

1992

# Utah v. Wayne Derron Potter : Brief of Appellee

Utah Court of Appeals

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Mark T Ethington; Day & Barney; Attorneys for Defendant/Appellee.

Jan Graham; Attorney General; J. Kevin Murphy; Assistant Attorney General; Attorneys for Plaintiff/Appellant.

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**BRIEF**

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DOCKET NO.

920614

IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,

Plaintiff-Appellant,

vs.

WAYNE DERRON POTTER,

Defendant-Appellee.

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:

:

Case No. 920614-CA

Priority No. 15

**BRIEF OF APPELLEE**

DEFENDANT-APPELLEE'S RESPONSE TO PLAINTIFF'S APPEAL FROM AN ORDER OF DISMISSAL FOLLOWING AN ORDER SUPPRESSING EVIDENCE IN A PROSECUTION FOR CARRYING A CONCEALED DANGEROUS WEAPON, A CLASS A MISDEMEANOR IN VIOLATION OF UTAH CODE ANN. SECTION 76-10-504(1)(b) (1990), UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE (MARIJUANA), A THIRD DEGREE FELONY IN VIOLATION OF UTAH CODE ANN. SECTION 58-37-8(2)(b)(iii) & (2)(d) (1990), AND UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE (COCAINE), A SECOND DEGREE FELONY IN VIOLATION OF UTAH CODE ANN. SECTION 58-37-8(2)(b)(ii) & (2)(d) (1990). THE ORDERS WERE ENTERED BY THE SEVENTH DISTRICT COURT, IN AND FOR EMERY COUNTY, UTAH, THE HONORABLE BOYD BUNNELL, PRESIDING.

MARK T. ETHINGTON (4828)  
DAY & BARNEY  
45 East Vine Street  
Murray, Utah 84107

Attorneys for Defendant-Appellee

JAN GRAHAM (1231)  
Attorney General  
J. KEVIN MURPHY  
Assistant Attorney General  
236 State Capitol  
Salt Lake City, Utah 84114

Attorneys for Plaintiff-Appellant

**FILED**

Utah Court of Appeals

MAY 25 1993

*Mark Ethington*

IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,

Plaintiff-Appellant,

vs.

WAYNE DERRON POTTER,

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MARK T. ETHINGTON (4828)  
DAY & BARNEY  
45 East Vine Street  
Murray, Utah 84107

Attorneys for Defendant-Appellee

JAN GRAHAM (1231)  
Attorney General  
J. KEVIN MURPHY  
Assistant Attorney General  
236 State Capitol  
Salt Lake City, Utah 84114

Attorneys for Plaintiff-Appellant

## TABLE OF CONTENTS

|   | Page |
|---|------|
| TABLE OF AUTHORITIES . . . . .  | ii   |
| JURISDICTION AND NATURE OF PROCEEDINGS . . . . .  | 1    |
| ISSUE PRESENTED ON APPEAL AND STANDARD OF<br>APPELLATE REVIEW . . . . .   | 1    |
| CONSTITUTIONAL PROVISIONS, STATUTES AND RULES . . . . .   | 1    |
| STATEMENT OF THE CASE . . . . .   | 2    |
| STATEMENT OF FACTS . . . . .  | 3    |
| SUMMARY OF ARGUMENT . . . . .   | 5    |
| ARGUMENT  |      |
| A. THE TRIAL COURT DID APPLY THE CORRECT<br>LEGAL STANDARD IN DETERMINING REASONABLE<br>SUSPICION . . . . .                   | 5    |
| B. THE DEFENDANT'S CONSTITUTIONAL RIGHTS WERE<br>VIOLATED BECAUSE THERE WAS NO REASONABLE<br>SUSPICION FOR THE STOP . . . . . | 9    |
| CONCLUSION . . . . .  | 13   |

## TABLE OF AUTHORITIES

### CASES CITED

|  | Page          |
|--|---------------|
| <u>Brown v. Texas</u> , 443 U.S. 47, 52, 99 S. Ct. 2637, 2641<br>(1979) . . . . .          | 11, 12        |
| <u>State v. Baird</u> , 763 P.2d 1214, 1216 (Utah App. 1988) . .                           | 13            |
| <u>State v. Holmes</u> , 774 P.2d 506, 507 (Utah App. 1989) . .                            | 10            |
| <u>State v. Mendoza</u> , 748 P.2d 181, 183 (Utah 1987) . . . .                            | 1             |
| <u>State v. Menke</u> , 787 P.2d 537, 541 (Utah App. 1990) . . .                           | 7             |
| <u>State v. Roth</u> , 181 UAR 25 . . . . .  | 6             |
| <u>State v. Steward</u> , 806 P.2d 213, 216 (Utah App. 1991) . .                           | 12, 13        |
| <u>State v. Sykes</u> , 198 Utah Adv. Rep. 35, 36 (Utah App.<br>1992) . . . . .            | 1, 10, 11, 12 |
| <u>State v. Trujillo</u> , 739 P.2d 85, 88 (Utah App. 1987) . .                            | 10            |
| <u>Terry v. Ohio</u> , 392 U.S. 1, 21, 22, 88 S. Ct. 1868, 1880<br>(1968) . . . . .        | 7, 10         |
| <u>United States v. Sokolow</u> , 490 U.S. 1, 7, 109 S. Ct. 1581, 1585<br>(1989) . . . . . | 8, 9          |

### CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

|   |              |
|---|--------------|
| United States Constitution Amendment IV . . . . . | 1, 9, 10, 13 |
| Utah Constitution Article I, Section 14 . . . . . | 1, 10, 13    |
| Utah Code Ann., Section 77-7-25 . . . . .         | 2, 5         |

IN THE UTAH COURT OF APPEALS

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|                      |   |                    |
|----------------------|---|--------------------|
| STATE OF UTAH,       | : |                    |
| Plaintiff-Appellant, | : | Case No. 920614-CA |
| v.                   | : | Priority No. 15    |
| WAYNE D. POTTER,     | : |                    |
| Defendant-Appellee.  | : |                    |

---

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

Appellee refers the Court to the State's statement of the Jurisdiction and Nature of Proceedings as it is sufficient.

ISSUE PRESENTED ON APPEAL  
AND  
STANDARD OF APPELLATE REVIEW

Should this Court affirm the trial court's decision to grant Defendant's Motion to Suppress and Defendant's Motion to Dismiss on the basis that there was no reasonable suspicion to stop Defendant? Trial court rulings on reasonable suspicion are not reversed unless they are clearly erroneous. State v. Mendoza, 748 P.2d 181, 183 (Utah 1987); and State v. Sykes, 198 Utah Adv. Rep. 35, 36 (Utah App. 1992).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The Fourth Amendment to the United States Constitution, and Article One Section 14 of the Utah Constitution provide, in pertinent part,

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches seizures, shall not be violated....

Utah Code Ann. section 77-7-15 (1990), provides:

A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions.

#### STATEMENT OF THE CASE

Defendant was charged with unlawful possession of a concealed weapon, and with two counts of unlawful possession of a controlled substance. The two narcotics charges were based upon a small amount of marijuana, and cocaine residue found in a small container.

Defendant moved to suppress the evidence on the basis that there was no reasonable suspicion to stop the Defendant in his vehicle. The trial Court granted this motion by finding that the fact of Defendant coming to and going from a house that was under surveillance because a drunk driver said a pot party was going on there did not give rise to reasonable suspicion that the Defendant was engaged in any criminal activity.

The trial court subsequently denied the State's Motion to Reconsider, and granted Defendant's Motion to Dismiss. The State has now appealed the dismissal of the prosecution on the basis that there was reasonable suspicion.

### STATEMENT OF FACTS

1. On February 16, 1991, Deputy Gayle Jensen of the Emery County Sheriff's office stopped a suspect for suspicion of DUI. (R. 100)

2. The DUI suspect, who was obviously intoxicated, and in an effort to obtain favorable treatment on his soon-to-be-pending DUI case, told the deputy that there was a pot party going on at the house of Devon Potter which was nearby. (R. 100, 127-32).

3. Other officers were summoned to the scene. One of these officers was Deputy Mangum. The officers began surveillance on the home of Devon Potter while they waited for a search warrant to be prepared. (R. 166-67).

4. The Defendant in this Case, Wayne Potter, was not identified by the informant as being at the home of Devon Potter at the time of the alleged pot party. (R. 100).

5. One of the officers at or near the scene was Trooper Horrocks of the Utah Highway Patrol. While at the scene Trooper Horrocks observed a person get out of a vehicle near the trailer being observed, go into the trailer, come out a few minutes later, get into the vehicle and drive away. (R. 100).

6. At the time of this observation, Trooper Horrocks did not know the identity of the person going to and leaving from the trailer. (R. 101).



7. Deputy Mangum radioed Trooper Horrocks and requested that he stop the vehicle that had just left near the trailer, and detain the occupants pending arrival of the search warrant. (R. 101).

8. Without any other facts that would indicate any illegal activity on the part of the occupants of the vehicle, Trooper Horrocks stopped the vehicle for the purpose of detaining the occupants until further instructions were received or a search warrant for the trailer was obtained. (R. 101).

9. Although Trooper Horrocks did not know who was driving the vehicle at the time of the stop, upon approaching the vehicle he recognized the Defendant, Wayne Potter, as the driver, and by prior experience with the Defendant, he believed that there may be some danger to himself if he did not conduct a search for weapons. (R. 101).

10. Trooper Horrocks then conducted a search for weapons by having the occupants, including Defendant, empty their pockets. A concealed firearm was discovered on the person of the Defendant. (R. 100).

11. Trooper Horrocks then arrested Defendant for carrying a concealed weapon, and then proceeded to conduct a search incident to the arrest. During this search the trooper discovered on the person of the Defendant some marijuana, some

pills, and a small container containing what was later analyzed to be cocaine residue. (R. 102).

### SUMMARY OF ARGUMENT

The trial court applied the correct legal standard in determining reasonable suspicion. This is evident by a review of the entirety of the court's ruling on the motion to suppress, and the court's findings, and the court's ruling on the State's motion to reconsider.

By applying the standard of reasonable suspicion, it is obvious that the fact that Defendant simply came to and left from a house where it was alleged that a pot party was going on, does not give rise to reasonable suspicion to stop the Defendant, especially when this Court has found no reasonable suspicion in similar cases.

### ARGUMENT

#### A. THE TRIAL COURT DID APPLY THE CORRECT LEGAL STANDARD IN DETERMINING REASONABLE SUSPICION

The State first argues that the trial court's ruling that there was no reasonable suspicion to stop the Defendant should be overturned on the basis that the judge, in making his ruling, applied the more stringent "arrest" standard instead of the reasonable suspicion standard set forth in Utah Code Ann. section 77-7-15 (1990). This argument by the State is not

valid. A review of the entirety of the judge's decision will clearly show that the correct legal standard was applied.

The main impetus for the State's argument is the judge's use of the term "reasonable cause" in the court's denial of the State's Motion to Reconsider. In that ruling the judge stated that "no matter how you consider the facts in this case, they do not establish reasonable cause to believe that the Defendant was committing any crime or had committed any public offense at this time and place that would justify his apprehension and detention." (R. 97). However, it must be remembered that this is language from the court's ruling on the State's Motion to Reconsider. If we look directly to the court's ruling on the Motion to Suppress, it is abundantly clear that the correct standard was applied, and that what the judge meant to say in his later ruling on the Motion to Reconsider was "reasonable suspicion".

In its ruling on the Motion to Suppress, the trial court stated that "thus, a stop can be justified only upon a showing of reasonable suspicion that defendant was committing a crime or that he was stopped incident to a traffic offense". (R. 79). In support of this statement the court cited the case of State v. Roth, 181 UAR 25, which is a case dealing with the issue of reasonable suspicion. The court further stated that:

in order to satisfy the reasonable suspicion inquiry, it must be determined if, from facts apparent to Officer

Horrocks, and the reasonable inferences drawn therefrom, that he would reasonably suspect that the Defendant was committing, or had committed, a crime prior to the stop. This suspicion must be based upon articulated objective facts then apparent to the officer. (R. 80).

This is exactly the reasonable suspicion standard articulated in the Statute and in the numerous reasonable suspicion cases announced by the Utah appellate courts. The statute provides an officer may stop a person if he has "...reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense...." The trial court used almost the same, or essentially the same language as set forth above.

In Terry v. Ohio, which is the threshold case on reasonable suspicion, the United States Supreme Court held that "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968), as quoted in State v. Menke, 787 P. 2d 537, 541 (Utah App. 1990).

Once again, this is the same or essentially the same language used by the trial court in setting forth the legal standard of review in its ruling on the motion to suppress.

In applying the correct legal standard to the facts of this case, the trial court concluded that:

there was nothing in what Officer Horrocks knew or in what was conveyed to him that would create reasonable suspicion

of illegal conduct upon the part of the Defendant. There was nothing at the time that any of the deputies of the Emery County Sheriff's Office could factually articulate that would give rise to reasonable suspicion that the Defendant had committed or was committing a crime except his unidentified brief appearance on the premises as indicated. The courts have consistently held that this fact alone is not enough to create reasonable suspicion. (R. 82).

After reading this, the only conclusion is that the trial court did consider the appropriate standard in determining reasonable suspicion, and the State's argument in this regard is a diversion from the fact of the matter, which is that there was no reasonable suspicion to make the stop, and that the Defendant's constitutional rights were violated.

In addition, the trial court used the term "reasonable cause" in its Conclusions of Law only in reference to possible illegal activity going on inside the trailer, and not in regards to the standard to be applied in determining the illegality of the stop. (R. 102).

In arguing that the trial court applied the wrong legal standard, the state has enamored itself with the phrase "minimal objective justification" from the case of United States v. Sokolow, 490 U.S. 1, 7, 109 S. Ct. 1581, 1585 (1989). The obvious attempt in referring to this phrase is to "minimize" the reasonable suspicion standard to almost nothing. It is undisputed by Defendant that the standard for reasonable suspicion is less than that for probable cause. However, what

the state is tending to forget is the first part of the reasonable suspicion standard - that the suspicion must be "reasonable". And as the courts have interpreted this standard, they have concluded consistently, as set forth above, that the officer must be able to point to specific articulable and objective facts which indicate that the Defendant has committed or is attempting to commit a crime. That is the standard. Not "minimal objective justification".

The State interestingly notes in its brief that in the Utah Cases since Sokolow, that have held that there was no reasonable suspicion, not one of those cases "cites the correct 'minimal objective justification' standard...." (See Appellant's brief at p. 17). The Utah appellate courts obviously know what they're doing, and the reason why there is no citation to that phrase is because that is not the standard. All "minimal objective justification" is, is another way of saying that the standard for showing reasonable suspicion is lower than for probable cause. Simply put, the standard for determining whether the officer was entitled to stop the defendant in this case is reasonable suspicion, not "minimal objective justification".

B. THE DEFENDANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED  
BECAUSE THERE WAS NO REASONABLE SUSPICION FOR THE STOP

The Fourth Amendment to the United States Constitution provides, "the right of the people to be secure in their

persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...." U.S. Const. amend. IV. (Article I Section 14 of the Utah Constitution contains the same language).

When a police officer stops a vehicle, a "seizure" occurs, giving rise to Fourth Amendment protections. State v. Holmes, 774 P.2d 506, 507 (Utah App. 1989), as quoted in State v. Sykes, 198 Utah Adv. Rep. 35, 36, (1992).

This Court has held that, "to pass under the Fourth Amendment, the seizure must be based on specific articulable facts which, together with rational inferences drawn from them, would lead a reasonable person to conclude defendant had committed or was about to commit a crime." State v. Trujillo, 739 P.2d 85, 88 (Utah App. 1987). In emphasizing the "objectiveness" of this standard, the United States Supreme Court has stated,

In making that assessment it is imperative that the facts be judged against an objective standard....Anything less would invite intrusions upon constitutionally guaranteed rights based upon nothing more substantial than unarticulated hunches, a result this Court has consistently refused to sanction.

Terry, 392 U.S. at 21-22, 88 S. Ct. at 1880.

The facts in this case do not indicate in any way that Defendant was engaged in any criminal conduct whatsoever. The facts boil down to Defendant going to and leaving from a house that was under surveillance because a drunk driver, in an

effort to get a break on his case, said a pot party was going on at the house. That is all. And, as this Court has previously held, that type of activity does not give rise to a reasonable suspicion that the Defendant is engaged in criminal activity. If it was concluded that simply being in the area of suspected criminal activity gives rise to reasonable suspicion, that would mean that every client that came to and from my office could be stopped and questioned if the police for some reason suspected that I was engaging in a conspiracy to defraud someone, or if the police believed I had possession of stolen property. This type of behavior is obviously unreasonable, but that is exactly what the state wants this Court to approve.

The facts in Sykes are very similar to this case. In Sykes, an officer was conducting surveillance of a home for suspected narcotics activity based upon reports from neighbors and from an informant. While watching the home, the officer observed the defendant drive up, park, and enter the home. Approximately three minutes later, the defendant returned to her car and drove off. Sykes, 198 Utah Adv. Rep. at 36. The officer subsequently stopped the vehicle. This Court then held that "...the facts do not support a reasonable suspicion that defendant was engaged in criminal activity." Id. at 37. The mere presence of the Defendant in the area of suspected drug activity does not give rise to reasonable suspicion. See Brown



v. Texas, 443 U.S. 47, 52, 99 S. Ct. 2637, 2641 (1979), and State v. Steward, 806 P.2d 213, 216 (Utah App. 1991).

The State attempts to distinguish Sykes on the basis that in Sykes no warrant had been sought for yet, whereas here, the police were in the process of obtaining a warrant. This fact does not make any difference. As noted, in Sykes the police suspected illegal drug activity based upon complaints from neighbors about suspicious activities, information from an informant in regards to drug activity at the home, and a purchase of cocaine by an undercover agent in the area. Actually, there was more "positive" evidence in Sykes about drug activity at the house than we have here. In this case all we have is the unconfirmed statements of a drunk driver who is trying to get a break on his case. In addition, the drunk driver did not identify the Defendant as being at the alleged pot party, the Defendant came to the house after the drunk driver made his statements, and the police did not know the identity of Defendant until after he left the house.


The State also attempts to distinguish Steward by pointing out that the defendant in Steward was stopped even before reaching the premises. What the State fails to point out is that the premises were located in a cul-de-sac, the defendant was heading towards the premises in his vehicle, it was about 11:30 pm., the police had conducted a raid and had definitely

found narcotics, and when the defendant observed the police he attempted to flee in his vehicle. Steward, 806 P.2d at 216. In Steward the police actually knew there was criminal activity at the home. Here they only suspected it. Still, this Court held there was no reasonable suspicion in Steward, and that should be the same result here.

#### CONCLUSION

The Defendant's rights under the Fourth Amendment of the United States Constitution, and Article I Section 14 of the Utah Constitution forbidding unreasonable searches and seizures was violated because there was no reasonable suspicion to stop the Defendant. "Absent reasonable suspicion, evidence derived from the stop is 'fruit of the poisonous tree' and must be excluded." State v. Baird, 763 P.2d 1214, 1216 (Utah App. 1988). Therefore, this Court should hold that the trial court's decision to grant the Motion to Suppress and exclude the evidence is not clearly erroneous, and should affirm that decision as well as the trial court's decision to dismiss the case against Defendant.

Respectfully submitted this 21 day of May, 1993.

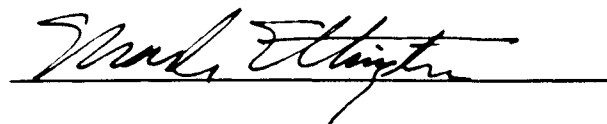
  
Mark T. Ethington  
Attorney for Appellee

CERTIFICATE OF MAILING

I certify that I am employed by the office of Day & Barney and that I mailed a true and correct copy of the foregoing, Brief of Appellee, postage pre-paid, to the following:

J. Kevin Murphy  
Assistant Attorney General  
236 State Capitol  
Salt Lake City, Utah 84114

on this 24 day of May, 1993.

A handwritten signature in cursive script, reading "Mark Ellington", is written over a horizontal line.

ADDENDUM  
Trial Court Rulings and Orders  
(in the ordered issued)

APR 13 1992

By                      Deputy

IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR EMERY COUNTY  
STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

WAYNE DERRON POTTER,

Defendant.

RULING ON MOTION TO  
SUPPRESS

Criminal No. 1029

The Defendant's Motion to Suppress the evidence in this case came on for hearing before the Court on April 6, 1992. The attorneys were present and the Court heard testimony of Trooper Jeff Horrocks and, pursuant to stipulation of the parties, considered the testimony of Officers of the Emery County Sheriff's Department by way of a transcript of hearing held on September 16, 1991, on a motion to suppress in the case of State v Devon Boyd Potter where the incidents leading up to the stop of the Defendant's vehicle were covered.

The Court finds that Officer Horrocks had good cause to search the Defendant after he stopped him in his vehicle. Although the officer did not know who was driving the vehicle until he approached it, he immediately recognized the defendant at that time and, by prior experience and general reputation, he knew that there may be some danger to himself if he carried out his intent to detain the Defendant without conducting a search for weapons.

The Officer stopped the vehicle with the intent to detain the occupants. Once this was done, the occupants were technically under arrest since they were not free to leave, and the officer has the right, under these circumstances, to search for weapons, which he did. In fact, he found a firearm concealed on the person of the Defendant in the search.

The question the Court must consider, however, is the legality of the stop of the vehicle and the detention of the Defendant. If this was done in violation of Defendant's constitutional rights, it follows that the evidence recovered from the search incident to that detention cannot be used as evidence.

There are several recent cases that have been considered by the Supreme Court and the Court of Appeals in Utah that analyze this question. They all conclude that "Thus, 'a stop can be justified only upon a showing of reasonable suspicion that defendant was committing a crime, or that he was stopped incident to a traffic offense'". (State v. Roth, 181 UAR 25)

In order to satisfy the reasonable suspicion inquiry, it must be determined if, from the facts apparent to Officer Horrocks, and the reasonable inference drawn therefrom, that he would reasonably suspect that the Defendant was committing, or had committed, a crime prior to the stop. This suspicion must be based upon articulated objective facts then apparent to the officer.

Officer Horrocks had a right to rely on the information given to him by other officers as a basis to support his reasonable suspicion, but only if the basis for the matters relayed were also based upon articulated facts. Officer Horrocks was told by Deputy Mangum that the trailer home that they were observing from about one-half block away was under surveillance while a search warrant was being secured. He further informed him that an informant, who had just previously been arrested for drunk driving, had told the officers that there was a pot party going on in the trailer and that marijuana was present.

Horrocks further stated that while observing the trailer he saw a person get out a car near the trailer, go to the trailer, and then go to the car, get into the car and begin to drive away. At that point, Officer Mangum instructed Officer Horrocks to stop the car and to detain the occupants pending the arrival of the search warrant.

Officer Horrocks followed these instructions and stopped the vehicle with the intent to detain its occupants pending the arrival of the search warrant, or pending further instructions. Without any other facts that would indicate any illegal activity on the part of the occupants of the car, the vehicle was stopped.

The Defendant was not in the house trailer when the officers entered it to secure the premises pending the receipt of a search warrant, and he was not identified to them by the informant as being in the trailer when the informant said he observed marijuana or that a pot party was in progress.

If there was reasonable cause to believe that illegal activity was going on inside the trailer at that time, there were no articulatable facts connecting the Defendant with such activity other than his brief appearance on the premises. None of the officers knew who the occupants of the vehicle were until it was stopped by Officer Horrocks. Since they did not know that the Defendant personally was in the vehicle or that he personally was on the premises, the fact that they may have known that he was a convicted drug abuser is immaterial since this fact was not used by them in formulating reasonable suspicion.



The attorney for the State in articulating facts states that Deputy Gayle Jensen personally observed defendant enter and exit the trailer. On review of Deputy Jensen's testimony (Transcript, page 32), he did not state that he saw the defendant enter and leave but only that he saw a little white car leave the trailer.

There was nothing in what Officer Horrocks knew or in what was conveyed to him that would create reasonable suspicion of illegal conduct upon the part of the Defendant. There was nothing at the time that any of the deputies of the Emery County Sheriff's Office could factually articulate that would give rise to reasonable suspicion that the Defendant had committed or was committing a crime except his unidentified brief appearance on the premises as indicated.

The Courts have consistently held that this fact alone is not enough to create reasonable suspicion.

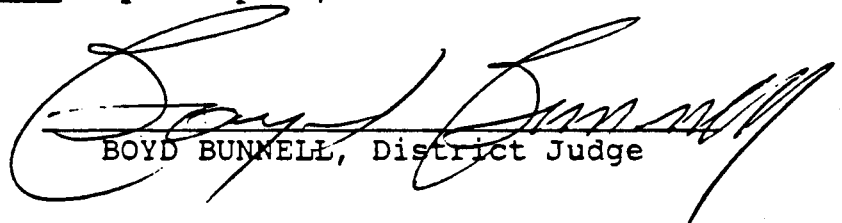
Even in cases where the officer has reasonable suspicion of illegal activity based upon direction from a dispatch officer or from other police officers, and he stops a vehicle, he can only stop the vehicle briefly while attempting to obtain further information regarding those suspicions. (See State v Bruce, 779 P2d 646)

Office Horrocks stated that he stopped the vehicle to detain the occupants pending further instructions or, the Court assumes, until the arrival of the search warrant for the trailer, and that his purpose was not to investigate or to make further inquiry relative to any suspicions of illegal activity.

For these reasons, THE COURT FINDS that the Defendant's constitutional rights were violated, and that the stop was not legally made, and that the Motion for Summary Judgment is granted.

The Attorney for the Defendant is directed to make formal Findings of Fact and an Order granting the Motion to Suppress.

DATED this 9<sup>th</sup> day of April, 1992.

  
BOYD BUNNELL, District Judge

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing RULING ON MOTION TO SUPPRESS by depositing the same in the United States Mail, postage prepaid, to the following:

Mark T. Ethington  
DAY AND BARNEY  
Attorneys at Law  
45 East Vine Street  
Murray UT 84107

Patricia Geary  
Emery County Attorney  
Post Office Box 1099  
Castle Dale UT 84513

DATED this 9<sup>th</sup> day of April, 1992.

Barbara Peterson  
Secretary

FILED  
IN THE SEVENTH JUDICIAL DISTRICT COURT  
OF UTAH IN AND FOR EMERY COUNTY

APR 29 1992

BRUCE C. FUNK - Clerk

By \_\_\_\_\_ Deputy

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT  
IN AND FOR EMERY COUNTY  
STATE OF UTAH

STATE OF UTAH,

Plaintiff,

v.

WAYNE DERRON POTTER,

Defendant.

RULING ON MOTION TO  
RECONSIDER

Criminal No. 91-2660

The State has filed a motion asking the Court to reconsider its previous ruling relative to the Defendant's Motion to Suppress the Evidence gathered against him.

In view of the fact that the Court missed the statement by Deputy Jensen found on page 37 of the transcript of his testimony, THE COURT WILL grant the Motion and will reconsider its previous ruling.

The statement of the Deputy contained at that page still leaves some doubt as to whether or not he recognized the Defendant at the time the Defendant left the trailer since his statement about seeing him leave came after he had talked to Officer Horrocks and the Defendant had been identified to him as the driver of the white car. No one whose testimony was used for the purpose of this hearing mentions the name of the Defendant at anytime prior to the stop and his identification being made known by Officer Horrocks.

The instructions to Officer Horrocks were to stop the white car and no mention was made relative to its occupants.

However, for the sake of this ruling we will assume that the Deputy recognized the Defendant as the person who left the trailer and drove away in the white car.

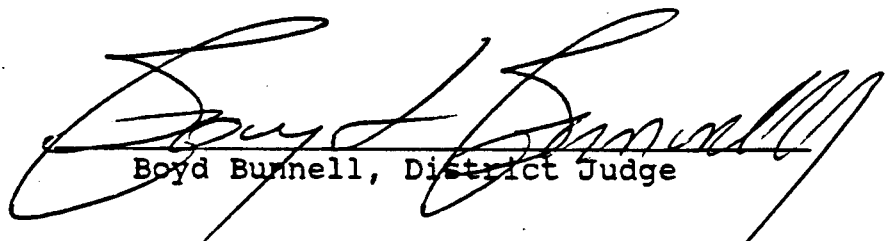
The i still remains that the Defendant was not in the trailer at the time the Officers entered, and he was not mentioned by the informant as being present at the alleged pot party.

On the contrary, Officer Horrocks said he observed the driver of the white car get out of the car, go to the trailer and return to the car and drive away.

No matter how you consider the facts in this case, they do not establish reasonable cause to believe that the Defendant was committing any crime or had committed a public offense at this time and place that would justify his apprehension and detention.

FOR THESE REASONS, the Court affirms its prior ruling that the Motion to Suppress be granted.

DATED this 28<sup>th</sup> day of April, 1992.

  
Boyd Bunnell, District Judge

0013mw

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing RULING ON MOTION TO RECONSIDER by depositing the same in the United States Mail, postage prepaid, to the following:

Mark T. Ethington  
Attorney at Law  
DAY AND BARNEY  
45 East Vine Street  
Murray, UT 84107

Patricia Geary  
EMERY COUNTY ATTORNEY  
P. O. Box 249  
Castle Dale UT 84013

DATED this 28th day of April, 1992.

  
\_\_\_\_\_

FILED

IN THE SEVENTH JUDICIAL DISTRICT COURT  
OF UTAH IN AND FOR EMERY COUNTY

MAY 8 1992

BRUCE G. FUNK - Clerk

By                      Deputy

IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR EMERY COUNTY  
STATE OF UTAH

|                      |   |                      |
|----------------------|---|----------------------|
| STATE OF UTAH,       | ) | FINDINGS OF FACT AND |
|                      | ) | CONCLUSIONS OF LAW   |
| Plaintiff,           | ) |                      |
|                      | ) |                      |
| vs.                  | ) |                      |
|                      | ) |                      |
| WAYNE DERRON POTTER, | ) | Case No. 1029        |
|                      | ) |                      |
| Defendant.           | ) |                      |

The Defendant's Motion to Suppress, previously filed in this case, came on for hearing before the Court on April 6, 1992. After hearing the testimony of Tropper Jeff Horrocks and pursuant to stipulation of the parties, considering the testimony of various officers of Emery County as set forth in a transcript of a suppression hearing in the case of State v. Devon Boyd Potter where the incidents leading up to the stop of Defendant's vehicle are set forth, the Court now makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Officer Horrocks was told by Deputy Mangum that the trailer home that they were observing from about one-half block away was under surveillance while a search warrant was being secured.

2. Deputy Mangum further informed Officer Horrocks that an informant, who had previously been arrested for drunk driving, had told the officers that there was a pot party going on in the trailer and that marijuana was present.

3. While observing the trailer, Officer Horrocks saw a person get out of a car near the trailer, go to the trailer and then come back to the car a short while later, get into the car and begin to drive away.

4. Officer Gayle Jensen (the officer who stopped the DUI suspect) observed the same vehicle leave the trailer.

5. The Defendant (who was subsequently discovered to be the driver of the vehicle) was not in the house trailer when the officers subsequently entered it to secure the premises pending receipt of a search warrant.

6. The Defendant was not identified by the informant as being in the trailer when the informant said he observed marijuana or that a pot party was in progress.

7. Deputy Jensen, who was on the premises being secured, recognized the Defendant as the person who was driving away in the car and knew that the Defendant had been previously convicted of a drug offense.



8. As the vehicle was leaving the trailer, Deputy Mangum, upon instruction from Deputy Jensen, requested Officer Horrocks to stop the vehicle and to detain the occupants pending arrival of the search warrant.

9. Without any other facts that would indicate any illegal activity on the part of any of the occupants of the car, Officer Horrocks then stopped the vehicle with the intent to detain the occupants until either the search warrant arrived or until further instructions. Officer Horrocks' purpose was not to investigate or to make further inquiry relative to any suspicions or illegal activity.

10. Although Officer Horrocks did not know who was driving the vehicle before the stop, upon approaching the vehicle he immediately recognized the Defendant as the driver of the vehicle, and, by prior experience and reputation, he knew that there may be some danger to himself if he carried out his intent to detain the Defendant without a search for weapons.

11. Officer Horrocks then conducted a search of the occupants, including the Defendant, by having them empty their pockets. A concealed firearm was discovered on the person of the Defendant during the course of this search.

12. Officer Horrocks then arrested the Defendant for carrying a concealed weapon, and then searched the Defendant incident to this arrest, and during this search he discovered some marijuana and some pills and a small container containing what was later analyzed as cocaine residue.

#### CONCLUSIONS OF LAW

1. If there was reasonable cause to believe that illegal activity was going on inside the trailer, there was no articulable facts connecting the Defendant with such activity other than his brief appearance on the premises.

2. There was nothing in what Officer Horrocks knew or in what was conveyed to him that would create reasonable suspicion of illegal conduct upon the part of the Defendant. There was nothing at the time that any of the deputies of the Emery County Sheriff's Office could factually articulate that would give rise to reasonable suspicion that the Defendant had committed or was committing a crime except his brief appearance on the premises.

3. Because there was no reasonable suspicion to stop Defendant's vehicle for the purpose of detaining him, the Defendant's constitutional rights as set forth in the Fourth and Fourteenth Amendments to the United States Constitution, and Aarticle I Section 14 of the Utah Constitution prohibiting unreasonable searches and seizures was violated, and Defendant's Motion to Suppress should be granted.

4. There was a seizure of Defendant when he was detained by Officer Horrocks in that Defendant was technically under arrest since he was not free to leave.

5. Officer Horrocks had good cause to search the Defendant after the Defendant was stopped. However, evidence discovered as a result of the search should be suppressed as a result of the prior illegal stop.

DATED this 7 day of May, 1992.

  
BOYD BUNNELL, District Judge

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW by depositing the same in the United States Mail, postage prepaid, to the following:

Mark T. Ethington  
DAY AND BARNEY  
Attorneys at Law  
45 East Vine Street  
Murray UT 84107

Patricia Geary  
Emery County Attorney  
Post Office Box 1099  
Castle Dale UT 84513

DATED this 7<sup>th</sup> day of May, 1992.

David Wilson

FILED

IN THE SEVENTH JUDICIAL DISTRICT COURT  
OF UTAH IN AND FOR EMERY COUNTY

MAY 8 1992

JOSE C. FUNK - Clerk

By                      Deputy

Mark T. Ethington (4828)  
DAY & BARNEY  
Attorneys for Defendant  
45 E. Vine Street  
Murray, Utah 84107  
Telephone: (801)262-6800

IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR EMERY COUNTY

STATE OF UTAH

|                      |   |                    |
|----------------------|---|--------------------|
| STATE OF UTAH,       | : | ORDER ON MOTION TO |
|                      | : | SUPPRESS           |
| Plaintiff,           | : |                    |
|                      | : |                    |
| vs.                  | : |                    |
|                      | : |                    |
| WAYNE DERRON POTTER, | : | Case No. 1029      |
|                      | : | Judge Boyd Bunnell |
| Defendant.           | : |                    |

The Defendant's Motion to Suppress, previously filed in this case, came on for hearing before the Court on April 6, 1992. After hearing the testimony of Trooper Jeff Horrocks and, pursuant to stipulation of the parties, considering the testimony of various officers of Emery County as set forth in a transcript of a suppression hearing in the case of State v. Devon Boyd Potter where the incidents leading up to the stop of Defendant's vehicle are set forth, and pursuant to the Findings of Fact and Conclusions of Law entered herewith, it is hereby,

ORDERED, ADJUDGED AND DECREED, that Defendant's Motion to Suppress is granted, and any and all evidence seized from the Defendant as a result of the stop and subsequent search in question, including but not limited to, a Titan 25 Caliber semi automatic

pistol serial number D823944, small plastic tuperware container allegedly containing cocaine residue, any alleged cocaine residue, marijuana, twelve Tylenol 3 tablets, and various other pills, shall be suppressed and not be allowed to be used as evidence against the Defendant.

Dated this 7 day of MAY, 1992.

  
Judge Boyd Bunnell

APPROVED AS TO FORM:

\_\_\_\_\_  
Patricia Geary  
Emery County Attorney

FILED

IN THE SEVENTH JUDICIAL DISTRICT COURT  
OF UTAH IN AND FOR EMERY COUNTY

JUN 19 1992

BRUCE C. FUNK - Clerk

By Jan Deputy

Mark T. Ethington (4828)  
DAY & BARNEY  
Attorneys for Defendant  
45 E. Vine Street  
Murray, Utah 84107  
Telephone: (801)262-6800

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IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR EMERY COUNTY  
STATE OF UTAH

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|                  |   |                    |
|------------------|---|--------------------|
| STATE OF UTAH,   | : | MOTION TO DISMISS  |
| Plaintiff,       | : |                    |
| vs.              | : |                    |
| WAYNE D. POTTER, | : | Case No. 1029      |
| Defendant.       | : | Judge Boyd Bunnell |

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COMES NOW the Defendant, by and through his attorney, and hereby respectfully moves this Court to dismiss with prejudice the Information herein for the following reasons. On April 6, 1992, a hearing was held before this Court on Defendant's Motion to Suppress all of the evidence seized from the Defendant at the time of his arrest in this matter. This Court took the matter under advisement at that time. On April 9, 1992, this Court entered a written Ruling on Motion to Suppress wherein Defendant's motion was granted. On April 21, 1992, the State of Utah filed a Motion to Reconsider or for Rehearing. On April 28, 1992, this Court entered a written Ruling on Motion to Reconsider wherein the State's motion was denied. On May 7, 1992, this Court entered an Order on Motion to Suppress along with Findings of Fact and Conclusions of Law wherein the Defendant's

Motion to Suppress was granted. A mailing certificate was attached to the Order indicating that a copy of the Order had been delivered to Patricia Geary, Emery County Attorney.

At least thirty (30) days have now elapsed since the filing of the Court's Order granting the motion to suppress, and the State has not filed an interlocutory appeal.

Because the State essentially can not make a prima facie case against the Defendant due to the granting of the motion to suppress, it would be fruitless and a waste of time and resources to proceed with a trial of this matter. Furthermore, it is unreasonable to continue to let the charges just sit without some type of action on them. This may constitute a violation of Defendant's Sixth Amendment right to a speedy trial.

Consequently, the Defendant respectfully requests that the Information herein be dismissed with prejudice.

Dated this 18 day of June, 1992.

  
Mark T. Ethington

#### CERTIFICATE OF MAILING

I certify that I am employed by the office of Day & Barney and that I mailed a true and correct copy of the foregoing Motion to Dismiss, postage pre-paid, to the following:

Patricia Geary  
Emery County Attorney  
P.O. Box 249  
Castle Dale, Utah 84513-0249

on this 18<sup>th</sup> day of June, 1992.





FILED  
IN THE SEVENTH JUDICIAL DISTRICT COURT  
OF UTAH IN AND FOR EMERY COUNTY  
AUG 17 1992  
BRUCE C. HUNTER, DEPT.  
By                      Deputy

MARK T. ETHINGTON (4828)  
DAY & BARNEY  
ATTORNEYS FOR DEFENDANT  
45 EAST VINE STREET  
MURRAY, UTAH 84107  
TELEPHONE: (801) 262-6800

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IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR  
EMERY COUNTY, STATE OF UTAH

---

STATE OF UTAH,

Plaintiff,

vs.

WAYNE D. POTTER,

Defendant.

:

:

:

:

NOTICE TO SUBMIT FOR DECISION

Civil No. 1029

Judge Boyd Bunnell

---

Plaintiff's Motion to Dismiss filed with the Court on the 18th  
day of June, 1992, by Mark T. Ethington, Attorney for Defendant, is  
now at issue and ready for decision of the Court.

DATED and SIGNED this 13 day of August, 1992.

Mark T. Ethington  
Mark T. Ethington  
Attorney for Defendant

CERTIFICATE OF MAILING

I certify that I am employed by the office of Day & Barney, and that I mailed a true and correct copy of the foregoing Notice to Submit for Decision, postage pre-paid, to:

Patricia Geary  
Emery County Attorney  
P.O. Box 249  
Castle Dale, Utah 84513-0249

on this 13<sup>th</sup> day of August, 1992.

Connie Carlson

SEP 2 1992

BRUCE C. FUNK - Clerk

By                      Deputy

IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR EMERY COUNTY  
STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

WAYNE D. POTTER,

Defendant.

RULING ON MOTION  
TO DISMISS

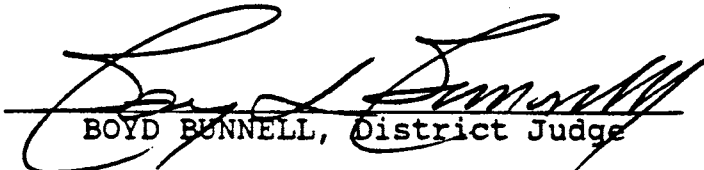
Criminal No. 1029

The Defendant has filed a motion to dismiss this action on the ground that the Court granted a motion to suppress the evidence in this case on May 7, 1992, and that the State has not proceeded to obtain a trial date, and on the further ground that the State has indicated that they have no other evidence of criminal activity on the part of the Defendant as alleged in the Information in this case.

The Plaintiff has filed no objection to the Motion.

THE COURT HEREBY GRANTS the Motion and Orders that this case be dismissed.

DATED this 1<sup>ST</sup> day of September, 1992.

  
BOYD BUNNELL, District Judge

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a true copy of the above  
entitled RULING ON MOTION TO DISMISS by depositing the same in  
the United States Mail, postage prepaid, to the following:

Mark T. Ethington  
DAY AND BARNEY  
Attorneys at Law  
45 East Vine Street  
Murray UT 84107

Patricia Geary  
County Attorney for Emery County  
Post Office Box 249  
Castle Dale UT 84513

Dated this 1st day of September, 1992.



---

Secretary

FILED  
IN THE SEVENTH JUDICIAL DISTRICT COURT  
OF UTAH IN AND FOR EMERY COUNTY  
SEP 18 1992  
BRUCE D. FUNK - Clerk  
By WD Deputy

R. PAUL VAN DAM (3312)  
Attorney General  
J. KEVIN MURPHY (5768)  
Assistant Attorney General  
Attorneys for Plaintiff/Appellant  
236 State Capitol  
Salt Lake City, Utah 84114  
Telephone: (801) 538-1021

---

IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR EMERY COUNTY  
STATE OF UTAH

---

STATE OF UTAH, : NOTICE OF APPEAL  
Plaintiff/Appellant, : Criminal No. 1029  
v. :  
WAYNE D. POTTER, : Judge Boyd Bunnell  
Defendant/Appellee. :

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The State of Utah appeals the trial court's final order of dismissal in the above-entitled case, entered September 1, 1992. This appeal is to the Utah Court of Appeals, and is filed pursuant to Utah Code Ann. §§ 77-18a-1(2)(a) and 78-2a-3(2)(f) (Supp. 1992).

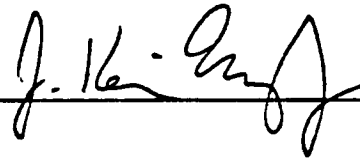
DATED this 16 day of September, 1992.

  
J. KEVIN MURPHY  
Assistant Attorney General

  
PATRICIA GEARY  
Emery County Attorney

CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing Notice of Appeal was mailed, postage prepaid, to Mark T. Ethington, attorney for defendant/appellee, 45 East Vine Street, Murray, Utah 84107, this 16 day of September, 1992.

  
\_\_\_\_\_