable under the Fourth Amendment, subject to only a few specifically established exceptions. State v. Ashe, 745 P.2d 1255 (Utah 1987), Katz v. United States, 389 U.S. 347, 357, 88 S. Ct. 507, 514, 19 L.Ed. 2d 576 (1967).

One exception to the warrant requirement permits an officer to

pat down a person for weapons when he reasonably suspects that such person may be armed and dangerous based upon specific and articulable facts. Terry v. Ohio at 21, 88 S. Ct. at 1879. The standard is whether a reasonably prudent man under the circumstances would believe that his safety or that of others was in jeopardy. State v. Roybol, supra. A brief check for weapons is permissible but anything beyond such a brief and narrowly defined intrusion constitutes a de facto arrest, and probable cause is required. Dunaway v. New York, 442 U.S. 200, 99 S. Ct. 2248, 2254 (1979).

Trooper Maycock did not initially frisk Defendant Rochell upon confronting him and during the time of the horizontal gaze nystagmus as he felt no need to do so (Tr. p.16). This fact strongly suggests that once Defendant exited his vehicle and stood within arm's length of Trooper Maycock the trooper did not suspect he was armed and dangerous. Prior to the actual frisk and search of Defendant, some 15 to 25 minutes after the initial stop, neither Defendant nor his passenger had done anything to suggest they were armed and dangerous (Tr. p.22). Therefore, the frisk and pat down of Defendant Rochell prior to searching his vehicle was not for dangerous weapons based upon a reasonable belief or suspicion permitted by Terry v. Ohio, supra or section 77-7-16 U.C.A., as amended.

POINT TWO: TROOPER MAYCOCK'S DETENTION OF DEFENDANT ROCHELL EXCEEDED THE SCOPE OF THE TRAFFIC STOP AND WAS NOT JUSTIFIED BY A REASONABLE SUSPICION OF CRIMINAL ACTIVITY

A police officer's stop of a vehicle is a seizure subject to fourth amendment protections. Delaware v. Prouse, 440 U.S. 648, 653, 99 S. Ct. 1391, 1396 (1979); State v. Steward, 806 P.2d 213, 215 (Utah App. 1991). A traffic stop is a limited seizure and is more like an investigative detention than a custodial arrest. United States v. Walker, 933 F.2d 812, 815 (10th Civ. 1991). In Terry v. Ohio, supra, the Supreme Court ruled the Fourth Amendment does not prohibit all seizures, but only unreasonable ones. To determine if a seizure is reasonable two questions must be asked: (1) Was Trooper Maycock's action initially justified?, and (2) Was Trooper Maycock's action reasonably related in scope to the circumstances which justified the interference in the first place? State v. Robinson, 797 P.2d 431, 435 (Utah App. 1990); State v. Parker, 189 Utah Adv. Rep 3 (Utah App. 1992).

Clearly, Trooper Maycock was justified in stopping Defendant for speeding 65 mph in a 55 mph zone (Tr. p.3). It was not a pretext stop (Tr. p.43). However, Trooper Maycock's conduct and subsequent action must also be reasonably related in length and scope to the stop of Defendant's motor vehicle for the initial traffic violations. State v. Lovegren, 183 Utah Adv. Rep 81 (Utah App. 1992). The Supreme Court has ruled that the detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Florida v. Royer, 460 U.S. 491, 500, 103 S. Ct. 1319, 1325 (1983). Once the reasons for the initial stop of the vehicle have been completed, the occupants must be allowed to proceed on their way. State v. Lovegren, supra. Any further

temporary detention for investigative questioning after the fulfillment of the purpose for the initial traffic stop is justified under the fourth amendment only if the detaining police officer has a reasonable suspicion of serious criminal activity. State v. Robinson, supra. Whether reasonable suspicion exists depends upon the totality of the circumstances. State v. Steward, supra; State v. Lovegren, supra.

Trooper Maycock did not have reasonable articulable suspicion of criminal activity beyond the initial traffic offense justifying further detention of Defendant. Defendant gave no reason to be searched by reason of his peaceful, cooperative attitude and Trooper Maycock was admittedly not fearful that Defendant was armed and dangerous (Tr. p.22). Trooper Maycock had no reason to search Defendant or his passenger.

Trooper Maycock did not have reasonable articulable suspicion there would be an open container of alcohol in Defendant's vehicle. According to Trooper Maycock it is perhaps logical and reasonable to assume Defendant had consumed alcohol other than in his vehicle (Tr. p.25). Trooper Maycock had no basis to assume that there existed an open container of alcohol within Defendant's immediate reach when he was seated in his vehicle. Upon actual search no open container was discovered (Tr. p.25). Trooper Maycock did not observe any objects which appeared to be open containers of alcohol when he looked inside the vehicle (Tr. p.19).

POINT THREE: SEIZURE OF THE CONTROLLED SUBSTANCE FROM DEFENDANT'S VEHICLE WAS OBTAINED BY ILLEGAL

EXPLOITATION AND THEREFORE WAS NOT ADMISSIBLE
EVIDENCE

Defendant Rochell admitted and disclosed to Trooper Maycock the location of a second baggie of cocaine in his vehicle following the search and seizure of cocaine from his pocket (Tr. p.10). Trooper Maycock admitted discovering the first baggie from the person of Defendant led to producing the second one (Tr. p.32).

The burden of proof is upon the State of Utah to show that the consent was voluntary and not obtained by exploitation of the prior illegality. State v. Arroyo, supra. The issue is whether Defendant's consent was sufficiently tainted by the illegal seizure of the controlled substance from his front pocket. The factors to be considered in an exploitation analysis are temporal proximity of the illegality and the consent, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct. Brown v. Illinois, 422 U.S. 590, 603-604, 95 S. Ct. 2254, 2261-2262 (1975).

The second baggie was discovered as a result of exploitation of the illegal detention and search of Defendant's person and not by means sufficiently distinguishable to be purged of the primary taint. Wong Sun v. United States, 371 U.S. 471, 488, 83 S. Ct. 407, 417 (1963). The State of Utah has the burden to prove the existence of intervening factors which prove that Defendant's consent was sufficiently attenuated from the prior illegality. State v. Arroyo, supra.

No such intervening factors exist in this case. Defendant's consent was obtained during an ongoing illegal search and there is

no delay in time between the illegal search and the consent. Nor has the State shown any intervening circumstances separating the illegality from the consent. Defendant's consent to search was the result of the exploitation of his illegal detention and unlawful search of his person. State v. Godina-Luna, 179 Utah Adv. Rep 21 (Utah App. 1992); State v. Hargraves, 806 P.2d 228 (Utah App. 1991).

POINT FOUR: TROOPER MAYCOCK DID NOT HAVE REASONABLE ARTICULABLE SUSPICION OR PROBABLE CAUSE TO DETAIN DEFENDANT AND SEARCH DEFENDANT OR HIS MOTOR VEHICLE

Trooper Maycock admitted he had formed the intent to search Defendant's vehicle for an open container and to personally frisk Defendant and his passenger as he was approaching Defendant's vehicle to give them their citations (Tr. p.23, 27). Therefore, the fact that Defendant may be hesitant in responding to Trooper Maycock's questioning and his failure to voluntarily empty his pockets when standing in front of his vehicle did not provide reasonable suspicion of serious criminal activity nor probable cause to search Defendant or his vehicle. Nervous behavior when confronted by a police officer does not give rise to a reasonable suspicion of criminal activity. State v. Godina-Luna, supra.

The fact that both parties had been drinking and the Trooper only saw one open container does not support a reasonable suspicion of serious criminal activity justifying further detention of defendant and search of Defendant or his vehicle. In Lovegren, the Court of Appeals held the fact that a car was cluttered with pop

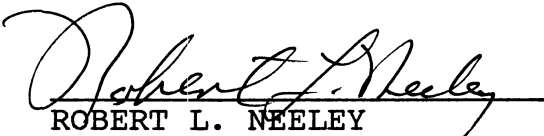
cans, beer cans, cigarette packages and ashes does not indicate Defendants were involved in criminal activity. Lovegren at 83. Trooper Maycock's "hunch" that there may be another open container in the vehicle, without more, is not sufficient to raise a reasonable articulable suspicion of criminal activity. State v. Johnson, 805 P.2d at 764. Trooper Maycock already had lawful authority to cite Defendant Rochelle for an open container but chose not to do so (Tr. p.30, 31). There existed no reason to search Defendant and his vehicle other than the personal desire of Trooper Maycock.

CONCLUSION

Defendant Rochell petitions this Court to reverse the trial court and suppress all evidence seized from Defendant's person and his vehicle, and remand this matter for further proceedings consistent therewith.

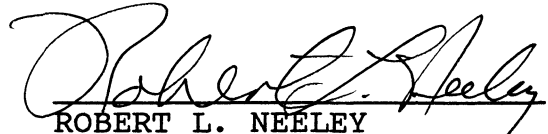
RESPECTFULLY SUBMITTED this 20th day of August, 1992.

CAMPBELL & NEELEY


ROBERT L. NEELEY
Attorney for Defendant-
Appellant

CERTIFICATE OF MAILING

I hereby certify that on this 20th day of August, 1992, I mailed four copies of the above and foregoing Brief of Appellant to Paul Van Dam, Attorney General, Attorney for State of Utah, Appellee, 236 State Capital, Salt Lake City, Utah 84102.


ROBERT L. NEELEY
Attorney for Defendant-
Appellant

William K. McGuire #2192
Davis County Attorney's Office
800 West State Street
Farmington, Utah 84025
Telephone: 451-4300

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF DAVIS, STATE OF UTAH

THE STATE OF UTAH,	:	FINDINGS OF FACT AND
Plaintiff,	:	CONCLUSIONS OF LAW
vs.	:	
JEFFREY WARREN ROCHELL,	:	Case No. 921700013
Defendant.	:	

This matter came on for hearing on Defendant's Motion to Suppress on the 18th day of March, 1992. Defendant was present and represented by Robert Neeley, the State was represented by William K. McGuire. The Court, having heard evidence and considered the memoranda of the parties, hereby enters its

FINDINGS OF FACTS

1. Defendant was stopped for speeding 65 miles per hour in a 55 mile per hour zone.
2. Officer David Maycock noticed smell of alcohol on defendant's breath.
3. Upon securing the registration, an open container fell from the passenger side of the vehicle. The officer determined it contained alcohol.
4. The passenger in the vehicle had also been consuming an alcoholic beverage.

5. The officer proceeded to write out citations; speeding and no seat belt to defendant and open container to the passenger. He then determined to search the vehicle for additional open containers since both occupants had been drinking, but only one container had been seen at that time.

6. The officer asked each occupant whether they had any weapons. The passenger, Mr. Miller, said no, emptied his pockets and turned around to show that he had no weapons. The defendant was hesitant in answering no and did not offer the contents of his pocket.

7. The officer noticed a bulge in defendant's left front pocket measuring 3-1/2 inches in diameter and 1 to 1-1/2 inches deep. The officer believed it could have been a knife or other weapon.

8. After the officer asked what the bulge was, defendant reached into his pocket and pulled out keys. However, the bulge was still present and the officer found it was still hard. The defendant then reached in and pulled out coins and as he did so a portion of a plastic baggie was exposed.

9. The officer asked what it was and the defendant said "nothing" and pulled his hand out of the pocket and placed it behind his back.

10. A second officer, approaching from the rear, observed a baggie of white powder and seized it.

11. Following the seizure of the baggie, defendant told the officer that another baggie was in the car and it was seized.

CONCLUSIONS OF LAW

1. The initial stop of defendant's vehicle was a proper traffic stop and not a pretext stop.

2. The officer had probable cause to believe that another alcoholic beverage was in the vehicle and therefore a search of the vehicle for that purpose was appropriate.

3. It was reasonable for the officer to determine if either of the occupants were armed with weapons prior to commencing a search of the vehicle. Based upon what he observed, the officer had a right to conduct a pat down of both occupants.

4. The seizure of the plastic baggie from defendant's hand was permissible.

5. The seizure of the baggie from the vehicle was pursuant to a valid arrest and appropriate impound of the vehicle.

Based upon the foregoing Findings of Facts and Conclusions of Law, the Court hereby ORDERS that defendant's motion to suppress is hereby denied.

DATED this 12 day of June, 1992.

BY THE COURT:


JUDGE

CERTIFICATE OF MAILING

I certify that I mailed a true and correct unexecuted copy of the foregoing Findings of Fact and Conclusions of Law, with postage prepaid thereon, to Robert Neeley, Attorney for Defendant at 2495 Grant Avenue, Suite 200, Ogden, Utah 84401, this 3rd day of June, 1992.

Kathy Morris
Secretary

STATE OF UTAH)
)
 Plaintiff,) RULING ON MOTION
)
 vs.) TO REVIEW RULING
)
 JEFFREY W. ROCHELL,) Criminal No. 921700013
)
 Defendant.)

JUDGE *Augustus L. Lundy*

Certificate of Mailing:

This is to certify that the undersigned mailed a true and correct copy of the foregoing Ruling to William McGuire, Davis County Attorney's Office, Farmington, Utah 84025 and Robert L. Neeley, 2485 Grant Avenue, Suite 200, Ogden, Utah 84401 on April 15th 1992.

Kathy Petts
Clerk

MELVIN C. WILSON 3513
Davis County Attorney
800 West State Street
Farmington, Utah 84025
Telephone: 451-4300

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CLERK OF DISTRICT COURT

BY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF DAVIS, STATE OF UTAH

THE STATE OF UTAH,	:	JUDGMENT
Plaintiff,	:	
vs.	:	Case No. 92170 0013
JEFFREY WARREN ROCHELL,	:	
Defendant.	:	Hon. Douglas L. Cornaby, Judge

The above-entitled matter came on for sentence on the 12th day of May, 1992, the defendant being present in person and represented by his attorney, Robert Neeley, the State being represented by Carvel R. Harward, the Honorable Douglas L. Cornaby, Judge, presiding.

The defendant having been convicted upon a plea of guilty of the offense of Possession of a Controlled Substance, a felony of the third degree, and the Court having asked if the defendant had anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty of the offense of Possession of a Controlled Substance, a felony of the third degree, as charged and convicted.

IT IS FURTHER ADJUDGED that the defendant be confined and

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imprisoned at the Utah State Prison for the indeterminate term of 0-5 years, and is fined \$2,000 as provided by law.

IT IS FURTHER ADJUDGED that the defendant is granted a stay of execution of the above sentence and the defendant is placed on probation under the supervision of the Utah State Department of Adult Probation and Parole for a period of three years under the following conditions:

1. Usual and ordinary conditions required by the Department of Adult Probation and Parole to be set forth in an agreement.

2. Thirty days in the Davis County Jail with work release.

3. All but \$550 of the fine is suspended on satisfactory completion of probation. Fine of \$550 and surcharge of \$467.50 is to be paid through the clerk of the court at a rate of \$100 per month on or before the first Tuesday of each month beginning with July, 1992. The defendant is to be present on any day he is not current.

4. No violations of law.

5. No consumption of alcohol or alcoholic beverages.

6. No use or possession of controlled substances.

7. Submit to search of person, premises or vehicles and seizure of any evidence without a search warrant at the request of a probation or police officer.

8. Submit to body fluids testing upon request.

9. No association with known drug users.

10. No association with co-defendants.

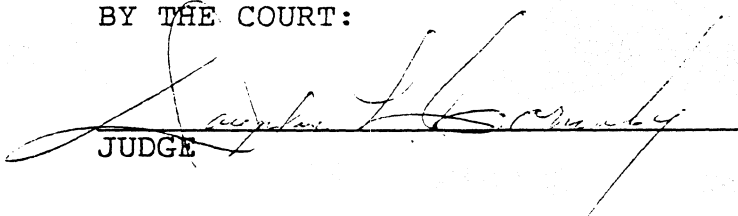
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- 11.. Drug and/or alcohol evaluation and follow-up.
12. Maintain full time employment.
13. No living with a person of the opposite sex without being married.
14. Felony Drug Supervision Program.

IT IS ORDERED that the Davis County Sheriff take the said defendant into his custody and confine and imprison said defendant in the Davis County Jail for the period of 30 days.

DATED this 1 day of June, 1992.

BY THE COURT:


JUDGE

Mailed an unexecuted copy of the foregoing Judgment this 20th day of May, 1992 to Robert Neeley, Attorney for Defendant, at 2485 Grant Avenue, Suite 200; Ogden, Utah 84401.

