

2004

Utah v. Mitchell Worwood : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff-Appellee,

v.

MITCHELL WORWOOD,
Defendant-Appellant.

Case No. 20040701-CA

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION FOR DRIVING UNDER THE
INFLUENCE OF ALCOHOL WITH TWO PRIORS, A THIRD DEGREE
FELONY, IN THE FOURTH JUDICIAL DISTRICT COURT, JUAB
COUNTY, THE HONORABLE DONALD J. EYRE PRESIDING

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
JURISDICTION AND NATURE OF PROCEEDINGS	1
ISSUES PRESENTED ON APPEAL AND STANDARDS OF REVIEW	1
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES	2
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	3
SUMMARY OF ARGUMENT	6
ARGUMENT	
I. DEFENDANT’S DETENTION WAS SUPPORTED BY REASONABLE SUSPICION WHERE HIS EYES WERE BLOODSHOT, HIS SPEECH WAS SLOW AND SLURRED, AND HIS BREATH SMELLED OF ALCOHOL	7
II. DEFENDANT’S DETENTION DID NOT ESCALATE TO A DE FACTO ARREST WHEN AN OFF-DUTY TROOPER, SUSPECTING THAT DEFENDANT HAD BEEN DRIVING DRUNK, TRANSPORTED HIM A MILE AND A HALF FROM A CANYON LOCATION TO A SITE MORE SUITABLE FOR FIELD SOBRIETY TESTS AND, IF NECESSARY, ARREST	12
A. Detaining defendant long enough to transport him to a more suitable site for field sobriety tests did not escalate the detention to a de facto arrest	13
B. Even if defendant was illegally arrested, he has failed to demonstrate that the evidence against him was “fruit of the poisonous tree” ..	21
CONCLUSION	23

ADDENDA

Addendum A - Ruling (R. 60-64)

Addendum B - *American Fork City v. Singleton*, 2004 UT App 172

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Brown v. Illinois</i> , 422 U.S. 590 (1975)	21
<i>Dunaway v. New York</i> , 442 U.S. 200 (1979)	13, 20
<i>Florida v. Royer</i> , 460 U.S. 491 (1983)	9, 14, 20
<i>Hayes v. Florida</i> , 470 U.S. 811 (1985)	20
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968)	9
<i>United States v. \$109,179 in U.S. Currency</i> , 228 F.3d 1080 (9th Cir.2000)	18
<i>United States v. Arvizu</i> , 534 U.S. 266 (2002)	9
<i>United States v. Charley</i> , 396 F.3d 1074 (9th Cir. 2005)	18
<i>United States v. Gori</i> , 230 F.3d 44 (2nd Cir.2000)	18
<i>United States v. Ibarra-Sanchez</i> , 203 F.2d 356 (5th Cir. 2000)	22
<i>United States v. Kapperman</i> , 764 F.2d 786 (11th Cir.1985)	19
<i>United States v. Montano-Gudino</i> , 309 F.3d 501 (8th Cir. 2002)	18
<i>United States v. Nurse</i> , 916 F.2d 20 (D.C.Cir.1990)	19
<i>United States v. Sharpe</i> , 470 U.S. 675 (1985)	8, 9, 13
<i>United States v. Van Horn</i> , 789 F.2d 1492 (11th Cir. 1986)	22
<i>United States v. Vega</i> , 72 F.3d 507 (7th Cir.1995)	19

STATE CASES

<i>American Fork City v. Singleton</i> , 2004 UT App 172	11
<i>Brigham City v. Stuart</i> , 2005 UT 13	8

<i>Commonwealth v. Eckert</i> , 728 N.E.2d 312 (Mass. 2000)	11
<i>Commonwealth v. Gommer</i> , 665 A.2d 1269 (Penn. Super. 1995)	16
<i>Eckenrod v. State</i> , 67 P.3d 635 (Wyo. 2003)	20
<i>People v. Carlos M.</i> , 269 Cal. Rptr. 447 (Cal. App. 1990)	19
<i>People v. Harris</i> , 124 Cal. Rptr. 536 (Cal. 1975)	20
<i>People v. Stevens</i> , 517 P.2d 1336 (Colo. 1973)	19
<i>State v. Alvarez</i> , 2005 UT App 145	2
<i>State v. Brake</i> , 2004 UT 95, 103 P.3d 699	2
<i>State v. Crasco</i> , 77 P.3d 555 (Mont. 2003)	11
<i>State v. Griffin</i> , 459 A.2d 1086 (Me.1983)	19
<i>State v. Grovier</i> , 808 P.2d 133 (Utah App.1991)	9
<i>State v. Heaps</i> , 711 P.2d 257 (Utah 1985)	21
<i>State v. Kier</i> , 678 N.W.2d 672 (Minn. App. 2004)	11
<i>State v. Levin</i> , 2004 UT App 396, 101 P.3d 846, cert. granted, Case no. 20050001-SC	14
<i>State v. Lopez</i> , 873 P.2d 1127 (Utah 1994)	9
<i>State v. Markland</i> , 2005 UT 26	8, 13
<i>State v. Ottesen</i> , 920 P.2d 183 (Utah App. 1996)	10, 17
<i>State v. Quartana</i> , 570 N.W.2d 618 (Wis. App. 1997)	19
<i>State v. Schreuder</i> , 712 P.2d 264 (Utah 1985)	21
<i>State v. Strausberg</i> , 895 P.2d 831 (Utah App. 1995)	10
<i>State v. Vialpando</i> , 2004 UT App 95, 89 P.3d 209	10

<i>State v. Warren</i> , 2003 UT 36, 78 P.3d 590	8
<i>Thomas v. State</i> , 2002 UT 128, 63 P.3d 672	21

FEDERAL STATUTES

U.S. Const., amend. IV	2, 8
------------------------------	------

STATE STATUTES

Utah Code Ann. § 41-6-44 (West 2004)	1, 2, 5, 13
Utah Code Ann. § 78-2a-3 (West 2004)	1

OTHER WORKS CITED

R. LaFave, <i>Search & Seizure: A Treatise on the Fourth Amendment</i> (4th ed. 2004) . . .	18
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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,
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v.

MITCHELL WORWOOD,
Defendant-Appellant.

Case No. 20040701-CA

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF THE PROCEEDINGS

This is an appeal from a conviction for driving under the influence of alcohol with two prior convictions, a third degree felony under Utah Code Ann. § 41-6-44 (West 2004), in the Fourth Judicial District Court, Juab County, the Honorable Donald J. Eyre presiding. This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(e) (West 2004).

ISSUES PRESENTED ON APPEAL AND STANDARDS OF REVIEW¹

1. Was defendant's detention for field sobriety testing supported by reasonable suspicion, where his eyes were bloodshot, his speech was slow and slurred, and his breath smelled of alcohol?

¹ The order of the issues has been reversed for purposes of the State's presentation.

2. Did defendant's detention escalate to a de facto arrest when an off-duty trooper, suspecting that defendant had been driving drunk, transported him a mile and a half from a canyon location to a site more suitable for field sobriety tests and, if necessary, arrest?

Factual findings underlying the trial court's decision to grant or deny a motion to suppress evidence are reviewed under a clearly erroneous standard; conclusions of law based on those findings are reviewed for correctness. *State v. Alvarez*, 2005 UT App 145, ¶ 8. Application of law to underlying factual findings in search and seizure cases receives "non-deferential review." *State v. Brake*, 2004 UT 95, ¶ 15, 103 P.3d 699.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

U.S. CONST., amend. IV

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.

STATEMENT OF THE CASE

Defendant was charged by information dated 29 September 2003 with driving under the influence of alcohol with two prior convictions, a third degree felony in violation of Utah Code Ann. § 41-6-44 (West 2004). R. 1-2. After being bound over at a preliminary hearing, defendant pled not guilty. R. 19-20. Defendant filed a motion to suppress evidence on the ground that defendant was unconstitutionally stopped and detained. R. 24-35. Following an evidentiary hearing and briefing, defendant's motion was denied in a four-page memorandum

decision. R. 36, 60-64, 92 (addendum A). Defendant entered a conditional guilty plea and was sentenced to a fine and a term of zero to five years, all but 180 days of which was suspended. R. 75-79. Defendant timely appealed. R. 81.

STATEMENT OF THE FACTS

Driving down Deep Canyon in Juab County, Cory Wright and his friend, Skyler Fautin, observed a large wet spot in the dirt road. R. 92: 5. Nearby a man stood by a truck parked diagonally in the middle of the road, blocking the way. R. 92: 5. Cory and Skyler had been horseback riding up the canyon and were pulling a horse trailer with Cory's truck. R. 92: 4. When Cory saw the wet spot and a crushed beer can on the road, his "job kicked in" and he thought, "maybe this guy has been drinking." R. 92: 6-7. Cory was an off-duty highway patrol trooper. R. 92: 4.

When defendant saw the truck and trailer approaching, he got into the truck and pulled off to the side of the road to let it pass. R. 92: 5-6. Instead of passing, Cory pulled up beside defendant, rolled down his window, and asked if everything was okay. R. 92: 6-7. Defendant said "Yeah" and stated that he had just stopped to urinate. R. 92: 6-7. However, Cory did not believe that one person could make such a large spot. R. 92: 6. He suspected that the spot was made by pouring out the contents of a cooler. R. 92: 6. He also observed that defendant's speech was "slow and slurred." R. 92: 8. And even from the driver's side of his truck, he could see that defendant's eyes were bloodshot. *Id.* Cory thought, "this

guy[']s got some alcohol in him”; in fact, he concluded that defendant was “very intoxicated.” R. 92: 8, 13.

Cory got out of his truck and walked around to defendant’s pickup, where he smelled the odor of alcohol. R. 92: 8-9; R. 91: 4; R. 60, 62. Cory told defendant, “You know, we’d better have a trooper look at you before you drive anymore.” R. 92: 8. At that point Cory considered defendant “detained.” R. 92: 15. He asked defendant for his driver’s license, saw his name, and had him get out of the pickup. R. 92: 9-10. Although Cory did not know defendant, defendant knew who Cory was, and that he was a peace officer. R. 92: 15.

Because Cory was off duty and “it would have messed up my night,” he wanted another officer to perform field sobriety tests. R. 92: 11. Also, at the canyon location he had no cell phone or other means of contacting law enforcement; he therefore decided to transport defendant down to his (Cory’s) own house, a “safer location” to have the field sobriety tests performed. R. 91: 5, R. 92: 10, 11. Although officers commonly perform field sobriety tests at roadside, they do so with a patrol car; Cory was driving a truck and pulling a horse trailer. R. 91: 15; R. 92: 6, 9.

Cory picked up the beer can, found it three-quarters empty, poured out the remaining beer, and tossed it into the back of defendant’s pickup. R. 92: 10-12. He had defendant get into Cory’s truck and drove about a mile and a half to his own house, which is at the base of Deep Canyon in the town of Levan. R. 92: 10. As before, while en route Cory smelled alcohol on defendant. R. 92: 9. Defendant was cooperative. R. 92: 16.

Meanwhile, Skyler drove defendant's vehicle out of the canyon, called the Juab County Sheriff's Department, and drove to Cory's house. R. 92: 10. Trooper Kevin Wright, Cory's brother, responded to the call. R. 92: 10; R. 91: 4, 14. All four men met at Cory's house outside Levan. R. 92: 10, 91: 12.

Trooper Kevin Wright could also smell the odor of alcohol on defendant's breath. R. 91: 6. He also observed that defendant's speech was slurred, he swayed when he walked, and his eyes were bloodshot. R. 91: 6-7. Trooper Kevin Wright performed the standard field sobriety tests. R. 91: 7; R. 92: 10. The horizontal gaze nystagmus test indicated that defendant had some alcohol in his system. R. 91: 8-10. Defendant failed the nine-step-walk-and-turn test and the one-legged-stand test. R. 91: 10-11. A portable breath test showed positive. R. 91: 11. Trooper Kevin Wright arrested defendant, took him to the Sheriff's office, and administered a breath test. R. 91: 11, 12. The test result was ".248 liters." R. 91: 13.²

With defendant's consent, Cory drove defendant's truck to defendant's house, giving the keys to his mother. R. 92: 11; R. 91: 12. Cory did this rather than impounding and inventorying it "because he was pretty decent when speaking with me" and "out of courtesy for someone that lives in the same community as I do." R. 92: 13.

Defendant had two prior DUI convictions. R. 91: 24.

² Presumably by this Officer Kevin Wright meant a blood alcohol level of .248 percent "per 210 liters of breath." Utah Code Ann. § 41-6-44(2)(c) (West 2004).

SUMMARY OF ARGUMENT

1. Off-duty trooper Cory Wright's detention of defendant up Deep Canyon was supported by reasonable suspicion. Defendant's eyes were bloodshot, his speech was slurred, his breath smelled of alcohol, an empty beer can was on the road nearby, there was a large wet spot in the road, defendant had an empty ice cooler, and defendant stated that he had stopped to urinate. Only a naive peace officer would fail to recognize these signs of DUI.

2. Defendant's detention by Cory Wright did not escalate to a de facto arrest. Cory Wright acted reasonably in deciding to hand defendant off to an on-duty officer in the valley. After observing defendant at close range, he reasonably concluded that defendant was intoxicated and required sobriety testing, for which the canyon roadside was an unfavorable location; it was neither safe or conducive to accurate testing. In addition, Cory was ill-prepared to effect an arrest should one have been necessary. He was off-duty, pulling a horse trailer, and accompanied by a "kid" with whom he had been horseback riding. He had neither patrol car, cell phone, nor, presumably, handcuffs or a sidearm. It was reasonable for him to transport defendant a mile and a half and hand him over to an on-duty officer.

Even if defendant's detention was a de facto arrest and that arrest was illegal for lack of probable cause, defendant is nevertheless not entitled to reversal. He has not demonstrated a causal link between the purportedly illegal arrest and the results of the field sobriety and other tests. Those test results were the fruit, not of the detention, but of Cory Wright's pre-detention observations that formed reasonable suspicion.

ARGUMENT

I.

DEFENDANT'S DETENTION WAS SUPPORTED BY REASONABLE SUSPICION WHERE HIS EYES WERE BLOODSHOT, HIS SPEECH WAS SLOW AND SLURRED, AND HIS BREATH SMELLED OF ALCOHOL

Defendant claims that the “articulable facts are not sufficient to create a reasonable suspicion of further illegality,” and thus that Cory Wright “had no justifiable reason either to stop or to detain [defendant] in this case.” Br. Aplt. at 11.

District court's ruling. The district court ruled that when Cory Wright approached defendant and asked what he was doing, defendant was free to leave and thus defendant was not detained. R. 62. However, the court ruled that the totality of the circumstances, including defendant's bloodshot eyes and slurred speech, the odor of alcohol on defendant's breath, the empty beer can, the wet spot, the empty cooler, and defendant's statement that he had stopped to urinate, “caused the trooper to believe that [defendant] was under the influence of alcohol to the extent that he was unable to safely operate his vehicle.” R. 62. Wright therefore “had reasonable suspicion that the defendant was committing a crime and lawfully detained the defendant to investigate.” R. 63. “The encounter escalated to a level two encounter when Trooper Wright told the defendant that he could not drive his vehicle until he had been checked out by another officer.” *Id.*

Controlling law. The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures:

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.

U.S. CONST. amend. IV. “The touchstone of our analysis under the Fourth Amendment is [and] always [has been] the reasonableness in all the circumstances of the particular government invasion of a citizen’s personal security.” *Brigham City v. Stuart*, 2005 UT 13, ¶ 49 (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977)) (alterations in original). Reasonableness depends “on a balance between the public interest and the individual’s right to personal security free from arbitrary interference by law officers.” *State v. Warren*, 2003 UT 36, ¶ 25, 78 P.3d 590 (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975) (citation omitted)). “The Fourth Amendment is not . . . a guarantee against *all* searches and seizures, but only against *unreasonable* searches and seizures.” *United States v. Sharpe*, 470 U.S. 675, 682 (1985).

“It is settled law that ‘a police officer may detain and question an individual when the officer has reasonable, articulable suspicion that the person has been, is, or is about to be engaged in criminal activity.’” *State v. Markland*, 2005 UT 26, ¶ 10 (quoting *State v. Chapman*, 921 P.2d 446, 450 (Utah 1996) (internal quotation omitted)). To justify such a detention, the officer’s suspicion must be supported by “specific and articulable facts and rational inferences,” *Id.* (quoting *United States v. Werking*, 915 F.2d 1404, 1407 (10th Cir.1990)), and cannot be merely an “inchoate and unparticularized suspicion or ‘hunch,’”

Terry v. Ohio, 392 U.S. 1, 27 (1968). However, “[a] determination that reasonable suspicion exists . . . need not rule out the possibility of innocent conduct.” *United States v. Arvizu*, 534 U.S. 266, 277 (2002). Indeed, “the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard.” *Id.* at 274.

In evaluating the reasonableness of an investigative stop and detention, a dual inquiry applies. *Sharpe*, 470 U.S. at 681. The first question is “whether the officer’s action was justified at its inception,” and the second is “whether it was reasonably related in scope to the circumstances which justified the interference in the first place.” *Id.* (quoting *Terry*, 392 U.S. at 20).

“Once a traffic stop is made, the detention ‘must . . . last no longer than is necessary to effectuate the purpose of the stop.’” *State v. Lopez*, 873 P.2d 1127, 1132 (Utah 1994) (quoting *Florida v. Royer*, 460 U.S. 491, 500 (1983)). “Investigative questioning that further detains the driver must be supported by reasonable suspicion of more serious criminal activity.” *Id.* “If reasonable suspicion of more serious criminal activity does arise, . . . officers must diligently [pursue] a means of investigation that [is] likely to confirm or dispel their suspicions quickly, during which time it [is] necessary to detain defendant.” *Lopez*, 873 P.2d at 1132 (internal quotation marks omitted) (quoting *State v. Grovier*, 808 P.2d 133, 136 (Utah App.1991) (quoting *United States v. Sharpe*, 470 U.S. 675, 686 (1985))) (alteration in original).

Indicia of intoxication give rise to reasonable suspicion. *See, e.g., State v. Ottesen*, 920 P.2d 183, 185-86 (Utah App. 1996) (holding that, after smelling alcohol on the driver and observing signs of intoxication, the officer had reasonable suspicion that the driver was driving under the influence of alcohol); *cf. State v. Vialpando*, 2004 UT App 95, ¶ 3-14, 89 P.3d 209 (trooper administered field sobriety tests where defendant's eyes were bloodshot, he smelled strongly of alcohol, and his speech was slurred); *State v. Strausberg*, 895 P.2d 831, 832 (Utah App. 1995) (trooper administered field sobriety tests after observing that defendant's breath smelled of beer, his eyes were red and glassy, and his speech was slightly slurred).

Analysis. Cory Wright had reasonable suspicion to detain defendant briefly for the purpose of administering field sobriety tests. As the trial court correctly found, reasonable suspicion rested on seven factors, which, taken in combination, “caused the trooper to believe that [defendant] was under the influence of alcohol to the extent that he was unable to safely operate his vehicle.” R. 62. These factors were (1) defendant's bloodshot eyes, (2) defendant's slurred speech, (3) the smell of alcohol on defendant's breath, (4) the empty beer can, (5) the large wet spot in the road, (6) the empty cooler, and (7) defendant's statement that he had stopped to urinate. *Id.* In addition, defendant's truck had been parked diagonally across the road, and Trooper Wright had seen defendant move it. *See* R. 92: 5.

Viewed in combination, these facts gave rise to a reasonable inference that defendant had been drinking beer from an ice chest while driving down the canyon and that, after

consuming most of the last beer, he stopped to dump the melted ice out of the cooler, crush and discard the beer can, and relieve himself. It would be a naive peace officer indeed who failed to comprehend that these facts painted a picture of an intoxicated driver.

In sum, these facts support the district court's finding that "under the totality of the circumstances, the officer had reasonable suspicion that the defendant was committing a crime and lawfully detained the defendant to investigate." R. 63.³

³ Indeed, he may have had probable cause to arrest defendant. In *American Fork City v. Singleton*, 2004 UT App 172, this Court addressed the question of probable cause in a drunk driving case. The Court noted, first, that Singleton "was operating a vehicle immediately prior to his encounter with the arresting officer." *Id.* at ¶ 4 (unnumbered). It then noted that Singleton "had glassy, bloodshot eyes and was slightly swaying as he talked." *Id.* (internal quotation marks omitted). Finally, when the officer tried to perform field sobriety tests, Singleton "became belligerent and refused to cooperate." *Id.* On these facts, "there was probable cause to arrest him to DUI." *Id.*

Although Singleton's indicia of intoxication do not precisely mirror defendant's here, other courts have held that bloodshot eyes, slurred speech, and an odor of alcohol support a finding of probable cause. *See, e.g., Commonwealth v. Eckert*, 728 N.E.2d 312, 319 (Mass. 2000) (slurred speech, red glassy eyes, and strong odor of alcohol on breath warrant probable cause to arrest); *State v. Crasco*, 77 P.3d 555 (Mont. 2003) (unpublished decision; text at 2003 WL 22171847) (bloodshot eyes, slurred speech, and odor of alcohol supported DUI arrest); *State v. Kier*, 678 N.W. 2d 672, 678 (Minn. App. 2004) (strong odor of an alcoholic beverage on driver's breath, blood-shot watery eyes, and slurred speech supported finding of probable cause).

II.

DEFENDANT’S DETENTION DID NOT ESCALATE TO A DE FACTO ARREST WHEN AN OFF-DUTY TROOPER, SUSPECTING THAT DEFENDANT HAD BEEN DRIVING DRUNK, TRANSPORTED HIM A MILE AND A HALF FROM A CANYON LOCATION TO A SITE MORE SUITABLE FOR FIELD SOBRIETY TESTS AND, IF NECESSARY, ARREST

Defendant claims that his seizure “was an arrest, and the encounter in this case escalated directly from a level one to a level three stop within a matter of seconds.” Br. Aplt. at 8. Defendant does not dispute that, if the trooper had reasonable suspicion, he was entitled to perform field sobriety tests there on the side of the canyon road. *See* Br. Aplt. at 11-12. Nor does defendant dispute that the eventual field sobriety tests yielded probable cause to arrest him. *See* Br. Aplt. at 8 (“it is not disputed that there was no probable cause to arrest in this case until after field sobriety tests were belatedly performed”). He complains rather that he was transported before being tested and arrested, rather than after.

District court’s ruling. The district court ruled that “it was reasonable for the trooper to transport the defendant a short distance from the mountain ro[ad] where the stop occurred to the trooper’s home.” R. 63. It was, the court found, “more fair to the defendant to conduct the field sobriety test in a location that would allow the officer to obtain accurate test results.” *Id.* In addition, under the circumstances “it was reasonable for Trooper [C]ory Wright to hand off the investigation of DUI to another trooper in that the DUI statutes allow the trooper to hand off a DUI investigation and the trooper’s actions did not cause an

unreasonable delay in the investigation.” *Id.*⁴ In sum, the court found, “the defendant was not unlawfully detained.” *Id.*

A. Detaining defendant long enough to transport him to a more suitable site for field sobriety tests did not escalate the detention to a de facto arrest.

Defendant argues that delay in conducting field sobriety tests converted the investigative stop into a de facto arrest. Br. Aplt. at 9. Case law identifies three levels of police/citizen encounters: a voluntary encounter, a brief investigative detention (*Terry* stop), and an arrest.

(1) An officer may approach a citizen at any time 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 . . . ; (3) an officer may arrest a suspect if the officer has probable cause to believe an offense had been committed or is being committed.

Markland, 2005 UT 26, ¶ 10, n.1 (citation omitted, ellipsis in original). A level two investigative detention may, at some point, become so overly intrusive that it can no longer be characterized as a minimal intrusion designed to confirm quickly or dispel the suspicions which justified the initial stop. *Sharpe*, 470 U.S. at 683-686. When the detention exceeds the boundaries of a permissible investigative stop, it becomes a de facto arrest, requiring probable cause. *Dunaway v. New York*, 442 U.S. 200, 212 (1979).

⁴ The court was apparently referring to Utah Code Ann. § 41-6-44(10) (West 2004), which provides that “[a] peace officer may, without a warrant, arrest a person for a violation of this section when the peace officer has probable cause to believe the violation has occurred, although not in the peace officer’s presence, and if the peace officer has probable cause to believe that the violation was committed by the person.”

In assessing whether a detention is “too long in duration to be justified as an investigative stop,” it is “appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant. *Sharpe*, 470 U.S. at 686 (citations omitted). “Obviously, if an investigative stop continues indefinitely, at some point it can no longer be justified as an investigative stop.” *Id.* at 685.

However, courts “should not indulge in unrealistic second-guessing.” *Id.* “A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished.” *Id.* at 686-87. “But ‘[t]he fact that the protection of the public might, in the abstract, have been accomplished by ‘less intrusive’ means does not, itself, render the search unreasonable.” *Id.* at 687 (quoting *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973)); *but see Royer*, 460 U.S. at 500 (“the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer’s suspicion in a short period of time”).

This Court recently stated that an investigative stop of over an hour did not “assume the character of an arrest.” *State v. Levin*, 2004 UT App 396, ¶ 16, 101 P.3d 846 (holding that the defendant was not in custody for *Miranda* purposes), *cert. granted*, Case no. 20050001-SC. The Court observed that “it is reasonable for a stop to require over an hour when an officer calls support personnel who must travel to the scene.” 2004 UT App 396, ¶ 17. In *Levin*, the officers were dealing with three suspects at the scene and had to perform multiple

tasks, including “summoning and awaiting support officers trained in drug recognition” and “performing field sobriety tests on each suspect for alcohol and drug consumption.” *Id.* This Court concluded, “Taken together, a stop lasting over an hour under these circumstances is not unreasonable.” *Id.*

Here, Cory Wright acted reasonably under the circumstances. He had seen defendant driving a truck. After observing defendant at close range, he had reasonably concluded that defendant was intoxicated. *See* Point I. He determined to detain defendant for field sobriety tests. However, a number of factors militated against performing the tests at the canyon location. The record suggests that the town would be “a safer location” for the tests than the side of a dirt road, especially where Cory was not in his patrol car. R. 91: 5, 10. Also, the canyon road was not conducive to accurate testing; indeed, the district court found that it was “more fair to the defendant to conduct the field sobriety test in a location that would allow the officer to obtain accurate test results.” R. 63.

In addition, Cory was ill-prepared to effect an arrest should one have been necessary. He was off-duty. R. 92: 4. He was not in his patrol car, but a truck. R. 92: 4; R. 91: 15. He was pulling a horse trailer and was accompanied by “[a] kid” with whom he had been horseback riding. R. 92: 4, 10. He had no cell phone or other means of communication. R. 92: 10. He presumably lacked handcuffs, a sidearm, or any other means of controlling a belligerent arrestee.

For an off-duty officer to detain a suspect and call for an on-duty officer to investigate, interrogate, and if necessary arrest the suspect is a common and appropriate course of action. It does not, without more, transform a *Terry* stop into a de facto arrest.

The Superior Court of Pennsylvania, on closely analogous facts, held that a brief detention by an off-duty officer until an on-duty officer arrived did not transform a *Terry* stop into a de facto arrest. *See Commonwealth v. Gommer*, 665 A.2d 1269 (Penn. Super. 1995). There, an off-duty state police officer observed Gommer driving erratically and suspected that he was driving under the influence of alcohol. *Id.* at 1273. She pulled Gommer over. *Id.* His eyes were bloodshot, his speech was slurred, and he was uncooperative. *Id.* at 1271. The off-duty officer identified herself as a member of the state police, instructed him to remain at the scene until other troopers arrived, informed him that she believed he was driving under the influence of alcohol, and took his keys. *Id.* at 1271, 1273. She “briefly detained him until the arrival of on duty state troopers who would be properly equipped to investigate and determine whether appellee was, in fact, intoxicated and, if necessary, to take him into custody.” *Id.* at 1274.

On these facts, the Pennsylvania court held that the off-duty officer’s detention of Gommer “was not sufficiently coercive to rise to the level of a custodial detention or arrest.” *Id.* Thus, Gommer “was not actually arrested until after [on-duty officers] arrived on the scene . . .” *Id.*

This Court has also rejected a Fourth Amendment challenge in a drunk driving case where the defendant was briefly detained until a backup officer arrived. In *State v. Ottesen*, 920 P.2d 183 (Utah App. 1996), this Court held that Ottesen was reasonably detained where, within fifteen minutes of the initial stop, the officer checked the driver's and Ottesen's identification and the vehicle's registration, ran a warrants check on the driver, and called for a backup officer to perform a sobriety test. *Id.* at 185. It took the backup officer five to ten minutes to arrive on the scene. *Id.* This Court held that after smelling alcohol on the driver and observing signs of intoxication, and notwithstanding the wait while a backup officer arrived, the detaining officer "properly and timely investigated his reasonable suspicion that the driver was driving under the influence of alcohol." *Id.* at 185-86.

Here, having determined that defendant could not safely drive, Cory transported defendant to his own (Wright's) home, which was "right there at the base of Deep Canyon." R. 92: 10. The trip down the canyon was obviously brief, since the parties traveled only a mile and a half or less. R. 92: 10; *cf.* 91: 5. Driving a mile and a half, even on a dirt road, takes only a few minutes. Nothing suggests that Cory Wright made any unnecessary stops along the way or otherwise dallied in the course of transporting defendant out of the canyon.

Cory Wright acknowledged that one reason he wanted to hand defendant off to an on-duty trooper is that he was off duty and "it would have messed up my night." R. 92: 11. Defendant makes sport of this, observing with mock seriousness that "the possibility that properly conducting field sobriety tests on location might unfavorably alter the arresting

officer's evening plans is not recognized as an exception to the warrant requirement under either the state or federal constitutions." Br. Aplt. at 7-8. He then asserts that "it is not necessary or reasonable to take a defendant into custody without probable cause and transport him to another location to facilitate the officer's evening plans." *Id.* at 8. Obviously, arresting a suspect without probable cause is never reasonable or constitutional. But defendant offers no reason to believe that an off-duty officer's desire to remain off-duty transforms an investigatory stop into a de facto arrest.

The more fundamental question defendant poses is whether transporting a suspect escalates an investigatory stop to a de facto arrest. The answer is that it does not: "it seems clear that some movement of the suspect in the general vicinity of the stop is permissible without converting what would otherwise be a temporary seizure into an arrest." 4 WAYNE R. LAFAYE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.2(g) (4th ed. 2004). *Accord United States v. Charley*, 396 F.3d 1074, 1081 (9th Cir. 2005) (holding that the defendant was not under arrest when officer transported her to her home for questioning); *United States v. Montano-Gudino*, 309 F.3d 501, 504 (8th Cir. 2002) (holding that there was no arrest where officers escorted the defendant who was in the process of emptying his rented storage unit to a room in the storage facility offices for questioning); *United States v. Gori*, 230 F.3d 44, 56 (2nd Cir.2000) ("it is well established that officers may ask (or force) a suspect to move as part of a lawful Terry stop"); *United States v. \$109,179 in U.S. Currency*, 228 F.3d 1080 (9th Cir.2000) (where suspect found at door of room 320 of motel,

movement of him to nearby room 323 “for safety and security purposes” during *Terry* stop lawful); *United States v. Vega*, 72 F.3d 507, 515-16 (7th Cir.1995) (holding that the defendant’s stop was “not tantamount to an arrest” notwithstanding that “the officers drew their weapons, asked [the defendant] to accompany them [back to the crime scene] in one of their cars,” and kept him in the officer’s vehicle for over an hour); *United States v. Nurse*, 916 F.2d 20, 24-25 (D.C.Cir.1990) (holding that officers’ conduct in preventing the defendant from getting into a taxi and escorting her back into the train terminal did not “exceed[] the established bounds for reasonable suspicion detentions”); *United States v. Kapperman*, 764 F.2d 786, 792 (11th Cir.1985) (holding that once defendant consented to search, moving the investigation or requiring him to ride in the patrol car to a nearby place where the search would be conducted did not convert lawful investigatory stop into an arrest); *People v. Carlos M.*, 269 Cal.Rptr. 447, 452, n.4, 452-55 (Cal. App. 1990) (holding that half-hour drive to hospital for show-up showed “commendable dispatch”); *People v. Stevens*, 517 P.2d 1336, 406 (Colo. 1973) (holding that, where stop occurred in lobby area of prison, it was proper to take the suspect to a nearby conference room to facilitate the interrogation); *State v. Griffin*, 459 A.2d 1086, 1089 (Me.1983) (holding that “it is within the reasonable scope of an investigatory stop or detention” and did not constitute an arrest for the officer to ask the suspect to get out of his car and get into the police cruiser to answer questions); *State v. Quartana*, 570 N.W.2d 618, 621-23 (Wis. App. 1997) (holding that taking suspect’s driver’s license and transporting him to the accident scene did not exceed

the scope of a *Terry* stop); *Eckenrod v. State*, 67 P.3d 635, 641 (Wyo. 2003) (holding that transporting defendant across the street to move away from a hostile crowd did not transform *Terry* stop into an arrest).

However, transporting a suspect to the police station or to a secluded location for interrogation is a factor that may contribute to a finding that a *Terry* stop has morphed into an arrest. *See, e.g., Hayes v. Florida*, 470 U.S. 811, 815-16 (1985) (holding that transporting suspect from home to police station for interrogation was an arrest); *Florida v. Royer*, 460 U.S. 491, 499-508 (1983) (holding that police exceeded the limits of a *Terry* stop when they transported airline passenger to a “police room” within airline terminal, retained his ticket and driver’s license, and retrieved his luggage from the airline without his consent); *Dunaway v. New York*, 442 U.S. 200, 208-16 (1979) (holding that transporting suspect from his neighbor’s home to police station and placing him in an interrogation room exceeded the limits of a *Terry* stop).

Here, defendant was subject not to an arrest, but to a “transport” or “transportation” detention. *Eckenrod*, 67 P.3d at 641; *People v. Harris*, 124 Cal.Rptr. 536, 540, 541 (Cal. 1975) (en banc). Cory Wright transported him a short distance, requiring only minutes, to a location more suitable for the field sobriety tests to be performed by an officer “properly equipped to investigate and determine whether [defendant] was, in fact, intoxicated and, if necessary, to take him into custody. *Gommer*, 665 A.2d 1269, 1274.

The district court properly ruled that this *Terry* stop did not escalate to an arrest.

B. Even if defendant was illegally arrested, he has failed to demonstrate that the evidence against him was “fruit of the poisonous tree.”

Even if Cory Wright inadvertently effected a de facto arrest and that arrest was illegal due to lack of probable cause, defendant is nevertheless not entitled to reversal of his conviction without demonstrating that the police obtained the challenged evidence by exploiting his arrest.

“[A]n illegal arrest or detention does not void a subsequent conviction.” *Thomas v. State*, 2002 UT 128, ¶ 7, 63 P.3d 672 (quoting *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975)). “The remedy for an unlawful arrest is the suppression of evidence obtained thereby.” *State v. Schreuder*, 712 P.2d 264, 271 (Utah 1985). However, an illegal arrest does not automatically require the suppression of all evidence acquired after the arrest. *Brown v. Illinois*, 422 U.S. 590, 599 (1975). The Supreme Court has “eschewed any per se or ‘but for’ rule; the relevant inquiry is whether the evidence sought to be used against a defendant was “obtained by exploitation of the illegality of his arrest,” *Dunaway*, 442 U.S. at 217 (quoting *Brown*, 422 U.S. at 600). In other words, the challenged evidence must be shown to be “fruit of the poisonous tree.” *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963).

Here, defendant has failed to demonstrate or even assert that the evidence he seeks to suppress was “the fruit of an illegal arrest.” *State v. Heaps*, 711 P.2d 257, 259 (Utah 1985) (declining to reach an unpreserved Fourth Amendment issue). He asserts that his detention

“was unreasonable and unlawful, and all evidence obtained thereby must be suppressed.” Br. Aplt. at 12.⁵ But no evidence was “obtained thereby.”

“Evidence seized during an unlawful arrest, or statements made by the person unlawfully arrested while in custody, are products of the arrest and will be suppressed.” *United States v. Van Horn*, 789 F.2d 1492, 1509 (11th Cir. 1986) (denying suppression). “Evidence with only a loose causal connection to an illegal arrest, however, will not be suppressed.” *Id.* (citing *Wong Sun*, 371 U.S. at 488). The law requires a “causal link” between the illegality and the evidence sought to be suppressed. *United States v. Ibarra-Sanchez*, 203 F.2d 356, 357 (5th Cir. 2000) (per curiam).

The case at bar is not the typical case where a defendant seeks to suppress evidence seized or statements made during the course of an allegedly illegal arrest. Defendant here challenges the results of alcohol testing conducted on the basis of pre-detention reasonable suspicion. Even before Cory Wright transported defendant, he “could see that he had been drinking,” that “he was very intoxicated.” R. 92: 9, 13. This observation, not the purportedly illegal detention, led to the field sobriety and breath tests and defendant’s eventual arrest.

Ibarra-Sanchez illustrates the need for a causal link between the purported illegality and the evidence sought to be suppressed. There, police legally stopped a van, removed and handcuffed the occupants and placed them in a patrol car. *Ibarra-Sanchez*, 203 F.2d at 357.

⁵ Although defendant never specifies what evidence he claims must be suppressed, see Br. Aplt. at 12, R. 26-35, he apparently refers to the field sobriety tests and breath test results.

They then approached the van, smelled marijuana, and searched the van. *Id.* The Fifth Circuit noted, “The officers’ ability to smell the marihuana in the van and their decision and ability to search the van depended in no way on the manner in which they had previously detained the appellants after the stop.” *Id.* The court reiterated that “there was no causal link between the post-stop alleged ‘illegal’ arrest of the appellants and the search of the van, which resulted in the seizure of [the challenged evidence].” *Id.* at 357-58. Accordingly, the evidence could not be suppressed. *Id.* at 358.

Likewise here the challenged evidence was the fruit, not of the detention, but of observations made before even defendant contends he was detained. Thus, even if the detention was illegal, the results of the field sobriety and other tests are not suppressible.

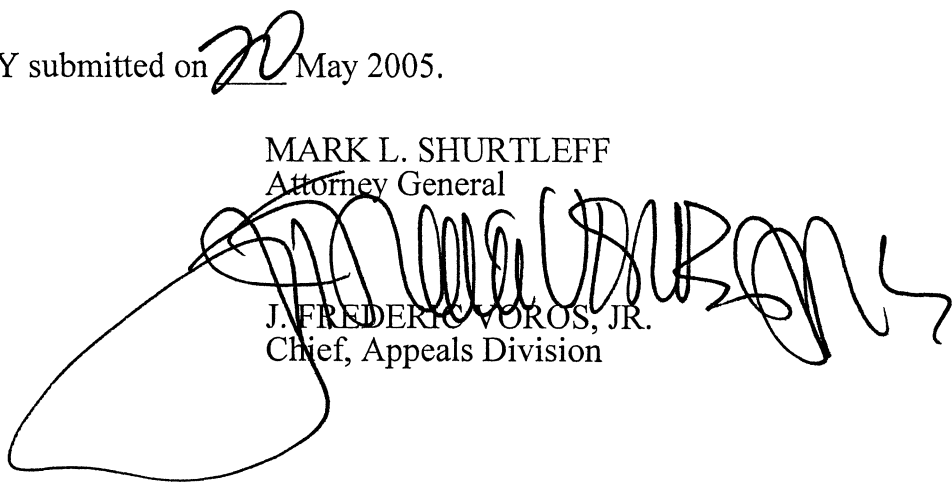
CONCLUSION

Defendant’s conviction should be affirmed.

RESPECTFULLY submitted on 20 May 2005.

MARK L. SHURTLEFF
Attorney General

J. FREDERIC VOROS, JR.
Chief, Appeals Division

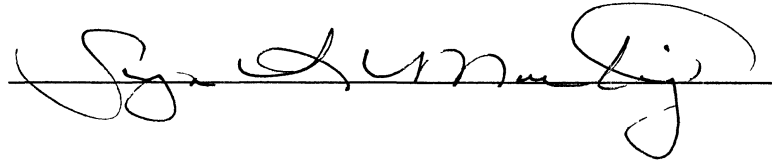
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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Appellee were this 20th May
2005 mailed to the following:

SCOTT P. CARD
JENNIFER K. GOWANS
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Counsel for Appellant

A handwritten signature in black ink, appearing to read "Scott P. Card", is written over a horizontal line.

Addenda

Addendum A

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IN THE FOURTH JUDICIAL DISTRICT COURT
JUAB COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

v.

MITCHELL L. WORWOOD

Defendant.

RULING

Case No. 031600152

Judge Donald J. Eyre

This matter comes before the Court on Defendant's Motion to Suppress. The Court has reviewed the file, considered the memoranda filed by the parties, heard oral arguments, and being fully advised in the premises, issues the following:

FACTUAL SUMMARY

1. On or about June 20, 2003, Korey Wright, an off duty highway patrolman, was in the area of Deep Canyon when he observed a pickup truck stopped in the middle of the road. Near the truck, Trooper Wright saw a man, a wet spot in the road, and a beer can. Trooper Wright observed the man get in the truck and pull it over to the side of the road so that Trooper Wright could pass. Trooper Wright later observed a cooler that appeared to have been recently emptied.

2. Trooper Wright stopped to talk to the man, who was later identified as Mitchell Worwood. While talking to Mr. Worwood, Trooper Wright noticed Mr. Worwood had blood shot eyes and slurred speech. After talking with Mr. Worwood at a closer proximity, Trooper Wright also smelled the odor of alcohol. Based on these observations, Trooper Wright believed that Mr. Worwood was intoxicated and was unable to safely operate his vehicle. Due to this

belief, Trooper Wright indicated to Mr. Worwood that he was not going to allow Mr. Worwood to drive until he had been checked out by an officer. Trooper Wright testified that Mr. Worwood was not free to leave at this point.

3. Trooper Wright did not have a telephone or other means to communicate with law enforcement. Due to this fact, Trooper Wright asked Mr. Worwood to ride with him in the trooper's truck and have another individual drive Mr. Worwood's truck to Trooper Wright's house, which was nearby, in order to meet a law enforcement officer. Mr. Worwood then got into Trooper Wright's truck, Trooper Wright's passenger got into Mr. Worwood's truck, and they all drove a short distance to Trooper Wright's house.

4. Another highway patrol trooper, Kevin Wright, responded to Korey Wright's house and took over this investigation. Trooper Kevin Wright administered field sobriety tests to the Defendant. The Defendant failed these tests, and Trooper Kevin Wright arrested Mr. Worwood.

RULING

The "right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" is guaranteed under the Fourth Amendment of the United States Constitution and under Article I, Section 14 of the Utah Constitution.

Generally, there are three levels of constitutionally permissible encounters between police officers and the public:

(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.

State v. Smith, 781 P.2d 879, 881 (Utah Ct. App. 1989)(quoting *State v. Deitman*, 739 P.2d 616,

617-18 (Utah 1987)).

The Utah Court of Appeals has held that a person is not seized when a police officer merely approaches the person on the street and asks questions if the person stopped is willing to listen. *State v. Trujillo*, 739 P.2d 85, 87-88 (Utah Ct. App 1987). In this case, Trooper Wright approached Mr. Worwood and asked what he was doing. At this point, Mr. Worwood was willing to listen and answer the trooper's questions. The defendant was free to leave, and Trooper Wright had not shown any authority over the defendant. Therefore, this Court finds that the trooper's initial interaction with the defendant was a level one interaction.

A person is "seized" within the meaning of the Fourth Amendment when an officer deprives a person of his liberty by means of physical force or show of authority. *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *State v. Trujillo*, 739 P.2d 85, 87 (Utah Ct. App 1987). Under the Fourth Amendment's protection against unreasonable searches and seizures, there must be a reasonable basis for even a brief investigatory detention and officers must have a "reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *Brown v. Texas*, 443 U.S. 47, 51 (1979). Whether the objective facts known to the officer support a reasonable suspicion of wrongdoing is to be determined by the totality of the circumstances and in light of the officer's experience and training. *State v. Dorsey*, 731 P.2d 1085 (Utah 1986).

In this case, while the trooper was speaking with the defendant, the trooper noticed that the defendant had blood shot eyes, that his speech was slurred, and that the defendant had an odor of alcohol on his breath. The trooper also observed the defendant's truck, an empty beer can, a wet spot, and an emptied cooler in the middle of the mountain road. Mr. Worwood also indicated to the trooper that he had stopped to urinate. These observations in totality caused the trooper to believe that Mr. Worwood was under the influence of alcohol to the extent that he was unable to safely operate his vehicle.

The Court finds that under the totality of the circumstances, the officer had reasonable suspicion that the defendant was committing a crime and lawfully detained the defendant to investigate. See, *State v. Davis*, 821 P.2d 9, 12 (Utah Ct. App. 1991). The encounter escalated to a level two encounter when Trooper Wright told the defendant that he could not drive his vehicle until he had been checked out by another officer. The trooper also testified that the defendant was not free to leave at this point.

The defendant argues that his detention became illegal when the trooper required him to ride to another location and wait for another trooper to conduct field sobriety tests. The Utah Supreme Court has held that an investigatory detention must be "temporary and last no longer than is necessary to effect the purpose of the stop." *State v. Deitman*, 739 P.2d 616, 617 (Utah 1987).

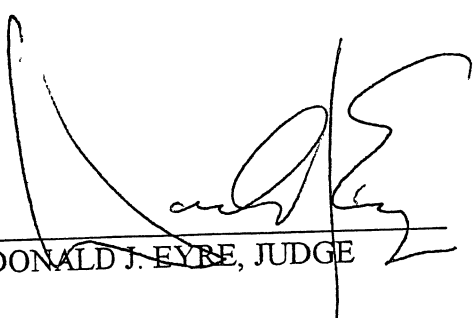
In this case, the Court finds that it was reasonable for the trooper to transport the defendant a short distance from the mountain road where the stop occurred to the trooper's home. The Court finds that transporting the defendant to another location was reasonable under the circumstances and that it was more fair to the defendant to conduct the field sobriety test in a location that would allow the officer to obtain accurate test results. Additionally, the Court finds under the circumstances that it was reasonable for Trooper Korey Wright to hand off the investigation of DUI to another trooper in that the DUI statutes allow the trooper to hand off a DUI investigation and the trooper's actions did not cause an unreasonable delay in the investigation. Therefore, the Court finds that the defendant was not unlawfully detained.

CONCLUSION

For the above reasons, the Court hereby rules that Defendant's Motion to Suppress is denied.

DATED this 13th day of April, 2004.




DONALD J. EYRE, JUDGE

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 031600152 by the method and on the date specified.

METHOD NAME

Mail SCOTT P CARD
ATTORNEY DEF
39 W 300 N
PROVO, UT 84601

By Hand JARED W ELDRIDGE

Dated this 16th day of April, 2004.


Deputy Court Clerk

Addendum B

2004 WL 1368211 (Utah App.), 2004 UT App 172

(Cite as: 2004 WL 1368211 (Utah App.))

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Utah.
AMERICAN FORK CITY, Plaintiff and Appellee,
v.
Larry J. SINGLETON, Defendant and Appellant.
No. 20030530-CA.

May 20, 2004.

Fourth District, American Fork Department; The Honorable Howard H. Maetani.

Noall T. Wootton, American Fork, for Appellant.

James Tucker Hansen, American Fork, for Appellee.

Before Judges DAVIS, GREENWOOD, and THORNE.

MEMORANDUM DECISION (Not For Official Publication)

GREENWOOD, Judge:

*1 Defendant, Larry Singleton, appeals from a conviction for driving under the influence of alcohol (DUI). We affirm.

Defendant argues that the trial court erred when it denied his motion to suppress evidence obtained pursuant to his arrest because there was no probable cause to support his arrest. "This court reviews a trial court's legal determination of probable cause for correctness, affording some discretion to the trial court." *Orem City v. Bovo*, 2003 UT App 286, ¶ 7, 76 P.3d 1170.

"A police officer may, without a warrant, arrest a person for [DUI] when the officer has **probable**

cause to believe the violation has occurred, although not in his presence, and if the officer has **probable cause** to believe that the violation was committed by the person." Utah Code Ann. § 41-6-44(10) (Supp.1999).

"[T]he determination of whether an officer can make a warrantless arrest should be made on an objective standard: whether from the facts known to the officer, and the inferences [that can] fairly ... be drawn therefrom, a reasonable and prudent person in [the officer's] position would be justified in believing that the suspect had committed the offense."

Bovo, 2003 UT App 286 at ¶ 14 (second, third, and fourth alterations in original) (quotations and citations omitted).

Applying this standard to the instant case, it is clear that the arresting officer had **probable cause** to arrest Defendant for **DUI**. It is undisputed that Defendant was operating a vehicle immediately prior to his encounter with the arresting officer. It is also undisputed that when the arresting officer encountered Defendant, he had "glassy, bloodshot eyes" and "was slightly swaying" as he talked. Finally, it is undisputed that when the officer attempted to perform field sobriety tests in Defendant's house, Defendant became belligerent and refused to cooperate. Therefore, although Defendant was initially arrested for obstruction of justice rather than **DUI**, his arrest was nonetheless lawful because there was **probable cause** to arrest him for **DUI**.

Accordingly, the judgment of the trial court is affirmed.

WE CONCUR: JAMES Z. DAVIS and WILLIAM A. THORNE JR., Judges.

2004 WL 1368211 (Utah App.), 2004 UT App 172

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