

1993

# The State of Utah v. Jamie Lee Moreno : Brief of Appellant

Utah Court of Appeals

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Jan Graham; Attorney General; Attorney for Appellee.

Aric Cramer; Attorney for Appellant.

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## Recommended Citation

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IN THE UTAH COURT OF APPEALS

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THE STATE OF UTAH,	:	BRIEF OF APPELLANT
	:	
PLAINTIFF/APPELLEE,	:	
	:	
VS.	:	CASE NO. 93009CA
	:	
JAMIE LEE MORENO,	:	
	:	
DEFENDANT/APPELLANT.	:	PRIORITY 2
	:	

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APPEAL FROM A JUDGEMENT OF CONVICTION FOR POSSESSION OF A CONTROLLED SUBSTANCE, A THIRD DEGREE FELONY, IN THE THIRD DISTRICT COURT FOR SALT LAKE COUNTY, BEFORE THE HONORABLE JAMES S. SAWAYA.

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SALT LAKE CITY, UTAH 84114

APPEALS

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IN THE UTAH COURT OF APPEALS

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PLAINTIFF/APPELLEE,	:	
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People v. Torres, 74 N.Y. 2d 22.4, 543 N.E. 2d 61  
U.S. v. Guzman, 864 F. 2d 1512 (1988)

IN THE COURT OF APPEALS

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THE STATE OF UTAH, :  
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 PLAINTIFF/APPELLEE, :  
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 VS. :  
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 JAMIE LEE MORENO, :  
 :  
 :  
 DEFENDANT/APPELLANT. :  
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BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION

This is an appeal from a judgement and conviction for a third degree felony. This court has jurisdiction pursuant to Utah Code Annotated

NATURE OF PROCEEDINGS

This is an appeal from a conviction and final judgement entered against appellant in the Third Judicial District Court, in and for Salt Lake County, The Honorable James S. Sawaya, Judge presiding. On November 23, 1992, Appellant pled guilty in a conditional plea to possession of a controlled substance a Third Degree Felony, as described in Utah Code Annotated

ISSUES PRESENTED FOR REVIEW

1. Did the trial court err in finding that the arresting officer in the case at bar had probable cause to enter the defendants locked vehicle without permission to retrieve a paper

bundle which later investigation tested positive for cocaine.

CONSTITUTION AND STATUTORY PROVISIONS

AMENDMENT IV OF THE UNITED STATES CONSTITUTION

THE RIGHT OF THE PEOPLE TO BE SECURE IN THEIR PERSONS, HOUSES, PAPERS, AND EFFECTS, AGAINST UNREASONABLE SEARCHES AND SEIZURES, SHALL NOT BE VIOLATED, AND NO WARRANTS SHALL ISSUE, BUT UPON PROBABLE CAUSE, SUPPORTED BY OATH OR AFFIRMATION, AND PARTICULARLY DESCRIBING THE PLACE TO BE SEARCHED, AND THE PERSONS OR THINGS TO BE SEIZED.

ARTICLE I SECTION 14 OF THE UTAH STATE CONSTITUTION

THE RIGHT OF THE PEOPLE TO BE SECURE IN THEIR PERSONS, HOUSES, PAPERS AND EFFECTS AGAINST UNREASONABLE SEARCHES AND SEIZURES SHALL NOT BE VIOLATED; AND NO WARRANT SHALL ISSUE BUT UPON PROBABLE CAUSE SUPPORTED BY OATH OF AFFIRMATION, PARTICULARLY DESCRIBING THE PLACE TO BE SEARCHED, AND THE PERSONS OR THING TO BE SEIZED.

STATEMENT OF THE CASE

The defendant was charged in February 1992 with solicitation of sex acts and possession of a controlled substance. The defendant waived his preliminary hearing and filed a motion to suppress in the District Court. (R 21 ).

On the time set for his preliminary hearing the defendant waived said preliminary hearing on the grounds that if an anticipated Motion to Suppress was not successful the defendant would plead guilty to a Class A misdemeanor for attempted possession of a controlled substance and solicitation of sex acts.

This plea negotiation was agreed to by James Cope, Deputy County Attorney and John R. Bucher, defendants former counsel.

Defendant had his Motion to Suppress and it was denied April 7th, 1992, and the Deputy County Attorney assigned to the case, Thomas Vuyk, refused to fulfill the plea negotiation agreed upon at the time of the preliminary hearing. On the 27th day of July, 1992, defendant filed a motion to remand the above case to the Circuit Court for a preliminary hearing based on the failure of the Deputy County Attorney to fulfill the terms of the plea bargain. The Trial Judge ordered an evidentiary hearing and requested that Mr. Cope and Mr. Bucher attend. On July 31st, 1992, Mr. Cope and Mr. Bucher were present to give evidence and the Trial Judge refused to hear evidence and summarily denied defendant's Motion and set the case for trial. This Court denied defendants Petition for Interlocutory Appeal

#### STATEMENT OF FACTS

On October 23, 1991, The defendant followed a woman who later proved to be a police decoy to a motel on State Street in Salt Lake City, Utah, (Tr. at 5). He parked at the motel and exited his vehicle and locked it (Tr.5, 10). The defendant was walking towards the motel when he was told he was under arrest and frisked (Tr. 6,10). The defendant was then asked several times if they could search his vehicle and he responded in the negative (Tr. 6).

The officers then saw an object which they testified was a paper which was folded into a triangle then folded so the top tucks into the bottom. (Tr. 18) The officer testified that this was a pharmaceutical type fold and that he had run into them several times (Tr. 16).

The officers then took the keys off of the top of the car, opened it, and seized the bundle (Tr. 11). The contents later tested positively for the presence of cocaine (Tr. 11).

Summary of Argument

A suspect should not be subject to a warrantless search of his vehicle when he is outside his vehicle, or private property, and in custody for a non-traffic crime, especially when there is no probable cause.

## ARGUMENT

1. THE APPELLANT MAINTAINS THAT THE SIGHT OF THE FOLDED PAPER DID NOT GIVE RISE TO PROBABLE CAUSE AND THAT EVEN IF IT DID, THE OFFICERS SHOULD HAVE OBTAINED A SEARCH WARRANT.

The evidence is uncontroverted that the appellant had parked his vehicle in the motel's parking lot and had locked it and was walking towards the officers when he was arrested (Tr. 10 and 11). The evidence is also uncontroverted that all the officer could see through the window of the vehicle was a folded paper. (Tr. 11).

The appellant maintains that when the officer took the keys from on top of the vehicle and opened it, that there was a search and the search was impermissible.

A police officer's entry into a citizen's automobile and his inspection of personal effects located within are significant encroachments upon that citizen's privacy interests....Under our own longstanding precedent, such intrusions must be both justified in their inception and reasonably related in scope and intensity to the circumstances which rendered their initiation permissible.

State v. Class, 67 N.Y.2d 431, 494 N.E.2d 444, 503 N.Y.S.2d 313, on remand from New York v. Class, 475 U.S. 106 (1986). State v. Glass, 583 P.2d 872 (Alaska 1978). People v. Torres, 74 N.Y.2d 224, 543 N.E.2d 61, 554 N.Y.S.2d 796 (Ct. App. 1989). State v. Larocco, 742 P.2d at 102 and in Larocco supra:

We likewise conclude that a constitutional privacy interest exists in the interior of an automobile and that the opening of the car door by the police officer here constituted a search. We now determine whether this search violated article I, section 14 of the Utah Constitution. Our analysis logically begins with a consideration of the history of the warrant requirement

under the federal constitution with respect to automobile searches.  
State v Larocco, 742 P. 2d at 102.

The appellee may reason that automobiles present an exception to the warrant requirement of the U.S. and Utah Constitutions. However, that exception has largely been abandoned especially in the situation as in the case at bar where there are no exigent circumstances.

The appellant maintains that even if the appellee argues that a folded paper is a plain view exception to the warrant requirement of Larocco Supra., that failed to meet its burden in the suppression hearing because there was insufficient foundation that the paper he saw contained an illicit substance.

In cross-examinations the officers stated at Tr. p. 13:

BY MR. BUCHER:

Q How many bindles have you seen in your two years as a narcotics officer?

A I could't give you a number, quite a few.

Q Over ten?

A Yes, sir.

Q And out of these bindles, that you have seen, how many have been of this kind of paper?

A I couldn't give you a number on that.

Q Of the number that you have seen, of this kind of paper, how many of them did it later--was it later established in court it had a controlled substance inside of it?

A That's difficult to say, sir.

Q Thank you.

However, the appellant maintains that Larocco Supra, and State v Hygh, 711 P.2d 264 (Ut. 1985) specify that a warrant should be obtained even if the officer reasonably suspects the presence of contraband. As stated in Larocco:

The time has come for this court, in applying an automobile exception to the warrant requirement of article 1, section 14 of the Utah Constitution, to try to simplify, if possible, the search and seizure rules so that they can be more easily followed by the police and the courts and, at the same time, provide the public with consistent and predictable protection against unreasonable searches and seizures. This can be accomplished by eliminating some of the confusing exceptions to the warrant requirement that have been developed by federal law in recent years. see id. Specifically, this court will continue to use the concept of expectation of privacy as a suitable threshold criterion for determining whether article I, section 14 is applicable. Then if article I, section 14 applies, warrantless searches will be permitted only where they satisfy their traditional justification, namely, to protect the safety of police or the public or to prevent the destruction of evidence. See id.; see also, e.g., Chimel v. California, 395 U.S. 752, 762-63 (1969).

As Justice Zimmerman explained in Hygh:

Once the threat that the suspect will injure the officers with concealed weapons or will destroy evidence is gone, there is no persuasive reason why the officers cannot take the time to secure a warrant. Such a requirement would present little impediment to police investigations, especially in light of the ease with which warrants can be obtained under Utah's telephonic warrant statute, U.C.A., 1953, 7-23-4(2) (1982 ed.).

State v. Hygh, 711 P.2d at 272; see also State v. Lopez, 676 P.2d 393 (Utah 1984).

The appellant wishes to emphasize that what is at issue is not

the situation where a routine traffic stop results in a search of a vehicle. That situation is governed by the objective, reasonable suspicion test to justify further questioning. U.S.v GUZMAN, 864 F/2d 1512 (10 Cir 1988). U.S. v Walker, Case No. 90-CR-13 (U.S. District Court For Utah).

The appellant does not believe the folded paper "bundle" satisfied the reasonable suspicion test but that test is merely to justify further questioning of a stopped motorist. In the case at bar the State must show probable cause and exigent circumstances sufficient to justify a warrantless search of a lawfully parked and locked vehicle.

CONCLUSION

Appellant contends that the State has not shown circumstances which would justify the warrantless search and seizure of appellants vehicle and that the trial court erred in not granting the Motion to Suppress of appellant and urges this court to so rule.

DATED THIS 12<sup>th</sup> DAY OF Nov, 1993.

Respectfully submitted

  
Eric Cramer

CERTIFICATE OF DELIVERY

I certify that on the 12<sup>th</sup> day of November, 1993 a true and correct copy of the forgoing Brief was sent to:

JAN GRAHAM  
ATTORNEY GENERAL  
ATTORNEY FOR PLAINTIFF/APPELLEE  
236 STATE CAPITOL BUILDING  
SALT LAKE CITY, UTAH 84114

Sandra Dune

## ADDENDUM

GRANT W. P. MORRISON  
ATTORNEY FOR DEFENDANT  
1200 EAST 3300 SOUTH  
SALT LAKE CITY, UTAH 84115  
1-801-485-7999

FILED IN CLERK'S OFFICE  
Salt Lake County Utah

DEC 29 1992

By Byron Stark Clerk 3rd Dist Court  
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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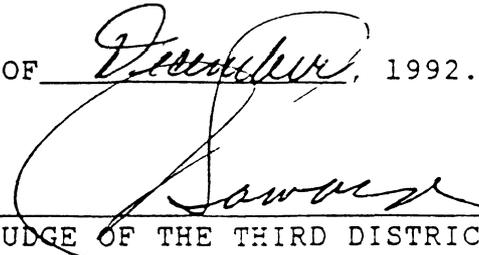
STATE OF UTAH.	)	CERTIFICATE
	)	OF
PLAINTIFF,	)	PROBABLE CAUSE
<b>vs</b>	)	
JAMIE LEE MORENO,	)	
DEFENDANT.	)	CASE NO. <u>911901754 FS</u>

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The above matter coming on before the Court on application of the defendant for a Certificate of Probable Cause allowing the defendant to appeal his conviction of Possession of a Controlled Substance and remain free of incarceration pending appeal if any incarceration is to be ordered as part of the sentence of defendant, now therefore;

IT IS HEREBY ORDERED that a Certificate of Probable Cause may issue in the appeal in the above matter and the plea herein has been accepted as conditional.

DATED THIS 29 DAY OF December, 1992.

  
\_\_\_\_\_  
JUDGE OF THE THIRD DISTRICT COURT

FILED  
DISTRICT COURT  
**IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

Dec 28 5 00 PM '92

THE STATE OF UTAH,

Plaintiff,

vs.

MORENO, JAMES L.

Defendant.

THIRD AMENDED DISTRICT  
**JUDGMENT, SENTENCE**  
BY (COMMITMENT)

Case No. 911901754  
Count No. \_\_\_\_\_  
Honorable James S. Sawaya  
Clerk Susan Hensley  
Reporter Dorothy Tripp  
Bailiff John Romero  
Date December 21, 1992

The motion of \_\_\_\_\_ to enter a judgment of conviction for the next lower category of offense and impose sentence accordingly is  granted  denied. There being no legal or other reason why sentence should not be imposed, and defendant having been convicted by  a jury;  the court;  plea of guilty;  plea of no contest; of the offense of possession of controlled substance, a felony of the 3rd degree,  a class \_\_\_\_\_ misdemeanor, being now present in court and ready for sentence and represented by G. Morrison and the State being represented by P. Parker, is now adjudged guilty of the above offense, is now sentenced to a term in the Utah State Prison:

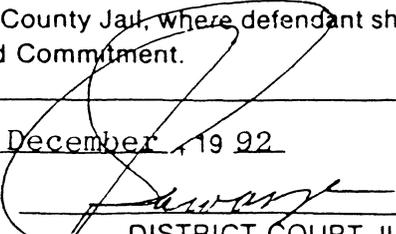
- to a maximum mandatory term of \_\_\_\_\_ years and which may be for life;
- not to exceed five years;
- of not less than one year nor more than fifteen years;
- of not less than five years and which may be for life;
- not to exceed \_\_\_\_\_ years;
- and ordered to pay a fine in the amount of \$ \_\_\_\_\_;
- and ordered to pay restitution in the amount of \$ \_\_\_\_\_ to \_\_\_\_\_

- such sentence is to run concurrently with \_\_\_\_\_
- such sentence is to run consecutively with \_\_\_\_\_
- upon motion of  State,  Defense,  Court, Count(s) \_\_\_\_\_ are hereby dismissed.
- \_\_\_\_\_

- Defendant is granted a stay of the above (~~xx~~ prison) sentence and placed on probation in the custody of this Court and under the supervision of the Chief Agent, Utah State Department of Adult Parole for the period of 24 months, pursuant to the attached conditions of probation.
- Defendant is remanded into the custody of the Sheriff of Salt Lake County  for delivery to the Utah State Prison, Draper, Utah, or  for delivery to the Salt Lake County Jail, where defendant shall be confined and imprisoned in accordance with this Judgment and Commitment.
- Commitment shall issue \_\_\_\_\_

DATED this 21st day of December, 19 92

APPROVED AS TO FORM:

  
DISTRICT COURT JUDGE

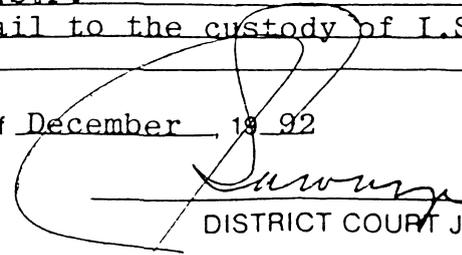
\_\_\_\_\_  
Defense Counsel

\_\_\_\_\_  
Deputy County Attorney

**CONDITIONS OF PROBATION**

- Usual and ordinary conditions required by the Dept of Adult Probation & Parole
- Serve 90 days  
in the Salt Lake County Jail commencing December 30, 1992 at 8:00 A.M.
- Pay a fine in the amount of \$ \_\_\_\_\_  at a rate to be determined by the Department of Adult Probation and Parole, or  at the rate of \_\_\_\_\_.
- Pay restitution in the amount of \$ \_\_\_\_\_, or  in an amount to be determined by the Department of Adult Probation and Parole,  at a rate of \_\_\_\_\_, or  at a rate to be determined by the Department of Adult Probation and Parole
- Enter, participate in, and complete any \_\_\_\_\_ program, counseling, or treatment as directed by the Department of Adult Probation and Parole
- Enter, participate in, and complete the \_\_\_\_\_ program at Cognitive Restructuring Therapy
- Participate in and complete any  educational, and/or  vocational training  as directed by the Department of Adult Probation and Parole, or  with \_\_\_\_\_
- Participate in and complete any \_\_\_\_\_ training  as directed by the Department of Adult Probation and Parole, or  with \_\_\_\_\_
- Submit person residence, and vehicle to search and seizure for the detection of drugs
- Submit to drug testing
- Not associate with anyone who illegally uses, sells, or otherwise distributes narcotics or drugs
- Not frequent any place where drugs are used, sold, or otherwise distributed illegally
- Not use or possess non-prescribed controlled substances
- Refrain from the use of alcoholic beverages
- Submit to testing for alcohol use
- Take antabuse  as directed by the Department of Adult Probation and Parole
- Obtain and maintain full-time employment
- Maintain full-time employment
- Obtain and maintain full-time employment or full-time schooling
- Maintain full-time employment or obtain and maintain full-time schooling
- Defendant is to have no contact nor associate with \_\_\_\_\_.
- Defendant's probation may be transferred to \_\_\_\_\_ under the Interstate Compact as approved by the Department of Adult Probation and Parole
- Complete \_\_\_\_\_ hours of community service restitution as directed by the Department of Adult Probation and Parole
- Complete \_\_\_\_\_ hours of community service restitution in lieu of \_\_\_\_\_ days in jail
- Defendant is to commit no crimes.
- Defendant is ordered to appear before this Court on \_\_\_\_\_ for a review of this sentence.
- Defendant to obtain requirement for high school equivalent degree.
- Defendant to obtain a substance abuse evaluation and abide by the recommendations of agency.
- Defendant to be supervised by I.S.P.
- Defendant to be released from jail to the custody of I.S.P.
- \_\_\_\_\_

DATED this 21st day of December, 1992

  
 \_\_\_\_\_  
 DISTRICT COURT JUDGE