

1993

# Utah v. Robert Newton : Brief of Appellant

Utah Court of Appeals

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Vincent Miester; Attorney for Appellee.

Robert Newton; Appellant.

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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO. 930723-CA

IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,

Plaintiff/Appellee,

Priority No. 1

v.

ROBERT NEWTON,

Case No. 930723-CA

Defendant/Appellant.

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BRIEF OF APPELLANT

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Appeal from Order of  
the Third Circuit Court, Sandy Department  
the Honorable Roger A. Livingston  
presiding,  
denying Defendant's Motion for Suppression  
and finding him guilty of Interference  
Order dated February 8, 1994  
Notice of Appeal filed November 4, 1993.

---

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**FILED**  
Utah Court of Appeals

MAR 17 1994

  
Mary T. Noonan  
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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Pursuant to Rule 24 of the Utah Rules of Appellate Procedure, the appellant, hereby submits the following brief.

#### STATEMENT OF JURISDICTION

Jurisdiction of this matter is appropriate in this Court pursuant to Utah Code Annotated 76-2a-2, Rules 3 and 4 of the Rules of Appellate Procedure and the Utah Constitution and is an appeal as of right.

#### ISSUE PRESENTED

1. The Court erred in denying the Motion to Suppress since Utah Code does not have a requirement for the height of muffler pipes or that a vehicle have more than two tail lights and therefore the Officer had no reason to stop the Appellant in the first place.

#### Standard of Review

This is a constitutional issue and the Court must give it "full review" with no deference to the lower Court's ruling. (State v. Taylor, 818 P.2d 561 (Utah 1991)).

#### DETERMINATIVE PROVISIONS, STATUTES AND RULES

##### CONSTITUTIONAL PROVISIONS

"No person shall be deprived of life, liberty or property without due process of law."  
Constitution of Utah, Article 1 Sec. 7

"The right of the people secure in their persons 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."  
Constitution of Utah, Article I, Section 14

"The right of the people 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, particularly describing the place to be searched, and the persons or things to be seized."  
Constitution of the United States, Fourth Amendment

"No person shall be \* \* \* deprived of life, liberty, or property, without due process of law; \* \* \*"  
Constitution of the United States, Fifth Amendment

### STATEMENT OF THE CASE

#### NATURE OF THE CASE

This is an appeal from a final criminal judgement of the Third Circuit Court, Sandy Department, the Honorable Roger A. Livingston presiding.

#### COURSE OF PROCEEDINGS AND DISPOSITION IN THE LOWER COURTS

Appellant (hereinafter "Newton") was charged with driving on a suspended driver's license, faulty equipment, failure to obey a lawful order of a police officer and interference with a police officer.

Newton, through his then Attorney, Mark Besendorfer, filed a Motion to Suppress Evidence which was illegally obtained. The Third Circuit Court, the Honorable Roger A. Livingston presiding denied the motion on October 4, 1993. The parties then entered into a plea bargain, dismissing all of the charges except the charge of Interference with a police officer, and Newton entered a conditional guilty plea on October 5, 1993, specifically reserving the right to appeal the Court's denial of his motion for Suppression. Newton filed his Notice of Appeal on November 4, 1993.



This Court, upon receiving the record from the Circuit Court determined that no signed judgment existed and entered a Sua Sponte Motion for Dismissal for lack of jurisdiction. The Circuit Court then amended the record to include a signed Criminal Judgment, which judgment was signed on February 8, 1994 at which time this Court determined that the appeal should not be dismissed and set it for briefing.

#### FACTS

1. On May 5, 1993, Appellant was traveling on a private lane when a Salt Lake County Deputy turned on her lights behind the vehicle in which the Appellant traveling, allegedly for having his "tail pipe too low, and one of his eight tail lights broken." (This allegation was made in the police report, but not at the time of the detention).

2. Appellant stopped and asked what the problem was. When she would not tell him, he continued on to his home, which was approximately a half a block away.

3. The Officer followed him, jumped out of her car and pointed her gun at him, demanding that he stop. Appellant then stopped and the officer attempted to handcuff him, which he resisted and walked into the house.

4. After some negotiation between Appellant, his attorney and the Officer she agreed to leave the scene but requested that he contact the Riverton City Court due a Warrant she said was on file there.

5. On May 24, 1993, Appellant was arrested by Sandy City Police Officers alleging that they had a "Bench Warrant" for "Resisting Arrest" from the May 5, 1993 incident.

6. The charges on the Riverton City Warrant were dismissed for lack of jurisdiction to issue the warrant.

7. Appellant was charged in Sandy Circuit Court, by Information alleging "Unsafe Equipment, Driving on Suspension, Interfering with a police officer, and Failure to Obey a Lawful Order of a Police Officer."

8. Appellant filed an Motion for Suppression of Illegally Obtained Evidence, which was denied by the Court.

9. Appellant then entered a conditional plea to the charge of Interfering with a Police Officer and all other charges were dismissed.

#### SUMMARY OF ARGUMENT

There is no law requiring that a muffler tail pipe be a specific height from the ground, nor requiring that a car possess more than two working tail lights. Therefore the observations of the officer did not give rise to a level of suspicion of criminal wrong doing sufficient to justify the stop and any evidence obtained after the stop should have been suppressed.

## ARGUMENT

**The Court erred in denying the Motion to Suppress since Utah Code does not have a requirement for the height of muffler pipes or that a vehicle have more than two tail lights and therefore the Officer had no reason to stop the Appellant in the first place.**

"An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to governmental regulation \* \* \* were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed. As *Terry v. Ohio*, [cites omitted] supra recognized, people are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles...."

Delaware v. Prouse 440 U.S. 648, 662-663 (1978)

Utah Code Annotated 77-7-15 allows an officer to stop an individual only when the officer has "reasonable suspicion" that the person has committed, is committing or is attempting to commit a crime.

This Court has required a higher standard for justifying the detention of a citizen in pursuit of his business. In the case of State v. Baird, 763 P.2d 1214, 1216 (Utah 1988) the Court held;

"There are three levels of police-citizen encounters requiring different degrees of justification to be constitutionally permissible. The Utah Supreme Court has listed these as follows:

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

offense has been committed or being committed.  
State v. Dietman, 739 P.2d 616, 617-18 (Utah 1987)  
(quoting United States v. Merritt, 736 F.2d 223, 230 (5th  
Cir. 1984) (citation omitted)>"

In this case the Officer claims that she stopped Newton because one of his eight tail lights had a broken light and his muffler pipe was hanging too low. However, the Officer has made no claim of violation of the law, sufficient to justify the initial stop.

Utah Code Annotated 41-6-120 requires that a vehicle be equipped with at least two red tail lights on the rear of the car. Newton's vehicle had eight red tail lights on the rear. One was broken which still left more working tail lights than required by law and was not in violation of the law.

Utah Code Annotated 41-6-147 requires that a vehicle be equipped with a muffler which prohibits excessive noise and smoke. There is no requirement that a muffler pipe be a certain height from the ground. The officer did not claim she heard any excessive noise or saw any excessive smoke.

Utah Code Annotated 41-6-117 and Utah Code Annotated 41-6-155 require that a vehicle which has "faulty equipment" not be driven on the road and "faulty equipment," is defined as equipment which would tend to endanger life or property. The officer has claimed no such danger was in existence due to equipment on the vehicle which Newton was driving, at the time of the stop.

The Officer cannot point to any articulable suspicion of criminal wrong doing which led to her initial stop, and therefore the arrest or detention was in fact, or should have been, a level

one encounter until the officer pulled her weapon and threatened Newton's life if he did not stop. At that time she still had no reasonable suspicion of criminal wrong doing on the part of Newton.

The officer did not act under articulable suspicion when she stopped Newton, instead she detained him for some obscure, non criminal action and used the stop itself and the subsequent events to build a case against Newton.

This Court defined the pretext doctrine in State v. Lopez, 181 Utah Adv.Rep. 41, 42 (citing e.g., Grovier, 808 P.2d 135; State v. Marshall, 791 P.2d 880 (Utah App.) cert denied, 800 P.2d 1105 (Utah 1990); State v. Baird, 763 P.2d at 1216-17; State v. Sierra, 754 P.2d at 977-80; United States v. Guzman, 864 F.2d 1512, (10th Cir. 1988); United States v. Smith, 799 F.2d 704 (11th Cir. 1986), as follows:

"...In Utah, the pretext doctrine applies in cases where an ... the officer has deviated from the normal course of action expected of a reasonable officer...."

Furthermore in Lopez, the Court, commenting on what constitutes pretext, said:

...."The fundamental rule is that a trial court may look to all facts and circumstances surrounding the ....stop to determine if a reasonable officer would have made the stop absent the illegal motivation. (citing e.g. Arroyo, 796 P.2d at 688; State v. Sierra, 754 P.2d at 978.)....

... the relevant legal inquiry is whether a reasonable officer would have stopped [the defendant] absent unconstitutional motivation..."

In this case, a reasonable officer would have (1) not stopped Newton, since no crime was committed; or (2) explained why she stopped him if she could have reasonably explained the reason. A

reasonable officer would not merely make random stops and expect unconditional co-operation.

The Defendant did not voluntarily submit to the police intrusion in his life. He, instead exercised his right to walk (or in this case, travel and then walk) away from the approach of an officer asking him a question, which he was not required to answer, pursuant to Baird.

In the case of State v. Arroyo, 796 P.2d 684 the Utah Court said:

"....When the prosecution attempts to prove voluntary consent after an illegal police action (e.g., unlawful arrest or stop), the prosecution has a much heavier burden to satisfy than .... proving consent to search which does not follow police misconduct ... "  
(citations omitted)

In this case, the police misconduct is clear, an illegal detention, without articulable suspicion that illegal activity was being perpetrated by Newton, and the evidence should have been suppressed.

#### CONCLUSION

A seizure which takes place without a warrant, is ".... unreasonable per se unless it falls within a recognized exception to the warrant requirement of the fourth amendment." State v. Bartley, 784 P.2d 1231, 1235 (Utah App. 1989); see also Katz v. United States, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967). Exceptions to the warrant requirements are "few" "specifically established." and "well delineated." Katz (citation omitted). For example, the plain view exception allows objects in plain view to be seized without a warrant. See Harris v. United States, 390 U.S.

234, 236, 88 S.Ct. 992, 993 (1968)(per curium); see also Bartley.

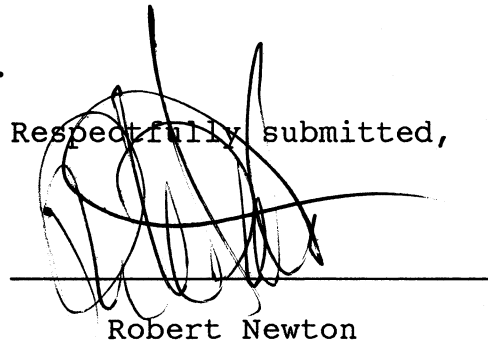
Furthermore, the Utah Court of Appeals, in State v. Larocco, 794 P.2d 460, 470 (Utah 1990) and State v. Sims, 808 P.2d 141 (Utah App. 1991) stated that the Utah Constitution Article I, Section 14, is more protective than the Fourth Amendment and requires a "showing of both probable cause and exigent circumstances [be] present ..." There are no exigent circumstances in this case. There is no probable cause.

There was no "articulable suspicion" of criminal wrong doing and Newton was entitled to all of the protections guaranteed in the Constitutions of Utah and the United States.

WHEREFORE, by reason of the law, defendant moves this Court to reverse his conviction.

Dated this 16 day of March, 1994.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Robert Newton', is written over a horizontal line. The signature is stylized and somewhat messy, with many loops and flourishes.

Robert Newton

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing BRIEF OF THE APPELLANT was served upon Plaintiff's attorney by placing same in the U.S. Mail, first class postage prepaid, addressed to him as follows:

Vincent Miester, Esq.  
2001 South State Street Rm. S3800  
Salt Lake City, Utah

on the 6 day of March, 1994,

A handwritten signature in black ink, appearing to read "Vincent Miester", is written over a horizontal line. The signature is stylized with loops and a long vertical stroke at the end.



ADDENDUM

Criminal Judgment dated February 8, 1994

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

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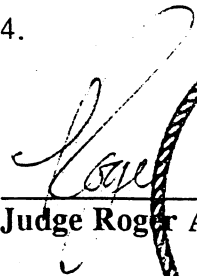
STATE OF UTAH,	)	
	)	
Plaintiff,	)	CRIMINAL JUDGMENT
	)	
vs.	)	
	)	
ROBERT NEWTON,	)	Case No. 935001512 TC
	)	
Defendant.	)	

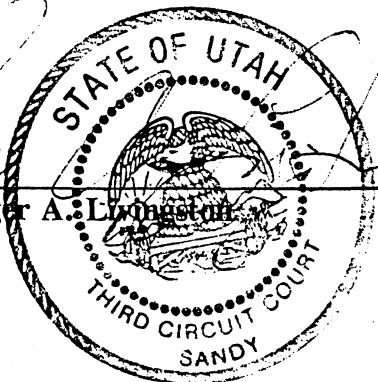
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The above-entitled case came on for sentencing before the Honorable Judge Roger A. Livingston on the 5th day of October, 1993. The defendant appeared in person with Mark Besendorfer, counsel and the plaintiff was represented by Vince Meister, deputy Salt Lake County Attorney.

The defendant is sentenced to 90 days jail, 90 days jail suspended upon 1 year good behavior probation to include no further violations, completion of counseling, and payment of \$750.00 fine. The amount of \$350.00 to be suspended upon proof of completion of counseling and 80 hours of community service to be completed in lieu of \$300 of fine.

DATED this 8th day of February, 1994.

  
\_\_\_\_\_  
Judge Roger A. Livingston

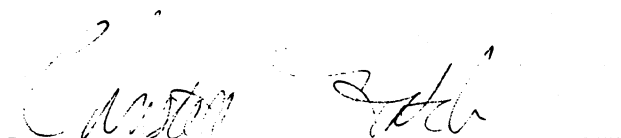


The foregoing criminal judgment was mailed to:

Mark Besendorfer  
5280 S. 1100 W., #D100  
Murray, Utah 84107

Salt Lake County Attorney  
2001 S. State, Suite #S3700  
Salt Lake City, Utah 84190-1200

Dated this 8th day of February, 1994.

  
\_\_\_\_\_  
Court Clerk