

2005

Utah v. Ernesto Alvarez : Brief of Respondent

Utah Court of Appeals

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Case No. 20050468-SC

IN THE
UTAH SUPREME COURT

STATE OF UTAH,
Plaintiff/Respondent,

vs.

ERNESTO ALVEREZ,
Defendant/Petitioner.

Brief of Respondent

On Writ of Certiorari to the Utah Court of Appeals

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IN THE
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STATE OF UTAH,
Plaintiff/Respondent,

vs.

ERNESTO ALVEREZ,
Defendant/Petitioner.

Brief of Respondent

STATEMENT OF JURISDICTION

This case is before the Court on a writ of certiorari to the Utah Court of Appeals from its decision in *State v. Alvarez*, 2005 UT App 145, 111 P.3d 808. The Court has jurisdiction under Utah Code Ann. § 78-2-2(5) (West 2004).

STATEMENT OF THE ISSUES

1. Did the officers violate the Fourth Amendment when they approached defendant in the parking lot and asked him some questions?
2. Did the level of suspicion rise to probable cause when defendant attempted to swallow something inside his mouth in response to the officers' request that he open his mouth to show that he was not concealing drugs?
3. Was it reasonable for the officers to place defendant in a wristlock and bend him over to prevent him from swallowing the drugs?

Standard of Review. On certiorari, the Supreme Court reviews the decision of the court of appeals for correctness, which “turns on whether that court accurately reviewed the trial court’s decision under the appropriate standard of review.” *State v. Visser*, 2000 UT 88, ¶ 9, 22 P.3d 1242.

The factual findings underlying a trial court’s decision to grant or deny a motion to suppress evidence are reviewed for clear error. *State v. Krukowski*, 2004 UT 94, ¶ 11, 100 P.3d 1222. The trial court’s legal conclusions are reviewed non-deferentially for correctness, including its application of the legal standard to the facts. *State v. Brake*, 2004 UT 95, ¶ 11, 103 P.3d 699.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

U.S. Const., amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Summary of Proceedings

Defendant was charged with two counts of unlawful possession of a controlled substance with intent to distribute, second degree felonies, in violation of Utah Code Ann. § 58-37-8(1)(a)(iii) (Supp. 2003). *Alvarez*, 2005 UT App 145, ¶ 6 (R. 1-2). Defendant moved to suppress the drugs which officers ordered him to spit out of his mouth while holding him in a wristlock. *Id.* (R. 32-33). After holding an evidentiary hearing, the trial court denied defendant’s motion. *Id.* (R. 42-46). Thereafter, defendant entered a

conditional guilty plea to one count of unlawful possession with intent to distribute, reserving the right to appeal the trial court's denial of his motion to suppress. *Id.* at ¶ 7 (R. 62-69). Defendant appealed and the court of appeals affirmed. *Id.* at ¶¶ 7 (R. 73-74), 8-34.

Summary of Facts

On June 23, 2003, Officer Don Wahlin was surveilling a condominium complex in response to a report from a woman that drug transactions were taking place in that area. *Id.* at ¶ 2 (R. 88: 3-4, 9-10). While observing the area that day, Officer Wahlin saw a vehicle pull into the condominium complex and park. *Id.* (R. 88: 3-4, 10). Officer Wahlin had previously received a narcotics intelligence report indicating that the vehicle was suspected of being involved in drug deals. *Id.* (R. 88: 4, 9). Officer Wahlin watched defendant exit the vehicle, enter the complex, return to his car five minutes later, and then drive away. *Id.* (R. 88: 4, 10). Although a computer check revealed that the car defendant was driving was not insured, Officer Wahlin did not initiate a traffic stop pursuant to a police department policy. *Id.* (R. 88: 10-12, 18-19).

Because defendant's short stay was consistent with a drug transaction and persons who deal drugs typically frequent the same location, Officer Wahlin, accompanied by Sergeant Chad Steed, returned to surveil the area the next day. *Id.* at ¶ 3 (R. 88: 4, 10, 12-15, 21). During their surveillance, the officers again saw defendant return to the complex in the same vehicle, park in the same area, exit the vehicle, and enter the complex. *Id.* (R. 88: 4, 21). After parking their car near the suspect vehicle, the officers exited their car and walked up to the suspect vehicle. *Id.* (R. 88: 4-5, 15, 21). Sergeant Steed looked inside defendant's vehicle and observed a facsimile of Jesus

Malverde, understood in the drug culture as the patron saint of drug dealing.¹ *Id.* at ¶¶ 3-4 (R. 21-22). He also saw a small water bottle in the console, which he testified drug dealers use to swallow drugs concealed in their mouths. *Id.* at ¶ 4.

The officers then waited behind a van that was parked next to defendant's vehicle. *Id.* at ¶ 3 (R. 5-6). Less than five minutes later, "defendant came around the van" whereupon the two officers approached defendant to speak with him. *Id.* at ¶ 5 (R. 88: 5-6, 15, 29). Officer Wahlin asked defendant whether he knew that his vehicle was uninsured. *Id.* (R. 88: 6, 15-16). After defendant asked how he knew that, Officer Wahlin told defendant that his vehicle was suspected of being "involved in some drug deal activities." *Id.* (R. 88: 6, 16). Defendant responded that he "knew nothing of that." *Id.* (R. 88: 6, 16). Officer Wahlin then asked defendant whether he had any drugs on his person, which defendant denied. *Id.* (R. 88: 6, 16, 29).

Because those dealing drugs often transport them in balloons carried in their mouth, Officer Wahlin asked defendant "if he minded opening up his mouth to show [him] he didn't have any drugs in his mouth." *Id.* (R. 88: 6).² After asking this question, Officer Wahlin noticed that defendant became nervous and used his tongue to move objects that appeared to be "in the pit of his lip area" in an attempt to swallow them. *Id.* (R. 88: 7, 17-18, 30). Before asking the question, Officer Wahlin did not observe defendant chewing or see anything in his mouth. *Id.* (R. 88: 19). Believing that defendant was about to swallow drugs, the two officers immediately grabbed

¹ Sergeant Steed was able to recognize the image based on training and interviews he had conducted. *Alvarez*, 2005 UT App 145, ¶ 4 (R. 88: 21-22).

² Officer Wahlin testified that it was standard procedure to ask those suspected of drug dealing whether they have anything in their mouth. R. 88: 18.

defendant in a wristlock, bent him forward to prevent him from swallowing, and told him to spit out what he had in his mouth. *Id.* (R. 88: 7-8, 30-31). Defendant spit out fifteen balloons containing illegal narcotics. *Id.* (R. 45; R. 88: 8, 31).

SUMMARY OF ARGUMENT

The officers' questioning of defendant about drugs did not implicate the Fourth Amendment because the questioning occurred during the course of a consensual encounter. Even assuming *arguendo* that defendant was detained, the officers had reasonable suspicion to question defendant about drugs. The officers were aware of a report that defendant's car was involved in selling drugs and that drug sales were occurring in the area where defendant visited. The officers observed defendant make two short-term visits that were consistent with drug dealing. Moreover, a facsimile of the patron saint of drug dealing was observed in defendant's car. These facts established reasonable suspicion.

The officers' suspicion raised to the level of probable cause when, in response to a request that he open his mouth, defendant became nervous and began manipulating objects in his mouth and begin to swallow them. The officers, based on their training and experience, immediately recognized that defendant was attempting to swallow drugs, a common practice among drug dealers. Defendant's attempt to conceal or destroy the contraband created an exigency justifying a warrantless search. Finally, the force used by the officers in grabbing defendant by the arm and bending him forward was reasonable.

ARGUMENT

I.

THE OFFICERS' INITIAL QUESTIONING OF DEFENDANT DID NOT OFFEND THE FOURTH AMENDMENT.

On direct appeal, the State argued that the officers' initial questioning of defendant constituted a voluntary encounter, not a detention as argued by defendant. *Alvarez*, 2005 UT App 145, ¶ 10 n.2. Because the court of appeals concluded that reasonable suspicion existed to justify an investigatory detention, it did not decide the issue but assumed for purposes of appeal that the officers' initial questioning constituted a detention. *See Alvarez*, 2005 UT App 145, ¶ 10 n.2.

This Court granted certiorari to review the court of appeals holding that reasonable suspicion existed to justify an investigatory detention. The State nevertheless maintains that the officers' initial questioning constituted a voluntary encounter not subject to the Fourth Amendment. Accordingly, the State will first address the voluntary nature of the initial encounter and then the facts that in any event supported an investigatory stop.

A. The Officers' Initial Questioning of Defendant Did Not Constitute a Detention.

This Court has recognized three levels of constitutionally permissible encounters between police officers and the public: “(1) an officer may approach a citizen at anytime [sic] and pose questions so long as the citizen is not detained against his will; (2) an officer may [temporarily] seize a person if the officer has an “articulable suspicion” that the person has committed or is about to commit a crime; . . . [and] (3) an officer may arrest a suspect if the officer has probable cause to believe an offense has been

committed or is being committed.” *State v. Deitman*, 739 P.2d 616, 617-18 (Utah 1987) (*per curiam*) (citations omitted). Defendant argues that the officers’ initial questioning of him constituted a detention requiring reasonable suspicion. Pet. Brf. at 10-12. Defendant’s contention lacks merit.

“A level one citizen encounter with a law enforcement official is a consensual encounter wherein a citizen voluntarily responds to non-coercive questioning by an officer.” *State v. Hansen*, 2002 UT 125, ¶ 34, 63 P.3d 650 (*Hansen*). Because “the encounter is consensual, and the person is free to leave at any point, there is no seizure within the meaning of the Fourth Amendment.” *Id.* In contrast, “[a] level two encounter involves an investigative detention that is usually characterized as brief and non-intrusive.” *Id.* at ¶ 35. A level two encounter is a seizure under the Fourth Amendment and must therefore be justified by reasonable suspicion of criminal wrongdoing. *Id.*

The United States Supreme Court has held that “a person has been ‘seized’ within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he [or she] was not free to leave.” *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877 (1980) (opinion of Stewart, J.).³ Under the *Mendenhall* test, “a person is ‘seized’ only when, by means of physical force or a show of authority, his freedom of movement is restrained.” *Id.* at 553, 100 S.Ct. at 1877. In other words, there is no

³ Although only Justice Rehnquist joined Justice Stewart’s opinion in what has become known as the *Mendenhall* test, the United States Supreme Court “has since embraced this test.” *Michigan v. Chesternut*, 486 U.S. 567, 573, 108 S.Ct. 1975, 1979 (1988); see also *California v. Hodari D.*, 499 U.S. 621, 627, 111 S.Ct. 1547, 1551 (1991) (recognizing the adoption of the *Mendenhall* test).

seizure under the Fourth Amendment “until the police officer in some way *demonstrably* curtail[s] [the person’s] liberty.” *Id.* (emphasis added). The test is an objective standard that focuses on the conduct of the officer and the setting in which the conduct occurs. *Michigan v. Chesternut*, 486 U.S. 567, 573-74, 108 S.Ct. 1975, 1979-80 (1988).

Circumstances suggestive of a seizure include: “the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, [and] the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.” *Mendenhall*, 446 U.S. at 554, 100 S.Ct. at 1877; *accord Hansen*, 2002 UT 125, ¶ 41. A seizure is likely to be found if the officer activates his overhead red-and-blue lights, *see Hansen*, 2002 UT 125, ¶¶ 37, 44, blocks a defendant’s egress, *State v. Struhs*, 940 P.2d 1225, 1228 (Utah App. 1997), or demands or retains “a person’s identification or other important papers,” *Salt Lake City v. Ray*, 2000 UT App 55, ¶ 14, 998 P.2d 274.

A review of “all of the circumstances surrounding the incident” here reveals that defendant was not detained during the questioning. *See Mendenhall*, 446 U.S. at 554, 100 S.Ct. at 1877. The evidence established that after defendant parked his car and walked into the condominium complex, the officers “moved [their unmarked] car up close to where [defendant’s] vehicle was parked.” R. 88: 4, 15, 21, 31. Both officers exited their car to await defendant’s return. R. 88: 4, 15, 21, 31-32. The officers approached defendant’s car and waited behind a van that was parked next to defendant’s vehicle. R. 88: 5-6, 21. Less than five minutes later, defendant “came around the van,” whereupon the officers “approached him to talk with him.” R. 88: 5-6, 15.

These facts were not indicative of a seizure. The officers did not display their weapons, touch defendant, or use language or a tone of voice indicating that defendant

was required to remain and speak with them. They did not activate their overhead red-and-blue lights, block defendant's egress, or retain defendant's identification. Although two uniformed officers approached defendant, nothing in the record suggests that they did so in a threatening or confrontational manner. They waited for him to return to his car, and when he did, they "start[ed] talking to him." R. 88: 15. In sum, the officers' conduct was not marked by a use "of physical force or show of authority" such that a reasonable person would believe that his or her "freedom of movement [was] restrained." *Mendenhall*, 446 U.S. at 553, 100 S.Ct. at 1877.

Defendant argues that the encounter nevertheless transformed into a seizure because the officers subjected him to "a series of accusatory questions that indicated he was suspected of being engaged in illegal activity." Pet. Brf. at 11-12. This argument lacks merit.

Officer Wahlin did explain to defendant that his vehicle "had been suspected of being . . . involved in some drug dealing activities," ask him "if he had any drugs on his person," and ask "if he minded opening up his mouth to show [that] he didn't have any drugs in his mouth." R. 88: 6. Mere questioning, however, even if investigative in nature, does not convert an otherwise consensual encounter into a seizure.

The United States Supreme Court has time and again emphasized that "even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual, ask to examine the individual's identification, *and [even] request consent to search his or her luggage*—as long as the police do not convey a message that compliance with their requests is required." *Florida v. Bostick*, 501 U.S. 429, 434-35, 111 S.Ct. 2382, 2386 (1991) (emphasis added). That such questioning is investigatory is not relevant to the issue. The Supreme Court has long "endorsed" the

proposition that police officers can approach individuals as to whom they have no reasonable suspicion and ask them *potentially incriminating questions*.” *Id.* at 439, 111 S.Ct. at 2388 (emphasis added). “While most citizens [may very well] respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response.” *I.N.S. v. Delgado*, 466 U.S. 210, 216, 104 S.Ct. 1758, 1762 (1984).

The decision of the United States Supreme Court in *I.N.S. v. Delgado* compels a conclusion here that the officers’ initial encounter with defendant was consensual. In *Delgado*, agents of the Immigration and Naturalization Service (INS) conducted three “factory surveys” in search of illegal aliens. *Delgado*, 466 U.S. at 212, 104 S.Ct. at 1760. With several INS agents positioned near the factory exits, other agents systematically questioned most, but not all, employees at their work stations. *Id.* The agents, who were armed and displayed badges, asked the employees one to three questions relating to their citizenship. *Id.* “If the employee gave a credible reply that he was a United States citizen, the questioning ended, and the agent moved on to another employee.” *Id.* On the other hand, “[i]f the employee gave an unsatisfactory response or admitted that he was an alien, the employee was asked to produce his immigration papers.” *Id.* at 212-13, 104 S.Ct. 1760. The agents arrested those they had probable cause to believe were illegal aliens. *Id.* at 218, 104 S.Ct. at 1763-64.

The Ninth Circuit Court of Appeals concluded that the employees were seized under the Fourth Amendment based on the stationing of the INS agents near the exits, the surprise element of the unannounced intrusion, the systematic questioning of the employees, the length of the survey, and the failure to advise employees they were free to leave. *See id.* at 217, 104 S.Ct. at 1763. The United States Supreme Court reversed. *Id.*

at 221, 104 S.Ct. at 1765. Noting that the employees were free to move about the factory, and that no one was actually prevented from leaving the buildings, the Supreme Court concluded that the agents' conduct "should have given [the respondent employees] no reason to believe that they would be detained if they gave truthful answers to the questions put to them or if they simply refused to answer." *Id.* at 218, 104 S.Ct. at 1764. The Court further held that "[t]he manner in which [the respondent employees] were questioned, given its obvious purpose [to verify their citizenship and right to work], could hardly result in a reasonable fear that respondents were not free to continue working or to move about the factory." *Id.* at 220-21, 104 S.Ct. at 1765.

The questioning by INS agents in *Delgado* was clearly investigatory in nature and designed to apprehend illegal aliens. The questioning was systematically conducted by multiple armed INS agents with other agents stationed near the exits. Yet, the Supreme Court found no seizure. The circumstances in this case were far less threatening. Although Officer Wahlin's questions were investigative in nature, there was no show of authority indicating that defendant was not free to leave or otherwise go about his business. The officers simply approached defendant when he walked around the van and asked him a few questions. It cannot be said under these circumstances that the conduct of Officers Wahlin and Steed was "so intimidating as to demonstrate that a reasonable person would have believed that he was not free to leave if he had not responded." *Id.* at 216, 104 S.Ct. at 1762.

In sum, as in *Delgado*, the officers' conduct here "should have given [defendant] no reason to believe that [he] would be detained if [he] gave truthful answers to the questions put to [him] or if [he] simply refused to answer." *Id.* at 218, 104 S.Ct. at 1764.

And where there was no seizure, the officers were free to ask defendant questions absent reasonable suspicion. See *Bostick*, 501 U.S. at 434-35, 111 S.Ct. at 2386.

B. The Officers Nevertheless Had Reasonable Suspicion To Support an Investigatory Detention.

Assuming arguendo that the questioning of defendant constituted a detention, as the court of appeals did, the detention was supported by reasonable suspicion. The court of appeals held that “under ‘the totality of the circumstances,’ [Officers] Wahlin and Steed had ‘specific and articulable facts which, taken together with rational inferences from those facts, warrant[ed] [the] detention’ of Defendant to question him about the uninsured status of the vehicle *and* about drugs.” *Alvarez*, 2005 UT App 145, ¶ 14 (citation omitted) (latter brackets supplied in *Alvarez*). This holding is correct.

“In determining whether a . . . seizure is constitutionally reasonable, [this Court] make[s] a dual inquiry: (1) Was the police officer’s action ‘justified at it’s inception’? and (2) Was the resulting detention ‘reasonably related in scope to the circumstances that justified the interference in the first place’?” *State v. Lopez*, 873 P.2d 1127, 1131-32 (Utah 1994) (quoting *Terry v. Ohio*, 392 U.S. 1, 19-20, 88 S.Ct. 1868, 1879 (1968)). A detention is justified “if the officer’s action is supported by reasonable suspicion to believe that criminal activity “‘may be afoot.’”” *United States v. Arvizu*, 534 U.S. 266, 273, 122 S.Ct. 744, 750 (2002) (quoting *Terry*, 392 U.S. at 30, 88 S.Ct. 1868) (other citations omitted)). However, “[o]nce the purpose of the initial stop is concluded, . . . the person must be allowed to depart.” *Hansen*, 2002 UT 125, at ¶ 31. Further detention is justified only if the officer “has probable cause or a reasonable suspicion of a further illegality.” *Id.*

Defendant acknowledges that Officer Wahlin had reasonable suspicion to detain him based on a computer check indicating that his vehicle was not insured. Pet. Brf. at 14.⁴ He contends, however, that the officer's questions about drugs exceeded the permissible scope of the alleged stop. Pet. Brf. at 14-15. Where defendant concedes that the alleged detention was justified at its inception, the only issue is whether the officers had a reasonable suspicion that defendant was selling or buying drugs. *See Hansen*, 2002 UT 125, at ¶ 31 (holding that further detention is justified if officer "has probable cause or a reasonable suspicion of a further illegality"). A review of the record reveals that they did.

An investigatory detention may not be based on "inarticulate hunches." *See Terry v. Ohio*, 392 U.S. 1, 22, 88 S.Ct. 1868, 1880 (1968). The officer must be able to identify "specific and articulable facts which, taken together with rational inferences from those facts," support a reasonable suspicion that "criminal activity may be afoot." *Id.* at 21, 30, 88 S.Ct. at 1880, 1884; *accord State v. Kohl*, 2002 UT 35, ¶ 11, 999 P.3d 7. "Although an officer's reliance on a mere 'hunch' is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard." *Arvizu*, 534 U.S. at 274, 122 S.Ct. at 751. Accordingly, "[a] determination that reasonable suspicion exists . . . need not rule out the possibility of innocent conduct." *Id.* at 277, 122 S.Ct. at 753.

⁴ Utah law makes it a class B misdemeanor for a driver to knowingly operate an uninsured motor vehicle on the highways of the state. Utah Code Ann. § 41-12a-302 (1998).

Defendant claims that the officers in this case “had no more than an inchoate and unparticularized suspicion or hunch that [he] was dealing drugs” Pet. Brf. at 22 (citation and quotation omitted). This claim ignores the “specific and articulable facts” known to the officers at the time and the “rational inferences from those facts.” See *Terry*, 392 U.S. at 22, 88 S.Ct. at 1880. The combination of these facts, together with their reasonable inferences, created a reasonable suspicion that defendant was transacting in drugs.

In this case, Officer Wahlin testified that he suspected defendant of dealing drugs based on the following facts: (1) a narcotics intelligence report indicated that the car defendant was driving was suspected of being involved in “dealing drugs,” R. 88: 3, 9-10, 30; (2) defendant drove that car into the parking lot of a condominium complex located at 2450 South Elizabeth Street, R. 88: 3-4, 10; (3) the officers had information that drugs were being sold “in the Elizabeth Street area of that south,” R. 88: 9; (4) defendant exited the car, entered the complex, returned five minutes later, and left, R. 88: 4, 10; (5) defendant returned to the condominiums the following day at approximately the same time in the same car, parking in approximately the same place, R. 88: 4, 21; (6) defendant again exited the car, entered the complex, and returned to his car less than five minutes later, R. 88: 4-5, 21; (7) defendant’s short-term stays at the complex were consistent with drug transactions, R. 88: 10;⁵ (8) in Officer Wahlin’s experience and consistent with his training, drug dealers often frequent the same location at approximately the same time of day, R. 88: 15; (9) Sgt. Steed observed in defendant’s car

⁵ Officer Wahlin confirmed that defendant’s short term visit was consistent with a “drug transaction taking place” during cross-examination. R. 88: 10. Defense counsel never challenged that conclusion. See R. 88: 10, 34-37.

a facsimile of Jesus Malverde, which he recognized through training and interviews as “the patron saint of drug dealing,” R. 88: 21-22; and (10) Sgt. Steed observed in defendant’s car a small bottle of water, which drug traffickers often carry to swallow drugs they transport in their mouths, R. 347: 88: 29.

As correctly held by the court of appeals, these facts were more than sufficient to support a reasonable suspicion that defendant was selling or buying drugs at the complex. *Alvarez*, 2002 UT App 145, ¶ 14.

Defendant contends however that the reports of drug dealing in the area and the car’s suspected involvement in drug deals should be ignored in determining reasonable suspicion because the reported activity was not independently corroborated by the officers and the reliability of the information could not be independently assessed. Pet. Brf. at 17-22 (citing *Alvarez*, 2005 UT App 145, ¶¶ 37, 42 (Orme, J., dissenting)). Had this been the only information available to the officers, it would have indeed been insufficient. But it was not.

This Court’s decision in *State v. Markland*, 2005 UT 26, 112 P.3d 507 is controlling. There, officers responded to the rear of an apartment complex at 3:14 a.m. after receiving a report that someone was screaming out for help. *Id.* at ¶ 2. Upon their arrival, they saw Markland walking alone toward the dead end of a poorly lit street behind the apartments. *Id.* After denying that he heard any cry for help, Markland told the officers that he was walking home, which was some twenty blocks away. *Id.* at ¶ 3. The officers knew the dead end road would not lead him home. *Id.* The officer then detained Markland to run a warrants check, which revealed an outstanding warrant. *Id.* at ¶ 4. A search incident to arrest uncovered illegal drugs and paraphernalia. *Id.*

In her dissent, Chief Justice Durham argued that the uncorroborated report added nothing to the reasonable suspicion determination. *Id.* at ¶¶ 37-41 (Durham, J., dissenting). But the majority disagreed, concluding that notwithstanding the lack of information about the report, it “was properly weighed as a factor contributing to reasonable suspicion.” *Id.* at ¶ 25 n.2. The Court explained that the officer “should not have been expected or required to completely ignore the suspicious backdrop provided by the dispatch report when investigating and evaluating the additional suspicious circumstances” *Id.* The Court held that “[s]uch an integral aspect of [an] officer’s background knowledge cannot be excised from the reasonable suspicion determination.” It also observed that the officers did not rely on the report alone to justify the detention. *Id.* Instead, the report “served a different function: it justified the initiation of an investigation, not the initiation of an investigatory detention.” *Id.*

Likewise in this case, the report of drug activity in the area and the report that defendant’s car was involved in drug deals cannot be ignored in determining reasonable suspicion. They constituted an “integral part” of Officer Wahlin’s background knowledge and “cannot be excised from the reasonable suspicion determination.” *See id.* As in *Markland*, each justified the initiation of an investigation—an investigation of the car in the one case and an investigation of the area in the other. And when these two reports converged at the parking lot of the apartment complex, Officer Wahlin’s suspicion was justifiably heightened.

With heightened suspicion, Officer Wahlin gathered additional information which added the necessary building blocks to form reasonable suspicion. Added to the converging reports, the officer observed defendant come and go within five minutes. Added to this, the officers observed defendant return to the same location the following

day at approximately the same time, enter the apartment complex, and again return within five minutes. Added to this, the officer knew, based on his training and experience, that such short term visits are consistent with drug transactions. Added to this, the officer knew, based on his training and experience, that drug dealers often return to the same location at approximately the same time. Added to this, the officer observed a Jesus Malverde facsimile hanging in defendant's car. Added to this, the officer knew, based on his training and experience, that Jesus Malverde is recognized in the drug culture as the "patron saint" of drug dealers. Added to this, the officer observed a water bottle in defendant's car. And added to this, the officer knew, based on his training and experience, that drug dealers often carry water bottles so they can readily swallow drugs concealed in their mouths if approached by police.

While similarly timed visits, short-term stays, water bottles, and Jesus Malverde facsimiles may mean nothing to the ordinary citizen or legal technician, the reasonable suspicion analysis "allows officers to draw on their own experience and specialized training to make inferences from and deductions about the *cumulative* information available to them that 'might well elude an untrained person.'" *United States v. Arvizu*, 534 U.S. at 273, 122 S.Ct. at 750-51 (emphasis added). And while none of the foregoing facts, standing alone, established reasonable suspicion, when added together they do. Thus, contrary to defendant's claim, the facts confronting Officers Wahlin and Steed corroborated the report that persons were selling drugs in the area, corroborated the

report that defendant's car was involved in drug deals, and corroborated their suspicion that defendant was dealing drugs.⁶

* * *

In summary, the officers' questioning of defendant did not implicate the Fourth Amendment because it occurred during a level-one consensual encounter. Assuming *arguendo* that defendant was seized, the alleged seizure was supported by reasonable suspicion.

II.

THE OFFICERS WERE JUSTIFIED IN PLACING DEFENDANT IN A WRISTLOCK, BENDING HIM FORWARD, AND ORDERING HIM TO SPIT OUT THE DRUGS BEFORE HE COULD SWALLOW THEM⁷

Defendant contends that the officers violated his Fourth Amendment rights when they placed him in a wristlock, bent him forward, and ordered him to spit out the drugs. Pet. Brf. at 22-39. He contends that the court of appeals erred in concluding that the officers had probable cause to believe drugs were hidden in his mouth, Pet. Brf. at 23-27, that exigent circumstances were present justifying a bodily search, Pet. Brf. at 27-36, and that the force used by the officers was reasonable, Pet. Brf. at 36-39. Defendant's argument fails.

⁶ Defendant's reliance on *Florida v. J.L.*, 529 U.S. 266, 120 S.Ct. 1375 (2000), and *State v. Case*, 884 P.2d 1274 (Utah App. 1994), is misplaced. Unlike the alleged detention here, the stop by the officers in *J.L.* was based *solely* on the tip of the anonymous informant—the officers articulated no other facts to support their suspicion. *J.L.*, 529 U.S. at 268, 120 S.Ct. at 1377. Likewise in *Case*, the officers' stop was based solely on an unsubstantiated dispatch report—the officers articulated no other facts to support the information in the report. *Case*, 884 P.2d at 1275, 1277-79.

⁷ For ease of analysis, the State will address points II and III of defendant's brief, which are the last two issues raised on certiorari, under this single point.

In determining whether the officers' actions were reasonable in this case, the court of appeals applied a three-part test first articulated in *State v. Hodson*, 866 P.2d 556, (Utah App. 1993), *rev'd on other grounds*, 907 P.2d 1155 (Utah 1995) (*Hodson I*). Under that test, the State must establish three elements to demonstrate the lawfulness of a warrantless bodily search: "(A) 'a clear indication that evidence would be found'; (B) 'exigent circumstances that justified the warrantless bodily intrusion'; and (C) 'that the method chosen was a reasonable one, performed in a reasonable manner.'" *Alvarez*, 2005 UT App 145, ¶ 16 (quoting *Hodson I*, 866 P.2d at 560).

Hodson I gleaned this test from *Schmerber v. California*, 384 U.S. 757, 768-72, 86 S.Ct. 1826 (1966)). In *Schmerber*, the United States Supreme Court held that a warrantless blood draw for evidence of alcohol impairment was justified if (1) there was "a clear indication that in fact such evidence will be found," *id.* at 770, 86 S.Ct. at 1835; (2) "the officer might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence,'" *id.* (citation omitted); and (3) the method chosen to obtain the evidence "was a reasonable one," *id.* at 771, 86 S.Ct. at 1836. The officers' actions here were reasonable under the *Schmerber* three-part test.

A. The Officers had Probable Cause to Believe That Defendant Was Concealing Drugs in His Mouth

The first prong of the test requires the State to demonstrate that "at the time of their warrantless search of Defendant, [the officers] had 'a clear indication that evidence would be found' in defendant's mouth. *Alvarez*, 2005 UT App 145, ¶ 16 (citation omitted). Although *Schmerber* did not define what it meant by "clear indication," it discussed this element of the test in terms of probable cause. *Schmerber*, 384 U.S. at 770,

86 S.Ct. at 1835 (explaining that “the facts which established probable cause to arrest . . . also suggested the required relevance and likely success of a test of petitioner’s blood for alcohol”). Based on this discussion, the court of appeals in *Hodson I* and *Alvarez* concluded that “ ‘clear indication’ is synonymous with probable cause. *Hodson I*, 866 P.2d at 560; *Alvarez*, 2005 UT App 145, ¶ 17. The State does not dispute this conclusion.

In determining whether probable cause exists, this Court makes a “practical, common-sense decision whether, given all the circumstances” confronting the officers, “there [was] a fair probability that contraband or evidence of a crime [would] be found in a particular place.” *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332 (1983). In other words, “probable cause does not require more than a rationally based conclusion of probability.” *State v. Dorsey*, 731 P.2d 1085, 1088 (Utah 1986); accord *State v. Poole*, 871 P.2d 531, 534 (Utah 1994). The probable cause requirement will be satisfied as long there exists a reasonable inference that supports a conclusion that the defendant probably committed the crime, even if there are equally strong inferences to the contrary. See *State v. Clark*, 2001 UT 9, ¶ 20, 20 P.3d 300 (holding that an inference of legitimate behavior “does not negate the reasonable inference” of criminal conduct)

Like reasonable suspicion, “[t]he determination of whether probable cause exists . . . depends upon an examination of all the information available to the searching officer in light of the circumstances as they existed at the time the search was made.” *Dorsey*, 731 P.2d at 1088. Moreover, “[t]he validity of the probable cause determination is made from the objective standpoint of a ‘prudent, reasonable, cautious police officer . . . guided by his experience and training.’” *Id.* (quoting *United States v. Davis*, 458 F.2d 819, 821 (D.C. Cir. 1972)).

As explained above, the officers here were justified initially in stopping defendant (though they did not) and questioning him concerning their suspicions. Defendant's behavior after he was asked if he would open his mouth added to the officers' suspicions and was sufficient, in light of the other information, to establish probable cause to believe he was concealing drugs in his mouth.

After Officer Wahlin asked if he could check defendant's mouth for drugs, he observed what appeared to be defendant's tongue moving objects inside his mouth and swallowing or attempting to swallow those objects. R. 88: 7, 19, 30. Both officers immediately recognized this as an attempt to swallow drugs. R. 88: 7-8, 17, 31. Officer Wahlin explained that based on his training and experience, drug dealers "typically" package drugs in balloons and conceal them in their mouths so they can swallow them if they are approached by police. R. 88: 6. As recognized in *Hodson I*, "a reasonable officer would know that it is a common practice among drug dealers to swallow the evidence if the police arrive on the scene." *Hodson I*, 866 P.2d at 560.

In addition, Officer Wahlin noticed that after asking defendant if he could check his mouth for drugs, he became nervous. R. 88: 18. While nervousness alone is insufficient to establish probable cause, "it may . . . be considered in conjunction with other relevant and objective facts." *State v. Yoder*, 935 P.2d 534, 541 (Utah App. 1997). In this case, defendant's nervousness was highly relevant because defendant did not become nervous until *after* Officer Wahlin asked if he could check his mouth for drugs.

Defendant contends that Officer Wahlin could not have probable cause because he testified that during the initial questioning, he did not see anything in defendant's mouth or notice any mumbling. Pet. Brf. at 24. However, the fact that the officer did not initially observe anything in defendant's mouth, but could later discern that

defendant had something in his mouth and was trying to swallow it, suggests that defendant was hiding contraband from the outset. If it was anything other than contraband, defendant would have no reason to conceal it. The United States Supreme Court has recognized that “nervous, evasive behavior is a pertinent factor in determining reasonable suspicion,” *Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S.Ct. 673, 676 (2000), and thus probable cause. As held in *Hodson I*, “‘deliberately furtive actions and flight at the approach of . . . law officers are strong indicia of mens rea, and when coupled with specific knowledge on the part of the officer relating the suspect to evidence of crime, they are proper factors to be considered in the decision to make an arrest.’” *Hodson I*, 866 P.2d at 560 (citations omitted).

In summary, the report of drug activity involving defendant’s car in the area of the condominium complex, defendant’s pattern of short-term visits at the same place and at approximately the same time, and the Jesus Malverde facsimile in his car, combined with defendant’s nervous behavior after the questioning, and his attempt to swallow previously concealed objects in his mouth, established probable cause to believe defendant was concealing contraband in his mouth.

Moreover, due weight must be given to the officers’ subjective assessment of these facts, given their training and experience in detecting drug violations. *See State v. Warren*, 2003 UT 36, ¶ 21, 78 P.3d 590. Indeed, it is particularly telling that both officers, *without communicating with the other*, immediately recognized defendant’s actions as an attempt to swallow contraband. *See* R. 88: 7, 17, 30 (Sgt. Steed testifying that they did not talk about grabbing defendant at all, but that “[i]t just happened” because he concluded defendant “was going to swallow drugs”).

B. Defendant's Attempt to Swallow the Drugs Created an Exigency That Justified Immediate Police Action Without a Warrant.

Under the second prong of the analysis, the State must establish that the officers "might reasonably have believed that [they were] confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'" *Schmerber, id.* at 770, 86 S.Ct. at 1835 (citation omitted). This Court has recently recognized that exigent circumstances are "'those that would cause a reasonable person to believe that [an immediate search] . . . was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.'" *Brigham City v. Stuart*, 2005 UT 13, ¶ 18, 122 P.3d 506 (quoting *State v. Beavers*, 859 P.2d 9, 18 (Utah App. 1993) (other quotations and citations omitted)

In this case, the officers' immediate retrieval of the contraband was necessary to prevent not only the possible loss of the evidence, but also to prevent possible harm to defendant. Even though the officers had probable cause to believe defendant was carrying the drugs in balloons, they could not be sure of that fact, nor could they be confident that the packaging was secure. As observed in *Hodson I*, "[w]hen illegal drugs are ingested to conceal them from law enforcement, a reasonable police officer cannot know, for certain, the method of packaging the drug." *Hodson I*, 866 P.2d at 561. Consequently, "it is not unreasonable [for officers] to assume the drug might not be securely packaged so as to avoid its dissipation in the ingester's system, with resulting probable toxic effects." *Id.*

Nor should officers be required to stand idly by as a suspect takes steps to conceal or destroy evidence, even if police might be able to retrieve that evidence later

through other means. See *United States v. Holloway*, 906 F.Supp. 1437, 1443 (D. Kan. 1995) (holding that “[o]fficers [are] not required to simply wait to let nature take its course”). In *People v. Bracamonte*, 540 P.2d 624, 532 (Cal. 1975), upon which defendant relies, see Pet. Brf. at 33-34, the California Supreme Court observed that “the mouth is not a sacred orifice and there is no constitutional right to destroy or dispose of evidence.” As a result, the court concluded, “attempts to swallow evidence can be prevented” by police. *Id.*

Defendant contends, however, that the potential loss of evidence or risk of harm to the swallower do not constitute exigent circumstances because the drugs could be retrieved after they passed through defendant’s digestive system. See Pet. Brf. at 34-36. In support of his claim, defendant relies on *State v. Hodson*, 907 P.2d 1155, 1158 (Utah 1995) (*Hodson II*), which reversed the *Hodson I* conclusion that the force used in that case to obtain the drugs was reasonable. Pet. Brf. at 32-36. The *Hodson II* holding upon which defendant relies does not, however, support his claim.

In *Hodson*, Officers Smith and Garcia initiated a stop of defendant in his vehicle after he completed a sale of heroin to a police informant. *Hodson II*, 907 P.2d at 1156. As the two officers approached Hodson, they observed him throw something in his mouth. *Id.* After Hodson stopped, the officers immediately exited their vehicle, ran up to Hodson, “grabbed him by the cheeks, held a gun to the side of his face, and ordered him to ‘spit it out.’” *Id.* When he did not comply, Officer Garcia placed his gun on the hood of the car and pulled Hodson out of the car as Officer Smith opened the door. *Id.* Officer Garcia placed his arm around Hodson’s neck and again ordered him to spit out the drugs. *Id.* Hodson spit out some plastic heroin chips and Officer Garcia retrieved

additional chips by inserting his finger in Hodson's mouth. *Id.* Hodson's motion to suppress the evidence was denied.

On appeal, the court of appeals examined the search under the three-part *Schmerber* test. *Hodson II*, 866 P.2d at 560. The court found both probable cause and exigent circumstances to justify the warrantless search. *Id.* at 560-61. In assessing the reasonableness of the force used on Hodson, the court adopted a standard that makes it "constitutionally reasonable for the police to place their hands on a suspect's throat to prevent the swallowing of evidence, as long as they do not choke him [or her], i.e., prevent him [or her] from breathing or obstruct the blood supply to [the] head." *Id.* at 563 (quotes and citations omitted) (brackets in original). Because no testimony was elicited on this issue, the Court remanded to the trial court for further findings. *Id.* The court held that the officer's use of the gun, without an express threat to kill Hodson, was reasonable. *Id.*

On certiorari, this Court reversed and ordered suppression of the evidence. *Hodson II*, 907 P.2d at 1160. It did not, however, address or otherwise disturb the court of appeals' conclusions of probable cause and exigent circumstances. Instead, the Court examined the court of appeals' analysis of the third prong of the *Schmerber* test—whether the force used by the officers to retrieve the drugs was reasonable. *Id.* at 1156. In doing so, the Court applied the three-part test articulated by the United States Supreme Court in *Winston v. Lee*, 470 U.S. 753, 105 S.Ct. 1611 (1985). The Court held that under the *Winston* test, "the reasonableness of force used in a search [must] be measured against (1) the extent to which the procedure used may threaten the safety or health of the individual, (2) the extent of the intrusion upon the individual's dignitary

interests in personal privacy and bodily integrity, and (3) the community's interest in fairly and accurately determining guilt or innocence." *Hodson II*, 907 P.2d at 1157.

Applying the three-part test, the Supreme Court concluded that the use of the neckhold created an "enormous *risk*" to the health and safety of Hodson. *Id.* at 1158. The Court held that the extent of the intrusion upon Hodson's dignitary interests in personal privacy and bodily integrity was "very high" where he was assaulted with a loaded weapon, dragged to the ground, was subjected to a neckhold, and had fingers inserted in his mouth. *Id.* The Court then examined the State's interest in preserving the evidence and whether that interest could shift the balance. *Id.* The Court concluded that the State's interest in preserving evidence did not shift the balance because nothing in the record suggested that the evidence could not eventually be recovered. *Id.* The Court held that "[i]n the absence of an urgent need to preserve evidence, there cannot be a justification for the significant risks to health and safety posed by using the kind of force in this case to get a suspect to spit out what is believed to be a mouthful of drugs." *Id.* In other words, the Court simply concluded that the exigency was not so great as to justify a use of force at this level. *See id.* (holding that "[n]o emergency or exigency justifies the use of force at [that] level to preserve evidence which would be readily (if inconveniently) accessible through nonviolent means"). Defendant's reliance on *Hodson II*, therefore, is misplaced.

In summary, the potential that the contraband would either be destroyed or cause harm if swallowed created an exigency that justified a reasonable search.

C. The Method Employed by the Officers to Prevent Defendant from Swallowing the Drugs Was Reasonable.

The third prong of the *Schmerber* test requires that the method chosen to obtain the evidence “was a reasonable one.” *Schmerber*, 384 U.S. at 771, 86 S.Ct. at 1836. As noted, this Court has explained that “the reasonableness of force used in a search [is] measured against (1) the extent to which the procedure used may threaten the safety or health of the individual, (2) the extent of the intrusion upon the individual’s dignitary interests in personal privacy and bodily integrity, and (3) the community’s interest in fairly and accurately determining guilt or innocence.” *Hodson II*, 907 P.2d at 1157. An examination of these factors reveals that the force used by Officers Wahlin and Steed was reasonable.

In this case, each officer grabbed defendant by an arm and wrist and bent him forward so it was harder for him to swallow. R. 88: 8, 30-31. Officer Wahlin then ordered defendant to spit out the drugs. R. 88: 8, 31. Defendant contends that the wristlock was “very painful” and “created a substantial risk of him aspirating on objects in his mouth.” Pet. Brf. at 37. These claims find no support in the record. No evidence was introduced indicating that the officers inflicted pain. And even had defendant suffered some pain, prong one of the *Winston* test considers the threat to safety or health, not pain. In this regard, no evidence was introduced suggesting that bending defendant forward created a risk that he would aspirate the contraband. This claim is nothing more than speculation by defendant. To the contrary, Officer Wahlin testified that bending defendant forward made it harder for him to swallow. R. 88: 8. In summary, therefore, the force used by the officers here did not threaten the safety or health of defendant.

Likewise, the intrusion on bodily integrity and dignitary interests, and the level of intrusion, was low. Although the officers grabbed defendant by the arm and bent him forward, they did not assault him with a loaded weapon, drag him to the ground, apply a dangerous neckhold, or physically intrude into defendant's mouth, as in *Hodson*. Indeed, the force used by Officers Wahlin and Steed is typical of any arrest.

Finally, the officers had a legitimate interest in preventing defendant from swallowing the evidence to conceal or destroy it. As noted, *Hodson II* holds that police may not prevent a suspect from swallowing contraband through a use of force that creates a substantial risk to the health or safety of the suspect. *Hodson II*, 907 P.2d at 1158-59. This is so because the government's interest in securing evidence, that might potentially be lost, does not outweigh an individual's interest in his or her health and safety. The same cannot be said about the use of minimal force. Indeed, the government's interest in preventing defendant from swallowing evidence, to prevent a potential risk to defendant's health and loss of evidence, outweighs defendant's interest in being held by police in a manner that is not dangerous or unduly intrusive.

In summary, the force used by the officers in this case did not threaten defendant's health or safety or substantially intrude upon defendant's dignitary interests in personal privacy and bodily integrity. Moreover, the interests of the government in preventing a potential health risk to defendant and a potential loss of evidence outweighed defendant's interest in being free from reasonable restraint.

* * *

Where the search of defendant was supported by probable cause and exigent circumstances, and the force used by the offices in conducting the "search" was

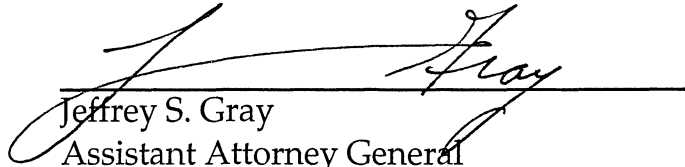
reasonable, the court of appeals correctly concluded that defendant's Fourth Amendment rights were not violated.

CONCLUSION

For the foregoing reasons, the State respectfully requests the Court to affirm the court of appeals decision.

Respectfully submitted December 6, 2005.

Mark L. Shurtleff
Utah Attorney General

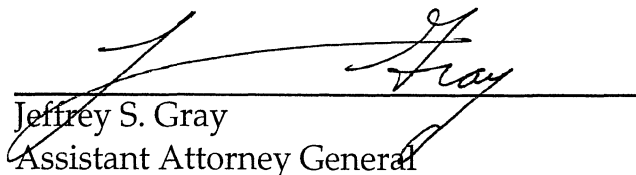


Jeffrey S. Gray
Assistant Attorney General
Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2005, I served two copies of the foregoing Brief of Respondent upon the defendant/petitioner, Ernesto Alvarez, by causing them to be delivered by hand to his counsel of record as follows:

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ADDENDA

Addendum A

MAR 24 2005

This opinion is subject to revision before
publication in the Pacific Reporter.

IN THE UTAH COURT OF APPEALS

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State of Utah,)	OPINION
)	(For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20040059-CA
v.)	
)	F I L E D
Ernesto Alvarez,)	(March 24, 2005)
)	
Defendant and Appellant.)	<div style="border: 1px solid black; padding: 2px;">2005 UT App 145</div>

Third District, Salt Lake Department
The Honorable Paul G. Maughan

Attorneys: Debra M. Nelson and Steven G. Shapiro, Salt Lake
City, for Appellant
Mark L. Shurtleff and Jeffrey S. Gray, Salt Lake
City, for Appellee

Before Judges Billings, Davis, and Orme.

DAVIS, Judge:

¶1 Ernesto Alvarez (Defendant) appeals his conviction of unlawful possession of a controlled substance with the intent to distribute. See Utah Code Ann. § 58-37-8(1)(a)(iii) (2002). We affirm.

BACKGROUND¹

¶2 On June 23, 2003, two Salt Lake City Police officers, one of whom was Officer Don Wahlin, were observing a condominium complex in Salt Lake City because, according to Wahlin, they had received information that drug transactions had been taking place in that area. While observing the condominium complex that day, Wahlin saw a vehicle (the vehicle) drive into the complex. Wahlin had

1. With the exception of the facts recited concerning the procedural history of Defendant's case, the following facts were presented at the August 29, 2003 hearing on Defendant's motion to suppress.

previously received information from the narcotics division of the Salt Lake City Police Department that the vehicle had possibly been involved in drug transactions. Wahlin then saw Defendant get out of the vehicle, enter the condominium complex, return to the vehicle less than five minutes later, get back into the vehicle, and drive the vehicle out of the complex. Based upon the information he had previously received and his observation of Defendant that day, Wahlin believed that Defendant had been involved in a drug transaction. Wahlin testified that he believed Defendant's short visit to the complex was consistent with short-stay drug traffic. Although Wahlin discovered that day that the vehicle was uninsured, he and the other officer chose not to initiate a traffic stop on that basis.

¶3 Wahlin testified that because it was typical for drug dealers to frequent the same location, he and Salt Lake City Police Sergeant Chad Steed decided to return to the condominium complex the following day to see if the vehicle would return. While observing the complex, Wahlin and Steed saw Defendant drive the vehicle into the same area of the complex as he had the previous day, get out of the vehicle, and enter the complex. Wahlin and Steed then walked to the vehicle and waited for Defendant to return. Wahlin and Steed waited in an empty parking stall adjacent to the vehicle, behind a full-size van that was parked in the stall adjacent to the empty stall.

¶4 While waiting, Steed looked inside the vehicle and observed a facsimile of "Jesus Malverde," which Steed testified he was able to recognize through his training, interviews he had conducted, and his observation of known drug houses. Steed also testified that, according to interviews he had conducted, "Jesus Malverde" was the patron saint of drug dealing. In addition, Steed observed a small bottle of water in the console of the vehicle, which he testified he had seen suspected drug dealers use during traffic stops to swallow drugs concealed in their mouths.

¶5 Less than five minutes after entering the condominium complex, Defendant exited the complex and approached the vehicle. As Defendant came around the full-size van, Wahlin and Steed, who were both in uniform, approached Defendant "to talk with him." Wahlin first asked if Defendant knew that the vehicle was uninsured. According to Wahlin, Defendant's response was, "How[did] you know that?" Wahlin then explained to Defendant that the vehicle had been suspected of being involved in some drug transactions. According to Wahlin, Defendant denied having any knowledge of this information. Wahlin continued by asking Defendant if he had any drugs on his person, and Defendant responded that he did not. Wahlin also asked Defendant if he would open his mouth to demonstrate that he did not have any

drugs in his mouth. Wahlin testified that he asked this question because, in his experience, drug dealers usually package drugs like cocaine and heroin in small balloons, which they carry in their mouths. Wahlin also testified that drug dealers do this so that they are able to swallow the balloons "before law enforcement can get to them." Prior to asking this question, Wahlin did not notice anything unusual about Defendant's mouth or any impediments to Defendant's speech. However, after asking this question, Wahlin noticed that Defendant became nervous and was using his tongue to move objects around in his mouth. In addition, both Wahlin and Steed observed Defendant making swallowing motions. Both Wahlin and Steed testified that, at this point, they believed that Defendant was trying to conceal evidence by swallowing it. Steed further testified that he believed that Defendant "had balloons in his mouth" and that Defendant "was going to swallow drugs." Immediately, both Wahlin and Steed grabbed Defendant's arms, placed him in a "wrist lock," and bent him forward. Wahlin testified that they bent Defendant forward because, based on Wahlin's experience, that made it harder for Defendant to swallow anything that might have been in his mouth. Wahlin then told Defendant to spit out what he had in his mouth. Defendant spit out fifteen balloons containing illegal narcotics. Wahlin testified that the amount of time that passed between him asking Defendant to open his mouth and Defendant spitting out the balloons was approximately five to ten seconds.

¶6 On June 26, 2003, Defendant was charged with two counts of unlawful possession of a controlled substance with the intent to distribute. See Utah Code Ann. § 58-37-8(1)(a)(iii) (2002). On August 13, 2003, Defendant filed a motion to suppress the evidence obtained by Wahlin and Steed during their encounter with Defendant, arguing that their warrantless search was constitutionally impermissible. At the conclusion of the August 29, 2003 evidentiary hearing on Defendant's motion to suppress, the trial court denied Defendant's motion.

¶7 On October 17, 2003, Defendant filed a petition for interlocutory review of the trial court's denial of his motion to suppress. This court denied Defendant's motion in an order dated November 26, 2003. On January 5, 2004, pursuant to State v. Sery, 758 P.2d 935 (Utah Ct. App. 1988), Defendant pleaded guilty to one count of unlawful possession of a controlled substance with the intent to distribute, see Utah Code Ann. § 58-37-8(1)(a)(iii), but preserved his right to appeal the trial court's denial of his motion to suppress. Defendant appeals.

ISSUE AND STANDARD OF REVIEW

¶8 Defendant argues that the trial court erred by denying his motion to suppress.

We review the factual findings underlying the trial court's decision to grant or deny a motion to suppress evidence using a clearly erroneous standard. However, we review the trial court's conclusions of law based on these findings for correctness, with a measure of discretion given to the trial judge's application of the legal standard to the facts.

State v. Veteto, 2000 UT 62, ¶8, 6 P.3d 1133 (quotations and citations omitted). "The measure of discretion afforded varies, however, according to the issue being reviewed." State v. Hansen, 2002 UT 125, ¶26, 63 P.3d 650. The Utah Supreme Court has stated that "[w]hen a case involves the reasonableness of a search and seizure, 'we afford little discretion to the district court because there must be state-wide standards that guide law enforcement and prosecutorial officials.'" State v. Warren, 2003 UT 36, ¶12, 78 P.3d 590 (quoting Hansen, 2002 UT 125 at ¶26). More recently, the Utah Supreme Court "abandon[ed] the standard which extended 'some deference' to the application of law to the underlying factual findings in search and seizure cases in favor of non[]deferential review." State v. Brake, 2004 UT 95, ¶15, 103 P.3d 699. Because this case involves a search and seizure, we do not extend any deference to the trial court in its application of the law to its factual findings. See id.

ANALYSIS

¶9 Defendant first argues that Wahlin and Steed unconstitutionally exceeded the scope of their initial encounter with Defendant when Wahlin, without reasonable suspicion to do so, questioned Defendant about drugs. Defendant also argues that even if Wahlin did have reasonable suspicion to ask Defendant about drugs, the State failed to demonstrate the lawfulness of Wahlin and Steed's subsequent warrantless search of Defendant. We will address each argument in turn.

I. Questioning About Drugs

¶10 Defendant asserts that when Wahlin began questioning Defendant about the uninsured status of the vehicle, he engaged

Defendant in a valid, level two encounter,² which was limited to the potential insurance violation. See generally Salt Lake City v. Ray, 2000 UT App 55, ¶11, 998 P.2d 274 (explaining a level two encounter). Defendant then argues that Wahlin and Steed unconstitutionally exceeded the scope of this initial detention when Wahlin, without reasonable suspicion to do so, detained Defendant further to question him about drugs. We disagree with Defendant's argument and with his characterization of his detention as being initially limited to the potential insurance violation.

¶11 "[A]n officer may stop and question a person when the officer has reasonable, articulable suspicion that the person has been, is, or is about to be engaged in criminal activity." State v. Pena, 869 P.2d 932, 940 (Utah 1994) (quotations and citation omitted). In determining whether an officer has reasonable, articulable suspicion, we consider "the totality of the circumstances to determine whether the officer had specific and articulable facts which, taken together with rational inferences from those facts, warrant a detention." State v. Munsen, 821 P.2d 13, 15 (Utah Ct. App. 1991) (quotations and citations omitted).

¶12 In an apparent attempt to limit the scope of his encounter with Wahlin and Steed, Defendant has mischaracterized the encounter as being limited to the uninsured status of the vehicle. Although it is true that the first question Wahlin asked Defendant concerned the potential insurance violation, we are not persuaded that this operated to limit the encounter to that issue alone. In essence, Defendant has selectively divided Wahlin and Steed's fluid encounter with Defendant into two parts, arguing that the first part was a valid level two encounter and that the second part unconstitutionally exceeded the scope of the

2. The parties disagree about the level of Defendant's encounter with Wahlin and Steed. Defendant argues that his detention was a level two encounter, which constitutes a seizure for purposes of the Fourth Amendment. See generally Salt Lake City v. Ray, 2000 UT App 55, ¶¶10-11, 998 P.2d 274 (explaining the "three levels of constitutionally permissible encounters between law enforcement officers and the public"). The State, on the other hand, argues that Defendant's detention was a level one encounter, which does not constitute a seizure for purposes of the Fourth Amendment. See id. Because the outcome of Defendant's appeal would be the same regardless of our conclusion on this issue, we adopt Defendant's position for purposes of our analysis. However, in doing so, we do not express an opinion about whether Defendant's encounter with Wahlin and Steed actually was a level two encounter constituting a seizure under the Fourth Amendment.

first. However, after reviewing the record, it is far from clear to us, despite Defendant's assumptions to the contrary, that Wahlin and Steed's sole purpose for approaching Defendant was to resolve the potential insurance violation.

¶13 Rather, our review of the record reveals that Wahlin and Steed had knowledge of the following "specific and articulable facts" and made the following "rational inferences from those facts," id. (quotations and citations omitted), which warranted engaging Defendant in a level two encounter to ask him about the potential insurance violation and about drugs. On June 23, 2003, Wahlin saw the vehicle enter the aforementioned condominium complex. The complex was located in an area where, according to information Wahlin had previously received, drug transactions had been taking place. In addition, Wahlin had previously received information from the narcotics division of the Salt Lake City Police Department that the vehicle had possibly been involved in drug transactions. On that day, Wahlin saw Defendant get out of the vehicle, enter the complex, return to the vehicle less than five minutes later, get back into the vehicle, and drive the vehicle out of the complex. Based upon the information he had previously received, his observation of Defendant that day, and his belief that Defendant's short visit to the complex was consistent with short-stay drug traffic, Wahlin believed that Defendant had been involved in a drug transaction. Based upon information he gathered that day, Wahlin discovered that the vehicle was uninsured. The following day, based upon Wahlin's experience that it was typical for drug dealers to frequent the same location, he and Steed returned to the complex and saw Defendant drive the vehicle into the same area of the complex as he had the previous day, get out of the vehicle, and enter the complex. After approaching the vehicle, Steed looked inside and observed a facsimile of "Jesus Malverde," which Steed recognized to be the patron saint of drug dealing. In addition, Steed observed a small bottle of water in the console of the vehicle, which he had seen suspected drug dealers use during traffic stops to swallow drugs concealed in their mouths.³

3. Defendant attempts to attack the veracity and significance of several of these facts individually. Defendant also correctly notes that the trial court accorded "little weight" to the facsimile of "Jesus Malverde" and the small bottle of water. However, our review of the record reveals that reasonable suspicion existed based upon the totality of the circumstances, not based upon an analysis of each individual fact. Further, Defendant's attack upon the individual facts is a tactic that has been criticized by the United States Supreme Court. See United States v. Arvizu, 534 U.S. 266, 274 (2002) (stating that the

(continued...)

¶14 Given the foregoing, it is clear that, under "the totality of the circumstances," Wahlin and Steed had "specific and articulable facts which, taken together with rational inferences from those facts, warrant[ed] [the] detention" of Defendant to question him about the uninsured status of the vehicle and about drugs. Id. (quotations and citations omitted). Therefore, we conclude that Wahlin had reasonable, articulable suspicion to ask Defendant about drugs.

II. Validity of Warrantless Search

¶15 Defendant also argues that even if Wahlin did have reasonable suspicion to ask Defendant about drugs, the State failed to demonstrate the lawfulness of Wahlin and Steed's subsequent warrantless search of Defendant. We disagree.

¶16 In order to demonstrate the lawfulness of a warrantless, bodily search, the State must establish three elements: (A) "a clear indication that evidence would be found"; (B) "exigent circumstances that justified the warrantless bodily intrusion"; and (C) "that the method chosen was a reasonable one, performed in a reasonable manner." State v. Hodson, 866 P.2d 556, 560 (Utah Ct. App. 1993) (Hodson I) (citing Schmerber v. California, 384 U.S. 757, 768-72 (1966)), rev'd on other grounds, 907 P.2d 1155 (Utah 1995) (Hodson II) (reversing based only upon the Hodson I court's conclusion on the third element--i.e., the reasonableness of the search procedure).

A. Clear Indication that Evidence Would be Found

¶17 To establish the first element, the State must prove that at the time of their warrantless search of Defendant, Wahlin and Steed had "a clear indication that evidence would be found." Hodson I, 866 P.2d at 560. "'Clear indication' requires that there be probable cause to believe that evidence will be found." Id. (citations omitted). "In general, probable cause means a fair probability that contraband or evidence of a crime will be found." State v. Yoder, 935 P.2d 534, 540 (Utah Ct. App. 1997) (quotations and citation omitted). "The probable cause determination is based on the totality of the circumstances." Id. (quotations and citation omitted). "The validity of the probable cause determination is made from the objective standpoint of a prudent, reasonable, cautious police officer

3. (...continued)

"evaluation and rejection" of facts "in isolation from each other does not take into account the 'totality of the circumstances,' " and noting that Terry v. Ohio, 392 U.S. 1 (1968), "precludes this sort of divide-and-conquer analysis").

. . . guided by his experience and training. In making that determination, a police officer is entitled to rely on information gained from other police officers." Hodson I, 866 P.2d at 560 (alteration in original) (quotations and citations omitted).

¶18 Because "[t]he probable cause determination is based on the totality of the circumstances," Yoder, 935 P.2d at 540 (quotations and citation omitted), we must consider the facts that served as the basis for Wahlin and Steed possessing reasonable suspicion to ask Defendant about drugs, as well as the following facts concerning Wahlin's questioning of Defendant about drugs. Wahlin asked Defendant to open his mouth to demonstrate that he did not have any drugs in his mouth because, based upon Wahlin's experience, drug dealers usually package drugs like cocaine and heroin in small balloons, which they carry in their mouths. Wahlin indicated that, based upon his experience, drug dealers do this so that they are able to swallow the balloons "before law enforcement can get to them." After asking Defendant to open his mouth, Wahlin noticed that Defendant became nervous⁴ and was using his tongue to move objects around in his mouth. In addition, both Wahlin and Steed observed Defendant making swallowing motions. Given these observations, Wahlin and Steed believed, based upon their experience and training, that Defendant was trying to conceal evidence by swallowing it. More specifically, Steed believed, again based upon his experience and training, that Defendant "had balloons in his mouth" and that Defendant "was going to swallow drugs."

¶19 In determining whether probable cause existed, we must consider all of the aforementioned facts from "the objective standpoint of a prudent, reasonable, cautious police officer . . . guided by his experience and training." Hodson I, 866 P.2d at 560 (alteration in original) (quotations and citation omitted). After reviewing the record facts in this light, we have determined that Wahlin and Steed were justified in believing that there was "a fair probability that contraband or evidence of a crime [would] be found." Yoder, 935 P.2d at 540 (quotations and citation omitted). Therefore, we conclude that Wahlin and Steed had "probable cause to believe"--i.e., "a clear indication"--"that evidence would be found." Hodson I, 866 P.2d at 560 (quotations and citations omitted).

4. "Although [D]efendant's nervous or suspicious behavior is insufficient by itself to establish probable cause, it may . . . be considered in conjunction with other relevant and objective facts." State v. Yoder, 935 P.2d 534, 541 (Utah Ct. App. 1997).

B. Exigent Circumstances

¶20 To establish the second element, the State must demonstrate "exigent circumstances that justified the warrantless bodily intrusion." Id. Exigent circumstances exist when either (1) "the procurement of a warrant would have jeopardized the safety of the police officers or the public," or (2) "the evidence was likely to have been lost or destroyed." Id. at 561 (quotations and citations omitted). In order for the second circumstance to apply, "the police must have probable cause and believe that either contraband or evidence of a crime . . . may be lost if not immediately seized." State v. Palmer, 803 P.2d 1249, 1252 (Utah Ct. App. 1990) (alteration in original) (quotations and citation omitted).

¶21 In arguing that exigent circumstances did not exist in this case, Defendant relies primarily upon Palmer, People v. Bracamonte, 540 P.2d 624 (Cal. 1975), and Hodson II. However, Defendant's reliance upon these cases is misplaced.

¶22 Defendant relies upon the Palmer court's conclusion that there was "no justifiable reason to believe [evidence] would be destroyed" by the defendant in Palmer "if he had swallowed it." Palmer, 803 P.2d at 1253 (citing Bracamonte, 540 P.2d at 631). Although Defendant's assertion is generally correct, he neglects to specifically mention that the evidence swallowed by the defendant in Palmer was a diamond ring. See id. at 1250-51. Based upon the difference between the evidence in Palmer and the evidence in this case, we conclude that the holding of Palmer is inapplicable to this case. As we will discuss below, we have determined that Wahlin and Steed had probable cause and believed that the evidence in this case, unlike the diamond ring in Palmer, may have been "lost if not immediately seized." Id. at 1252 (quotations and citation omitted).

¶23 Defendant also relies upon the reasoning and holding of Bracamonte. In Bracamonte, the officers observed the defendant place balloons in her mouth and swallow them. See 540 P.2d at 626. In holding that the balloons should not have been received in evidence by the trial court, see id. at 631, the Bracamonte court noted that evidence such as that swallowed by the defendant "may pass completely through the digestive tract, by the ordinary processes of nature, without causing any ill effects. The rubber container would effectively prevent the contents from being absorbed into the system." Id. Unlike the officers in Bracamonte, Wahlin and Steed did not observe Defendant place any objects in his mouth or have any knowledge of how any objects in his mouth were packaged. Although Wahlin testified that, based upon his experience, drug dealers typically package drugs in small balloons for transport in their mouths, he and Steed did

not know conclusively what was in Defendant's mouth or how any objects in Defendant's mouth were packaged. For this reason, we decline to adopt the reasoning and holding of Bracamonte in this case.

¶24 Finally, Defendant relies upon Hodson II. Although it is true that the Hodson II court overruled this court's decision in Hodson I, it did so on only one issue and it did not upset this court's ruling on exigent circumstances. See State v. Hodson, 866 P.2d 556, 560 (Utah Ct. App. 1993) (Hodson I), rev'd on other grounds, 907 P.2d 1155 (Utah 1995) (Hodson II) (reversing based only upon the Hodson I court's conclusion on the third element--i.e., the reasonableness of the search procedure). Therefore, the Hodson II court's decision is not directly applicable to the exigent circumstances element, and this court's conclusion on exigent circumstances in Hodson I is still valid. Accordingly, we apply Hodson I in analyzing Defendant's argument.

¶25 In Hodson I, this court stated:

When illegal drugs are ingested to conceal them from law enforcement, a reasonable police officer cannot know, for certain, the method of packaging the drug. As a result, it is not unreasonable to assume the drug might not be securely packaged so as to avoid its dissipation in the ingester's system, with resulting probable toxic effects. Therefore, contrary to defendant's assertion, it is precisely because the police did not know how the heroin was packaged that exigent circumstances justified a warrantless search and seizure. The exigencies in this case included both possible destruction of evidence and potential harm to defendant.

866 P.2d at 561.

¶26 We agree with the reasoning and holding of the Hodson I court.⁵ In this case, although Wahlin and Steed may have

5. Holdings from other jurisdictions are consistent with this court's holding on exigent circumstances in Hodson I. See, e.g., State v. Holton, 975 P.2d 789, 790, 792-93 (Idaho 1999) (holding that exigent circumstances existed when one officer asked the defendant to open his mouth, the defendant began chewing and attempting to swallow something that was in his mouth (later discovered to be a small plastic bag of methamphetamine), the
(continued...)

believed that the objects in Defendant's mouth were drugs that were securely packaged in balloons, they could not "know, for certain, the method of packaging the drug." Id. In accordance with Hodson I, because they did not know how the drugs were packaged, exigent circumstances existed in this case. See id. Put another way, because we conclude that Wahlin and Steed had "probable cause and believe[d] that either contraband or evidence of a crime . . . may [have been] lost if not immediately seized," Palmer, 803 P.2d at 1252 (second alteration in original)

5. (...continued)

defendant refused to disgorge the object, and one officer saw something that looked like a piece of plastic in defendant's mouth while he was chewing, because "[t]he officers acted on a reasonable belief that [the defendant] was attempting to destroy the evidence" and there was a risk that the defendant could "asphyxiate on the plastic bag or suffer from a massive overdose of methamphetamine"); State v. Harris, 505 N.W.2d 724, 727, 732 (Neb. 1993) (holding that exigent circumstances existed when the officer noticed that the defendant was chewing on something and the defendant refused to disgorge the object, because the officer "had no way of knowing whether the suspected narcotic in [the defendant's] mouth could be retrieved later or whether it would be destroyed when [the defendant] ingested it" and the defendant's "health and physical safety could have been endangered had the police officers allowed [the defendant] to swallow the suspected narcotic"); State v. Lomack, 545 N.W.2d 455, 459, 463 (Neb. Ct. App. 1996) (holding that exigent circumstances existed when one officer saw a small plastic bag in the defendant's mouth and the defendant refused to disgorge it, because "there [was] nothing to show that the officers could have determined, when making their split-second decision, how effectively the substance was packaged or whether [the defendant] could have bitten through the packaging" and "[b]ecause of the possibility that the evidence in [the defendant]'s mouth could have been destroyed or that [the defendant] could have injured himself by ingesting the cocaine"); State v. Taplin, 676 P.2d 504, 505-06 (Wash. Ct. App. 1984) (rejecting the defendant's argument that was based upon People v. Bracamonte, 540 P.2d 624 (Cal. 1975), and holding that exigent circumstances existed when the officer saw the defendant make swallowing motions, the officer saw balloons in the defendant's mouth, and the defendant initially refused to disgorge the balloons, because it was "possible that the evidence would not have passed through [the defendant's] digestive system," "[u]nder the circumstances the possibility that the evidence could have been destroyed justified the officers in 'seizing' the balloons," and "[i]t was as likely that the evidence would have been destroyed as that it would have been recovered").

(quotations and citation omitted), "exigent circumstances . . . justified the warrantless bodily intrusion." Hodson I, 866 P.2d at 560.

C. Reasonable Method Performed in a Reasonable Manner

¶27 To establish the third element, the State must demonstrate that the search procedure employed by Wahlin and Steed "was a reasonable one, performed in a reasonable manner." Id. To determine whether a search procedure was reasonable, we must measure it against three factors: "(1) the extent to which the procedure used may threaten the safety or health of the individual, (2) the extent of the intrusion upon the individual's dignitary interests in personal privacy and bodily integrity, and (3) the community's interest in fairly and accurately determining guilt or innocence." Hodson II, 907 P.2d at 1157 (citing Winston v. Lee, 470 U.S. 753, 761-62 (1985)). The first two factors represent Defendant's individual interests and are weighed against the third factor, which represents the State's interest. See Winston 470 U.S. at 762 (outlining the first two factors and stating that the third factor is "[w]eighed against these individual interests"); Hodson II, 907 P.2d at 1158 (determining that "the weight of the risk and the intrusion under the first two [factors] . . . was considerable, and the critical determination is whether the third factor . . . can shift the balance").

¶28 First, we must determine the extent to which the procedure used by Wahlin and Steed "threaten[ed] the safety or health of" Defendant. Hodson II, 907 P.2d at 1157. According to the record, Wahlin and Steed placed Defendant in a "wrist lock" that lasted approximately five to ten seconds. Even if Defendant is correct in his assertion that the "wrist lock" was "extremely painful," any pain inflicted was very brief in nature. Accordingly, we conclude that the procedure used by Wahlin and Steed created little or no threat to Defendant's safety or health. Cf. id. at 1158 (holding that risk to safety and health was "considerable" when the defendant was "threatened with a firearm, . . . dragged from his vehicle, thrown to the ground, and ordered to spit out what was in his mouth by an officer whose arm was around his neck").

¶29 Second, we must determine the extent to which the procedure used by Wahlin and Steed intruded upon Defendant's "dignitary interests in personal privacy and bodily integrity." Id. at 1157. According to the record, the only physical contact that Wahlin and Steed had with Defendant was the "wrist lock." Given its brief nature and limited physical contact, we conclude that the "wrist lock" presented an extremely low level of intrusion upon Defendant's interests in personal privacy and bodily

integrity. Cf. id. at 1158 (holding that intrusion was high where the defendant "was assaulted with a loaded weapon, dragged to the ground, had some degree of force applied to his throat, and had fingers inserted in his mouth without his consent or cooperation").

¶30 Finally, we must examine the State's "interest in fairly and accurately determining guilt or innocence." Id. at 1157. In other words, we must determine "the need to preserve evidence of criminal behavior." Id. at 1158. Defendant argues that the Hodson II court's holding is directly applicable to this factor. We disagree.

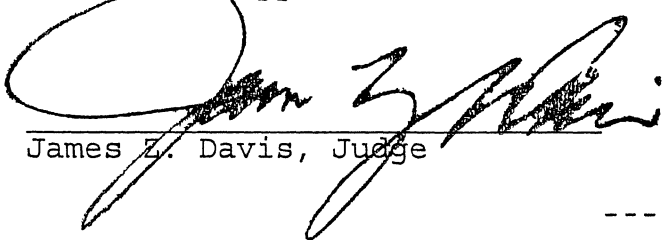
¶31 The Hodson II court held that "[i]n the absence of an urgent need to preserve evidence, there cannot be a justification for the significant risks to health and safety posed by using the kind of force in this case to get a suspect to spit out what is believed to be a mouthful of drugs." Id. (emphasis added). The Hodson II court also stated that "[n]o emergency or exigency justifies the use of force at this level to preserve evidence which would be readily (if inconveniently) accessible through nonviolent means." Id. (emphasis added). In his argument, Defendant neglects to mention the emphasized portions of these statements from Hodson II, which, in our view, limit its holding to the type of extreme force used by the officers in that case. See id. Further, contrary to Defendant's argument, Hodson II does not operate to diminish the State's "need to preserve evidence of criminal behavior," id., in every case where officers suspect that a defendant is about to swallow or has swallowed drugs. Rather, it specifically holds that this State interest--represented by the third factor--is outweighed by the individual's interests--represented by the first two factors--when a defendant is about to swallow or has swallowed drugs and the officers employ the extreme levels of force described in Hodson II. See id.

¶32 Considering the force used by Wahlin and Steed in this case, we conclude that the State's "interest in fairly and accurately determining guilt or innocence," id. at 1157, in this case clearly outweighs the extremely low threat to Defendant's safety or health and the negligible intrusion upon Defendant's interests in personal privacy and bodily integrity. See id. Accordingly, we conclude that the search procedure used by Wahlin and Steed was reasonable.

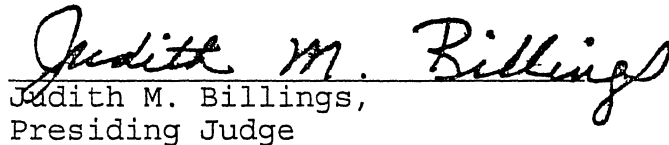
¶33 Because the State has demonstrated the three required elements, see State v. Hodson, 866 P.2d 556, 560 (Utah Ct. App. 1993) (Hodson I), rev'd on other grounds, 907 P.2d 1155 (Utah 1995) (Hodson II), we conclude that Wahlin and Steed's warrantless search of Defendant was lawful.

CONCLUSION

¶34 We conclude that Wahlin had reasonable, articulable suspicion to ask Defendant about drugs. We also conclude that Wahlin and Steed's warrantless search of Defendant was lawful. Therefore, we affirm the trial court's denial of Defendant's motion to suppress.


James L. Davis, Judge

¶35 I CONCUR:


Judith M. Billings,
Presiding Judge

ORME, Judge (dissenting):

¶36 I respectfully dissent from the majority's conclusion that the police officers in this case had the required reasonable, articulable suspicion to question Alvarez about drugs after approaching him in the context of a level two encounter.¹ It follows that I cannot agree the ensuing search of Alvarez's person was constitutional. I would reverse the trial court's denial of Alvarez's motion to suppress and remand with instructions to grant the motion.

¶37 The majority concludes that the officers had the required reasonable, articulable suspicion that Alvarez had engaged, was engaging, or was about to engage in criminal activity to warrant

1. "While the required level of suspicion is lower than the standard required for probable cause . . . the same totality of facts and circumstances approach is used to determine if there are sufficient 'specific and articulable facts' to support reasonable suspicion." State v. Case, 884 P.2d 1274, 1276 (Utah Ct. App. 1994) (citations omitted). "[T]he State bears the initial burden for establishing the articulable factual basis for the reasonable suspicion necessary to support a[level two] investigative stop." Id.

Alvarez's detention to question him about drugs. See State v. Pena, 869 P.2d 932, 940 (Utah 1994). Under the majority's view, the articulable factual basis the officers had for suspecting that Alvarez was involved in illegal drug-related activity is supported mainly by two pieces of information that originated from sources outside of the officers' own observations.² First, the officers had "information" that drug transactions had been taking place at the condominium complex where they had observed Alvarez, two days in a row, make brief visits to the same area of the complex. Second, the officers had "information" that Alvarez's vehicle had possibly been involved in drug transactions. However, because the "information" upon which the officers based their suspicions originated outside of the officers' own observations, and because the State failed to develop any articulable factual basis substantiating this "information," the information does not provide a legally cognizable factual basis for the officers' suspicions about Alvarez. Thus, on the record before us, the officers were simply not justified in stopping and questioning him about drugs.

¶38 While "[a]n investigative stop may survive the Fourth Amendment prohibition of unreasonable searches and seizures if performed by an officer who objectively relies on information, bulletins, or flyers received from other law enforcement sources," it is also well settled that "the legality of a stop based on information imparted by another will depend on the sufficiency of the articulable facts known to the individual originating the information . . . [that is] received and acted upon by the investigating officer." State v. Case, 884 P.2d 1274, 1277 (Utah Ct. App. 1994) (emphasis in original). See also State v. Kohl, 2000 UT 35, ¶¶13-15, 999 P.2d 7 (concluding State produced adequate evidence to show police dispatch was based on sufficient articulable facts to justify stop); State v. Bruce, 779 P.2d 646, 650-51 (Utah 1989) (allowing for "reliance on a bulletin issued by other police officers" when bulletin "was issued by officers possessing 'a reasonable suspicion justifying a stop'"); State v. Humphrey, 937 P.2d 137, 141-42 (Utah Ct. App. 1997) (in considering whether information outside of officer's own observations forms part of factual basis to support vehicle

2. In reviewing the totality of the circumstances presented by this case, the majority opinion appropriately acknowledges that several of the circumstances relied on by the officers as giving rise to their suspicions about Alvarez were properly given little weight by the trial court. For example, the trial court accorded little weight to the facsimile of Jesus Malverde, "The Narco Saint," which the officers observed in Alvarez's vehicle, as well as the bottle of water they observed in the vehicle's console.

stop, court analyzed "both the content of the information and its reliability").

¶39 In Case, an officer received a dispatch call directing him to a specific area to investigate a possible car prowler or car burglary. See 884 P.2d at 1275. The dispatcher described the suspect as a male in a white tee shirt, possibly Hispanic, with a "chunky" build. Id. Based on that information, the officer stopped a vehicle leaving the area that was carrying a passenger that appeared to fit the description. See id. During the course of the officer's stop, he detected an odor of alcohol on the breath of the vehicle's driver, whom he subsequently arrested for driving while under the influence of alcohol. See id. The driver claimed that the officer, acting on the radio dispatch, lacked a reasonable suspicion to stop his car and that any evidence obtained during the stop was illegal. See id. The trial court denied the driver's motion to suppress the evidence, but this court reversed the denial of the driver's motion. See id. at 1278. Because the State failed to establish any reasonable, articulable suspicion underlying the issuance of the bulletin, no such suspicion supported making the stop. See id. One was left to speculate as to the source of, or the reason for, the dispatcher's instruction to the investigating officer. See id. In Case, this court held that "[m]erely providing descriptive information to an officer about whom to stop, by itself, is not enough to justify the stop if there are no articulable facts pointed to which establish why a stop was to be made." Id. (emphasis in original).

¶40 Much like the situation in Case, the officers in this instance may or may not have been justified in relying on their "information," depending on its basis. Unfortunately, the State wholly failed to detail what the information was and how these officers came to receive it. See id. at 1276. Thus, the State failed to establish that the information about the condominium complex and about Alvarez's vehicle was based on reliable articulable facts. At the suppression hearing, the State was required to outline the factual basis known to the individual or entity that originated the "information" about the condominium complex and Alvarez's vehicle, and it was required to show that some legally articulable suspicion prompted the transmittal of the information in the first place. See id. at 1277-78 n.5 (stating that "the State becomes obligated, albeit after the fact, to show that legally sufficient articulable suspicion prompted the issuance of the flyer or dispatch in the first place"). The State simply failed in its burden at the suppression hearing in this case.

¶41 Reasonable suspicion cannot be justified by an officer's reliance on some sort of amorphous, unexplained "information"

received from some other, undisclosed source. Therefore, in a situation like the instant one, the "reasonable suspicion" inquiry is one step removed from the typical inquiry that focuses on the articulable factual basis behind a police officer's own observations and inferences that give rise to his suspicions of illegal activity. Instead, the focus is on the articulable factual basis behind the "information" that an officer receives from another source if it is to provide the legal basis for reasonable suspicion about an individual.

¶42 The officers in this case began their initial observation of the condominium complex solely because of the unexplained "information" they had about drug transactions taking place in that area. Likewise, they only took an interest in Alvarez because of the "information" they had that his vehicle had possibly been involved in drug transactions.³ In fact, after asking Alvarez if he knew his vehicle was uninsured, the very next thing the officer said to him was that his vehicle was suspected of being involved in drug transactions. Then, the officers asked Alvarez if he was carrying any drugs and if they could look in his mouth. Without the "information" tying Alvarez to illegal drug transactions, the remaining circumstances the officers relied on to justify questioning Alvarez about his involvement in drug trafficking, as well as to justify the

3. The pivotal role of the underlying factual basis for the mysterious information can easily be understood with a couple of examples. If the "information" was a radio report from a narcotics officer who had been working undercover, and who had participated in controlled buys at the condominium complex and from a person who had retrieved the drugs from the vehicle Alvarez was driving, there would be a sound basis for the information, and the suspicions of the officers who confronted Alvarez would be deemed warranted. Just the opposite is true if the "information" was (1) a report from one of the officers' wives that she had golfed with a friend whose husband used to work as a realtor and he had always said there was "a lot of hanky-panky in the condos and apartments south of 21st South" and (2) an admonition from the shift sergeant that "Hispanic men driving around with a water bottle in the console is gonna mean drugs 90% of the time." The problem, then, is a failure of proof by the State at the suppression hearing. Not all "information" passed along to police officers is of equal validity. The State had the burden to explain what this "information" was and where it came from. Whether or not it constituted a reasonable, articulable basis for suspicion is simply not known in the absence of such proof.

subsequent warrantless search of Alvarez's mouth, wholly fail to provide an articulable factual basis for the officers' actions.⁴

¶43 The only circumstances left to justify any encounter between Alvarez and the officers was the officers' knowledge that Alvarez's vehicle was uninsured, the officers' observations of the picture of Jesus Malverde and the water bottle in Alvarez's vehicle, Alvarez's two visits to the complex, and Alvarez's nervous behavior when confronted by police. Such circumstances, however, do not give the officers the required reasonable suspicion to detain Alvarez and question him about drugs.



Gregory K. Orme, Judge

4. Without the "information" about Alvarez's vehicle or the condominium complex, his two repeat visits to the same complex are relatively innocuous. A dutiful nephew with a limited lunch break might make a brief, daily visit to his invalid aunt's condominium, just to check in on her. That visit by itself would not justify the reasonable suspicion that he is involved in some type of criminal activity at the condominium complex. Nevertheless, if the same type of brief visit to a condominium complex was coupled with reliable information that the targeted individual is a known drug dealer and that the complex is a drug haven, it might more appropriately give rise to reasonable suspicion of criminal activity. The key inquiry in this context, however, would be about the articulable, factual basis behind the "information" that he is a drug dealer and that the condominium complex is a drug haven.

Addendum B

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FILED DISTRICT COURT
Third Judicial District

OCT 14 2003

SALT LAKE COUNTY

By Deputy Clerk

IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT
IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

THE STATE OF UTAH,

Plaintiff,

-VS-

ERNESTO ALVAREZ,

Defendant.

FINDING OF FACT AND
CONCLUSIONS OF LAW

Case No. 031904214

Judge Paul G. Maughn

THE ABOVE ENTITLED MATTER CAME BEFORE the Court for hearing and determination of the Defendant's Motion to Suppress, on August 26, 2003. The Honorable Paul G. Maughn presided. The Defendant was present and represented by Steve Shapiro. Kimberly McKinnon, Deputy District Attorney for Salt Lake County, represented the State. Based upon the memorandums of law submitted and the arguments of counsel presented, and for good cause shown, the Court now makes and enters the following:

FINDINGS OF FACT

1. On June 24, 2003, Sergeant Chad Steed and Officer Wahlin of the Salt Lake City Police Department observed a vehicle under suspicion for illegal activities pulling into a apartment complex at 2430 S. Elizabeth Street. The officers watched the defendant enter the complex, and then return shortly after.

For the second consecutive day and at the same time of day.

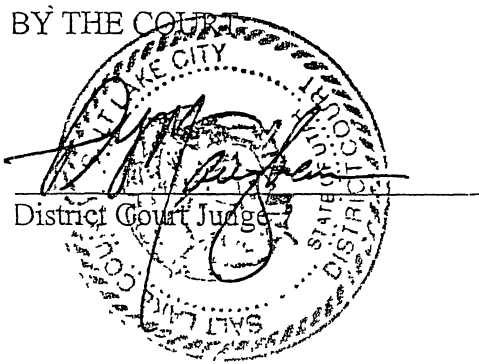
2. On the initial approach to the defendant's vehicle, Sergeant Steed observed in the center console of the defendant's vehicle a bottle of water as well as a facsimile of "Jesus Malverde."
3. When the defendant returned to his vehicle Officer Wahlin talked to the defendant. During the course of the conversation, Officer Wahlin asked the defendant if he had drugs in his mouth. At that point the defendant made swallowing motions with his mouth. Both officers simultaneously watched as the defendant moved objects in his mouth and tried to swallow. Officers then each physically grabbed one of the defendant's arms and forced him to spit out the balloons containing illegal narcotics.

FROM THE FOREGOING FINDINGS OF FACT, THE COURT NOW MAKES AND ENTERS THE FOLLOWING:

CONCLUSIONS OF LAW

1. In the totality of the circumstances, the Officers acted reasonably.
2. The defendant did not open his mouth and officers clearly observed a crime being committed in their immediate presence.
3. Given the circumstances, a search warrant was not needed.
4. The Defendant's Motion to Suppress Illegally Obtained Evidence is Denied.

DATED this 9 day of OCT, 2003.



Approved as to Form:

Kimberly McKinnon

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FILED DISTRICT COURT
Third Judicial District
OCT 14 2003
SALT LAKE COUNTY
By [Signature]
Deputy Clerk

IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT
IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, -vs- ERNESTO ALVAREZ, Defendant.	ORDER Case No. 031904214 Judge Paul G. Maughan <u>[Signature]</u>
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Based upon the Findings of Fact and Conclusions of Law, it is hereby ORDERED,
ADJUDGED AND DECREED:

The Defendant's Motion to Suppress Illegally Obtained Evidence is Denied.

DATED this 9 day of Oct, 2023.

BY THE COURT:

[Signature]
District Court Judge