

1993

Utah v. Rock : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Todd J. Godfrey; Assistant City Prosecutor; Attorney for Plaintiff/Appellee.

Mitchel Zagar; Attorney for Defendant/Appellant.

Recommended Citation

Brief of Appellee, *Utah v. Rock*, No. 930458 (Utah Court of Appeals, 1993).
https://digitalcommons.law.byu.edu/byu_ca1/5380

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

930458

Mary T. Noonan
Clerk of the Court

)
)
)
)
)
)
)

Defendant .

Mitchel Zagar #3968
Attorney for Defendant/Appellant
3587 West 4700 South
Salt Lake City, Utah 84118
Tele: (801) 964-6100

TABLE OF CONTENTS

<u>TABLE OF AUTHORITIES</u>	ii
<u>JURISDICTIONAL STATEMENT</u>	1
<u>STATEMENT OF THE ISSUES AND STANDARD OF REVIEW</u>	1
<u>STATUTES AND CONSTITUTIONAL PROVISIONS</u>	2
<u>STATEMENT OF THE CASE AND NATURE OF PROCEEDINGS</u>	2
<u>STATEMENT OF FACTS</u>	3
<u>SUMMARY OF ARGUMENT</u>	4
<u>ARGUMENT</u>	4
I. THE DETENTION OF DEFENDANT WAS NOT CONSTITUTIONALLY UNREASONABLE.	4
<u>SUMMARY</u>	10
<u>CONCLUSION</u>	10

TABLE OF AUTHORITIES

CASES

<u>Arizona v. Hicks</u> , 480 U.S. 321, 94 L.Ed.2d 347, 107 S. Ct. 1149 (1988).	9
<u>Hayes v. Florida</u> , 470 U.S. 811, 105 S. Ct. 1643, 84 L.Ed.2d 705 (1985).	6, 8
<u>State v. Cox</u> , 787 P.2d 4 (Utah App. 1990).	9
<u>State v. Dudley</u> , 206 Utah Adv. Rep. 13, __ P.2d __ (Utah App. 1993).	10
<u>State v. Featherstone</u> , 781 P.2d 424 (Utah 1989).	9
<u>State v. Godina-Luna</u> , 826 P.2d 652 (Utah App. 1992).	5
<u>State v. Grovier</u> , 808 P.2d 133 (Utah App. 1991).	5, 9, 10
<u>State v. Marshall</u> , 791 P.2d 880 (Utah App. 1990).	5
<u>State v. Munsen</u> , 821 P.2d 13 (Utah App. 1991).	1
<u>State v. Taylor</u> , 818 P.2d 561, 565 (Utah App. 1991).	2
<u>Terry v. Ohio</u> , 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968).	4
<u>United States v. Gonzalez</u> , 763 F.2d 1127 (10th Cir. 1985).	6, 8
<u>United States v. Recalde</u> , 761 F.2d 1448 (10th Cir. 1985).	6, 8
<u>United States v. Sharpe</u> , 470 U.S. 675, 105 S. Ct. 1568, 84 L.Ed.2d 605 (1985).	5, 6
<u>United States v. Streifel</u> , 781 F.2d 953 (1st Cir. 1986).	6-8

OTHER AUTHORITIES

United States Constitution, Amendment IV.	2
Utah Judicial Code §78-2a-3(2)(f) (1992, 1993).	1
Utah Rule of Criminal Procedure 26(2)(a) (1989).	1

SALT LAKE CITY CORP.,
Plaintiff,

vs.

HEIDI ROCK,
Defendant.

)
)
)
)
) Case No. 930458-CA
) Priority No.2
)
)

JURISDICTIONAL STATEMENT

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

The Court will review Appellant's claim of error on the Trial Court's denial of her motion to suppress under a correction of error standard. State v. Munsen, 821 P.2d 13 (Utah App. 1991),

State v. Taylor, 818 P.2d 561, 565 (Utah App. 1991).

STATUTES AND CONSTITUTIONAL PROVISIONS

The City relies upon the following statutes and Constitutional Provisions:

I. 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.

STATEMENT OF THE CASE AND NATURE OF PROCEEDINGS

On July 19, 1992, Appellant Heidi Rock was Cited for the Offense of driving under the influence of alcohol and other infractions. She was later formally charged by Salt Lake City in an information in the Third Circuit Court with the same violations. On November 27, 1992, Rock filed a motion to suppress evidence, with supporting memorandum, in the Circuit Court.

On March 18, 1993, an evidentiary hearing was held in front of the Honorable Judge Philip Palmer on Rock's motion to suppress. On request of the Court, the Plaintiff City of Salt Lake filed a written response to the motion to suppress on March 29, 1993. On April 6, 1993, Rock filed an answer to the City's response.

On April 12, 1993, Judge Palmer denied defendant's motion to

suppress. On April 16, 1993, Judge Palmer reaffirmed the Court's decision on the motion to suppress.

On June 17, 1993, Heidi Rock entered a plea of guilty to the charge of driving under the influence, preserving the right to appeal the Court's decision on the motion to suppress.

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 and making a wide right turn. Officer Hurst was off-duty, in uniform, at the time of the stop. R. at p.63. Officer Hurst noted an odor of alcohol when he contacted Ms. Rock. R. at p. 64.

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. R. at p. 71.

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. R at p. 64. Officer Hurst took this action because Department Policy dictated that if an on-duty officer were available, the on-duty officer should be called to save overtime expense. R. at pp. 64, 72. Within five to ten minutes of the call from Officer Hurst, Officer Rusty Isaakson of

the SLCPD responded. R. at p. 65. 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. R. at pp. 65, 66.

Following Defendant's performance of the tests, Officer Isaakson arrested Defendant for DUI.

SUMMARY OF ARGUMENT

The detention of Heidi Rock was not constitutionally unreasonable. The initial officer acted reasonably in calling for an on-duty officer, and did not act unreasonably in waiting for the on-duty officer to finish the field tests. The five to ten minute wait is clearly not unreasonable, and the reasons for the wait are legitimate and valid and did not violate defendant's constitutional rights.

ARGUMENT

I. THE DETENTION OF DEFENDANT WAS NOT CONSTITUTIONALLY UNREASONABLE.

A police officer may be justified in making an investigative stop based on less than probable cause. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968). The determination of when an investigative stop or detention becomes constitutionally invalid

because of excessive length focuses 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. 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.

It is clear from the Court's discussion in Sharpe, that the determination focused not only on the length of the detention, but also on the reasonableness of the officer's actions. The Court was 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. Other cases have confirmed this analysis.¹

The conduct of the Officer in Ms. Rock's case, clearly meets a standard of constitutional reasonableness, and was "diligent pursuit of a means of investigation likely to confirm or dispel suspicions quickly." Sharpe at 686. Ms. Rock has argued that the Officer did not act diligently in pursuit of the investigation when he discontinued field tests awaiting the arrival of an on-duty officer. Such an argument is clearly erroneous in light of Sharpe.

In Sharpe, a state patrolman detained an individual while waiting for another law enforcement officer who was better situated to conduct the investigation. 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. The Court apparently did not consider this fatal to the actions of the officers.²

¹ Hayes v. Florida, 470 U.S. 811, 105 S. Ct. 1643, 84 L.Ed.2d 705 (1985), United States v. Gonzalez, 763 F.2d 1127 (10th Cir. 1985), United States v. Recalde, 761 F.2d 1448 (10th Cir. 1985), United States v. Streifel, 781 F.2d 953 (1st Cir. 1986).

Hayes, Recalde, and Gonzalez are distinguishable from Sharpe and Ms. Rock's situation. In Hayes, Recalde and Gonzalez, the defendant's were transported to the police station for further investigation without probable cause for their arrest. All three cases specifically note the distinction from Sharpe, where the investigation occurred in a much less coercive circumstance. Nevertheless, the four cases cited clearly indicate that the analysis focuses not only on the length, but on the reasonableness of the conduct.

² Further error in Defendant's argument is shown by hypothesizing a situation envisioned by Ms. Rock. The initial Officer could have continued and conducted all the field tests, and then communicated the results of those tests to the second officer, who then would have transported defendant to the police department

Ms. Rock has also argued that the Officer's stated reasons for calling an on-duty Officer were inconsistent with his actions because he stayed on the scene an hour more to complete the impound of Ms. Rock's car. This is at odds with the record where the Officer clearly stated that processing the DUI completely would take as much as three hours. R. at p. 66, 67. The Officer's actions did result in a significant reduction in overtime pay.

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.

In United States v. Streifel, *infra*, p. 6, note 1, the 1st Circuit was faced with a factual situation somewhat like the present case. In Streifel, agents from the DEA and the Maine State Police set up a search operation based on information from an informant. The Officers waited at a home where they believed the defendants would be going. When the defendants arrived, the State Police blocked their cars in and immediately separated the two

for a breath test. If a test were conducted and the result were under the legal limit, the second Officer would clearly be at a considerable disadvantage in determining whether or not the field tests warranted the issuance of a citation for driving while impaired by alcohol. It is clearly the better policy to have the Officer who administered the field tests conduct the breath test, or at least to have an officer who observed the field tests conduct the breath test, particularly where a ten minute wait is all that is sacrificed.

It is also interesting to note that if the initial officer had conducted the entire investigation, the Defendant would have waited for some period of time for another officer or a tow truck driver to respond to complete the impound of the car.

defendants. They were asked by uniformed officers why they were there and for identification. Additionally, they were told they could not leave until the DEA agent in charge of the operation arrived. The DEA agent had been on the scene, but left shortly before the defendant's arrival. He was radioed on their arrival and returned to the scene about five minutes later. Once on the scene, he proceeded with the investigation.

Defendants challenged the detention, saying that it was unreasonable that they would be required to wait until the DEA agents returned. The Court, in cursory fashion, rejected this claim by the defendants, noting:

[F]inally, that Streifel and Quinn were told that they could not leave until Agent Steadman, the head of the investigation, returned, did not render the stop so unreasonable as to elevate it into a custodial situation requiring *Miranda* warnings.

Streifel at 959.

Clearly, in Streifel, the State Police had the ability to carry out the investigation in the same manner and collect evidence just as the DEA agent did. In fact, the State Police conducted a cursory search of one the vehicles, a search that was later repeated by the DEA agent because he had concerns about the legitimacy of the search conducted by the State Police. Id. at 956. This situation is analogous to the case at hand. Clearly, Officer Hurst's action were no more intrusive and were supported by equally valid public policy concerns.

Other Federal case law on the issue of unlawful detention seems to note a distinction between cases challenging the length of

the detention as opposed to cases that address the reasonableness of the detention. See cases cited *supra* p. 6, note 1.

In those case addressing the reasonableness of the detention, the Court notes a common thread, specifically the removal of a defendant from his home or another place to a police station, or an equally coercive situation, for further investigation. See Hayes at 815, 105 S. Ct. at 1646, Gonzalez at 1132, Recalde at 1456. The distinction drawn in these cases from Sharpe appears to be that the roadside situation in Sharpe did not share the same coercive aspects.³ Streifel appears to be consistent with this analysis.

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

³ Another possible distinction lies in the apparent lack of probable cause in Hayes and the similar cases cited. In none of those situations did the police have probable cause for a search or for an arrest.

In the case now before this court, probable cause for an arrest arguably did exist. Although the testimony of the Officer at the suppression hearing was somewhat ambiguous, his final conclusion was that if she had refused to perform any more tests, he would have placed her under arrest.

The standard to determine probable cause is whether there are sufficient articulable facts to warrant a person of reasonable caution in believing a crime has been or is or is about to be committed. Arizona v. Hicks, 480 U.S. 321, 94 L.Ed.2d 347, 107 S. Ct. 1149 (1988). The officer's observations of the driving pattern, the lack of headlights, the defendant's apparent difficulty communicating, the smell of alcohol, and the performance on the field tests arguably would seem to satisfy the standards of probable cause.

If, in fact, the officer did have probable cause to arrest the defendant, any detention would clearly be reasonable as another officer would have needed to respond to secure defendant's car. Therefore, the detention would be harmless. State v. Cox, 787 P.2d 4, 7 (Utah App. 1990), State v. Featherstone, 781 P.2d 424, 431 (Utah 1989).

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 the Officer in the present case, the reasons are subject to the same reasonableness standard. Grovier distinctly noted that no major interruptions occurred during the search. Grovier at 136. Under the same reasonableness standard, it is difficult to imagine that five to ten minutes is a major interruption that would invalidate a proper investigation.

SUMMARY

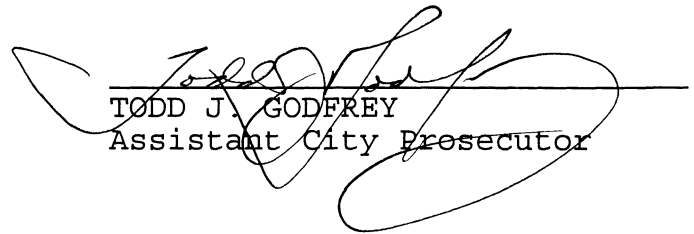
Under either the United States Constitution or the Constitution of the State of Utah⁴, the Officer's actions were reasonable and justified and the detention of the Defendant Heidi Rock was proper.

⁴ As Defendant has presented no separate analysis under the State Constitution, and no reason is given as to why analysis would be different, the court should review the case under Federal Constitutional guidelines. State v. Dudley, 206 Utah Adv. Rep. 13, __ P.2d __ (Utah App. 1993).

CONCLUSION

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

Dated this 1st day of November, 1993.


TODD J. GODFREY
Assistant City Prosecutor

MAILING CERTIFICATE

I hereby certify that I caused to be mailed four true and correct copy of the above brief of appellee to defense counsel Mitch Zagar 3587 West 4700 South Salt Lake City, Utah 84118, and eight copies delivered to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102.

this 1st day of November, 1993.

Emma J. Stone

TABLE OF ADDENDUMS

Motion to Suppress Dated November 27, 1992.....	1
Motion to Suppress Dated April 6, 1993.....	3
Decision on Motion to Suppress.....	8
Utah Judicial Code §78-2a-3.....	10
Utah Rules of Criminal Procedure 26(2)(a).....	11

IKL 12-13-76
9:30 AM
0:30

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

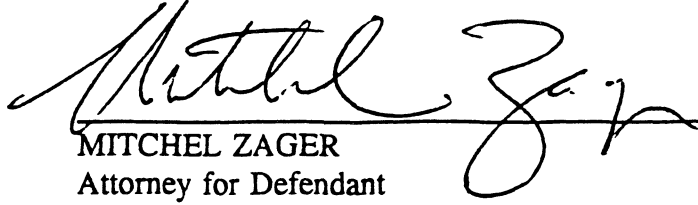
STATE OF UTAH,		MOTION TO SUPPRESS EVIDENCE
		IN DUI CHARGE AND MOTION TO
		DISMISS OPEN CONTAINER CHARGE
Plaintiff,		
v.		
HEIDI ROCK,		Case No. 925020755 TC
Defendant.		

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.

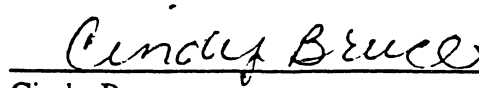
Based upon the Motion, Points and Authorities, and surrounding circumstances, and in the interest of the furtherance of justice, defendant's motion should be granted.

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 prepaid, 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,

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

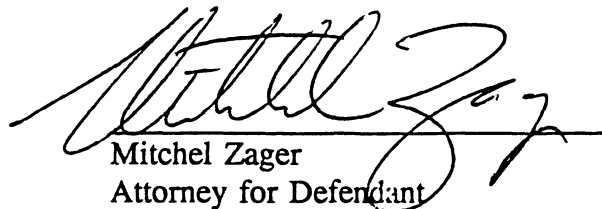
The unreasonable, unjustified and unnecessary detention of Heidi Rock violates her fundamental freedoms as guaranteed under the United States and Utah Constitutions as stated. The reason given that Officer Hurst was off-duty is not a legitimate reason, nor has it been recognized as such in any case cited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



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	:	

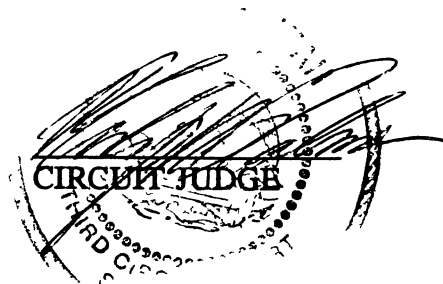
The time for further responsive memorandum in the above entitled case having expired, the court now renders its decision on defendant's motion to suppress and dismiss.

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.



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


_____.

a successor is appointed and qualified The presiding judge of the Court of Appeals shall receive as additional compensation \$1,000 per annum or fraction thereof for the period served

(2) The Court of Appeals shall sit and render judgment in panels of three judges Assignment to panels shall be by random rotation of all judges of the Court of Appeals The Court of Appeals by rule shall provide for the selection of a chair for each panel The Court of Appeals may not sit en banc

(3) The judges of the Court of Appeals shall elect a presiding judge from among the members of the court by majority vote of all judges The term of office of the presiding judge is two years and until a successor is elected A presiding judge of the Court of Appeals may serve in that office no more than two successive terms The Court of Appeals may by rule provide for an acting presiding judge to serve in the absence or incapacity of the presiding judge

(4) The presiding judge may be removed from the office of presiding judge by majority vote of all judges of the Court of Appeals In addition to the duties of a judge of the Court of Appeals, the presiding judge shall

- (a) administer the rotation and scheduling of panels,
- (b) act as liaison with the Supreme Court,
- (c) call and preside over the meetings of the Court of Appeals, and
- (d) carry out duties prescribed by the Supreme Court and the Judicial Council

(5) Filing fees for the Court of Appeals are the same as for the Supreme Court 1988

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,

(h) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons except in cases involving a first degree or capital felony,

(i) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity,

(j) appeals from the Utah Military Court, and

(k) cases transferred to the Court of Appeals from the Supreme Court

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction

(4) The Court of Appeals shall comply with the requirements of Title 63, Chapter 46b, in its review of agency adjudicative proceedings 1992

78-2a-4. Review of actions by Supreme Court.

Review of the judgments, orders, and decrees of the Court of Appeals shall be by petition for writ of certiorari to the Supreme Court 1986

78-2a-5. Location of Court of Appeals.

The Court of Appeals has its principal location in Salt Lake City The Court of Appeals may perform any of its functions in any location within the state 1986

CHAPTER 3

DISTRICT COURTS

Section

78-3-1 to 78-3-2	Repealed
78-3-3	Term of judges — Vacancy
78-3-4	Jurisdiction — Transfer of cases to circuit court — Appeals — Jurisdiction when circuit and district court merged
78-3-5	Repealed
78-3-6	Terms — Minimum of once quarterly
78-3-7 to 78-3-11	Repealed
78-3-11 5	State District Court Administrative System
78-3-12	Repealed
78-3-12 5	Costs of system
78-3-13	Repealed
78-3-13 4	Counties joining court system — Procedure — Facilities — Salaries
78-3-13 5, 78-3-14	Repealed
78-3-14 5	Allocation of district court fees and fines
78-3-15 to 78-3-17	Repealed
78-3-17 5	Application of savings accruing to counties
78-3-18	Judicial Administration Act — Short title
78-3-19	Purpose of act
78-3-20	Definitions
78-3-21	Judicial Council — Creation — Members — Terms and election — Responsibilities — Reports
78-3-21 5	Data bases for judicial boards
78-3-22	Presiding officer — Compensation — Duties
78-3-23	Administrator of the courts — Appointment — Qualifications — Salary
78-3-24	Court administrator — Powers, duties, and responsibilities

mit the defendant or may continue or alter bail or recognizance

Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment, or to show any legal cause why sentence should not be imposed. The prosecuting attorney shall also be given an opportunity to present any information material to the imposition of sentence.

(b) On the same grounds that a defendant may be tried in his absence, he may likewise be sentenced in his absence. If a defendant fails to appear for sentence, a warrant for his arrest may be issued by the court.

(c) Upon a verdict or plea of guilty or plea of no contest, the court shall impose sentence and shall enter a judgment of conviction which shall include the plea or the verdict, if any, and the sentence. Following imposition of sentence, the court shall advise the defendant of his right to appeal and the time within which any appeal shall be filed.

(d) When a jail or prison sentence is imposed, the court shall issue its commitment setting forth the sentence. The officer delivering the defendant to the jail or prison shall deliver a true copy of the commitment to the jail or prison and shall make his return on the commitment and file it with the court.

(e) The court may correct an illegal sentence, or a sentence imposed in an illegal manner, at any time.

Rule 23. Arrest of judgment.

At any time prior to the imposition of sentence, the court upon its own initiative may, or upon motion of a defendant shall, arrest judgment if the facts proved or admitted do not constitute a public offense, or the defendant is mentally ill, or there is other good cause for the arrest of judgment. Upon arresting judgment the court may, unless a judgment of acquittal of the offense charged is entered or jeopardy has attached, order a commitment until the defendant is charged anew or retried, or may enter any other order as may be just and proper under the circumstances.

Rule 24. Motion for new trial.

(a) The court may, upon motion of a party or upon its own initiative, grant a new trial in the interest of justice if there is any error or impropriety which had a substantial adverse effect upon the rights of a party.

(b) A motion for a new trial shall be made in writing and upon notice. The motion shall be accompanied by affidavits or evidence of the essential facts in support of the motion. If additional time is required to procure affidavits or evidence the court may postpone the hearing on the motion for such time as it deems reasonable.

(c) A motion for a new trial shall be made within 10 days after imposition of sentence, or within such further time as the court may fix during the ten-day period.

(d) If a new trial is granted, the party shall be in the same position as if no trial had been held and the former verdict shall not be used or mentioned either in evidence or in argument.

Rule 25. Dismissal without trial.

(a) In its discretion, for substantial cause and in furtherance of justice, the court may, either on its own initiative or upon application of either party, order an information or indictment dismissed.

(b) The court shall dismiss the information or indictment when:

(1) There is unreasonable or unconstitutional delay in bringing defendant to trial,

(2) The allegations of the information or indictment, together with any bill of particulars furnished in support thereof, do not constitute the offense intended to be charged in the pleading so filed,

(3) It appears that there was a substantial and prejudicial defect in the impaneling or in the proceedings relating to the grand jury,

(4) The court is without jurisdiction, or

(5) The prosecution is barred by the statute of limitations.

(c) The reasons for any such dismissal shall be set forth in an order and entered in the minutes.

(d) If the dismissal is based upon the grounds that there was unreasonable delay, or the court is without jurisdiction, or the offense was not properly alleged in the information or indictment, or there was a defect in the impaneling or of the proceedings relating to the grand jury, further prosecution for the offense shall not be barred and the court may make such orders with respect to the custody of the defendant pending the filing of new charges as the interest of justice may require. Otherwise the defendant shall be discharged and bail exonerated.

An order of dismissal based upon unconstitutional delay in bringing the defendant to trial or based upon the statute of limitations, shall be a bar to any other prosecution for the offense charged.

(e) In misdemeanor cases, upon motion of the prosecutor, the court may dismiss the case if it is compromised by the defendant and the injured party. The injured party shall first acknowledge the compromise before the court or in writing. The reasons for the order shall be set forth therein and entered in the minutes. The order shall be a bar to another prosecution for the same offense, provided however, that dismissal by compromise shall not be granted when the misdemeanor is committed by or upon a peace officer while in the performance of his duties, or riotously, or with an intent to commit a felony.

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,