1993

The State of Utah v. Michael L. Bean : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	)	
Plaintiff/Appellee,	)	
vs.	)	Appeal Case No. 930267-CA Priority No. 2
MICHAEL L. BEAN,	)	
Defendant/Appellant.	)	

BRIEF OF APPELLEE

Appeal from the order of the Honorable Michael K. Burton of the Third Circuit Court in and for Salt Lake County, State of Utah, Murray Department, denying Appellant's Motion to Suppress. A conditional plea of guilty was entered to Minor in Possession of Alcohol, Class B misdemeanor, U.C.A. § 32A-12-209(1) (1953, as amended) and Unlawful Possession of Drug Paraphernalia, a Class B misdemeanor, U.C.A. § 58-37a-5(1) (1953, as amended).

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STATEMENT OF JURISDICTION

Appeal is taken from the final order of Honorable Michael K. Burton, Third Circuit Court, Murray Department, denying appellant's motion to suppress. Rules 3 & 4 of the Utah Rules of Appellate Procedure authorize the appeal and confer jurisdiction on the Utah Court of Appeals.

STANDARDS OF REVIEW

Factual findings determined at a hearing on a motion to suppress will not be disturbed unless they are clearly erroneous. State v. Menke, 787 P.2d 537, 539 (Utah App. 1990). A trial court's legal conclusions are reviewed under a correction of error standard. State v. Steward, 806 P.2d 213 (Utah App. 1991).

STATEMENT OF ISSUES

1. Was the trial court in error for finding that the arresting officer's encounter with appellant was reasonable and minimally intrusive, and constituted a "level-one" police-citizen encounter, and did not violate federal constitutional standards?

2. Was the arresting officer's stop of appellant valid and proper under Art. 1, Section 14 of the Utah Constitution, and under U.C.A. § 77-7-15?

STATEMENT OF THE CASE

On January 26, 1991, appellant was arrested by a Salt Lake County Sheriff Deputy and charged with three misdemeanor offenses. Appellant moved to suppress evidence seized pursuant to the arrest.

The Honorable Michael K. Burton, Third Circuit Court, heard and denied appellant's motion on August 22, 1991, finding that the arresting deputy's actions did not constitute an unreasonable seizure under either the federal or state constitutions.

Appellant then entered conditional guilty pleas to two of the misdemeanor charges; consumption of alcohol by a minor, and unlawful possession of drug paraphernalia. The pleas were conditional on this appeal of the trial court's denial of appellant's motion to suppress evidence obtained during arrest.

STATEMENT OF FACTS

On January 6, 1991, at 2:50 a.m., Sheriff's Office Deputy Dwight Schreuder was patrolling alone in a marked Salt Lake County Sheriff vehicle.[1] (T 1-3) Ten minutes earlier Deputy Schreuder heard a police radio report of criminal activity involving male suspects in the nearby area. (T 2, 9) Because Deputy Schreuder was in the vicinity he sought to assist the Murray Police Department in an attempt to locate the suspects.

As Deputy Schreuder drove past a strip-mall business area, he saw two young males walking by the closed businesses. (T 3) One of the males was appellant, MICHAEL L. BEAN. Deputy Schreuder pulled his patrol car over to ask the males where they were going, and to see if they matched the suspects on the attempt-to-locate recently reported on the police radio. (T 8-9)

The two young men were walking on the sidewalk as Deputy Schreuder pulled over ahead of them. (T 7, 10) As Schreuder got out of the patrol car, the young men walked towards him. Once Schreuder got out of his vehicle, he saw how young the men seemed. (T 7-8) Schreuder asked the men where they were headed, and as appellant answered, Schreuder could smell the odor of alcohol on appellant's breath. (T 3, 9-11) The deputy asked the young men for identification and ran warrant-checks on the names. The deputy found that appellant was under twenty-one years old and had an outstanding warrant. (T 4) While Deputy Schreuder ran the warrant check, another Deputy who was in the area stopped to offer assistance, if needed. The second officer was not called for support. (T 6) In further conversation with Schreuder, appellant admitted drinking two beers that evening. (T 5) Appellant was arrested on the outstanding warrant and charged with Consumption of Alcohol by a Person under 21 Years of Age.

Meanwhile, Murray Police Officers responded to see if the young men were the suspects in the earlier reported offense. (T 6) They were not. Appellant's companion, asked if he was free to go, and was told that he was. Appellant was taken to

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[1] This brief cites the transcript of the motion to suppress, heard on May 7, 1991, and the findings of fact entered on August 20, 1991, as "T" and "F" respectively.

the Salt Lake County Jail where further charges were added when marijuana and drug paraphernalia were found on his person. (T 5)

SUMMARY OF ARGUMENT

Both state and federal law allow law enforcement officers reasonable contact with citizens while investigating possible criminal activity. Articulable reasonable suspicion of criminal activity is required only when the police-citizen contact becomes a stop or seizure as defined by law.

Deputy Schreuder's initial contact with appellant was unintrusive and constituted only a reasonable investigation of possible criminal activity. Appellant's freedom of action was not in any way curtailed. Appellant was questioned only as to where he was going. No articulable reasonable suspicion of criminal activity was necessary for this contact because there was no stop or seizure. No detention occurred at all until the deputy saw how young appellant looked and then smelled the odor of alcohol on his breath. At this point, the deputy did have reasonable suspicion of criminal activity and further detention was justified and proper.

Additionally, Deputy Schreuder was able to articulate that even before any contact with appellant, he had information indicating criminal activity in that vicinity. He'd received a report of criminal activity involving male suspects in the immediate time frame and vicinity. Also, the hour was late, nearby businesses were closed, and the appellant's youthful appearance indicated possible curfew violations.

Deputy Schreuder's contact with appellant was minimally intrusive, as it involved no traffic stop, no restriction on appellant's freedom, no physical contact, and lasted only minutes. Under all the circumstances, it was reasonable investigatory questioning and violated none of appellant's constitutional rights.

ARGUMENT

I.

THE INITIAL ENCOUNTER WITH DEFENDANT WAS A LEVEL ONE POLICE-CITIZEN ENCOUNTER SINCE DEFENDANT WAS NEVER DETAINED BY THE OFFICERS UNTIL AFTER EVIDENCE OF CRIMINAL ACTIVITY WAS DISCOVERED.

Appellant erroneously alleges that he was illegally detained without reasonable suspicion when Deputy Schreuder questioned him on the street. In fact, appellant's encounter with police was not one which could constitute a seizure until after the point at which the police officer smelled alcohol on appellant's breath, and then effected a detention based on a reasonable articulable suspicion of criminal activity.

The Utah Supreme Court has recognized three levels of police citizen encounters. State v. Deitman, 739 P.2d 616 (Utah 1987). In Deitman, the Court stated:

> (1) an officer may approach a citizen at anytime [sic] and pose questions so long as the citizen is not detained against his will; (2) an officer may seize a person if the officer has an "articulable suspicion that the person has committed or is about to commit a crime; however, the "detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop"; (3) an officer may arrest a suspect if the officer has probable cause to believe an offense has been committed or is being committed.

Id. at 617-18 (*quoting* United States v. Merritt, 736 F.2d 223, 230 (5th Cir. 1984)).

A "level one" encounter involves consensual police citizen encounters, such as where a police officer approaches a person and poses questions to that person, so long as the individual is not detained against his or her will. State v. Carter, 812 P.2d 460, 463 (Utah App. 1991). Where a person remains free to walk away and disregard the officer's questions, no intrusion on personal liberty or privacy has occurred. Id., *citing* State v. Jackson, 805 P.2d 765, 767 (Utah App. 1990).

In contrast, "a seizure occurs where an officer by show of authority or

physical force in some way restricts the liberty of an individual." State v. Trujillo, 739 P.2d 85, 87 (*citing* United States v. Mendenhall, 446 U. S. 544, at 553, 100 S. Ct. 1870, at 1876, 64 L.Ed.2d 497 (1980)). Other circumstances which might indicate that a seizure has occurred include: "(1) the presence of several uniformed officers; (2) the display of a weapon by an officer; (3) physical touching of the individual; and (4) the use of language or voice tone threatening to the individual." Jackson, 805 P.2d at 767, *quoting* Mendenhall, 446 U.S. at 554, 100 S.Ct. at 1876.

The Fourth Amendment prohibits only "unreasonable" police conduct, rather than all searches and seizures, because the law must recognize the government's "legitimate interest in crime prevention and detection." Trujillo, 739 P.2d at 87. A seizure generally does not occur where an individual is approached by an officer in public, is asked questions, or is asked to produce identification. Deitman, 739 P.2d at 618.

None of the classic indicia of a seizure were present in appellant's situation. Deputy Schreuder did not use any lights or sirens, and did not call out to or pull over appellant. No weapons were displayed, no officer touched or restrained appellant in any way, made any threats or gave any authoritative commands. In fact, Schreuder testified that when he exited his vehicle, the appellant walked towards him. (T 10) Only one officer initially questioned appellant and his companion. No authority or force was used to restrict appellant's liberty until the warrants check was completed and appellant was arrested based on his outstanding warrant and admitted consumption of alcohol.

At the time the contact between police and appellant rose to a "level-two" encounter, an articulable suspicion of criminal conduct existed when the detention began, which legitimated the detention. State v. Deitman, 739 P.2d 616, 617-18; *see also* State v. Menke, 787 P.2d 537, 542-43 (Utah App. 1990). This Court has acknowledged that "when a police officer sees or hears conduct which gives rise to a suspicion of crime, he has not only the right but the duty to make observations and investigations to determine whether the law is being violated, and if so, to take such measures as are necessary in

enforcement of the law." State v. Holmes, 774 P.2d 506, 508 (Utah App. 1989), *quoting* State v. Folkes, 565 P.2d 1125, 1127 (Utah 1977).

Appellant was questioned by a police officer on a public street. During this questioning, Deputy Schreuder's ordinary senses enabled him to suspect that a crime had been committed, given the smell of alcohol on appellant's breath and appellant's age at the time. In checking the status of the persons he was questioning, Deputy Schreuder's behavior was well within Fourth Amendment standards for a "level two" detention. Upon discovery of the appellant's age and the knowledge that appellant was wanted on an outstanding warrant, a search incident to a legal arrest was entirely appropriate as a "level three" encounter under Deitman.

The resulting search at the police station and discovery of contraband there were well within the law. Deputy Schreuder was simply following his duty to observe and investigate by exiting his vehicle to talk to the young men and determine their reason for being there. Not only was the Deputy's conduct reasonable and appropriate under the circumstances, it was required of him by his law enforcement position.

II.

DEPUTY SCHREUDER'S ENCOUNTER WITH APPELLANT WAS REASONABLE AND APPROPRIATE UNDER ARTICLE 1, SECTION XIV OF THE UTAH CONSTITUTION AND UNDER SECTION 77-7-15 OF THE UTAH CODE.

Appellant has argued that interpretation of the Utah Constitution should vary from federal interpretation of the Fourth Amendment standard applicable to investigatory stops.

Appellant claims that Utah's Constitution should be viewed as historically different in meaning than the federal constitution. This claim does not carry great weight, given that the Utah Constitution was written with an eye towards achieving statehood as soon as possible. The framers incorporated a search and seizure provision virtually identical to

the federal counterpart. Should the framers have intended a greater or different level of protection for Utah citizens, it seems likely that the provision would substantively reflect that intent.

Appellant cites to State v. Larocco, 794 P.2d 460 (Utah 1990), to claim that Utah's appellate courts interpret the state constitution differently from federal interpretation of the United States Constitution. However, appellant's claim is overbroad. Interpretation of Art. I, § 14 of the Utah Constitution and a separate state exclusionary rule, if any, is not settled. *See generally* State v. Thompson 810 P.2d 415 (Utah 1991); Sims v. State Tax Commission 841 P.2d 6 (Utah 1991).

In Larocco, the Utah Supreme Court held that opening a car door to check a vehicle identification number constituted a search, in contradiction to the United States Supreme Court position taken in New York v. Class, 475 U.S. 106, 106 S.Ct. 960, 89 L.Ed.2d 81 (1986). In fact, Larocco may be viewed simply as affirmation of the exigent circumstances requirement for warrantless automobile searches. Larocco does not completely diverge Utah's interpretation of Art. 1, § 14 from federal interpretation of the Fourth Amendment. This Court has stated, "Larocco affirms that Utah Courts will continue to follow the original exigent circumstances test for warrantless searches of automobiles as originally required by the United States Supreme Court." State v. Morck, 821 P.2d 1190, 1193 (Utah App. 1991).

In most judicial interpretations of the state constitution, the Utah Supreme Court is leaning towards similarity of interpretation of the federal constitution and the Utah Constitution's provision. In Hanson v. Owens, 619 P.2d 315 (Utah 1980), the Utah Supreme Court diverged from federal interpretation of the Fifth Amendment to the United States Constitution in its interpretation of the nearly identical Article 1, Section 2 of the Utah Constitution. Hanson was overturned by American Fork City v. Cosgrove, 701 P.2d 1069 (Utah 1985), where the Court reversed its position, to avoid requiring "the state to make overly fine distinctions that may not further significantly the policies of the privilege." Id. at 1075.

The same could be said of an Art. 1, § 14 standard that is broader than the Fourth Amendment. A standard requiring that a police questioning occur only where probable cause already exists as advocated by appellant, would effectively eliminate most investigatory questioning. Such a standard would make police work much more difficult.

In Cosgrove, the Utah Supreme Court advocated uniformity with federal interpretation of the U.S. Constitution and the Utah Constitution. 701 P.2d at 1072-1073. Divergence from long standing legal principles should be based only on strong justifications, which appellant has not shown to apply in cases of investigatory questioning. There must be good reason for states to diverge from federal interpretation of the Fourth Amendment. With respect to a simple investigatory level one stop, as at issue here, appellant has failed to show a reason for divergence from prior law. In Larocco, the Utah Supreme Court said:

> [W]e note that although the history and identical language of the state and federal constitutional privacy guarantees generally support a `policy of uniformity' this court has demonstrated its willingness to adopt more protective standards under the state Constitution `when doing so best promotes predictability and precision in judicial review of search and seizure cases and the protection of the individual rights of our citizens.'

794 P.2d at 466 (*quoting* People v. P.J Video, 68 N.Y.2d 296, 304 (1986), *quoting* People v. Johnson, 66 N.Y.2d 398, 407 (1985)). In this case, divergence from federal interpretation will not aid in the promotion of predictability and precision in judicial review, but will make police work significantly more difficult. Appellant's interpretation of the Utah Constitution would poorly serve both the people of Utah and the deserved deference to the document itself, and should not be adopted. Based on the points of appellant's argument, the similarity of the Utah and federal provisions and well established state precedent, the request for a divergent constitutional interpretation of the investigatory questioning standard does not rise to the significance required under Utah case law.

The Utah Constitution, as well as state statutory and case law amply define limits on law enforcement personnel regarding search and seizure issues. Even hypothetically, if the Utah Constitution provided greater protection against unreasonable police conduct than federal law in these areas, these protections do not and can not eliminate investigation of crime. As with federal constitutional law, the standard is reasonableness of police conduct, and Deputy Schreuder's conduct was wholly reasonable under state law.

There is no evidence that Utah's standard of reasonable police conduct, under the circumstances in this case, should differ from federal law. In comparing constitutions, the language in Article I, § 14 of the Utah Constitution is identical to that of the 4th Amendment to 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.

Utah case law restates and confirms the three levels of police-citizen encounters addressed in federal case law. Utah law codifies the level-two standard in requiring reasonable suspicion for a stop. U.C.A. § 77-7-15. The statute does not prohibit level-one situations where the intrusion does not rise to the level of a constitutional stop or seizure. As analyzed in Point I of appellee's argument, Deputy Schreuder complied with those constitutional, statutory, and judicial legal standards.

Even if the three level analysis were hypothetically set aside, and this case were analyzed under a principle that Utah law requires all police citizen encounters to be reasonable under the totality of the circumstances, Deputy Schreuder's conduct is equally satisfactory.

Reviewing all of the circumstances known to Deputy Schreuder at the time contact was first made with appellant, the Deputy's behavior was reasonable. Deputy Schreuder had received information of criminal activity involving two male suspects only ten minutes before he saw two men walking directly in front of the building adjacent to

the area of the crime. The Deputy knew it was 2:50 a.m., the surrounding businesses were closed and that appellant and his companion appeared under age. Given all this information, under a general reasonableness or totality of the circumstances standard, Schreuder was not only reasonable in continuing his investigations, he would have been derelict in his duties as a police officer to do otherwise.

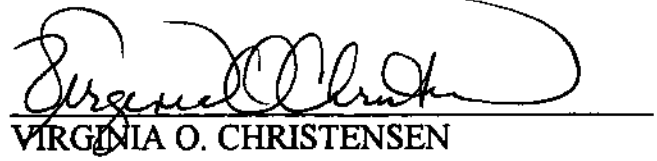
Deputy Schreuder's brief encounter with appellant did not involve any intrusion into appellant's freedom until Schreuder gained more information of possible criminal activity, in the form of the smell of alcohol on appellant's breath. After this discovery, the Deputy's actions remained minimally intrusive in the steps that legitimately followed. Analyzing the entire situation as a whole under Utah law, Deputy Schreuder did only what was necessary to investigate crime and did not unreasonably intrude on appellant's state or federal constitutional rights.

CONCLUSION

Appellee asks this Court to affirm the trial court's findings that Deputy Schreuder's conduct was justified and reasonable under state and federal constitutional standards, that appellant's rights were upheld, and that the evidence of criminal activity gathered in the incident was legally obtained.

RESPECTFULLY SUBMITTED this 27th day of September, 1993.

DAVID E. YOCOM
Salt Lake County Attorney



VIRGINIA O. CHRISTENSEN
Deputy Salt Lake County Attorney

CERTIFICATE OF DELIVERY

I hereby certify that eight copies of this brief were delivered to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102, and four copies were mailed to Kendall S. Peterson, 4 Triad Center, Suite 825, Salt Lake City, Utah 84180, this 7th day of September, 1993.

State of Utah

Plaintiff

vs.

Michael Larry BEAN

Defendant

Tape_____

Counter No._____

Criminal Judgment

Case No. 931 CCC209

The above entitled case came on for trial / arraignment before the Honorable Michael BURTON, ____, Judge of the above entitled Court on the 16th day of MARCH, 19 93

Plaintiff was represented by V. Meister ☒ Deputy County Attorney. ☐ Murray City Attorney.

☒ The defendant appeared in person and was ~~not~~ represented by K Peterson as counsel.

☐ The defendant failed to appear, and the Court finding, that the defendant had received proper notice of the trial date and had voluntarily absented himself therefrom; the trial is ordered to proceed in absentia.

☐ Comes now the defendant and changes his plea to guilty to the following charge(s) _____

JUDGMENT

After hearing the evidence in the matter and taking into consideration the arguments of the parties, the Court finds the following:

☒ Guilty ☐ Not Guilty ☐ Dismissed of Poss. f'cont. a Class B misdemeanor (Count 1)

☐ Guilty ☒ Not Guilty ☐ Dismissed of Poss. o'sub. a Class B misdemeanor (Count 2)

conditional as per State vs Sery

☒ Guilty ☐ Not Guilty ☐ Dismissed of Poss. Drug Par. a Class B misdemeanor (Count 3)

☐ Guilty ☐ Not Guilty ☐ Dismissed of _____ a Class ___ misdemeanor (Count ___)

☐ Count____

On the 16 day of March, 19 93, the Court sentenced the defendant as follows:

(1) Imprisoned in the Utah jail for a period of 20 days ~~months~~, and

(2) Ordered to pay a fine in the amount of $ 250.00. The Court suspended 20 days of the jail sentence and $ 0 of the fine and placed the defendant on probation upon the following conditions: (1) no similar violations

Term of probation 6 ~~days~~ / months, defendant to be supervised by court.

Defendant is granted a stay to _____ at the hour of _____ to commence serving his jail sentence.

Defendant is granted a stay to 16 April 93 to pay the fine.

Dated this 16 day of March, 19 93

License Received_____

Recommend DLD Letter _____

Michael F. Burton

CIRCUIT COURT JUDGE

Received a copy of the above judgment and sentence of the date the Judge signed the same.

_____

Defendant / Defendant's Attorney

BP AF0085

FILED

CATHERINE HAMMARSTEN
Attorney for Defendant
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South Suite 300
Salt Lake City, UT 84111
Tel: 532-5444

91 JUL 16 PM 12:00
THIRD CIRCUIT COURT
MURRAY DEPT.
BY [signature]
DEPUTY CLERK

FILE COPY

IN THE THIRD CIRCUIT COURT IN AND FOR SALT LAKE COUNTY,

STATE OF UTAH, MURRAY DEPARTMENT

STATE OF UTAH, Plaintiff, v. MICHAEL BEAN, Defendant.	:	FINDINGS OF FACT AND CONCLUSIONS OF LAW Case No. 911000266 JUDGE BURTON

AUG 22 1991

91 JUL 16 PM 3:31

FINDINGS OF FACT

This case came before the Court on May 7, 1991 for hearing on Defendant's Motion to Suppress criminal evidence gained in a stop by police of Defendant. As a result of this stop, Defendant was charged with Consumption of Alcohol by a Minor, Unlawful Possession of a Controlled Substance, and Unlawful Possession of Drug Paraphernalia.

Defendant alleges the officer violated his right to be free from an unreasonable search and seizure, citing U.S. Constitution, Amendment IV; Utah State Constitution, Article I, §14; U.C.A. §77-7-15; State v. Deitman, 739 P.2d 616 (Utah 1987), Wallentine, Heeding The Call: Search & Seizure Jurisprudence Under the Utah Constitution, Article I, §14 (1991).

The Court makes the following findings of fact:

On January 26, 1991, at approximately 2:50 a.m., Deputy Schroeder, a Salt Lake County Sheriff, was working in the neighborhood of 4500 South State. His recollection is that ten minutes prior to encountering Defendant, he was assisting other officers in "an attempt to locate" a suspect(s). Deputy Schroeder could not recall the incident that prompted him to be looking for a suspect, stating it was "a fight suspect or a rape suspect or something like that." He also stated that he did not have descriptions of the individuals for whom he was looking, but knew they were males who had left the scene of the apartment complex located behind the businesses where Defendant and his companion were stopped.

Testimony from Deputy Schroeder, Defendant, and defendant's companion, Bob McElwrath, indicated Defendant and McElwrath were slowly walking in front of closed businesses toward an open convenience store at roughly 2:50 in the morning. There is no indication they were engaging in any criminal activity.

Deputy Schroeder drove his unit over to Defendant and McElwrath, exited his vehicle and began talking to them. Deputy Schroeder's explanation for approaching Defendant was "I just stopped over there to see where they were headed, uh, see if they possibly matched the suspect description."

Testimony of both the officer and Defendant was that the encounter lasted a matter of minutes. He asked where they were going, and they told him to the convenience store. He noticed

Defendant appeared young and smelled like alcohol. He then asked both Defendant and McElwrath for identification and checked them for warrants. Upon an admission by Defendant that he had consumed alcohol, Deputy Schroeder arrested Defendant for the outstanding warrant and consumption of alcohol by a minor. A search at the jail resulted in additional charges.

The State contends that this is a valid Level I stop, under U.S. Constitution Amendment 4, as articulated in State v. Deitman, 739 P.2d 616 (Utah 1987). Defense claims the stop is not a valid Level I stop, and further urges the Court to adopt the theory that Utah law provides greater protection from unreasonable searches and seizures than does the federal law, citing Utah Constitution, Article I, §14; U.C.A. 77-7-15, and Wallentine, Heeding the Call: Search and Seizure Jurisprudence Under the Utah Constitution (1991).

CONCLUSIONS OF LAW

The Court is inclined to follow the law as it now stands. This is a valid Level I encounter.

Deputy Schroeder approached the Defendant and posed questions. The intrusion lasted only a few minutes, and a seizure only occurred at the point the officer noticed the Defendant appeared young and smelled of alcohol.

However, even assuming Utah law required reasonable suspicion for the officer to approach Defendant, the standard is met. It's 3:00 a.m.; there is an unspecified problem in the neighborhood and there is an attempt to locate on a male or males,

though the officer has no definite description of the suspect(s); Defendant and his companion are walking in the neighborhood nearby, and as the officer drives up, he notices that Defendant appears young, possibly in violation of curfew. He then smells alcohol on Defendant's breath.

For the foregoing reasons, Defendant's Motion to Suppress is denied.

SO ORDERED, this 20th day of August, 1991.

MICHAEL K. BURTON
Third Circuit Court

Approved as to form.

ANN BOYDEN
County Attorney