

1992

Utah v. Rochell : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff/Appellee, : Case No. 920309-CA
v. :
JEFFREY W. ROCHELL, : Priority No. 2
Defendant/Appellant, :

BRIEF OF APPELLEE
- - - - -

THIS IS AN APPEAL FROM A CONVICTION FOR
POSSESSION OF A CONTROLLED SUBSTANCE,
(COCAINE) A THIRD DEGREE FELONY IN THE SECOND
JUDICIAL DISTRICT COURT, DAVIS COUNTY, STATE
OF UTAH, THE HONORABLE DOUGLAS L. CORNABY,
PRESIDING.

UTAH COURT OF APPEALS

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OCT 30 1992

J. T. Noonan
Court
Appeals

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IN THE UTAH COURT OF APPEALS

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Defendant/Appellant.:

BRIEF OF APPELLEE

- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction for possession of a controlled substance (cocaine), a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (Supp. 1992), in the Second Judicial District Court, Davis County, State of Utah, the Honorable Douglas L. Cornaby presiding.

This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1992).

STATEMENT OF ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Was the officer's protective frisk supported by a reasonable suspicion that defendant was armed and dangerous?

This Court has implied that a deferential, clearly erroneous standard of review applies to a trial court's determination of reasonable suspicion in support of a protective frisk. State v. Ayala, 762 P.2d 1107, 1111 (Utah App.) ("the record contains *sufficient evidence* that the officers in this case were justified in frisking defendant") (emphasis added), cert. denied, 773 P.2d 45 (Utah 1989). Because a protective

frisk must be based on reasonable suspicion that a person is armed, it is appropriate to apply a clearly erroneous standard, the general standard for reasonable suspicion rulings. See State v. Mendoza, 748 P.2d 181, 183 (Utah 1987) (trial court determination of reasonable suspicion will not be reversed on appeal unless it is clearly erroneous); State v. Sykes, Case No. 910554-CA, slip op. at 3 (Utah App. October 19, 1992) (trial court determination of reasonable suspicion should not be overturned unless it is clearly erroneous). But see State v. Munsen, 821 P.2d 13 (Utah App.) (applying nondeferential, "correction of error" standard in reversing trial court's reasonable suspicion determination), cert. denied, ___ P.2d ___ (Utah 1992).

2. Was defendant's detention beyond the initial purposes of the traffic stop supported by a reasonable suspicion of other more serious criminal activity?

A trial court's ruling on this question is also reversed on appeal only if clearly erroneous. State v. Robinson, 797 P.2d 431, 436-437 (Utah App. 1990).

3. Was defendant's consent to search his vehicle sufficiently attenuated from the alleged improper protective frisk and detention? Additionally, notwithstanding defendant's consent, was contraband seized from his vehicle tainted by the alleged improper protective frisk and detention?

Defendant failed to preserve for review any argument concerning the validity of his consent to search the vehicle.

State v. Price, 827 P.2d 247, 248 n.2 (Utah App. 1992); State v. Archambeau, 820 P.2d 920, 922 (Utah App. 1992). As for his allegations of taint resulting from the protective frisk and detention, the standard of review for a trial court's reasonable suspicion determination -- stated above -- applies here also.

4. Was the vehicle search justified as incident to defendant's arrest?

Because defendant does not challenge the validity of his arrest, or the trial court's conclusion that the vehicle search was justified as incident to his arrest, no standard of review for this issue need be set forth.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Any relevant text of constitutional provisions, statutes and rules pertinent to the resolution of the issues presented on appeal is contained in the body of this brief.

STATEMENT OF THE CASE

Defendant, Jeffrey W. Rochell, was charged with possession of a controlled substance (cocaine) with intent to distribute, a second degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(iv) (Supp. 1992); possession of a controlled substance (cocaine) without tax stamps affixed, a third degree felony, in violation of Utah Code Ann. § 59-19-106 (1992); speeding, a class C misdemeanor, in violation of Utah Code Ann. § 41-6-46(2)(d) (Supp. 1992); open container of liquor in or about a vehicle, a class C misdemeanor, in violation of Utah Code Ann. § 41-6-44.20 (Supp. 1992) (R. 10-12).

Defendant filed a motion to suppress contraband allegedly seized in violation of the fourth amendment and article I, section 14 of the Utah Constitution (R. 17).

After conducting a suppression hearing, the trial court denied defendant's motion to suppress (R. 38, 40-49). Thereafter, defendant entered a conditional guilty plea to the reduced offense of possession of a controlled substance (cocaine), a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (Supp. 1992), which preserved defendant's right to appeal the suppression ruling (see State v. Sery, 758 P.2d 935, 937-40 (Utah App. 1988)) (R. 50-54).

The trial court sentenced defendant to zero to five years in the Utah State Prison and imposed various fines and fees (R. 66). The court then stayed defendant's sentence and placed him on three years probation under certain specified conditions (R. 66-67).

STATEMENT OF THE FACTS

The following pertinent evidence was presented at the hearing on defendant's motion to suppress. It supports the trial court's findings.¹

On the evening of June 5, 1991, Trooper Maycock of the Utah Highway Patrol stopped defendant's vehicle on the northbound

¹ Although the trial court's written Findings of Fact and Conclusions of Law are contained in the record before this Court, they have not been numbered. A copy of the court's ruling is contained in Addendum B and the State will hereafter cite this Court to Addendum B when referring to the trial court's written findings and conclusions.

lane of I-15, near north Salt Lake, for speeding (Transcript of suppression hearing, March 18, 1992 [T.] at 3). Immediately upon being stopped, defendant exited his vehicle and began walking toward Trooper Maycock (T. 4). Defendant's passenger remained seated inside the car. Although he had anticipated a routine traffic stop, Trooper Maycock was "alerted" by defendant's behavior because it was unusual for a stopped driver to approach his patrol car (T. 12). The officer proceeded to carry out the traffic stop, making sure he could see defendant's hands (T. 12).

Trooper Maycock asked defendant for his driver's license, and in so doing, noticed the smell of alcohol on defendant's breath (T. 4). Defendant produced a valid Utah drivers' license, and the officer asked how much he had had to drink (T. 4). Defendant replied, "One beer" (T. 4). Trooper Maycock then asked defendant to perform a horizontal gaze nystagmus test to determine whether he was unlawfully intoxicated (T. 4). After defendant successfully completed the test, Trooper Maycock informed him that he had been stopped for a speeding violation (T. 5, 15).

The officer then asked to see defendant's vehicle registration (T. 5, 15). Defendant returned to his vehicle to retrieve the registration, followed by Trooper Maycock who was concerned that defendant might have a weapon in the vehicle (T. 17). When defendant opened the passenger side door to access the glove compartment, a plastic cup fell out, spilling alcohol on the ground (T. 5). The officer picked up the cup, checked the

smell, and returned it to defendant's passenger, who identified himself as Billy Gene Miller (T. 5).

Trooper Maycock then asked defendant to sit in his (defendant's) vehicle while he returned to the patrol car to write out citations (T. 6). The officer cited defendant for the speeding and seat belt violations and Miller for the open container violation. He then returned to defendant's vehicle and asked both defendant and Miller to step to the front of the car where he advised them that only Miller had been cited for the open container violation (T. 7). However, based on his observation of the open container, and the smell of alcohol on both men, Trooper Maycock indicated that he wanted to search the driver's side area of defendant's vehicle for additional containers, and that if he found one, he would cite defendant for that violation as well (T. 7, 25).

Because searching the vehicle would necessitate having his back to both men, Trooper Maycock first inquired whether either defendant or Miller had any weapons (T. 7, 23, 29). Both men said "No," and Miller immediately began emptying his pockets (T. 7). However, Trooper Maycock noticed a large bulge inside the left front pocket of defendant's shorts (T. 8). Fearing that the bulge was some type of a pocket knife, the officer lightly tapped it, determined that it was hard, and asked "What do you have in your pocket?" (T. 8). Defendant replied that he didn't have a weapon and produced a set of keys (T. 8).

Because there was still a noticeable bulge in defendant's pocket, the officer lightly tapped it again, noted that it was still hard, and asked, "What's that?" (T. 8). Trooper Maycock then explained that he didn't like the "thought of getting stuck with a pen knife" (T. 9). Defendant reached into his pocket a second time and produced a handful of loose change (T. 9). In so doing, he exposed a plastic baggie containing a white powdery substance (T. 9). The officer asked, "What's that baggy [sic]" and defendant replied, "Nothing" (T. 9). Defendant then attempted to conceal the baggie behind his back (T. 9).

Another officer, who had just arrived on the scene, approached from behind defendant.² After observing defendant's attempts to conceal the baggie behind his back, Officer Garrido seized the contraband (T. 10). Defendant was immediately arrested for possession of a controlled substance (cocaine) (T. 10). Following the administration of Miranda warnings,³ the officers inquired whether there was "any other dope in the car" (T. 10). Defendant said "Yes," and "advised" the officers "where it could be found" (T. 10). The officers then retrieved additional contraband from "between the cushions of the passenger seat" (T. 10).

² Trooper Maycock was contacted by Officer Garrido while sitting in his patrol vehicle writing out the initial citations. Officer Garrido requested Trooper Maycock's location so that he could return some handcuffs he had borrowed to make an earlier arrest (T. 6).

³ See Miranda v. Arizona, 384 U.S. 436 (1966).

Defendant filed a motion to suppress the contraband seized on the ground that it had been obtained in violation of the fourth amendment and article I, section 14 of the Utah Constitution (R. 17). In a supporting memorandum defendant alleged that Trooper Maycock lacked reasonable suspicion to frisk him for weapons and that additional contraband discovered in his vehicle was "fruit discovered from the previous illegal search of defendant's person and should be excluded" (R. 18-28) (copies of defendant's motion and memorandum are contained in Addendum A).

At a hearing on the matter, defendant argued that Trooper Maycock lacked reasonable suspicion to frisk him because "there was nothing to alert the officer that [he and Miller] had any weapons on them" (T. 39). Additionally, defendant argued that the officer "exceeded the duration and the scope of his initial stop when he ordered [defendant and Miller] to step forward so he [could] search them and search the vehicle" (T. 41). Finally, defendant argued that the vehicle search was not supported by probable cause (T. 41) (a complete copy of defense counsel's argument is contained in Addendum A).

The trial court denied defendant's motion on the grounds that the protective frisk and detention were reasonable and that the search of the vehicle was supported by probable cause. Additionally, the court concluded that the seizure of contraband from defendant's vehicle was justified as incident to his arrest (Addendum B).

SUMMARY OF THE ARGUMENT

The trial court's determination of reasonableness with respect to the protective frisk and the scope of the detention is not clearly erroneous. Concerning the officer's protective frisk, the officer's observation of a noticeable bulge in defendant's pocket reasonably gave rise to his suspicion that defendant was armed and potentially dangerous. The reasonableness of the officer's fear is not overcome by the fact that defendant and his passenger were outside the vehicle at the time of the frisk; moreover, as recently recognized by this Court, roadside traffic stops are inherently dangerous. Additionally, the protective frisk was no more intrusive than necessary to dispel or confirm the officer's suspicion of a concealed weapon.

As for the scope of the detention beyond the initial purposes of the traffic stop, the officer had at least a reasonable suspicion that defendant and his passenger were involved in other more serious criminal activity. During the course of investigating defendant's driver's license the officer smelled alcohol on the breath of both men and defendant admitted to having had one beer. Additionally, the officer observed an open container of alcohol fall from the passenger compartment when defendant attempted to retrieve the vehicle registration. Considering the totality of the circumstances, further detention was justified to investigate for consumption of alcohol while driving.

The trial court's conclusion that the subsequent search of defendant's vehicle was justified as incident to his arrest was similarly proper and should be affirmed. Defendant was arrested following the protective frisk which revealed the presence of contraband on his person. Contemporaneous with his arrest for possession of a controlled substance (cocaine), defendant's vehicle was searched for additional contraband. Because the contraband found on defendant's person provided probable cause for his arrest independent of the contraband later seized from his vehicle and because defendant's vehicle was within his immediate control at the time of his arrest, the contraband found therein was admissible.

Finally, because the vehicle search was justified as incident to defendant's arrest, there is no need to consider whether the search would be justified under the "automobile exception," or any other exception to the warrant requirement. Although defendant challenges the vehicle search on the ground that his consent was not sufficiently attenuated from alleged prior illegalities, he failed to preserve any argument concerning his consent in the trial court and has thus waived its consideration on appeal. As for defendant's additional allegations of taint stemming from the protective frisk and the scope of detention, he has failed to demonstrate that either the protective frisk or the detention were improper. Thus, it is not necessary for the State, or this Court, to engage in a taint analysis.

ARGUMENT

POINT I

THE OFFICER'S PROTECTIVE FRISK WAS SUPPORTED
BY A REASONABLE SUSPICION THAT DEFENDANT WAS
ARMED AND DANGEROUS

In Point I of his brief defendant asserts that because Trooper Maycock "did not initially frisk [him] upon confronting him," nor during the course of administering a subsequent field sobriety test, the officer could not have reasonably suspected that he was "armed and dangerous" (Br. of Appellant [App.] at 15). As support for his assertion defendant argues that "some 15 to 25 minutes after the initial stop, neither [he] nor his passenger had done anything to suggest they were armed and dangerous" (Br. of App. at 15). Because defendant's argument ignores the trial court's factual findings that the "officer noticed a bulge in defendant's left front pocket" (Addendum B), and that the officer reasonably "believed [the bulge to be] a knife or other weapon" (Addendum B), his argument lacks merit and should be rejected.

It is permissible for an officer "who reasonably suspects that an individual may be armed and dangerous, to pat down the outer clothing of that individual in a search for concealed objects which might be used as instruments of assault." State v. Ayala, 762 P.2d 1107, 1111 (Utah App.) (quotation omitted), cert. denied, 773 P.2d 45 (Utah 1989). See also State v. Bradford, No. 910282-CA, slip op. at 5 (Utah App. October 14, 1992); State v. Roybal, 716 P.2d 291, 292 (Utah 1986); Utah Code

Ann. § 77-7-16 (1990).⁴ The reasonableness of a protective frisk is assessed under an objective standard: "[W]ould the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate?" Terry v. Ohio, 392 U.S. 1, 21-22 (1968) (quotation and citations omitted). See also Ayala, 762 P.2d at 1111 ("The standard is whether a reasonably prudent man under the circumstances would believe that his safety or that of others was in jeopardy"). Thus, it is not "essential" that the officer actually be in fear, or that he be absolutely certain that the suspect is armed. Roybal, 716 P.2d at 293.

Trooper Maycock's protective frisk was based on a reasonable suspicion that defendant was armed and dangerous. Determining that he should search the driver's side area of the vehicle for an additional open container,⁵ Trooper Maycock asked defendant and Miller to step away from the vehicle (T. 6). See State v. Schlosser, 774 P.2d 1132, 1135 (Utah 1989) (driver stopped for traffic violation may be ordered out of vehicle for purposes of officer safety); Roybal, 716 P.2d at 293-94 (recognizing "need of officers to take reasonable precautions to insure their safety"). After defendant and Miller exited the

⁴ Section 77-7-16 provides:

A peace officer who has stopped a person temporarily for questioning may frisk the person for a dangerous weapon if he reasonably believes he or any other person is in danger.

⁵ Defendant's allegations concerning the propriety of the vehicle search are addressed in Point IV of this brief.

vehicle, Trooper Maycock observed a "bulge" in the left front pocket of defendant's shorts, the dimensions of which reasonably led the officer to believe that defendant was concealing a type of pocket knife and that he should perform a protective frisk before searching the vehicle (T. 8).

As recently noted by this Court, "roadside traffic stops are particularly dangerous when weapons may be present in the area immediately surrounding a suspect." Bradford, No. 910282-CA, slip op. at 4. See also Michigan v. Long, 463 U.S. 1032, 1047-49 n.13 (1983) ("investigative detentions involving suspects in vehicles are especially fraught with danger to police officers," approximately 30% of police shootings occur when an officer approaches a suspect seated in a vehicle); State v. Johnson, 784 P.2d 1135, 1137 (Utah 1989) (officer shot without warning as he approached vehicle); 3 W. LaFare, *Search and Seizure*, § 9.4(a) n.26 (1987) (noting that more officers are shot while conducting field interrogations than while dealing with known felons and that 43% of officer shootings that occur pursuant to a vehicle stop, take place after the initial contact has been made). In Bradford, this Court further noted that "an officer's reasonable fear" is "not overcome" by the "the fact, taken in isolation, that a suspect is outside a vehicle while an officer is conducting a search." Id. at 5. See State v. Dorsey, 731 P.2d 1085, 1093 n.3 (Utah 1986) (Zimmerman, J., concurring) (rejecting defendant's contention that it was "unrealistic" for officers to fear that defendants presented a threat to their

safety since they were "standing by the rear of the truck under control of several officers holding drawn weapons"). See also Long, 463 U.S. at 1051 (rejecting a similar claim, reasoning that a suspect "despite being under the brief control of a police officer, [could] reach into his clothing and retrieve a weapon").

Additionally, the noticeable bulge in defendant's pocket reasonably supported Trooper Maycock's belief that defendant had access to a concealed weapon. Stout v. State, 304 Ark. 610, 804 S.W.2d 686, 689 (Ark. 1991) (protective frisk justified in order to determine that "obvious bulge" in suspect's jacket was not a weapon); United States v. Barnes, 909 F.2d 1059, 1067 n.10 (7th Cir. 1990) (protective frisk justified by officer's observation of a "heavy object" protruding from suspect's jacket pocket). See 3 W. LaFave, *Search and Seizure*, § 9.4(a) n.44-45 (1987 & Supp. 1992). Moreover, the officer's protective frisk was not overly intrusive, consisting of light taps on the outside of defendant's pocket. Terry, 392 U.S. at 6, 30 (upholding more aggressive frisk where the officer "grabbed petitioner Terry, spun him around . . . and patted down the outside of his clothing," on the ground that the frisk did not invade Terry's person beyond the outer surfaces of his clothes and was thus confined to what was minimally necessary to discover the suspected weapon).

In light of the foregoing, defendant's unsupported assertions fail to demonstrate that the trial court's determination of reasonable suspicion to conduct a frisk was

clearly erroneous. Ayala, 762 P.2d at 1111; Mendoza, 748 P.2d 181, 183 (Utah 1987). Based on his observations of the suspicious bulge in defendant's pocket, Trooper Maycock's protective frisk was reasonable. Additionally, his light taps on the outside of defendant's pocket were no more intrusive than necessary to confirm or dispel his suspicion. Terry, 392 U.S. at 19 n.15. Thus, this Court should affirm the trial court's determination that the officer's protective frisk was reasonable and proper under the fourth amendment.

POINT II

DEFENDANT'S DETENTION BEYOND THE INITIAL
PURPOSES OF THE TRAFFIC STOP WAS JUSTIFIED BY
THE OFFICER'S REASONABLE SUSPICION OF OTHER
MORE SERIOUS CRIMINAL ACTIVITY

In Point II of his brief defendant asserts that "Trooper Maycock's detention of [him] exceeded the scope of the traffic stop and was not justified by a reasonable suspicion of criminal activity" (Br. of App. at 15). Additionally, defendant asserts that "Trooper Maycock had no reason to search [him]," or his vehicle (Br. of App. at 17). As defendant's allegations concerning the reasonableness of the protective frisk are addressed in Point I of this brief, and his allegations concerning the propriety of the vehicle search will be addressed in Point IV of this brief, the State's response here will focus on the reasonableness of the detention. Defendant's arguments concerning the scope of his detention lack merit and should be rejected.

As recently observed by this Court, "[a]fter stopping a

vehicle for a traffic violation, an officer may briefly detain the vehicle and its occupants while he examines the vehicle registration and the driver's license." State v. Bradford, No. 910282-CA, slip op. at 3 (Utah App. October 14, 1992) (quotations and citations omitted). However, once the driver has produced a valid license and evidence of entitlement to use the vehicle, the occupants may not be further detained in the absence of a reasonable suspicion of other serious criminal activity. Id. at 3-4.

Defendant acknowledges that the stop of his vehicle for a traffic violation was justified at its inception (Br. of App. at 16). Specifically, Trooper Maycock stopped defendant's car for traveling sixty-five miles per hour in a fifty-five mile-per-hour zone (T. 3), a clear violation of Utah Code Ann. § 41-6-46(2)(d) (Supp. 1992). See Bradford, No. 910282-CA, slip op. at 3 (police officer may stop a vehicle when the officer has witnessed the commission of a traffic violation). Defendant's detention beyond the initial purposes of the traffic stop was similarly justified based on observations by the officer during that time which gave rise to a reasonable suspicion of defendant's participation in other more serious criminal activity. Id. at 4.

During the course of his investigation Trooper Maycock smelled alcohol on both defendant's and Miller's breath, and defendant admitted that he had been drinking (T. 4, 6). Additionally, the officer observed an open container of alcohol

fall from the passenger side of the vehicle when defendant attempted to retrieve the vehicle registration from the glove compartment (T. 5). At the very least, these circumstances gave rise to a reasonable suspicion of alcohol use such that further detention to investigate for consumption of alcohol while driving was justified. See Utah Code Ann. § 41-6-44.20(1) & (2) (Supp. 1992) (prohibiting consumption of alcoholic beverage or possession of an open container while in a motor vehicle on a highway). Considering the totality of the circumstances, it is hard to imagine what more an officer would need beyond the circumstances present here: the smell of alcohol on both defendant and his passenger, an open container of alcohol in the passenger compartment, and defendant's admission that he had been drinking. See Bradford, No. 910282-CA, slip op. at 5 (courts will engage in a totality of the circumstances analysis to determine whether there was a reasonable suspicion of criminality).

Although not directly so stating, the trial court implicitly determined that the scope of defendant's detention was supported by at least a reasonable suspicion of illegal conduct (Addendum B).⁶ Because defendant's unsupported assertions fail to demonstrate that the trial court's determination was clearly erroneous, this Court should affirm. State v. Robinson, 797 P.2d

⁶ In denying defendant's motion to suppress, the trial court concluded that Trooper Maycock "had *probable cause* to believe that another alcoholic beverage was in the vehicle" (Addendum B) (emphasis added).

431, 436-437 (Utah App. 1990); State v. Mendoza, 748 P.2d 181, 183 (Utah 1987).

POINT III

DEFENDANT FAILED TO PRESERVE ANY ARGUMENT CONCERNING THE VALIDITY OF HIS CONSENT TO SEARCH THE VEHICLE IN THE TRIAL COURT AND HAS THUS WAIVED ITS CONSIDERATION ON APPEAL; AS FOR DEFENDANT'S ADDITIONAL ALLEGATIONS OF TAINT, HE HAS NOT DEMONSTRATED THAT EITHER THE DETENTION OR THE PROTECTIVE FRISK WERE ILLEGAL; THUS, NEITHER THE STATE NOR THIS COURT NEED ENGAGE IN A TAINT ANALYSIS

In Point III of his brief defendant asserts that contraband discovered inside in his vehicle was illegally seized (Br. of App. at 18). In so arguing, defendant primarily asserts that his consent to search the vehicle was not sufficiently attenuated from the officer's previous "illegal seizure of the controlled substances from his front pocket" (Br. of App. at 18). Additionally, defendant asserts that contraband found in his vehicle "was discovered as a result of exploitation of the illegal detention and search of [his] person" (Br. of App. at 18). Because defendant failed to preserve any argument concerning the validity of his consent to search the vehicle in the trial court and because he has not demonstrated that the detention or the protective frisk were illegal, this Court should reject both arguments.

A. Waiver of Consent Issue

Defendant filed a motion to suppress the physical evidence against him in the trial court, broadly alleging that the contraband had been illegally seized under the fourth

amendment and article I, section 14 of the state constitution (R. 17; see Addendum A). In his supporting memorandum defendant cursorily relied on Wong Sun v. United States, 371 U.S. 471 (1963), and Sibron v. New York, 392 U.S. 40 (1968), to allege that contraband "found in [his] vehicle [was] fruit discovered from the previous illegal search of [his] person and should be excluded" (R. 18-28, 26; see Addendum A). He made no argument challenging the validity of the alleged consent search of the vehicle (R. 18-28, see Addendum A).

Defendant's oral argument on the matter was similarly devoid of any meaningful analysis concerning his argument under Wong Sun and Sibron. Rather, defendant merely concluded that "the second baggy [sic] obviously came from exploitation of . . . an illegal search and seizure which led to its finding after the wrongful taking of the first one" (T. 42; see Addendum A). Additionally, like his memorandum, defendant's oral argument was bereft of any challenge to the validity of his consent to search the vehicle (T. 38-42, see Addendum A).

On appeal to this Court defendant asserts for the first time that contraband discovered inside his vehicle was illegally seized because his consent to search the vehicle was not sufficiently attenuated from the officer's "illegal detention and search of [his] person" (Br. of App. at 18). Defendant's complete failure to develop this argument in the trial court constitutes a waiver of its consideration on appeal. State v. Price, 827 P.2d 247, 248 n.2 (Utah App. 1992); State v.

Archambeau, 820 P.2d 920, 922 (Utah App. 1992); State v. Carter, 707 P.2d 656, 660-61 (Utah 1985). The fourth amendment law recited in defendant's brief was available for presentation in the trial court; moreover, the record fails to indicate any reason for defendant's failure to develop the argument below. Absent special justification for failing to present all available grounds in support of a suppression motion, this Court will not rule on those grounds not addressed in the trial court. Ibid.

B. No Necessity for Taint Analysis

As for defendant's secondary assertion that the contraband seized from his vehicle was discovered as a result of the officer's "exploitation of the illegal detention and [frisk]," for reasons set forth in Points I-II of this brief, defendant has not demonstrated that either the protective frisk, or the scope of the detention were illegal. Thus, it is not necessary for the State, or this Court, to engage in an analysis of defendant's allegations of taint under Wong Sun, 371 U.S. at 487 (excluding evidence come at by exploitation of illegality rather than by means sufficiently distinguishable to be purged of the primary taint). Because defendant's unsupported assertions of illegality and taint under Wong Sun fail to pinpoint any clear error in the trial court's factual findings concerning reasonable suspicion for the protective frisk and detention, this Court should affirm. State v. Ayala, 762 P.2d 1107, 1111 (Utah App.), cert. denied, 773 P.2d 45 (Utah 1989); State v. Robinson, 797 P.2d 431, 436-437 (Utah App. 1990).

POINT IV

THE SEARCH OF DEFENDANT'S VEHICLE WAS JUSTIFIED AS INCIDENT TO HIS ARREST

In Point IV of his brief defendant again challenges the reasonableness of the protective frisk and the detention (Br. of App. at 19). Additionally, defendant asserts that Trooper Maycock did not have probable cause to search his vehicle (Br. of App. at 19). As defendant's allegations concerning the reasonableness of the protective frisk and the scope of detention are addressed in Points I-II of this brief, the State's response here will focus on the propriety of the vehicle search. Defendant's argument concerning the validity of the vehicle search lacks merit and should be rejected.

An exception to the probable cause and warrant requirements of the fourth amendment "justifies warrantless searches and seizures incident to a lawful arrest." In re K.K.C., 636 P.2d 1044, 1047 (Utah 1981); State v. Harrison, 805 P.2d 769, 784 (Utah App.) ("contemporaneous, warrantless search of the area within an arrestee's immediate control is permissible for the purpose of recovering weapons the arrestee might reach, or to prevent concealment or destruction of evidence"), cert. denied, 817 P.2d 327 (Utah 1991). As defendant has raised no challenge to the lawfulness of his warrantless arrest for possession of a controlled substance,⁷ the only issue on appeal

⁷ See Utah Code Ann. § 77-7-2(1) (1990) (peace officer may make a warrantless arrest for any public offense committed or attempted in his presence).

is whether the seizure of contraband from defendant's vehicle was made incident to his arrest.

The trial court did not make an express finding as to the time of defendant's arrest; however, Trooper Maycock testified at the suppression hearing that defendant was arrested immediately following the protective frisk revealing the presence of contraband on defendant's person (T. 10). Following the administration of Miranda warnings, the officer inquired whether defendant had "any other dope in the car" (T. 10). Defendant said "Yes," and "advised" Trooper Maycock "where it could be found" (T. 10). Accordingly, the trial court concluded that "[t]he seizure of the baggie from the vehicle was pursuant to a valid arrest" (Addendum B).

Based on the foregoing, the search of defendant's vehicle was permissible as incident to his arrest. K.K.C., 636 P.2d at 1046. The cocaine found on defendant's person provided probable cause for his arrest independent of the contraband later seized from the vehicle. See Utah Code Ann. § 58-37-8 (1) & (2) (Supp. 1992) (prohibiting the knowing and intentional possession and/or distribution of controlled substances). Moreover, defendant and Miller were standing near the vehicle at the time of the arrest and search (T. 9-10). The car being "within [defendant's] immediate control," New York v. Belton, 453 U.S. 454, 460 (1981), the contraband found as a result of the vehicle search was admissible. See Harrison, 805 P.2d at 784 n.29 (and cases cited therein recognizing constitutional validity of


searches incident to arrest where the arrestees were similarly removed from the searched area).⁸ Thus, the trial court correctly concluded that the search was justified as incident to defendant's arrest and this Court should affirm that conclusion.

CONCLUSION

The trial court's denial of defendant's motion to suppress evidence should be affirmed. Defendant's conviction therefore should also be affirmed.


RESPECTFULLY SUBMITTED this 30th day of October, 1992.

R. PAUL VAN DAM
Attorney General


MARIAN DECKER
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to Robert L. Neeley, CAMPBELL & NEELEY, attorney for appellant, 2485 Grant Ave., Suite 200, Ogden, Utah 84401, this 30th day of October, 1992.



⁸ Because the vehicle search was justified as incident to defendant's arrest, there is no need to consider whether the search and seizure would also be justified under the "automobile exception" to the warrant requirement. See K.K.C., 636 P.2d at 1047; Belton, 453 U.S. at 462 n.6.

ADDENDA

ADDENDUM A

ROBERT L. NEELEY #2373
OF CAMPBELL & NEELEY
Attorney for Defendant
2485 Grant Ave., Suite 200
Ogden, Utah 84401
Telephone: 621-3646

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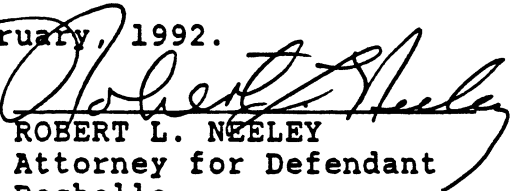
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IN THE DISTRICT COURT OF DAVIS COUNTY, STATE OF UTAH

STATE OF UTAH,) MOTION TO SUPPRESS
Plaintiff,)
vs.)
JEFFREY W. ROCHELL,) Judge: Douglas L. Connolly
Defendant.) Civil No. 921700013FS

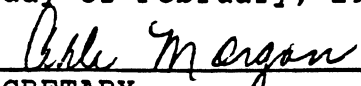
Comes now defendant, Jeffrey W. Rochell, by and through his attorney, and moves the above-entitled Court to suppress all evidence, specifically two baggies of cocaine, as the same was illegally seized and taken from defendant contrary to the 4th Amendment to the United States Constitution and Article I, Section 14 of the State of Utah Constitution. Upon suppression of the above described evidence, the criminal charges against defendant should be dismissed.

DATED this 24th day of February, 1992.


ROBERT L. NEELEY
Attorney for Defendant
Rochelle

CERTIFICATE OF HAND DELIVERY

I hereby certify that I hand delivered a copy of the foregoing Motion to Suppress to plaintiff's attorney, William K. McGuire, Davis County Attorney, this 24th day of February, 1992.


SECRETARY

ROBERT L. NEELEY #2373
OF CAMPBELL & NEELEY
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IN THE DISTRICT COURT OF DAVIS COUNTY, STATE OF UTAH

STATE OF UTAH,)	MEMORANDUM OF POINTS AND
)	AUTHORITIES IN SUPPORT OF
Plaintiff,)	MOTION TO SUPPRESS AND
)	DISMISS
vs.)	
JEFFREY W. ROCHELL,)	Judge: <i>Douglas L. Connelley</i>
Defendant.)	Civil No. 921700013FS

Comes now defendant, Jeffrey W. Rochell, and submits the following Memorandum of Points and Authorities in support of his Motion to Suppress and Motion to Dismiss, as follows, to-wit:

FACTS

1. On June 5, 1991, Trooper Dave Maycock, was stationary at the St. Joes overpass on I-15. His patrol vehicle was facing south and he was running radar.

2. At approximately 2015 hours, he observed a yellow Mustang northbound in the left lane. He estimated its speed at 65 M.P.H. He watched his radar unit, which showed a reading of 66 M.P.H., then it dropped to 65 M.P.H. The speed limit in that area is 55 M.P.H.

3. Traffic was light to moderate and the weather was clear. He pursued the vehicle, caught up to it, and initiated a

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traffic stop just north of the right hand guard rail near Carpenter Paper, Davis County, Utah.

4. The driver exited the vehicle and met him between their cars. He immediately noticed the smell of alcohol coming from defendant Rochell's breath. He asked to see defendant's driver license, at which time he offered it to Trooper Maycock. The driver was identified by his picture driver license as Jeffrey W. Rochell, D.O.B. 3-16-70.

5. The Trooper asked defendant Rochell how much he had to drink, and defendant stated "one beer". The Trooper had defendant perform a Horizontal Gaze Nystagmus Test and got no clues as to his being intoxicated. The Trooper then advised defendant of the reason for his stopping him and asked to see his registration.

6. Defendant Rochell approached the passenger side of the vehicle and opened the door. As soon as he opened the door a blue plastic cup with alcoholic beverage in it fell out and spilled on the ground. The Trooper then asked the passenger for some I.D., the passenger stated he had none. The passenger identified himself as Billy Gene Miller, D.O.B. 1-30-50.

7. Defendant Miller also had an obvious odor of alcohol coming from his breath. Defendant Rochell found the vehicle registration and joined the Trooper again at the rear of his vehicle.

8. The Trooper advised defendant Rochell to return to

his vehicle. The Trooper returned to his patrol vehicle. The Trooper filled out a citation for defendant Rochell for speeding 65/55, and failure to wear his seatbelt. The Trooper also filled out a citation for defendant Miller for an open container.

9. Officer Garrido of North Salt Lake P.D. called the Trooper on the radio and asked if he could meet Trooper Maycock. Trooper Maycock told him his location and asked Officer Garrido to meet the Trooper there. Officer Garrido had to return a set of Trooper Maycock's handcuffs he had borrowed earlier on a previous arrest.

10. Trooper Maycock approached the driver side of the vehicle again and asked both occupants to step to the front of their vehicle. The Trooper advised them he had already seen the one open container of alcohol and defendant Miller was receiving a citation for it. The Trooper advised them that he was going to have a look into the car to see if there was another open container, and that defendant Rochell would be cited for it if there was.

11. About that time, Officer Garrido pulled in behind the Trooper's patrol vehicle. Trooper Maycock was facing south so he could see Officer Garrido's approach and both suspects was facing north with their backs to the vehicles.

12. The Trooper asked both defendants if they had any weapons, knives or needles on them that he could be stuck with

while he was bent over looking into the car. Both stated "no". Defendant Miller volunteered everything in his pockets without being asked. He had no weapons.

13. Defendant Rochell just stated something to the effect of no, he didn't have any weapons on him. The Trooper saw a bulge in his left front pocket and he tapped it with the back of his fingers, feeling that it was something hard. Trooper Maycock asked "what's that"? Defendant Rochell reached in his pocket, rustled around for a second and then pulled out a set of keys. The Trooper noticed there was still a bulge there and tapped it again with the back of his fingers, feeling only that something was hard in there. The Trooper asked again "what's that"? and added "I don't like those little pen knives." Defendant Rochell stated it was only change. The Trooper asked him to pull it out so he could see. Defendant Rochell put his hand into his pocket again, rustled around for a second and pulled out a handful of change.

14. As defendant Rochell pulled out his change he also partially exposed a plastic baggie. The Trooper pointed to the baggie/pocket and asked "what's that"? Defendant Rochell put his hand into his pocket with change still in his hand and stated "nothing" pulling his hand back out of his pocket and concealing it behind his back. Officer Garrido immediately went for Mr. Rochell's hand and pulled the baggie from his hand.

15. Officer Garrido immediately handed the baggie to

Trooper Maycock. In it was a powdery substance suspected to be cocaine.

16. Both individuals were placed into custody and given Miranda. Defendant Rochell received his rights by Trooper Maycock and defendant Miller received his rights by Officer Garrido.

17. Defendant Miller denied any knowledge of any narcotics in the vehicle.

18. Defendant Rochell was asked by Trooper Maycock and again by Officer Garrido if there was any other "Dope" in the car. Defendant Rochell stated that there was another baggie just like the one the Trooper found in his pocket, stuck between the cushions of the passenger seat. As was stated by him, another baggie was found in that position.

19. Defendant Rochelle indicated to Detective Lon Bryan the second baggie of cocaine found between the cushions of the passenger seat was the property of Billy G. Miler.

I

THE TROOPER MAY INITIALLY ENGAGE IN A
PROTECTIVE SEARCH OF DEFENDANT ROCHELLE
IF HE REASONABLY BELIEVES HE IS IN DANGER.

Although a person has a lesser expectation of privacy in a car than in his or her home, California v. Carney, 471 U.S. 386, 390-93, 105 S.Ct. 2066, 2068-70, 85 L.Ed. 2d 406 (1085), one does

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not lose the protection of the Fourth Amendment while in an automobile. However, when an officer stops a vehicle for a traffic violation, he may briefly detain the vehicle and its occupants while he examines the vehicle registration and the driver's license. See Delaware v. Prouse, 440 U.S. 648, 654, 99 S.Ct. 1391, 1396, 59 L.Ed 2d 660 (1979). An officer, for his own protection, may also order a driver out of a vehicle which has been stopped for a traffic violation. Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed. 2d 331 (1977).

U.C.A., 1953, Section 77-7-16, authorizes a peace officer to frisk a person for dangerous weapons if he reasonably believes he or any other person is in danger. The section must be interpreted to meet the constitutional requirements of Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968). In that case, the Supreme Court established a narrowly drawn exception to the requirement that police obtain a warrant for all searches. The exception applies in cases where the officer has a reasonable belief, based on "specific and articulable facts," that the person may be armed and dangerous. Id. at 21, 88 S.Ct. at 1879. State v. Carter, Utah 707 P.2d 656 (1985).

Although a warrant is required before the government may intrude upon a person's reasonably expectation of privacy, an exception to the warrant requirement is the investigative stop situation. The United States Supreme Court has held that a law

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enforcement officer may "in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." Terry v. Ohio, 392 U.S. 1, 22, 88 S.Ct. 1868, 1880, 20 L.Ed. 2d. 889 (1968). The oft-stated test to determine the validity of a temporary investigative stop, short of an arrest based on probable cause, is whether the police officer can point to specific and articulable facts which taken together with rational inferences from those facts, reasonably warrant that intrusion. Terry, 392 U.S. at 21, 88 S.Ct. at 1880.

II

THE FACT THAT TROOPER MAYCOCK DID NOT CONSIDER IT NECESSARY TO INITIALLY FRISK DEFENDANT ROCHELLE PRECLUDES CONCLUSION THAT TROOPER HAD A REASONABLE BASIS TO SUSPECT DEFENDANT ROCHELLE MIGHT BE ARMED AND DANGEROUS PERMITTING SEARCH OF HIS PERSON BEFORE SEARCHING DEFENDANT'S VEHICLE.

It is obvious from the facts of this case Trooper Maycock had no reasonable basis or suspicion he may articulate that defendant Rochelle was armed and dangerous justifying a search of his person. Trooper Maycock did not consider defendant armed and dangerous as evidenced by the following:

1. Defendant upon being stopped by the Trooper did not flee or attempt to evade the Trooper.

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2. Defendant exited his vehicle and met him between their vehicles.

3. Defendant produced his driver's license.

4. Defendant cooperated in performing field sobriety tests requested by the Trooper.

5. The Trooper was standing extremely close to defendant in order to conduct Horizontal Gaze Nystagas Test.

6. The Trooper did not initially frisk the defendant evidencing no fear or suspicion defendant was armed and dangerous.

7. Defendant went to his vehicle with Trooper to obtain his automobile registration.

8. Trooper allowed defendant to get into his vehicle to obtain registration evidencing Trooper had no fear or suspicion that defendant might obtain a weapon while searching for registration.

9. Defendant cooperated and produced his vehicle registration.

10. Defendant joined the Trooper at the rear of his vehicle with the registration.

11. Trooper decides to issue citations for offenses and allows defendant to return to his vehicle evidencing no fear that defendant might obtain a weapon from the vehicle.

12. Defendant exits vehicle and steps to front of vehicle when requested by Trooper to receive citation.

13. Trooper then indicates for the first time he is going to search the parties for weapons before searching their vehicle for alcohol. He was not searching the vehicle for weapons.

14. Both defendants indicated they had no weapons on their person. Trooper searches defendant Miller and finds no weapon.

15. Trooper persists in searching defendant Rochelle until defendant empties his front pocket.

From the facts and sequence of events in the case, it is clear the Trooper had no fear the defendant had a weapon on his person or one in the vehicle as he allowed defendant to get back into his vehicle unattended. Therefore, the frisk of defendant Rochelle 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 77-7-16 U.C.A., as amended. The baggie of cocaine seized from defendant's person should be suppressed.

III

EVIDENCE SEIZED FROM DEFENDANT'S MOTOR
VEHICLE WAS A DIRECT RESULT FROM EVIDENCE
WRONGFULLY SEIZED FROM DEFENDANT AND IS
FRUIT OF PREVIOUS ILLEGAL SEARCH.

The second baggie of cocaine seized from defendant's motor vehicle was discovered as a direct result of evidence wrongfully seized from defendant. The second baggie of cocaine

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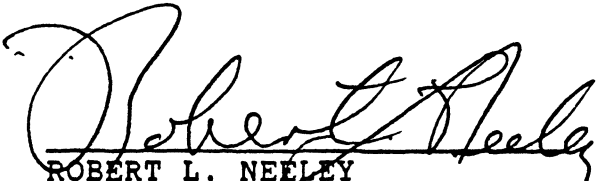
found in the vehicle is fruit discovered from the previous illegal search of defendant's person and should be excluded. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963); Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed. 2d 917 (1968).

Further, defendant Rochell indicated to the officers on the scene the second baggie of cocaine was not his but that of defendant Miller who put it between the cushions of his seat.

CONCLUSION

The search of defendant's Rochelle person by Trooper Maycock was illegal contrary to the United States and Utah Constitution and the evidence produced there from should be suppressed. The fruits derived from the illegal search should likewise be suppressed and all evidence derived as a result thereof suppressed from evidence.

Respectfully submitted this 24th day of February, 1992.


ROBERT L. NEELEY
Attorney for Defendant Rochelle

MEMORANDUM
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CERTIFICATE OF HAND DELIVERY

I hereby certify that I hand delivered a copy of the foregoing Memorandum of Points and Authorities in Support of Motion to Suppress and Dismiss to plaintiff's attorney, William K. McGuire, Davis County Deputy Attorney, this 24 day of February, 1992.

Arden Morgan

1 before the Court, that this evidence should not be
2 suppressed.

3 THE COURT: Mr. Neeley?

4 MR. NEELEY: In response, your Honor, I would like to
5 point out some language to you. I suspect the Court's
6 already familiar with it and has the memorandums on file.
7 But my understanding of the Terry v. Ohio case as well as
8 Section 77-6-16 of the Utah Code authorizes a police officer
9 to search a party he's confronting if he reasonably believes
10 he is endangered.

11 And the Court has set forth something that has been
12 described as a narrowly drawn exception to the requirement
13 that police always obtain a warrant before any searches.
14 Searches per say are unreasonable unless they fall within the
15 exception. And the exception set forth in Terry applies in a
16 case where the officer has reasonable belief based upon facts
17 that he can articulate and be specific about that this person
18 must be armed and dangerous.

19 I emphasize this, your Honor, because it's apparent
20 that Trooper Haycock has been in the company of Mr. Rochell
21 at this point in time for in excess of 15 to 20 to 25 minutes
22 by the time they get up to the car the second time. And he
23 candidly has indicated to you that there has been absolutely
24 nothing about Mr. Rochell that alerted him to any weapons.
25 He was not angry. He was cooperative. He did not make any

1 inadvertent gestures, nothing which would lead him to believe
2 that he was armed or dangerous.

3 I think it's also very crucial and very candidly
4 stated by the trooper that he had formed the intent to search
5 his person when he walked up to the car the second time. He
6 hadn't seen any bulges in the pocket. He hadn't asked him to
7 step out. He had absolutely no reason at that time to
8 suspect that either party was armed or dangerous. And he
9 forms the intent that he will search their person prior to
10 searching the contents of the vehicle.

11 Now, it would appear to me that the longer you're
12 with someone on a traffic stop, the greater feel you have for
13 the type of stop that you have. Is it a dangerous one, or
14 are the parties cooperating and so forth? And I would
15 suspect that based on all of the evidence before the Court,
16 there is nothing out of the ordinary, nothing unusual. The
17 only unusual factor being the open container that fell out.
18 But there was nothing to alert the officer that these people
19 had any weapons on them. In fact, as the case turns out,
20 there were no weapons. The officer forms the intent to
21 search not based on any facts that he can specifically
22 articulate to the Court.

23 And I submit that under the Terry v. Ohio and under
24 Section 77-6-16 that he had no right to search the person.
25 If he felt endangered, if he felt that they had a weapon or

1 if they were being uncooperative, if they were mad at him, if
2 they were angry, those might be facts that he could tell the
3 Court. But that's not the case. These people have done
4 absolutely nothing to alert him to the fact that he might be
5 in danger.

6 Secondly, your Honor, I believe that the trooper
7 exceeded the scope and the duration of his initial stop when
8 he orders both of the parties out of the vehicle so that he
9 can search the vehicle and he can search their person. I did
10 not cite this particular case, but after getting counsel's
11 memorandum, and I will give the Court a copy of it and
12 counsel a copy of it. There's State of Utah vs. Hargraves,
13 February 7th, 1991, case that the Court of Appeals decided,
14 and that basically is a traffic stop. And the Court stated:

15 "If the trial court finds that the defendant
16 Hargraves was in custody throughout this incident" --
17 and there's no question the trooper's indicated these
18 parties were in his custody, they were not free to
19 leave -- "the Court must determine whether the custody
20 was lawful in its scope and duration."

21 And you read the cases under Terry V. Ohio and the
22 following cases.

23 "The detention must be temporary and last no longer
24 than is necessary to affectuate the purpose of the
25 stop."

1 And I submit that he had concluded and had done
2 everything that he had to when he filled out that citation
3 and walked up there and was prepared to hand the citation to
4 the parties. And I submit that he has exceeded the duration
5 and the scope of his initial stop when he orders them out of
6 the vehicle to step forward so he can search them and search
7 the vehicle.

8 Thirdly, I would submit that he had no probable
9 cause to search the vehicle. It would be erroneous to saying
10 that any time you detect the odor of alcohol about someone's
11 person, you can search their vehicle. If you follow the
12 trooper's reasoning, he had two people with the odor of
13 alcohol about their breath, about their person. He observes
14 one open container. He does not see any objects when he's
15 passing by or observing the inside of that vehicle to alert
16 him to any other open container. And I submit that he does
17 not have probable cause to search the vehicle simply because
18 the driver has the odor of alcohol about his person.

19 And the only other point that I would like to make,
20 your Honor, is there was a fairly recent case, just decided
21 last month -- well, actually it looks like the end of
22 January, January 30th, 1992. It's State vs. Godina-Luna,
23 also a traffic stop. And in that case, the Court of Appeals
24 emphasized again that:

25 "The length and scope of the detention must be

1 strictly tied to and justified by the circumstances
2 which rendered its initiation" -- the initial stop --
3 "permissible. Once the reasons for the initial stop
4 have been satisfied, the individual must be allowed to
5 proceed on his or or her way. Any further temporary
6 detention for investigative questioning after the
7 fulfillment of the purpose for the initial traffic stop
8 is justified under the fourth amendment only if the
9 detaining officer has a reasonable suspicion of serious
10 criminal activity."

11 I submit the trooper did not. And I will give the
12 Court and counsel a copy of both of those cases which I did
13 not attach to the memorandum in as much as counsel's
14 memorandum alerted me to those issues.

15 I would submit it, your Honor. I would ask that
16 the baggy of cocaine found on his person be suppressed and
17 that the baggy of cocaine found in the passenger seat
18 likewise be suppressed inasmuch as the second baggy obviously
19 came from exploitation of what I believe to be an illegal
20 search and seizure which led to its finding after the
21 wrongful taking of the first one. Thank you.

22 THE COURT: Thank you.

23 Any rebuttal?

24 MR. McGUIRE: Just one matter, your Honor.

25 With regard to the Hargraves and Godina-Luna

ADDENDUM B

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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.

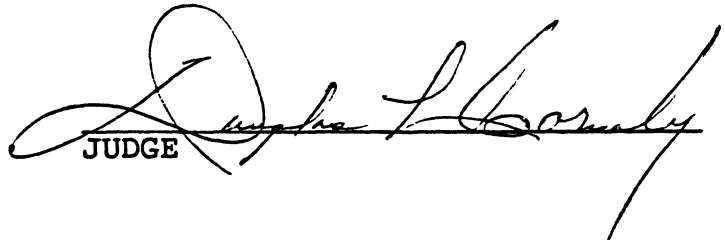
4. The seizure of the plastic baggie from defendant's hand was permissible.

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