

1993

Utah v. Rock : Brief of Appellant

Utah Court of Appeals

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930458 IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	BRIEF OF THE APPELLANT
	:	
Plaintiff/Appellee,	:	
	:	
vs.	:	Court of Appeals Case No.
	:	930458-CA
HEIDI ROCK,	:	
	:	
Defendant/Appellant.	:	Priority No. 2

APPEAL FROM FINAL ORDER FROM THE THIRD JUDICIAL CIRCUIT COURT,
SALT LAKE COUNTY, STATE OF UTAH, JUDGE PHILIP K. PALMER

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SEP 30 1993
Utah Court of Appeals

SEP 30 1993


Mary T. Noonan
Clerk of the Court

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16. State v. Marshall, 791 P.2d. 880, 884 (Utah Ct. App. 1990).

I.

STATEMENT OF JURISDICTION OF THE COURT OF APPEALS

The Court of Appeals has jurisdiction to review, reverse or annul the final judgment and conviction rendered by the Third Judicial Circuit Court, Salt Lake County, State of Utah in this criminal case. Rule 26(2)(a) Utah Rules of Criminal Procedure (1989) (Addendum 1), and Judicial Code §78-2a-3(2)(f) U.C.A. (1953 as amended) (Addendum 2).

II.

STATEMENT OF ISSUES

1. Whether appellant's constitutional rights as guaranteed by the United States Constitution, Fourth Amendment, as well as Article 1, Sect. 14 of the Utah Constitution were violated by the investigatory detention which took longer than necessary to effect the purpose of the stop? State v. Marshall, 791 P.2d. 880 (Utah Ct. App. 1990), State v. Grovier, 808 P.2d. 133 (Utah App. 1991); State v. Davis, 821 P.2d. 9 (Utah Ct. App. 1991); United States Constitution, Fourth Amendment; Article 1, §14 of the Utah Constitution.

2. Whether the Circuit Court Judge erred in denying appellant's motion to Suppress evidence obtained after appellant's impermissible detention? State v. Marshall, 791 P.2d. 880 (Utah App. 1990), State v. Grovier, 808 P.2d. 133 (Utah Ct. App. 1991); State v. Davis, 821 P.2d. 9 (Utah Ct. App. 1991); United States Constitution, Fourth Amendment; Article 1, §14 of the Utah Constitution.

III.

STANDARDS OF REVIEW

1. The standard of review for findings of fact underlying a Trial Court's decision on a Motion to Suppress is the "clearly erroneous" standard. State v. Marshall, at 882 and State v. Grovier, at 135, 136.

IV.

DETERMINATIVE CONSTITUTIONAL PROVISIONS

A. Constitutional Provisions

1. United States Constitution, 4th Amendment (Addendum No. 3).
2. Article 1, §14 of the Utah Constitution (Addendum No. 4).

B. Rules of Appellate Procedure

1. Rule 11, The Record on Appeal (Addendum No. 5).
2. Rule 24, Briefs (Addendum No. 6).

V.

STATEMENT OF THE CASE

A. Nature of the Case

This is a criminal appeal of the Third Judicial Circuit Court's decision denying defendant's Motion to Suppress Evidence in a DUI case (Addendum 7).

B. Course of Proceedings

On November 27, 1992, defendant filed a Motion to Suppress Evidence in a DUI Charge with Supporting Points and Authorities (Addendum 8).

On March 18, 1993, an Evidentiary Hearing was heard by the Third Judicial Circuit Court regarding defendant's Motion to Suppress (Addendum 9).

On March 29, 1993, plaintiff filed its Response to Motion to Suppress Evidence (Addendum 10).

On April 6, 1993, in response to plaintiff's Response, defendant filed a pleading entitled Motion to Suppress Evidence in DUI Charge (Addendum No. 11).

On April 12, 1993, the Third Judicial Circuit Court, Salt Lake County, State of Utah, denied defendant's Motion to Suppress (Addendum 7).

On April 16, 1993, the Third Judicial Circuit Court reaffirmed its decision (Addendum 12).

On June 17, 1993, defendant Heidi Rock entered a conditional plea of guilty to the DUI charge, specifically reserving the Appellate issues arising out of defendant's Motion to Suppress (Addendum 13 at 2, 3 and 4).

C. Disposition at Trial Court

The Trial Court denied defendant's Motion to Suppress Evidence in a DUI Charge (Addendum 7). A conditional plea of guilty to the DUI charge was entered June 17, 1993, specifically reserving the Appellate issues arising out of defendant's Motion to Suppress Evidence in a DUI Charge (Addendum 13, pages 2, 3 & 4).

VI.

SUMMARY OF THE ARGUMENT - FACTS

An investigatory detention must be "temporary and last no longer than is necessary to effect the purpose of the stop." State v. Davis, 821 P.2d. 9, 12 (Utah Ct. App. 1991)

(Addendum No. 14).

On or about July 19, 1992, at 2:05 to 2:10 am, Heidi Rock was stopped by Officer Jed Hurst (Addendum 9, pages 6 & 9). Officer Hurst was off-duty at the time of the stop (Addendum 9, page 7). Officer Hurst had Heidi Rock perform two field tests, including the horizontal gaze nystagmus and the hand-slap test (Addendum 9, page 7). Following the two field tests, Officer Hurst did not believe he had enough probable cause for an arrest as his usual practice is to give four or five field sobriety tests (Addendum 9, page 19). Officer Hurst could have requested Heidi Rock to perform a third, fourth and fifth field sobriety test without delay and make a determination concerning probable cause to arrest Heidi Rock for DUI, but did not want to (Addendum 9, page 19). Officer Hurst had the skill, ability and training to conduct field sobriety tests (Addendum 9, page 19). Heidi Rock's detention was prolonged five to ten minutes while they waited for Officer Isakson to arrive at the scene (Addendum 9, pages 20 and 22). During the prolonged detention, no investigation nor further field tests took place (Addendum 9, page 20). Heidi Rock was not free to leave while waiting for Officer Isakson to arrive (Addendum 9, page 20). The only reason claimed for the prolonged detention was to reduce the overtime pay to the Police Department (Addendum 9, page 20). Following Officer Isakson's arrival, Officer Hurst remained at the scene and observed all of the field tests conducted by Officer Isakson, which included tests previously performed by Heidi Rock during Officer Hurst's partial investigation (Addendum 9, page 8). Nearly one hour following the initial stop, Officer Hurst continued to remain present at the scene of the stop until 3:00 a.m., and personally performed the inventory search and impound of Ms. Rock's vehicle (Addendum 9, pages 9 and 10). Officer Hurst was qualified to conduct sufficient field tests to determine

whether probable cause existed to arrest Heidi Rock, in which case, he could have arrested Heidi Rock and delivered her to another officer at the scene without delay (Addendum 9, page 13). The investigatory detention of Heidi Rock was unnecessarily delayed and lasted longer than was necessary to effect the purpose of the stop State v. Davis, 821 P.2d. 9, 12 (Utah Ct. App. 1991) (Addendum 14).

VII.

DETAIL OF THE ARGUMENT

THE INVESTIGATORY DETENTION OF HEIDI ROCK LASTED LONGER THAN NECESSARY TO EFFECT THE PURPOSE OF THE STOP.

In State v. Marshall, this court stated "the protective shield of the Fourth Amendment applies when an officer stops an automobile on a highway and detains its occupants. State v. Marshall, 791 P.2d., 880, 883 (Utah Ct. App. 1990), citing State v. Sierra, 754 P.2d. 972, 975 (Utah Ct. App. 1988) (Addendum 15). The Constitutional protections guaranteed by the United States and Utah Constitutions against unreasonable seizures apply here since Heidi Rock was stopped by the officer and was not free to leave (Addendums 1, 2, and 12, pages 6 & 20). The Fourth Amendment to the United States Constitution and Article I, Section 14 of the Utah Constitution, guarantee a fundamental right to citizens to be free from unreasonable seizures (Addendums 1 and 2). As such she could not be subject to an unreasonable and unnecessarily lengthy investigatory detention. The detention of Heidi Rock violates both the United States and Utah Constitutions to be free from unreasonable seizures.

In State v. Davis, the court stated:

Moreover, an investigatory detention must be "temporary and last no longer than is necessary to effect the purpose of the stop." State v. Davis, 821 P.2d. 9, 12 (Utah Ct. App. 1991), citing State v. Deitman, 739 P.2d. 616, 617 (Utah 1987) (citing United States v. Merritt, 736 F.2d. 223, 230 (5th Cir. 1984), cert. denied, 476 U.S. 1142, 106 S.Ct. 2250, 90 L.Ed. 2d. 696 (1986)) (emphasis added).

The cases of State v. Grovier and State v. Marshall both focus "not on the length of the detention alone, but on "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." State v. Grovier, 808 P.2d. 133, 136 (Utah Ct. App. 1991), State v. Marshall, 791 P.2d. 880, 884 (Utah Ct. App. 1990) (emphasis added) (Addendum 16). The investigatory detention to determine by field tests whether Heidi Rock had violated a DUI law was unreasonable for two reasons. First, the investigatory detention lasted longer than necessary to effect the purpose of the stop. Officer Hurst had the skill and training to conduct the complete investigation without delay (Addendum 9, page 19). Officer Hurst did not diligently pursue the investigation when he chose to discontinue the investigation in order to wait for Officer Isakson to appear at the scene (Id. at 20). Officer Hurst could have called for an on-duty officer to appear at the scene and at the same time continue with the investigation (Id. at 19). The detention, therefore, took longer than necessary to effect the purpose of the stop and was, therefore, unreasonable.

Secondly, the investigatory detention was unreasonable since there was no legitimate reason to prolong the investigation. Officer Hurst claimed that the reason for the prolonged detention was to reduce the overtime pay to the Police Department (Id. at 20). In fact, Officer Hurst's actions were inconsistent with the reason given when he continued to remain at the scene

of the stop for nearly one hour, and personally performed the inventory search and impound of Ms. Rock's vehicle (Id. at 9 & 10). The interest in reducing overtime pay was not served. The interest in reducing overtime charges to the Police Department could have been served without prolonging Heidi Rock's detention. The investigation could have completed without delay. In the event of an arrest, Heidi Rock could have been delivered to another officer responding to the scene (Id. at 13). In that manner, the detention would have taken no longer than necessary to effect the purpose of the stop and Officer Hurst's off-duty time would have terminated upon Officer Isakson's arrival at the scene thereby satisfying the Police Department's interest.

VIII.

CONCLUSION

The investigatory detention to determine whether Heidi Rock was operating a motor vehicle in violation of Utah's DUI statute took longer than necessary. Officer Hurst was trained and skilled in conducting field sobriety tests and should have continued conducting the investigation during which time Officer Isakson was heading to the scene. Officer Hurst could then have completed the investigation without delay and either arrested or released her. If arrested, Heidi Rock could have been delivered to Officer Isakson without further involvement by Officer Hurst. In that manner, the investigatory detention of Heidi Rock would have been no longer than necessary.

The reason given by Officer Hurst for the delay in the investigation was concern regarding overtime charges to the Police Department. However, Officer Hurst's actions in remaining at the scene for nearly one hour following Officer Isakson's arrival, and then performing the inventory search and impound of Ms. Rock's vehicle were inconsistent with the

the interests of the Police Department. The interests of the Police Department would have been best served by following the procedure described above. More importantly, the detention of Heidi Rock would not have been longer than necessary.

The facts support a finding that Heidi Rock's constitutional rights as guaranteed under the United States and Utah Constitutions against unreasonable seizures were violated and require a reversal of the Trial Court's decision.

RESPECTFULLY SUBMITTED this 29 day of September, 1993.


Mitchel Zager
Attorney for Appellant

Hand Delivered
CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing BRIEF OF APPELLANT
HEIDI ROCK was mailed, postage prepaid, on this ³⁰~~29~~ day of September, 1993, to the
following:

Salt Lake City Attorney's Office
Todd Godfrey, Esquire
Cheryl Luke, Esquire
451 South 200 East, Room 125
Salt Lake City, UT 84111


Mitchel Zager

Addendum Number 1

Rule 26(2)(a) Utah Rules of Criminal Procedure (1989)

Rule 26. Appeals.

(1) An appeal is taken by filing with the clerk of the court from which the appeal is taken a notice of appeal, stating the order or judgment appealed from, and by serving a copy of it on the adverse party or his attorney of record. Proof of service of the copy shall be filed with the court.

(2) An appeal may be taken by the defendant from:

(a) the final judgment of conviction, whether by verdict or plea;

(b) an order made, after judgment, affecting the substantial rights of the defendant;

(c) an interlocutory order when, upon petition for review, the appellate court decides that the appeal would be in the interest of justice; or

(d) any order of the court judging the defendant by reason of a mental disease or defect incompetent to proceed further in a pending prosecution.

(3) An appeal may be taken by the prosecution from:

(a) a final judgment of dismissal;

(b) an order arresting judgment;

(c) an order terminating the prosecution because of a finding of double jeopardy or denial of a speedy trial;

(d) a judgment of the court holding a statute or any part of it invalid;

Addendum Number 2

Judicial Code, Section 78-2a-3(2)(f)
Utah Code Ann. (1953 as amended)

78-2a-3. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

(a) to carry into effect its judgments, orders, and decrees; or

(b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, Board of State Lands, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and

(ii) a challenge to agency action under Section 63-46a-12.1;

(c) appeals from the juvenile courts;

(d) appeals from the circuit courts, except those from the small claims department of a circuit court;

(e) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(f) appeals from a court of record in criminal cases, except those involving a conviction of a first degree or capital felony;

(g) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

Addendum Number 3

The United States Constitution Fourth Amendment

UNITED STATES CONSTITUTION
AMENDMENT IV
(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.

Addendum Number 4

The Utah State Constitution Article I, Section 14

CONSTITUTION OF UTAH

ARTICLE 1, §14

(Unreasonable searches forbidden - issuance of warrant.)

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 or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

Addendum Number 5

Utah Rule of Appellate Procedure 11 Record on Appeal

submitted to the court for consideration and an appropriate order. The time for taking other steps in the appellate procedure is suspended pending disposition of a motion to affirm or reverse or dismiss.

(e) **Ruling of court.** The court, upon its own motion, and on such notice as it directs, may dismiss an appeal or petition for review if the court lacks jurisdiction; or may summarily affirm the judgment or order which is the subject of review, if it plainly appears that no substantial question is presented; or may summarily reverse in cases of manifest error.

(f) **Deferral of ruling.** As to any issue raised by a motion for summary disposition, the court may defer its ruling until plenary presentation and consideration of the case.

NOTES TO DECISIONS

ANALYSIS

Dismissal by court.
Summary affirmance.
Time for filing.

Dismissal by court.

Appeal appropriate for summary disposition (i.e., dismissal) on court's own motion. See *Thompson v. Jackson*, 743 P.2d 1230 (Utah Ct. App. 1987).

Summary affirmance.

Summary affirmance under this rule is a determination of the appeal on its merits, after the parties have been afforded a full and ade-

quate opportunity to present relevant arguments and authorities. An appellate court's rejection of appellant's contentions as unmeritorious does not deny him his right of appeal. *Hernandez v. Hayward*, 764 P.2d 993 (Utah Ct. App. 1988); *State v. Palmer*, 786 P.2d 248 (Utah Ct. App. 1990) (decided under former Rule 10, Utah R. Ct. App.).

Time for filing.

A motion for summary disposition that is clearly meritorious supports a suspension of the time limitation contained in this rule. *Bailey v. Adams*, 798 P.2d 1142 (Utah Ct. App. 1990).

Rule 11. The record on appeal.

(a) **Composition of the record on appeal.** The original papers and exhibits filed in the trial court, the transcript of proceedings, if any, the index prepared by the clerk of the trial court, and where available the docket sheet, shall constitute the record on appeal in all cases. However, with respect to papers only those prescribed under paragraph (d) of this rule shall be transmitted to the appellate court.

(b) **Pagination and indexing of record.** Immediately upon filing of the notice of appeal, the clerk of the trial court shall paginate all of the original papers filed in that court in chronological order and shall prepare an alphabetical index of those papers. The index shall contain a reference to the date on which the paper was filed in the trial court and the starting page of the record on which the paper will be found.

(c) **Duty of appellant.** After filing the notice of appeal, the appellant, or in the event that more than one appeal is taken, each appellant, shall comply with the provisions of paragraphs (d) and (e) of this rule and shall take any other action necessary to enable the clerk of the trial court to assemble and transmit the record. A single record shall be transmitted.

(d) **Papers and exhibits on appeal.**

(1) **Criminal cases.** All of the original papers in a criminal case shall be included by the clerk of the trial court as part of the record on appeal.

(2) **Civil cases.** In all civil cases, the record shall remain in the custody of the clerk of the trial court, as set forth in Rule 12(b)(2), during preparation and filing of briefs.

The clerk of the trial court shall establish rules and procedures for checking out the record, after pagination, for use by the parties in briefing.

(A) **Civil cases with short records.** In civil cases where all the original papers total fewer than 300 pages, all of the original papers will be transmitted to the appellate court upon completion of the filing of briefs by the parties, as set forth in Rule 12(b)(2). In such cases, the appellant shall serve upon the clerk of the trial court, simultaneously with the filing of appellant's reply brief, notice of the date on which appellant's reply brief was filed. If appellant does not intend to file a reply brief, appellant shall notify the clerk of the trial court of that fact within 30 days of the filing of appellee's brief.

(B) **All other civil cases.** In all other civil cases where the original papers are or exceed 300 pages, all parties shall file with the clerk of the trial court, within 10 days after briefing is completed, a joint or separate designation of those papers referred to in their respective briefs. Only those designated papers and the following, to the extent applicable, shall be transmitted to the clerk of the appellate court by the clerk of the trial court:

(i) the pleadings as defined in Rule 7(a), Utah Rules of Civil Procedure;

(ii) the pretrial order, if any;

(iii) the final judgment, order, or interlocutory order from which the appeal is taken;

(iv) other orders sought to be reviewed, if any;

(v) any supporting opinion, findings of fact or conclusions of law filed or delivered by the trial court;

(vi) the motion, response, and accompanying memoranda upon which the court rendered judgment, if any;

(vii) jury instructions given, if any;

(viii) jury verdicts and interrogatories, if any;

(ix) the notice of appeal.

(e) **The transcript of proceedings; duty of appellant to order; notice to appellee if partial transcript is ordered.**

(1) **Request for transcript; time for filing.** Within 10 days after filing the notice of appeal, the appellant shall request from the reporter a transcript of such parts of the proceedings not already on file as the appellant deems necessary. The request shall be in writing, and, within the same period, a copy shall be filed with the clerk of the trial court and the clerk of the appellate court. If no such parts of the proceedings are to be requested, within the same period the appellant shall file a certificate to that effect with the clerk of the trial court and a copy with the clerk of the appellate court. If there was no reporter but the proceedings were otherwise recorded, the appellant shall request from a court transcriber, certified in accordance with the rules and procedures of the Judicial Council, a transcript of such parts of the proceeding not already on file as the appellant deems necessary. By stipulation of the parties approved by the appellate court, a person other than a certified court transcriber may transcribe a recorded hearing. The clerk of the appellate court shall, upon request, provide a list of all certified court transcribers. The transcriber is subject to all of the obligations imposed on reporters by these rules.

(2) **Transcript required of all evidence regarding challenged finding or conclusion.** If the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.

(3) **Statement of issues; cross-designation by appellee.** Unless the entire transcript is to be included, the appellant shall, within 10 days after filing the notice of appeal, file a statement of the issues that will be presented on appeal and shall serve on the appellee a copy of the request or certificate and a copy of the statement. If the appellee deems a transcript of other parts of the proceedings to be necessary, the appellee shall, within 10 days after the service of the request or certificate and the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. Unless within 10 days after service of such designation the appellant has requested such parts and has so notified the appellee, the appellee may within the following 10 days either request the parts or move in the trial court for an order requiring the appellant to do so.

(4) **Payment of reporter.** At the time of the request, a party shall make satisfactory arrangements with the reporter or transcriber for payment of the cost of the transcript.

(f) **Agreed statement as the record on appeal.** In lieu of the record on appeal as defined in paragraph (a) of this rule, the parties may prepare and sign a statement of the case, showing how the issues presented by the appeal arose and were decided in the trial court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with such additions as the trial court may consider necessary fully to present the issues raised by the appeal, shall be approved by the trial court. The clerk of the trial court shall transmit the statement to the clerk of the appellate court within the time prescribed by Rule 12(b)(2). The clerk of the trial court shall transmit the index of the record to the clerk of the appellate court upon approval of the statement by the trial court.

(g) **Statement of evidence or proceedings when no report was made or when transcript is unavailable.** If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including recollection. The statement shall be served on the appellee, who may serve objections or propose amendments within 10 days after service. The statement and any objections or proposed amendments shall be submitted to the trial court for settlement and approval and, as settled and approved, shall be included by the clerk of the trial court in the record on appeal.

(h) **Correction or modification of the record.** If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated, the parties by stipulation, the trial court, or the appellate court, either before or after the record is transmitted, may direct that the omission or misstatement be corrected and if necessary that a supplemental record be certified and transmitted. The moving

party, or the court if it is acting on its own initiative, shall serve on the parties a statement of the proposed changes. Within 10 days after service, any party may serve objections to the proposed changes. All other questions as to the form and content of the record shall be presented to the appellate court.

Advisory Committee Note. — The rule is amended to make applicable in the Supreme Court a procedure of the Court of Appeals for preparing a transcript where the record is maintained by an electronic recording device.

The rule is modified slightly from the former Court of Appeals rule to make it the appellant's responsibility, not the clerk's responsibility to arrange for the preparation of the transcript.

NOTES TO DECISIONS

ANALYSIS

Correction or modification.

—Supplemental record.

—Notice of transmission.

—Purpose.

—Supplementation denied.

Evidence.

Incomplete record.

Statement where transcript unavailable

—Adequacy of rule's procedures.

—Right to appeal.

Transcript.

—Factual matters.

—Purpose of rule.

Cited.

Correction or modification.

—Supplemental record.

In considering a motion to supplement the record, the appellate court should evaluate several factors. These include the need for the supplemental material, prior opportunity to introduce the supplemental material, and length of the resulting delay. Under appropriate circumstances and in the interest of judicial economy, the court will deny a motion to supplement the record. *Jeschke v. Willis*, 793 P.2d 428 (Utah Ct. App. 1990).

The trial court properly supplemented the record with respect to the circumstances surrounding the question of whether defendant waived his right to a jury trial, when the trial court had the parties submit proffers of evidence in the form of affidavits to the trial judge stating the recollection each had of the circumstances surrounding the waiver. *State v. Moosman*, 794 P.2d 474 (Utah 1990).

—Notice of transmission.

Although this rule does not require notice to the parties of transmittal of any supplemental records, it is advisable to give notice of any proposed action that may affect the parties' rights or responsive procedures. *William C. Moore & Co. v. Sanchez*, 6 Utah 2d 309, 313 P.2d 461 (1957).

—Purpose.

It is not improper for the Supreme Court to consider a supplemental record for purposes of determining if the trial court's ruling was supported by competent evidence. *Bawden & Assocs. v. Smith*, 646 P.2d 711 (Utah 1982).

—Supplementation denied.

Supreme Court declined to permit supplementation of the record to show that the objections required by Rule 51, U.R.C.P., were made, where the exact nature of the objections made was not clear, and the parties could not agree upon and the trial judge could not recall specific details of the proposed instructions that were rejected or modified. *Hansen v. Stewart*, 761 P.2d 14 (Utah 1988).

Evidence.

In essence, this rule directs counsel to provide the appellate court with all evidence relevant to the issues raised on appeal. *Sampson v. Richins*, 770 P.2d 998 (Utah Ct. App.), cert denied, 776 P.2d 916 (Utah 1989).

Because counsel failed to provide the Court of Appeals with all relevant evidence bearing on the issues raised on appeal, as required by Subdivision (e)(2), the court could only presume that the judgment was supported by sufficient evidence. *State v. Nine Thousand One Hundred Ninety-Nine Dollars*, 791 P.2d 213 (Utah Ct. App. 1990); *Intermountain Power Agency v. Bowers-Irons Recreation Land & Cattle Co.*, 786 P.2d 250 (Utah Ct. App. 1990).

Incomplete record.

If the record before the Court of Appeals is incomplete, the court is unable to review the evidence as a whole and must therefore presume that the verdict was supported by admissible and competent evidence. *Sampson v. Richins*, 770 P.2d 998 (Utah Ct. App.), cert denied, 776 P.2d 916 (Utah 1989); *Horton v. Gem State Mut.*, 794 P.2d 847 (Utah Ct. App. 1990).

Statement where transcript unavailable.

—Adequacy of rule's procedures.

—Right to appeal.

To prove that the loss of the reporter's notes

from an earlier hearing effectively denied an appellant his constitutional right to appeal the judgment of that hearing, the appellant must show that the procedures provided by this rule for reconstructing and settling the record are inadequate. *Emig v. Hayward*, 703 P.2d 1043 (Utah 1985).

Transcript.

—Factual matters.

The Supreme Court cannot resolve or undertake to determine appeals involving factual

matters without a transcript of the testimony. *Sawyers v. Sawyers*, 558 P.2d 607 (Utah 1976).

—Purpose of rule.

The purpose of this rule is to avoid the court's attempting to recreate, based upon conflicting testimony of counsel, what oral arguments were made by counsel at a law and motion hearing. *Guardian State Bank v. Humphreys*, 762 P.2d 1084 (Utah 1988).

Cited in *Prudential Capital Group Co. v. Mattson*, 148 Utah Adv. Rep. 35 (Ct. App. 1990).

COLLATERAL REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d Appeal and Error §§ 397 to 544.

C.J.S. — 4A C.J.S. Appeal and Error §§ 680 to 1216.

A.L.R. — Court reporter's death or disability

prior to transcribing notes as grounds for reversal or new trial, 57 A.L.R.4th 1049.

Key Numbers. — Appeal and Error ¶ 493 et seq.

Rule 12. Transmission of the record.

(a) **Duty of reporter to prepare and file transcript; notice to appellate court.** Upon receipt of a request for a transcript, the reporter shall file with the clerk of the appellate court an acknowledgment that the request has been received, the date of its receipt, the date on which the reporter expects to file the transcript, and whether satisfactory arrangements for payment have been made. The transcript shall be completed within 30 days of receipt of the request. The reporter may file a motion for an enlargement of time with the clerk of the appellate court. The clerk of the appellate court may grant an enlargement of time upon a showing by the reporter of good cause. The reporter shall give notice of the motion for enlargement of time to the parties. The clerk of the appellate court shall enter the decision upon the motion in the docket and notify the parties. In the event of the failure of the reporter to file the transcript within the time allowed, the clerk of the appellate court shall notify the trial court judge and take such other steps as may be directed by the appellate court, including but not limited to an order relieving the reporter of all regular duties until such time as the transcript is completed. Upon completion of the transcript, the reporter shall file it with the clerk of the trial court and shall notify the clerk of the appellate court that the transcript has been filed.

(b) **Transmittal of record on appeal to appellate court; duty of trial court clerk.**

(1) **Duty of trial court clerk in criminal cases.** In criminal cases, all of the original papers and the index prepared pursuant to Rule 11(b) will be transmitted by the clerk of the trial court to the clerk of the appellate court upon completion of the transcript under paragraph (a) above or, if there is no transcript, within 20 days of the filing of the notice of appeal.

(2) **Duty of trial court clerk in civil cases.** In civil cases, unless otherwise ordered by the appellate court, the record shall remain in the custody of the trial court clerk during the preparation and filing of briefs. When the transcript is completed pursuant to paragraph (a) above, the clerk of the trial court shall immediately transmit a certified copy of the

Addendum Number 6

Utah Rule of Appellate Procedure 24 Requirements of Appellant's Brief

Any party may file a response in opposition to a motion within 10 days after service of the motion; however, the court may, for good cause shown, dispense with, shorten or extend the time for responding to any motion.

(b) **Determination of motions for procedural orders.** Notwithstanding the provisions of paragraph (a) of this rule as to motions generally, motions for procedural orders which do not substantially affect the rights of the parties or the ultimate disposition of the appeal, including any motion under Rule 22(b), may be acted upon at any time, without awaiting a response. Pursuant to rule or order of the court, motions for specified types of procedural orders may be disposed of by the clerk. The court may review a disposition by the clerk upon motion of a party or upon its own motion.

(c) **Power of a single justice or judge to entertain motions.** In addition to the authority expressly conferred by these rules or by law, a single justice or judge of the court may entertain and may grant or deny any request for relief which under these rules may properly be sought by motion, except that a single justice or judge may not dismiss or otherwise determine an appeal or other proceeding, and except that the court may provide by order or rule that any motion or class of motions must be acted upon by the court. The action of a single justice or judge may be reviewed by the court.

(d) **Form of papers; number of copies.**

(1) Except for motions to enlarge time, five copies shall be filed with the original in the Supreme Court, and four copies shall be filed with the original in the Court of Appeals, but the court may require that additional copies be furnished. Only the original of a motion to enlarge time shall be filed.

(2) Motions and other papers shall be typewritten on opaque, unglazed paper 8½ by 11 inches in size. The text shall be in type not smaller than ten characters per inch. Lines of text shall be double spaced and shall be upon one side of the paper only. Consecutive sheets shall be attached at the upper left margin.

(3) A motion or other paper shall contain a caption setting forth the name of the court, the title of the case, the docket number, and a brief descriptive title indicating the purpose of the paper. The attorney shall sign all papers filed with the court with his or her individual name. The attorney shall give his or her business address, telephone number, and Utah State Bar number in the upper left hand corner of the first page of every paper filed with the court except briefs. A party who is not represented by an attorney shall sign any paper filed with the court and state the party's address and telephone number.

Rule 24. Briefs.

(a) **Brief of the appellant.** The brief of the appellant shall contain under appropriate headings and in the order indicated:

(1) A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties. The list should be set out on a separate page which appears immediately inside the cover.

(2) A table of contents, with page references.

(3) A table of authorities with cases alphabetically arranged and with parallel citations, rules, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(4) A brief statement showing the jurisdiction of the appellate court.

(5) A statement of the issues presented for review and the standard of appellate review for each issue with supporting authority for each issue.

(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and in that event, the provision shall be set forth as provided in paragraph (f) of this rule.

(7) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record (see paragraph (e)).

(8) Summary of arguments. The summary of arguments, suitably paragraphed, shall be a succinct condensation of the arguments actually made in the body of the brief. It shall not be a mere repetition of the heading under which the argument is arranged.

(9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, with citations to the authorities, statutes, and parts of the record relied on.

(10) A short conclusion stating the precise relief sought.

(b) **Brief of the appellee.** The brief of the appellee shall conform to the requirements of paragraph (a) of this rule, except that a statement of the issues or of the case need not be made unless the appellee is dissatisfied with the statement of the appellant.

(c) **Reply brief.** The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. Reply briefs shall be limited to answering any new matter set forth in the opposing brief. No further briefs may be filed except with leave of the appellate court.

(d) **References in briefs to parties.** Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee". It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," etc.

(e) **References in briefs to the record.** References shall be made to the pages of the original record as paginated pursuant to Rule 11(b), to pages of the reporter's transcript, or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to exhibits shall include exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the transcript at which the evidence was identified, offered, and received or rejected.

(f) Reproduction of opinions, statutes, rules, regulations, documents, etc.

(1) Any opinion, memorandum of decision, findings of fact, conclusions of law, or order pertaining to the issues on appeal and any jury instructions or other part of the record of central importance to the determination of the appeal shall be reproduced in the brief or in an addendum to the brief.

(2) If determination of the issues presented requires the study of statutes, rules, regulations, etc., or relevant parts thereof, to the extent not set forth under subparagraph (a)(6) of this rule, they shall be reproduced in the brief or in an addendum at the end, or they may be supplied to the court in pamphlet form.

(g) Length of briefs. Except by permission of the court, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or portions of the record as required by paragraph (f) of this rule.

(h) Briefs in cases involving cross-appeals. If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant for the purposes of this rule and Rule 26, unless the parties otherwise agree or the court otherwise orders. The brief of the appellee shall contain the issues and arguments involved in the cross-appeal as well as the answer to the brief of the appellant.

(i) Briefs in cases involving multiple appellants or appellees. In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(j) Citation of supplemental authorities. When pertinent and significant authorities come to the attention of a party after that party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the appellate court, by letter setting forth the citations. An original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies shall be filed in the Court of Appeals. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made within 7 days of filing and shall be similarly limited.

(k) Requirements and sanctions. All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

(l) Brief covers. The covers of all briefs shall be of heavy cover stock and shall comply with Rule 27.

Advisory Committee Note. — The brief must now contain for each issue raised on appeal, a statement of the applicable standard of review and citation of supporting authority.

NOTES TO DECISIONS

ANALYSIS

Constitutional arguments.

Contents.

—Inappropriate language.

—Issues raised.

—Reply brief.

—Statement of facts with citation to record.

—Failure to contain.

Failure to file.

—Defective appeal.

Properly documented argument.

Cited.

Constitutional arguments.

In order to make an argument for an innovative interpretation of a state constitutional provision textually similar to a federal provision, the following points should be developed and supported with authority and analysis. First, counsel should offer analysis of the unique context in which Utah's constitution developed with regard to the issue at hand. Second, counsel should demonstrate that state appellate courts regularly interpret even textually similar state constitutional provisions in a manner different from federal interpretations of the United States Constitution and that it is entirely proper to do so in our federal system. Third, citation should be made to authority from other states supporting the particular construction urged by counsel. *State v. Bobo*, 149 Utah Adv. Rep. 67 (Ct. App. 1990).

Contents.

A brief must contain some support for each contention. *State v. Wareham*, 772 P.2d 960 (Utah 1989); *State v. Reiners*, 151 Utah Adv. Rep. 17 (Ct. App. 1990).

—Inappropriate language.

Derogatory references to others or inappropriate language of any kind has no place in an appellate brief and is of no assistance in attempting to resolve any legitimate issues presented on appeal. *State v. Cook*, 714 P.2d 296 (Utah 1986).

—Issues raised.**—Reply brief.**

As a general rule, an issue raised initially in

a reply brief will not be considered on appeal, although the court, in its discretion, may decide a case upon any points that its proper disposition may require, even if first raised in a reply brief. *Romrell v. Zions First Nat'l Bank*, 611 P.2d 392 (Utah 1980).

—Statement of facts with citation to record.**—Failure to contain.**

The Supreme Court need not, and will not, consider any facts not properly cited to, or supported by, the record. *Uckerman v. Lincoln Nat'l Life Ins. Co.*, 588 P.2d 142 (Utah 1978).

The Supreme Court will assume the correctness of the judgment in a criminal trial if counsel on appeal does not comply with the requirements as to making a concise statement of facts and citation of the pages in the record where they are supported. *State v. Tucker*, 657 P.2d 755 (Utah 1982).

If a party fails to make a concise statement of the facts and citation of the pages in the record where those facts are supported, the court will assume the correctness of the judgment below. *Koulis v. Standard Oil Co.*, 746 P.2d 1182 (Utah Ct. App. 1987).

Failure to file.**—Defective appeal.**

Where defendant was convicted of operating a motor vehicle without insurance, and attempted to file his appeal pro se, but failed to file a brief or submit a transcript of the record, there was no reversible error presented which would permit the appellate court to reverse the judgment. *State v. Hansen*, 540 P.2d 935 (Utah 1975).

Properly documented argument.

Brief that was filled with burdensome, emotional, immaterial and inaccurate arguments did not set forth a properly documented argument as required by this rule; therefore the court disregarded it. *Koulis v. Standard Oil Co.*, 746 P.2d 1182 (Utah Ct. App. 1987).

Cited in *Weber v. Snyderville West*, 146 Utah Adv. Rep. 40 (Ct. App. 1990).

COLLATERAL REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d Appeal and Error §§ 684 to 690.

C.J.S. — 5 C.J.S. Appeal and Error § 1311 et seq.

Key Numbers. — Appeal and Error ⇐ 755 to 807.

Addendum Number 7

**Decision denying Defendant's Motion to
Suppress Evidence in a DUI Case**

THIRD CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

Salt Lake City Corp,	:	
Plaintiff,	:	Decision
	:	
vs	:	Case No. 925020755TC
	:	
Heidi Rock,	:	
Defendant	:	

The time for further responsive memorandum in the above entitled case having expired, the court now renders its decision on defendant's motion to suppress and dismiss.

On the motion to suppress, the court finds that the detention of the defendant in order to wait for an on-duty officer to complete the investigation was not unreasonable. It served valid public interests and did not unreasonably detain the defendant. The motion to suppress is therefore denied.

On the motion to dismiss the charge of open container, the fact that the officer destroyed the alleged alcohol and its container would go to the weight, not the admissibility of the evidence, and the defendant is not unduly prejudiced by the destruction. The motion to dismiss is accordingly denied.

The matter is set for Jury Trial on the 19th of May at 9:00 a. m. No further notice will be provided.

DATED this 12 day of April, 1993.


CIRCUIT JUDGE

CERTIFICATE OF MAILING


I hereby certify that a true and correct copy of the foregoing Decision was mailed
to :

TODD J. GODFREY
ASSISTANT CITY PROSECUTOR
SALT LAKE CITY CORPORATION
451 South 200 East # 125
Salt Lake City, Utah 84111

and

MR MITCHELL ZAGER
ATTORNEY AT LAW
3587 West 4700 South
Salt Lake City, Utah 84118

on the 12th day of April, 1993



Addendum Number 8

Defendant's Motion to Suppress Evidence in a DUI Case along with Supporting Points & Authorities

MITCHEL ZAGER - 3968
Attorney for Defendant
3587 West 4700 South
Salt Lake City, Utah 84118
Telephone: 801-964-6100

IN THE THIRD CIRCUIT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

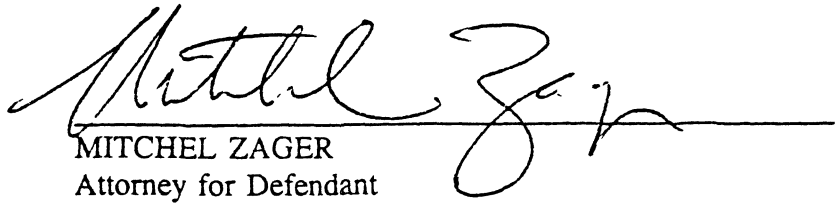
STATE OF UTAH,		MOTION TO SUPPRESS EVIDENCE IN DUI CHARGE AND MOTION TO DISMISS OPEN CONTAINER CHARGE
Plaintiff,		
v.		
HEIDI ROCK,		Case No. 925020755 TC
Defendant.		

COMES NOW, the defendant, HEIDI ROCK, by and through her attorney of record, MITCHEL ZAGER, and hereby moves this Honorable Court to suppress all evidence after the unreasonable and unlawful detention of HEIDI ROCK on the grounds that she was illegally detained after performing field tests for Officer Jed Hurst; and on the basis that her constitutional rights as guaranteed by the United States Constitution, Fourth Amendment, as well as Article 1, §14 of the Utah Constitution were violated thereby. Defendant further moves this court to dismiss the charge of open container on the basis that the State has destroyed all tangible evidence of the alleged charge.

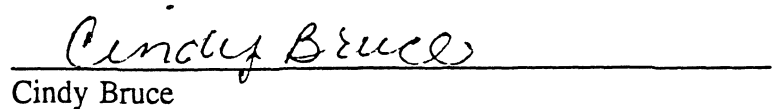
Based upon the Motion, Points and Authorities, and surrounding circumstances, and in the interest of the furtherance of justice, defendant's motion should be granted.

Defendant requests that oral argument be set in this matter.

DATED this 27 day of November, 1992.


MITCHEL ZAGER
Attorney for Defendant

The undersigned certifies that a copy of the Motion to Suppress Evidence in D.U.I. Charge and MOtion to Dismiss Open Container Charge was sent via U.S. mail, postage pre-paid, this 27 day of November 1992, to the following: Salt Lake City Prosecutor, 451 So. 200 East, Room 125, Salt Lake City, UT 84111.


Cindy Bruce

MITCHEL ZAGER - 3968
Attorney for Defendant
3587 West 4700 South
Salt Lake City, Utah 84118
Telephone: 801-964-6100

IN THE THIRD CIRCUIT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,		POINTS AND AUTHORITIES IN
Plaintiff,		SUPPORT OF MOTION TO SUPPRESS
		EVIDENCE IN D.U.I. CHARGE AND
		DISMISS OPEN CONTAINER CHARGE
v.		
HEIDI ROCK,		Case No. 925020755 TC
Defendant.		

COMES NOW the defendant, by and through her attorney, MITCHEL ZAGER, and in support of her motion to suppress evidence in a D.U.I. charge and dismiss open container charge, states as follows:

I. STATEMENT OF FACTS

1. On or about July 19, 1992, defendant HEIDI ROCK was stopped by Officer Hurst for allegedly having no headlights on but only her parking lights on. See supplemental report of Officer Hurst attached hereto as Exhibit 1.

2. HEIDI ROCK, according to Officer Hurst, had bloodshot eyes and a "faint" odor of alcohol. See Exhibit 1 attached hereto.

3. HEIDI ROCK was required by Officer Hurst to perform two (2) field tests. Following her performance of the two field tests, Officer Hurst was unable to assess whether

HEIDI ROCK ... "was impaired or not." See Exhibit 1 attached hereto.

4. HEIDI ROCK returned to her vehicle and was ready to leave, but was prevented from doing so.

5. HEIDI ROCK continued to be detained by Officer Hurst for approximately twenty-three minutes from the time of the stop until Officer Isakson arrived at the scene. Officer Isakson required HEIDI ROCK to perform four (4) additional field tests and stated that HEIDI ROCK had a strong odor of alcohol about her person. Following the field tests, HEIDI ROCK was placed under arrest. See Exhibit 1 attached hereto.

6. The Officers allege that a half-full pint bottle of vodka was found behind the driver's seat on the floor, which at inventory was found to be a one-quarter full pint bottle of vodka. The bottle of vodka alleged by the officers was subsequently destroyed and is presently not in evidence.

7. HEIDI ROCK, who had no previous offenses of any kind, was arrested for D.U.I. and open container.

II.

THE OFFICER'S CONTINUED DETENTION OF HEIDI ROCK FOLLOWING HER PERFORMANCE OF FIELD TESTS WAS UNREASONABLE AND IN VIOLATION OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION, AS WELL AS ARTICLE I §14 OF THE UTAH CONSTITUTION.

The defendant HEIDI ROCK was detained longer than was reasonable in this instance in violation of both the United States Constitution Fourth Amendment and Article I §14 of the Utah Constitution. HEIDI ROCK allegedly was stopped for having her parking lights on instead of her headlights. Following her performance of field tests, Officer Hurst was unable to conclude with probable cause that she was impaired (see Exhibit 1 attached hereto). In State v.

conclude with probable cause that she was impaired (see Exhibit 1 attached hereto). In State v. Marshall, the Utah Court of Appeals stated:

"The United States Supreme Court has not chosen to define a bright-line rule as to the acceptable length of a detention because "common sense" and ordinary human experience must govern over rigid criteria." State v. Marshall 791 P.2d 880,884 (Utah App. 1990), citing United States v. Sharp, 470 U.S. 675, 685, 105 S.Ct. 1568,1575 (1985).

The Marshall court went on to say that the length of the detention is one factor as well as whether the police investigation was likely to confirm or dispel their suspicions quickly during which time it was necessary to detain the defendant. Id. In the instant case, Officer Hurst, a trained law enforcement official, following his trained observations of the defendant's driving pattern, her person, her speech and her performance on field tests, he did not believe he had enough evidence to establish probable cause to arrest HEIDI ROCK for driving under the influence of alcohol. The continued detention of HEIDI ROCK to perform the same and additional field tests by another officer, was unreasonable and not likely to confirm nor dispel their suspicions whether HEIDI ROCK was impaired. Officer Isakson had no greater training and, in fact, had less insight concerning HEIDI ROCK'S condition, having not observed her driving pattern. Having another officer re-test the defendant did not add any evidence that Officer Hurst had not gathered through his investigation. The repeat testing of HEIDI ROCK by another officer did not further the investigation. It simply substituted one officer's opinion for another. Thus, the continued detention of HEIDI ROCK was unreasonable and did not further the investigation. Following her performance of field tests for Officer Hurst HEIDI ROCK should have been released. Her continued detention violated both the Utah and United States Constitutions as cited and all evidence obtained following the unreasonable detention of HEIDI ROCK as stated must be suppressed.

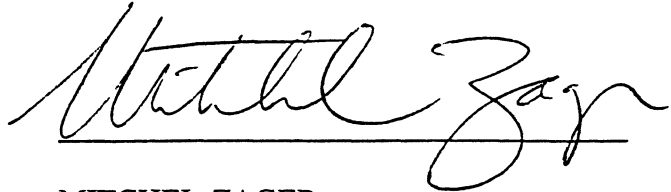
III.

THE STATE DESTROYED ALL EVIDENCE SUPPORTING THE CHARGE OF OPEN CONTAINER AND, THEREFORE, THE CHARGE MUST BE DISMISSED.

The officers destroyed all alleged tangible evidence of an open container of alcohol in the vehicle thereby preventing HEIDI ROCK from obtaining that evidence and testing it to determine whether in fact an open container of alcohol was in her vehicle. Without this evidence HEIDI ROCK cannot effectively cross-examine, test, nor examine the evidence, and as such it violates her due process rights under the United States and Utah Constitution.

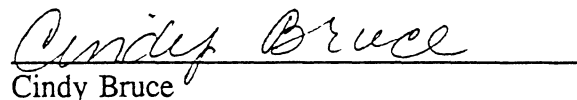
The impoundment of the vehicle was also improper since the vehicle could have been legally parked or removed by the licensed passengers in the vehicle. The impound and subsequent inventory search without warrant were impermissible. Therefore, the charge of open container must be dismissed.

Respectfully submitted,

A handwritten signature in cursive script, reading "Mitchel Zager", written over a horizontal line.

MITCHEL ZAGER
Attorney for Plaintiff

The undersigned certifies that a copy of the Points and Authorities in Support of Motion to Suppress Evidence in a D.U.I. Charge and Dismiss Open Container Charge was sent via U.S. mail, postage pre-paid, this 27 day of November 1992, to the following: Salt Lake City Prosecutor, 451 So. 200 East, Room 125, Salt Lake City, UT 84111.

A handwritten signature in cursive script, reading "Cindy Bruce", written over a horizontal line.

CLOPD

SUPPLEMENTARY REPORT - SR

CASE 92-077792

! NCIC ! PRIMARY OFFENSE	! NCIC ! SECONDARY OFFENSE	! DATE	! CASE NO.
! 5404 ! DUI/ALCOHOL	! OCCURRED	! 07/26/92	! 92-077792
! CLASSCTN ! FELONY?	! DATE	! TIME	! DAY
! CHANGE?	! 07/19/92	! 02:15	! SUN
! NO ! NO			
! ADDRESS OF OCCURRENCE			
! 244 W	! 400 S.	! APT	! COUNCIL

DETAILS FIELD - DF

CASE 92-077792

! A/P MADE A RIGHT TURN ONTO WEST TEMPLE FROM 500 S. NORTHBOND SHE
 ! TURNED INTO THE INSIDE LANE. THE VEHICLE HAD NO HEADLIGHTS ON; PARK LIGHTS
 ! WERE ON. I STOPPED THE VEHICLE A/P WAS DRIVING. A/P HAD BLOODSHOT GLAZED
 ! EYES AND THERE WAS A FAINT ODOR OF ALCOHOL FROM HER. A/P ASKED ME REPEATED
 ! LY WHY I STOPPED. I EXPLAINED TO HER THE REASON FOR THE STOP AS MANY TIMES
 ! AS A/P ASKED. A/P WAS GOING TO START THE CAR AT ONE POINT AS IF TO LEAVE
 ! WHILE I WAS STILL IN THE STREET TALKING TO HER. I ASKED A/P TO PERFORM TWO
 ! FST'S FOR ME. A/P'S ABILITY TO FOLLOW MY INSTRUCTIONS WAS POOR, SHE
 ! PERFORMED TEST DURING INSTRUCTION. ATTENTION SPAN WAS SHORT, KEPT ASKING
 ! ME WHAT I WANTED HER TO DO AS I WAS EXPLAINING AND DEMONSTRATING TESTS TO
 ! HER.

! TEST #1: H.G.N. EARLY ANGLE OF ONSET, JERKY PURSUIT. TEST #2: HAND
 ! SLAP. A/P WAS UNABLE TO PERFORMED AT ALL WITHOUT MULTI

! PLE SLAPS PER SIDE. I WAS OFF DUTY AND I NEEDED TO ASSESS A/P'S IF A/P
 ! WAS IMPAIRED OR NOT. IF SO, I WOULD NEED AND ON DUTY CAR TO HANDLE THE
 ! ARREST SO AS TO KEEP O.T. TO A MINIMUM.

! ON DUTY OFFICER ISAKSON WAS DISPATCHED TO MY LOCATION AND MADE

! INDEPENDENT ASSESSMENTS OF A/P WITH FST'S WHICH I WITNESSED. A/P WAS PRO
 ! CESSSED BY OFFICER ISAKSON. I IMPOUNDED A/P'S CAR. DURING THE INVENTORY I
 ! FOUND AN OPEN 1/4-FULL PINT BOTTLE OF VODKA IN A PAPER SACK WHICH WAS LOCA
 ! TED BEHIND THE DRIVER'S SEAT ON THE FLOOR.

OFFICER INFORMATION FIELD - OF

CASE 92-077792

! ID NO./DIV	! REPORTING OFFICER	! ASSISTING OFFICERS ID NO./DIV.
! G52	! HURST, JED	
! REPORT STATUS	! CLEARANCE:	! AGE GROUP:
! CASE CLOSED?	! EXCEPT? UNF? ARREST?	! ADULT? JUVENILE?
! YES		
! RECEIVED IN RECORDS		! COMPUTER ENTRY ID
! DATE	! TIME	
! 07/22/92	! 20:17	! 62ER

Exhibit 1

Addendum Number 9

**Transcript of Hearing on 3/18/93, pages
6, 7, 8, 9, 10, 13, 19, 20, 22**

1 A The night involved in this situation.

2 Q Can you tell us what happened that night.

3 A I was driving on West Temple southbound
4 approaching Fifth South.

5 Q Were you on duty?

6 A No, I was off duty. I was in my patrol
7 vehicle in uniform. I saw the defendant's car making a
8 turn off of Fifth South onto West Temple going northbound,
9 made a wide turn into the inside lane, had no headlights
10 on. I decided to stop the car and see what the problem
11 was and why the headlights weren't on.

12 Q Why did you stop the car?

13 A Because of the wide turn and no headlights.

14 Q You were off duty though, correct?

15 A Yes.

16 Q So what did you do when you decided to stop
17 the car?

18 A She pulled up to Fourth South and made a
19 left turn onto Fourth South off of West Temple. As soon
20 as she completed that turn I was right behind her. I
21 initiated my emergency lights to indicate that I wanted
22 her vehicle to pull over which didn't happen clear until
23 just before Third West on Fourth South.

24 Q And what happened once the car did stop?

25 A She pulled the car over. I approached the

1 vehicle on the driver's side, asked for her drivers
2 license. She asked me why I had stopped her. I explained
3 the reasons and then she asked me several times while I
4 was talking to her why I had stopped her even as I was
5 explaining indicating that there was some problem with her
6 understanding me. I decided because I smelled alcohol
7 from the car, decided that perhaps she was intoxicated and
8 had her exit the car and had her perform two field
9 sobriety tests.

10 Q What tests did you ask her to perform?

11 A Horizontal gaze nystagmus and hand slap.

12 Q How did she do on those tests?

13 A She did poorly on both of them.

14 Q What did you do at that point?

15 A I called for an on duty car to come and
16 take care of the arrest portion of the DUI.

17 Q Why did you call for an on duty car.

18 A Because I was off duty and we had recently
19 had a policy that if an on duty car could handle a problem
20 that an off duty car is handling that's what they want us
21 to do.

22 Q How long had that policy been in place at
23 this time?

24 A I'm not sure. Probably about two or three
25 months.

1 Q Had you been on duty at all that day?
2 A Yeah, earlier that day I had been on duty.
3 Q How long had you been off duty?
4 A Uh, about four hours, I think. I had been
5 working a part time job prior to leaving -- prior to my
6 contact with her. I was just leaving my part time job.
7 Q Where was that?
8 A That was at City Centre at Fourth South and
9 State Street.
10 Q Once you made the call for another on duty
11 car, how long was it before another officer responded?
12 A To the best of my recollection it was about
13 five or ten minutes.
14 Q And who was the officer who responded?
15 A Officer Isaacson.
16 Q What did you observe after Officer Isaacson
17 responded?
18 A Officer Isaacson performed some field
19 sobriety tests or had the defendant perform some field
20 sobriety tests for him.
21 Q Did he duplicate any of the tests you had
22 done?
23 A I believe so.
24 Q Did you instruct him to do that?
25 A No I did not.

1 Q Did you inform him at any time that you had
2 already conducted those tests?

3 A Yeah, I told him that I had conducted a
4 couple of field sobriety tests.

5 Q Do you recall if you told him specifically
6 which tests?

7 A I don't recall specifically.

8 Q What time did you leave the scene of the
9 stop?

10 A I think it was close to 3:00 o'clock once
11 the car had been impounded and taken away from there.

12 Q How long was that after you made the
13 initial stop?

14 A The initial stop was probably made at 2:05,
15 2:10, somewhere in that area.

16 Q When Officer Isaacson got to the scene,
17 what did you tell him?

18 A I told him the reason that I had stopped
19 her and the reason that I had called him was that I had
20 performed a couple of field sobriety tests and I felt that
21 she was impaired and shouldn't be driving.

22 Q Why didn't you just arrest her at that
23 point?

24 A Well, because it would have taken probably
25 2 1/2 to 3 hours for the completion of the process -- the

1 intoxilyzer tests and paperwork and booking and jail.

2 Q Did you have anything to do with the
3 impound of the car?

4 A Yes, I did.

5 Q Did you personally perform the impound?

6 A Yes, I did.

7 Q Did you find anything during that impound?

8 A During the inventory search I found a
9 bottle of vodka that had about a quarter -- was about a
10 quarter full.

11 Q Was the bottle open or closed?

12 A The lid was on. It was in a paper sack
13 behind the driver's seat.

14 Q What did you do with that when you found
15 it?

16 A I dumped out the vodka and disposed of the
17 bottle.

18 MR. ZAGER: Your Honor, I am going to
19 object to the conclusion that there was vodka in the
20 bottle. That's the issue. There needs to be a
21 foundation.

22 THE COURT: Sustained.

23 Q (By Mr. Godfrey) When you opened the
24 bottle did you smell anything?

25 A Yes, I did.

1 BY MR. ZAGER:

2 Q How long have you been a police officer?

3 A About eleven years.

4 Q Have you ever heard of a hand off arrest?

5 A Excuse me.

6 Q A hand off arrest?

7 A No.

8 Q Familiar with that term?

9 A No.

10 Q Wouldn't you have been able to arrest Heidi
11 Rock and then when another officer came on the scene
12 deliver the suspect to that officer.

13 A Yes, I could have.

14 Q But you didn't do that on this occasion?

15 A No.

16 Q Have you received training in making DUI
17 arrests?

18 A Yes.

19 Q Where have you received that training?

20 A Post academy.

21 Q Were you taught how to give field tests to
22 your suspects?

23 A Yes.

24 Q And you were taught how to assess the
25 subject's performance on those tests?

1 decided that I was going to arrest her with the
2 information I had.

3 Q Maybe I could elicit some help from the
4 court. I'm having a problem understanding whether the
5 officer following the performance of the two tests
6 believed that he could arrest her or not. I think that's
7 a straightforward question.

8 THE COURT: My understanding is he didn't
9 believe he had enough probable cause after two field tests
10 for an arrest. His usual practice is to give four or five
11 tests.

12 Q Okay. Now, you were trained to give more
13 tests to Heidi Rock and you could -- and she didn't refuse
14 to perform any further tests for you?

15 A Correct.

16 Q And so after the two tests you could have
17 easily asked her to perform a third and a fourth and a
18 fifth test and made your determination without delay as to
19 whether or not she was under the influence of alcohol, now
20 is that correct?

21 A I could have, but I didn't want to.

22 Q We'll get to whether you wanted to or not
23 but you had the skill and the ability and the training to
24 do that?

25 A That's correct.

1 Q The only reason that you needed to call in
2 a second officer was to reduce the overtime pay to your
3 department?

4 A True.

5 Q And she was detained for that period of
6 time where she basically -- you and she waited for another
7 officer to arrive at the scene?

8 A True.

9 Q And during that time there was no
10 investigation that took place, there was no further field
11 tests while you waited for Officer Isaacson?

12 A No, there were no more.

13 Q Now, was Heidi Rock free to leave while you
14 were waiting for Officer Isaacson to arrive?

15 A No, she was not.

16 Q Now did you stick around and watch Heidi
17 Rock perform the field tests for Officer Isaacson?

18 A Yes, I did.

19 Q And I believe your testimony was that some
20 of the tests that you had her perform he repeated?

21 A I don't recall.

22 Q Well, didn't you do a gaze nystagmus test?

23 A Yes, I did.

24 Q Didn't Officer Isaacson have her do a gaze
25 nystagmus test?

1 A No. If I was on duty, yes.

2 Q Well, that's what I meant.

3 A If I were on duty I would have had to form
4 my opinion with only those tests which she gave me.

5 Q Regardless of your opinion as to whether
6 she was intoxicated or not, you wouldn't have arrested her
7 in this situation because you were off duty?

8 A If another officer was unable to respond to
9 my location and I was given that information, I would have
10 done the arrest myself but since one was able to come and
11 there was no need for me to incur any extra overtime then
12 I had another one come.

13 Q And I understand it's your testimony that
14 it was about ten to fifteen minutes period of time it took
15 Officer Isaacson to arrive at the scene?

16 A I think I said five to ten minutes.

17 Q Okay. Five to ten minutes is now your
18 testimony on how long you waited. As long as ten minutes.

19 A I think that's what I said.

20 THE COURT: That was his original
21 testimony, five to ten minutes.

22 MR. ZAGER: I guess I'm referring back to
23 our discussion in the hall, but somewhere in the
24 neighborhood of ten minutes is the detention period while
25 you waited for Officer --

Addendum Number 10

Plaintiff's Response to Defendant's Motion to Suppress Evidence

Todd J. Godfrey #6094
Assistant City Prosecutor
Salt Lake City Corporation
451 South 200 East, #125
Salt Lake City, Utah 84111

IN THE THIRD CIRCUIT COURT
SALT LAKE COUNTY, STATE OF UTAH

SALT LAKE CITY CORP.,)	RESPONSE TO MOTION TO
Plaintiff,)	SUPPRESS AND MOTION TO
)	DISMISS
vs.)	
)	Case No. 925020755
HEIDI ROCK,)	
Defendant.)	

I. STATEMENT OF FACTS

On July 19, 1992, Defendant Heidi rock was stopped by Officer Jedd Hurst of the Salt Lake City Police Department when Officer Hurst observed her driving her car without headlights. Officer Hurst was off-duty, in uniform, at the time of the stop. Officer Hurst noted a faint odor of alcohol and bloodshot eyes when he contacted Defendant.

Due to his observations of Defendant's physical condition and her apparent mental state, Officer Hurst asked Defendant to perform two field sobriety tests. Based on Defendant's performance on the tests, Officer Hurst formed the opinion that Defendant was under the influence of alcohol.

Upon forming that opinion, Officer Hurst called for an on-duty Officer to respond and handle what Officer Hurst believed would ripen into an arrest for a DUI. Within five to ten minutes of the call from Officer Hurst, Officer Rusty Isaakson of the SLCPD

responded. Officer Isaakson requested Defendant perform field tests so that he could make an independent assessment of Defendant's condition. Two of the tests requested by Officer Hurst were also requested by Officer Isaakson.

Following Defendant's performance of the tests, Officer Isaakson arrested Defendant for DUI. In a subsequent impound search of the Defendant's car an open bottle of what appeared to Officer Hurst to be vodka was found. The contents and the bottle were destroyed.

II. ARGUMENT

A. THE DETENTION OF HEIDI ROCK WAS PROPER AND JUSTIFIED UNDER THE CONSTITUTION OF THE UNITED STATES AND THE STATE CONSTITUTION

The procedure used by Officers Hurst and Isaakson was proper and was reasonable under the Fourth Amendment of the United States Constitution and under Article I §14 of the Utah State Constitution.

The determination of when a detention becomes constitutionally invalid because of excessive length focuses not on the length of the detention alone, but on whether the police ~~diligently~~ pursued means of investigation that was likely to confirm or dispel their suspicions quickly, ~~during which time it was necessary to detain~~ the defendant. United States v. Sharpe, 470 U.S. 675, 105 S. Ct. 1568, 84 L.Ed.2d 605 (1985); State v. Grovier, 808 P.2d 133 (Utah App. 1991); State v. Marshall, 791 P.2d 880 (Utah App. 1990); State v. Godina-Luna, 826 P.2d 652 (Utah App. 1992).

In Sharpe, the issue of an excessive detention was raised when a defendant was detained 20 minutes by a State Highway Patrolman who was waiting for the assistance of a DEA agent. The Court concluded that the 20 minute detention was not unlawful. Considering the traditional justification for a Terry stop, the Court noted that:

the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion, ... we have

emphasized the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes.

Sharpe, 470 U.S. at 685, 84 L.Ed 2d at 615. The Court was also careful to note that:

[t]he fact that the protection of the public might, in the abstract have been accomplished by "less intrusive" means does not, by itself, render the search unreasonable. [citations omitted]. The question is not simply whether some other alternative means was available, but whether the police acted unreasonably in failing to recognize or to pursue it.

Sharpe at 687, 84 L.Ed.2d at 616.

The situation in Sharpe is analogous to the case currently before the court. In Sharpe, a law enforcement officer detained an individual while waiting for another law enforcement officer who was better situated to conduct the investigation. The matter at hand in Sharpe was a narcotics investigation and the DEA agent was better able to conduct a full and proper investigation, although the State Highway Patrolman certainly had the authority and some experience in conducting narcotics investigations.

Similarly, in this case, Officer Hurst had the skills and the ability to conduct the investigation, but Officer Isaakson was better situated to conduct the investigation. Department Policy required that Officer Hurst call for an on-duty Officer to handle the situation. Officer Isaakson responded to the scene within five to ten minutes, less than the time of the detention in Sharpe. Clearly, the detention in the case now before the court was no more intrusive than the delay in Sharpe, and was occasioned by an equally legitimate purpose. Although Officer Hurst certainly could have conducted the investigation himself, he did not act unreasonably in calling for an on-duty officer.

Utah case law has also followed the rule set out in Sharpe. In State v. Grovier, 808 P.2d 133 (Utah App. 1991), the Court of Appeals of Utah upheld a 90 minute detention necessitated by a search of defendant's car. In Grovier, the Court noted specifically that the focus was not on the length of the detention, but on the means used by the officers to dispel their suspicions.

Grovier at 136.

The length of the detention in Grovier was apparently justified by the officer's concern for safety. Although the justification for the length of the detention was different from the justification presented by Officer Hurst in the present case, the reason are subject to the same reasonableness standard. Grovier distinctly noted that no major interruptions occurred during the search. Under the same reasonableness standard, it is difficult to imagine that ten to fifteen minutes is a major interruption that would invalidate a proper investigation.

B. THE DESTRUCTION OF THE OPEN CONTAINER AND ITS CONTENTS DOES REQUIRE DISMISSAL OF THE CHARGE

Defendant's challenge to the City's destruction of the open container and its contents is based on the Constitutions of the United States and the State of Utah and as such is governed by a reasonableness standard.

The fact that the tangible evidence does not remain is a matter that would properly go to the weight of the evidence presented at the time of trial, not to its admissibility. Officer Hurst, as he testified at the time of the hearing on the issue, is able to provide proper foundation for what his testimony will be as to the contents of the container seized from the Defendant. Defendant also has the opportunity to present evidence to the contrary. The City acknowledges that it is a proper topic of examination of witnesses as to why the evidence was not retained.

III. SUMMARY

Under either the United States Constitution or the Constitution of the State of Utah, Officer Hurst's actions are reasonable and justified and the detention of the Defendant Heidi Rock was proper.

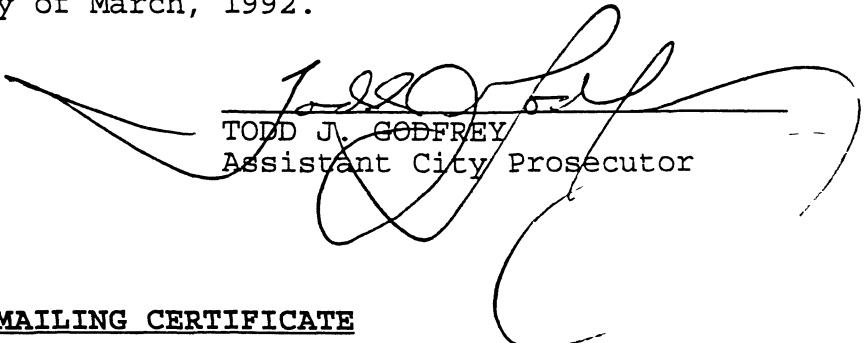
Additionally the destruction of the open container does not rise to the level of a violation of Due Process and does not

require suppression of evidence or dismissal of the charge.

IV. CONCLUSION

For all the foregoing reasons the City respectfully requests that the Court deny the motion of Defendant.

Dated this 29th day of March, 1992.



TODD J. GODFREY
Assistant City Prosecutor

MAILING CERTIFICATE

I hereby certify that I caused to be mailed a true and correct copy of the above memorandum to defense counsel Mitch Zagar 3587 West 4700 South Salt Lake City, Utah 84118

this 29th day of March, 1993.

Addendum Number 11

Defendant's Motion to Suppress Evidence in a DUI Charge

MITCHEL ZAGER - 3968
Attorney for Defendant
3587 West 4700 South
Salt Lake City, Utah 84118
Telephone: 801-964-6100

IN THE THIRD CIRCUIT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

v.

HEIDI ROCK,

Defendant.

|
**MOTION TO SUPPRESS
EVIDENCE IN D.U.I. CHARGE AND
DISMISS OPEN CONTAINER CHARGE**

| Case No. 925020755 TC

| Honorable Philip K. Palmer

I.
STATEMENT OF FACTS

1. HEIDI ROCK was detained by Officer Hurst between 5 and 10 minutes during which time she was required to wait for Officer Isaacson to arrive at the scene and conduct field tests, which included some of the field tests previously conducted by Officer Hurst.

2. Officer Hurst had the same skills, training and qualifications as Officer Isaacson concerning DUI investigations and conducting field tests.

3. Officer Hurst had observed the driving pattern and demeanor of Heidi Rock as she exited her vehicle. Officer Isaacson possessed no personal knowledge of those facts.

4. Officer Hurst testified that the prolonged detention was necessitated by his off-duty status.

II.
THE PROLONGED DETENTION OF HEIDI ROCK BY OFFICER
HURST VIOLATES BOTH THE UTAH AND UNITED STATES
CONSTITUTIONS AND WAS WITHOUT LEGITIMATE
REASON AND THEREFORE UNREASONABLE

Nowhere in case history has a Court held a detention permissible for the reason that an officer was off-duty. There are cases where Courts have held that a detention was permissible when legitimate reasons were shown. In United States vs. Sharpe, the Court found legitimate reasons to find the detention permissible where a patrolman detained a suspect until a DEA Agent with superior training and experience in dealing with narcotics investigations arrived at the scene. United States vs. Sharpe, 470 U.S. 675, 105, S.Ct. 1568, 1576 (1985). In Sharpe the patrolman who made the stop lacked the training and experience in dealing with narcotics and did not know all the facts involved in the case which were known to the DEA Agent from his previous observations. Id. at 1576. As further justification for the detention in Sharpe the Court recognized that the delay in the investigation was created by the defendant's own evasive actions in avoiding the police. Id. In determining whether a detention is permissible, the United States Supreme Court in Sharpe stated that:

. . . whether a detention is too long in duration to be justified as an investigative stop, we consider it 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. Id. at 1575 (emphasis added).

The Sharpe Court pointed out that "the question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it." Id. at 1576.

In this instance the detention is impermissible, since Officer Hurst has testified that he possessed training and experience in dealing with DUI arrests equivalent to that of Officer Isaacson. Furthermore, Officer Hurst was better situated than Officer Isaacson to conduct the DUI investigation, having personally observed the driving pattern of Heidi Rock and her demeanor as she exited her vehicle. It was Officer Hurst in this case who possessed all the facts involved in the case, not Officer Isaacson. The legitimate reasons supporting the permissible detention in Sharpe are not present in this case.

Legitimate reasons for a prolonged detention were also found in State vs. Grovier where a vehicle search occurred during a 90-minute period without major interruption and where the delay was necessitated to ensure the officers' safety. State vs. Grovier, 808 P.2d. 133 (Utah App. 1991). In our case there was no reason nor necessity to seek an alternative investigation procedure. There was only one course of action that was reasonable and that was for Officer Hurst to complete his investigation without delay by conducting a sufficient number of field tests to determine Heidi Rock's sobriety. Incidentally, a hand-off arrest could have been made to Officer Isaacson in the event Heidi Rock was eventually arrested, thereby satisfying Officer Hurst's concern regarding his off-duty status.

The Court in Grovier states that:

. . . the detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Grovier at 136 (emphasis added).

In this case the prolonged detention was not necessary to determine whether Heidi Rock was under the influence of alcohol. Officer Hurst had the skills to complete the investigation and make the determination without delay. The fact that Officer Hurst was off duty is not a

legitimate reason recognized by any Court to detain an individual's freedom. Officer Hurst's failure to complete his investigation without delay is unreasonable, unnecessary and impermissible. Absent a legitimate reason, Heidi Rock's fundamental rights as guaranteed by the Utah and United States Constitutions were violated and require suppression of evidence following the unlawful detention.

III.

THE DESTRUCTION OF EVIDENCE BY SALT LAKE CITY POLICE OFFICERS REQUIRE DISMISSAL OF THE OPEN CONTAINER CHARGE

In this instance Salt Lake City Police Officers destroyed material, tangible evidence which they allege was an open container of alcohol. Heidi Rock is denied her due process under the United States and Utah Constitutions and is deprived of an opportunity to effectively cross-examine and confront the allegations against her due to the destruction of material evidence as described. Her opportunity to test and otherwise examine the alleged evidence is gone as a result of the Officers' actions.

Admission of the officers' testimony that the label on the bottle said vodka is hearsay and also violates the Best Evidence Rule. For the reasons stated, the charge of Open Container requires dismissal.

IV.

CONCLUSION

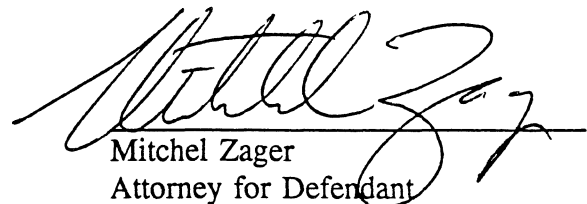
The unreasonable, unjustified and unnecessary detention of Heidi Rock violates her fundamental freedoms as guaranteed under the United States and Utah Constitutions as stated. The reason given that Officer Hurst was off-duty is not a legitimate reason, nor has it been recognized as such in any case cited as a justification to violating a person's fundamental rights.

This instance is plainly distinguishable from the legitimate reasons for extended detentions upheld in each of the cases cited before this Court.

Furthermore, the destruction of material evidence requires dismissal of the Open Container Charge.

Officer Hurst's arbitrary and unreasonable actions in detaining Heidi Rock without legitimate reason requires suppression of all the evidence obtained after the unlawful detention. Based upon the pleadings, testimony and oral argument, defendant moves this Honorable Court to grant this Motion for Suppression and Dismissal.

RESPECTFULLY SUBMITTED this 6 day of April, 1993.


Mitchel Zager
Attorney for Defendant

MAILING CERTIFICATE

The undersigned certifies that a copy of the foregoing Motion To Suppress Evidence and Dismiss Open Container Charge was sent via U.S. mail, postage pre-paid, this 6th day of April, 1993, to Salt Lake City Prosecutor, 451 South 200 East, Room 125, Salt Lake City, UT 84111.

Cindy Bruce

Addendum Number 12

**Third Judicial Court's Reaffirmation
Decision of 4/16/93**

Third Circuit Court

Judge Philip K. Palmer

April 16, 1993

Mr. Mitchell Zager
Attorney at Law
3587 West 4700 South
Salt Lake City UT 84118

RE: Salt Lake City vs. Heidi Rock

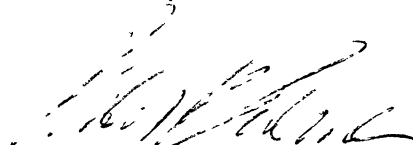
Dear Mr. Zager:

For your information, no copy of your responsive brief is in the court file, nor can my clerk locate one anywhere in the court system. Todd Godfrey, of the Salt Lake City Prosecutor's Office, provided me with a copy of the brief he received, at your request.

I have carefully read your brief but regret to inform you that it does not change my original decision. Todd informs me you will be out of town approximately 30 days, but will be back prior to the May 19th date set for a jury trial on this matter. The court will hold this day open pending your return to Salt Lake City.

Please notify the court if you do not intend to pursue a jury trial on the above date.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Philip K. Palmer', with a stylized flourish at the end.

Philip K. Palmer
Third Circuit Court Judge

PKP/ab

Addendum Number 13

**Transcript of Hearing on 6/17/93,
pages 2, 3 and 4**

1 P R O C E E D I N G S

2 THE COURT: This is your matter.

3 MR. ZAGER: Yes, Judge. Heidi Rock.

4 THE COURT: Oh, yes. Heidi Rock. That
5 matter is on for review, I think.

6 MR. ZAGER: Come on up, Heidi.

7 THE COURT: This will be a plea, is that
8 right, Mr. Zager?

9 MR. ZAGER: Yes, Your Honor.

10 THE COURT: All right.

11 MR. ZAGER: There's a caveat on the pleading.
12 We are considering an appeal in the case concerning the
13 motion that we brought and in view of that I imagine the
14 severity of the sentence may affect that decision.

15 THE COURT: Okay. Your time hasn't run has
16 it? Okay, what's the proposed plea?

17 MR. GODFREY: Your Honor, we're moving to
18 dismiss the infractions charged against Ms. Rock. I believe
19 she's going to enter a change of plea on the DUI. It is our
20 understanding that is a _____ plea. I have some
21 presentence recommendations for the court also.

22 THE COURT: So you're moving to dismiss
23 Counts Two and Three.

24 MR. GODFREY: That's correct.

25 THE COURT: Did you go over a plea form with

1 Ms. Rock, Mr. Zager.

2 MR. ZAGER: I haven't, Your Honor.

3 THE COURT: Will you give him the plea form?

4 THE CLERK: (unclear) I passed a couple out
5 this morning already.

6 MR. GODFREY: You handed them to me.

7 THE CLERK: Did I hand it to you?

8 MR. GODFREY: You handed it to me not to Mr.
9 Zager.

10 THE CLERK: I apologize, Your Honor, I can't
11 tell these two guys apart.

12 THE COURT: All right, Ms. Rock.

13 Do you understand that by pleading guilty to the
14 DUI you give up your right to a trial on the charge and you
15 give up your right not to incriminate yourself because by
16 pleading guilty you do admit that on July 19th of last year
17 you drove your vehicle in Salt Lake City while you were
18 under the influence of alcohol or had a blood alcohol
19 content of .08 grams or greater. Do you understand that's
20 the admission you are making.

21 MS. ROCK: Yes.

22 THE COURT: You also give up your right to
23 appeal after trial, do you understand and wish to waive all
24 those rights, Ms. Rock.

25 MR. ZAGER: With the one caveat, Your Honor,

1 on the appellant issues that have been specifically reserved
2 in this case.

3 THE COURT: All right. You understand all
4 the other information in that plea form that Mr. Zager has
5 gone over with you?

6 MS. ROCK: Yes, I do.

7 THE COURT: Go ahead and sign it if you would
8 both, please.

9 Ms. Rock, what is your plea to the charge of
10 driving while under the influence of alcohol?

11 MS. ROCK: Guilty.

12 THE COURT: The court will accept the plea.
13 Do you waive time for sentencing, Mr. Zager?

14 MR. ZAGER: We do, Your Honor.

15 THE COURT: What was the City's
16 recommendation?

17 MR. GODFREY: Your Honor, it's a rare
18 circumstance when I ever have the opportunity to speak on
19 behalf of the defendant but I have spoken with Mr. Zager
20 twice about Ms. Rock. This is a first offense. It is a
21 situation where the breath test was in what I would call the
22 medium range. I don't think there's an alcohol problem that
23 underlies this offense. I'm convinced from my discussions
24 with Mr. Zager that she's taken a lot of steps to see that
25 this doesn't happen again. I don't think it's a situation

Addendum Number 14

State v. Davis,
821 P.2d, 9, 12 (Utah Ct. App. 1991)

CONCLUSION

We vacate the Commission's order denying Adams benefits and direct the Commission to produce adequate findings of fact and conclusions of law and enter a new order.

GREENWOOD and ORME, JJ., concur.



STATE of Utah, Plaintiff and Appellee,

v.

Edwin Leslie DAVIS, Defendant
and Appellant.

No. 910166-CA.

Court of Appeals of Utah.

Nov. 5, 1991.

Defendant was convicted in the Fifth Circuit Court, St. George Department, James L. Shumate, J., of driving under the influence, interfering with peace officer, refusing to provide information, and driving with revoked license. Defendant appealed. The Court of Appeals, Bench, P.J., held that officer had reasonable suspicion to detain defendant.

Affirmed.

Criminal Law ¶1130(5)

In reviewing defendant's driving under the influence conviction, Court of Appeals could not consider defendant's challenge to trial court's finding that particular road was open to public where defendant did not raise issue in compliance with Rules of Appellate Procedure. Rules App.Proc., Rule 24(a).

Criminal Law ¶1158(4)

Trial court's factual findings underlying decision to grant or deny motion to suppress adequate findings. Her remaining claims are

suppress will not be disturbed unless "clearly erroneous," that is, against clear weight of evidence or such that appellate court reaches definite and firm conviction that mistake has been made.

See publication Words and Phrases for other judicial constructions and definitions.

3. Arrest ¶63.5(1)

Fourth Amendment protection against unreasonable searches and seizures applies to all detentions, including brief investigatory stops by police that fall short of formal arrest. U.S.C.A. Const.Amend. 4.

4. Arrest ¶68(4)

No Fourth Amendment seizure occurs if nothing during encounter between police officer and citizen approximates detention. U.S.C.A. Const.Amend. 4.

5. Arrest ¶63.5(4)

Where police officer approaches person and asks questions, person's refusal to talk to officer, without more, does not furnish reasonable grounds for further detention. U.S.C.A. Const.Amend. 4.

6. Arrest ¶68(4)

Person is "seized" within meaning of Fourth Amendment when officer deprives person of liberty by means of physical force or show of authority. U.S.C.A. Const.Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

7. Arrest ¶63.5(4)

There must be reasonable basis for even brief investigatory detention and officers must have reasonable suspicion, based on objective facts, that individual is involved in criminal activity. U.S.C.A. Const. Amend. 4.

8. Arrest ¶68(4)

Whether objective facts known to officer support reasonable suspicion of wrongdoing to justify investigative detention is to be determined by totality of circumstances and in light of officer's experience and training. U.S.C.A. Const.Amend. 4.

best left for another day.

PACIFIC REPORTER, 2d SERIES

Investigatory ~~power~~ must be temporary and last no longer than necessary to effect purpose of ~~the~~ Const. Amend. 4.

There was no ~~actual~~ suggestion to Fourth Amendment ~~protection~~ ~~with~~ officer pulled his car ~~to~~ ~~the~~ ~~place~~ defendant's already parked ~~at~~ ~~the~~ ~~place~~ Const. Amend. 4.

Officer had ~~reasonable~~ suspicion that crime had been ~~committed~~ sufficient to justify detention of ~~person~~ ~~person~~ ~~person~~ upon pulling his car up ~~front~~ ~~person's~~ car which was parked in ~~front~~ ~~front~~ ~~front~~ Officer saw beer can on trunk ~~and~~ ~~passenger~~ door, and man standing ~~near~~ ~~at~~ ~~and~~ urinating. U.S.C.A. ~~Cour. Amers~~ 4; U.C.A. 1953, 41-6-423; --15

Eric A. Ludlow ~~is~~ ^{was} a runaway,
St. George, for ~~present~~ ^{as} appraiser.

BENCH, Presiding Judge

I. FACTS

fore the car reached the officer, it turned down a side road leading to some nearby corrals, a small subdivision, and the private residence of the developer of the subdivision. The car traveled about 100 feet on the side road when its lights suddenly extinguished.

The officer was concerned about the possibility of car problems and went to assist. As the officer pulled in behind the stopped car, he noticed a can of beer sitting on the trunk. The officer also noticed an opened passenger door, and a man standing near the trunk, urinating. The officer suspected an alcohol-related violation and activated the overhead lights on his vehicle.

The officer then approached the car and found Davis seated behind the steering wheel. Although the keys were still in the ignition, the engine was off. The officer asked Davis where he had been and requested Davis to produce a driver's license or some other form of identification. Davis said he was returning from closing "the Eagles" in Hurricane, but refused to produce any identification. During this verbal exchange, the officer smelled a strong odor of alcohol on Davis's breath.

The man who had been urinating returned to the car and handed the officer the vehicle registration through the driver's open door. The officer repeated his request for Davis's license. This time, however, Davis cursed the officer, slammed the car door, and drove off without producing any identification. The officer pursued Davis to a motor home near the developer's residence. Davis was subsequently arrested for driving under the influence, interference with an arresting officer, refusal to provide information, and driving with a revoked license.

[1] At the suppression hearing, Davis denied that he had driven on the state road, but claimed that he had driven along a parallel road, and stopped the car to move a rock. Since the place of the initial encounter was private, Davis argued that any police investigation was precluded.¹ Davis

Although Davis lists the issue as one presented for review, Davis is wrong.

1. On appeal, Davis challenges the finding of the trial court that the road was open to the public.

also argued that the arrest was invalid because it was not based on probable cause.

The trial court held that the officer had a sufficiently articulable suspicion of wrongdoing, on the basis of the facts as the officer perceived them, to permit investigation. The court analyzed the encounter by noting that the officer was first alerted to a possible problem by seeing a vehicle turn off the State road and suddenly stop. The court then pointed out that, as the officer arrived at the scene, he saw a can of beer and a man urinating in close proximity to the car he had seen on the road only moments before. The trial court found that these facts, "by reason of simple biology," gave the officer an articulable suspicion that an alcohol-related offense had been committed and, on that basis, that an investigation was proper.

Following the denial of the suppression motion, Davis entered a conditional guilty plea and this appeal followed. *See generally State v. Sery*, 758 P.2d 935, 939 (Utah App.1988) (regarding the use of conditional guilty pleas).

II. STANDARD OF REVIEW

[2] Search and seizure challenges are fact sensitive. *State v. Smith*, 781 P.2d 879, 880 (Utah 1989). The factual findings of a trial court that underlie its decision to grant or deny a motion to suppress will not be disturbed on appeal unless clearly erroneous. *Smith*, 781 P.2d at 881. Factual findings are clearly erroneous if they are "against the clear weight of evidence, or the appellate court otherwise reaches a definite and firm conviction that a mistake has been made." *State v. Walker*, 743 P.2d 191, 193 (Utah 1987).

III. ANALYSIS

Davis argues that the police encounter was illegal because the officer did not have probable cause to detain, question, and arrest for "driving under the influence and the other offenses that arose out of the detention and arrest."

Accordingly, we do not consider it for failure to comply with our briefing requirements under Rule 24(a) of the Rules of Appellate Procedure.

[3,4] At the outset, we reiterate the well-settled law since *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), that the Fourth Amendment protection against unreasonable searches and seizures applies to all detentions, including brief investigatory stops by police that fall short of formal arrest. *Terry*, 392 U.S. at 19, 88 S.Ct. at 1879. *See also State v. Sierra*, 754 P.2d 972, 975 (Utah App.1988); *State v. Trujillo*, 739 P.2d 85, 87 (Utah App.1987). Not every encounter between the police and the citizenry, however, implicates a Fourth Amendment violation; if nothing during an encounter approximates a detention, there is no Fourth Amendment seizure. *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980).

[5] In *Trujillo*, 739 P.2d at 87-88, this court 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. The person approached is not required to listen to or answer an officer's questions, and refusal to talk to an officer, without more, "does not furnish reasonable grounds for further detention." *Id.* at 88. *See also Florida v. Royer*, 460 U.S. 491, 498, 103 S.Ct. 1319, 1324, 75 L.Ed.2d 229 (1983).

[6-8] However, 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*, 392 U.S. at 21, 88 S.Ct. at 1879 n. 16; *Trujillo*, 739 P.2d at 87. Since the Fourth Amendment protects 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, 99 S.Ct. 2637, 2641, 61 L.Ed.2d 357 (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

See Christensen v. Munns, 812 P.2d 69, 72 (Utah App.1991); *Koulis v. Standard Oil Co. of Cal.*, 746 P.2d 1182, 1184-85 (Utah App.1987).

P.2d 1085, 1088 (Utah 1986); *State v. Menke*, 787 P.2d 537, 541 (Utah App.1990); *State v. Holmes*, 774 P.2d 506, 508-09 (Utah App.1989).

[9] Moreover, 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) (citing *United States v. Merritt*, 736 F.2d 223, 230 (5th Cir.1984), cert. denied, 476 U.S. 1142, 106 S.Ct. 2250, 90 L.Ed.2d 696 (1986)).

[10] In this case, there was no detention subject to Fourth Amendment protection when the police officer initially pulled in behind the stopped car. Nothing in the record suggests that the officer caused Davis to stop the car or that formal investigation into possible criminal wrongdoing had begun when the officer first arrived. The car in which Davis was seated had stopped before the officer arrived, independent of any action taken by the officer, express or implied, under show of authority or physical force.² Davis had not been detained by the officer, even momentarily, and could have reasonably believed that he was free to drive away as the officer pulled up in his vehicle. *Mendenhall*, 446 U.S. at 554, 100 S.Ct. at 1877.

[11] However, the moment the officer saw a can of beer on the trunk of the car, an open passenger door, and a man urinating, the officer had a reasonable suspicion, based upon objective facts, that a crime had been committed. The officer then detained Davis by a display of authority when he activated the overhead lights on his vehicle. Although there may be a host of other innocent explanations to account for the presence of the persons and the things in and around the car, the officer had a reasonable basis to believe that the man urinating had been a passenger in the car, and that he had been drinking during the time he had been a passenger.

The officer had a reasonable suspicion, based on objective facts, of a violation of the open container law, since it is illegal for

a passenger to drink any alcoholic beverage in a motor vehicle, whether or not the vehicle is moving, stopped or parked on a highway. See Utah Code Ann. § 41-6-44.20 (1990). In addition, the officer had a reasonable basis to suspect the driver of a related violation since it is illegal to allow another to keep, carry, possess or transport an open container of alcohol in the passenger compartment of a motor vehicle when the vehicle is on the highway. *Id.*

A peace officer has statutory authority to "stop any person in a public place when [the officer] has reasonable suspicion to believe [the person] has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions." Utah Code Ann. § 77-7-15 (1990). Therefore, the officer could properly approach Davis, and ask for proof of identification as part of his investigation.

Based on objective facts learned in the course of his investigation, the officer had reasonable grounds to suspect Davis of drunk driving. The officer observed a can of beer on the car, smelled a strong odor of alcohol on Davis's breath, and found him to be uncooperative and argumentative. Davis's refusal to produce a driver's license also provided grounds to suspect Davis of a license-related violation.

The factual findings of the trial court that the officer had probable cause were, therefore, not clearly erroneous. They were not against the clear weight of evidence, and we are not convinced that a mistake was made.

The judgment of the trial court is therefore affirmed.

GREENWOOD and ORME, JJ., concur.



2. Davis cites several cases for the proposition that a police officer must have reasonable suspicion to detain for a traffic violation. See *State*

Carpena, 714 P.2d 674 (Utah 1986). Since the police encounter in this case was not initiated by a traffic stop for a moving violation, Davis's

Addendum Number 15

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808 P.2d. 133, 136 (Utah Ct. App. 1991)**

uously barred the present action against Davis.

We look to contract law to answer appellant's assertion. We first must determine whether the release provisions relating to appellant's claims against Davis are ambiguous. "Whether an ambiguity exists in a contract is a question of law which we review for correctness." *Jarman v. Reagan Outdoor Advertising*, 794 P.2d 492, 494 (Utah Ct.App.1990). Moreover, "[q]uestions of whether a contract is ambiguous because of uncertain meaning of terms, missing terms, or facial deficiencies are questions of law that must be determined by the court before parol or extrinsic evidence may be admitted to clarify the contractual intent of the parties." *Fitzgerald v. Corbett*, 793 P.2d 356, 358 (Utah 1990). See also Utah R.Civ.P. 52(a).

"[T]he settled rule [for] interpreting a contract [is to] first look to the four corners of the agreement to determine the intentions of the parties. The use of extrinsic evidence is permitted only if the document appears to incompletely express the parties' agreement or if it is ambiguous in expressing that agreement." *Ron Case Roofing*, 773 P.2d at 1385 (citations omitted); see also *John Call Eng'g v. Manti City Corp.*, 743 P.2d 1205, 1207 (Utah 1987); *Nixon and Nixon, Inc. v. John New & Assoc.*, 641 P.2d 144, 146 (Utah 1982). "Contract provisions are not rendered ambiguous merely by the fact that the parties urge diverse interpretations." *Jones v. Hinkle*, 611 P.2d 733, 735 (Utah 1980).

Appellant claims the meaning of the passage in the release which reserves her rights against Davis is ambiguous. Because of this alleged ambiguity, appellant urges this court to consider extrinsic evidence (the parties' unexpressed intentions) and interpret this passage to mean that appellant merely agreed to pursue recovery directly from Davis and not from the released parties under the doctrine of respondeat superior.

The trial court did not look to extrinsic evidence but concluded the unambiguous language of the release barred appellant's claim. We agree. If appellant intended to

agree to pursue recovery directly from Davis and not from the released parties under the doctrine of respondeat superior, she easily could have stated that in the release. This court cannot rewrite the contract because appellant failed to include language to protect her rights. As stated by Professor Corbin, "it certainly is not proper to reform the contract or to put in new provisions merely because one of the parties is disappointed in the . . . outcome." 3 A. Corbin, *Corbin on Contracts* § 541 (1972). The Utah Supreme Court has echoed Professor Corbin's statement, noting that "[a] court will not . . . make a better contract for the parties than they have made for themselves," adding that "[a]n express agreement or covenant relating to a specific contract right excludes the possibility of an implied covenant of a different or contradictory nature." *Rio Algom Corp. v. Jimco, Ltd.*, 618 P.2d 497, 505 (Utah 1980), at 505 (citation omitted). The release, by its clear and unambiguous language, releases Davis from liability for his actions taken while he was an employee.

CONCLUSION

Davis' status as an employee was undisputed on summary judgment. Because Davis was an employee of the settling parties, the release, in clear and unambiguous language, bars appellant's claims against him. We therefore affirm the trial court's summary judgment dismissing appellant's claims against Davis.

GARFF and RUSSON, JJ., concur.



3. Arrest ⇐63.5(9)

Determination of whether a detention of automobile, initially stopped for valid reasonable and articulable suspicion that crime had been committed, was constitutionally invalid because excessive in length, focuses not on length of detention alone but on whether police diligently pursued means of investigation that was likely to confirm or dispel their suspicions quickly. U.S.C.A. Const.Amend. 4.

4. Arrest ⇐63.5(9)

Duration of stop of vehicle, involving search for the presence of drugs, did not exceed the minimum intrusion necessary to dispel suspicion; automobile had promptly been taken to a sally port to continue the search, which was conducted without major interruptions and lasted no longer than 90 minutes.

5. Searches and Seizures ⇐194, 198

In order for a consent to search of automobile to be constitutionally valid there must: (1) be clear and positive testimony that consent was unequivocal and specific and freely and intelligently given; (2) government must prove consent was given without duress or coercion, express or implied; and (3) courts indulge every reasonable presumption against waiver of functional constitutional rights and there must be convincing evidence that such rights were waived. U.S.C.A. Const. Amend. 4.

6. Searches and Seizures ⇐184

Consent to drug search of automobile, made while detainee was not under restraint, was voluntary even though he was later handcuffed and placed in a holding area. U.S.C.A. Const.Amend. 4.

7. Searches and Seizures ⇐186

Statement made by detainee whose vehicle was being searched for drugs, that he did not want his car dismantled, did not constitute revocation of his earlier consent to a search of his vehicle, including the trunk and motor compartment. U.S.C.A. Const.Amend. 4.

STATE of Utah, Plaintiff and Appellee,

v.

David Vance GROVIER and Petie Ray Hale, Defendants and Appellants.

No. 900329-CA.

Court of Appeals of Utah.

March 7, 1991.

Defendant was convicted of possession of a controlled substance. Judgment was entered in the Fifth District Court, Iron County, J. Philip Eves, J. Defendant appealed. The Court of Appeals, Jackson, J., held that: (1) trial court's determination that initial stop of vehicle was made on reasonable and articulable suspicion that crime had been committed, based upon report of confidential informant, was not clearly erroneous; (2) defendant had voluntarily consented to search of vehicle; and (3) officer's act of pushing aside heater hose, which revealed presence of drug, had not exceeded scope of consent which had prohibited dismantling of the vehicle.

Affirmed.

1. Arrest ⇐63.5(6)

A reasonable and articulable suspicion, sufficient to support an initial stop of an automobile without a warrant or probable cause, may be premised upon an informant's tip so long as it is sufficiently reliable. U.S.C.A. Const.Amend. 4.

2. Arrest ⇐63.5(6)

Trial court determination that police had reasonable and articulable suspicion that crime was committed when stopping automobile was not clearly erroneous; confidential informant known to officer, who had previously tipped him approximately 10 to 15 times, had reported presence of methamphetamine in a described automobile bearing specified license plate, and informant gave approximate area where vehicle was seen. U.S.C.A. Const.Amend. 4.

8. Searches and Seizures \Rightarrow 186

Police officer's pushing aside of an automobile heater hose, in connection with a search of detained vehicle for the presence of drugs, did not exceed scope of detainee's consent to search, which had prohibited dismantling of vehicle; heater hose was unclamped when search began and it became disconnected when officer pushed it aside to look up under dash. U.S.C.A. Const. Amend. 4.

Loni F. DeLand (argued), McRae & DeLand, Salt Lake City, for defendants and appellants.

R. Paul Van Dam, State Atty. Gen., Marian Decker (argued), Asst. Atty. Gen., Salt Lake City, for plaintiff and appellee.

Before BENCH, JACKSON and RUSSON, JJ.

OPINION

JACKSON, Judge:

Defendant appeals from an order denying his motion to suppress evidence. The defendant, David Vance Grovier, was charged with possession of a controlled substance (24.8 grams of methamphetamine) in violation of Utah Code Ann. § 58-37-8 (Supp.1990). Defendant challenges the order on three grounds: (1) the officer did not have reasonable suspicion to stop him, (2) defendant's consent to search his vehicle was not voluntary, and (3) the search of his vehicle exceeded the scope of his consent. We affirm.

FACTS

On February 23, 1990, at approximately 10:30 a.m., Agent Lynn Davis of the Cedar City Police Department received a message to call one of his confidential informants. The informant gave the license plate number of a green 1973 Buick Riviera as either 175BAT or 175BAP and told Davis that there was methamphetamine in the car.

Officer Davis relayed this information to the Chief of Police, Peter J. Hansen, who then located the vehicle and had one of his

officers, Sergeant Dennis Anderson, stop the green Riviera as it approached the Iron County Correctional Facility between 11:15 and 11:30 a.m. Sergeant Anderson, not having been told by Hansen why the car should be stopped, told defendant that "a citizen had possibly seen him smoking marijuana," to which defendant replied, "I don't have anything, go ahead and search." Anderson then asked, "can we?" and defendant replied, "yes." Sergeant Anderson informed defendant that additional officers were on the way to help and defendant stated, "go ahead and search."

Shortly after Anderson stopped defendant, Hansen and Officer Kelvin Orton arrived. Orton searched defendant's passenger, Petie Ray Hale, and removed a "fannypack" which was searched by Hansen. Inside the fannypack, Hansen found a marijuana pipe and other drug paraphernalia. Subsequently, the trial court granted Hale's motion to suppress this evidence on the grounds that it was obtained without a warrant and that no exception to a warrantless search existed.

While Hale was being arrested, Hansen informed defendant that he intended to search the car for drugs. Defendant replied, "go ahead and look." Hansen then asked him if his consent included the "trunk, passenger area, and motor compartment," to which defendant replied, "yes." Several officers searched the vehicle for approximately twenty minutes during which time no controlled substances were found.

Hansen approached defendant a second time, telling him that he believed that there were drugs in the car, and asked defendant if he intended to tell Hansen where to find them. Hansen further told defendant that he intended "to remove the car from the street into the sally port of the correctional facility and dismantle the car bolt by bolt if necessary." Defendant replied, "go for it."

Defendant was then handcuffed, and he, Hale, and the vehicle were transported to the correctional facility which was approximately 200 yards from the initial stop. Defendant, while riding in the back of Anderson's patrol car on the way to the

correctional facility, stated that he did not want his car "torn apart."

Once at the facility, defendant, who was not formally charged at the time, was placed in a holding area between the sally port and the booking area while the search proceeded. While there, defendant told Hansen he did not have permission to dismantle the car. Hansen then instructed the officers conducting the search not to dismantle the car. Upon arriving at the correctional facility Gary Bulloch, a corrections officer, searched defendant. While being searched, defendant stated that he did not want his car torn apart.

After an unsuccessful cursory search, Hansen left the sally port to obtain a search warrant to dismantle the car. While Hansen was seeking to obtain a search warrant, Davis continued the search. When Davis pushed an unclamped heater hose aside to reach up under the dash, the heater hose end fell away, revealing a cloth wrapped around a ziplock bag containing 24.8 grams of methamphetamine.

STANDARD OF REVIEW

We review findings of fact underlying a trial court's decision on a motion to suppress under the "clearly erroneous" standard. *State v. Marshall*, 791 P.2d 880, 882 (Utah Ct.App.1990); *State v. Webb*, 790 P.2d 65, 82 (Utah Ct.App.1990); *State v. Sierra*, 754 P.2d 972, 974 (Utah Ct.App.1988). A trial court's findings of fact are clearly erroneous only if they are against the clear weight of the evidence. *Marshall*, 791 P.2d at 882.

THE INITIAL STOP

Defendant claims that Sergeant Anderson did not have sufficient reasonable suspicion to make the initial stop. This court has noted that there are three constitutionally permissible levels of police stops:

(1) [A]n officer may approach a citizen at anytime 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 defendant 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.

State v. Johnson, 805 P.2d 761, 763 (Utah 1991) (quoting *State v. Deitman*, 739 P.2d 616, 617-618 (Utah 1987) (per curiam)).

We have previously held that a level two stop requires a "reasonable articulable suspicion" that defendant has committed or is about to commit a crime. *State v. Menke*, 787 P.2d 537, 541 (Utah Ct.App.1990); see also, Utah Code Ann. § 77-7-15 (Supp. 1990). Moreover, a reasonable articulable suspicion must be based on "'objective facts' that the 'individual is involved in criminal activity.'" *State v. Holmes*, 774 P.2d 506, 508 (Utah Ct.App.1989) (quoting *State v. Swanigan*, 699 P.2d 718, 719 (Utah 1985)). "Whether there are objective facts to justify such a stop depends on the 'totality of the circumstances.'" *Id.* (quoting *State v. Mendoza*, 748 P.2d 181, 183 (Utah 1987)).

[1,2] A reasonable suspicion may be premised upon an informant's tip so long as it is sufficiently reliable. *Alabama v. White*, — U.S. —, 110 S.Ct. 2412, 2414, 110 L.Ed.2d 301 (1990); *Adams v. Williams*, 407 U.S. 143, 146-47, 92 S.Ct. 1921, 1923-24, 32 L.Ed.2d 612 (1972); *United States v. Thompson*, 906 F.2d 1292, 1295 (8th Cir.1990). In the case at bar, the trial court made the following findings: the informant was known to Officer Davis; he had previously tipped Davis approximately ten to fifteen times; he reported to Davis that he observed methamphetamine in an older green Buick Riviera driven by a man with a female passenger; he identified the license plate number as either 175BAT or 175BAP; and he last observed the vehicle at the south end of Main Street in Cedar City.

Based on those findings, the trial court concluded that the police officer's stop was "based upon articulable and substantial

facts that would lead a reasonable and prudent police officer to believe that a felony was presently being committed." After examining the totality of the circumstances, we conclude that the trial court's determination of reasonable suspicion was not clearly erroneous.

[3, 4] Defendant further claims that even if the officer had a reasonable suspicion that a crime had been committed, the officer's search exceeded the minimum intrusion necessary to dispel or confirm his reasonable suspicion. In analyzing acceptable lengths of detention, we have stated

The United States Supreme Court has not chosen to define a bright line rule as to the acceptable length of a detention because "common sense and ordinary human experience must govern over rigid criteria." *United States v. Sharpe*, 470 U.S. 675, 685, 105 S.Ct. 1568, 1575, 84 L.Ed.2d 605 (1985). The Court has chosen to focus, not on the length of the detention alone, but on "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." *Id.* at 686, 105 S.Ct. at 1575.

State v. Marshall, 791 P.2d 880, 884 (Utah Ct App 1990).

Defendant claims that the search, which lasted no longer than ninety minutes, exceeded the minimum intrusion necessary to dispel the officer's reasonable suspicions. However, the length of defendant's detention is not the primary focus. Rather, the focus is upon the means used by the officers to dispel their suspicions. *Id.* Chief Hansen testified that the reason he removed the car to the Sally port to continue the search was for safety reasons. He further testified that no major interruptions occurred during the entire search. Accordingly, the trial court's factual finding that the officers diligently pursued a means of investigation that was likely to confirm or dispel their suspicions was not clearly erroneous.

CONSENT

[5] "A warrantless search conducted pursuant to a consent that is voluntary in fact does not violate the fourth amendment." *State v. Webb*, 790 P.2d 65 (Utah Ct App 1990) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043, 36 L.Ed.2d 854 (1973)). Whether a consent to a search was voluntary is a question of fact to be determined from the totality of all the circumstances. *State v. Marshall*, 791 P.2d 880, 887 (Utah Ct App 1990) (citing *Schneckloth*, 412 U.S. at 227, 93 S.Ct. at 2047)), *Webb*, 790 P.2d at 82. Further, the State has the burden of showing that the consent was voluntarily given. *Webb*, 790 P.2d at 82; *Marshall*, 791 P.2d at 887. This court has adopted the tenth circuit's analysis for determining whether the State has met its burden.

(1) There must be clear and positive testimony that the consent was "unequivocal and specific" and "freely and intelligently given"; (2) the government must prove consent was given without duress or coercion, express or implied, and (3) the courts indulge every reasonable presumption against the waiver of fundamental constitutional rights and there must be convincing evidence that such rights were waived.

Webb, 790 P.2d at 82 (quoting *United States v. Abbott*, 546 F.2d 883, 885 (10th Cir 1977)) (citations omitted).

[6, 7] When Chief Hansen asked defendant for his consent to search the car he replied, "go ahead and look." When asked if his consent included a trunk and motor compartment search, defendant replied, "yes." When Hansen told defendant that he intended to remove the car to the correctional facility and dismantle it bolt by bolt if necessary, defendant replied, "go for it."

Defendant contends that his consent was not voluntary because he was either handcuffed or in the holding area after the initial detention. However, the facts do not support his claim. When defendant initially consented to the search, he was neither handcuffed nor in the holding area. His consent was unequivocal and unlimited regarding the scope of the search. Later,

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Cite as 808 P.2d 133 (Utah App 1991)

he told Chief Hansen that he did not want his car dismantled. At that time, the handcuffs had been removed and he had been placed in the holding area. Finally, when defendant stated that the officers had better not tear his car apart, he was not handcuffed or otherwise restrained.

Defendant's statements about dismantling and not tearing apart his car did not revoke his consent; they simply limited the scope of the search to which he had previously consented. Defendant was detained while his car was searched, but the detention came after he had given his consent. The later detention did not produce coercion or duress which would preclude a finding of voluntary consent at the outset.

Defendant was not informed of his right to refuse consent. While failure to inform suspects of their right to refuse consent is not determinative, it is a factor to be evaluated in assessing the voluntariness of a suspect's consent. *Schneckloth*, 412 U.S. at 227, 93 S.Ct. at 2047. Therefore, the officer's failure to inform defendant of his right to refuse to consent, in and of itself, does not indicate that defendant involuntarily consented.

The trial court considered this court's requirements as set forth in *Webb* and determined that defendant voluntarily consented to the search of his car. The trial court's finding on this issue was not clearly erroneous. See *State v. Sterger*, 808 P.2d 122, 126-127, n. 5 (Utah Ct App 1991).¹

THE SCOPE OF THE SEARCH

[8] Defendant argues that Officer Davis's pushing aside of the heater hose exceeded the scope of the search to which he consented. We disagree. "The scope of a consent search is limited by the breadth of the actual consent itself." *United States v. Gay*, 774 F.2d 368, 377 (10th Cir 1985), quoted in *Marshall*, 791 P.2d at 888. "Whether the search remained within the boundaries of the consent is a fact to

be determined from the totality of the circumstances." *US v. Espinosa*, 782 F.2d 888, 892 (10th Cir 1989). The trial court found that defendant limited the scope of the search by telling Chief Hansen not to "dismantle" his car, and by telling Officer Bulloch that he did not want his car torn apart. Accordingly, Chief Hansen instructed his officers not to "dismantle" defendant's car. The trial court further found that Officer Davis "did not go beyond the scope permitted by the Defendant's consent and did not damage the car, dismantle the car, tear the car apart, or do anything but merely push aside an unconnected heater hose."

The heater hose was unclamped when the search began, and it became disconnected when Officer Davis pushed it aside to look up under the dash. The hose's disconnection was not the result of stripping, taking apart, or tearing down actions which would indicate that Officer Davis attempted to dismantle defendant's car. Furthermore, no other evidence was offered to show that Officer Davis or any of the officers exceeded the scope of defendant's consent. We see no error in the trial court's finding that Officer Davis's search did not exceed the scope of defendant's consent.

CONCLUSION

We affirm the trial court's denial of defendant's motion to suppress evidence.

BENCH and RUSSON, JJ., concur.



1. We decline to follow the analytical approach taken in *State v. Bobo*, 803 P.2d 1268 (Utah Ct App 1990) which creates a two part analysis—first a factual determination then a legal conclusion. Rather we follow Utah and federal

case law which views the question of whether consent to a search was voluntary as a question of fact. *State v. Sterger*, 808 P.2d at 126-127 n. 5 (Utah Ct App 1991).

Addendum Number 16

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791 P.2d. 880, 884 (Utah Ct. App. 1990)**

HALL, C.J., concurs in the concurring opinion of ZIMMERMAN, J

HOWE, Associate Chief Justice, concurs in the result



STATE of Utah, Plaintiff and Appellee,

v.

Gregory MARSHALL, Defendant
and Appellant.

No. 890121-CA.

Court of Appeals of Utah

April 18, 1990

Defendant appealed from order of the Seventh District Court, Sevier County, Don V Tibbs, J., which denied motion to suppress. The Court of Appeals, Billings, J., held that (1) stop of defendant was not pretextual, (2) detention of defendant after the stop was not unreasonable, but (3) State could not raise issue of defendant's standing for the first time on appeal, but (4) remand was required for determination of specific issues with respect to search of suitcase found in trunk of automobile.

Reversed and remanded

1 Criminal Law ⇨394.6(5)

Trial court must state its findings on the record with respect to motion to suppress and those findings must be sufficiently detailed in order to allow reviewing court the opportunity to adequately review the decision. U.C.A. 1953, 77-35-12(c)

2 Arrest ⇨63.5(6)

Protective shield of the Fourth Amendment applies when an officer stops an automobile on the highway and detains its occupants. U.S.C.A. Const Amend 4

3. Arrest ⇨63.5(4)

Police officer may constitutionally stop a citizen based on specific, articulable facts which would lead a reasonable person to conclude that the citizen has committed or is about to commit a crime

4 Automobiles ⇨349(3)

Police officer can stop an automobile for a traffic violation committed in the officer's presence

5. Automobiles ⇨349.5(3)

Officer may not use traffic violation stop as a pretext to search for evidence of a more serious crime

6. Automobiles ⇨349(5), 349.5(3)

Stop of defendant's vehicle because of malfunctioning turn signal was permissible and was not a pretext to search for evidence of drug trafficking where the officer did not become suspicious of the defendant until after the stop

7 Automobiles ⇨349(17, 18)

Officer's investigatory detention of motorist and request for permission to search trunk was reasonable where motorist stated that he was driving rental car on a skunk trip but the rental agreement called for the automobile to be returned to New York five days after being rented in California

8 Criminal Law ⇨1031(1)

State cannot raise issue of standing to challenge search for the first time on appeal

9 Searches and Seizures ⇨192

Defendant had the ultimate burden of proof to establish that his Fourth Amendment rights were violated and that he had an expectation of privacy in the area searched or the article seized. U.S.C.A. Const Amend 4

10. Searches and Seizures ⇨23, 192

Warrantless searches are per se unreasonable, and burden is on the State, in first instance, to show that a warrantless search is lawful

AMENDED OPINION *

BILLINGS, Judge

11. Criminal Law ⇨394.5(4)

Prosecutor, as part of the State's burden to establish constitutionality of a warrantless search, must give a defendant notice that he will be put to his proof on the issue of Fourth Amendment standing, that can be done at any time during the hearing on defendant's motion to suppress as long as defendant has an opportunity to put on evidence to meet the claim. U.S.C.A. Const Amend 4

12. Criminal Law ⇨539(2)

Defendant's testimony at motion to suppress hearing cannot be used against him at trial

13 Criminal Law ⇨1181.5(7)

Remand for rehearing on motion to suppress was required where trial court had not focused on the critical issue of the search of suitcases in trunk of automobile

14 Searches and Seizures ⇨171

Search is valid under the Fourth Amendment if it is conducted as a result of defendant's voluntary consent. U.S.C.A. Const Amend 4

15. Searches and Seizures ⇨186

Even when a defendant voluntarily consents to a search, the ensuing search must be limited in scope to only the specific area agreed to by the defendant

16. Searches and Seizures ⇨161

Loss of standing to challenge a search cannot be brought about by illegal police conduct

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R Paul Van Dam and Christine F Soltis, Salt Lake City, for plaintiff and appellee

Before DAVIDSON, BILLINGS and JACKSON, JJ

* This opinion issued on Petition for Rehearing replaces the opinion of the same name issued

The appellant, Gregory J Marshall ("Mr Marshall"), was charged with possession of a controlled substance with the intent to distribute for value, a second degree felony, in violation of Utah Code Ann § 58-37-8 (1989). Mr Marshall filed a pre-trial motion to suppress the 140 pounds of marijuana seized from the rental car he was driving when he was arrested. The trial court denied Mr Marshall's motion and he filed this interlocutory appeal. We reverse and remand for further proceedings consistent with this opinion.

We recite the facts surrounding the seizure of the contraband in detail as the legal issues presented are fact sensitive. *State v Sierra*, 754 P.2d 972, 973 (Utah Ct App 1988). Utah Highway Patrol Trooper Dennis Avery ("Trooper Avery") was driving on Interstate 70 near Salina, Utah. He noticed Mr Marshall's vehicle in the left hand lane passing a motor home. Trooper Avery observed that Mr Marshall's turn signal remained blinking for approximately two miles after he passed the motor home. Not knowing whether Mr Marshall's signal was malfunctioning or whether Mr Marshall had negligently left the signal on, Trooper Avery pulled the vehicle over to inform Mr Marshall of the problem and to give him a warning ticket. Trooper Avery had issued similar warning citations for turn signal violations approximately five to ten times in the previous six month period.

Prior to stopping Mr Marshall, Trooper Avery noticed the vehicle had California license plates. He approached Mr Marshall's vehicle and informed Mr Marshall of the turn signal problem. Mr Marshall responded that he had been having "a hard time keeping the thing turned off."

Trooper Avery asked Mr Marshall for his driver's license and vehicle registration. Mr Marshall produced a New York driver's license and a California rental agreement for the vehicle. Mr Marshall said he was

on December 26 1989

going skiing in Denver and planned to return the car to San Diego, California. However, the rental agreement indicated that the car would be returned in New York in five days.

Trooper Avery acknowledged he became suspicious that Mr. Marshall might be transporting drugs. Trooper Avery asked Mr. Marshall to return with him to his patrol car where he issued a warning citation for "Lights, head, tail, other." Trooper Avery then returned Mr. Marshall's driver's license and the rental agreement.

Trooper Avery next asked Mr. Marshall if he was carrying alcohol, drugs or firearms. Mr. Marshall stated he was not. Trooper Avery then asked Mr. Marshall if he could "look inside the vehicle." Mr. Marshall responded, "Go ahead." Trooper Avery and Mr. Marshall walked back to Mr. Marshall's vehicle. The passenger door was locked and Mr. Marshall reached in on the driver's side to open the door. Trooper Avery noticed a small red bag on the floor of the vehicle and asked if he could open it. Mr. Marshall agreed. No contraband was found inside the bag or the passenger compartment of the vehicle.

Trooper Avery then asked if Mr. Marshall had a key to the trunk and if Mr. Marshall would open the trunk. Mr. Marshall attempted to open the trunk, but was shaking so badly that Trooper Avery had to assist him by holding the key latch cover up while Mr. Marshall inserted the key. Trooper Avery saw four padlocked suitcases when Mr. Marshall opened the trunk. Trooper Avery asked Mr. Marshall what the suitcases contained and Mr. Marshall responded "clothes." Trooper Avery then asked if he could look in the suitcases. Mr.

Marshall immediately reversed his statement and responded that the suitcases were not his and must have already been in the trunk when he rented the vehicle. Trooper Avery testified there was some play in the zipper of one bag and he unzipped it far enough to see a green leafy substance. Trooper Avery then arrested Mr. Marshall for possession of a controlled substance.

Mr. Marshall did not testify or present any evidence to contradict Trooper Avery's testimony during the hearing below.

STANDARD OF REVIEW

"[W]e will not disturb the trial court's factual evaluation underlying its decision to grant or deny a motion to suppress unless it is clearly erroneous." *State v. Sierra*, 754 P.2d 972, 974 (Utah Ct.App.1988). See also *State v. Walker*, 743 P.2d 191, 193 (Utah 1987); *State v. Johnson*, 771 P.2d 326, 327 (Utah Ct.App.1989). Further, "[t]he trial court's finding is clearly erroneous only if it is against the clear weight of the evidence or if [the appellate court] reach[es] a definite and firm conviction that a mistake has been made." *State v. Sery*, 758 P.2d 935, 942 (Utah Ct.App.1988).

[1] Utah Rule of Criminal Procedure 12(c) requires the trial court to state its findings on the record "[w]here factual issues are involved in determining a motion." Those findings must be sufficiently detailed in order to allow us the opportunity to adequately review the decision below.¹

PRETEXT STOP

Initially, Mr. Marshall contends Trooper Avery used the fact that his turn signal

court." (quoting *Parks v. Zions First Nat'l Bank*, 673 P.2d 590, 601 (Utah 1983)).

Detailed findings of fact likewise greatly ease the burden of an appellate court in its review of a trial court's decision on a motion to suppress. This is particularly true where multiple issues are presented in the motion to suppress. 4 W. LaFave, *Search & Seizure* § 11.2, at 252 (1987) [hereinafter "LaFave"] (citing *State v. Johnson*, 16 Or.App. 560, 519 P.2d 1053, 1058-59 (1974)). Many jurisdictions require specific findings of fact on all motions to suppress. See LaFave at § 11.2 n. 188. We believe the requirement a sound one.

was malfunctioning as a pretext to stop his vehicle to search for evidence of drug trafficking.

[2-5] The protective shield of the fourth amendment applies when an officer stops an automobile on the highway and detains its occupants. *State v. Sierra*, 754 P.2d 972, 975 (Utah Ct.App.1988). A police officer may constitutionally stop a citizen on two alternative grounds. First, the stop "could be based on specific, articulable facts which, together with rational inferences drawn from those facts, would lead a reasonable person to conclude [defendant] had committed or was about to commit a crime." *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968); *State v. Christensen*, 676 P.2d 408, 412 (Utah 1984); *State v. Trujillo*, 739 P.2d 85, 88 (Utah Ct.App.1987)). Second, the police officer can "stop an automobile for a traffic violation committed in the officer's presence." *Sierra*, 754 P.2d at 977. However, an officer may not use a traffic violation stop as a pretext to search for evidence of a more serious crime. *Id.*

To determine if Trooper Avery stopped Mr. Marshall's vehicle to investigate his hunch that Mr. Marshall's vehicle was involved in drug trafficking, we determine whether a hypothetical reasonable officer, in view of the totality of the circumstances confronting him or her, would have stopped Mr. Marshall to issue a warning for failing to terminate a turn signal. *Id.* at 978.

2. While the warning citation does not specify which provision of the Utah Code Mr. Marshall violated, the state asserts that his conduct was in violation of Utah Code Ann. § 41-6-117(1) (1988) which, with our emphasis, provides:

It is a misdemeanor for any person to drive or move or for the owner to cause or knowingly permit to be driven or moved on any highway any vehicle or combination of vehicles which is in such unsafe condition as to endanger any person, or which does not contain those parts or is not at all times equipped with lamps and other equipment in proper condition and adjustment....

3. In *Delaware v. Prouse*, 440 U.S. 648, 660-61, 99 S.Ct. 1391, 1399-1400, 59 L.Ed.2d 660 (1979), the United States Supreme Court stated that an officer has a duty in the interest of highway safety to stop vehicles for safety reasons. "Many violations of minimum vehicle-safety requirements are observable, and something can

[6] Mr. Marshall claims Trooper Avery's stop of his vehicle is similar to the stop we found unconstitutional in *Sierra*. We disagree. In *Sierra*, the basis articulated for the stop was that the driver remained in the left lane too long after passing a car. In this case, Trooper Avery perceived an equipment problem with Mr. Marshall's car. Either his turn signal was malfunctioning or he had negligently failed to turn it off.² Courts consistently have held that a police officer can stop a vehicle when he or she believes the vehicle's safety equipment is not functioning properly.³

Furthermore, unlike the officer in *Sierra*, Trooper Avery was not suspicious of Mr. Marshall for other reasons before the stop, had not followed him in order to find some reason to pull him over, and, before the alleged violation occurred, had not radioed for help thereby indicating he intended to stop the vehicle.

In conclusion, we find Trooper Avery's stop of Mr. Marshall's vehicle was not a pretext, but was a valid exercise of police authority to make certain Mr. Marshall's vehicle was functioning properly.

UNREASONABLE DETENTION

[7] Next, Mr. Marshall complains that the extent of his detention and the scope of Trooper Avery's investigation exceeded constitutional limits.⁴

be done about them by the observing officer, directly and immediately." *Id.* at 660, 99 S.Ct. at 1399. The Court inferred that as long as an officer suspects the driver is violating "any one of the multitude of applicable traffic and equipment regulations," the police officer may legally stop the vehicle. *Id.* at 661, 99 S.Ct. at 1400. See *Townsel v. State*, 763 P.2d 1353, 1355 (Alaska Ct.App.1988) (court held stop justified when vehicle's headlight was out, a tail light was broken, the license plate and windows were obscured, and speeding); *State v. Puig*, 112 Ariz. 519, 544 P.2d 201, 202 (1975) (suspicion of defective turn signals justified stop); *State v. Fuller*, 556 A.2d 224, 224 (Me.1989) (stop justified when blinking headlights led officer to stop vehicle for safety reasons).

4. We do not analyze this issue under article I, section 14 of the Utah Constitution as the state constitutional issue was not sufficiently particularized below nor is a reasoned analysis provided.

1. Utah appellate courts have consistently required detailed findings of fact to support a judgment entered by a trial judge in civil cases. *Rucker v. Dalton*, 598 P.2d 1336, 1338 (Utah 1979) ("The importance of complete, accurate and consistent findings of fact in a case tried by a judge is essential to the resolution of dispute under the proper rule of law. To that end the findings should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached."); *Sampson v. Richins*, 770 P.2d 998, 1002-03 (Utah Ct.App.1989) (findings of fact must indicate the "mind of the

"[I]n determining whether the seizure and search were 'unreasonable' our inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry v. Ohio*, 392 U.S. 1, 19–20, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968).

We have previously found that Trooper Avery's traffic stop of Mr. Marshall was justified. The remaining question is whether Trooper Avery's subsequent detention and questioning of Mr. Marshall was reasonably related to the initial traffic stop or was justified because Trooper Avery had a reasonable suspicion to believe Mr. Marshall was engaged in a more serious crime. *United States v. Guzman*, 864 F.2d 1512, 1519 (10th Cir.1988).

The United States Supreme Court has not chosen to define a bright-line rule as to the acceptable length of a detention because "common sense and ordinary human experience must govern over rigid criteria." *United States v. Sharpe*, 470 U.S. 675, 685, 105 S.Ct. 1568, 1575, 84 L.Ed.2d 605 (1985). The Court has chosen to focus, not on the length of the detention alone, but on "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." *Id.* at 686, 105 S.Ct. at 1575.

Trooper Avery wrote out the warning citation within ten minutes of stopping Mr. Marshall and then returned Mr. Marshall's driver's license and the vehicle rental agreement. Trooper Avery claims that as a result of his examination of Mr. Marshall's driver's license and the vehicle rental agreement and his brief conversation with Mr. Marshall, he became suspicious that Mr. Marshall was involved in drug trafficking. Specifically, Trooper Avery points to the fact that Mr. Marshall produced a New York driver's license and a California rental agreement for the vehicle. When questioned about the rental agree-

ed on appeal as to why our analysis should be different under Utah's constitution. See *State v.*

ment, Mr. Marshall said he was going skiing in Colorado and planned to return the car to San Diego, California. However, the rental agreement indicated the car was to be returned to New York in five days, the approximate time it takes to drive directly from California to New York. In addition, Mr. Marshall was driving along a well-known drug trafficking route.

As a result of his suspicion, Trooper Avery then asked Mr. Marshall if he was carrying weapons, alcohol, or drugs in the vehicle. Mr. Marshall responded he was not. Then Trooper Avery allegedly asked for permission to look into the vehicle and received Mr. Marshall's consent.

The trial judge found that Trooper Avery's "investigation was reasonable in view of the defendant's statements in regards to the vehicle ownership and the driver's usage. The destination itinerary would have put a reasonable officer on notice that something was wrong." Although not directly so stating, the judge, in substance, concluded that Trooper Avery had reasonable suspicion to believe that Mr. Marshall was involved in illegal conduct. Although it is a close call, we agree with the trial court's assessment of the reasonableness of the detention.

We find that Trooper Avery's questioning of Mr. Marshall as to conduct unrelated to the traffic stop was justified because he had reasonable suspicion to believe Mr. Marshall was engaged in a more serious crime. See *Guzman*, 864 F.2d at 1519.

In conclusion, based on the totality of the circumstances, we agree with the trial court that Trooper Avery's ten-minute detention and brief questioning of Mr. Marshall prior to Mr. Marshall's alleged consent to search the vehicle was not an unreasonable detention.

SEARCH

On appeal, Mr. Marshall argues that even if his initial stop and subsequent detention were not constitutionally deficient, the subsequent search of the trunk of the

Johnson, 771 P.2d 326, 327–28 (Utah Ct.App. 1989).

vehicle and the suitcases found in the trunk without a warrant violated his fourth amendment rights. The state contends, on the other hand, that Mr. Marshall consented to the search of the trunk and abandoned any privacy interest in the suitcases and thus Trooper Avery's search of the suitcases was constitutionally permissible.⁵ In our prior opinion, we focused solely on whether the search of the suitcases was proper. We found the warrantless search of the suitcases unconstitutional as we refused to allow the state to raise the issue of fourth amendment standing for the first time on appeal. We granted the state's petition for rehearing to re-examine the related fourth amendment issues of voluntary consent and abandonment which are central to a resolution of this appeal.

1. Standing

The state, in its original brief on appeal, claimed Mr. Marshall was without standing to challenge the seizure of the suitcases as he had disclaimed any ownership or possessory interest in the suitcases during the search and thus had no expectation of privacy in their contents. See *Rakas v. Illinois*, 439 U.S. 128, 138–50, 99 S.Ct. 421, 427–34, 58 L.Ed.2d 387 (1978); *State v. Valdez*, 689 P.2d 1334, 1335 (Utah 1984); *State v. Grueber*, 776 P.2d 70, 73–75 (Utah Ct.App.1989); *State v. DeAlo*, 748 P.2d 194, 196–97 (Utah Ct.App.1987). The state relies upon the following testimony from the preliminary hearing:

5. The state does not argue that Trooper Avery had probable cause to search either the car or the suitcases. We, therefore, need not deal with the troublesome issue of whether probable cause to search an automobile is sufficient under the automobile exception to search a locked suitcase found in the trunk of a car. See, e.g., *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982) (if probable cause exists, police can search closed containers found in vehicle); *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979) (warrantless search of a suitcase found in the trunk of a taxi invalid); *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977) (warrantless search of a footlocker found in the trunk of a vehicle invalid); *State v. Hygh*, 711 P.2d 264, 272 n. 1 (Utah 1985) (Zimmerman, J., concurring separately) (criticizing the *Ross* holding).

Q. [Defense Counsel] And what was inside the trunk?

A. [Trooper Avery] There were four suitcases.

Q. Did you ask if you could look in those suitcases?

A. Uh huh (affirmative). First of all, I asked him what was in the suitcases, and he told me, right quickly, clothes. Then when I looked at him again, he told me that he didn't know where they came from, they must have been in there when he rented the car.

In our prior opinion, we relied on the Utah Supreme Court decision of *State v. Schlosser*, 774 P.2d 1132 (Utah 1989), which squarely held that standing to challenge the validity of a search under the fourth amendment "is not a jurisdictional doctrine [but] is a substantive doctrine that identifies those who may assert rights against unlawful searches and seizures." *Id.* at 1138. Citing the general rule that a substantive issue or "claim of error cannot be raised for the first time on appeal," the supreme court deemed the issue of standing waived. *Id.* at 1138–39.

The state attempts to distinguish *Schlosser*, claiming that in that case the state not only failed to raise the issue of standing in the motion to suppress hearing, but also on appeal and that here, unlike *Schlosser*, the state raises standing simply as an alternative ground to uphold the trial court's denial of the motion to suppress.⁶ We do not

6. Prior to *Schlosser*, the Utah Supreme Court had, in several cases, considered standing for the first time on appeal and had utilized the doctrine to refuse to consider the constitutional validity of a challenged search. See, e.g., *State v. Constantino*, 732 P.2d 125, 126–27 (Utah 1987) (per curiam) (court did not address whether the issue of standing had been raised below, but stated that defendant could not assert any expectation of privacy in vehicle because he did not own vehicle and had presented no testimony that he had permission of owner or had borrowed vehicle "under circumstances that would imply permissive use"); *State v. Iacono*, 725 P.2d 1375, 1377–78 (Utah 1986) (State below argued there was consent by defendant's ex-wife to search his mother's trailer. On appeal, the state argued defendant had no possessory or proprietary interest in the trailer and thus had no expectation of privacy. The court declined

find the distinction determinative.⁷

The United States Supreme Court took the same position in *Steagald v. United States*, 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981), when it refused to allow the government to raise the issue of fourth amendment standing for the first time on appeal to provide an alternative ground to sustain the trial court's refusal to grant a motion to suppress. The Court concluded:

Aside from arguing that a search warrant was not constitutionally required, the Government was initially entitled to defend against petitioner's charge of an unlawful search by asserting that petitioner lacked a reasonable expectation of privacy in the searched home, or that he consented to the search, or that exigent circumstances justified the entry. *The Government, however, may lose its right to raise factual issues of this sort before this Court* when it has made contrary assertions in the courts below, when it has acquiesced in contrary findings by those courts, or *when it has failed to raise such questions in a timely fashion during the litigation.*

Id. at 209, 101 S.Ct. at 1646 (emphasis added).

[8] The state, on petition for rehearing, contends that language in *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), is contrary to our conclusion that the state should not be allowed to

reach the issue of consent because it found that defendant lacked standing to object to the search because the stipulated evidence did not show that defendant shared ownership, use or possession of the trailer.; *State v. Valdez*, 689 P.2d 1334, 1335 (Utah 1984) (At trial, the defendant produced evidence that neither the attaché case in which the evidence was found nor the vehicle belonged to the defendant. The court did not address whether the issue of standing was raised below, but declined to reach the question of the validity of the search because the defendant conceded he did not own the case or the vehicle and had failed to show any expectation of privacy.). In these earlier cases, it is sometimes unclear whether the Utah Supreme Court raised the issue of standing *sua sponte* on appeal or permitted the state to raise the issue of standing for the first time on appeal. We assume that *Schlosser* supercedes these earlier cases and thus do not follow them.

7. Although the Utah Supreme Court refused to allow standing to be utilized to attack the trial

raise standing for the first time on appeal. We disagree. The language in *Rakas* relied upon by the state is consistent with our view.

The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure. The *prosecutor argued* that petitioners lacked standing to challenge the search because they did not own the rifle, the shells or the automobile. *Petitioners did not contest the factual predicates of the prosecutor's argument and instead, simply stated that they were not required to prove ownership to object to the search. The prosecutor's argument gave petitioners notice that they were to be put to their proof* on any issue as to which they had the burden, and because of their failure to assert ownership, we must assume, for purposes of our review, that petitioners do not own the rifle or the shells.

Id. at 130 n. 1, 99 S.Ct. at 424 n. 1 (citations omitted) (emphasis added).

[9, 10] We agree with the state and *Rakas* that Mr. Marshall has the ultimate burden of proof to establish that his fourth amendment rights were violated or, to put it otherwise, that he had an expectation of privacy in the area searched or the articles seized.⁸ Nevertheless, warrantless

court's granting of a motion to suppress in *Schlosser*, the court relied on *State v. Goodman*, 42 Wash.App. 331, 711 P.2d 1057 (1985), which held the state could not raise the issue of standing for the first time on appeal to provide an alternative ground for sustaining the trial court's denial of a motion to suppress. *Id.* 711 P.2d at 1060.

8. However, the failure of the state to challenge Mr. Marshall's standing at the suppression hearing did not give Mr. Marshall an opportunity to assert his expectation of privacy. See *Combs v. United States*, 408 U.S. 224, 227-28, 92 S.Ct. 2284, 2286, 33 L.Ed.2d 308 (1972) (per curiam) (Where petitioner's failure to assert an expectation of privacy may have been explained by the Government's failure to challenge standing either at the suppression hearing or at trial, the United States Supreme Court remanded to the district court for further proceedings to allow petitioner to establish a privacy interest.).

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searches are per se unreasonable and the burden is on the state, in the first instance, to show that a warrantless search is lawful. *State v. Christensen*, 676 P.2d 408, 411 (Utah 1984).

[11, 12] We believe *Rakas* is consistent with our view that the prosecutor, as part of the state's burden to establish the constitutionality of a warrantless search, must give a defendant "notice that he will be put to his proof" on the issue of fourth amendment standing. This can be done at any time during the hearing on a defendant's motion to suppress as long as the defendant has an opportunity to put on evidence to meet the claim.⁹ Once the defendant has been put on notice that the state claims the warrantless search was constitutional because he has no expectation of privacy in the area searched, then the defendant must factually demonstrate that he does have standing to contest the warrantless search. We believe the *Schlosser* standing rule was fashioned to protect the defendant from being required to deal with new legal issues on appeal when he had no warning of the necessity to develop the relevant facts below.

2. Consent/Abandonment

The state, on petition for rehearing, excuses its failure to raise the issue of standing claiming that neither Mr. Marshall, the state nor the trial judge focused on the search of the suitcases in the motion to suppress hearing. Rather, the state claims the hearing centered on the pretextual nature of the stop, the unreasonable detention of Mr. Marshall and the unlawful search of the trunk.

Mr. Marshall, on petition for rehearing, claims the following comment made by defense counsel sufficiently focused the proceeding on the search of the suitcases:

9. The defendant's testimony at the motion to suppress hearing cannot be used against the defendant at trial. See *Simmons v. United States*, 390 U.S. 377, 394, 88 S.Ct. 967, 976, 19 L.Ed.2d 1247 (1968) (prosecutor cannot use a defendant's testimony at a suppression hearing as substantive evidence of guilt at trial unless defendant makes no objection). We note, how-

"Additionally there is no evidence that there was consent to search the bags."

[13] Upon a re-examination of the record, we agree with the state that the parties and the trial judge did not focus on the critical issue of the search of the suitcases at the motion to suppress hearing. The result is that the trial judge did not make adequate findings of fact on the issues of voluntary consent to search the trunk or the suitcases and Mr. Marshall's alleged abandonment of any privacy interest in the suitcases, which the parties now agree are pivotal on appeal. We therefore remand for a rehearing on these critical issues. We nevertheless discuss the controlling law to guide the trial court on rehearing.

[14] A search is valid under the fourth amendment if it is conducted as a result of the defendant's voluntary consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043, 36 L.Ed.2d 854 (1973); *State v. Sierra*, 754 P.2d 972, 980 (Utah Ct.App.1988). "[T]he question [of] whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Schneckloth*, 412 U.S. at 227, 93 S.Ct. at 2047-48. "A trial court's finding of voluntary consent will not be reversed unless it is clearly erroneous." *United States v. Miller*, 589 F.2d 1117, 1130 (1st Cir.1978), cert. denied, 440 U.S. 958, 99 S.Ct. 1499, 59 L.Ed.2d 771 (1979).

In *United States v. Abbott*, 546 F.2d 883 (10th Cir.1977), the Tenth Circuit outlined the specifics necessary for the government to sustain its burden to show that voluntary consent was given:

(1) There must be clear and positive testimony that the consent was "unequivocal and specific" and "freely and intelligent-

ever, that the United States Supreme Court had not decided whether the *Simmons* rule precludes the use of a defendant's suppression hearing testimony to impeach the defendant's testimony at trial. See *United States v. Salvucci*, 448 U.S. 83, 94 & n. 9, 100 S.Ct. 2547, 2554 & n. 9, 65 L.Ed.2d 619 (1980).

ly given"; (2) the government must prove consent was given without duress or coercion, express or implied; and (3) the courts indulge every reasonable presumption against the waiver of fundamental constitutional rights and there must be convincing evidence that such rights were waived.

Id. at 885 (quoting *Villano v. United States*, 310 F.2d 680, 684 (10th Cir.1962)). See also *United States v. Recalde*, 761 F.2d 1448, 1453 (10th Cir.1985). See generally *State v. Whittenback*, 621 P.2d 103, 106 (Utah 1980); *State v. Sierra*, 754 P.2d 972, 980-81 (Utah Ct.App.1988).

[15] Even when a defendant voluntarily consents to a search, the ensuing search must be limited in scope to only the specific area agreed to by defendant. "The scope of a consent search is limited by the breadth of the actual consent itself.... Any police activity that transcends the actual scope of the consent given encroaches on the Fourth Amendment rights of the suspect." *United States v. Gay*, 774 F.2d 368, 377 (10th Cir.1985); see, e.g., *People v. Thiret*, 685 P.2d 193, 201 (Colo.1984) (scope of consent exceeded when police asked to "look around" the house, then conducted a 45-minute search of rooms, drawers, boxes and closed containers).

The trial court made the following conclusory finding on the issue of Mr. Marshall's consent: "The Defendant consented to the search. There was no evidence of duress or coercion." This conclusory finding on consent is not particularly helpful in determining whether Mr. Marshall's consent was "unequivocal and specific" as it does not detail what Mr. Marshall agreed could be searched—the interior of the passenger compartment, the trunk, or the locked suitcases.¹⁰ Furthermore, the relevant portions from the transcript of Trooper Avery's testimony are troubling:

Q. [Defense Counsel] What were the words he [sic] used when you asked him to search his vehicle?

....

10. See *supra* note 1 and accompanying text for a discussion of the importance of detailed find-

A. [Trooper Avery] I asked Mr. Marshall if—if there were any—if there was any—were there any drugs in the vehicle, and he took two or three seconds—no, wait a minute, I guess—I first asked him if he was carrying any weapons and he told me no. I then asked him if he was carrying any—if there was any alcohol in the vehicle, he said that he did not drink. I recall both answers were quite quick. And then I asked him if there were any drugs in the vehicle, he paused for, you know, probably two or three seconds, and then told me no. I then asked him if it would be okay if I looked in the vehicle, search the vehicle, and he said go ahead.

Q. Now, did you ask if you could look in the vehicle, or did you ask if you could search the vehicle?

A. Well, according to this [his report], I said—I asked if I could look in the vehicle.

Q. So, it was "look in the vehicle"?

You didn't ask if you could open anything inside the vehicle or anything else, did you?

A. No. I just asked if I could look in the vehicle.

Q. And what happened then?

A. Mr. Marshall just told me, you know, he said go right ahead. He got out, gathered up his papers and we walked up to the front of the vehicle, and he had to open the passenger door, as I recall.

....

Q. And how did you get in the trunk?

A. I asked him, I said—asked him if he had the key to the trunk and he says yes, and I says—and I asked him if he[d] open it, which he did, he tried. He was extremely nervous at the time. I—

Q. So did you open the trunk?

A. No, sir, I did not. He—he could not—there was a little latch over the key hole. He was shaking so hard, he

ings on a motion to suppress.

couldn't even hold the latch open, so I held the latch up for him so he could insert the key.

Without the assistance of specific findings of fact, we cannot resolve the difficult issue of whether Mr. Marshall's opening the trunk constituted implied consent to search the trunk under the totality of the circumstances presented. See *United States v. Almand*, 565 F.2d 927, 930 (5th Cir.), cert. denied, 439 U.S. 824, 99 S.Ct. 92, 58 L.Ed.2d 116 (1978) (voluntary consent found where defendant silently reached into his pocket, removed key, then unlocked and opened camper door).

Furthermore, the record creates a substantial question as to whether the court's general finding that there was "no evidence of duress or coercion" was intended to apply to the search of the trunk or, even if it was, whether the finding is consistent with the standard required for a voluntary consent. See *United States v. Abbott*, 546 F.2d 883, 885 (10th Cir.1977); *State v. Sierra*, 754 P.2d 972, 980-81 (Utah Ct.App. 1988). Likewise, the court in its findings fails to focus on the search of the locked suitcases and the issues of voluntary consent or abandonment.

[16] Even if we were to accept the state's argument that the undisputed facts support a finding that Mr. Marshall abandoned "any expectation of privacy in the suitcases by his ambiguous disclaimer of ownership and that the state should be allowed to raise this fourth amendment standing issue for the first time on appeal, we would be unable to dispose of this case on the record before us. The state, in its petition for rehearing, correctly points out

11. See, e.g., *United States v. Jones*, 707 F.2d 1169, 1173 (10th Cir.1983) (Court found abandonment when police initially saw defendant running with a brown satchel, however, when they captured defendant, he did not have the satchel and disavowed knowledge of it. Police later found the satchel outside the building and searched it.); *United States v. Kendall*, 655 F.2d 199, 202 (9th Cir.1981), cert. denied, 455 U.S. 941, 102 S.Ct. 1434, 71 L.Ed.2d 652 (1982) (court found abandonment where the defendant, after picking up the luggage at the claim area, produced a mismatched baggage claim check, told agents that his name was not on the luggage

that "a loss of standing to challenge a search cannot be brought about by illegal police conduct." *United States v. Labat*, 696 F.Supp. 1419, 1425 (D.Kan.1988).

Thus, we would have to determine if the search of the trunk was illegal or was a result of a voluntary consent. This we cannot do on the record before us.

Even if we determined the search of the trunk was unlawful, the "defendant must show a nexus between the allegedly unlawful police conduct and the abandonment of the property." *Id.* at 1426. See, e.g., *United States v. Tolbert*, 692 F.2d 1041 (6th Cir.1982), cert. denied, 464 U.S. 933, 104 S.Ct. 337, 78 L.Ed.2d 306 (1983) (While "an unconstitutional seizure or arrest which prompts a disclaimer of property vitiates that act," *id.* at 1045, the court found the defendant's disclaimer was not precipitated by improper conduct. *Id.* at 1048.); *United States v. Gilman*, 684 F.2d 616, 620 (9th Cir.1982) ("There must be a nexus between the allegedly unlawful police conduct and abandonment of property if the challenged evidence is to be suppressed."); *United States v. Beck*, 602 F.2d 726, 730 (5th Cir. 1979) (if there is a nexus between unlawful police conduct and the discovery of evidence, the court should suppress the evidence). See generally *Search and Seizure: What Constitutes Abandonment of Personal Property within Rule that Search and Seizure of Abandoned Property Is Not Unreasonable—Modern Cases*, 40 A.L.R.4th 381 (1985). Again, there is no finding on this crucial issue.

Therefore, we reverse and remand this interlocutory appeal for a rehearing on Mr. Marshall's motion to suppress on the limited issues of whether Mr. Marshall volun-

name tag, and allowed the agents to return the luggage to the claim area, thus giving the agents the impression that he had no interest in the luggage); *United States v. Veatch*, 674 F.2d 1217, 1220-21 (9th Cir.1981), cert. denied, 456 U.S. 946, 102 S.Ct. 2013, 72 L.Ed.2d 469 (1982) (court found abandonment where the defendant disclaimed ownership of a wallet found on the seat of the vehicle); *United States v. Colbert*, 474 F.2d 174, 177 (5th Cir.1973) (en banc) (court found abandonment when defendants disclaimed ownership of suitcases and began to walk away from them).

tarily consented to the search of the trunk or the suitcases, whether Mr Marshall abandoned any privacy interest in the suitcases and thus lacks standing to challenge their search, and finally, if the trial court finds there was an illegal search of the trunk or suitcases, whether there is a sufficient nexus between that illegal search and Mr Marshall's abandonment, if any, of his expectation of privacy in the suitcases

DAVIDSON and JACKSON, JJ,
concur



STATE of Utah, Plaintiff and Appellee,

v

Johnny Wade DRAWN, Defendant
and Appellant

No. 890253-CA.

Court of Appeals of Utah

May 2, 1990

Defendant was convicted in the Third District Court, Salt Lake County, David S Young, of aggravated robbery. Defendant appealed. The Court of Appeals, Davidson, J., held that (1) trial court did not abuse its discretion in admitting witness' in court identification testimony, (2) hearsay statements were properly admitted under unavailable witness exception, and (3) defendant's sentence was permissibly enhanced for use of firearm.

Affirmed

1 Criminal Law §339.9(3)

Trial court did not abuse its discretion in admitting salesperson's in court identification of shoe store robbery defendant, even though witness had previously failed to identify defendant at line up, while defendant's presence at counsel table may

have been suggestive, there was adequate independent basis for identification

2 Criminal Law §1169.5(2)

Any error attributed to alleged misidentification of defendant by witness at trial was cured by detailed jury instruction which properly apprised jury of inherent limitations of eyewitness identification

3 Criminal Law §419.1, 5)

Hearsay statements of witness are admissible at trial provided that State can show witness' unavailability and prove that statement bears adequate indicia of reliability. U.S.C.A. Const Amend 6, Const Art 1, § 12, Rules of Evid., Rule 804(a)(5)

4 Criminal Law §419(5)

State showed unavailability of witnesses, as required for witnesses' statements to be admissible under unavailable witness exception to hearsay rule. State subpoenaed each witness several times, attempted to make personal contact, and used informants and other police resources to locate them, all of which proved unsuccessful. U.S.C.A. Const Amend 6, Const Art 1, § 12, Rules of Evid., Rule 804(a)(5)

5 Criminal Law §419(5)

Statements of unavailable witnesses had sufficient indicia of reliability to warrant admission under unavailable witness exception to hearsay rule. Statements of witnesses were made against their penal interests, their statements were substantially similar, and other evidence corroborated portions of statements. U.S.C.A. Const Amend 6, Rules of Evid., Rules 804(a)(5), 804(b)(3)

6 Criminal Law §1208.6(4)

Aggravated robbery defendant's sentence was permissibly enhanced for use of firearm

James A. Valdez, Elizabeth Holbrook (argued), Salt Lake Legal Defender Association, Salt Lake City for defendant and appellant

R. Paul Van Dam, Atty. Gen., Charlene Barlow (argued), Asst. Atty. Gen., for plaintiff and appellee

Before DAVIDSON, BILLINGS and
ORME, JJ.

DAVIDSON, Judge

Defendant appeals his conviction of aggravated robbery. He argues that the trial court erred by failing to suppress a witness's in court identification of defendant, by admitting hearsay statements of unavailable witnesses, and by enhancing his sentence for the use of a firearm. We affirm.

On August 21, 1988, a man entered the Payless Shoe Store located in Magna, Utah, wearing pink and beige colored nylon stockings over his head and carrying a sawed off shotgun. Two salespersons were working at the time. The man ordered one salesperson to hand over all the money in the register and the other salesperson to take all the money out of the safe and place it in a corduroy bag. The salesperson working at the register testified that she was looking at the man's face "the whole time." The second salesperson only viewed the man briefly.

After the robbery, a woman driving through the mall parking lot observed a man wearing something pink on his head, running alongside the Payless Shoe Store attempting to shove something into a bag. The witness observed the man enter a small white station wagon driven by a black woman and watched the car exit the parking lot heading southbound on 5600 West and later turning west on 3500 South. She reported this information to the police after discovering that the shoe store had been robbed. She later identified the car after the police had detained the car and its occupants.

Several blocks from the robbery, a fourth witness observed a light skinned black man exit a white compact station wagon. Several minutes later, he observed a police officer pull the station wagon over and handcuff the vehicle's two remaining female occupants. After observing this, he drove down the road where he observed the same black man. The witness lost sight of the man for about fifteen or twenty minutes, but later observed the same man

wearing different clothing. The witness thereafter lost sight of the black man.

West Valley City Police Officer Kory Newbold responded to the Payless robbery. While driving to Payless he observed a possible suspect vehicle travelling in the opposite direction. The officer turned around, and pursued the vehicle. He momentarily lost sight of the vehicle but later found it on a side street and pulled it over. He questioned the two black female occupants, but released them because they did not match the reported description. Upon returning to the patrol car, the officer received updated information on the suspects and getaway vehicle. With this knowledge, he again pulled the vehicle over and this time arrested the occupants.

At the arrest scene, one witness identified the car as the getaway vehicle, another recognized one of the women suspects as having been in the shoe store earlier in the day. The bag of money and the shotgun used in the robbery were also found near the scene of arrest. At the police station, the two suspects were interviewed by Detective Ron Edwards of the West Valley City Police Department. Detective Edwards later testified that both women admitted that they waited in the car while defendant robbed the shoe store. Edwards also testified that both women told him that after the robbery they momentarily evaded police, let defendant out, and threw the money bag and gun out the window. Neither woman testified at trial. Instead, their testimony was admitted through Detective Edwards under the unavailable witness exception to the hearsay rule. See Utah R. Evid. 804.

Defendant was arrested the day after the robbery and was questioned by Detective Edwards. Detective Edwards later testified that defendant confessed to the robbery after asking defendant's parole officer and another police officer to leave the interrogation room. Neither the testimony of the two women nor defendant's testimony was recorded.

Two lineups were held several weeks after the robbery. None of the witnesses brought to the lineup could identify defen