

2005

Utah v. Ernesto Alvarez : Reply Brief

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

THE STATE OF UTAH, :
Plaintiff/Respondent, :
v. :
ERNESTO ALVEREZ, : Case No. 20050468-SC
Defendant/Petitioner. :

**REPLY BRIEF OF PETITIONER ON CERTIORARI
TO THE UTAH COURT OF APPEALS**

This writ of certiorari arises from a court of appeals decision affirming the conviction of unlawful possession of a controlled substance with the intent to distribute, a second degree felony, in violation of Utah Code Ann. § 58-37-8 (1)(a)(iii) (2002), in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Paul G. Maughan presiding.

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	:	Respondent's Brief
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Contrary to the state's brief, Mr. Alvarez respectfully requests that this Court reverse the court of appeals opinion because Mr. Alvarez was seized under the Fourth Amendment and the totality of the circumstances in this case did not create a reasonable articulable suspicion that he was involved in drug activity. Moreover, this Court should reverse because under the totality of the circumstances, the facts of this case did not give the officers probable cause to conduct a forcible bodily search. Likewise, the force the officers used to conduct that search was not reasonable in this case. Accordingly, this Court should reverse the court of appeals opinion.

POINT 1. THE OFFICERS CONDUCTED A LEVEL TWO DETENTION OF MR. ALVEREZ WHEN QUESTIONING HIM REGARDING THE LACK OF INSURANCE ON THE VEHICLE HE WAS DRIVING.

Mr. Alvarez was not free to leave when the officers questioned him about the uninsured status of the vehicle he was driving in relation to a violation of Utah

Code Ann. § 41-12a-302 (1998).¹ Although the state maintains that the encounter was voluntary even though officers questioned Mr. Alvarez about this insurance violation, Mr. Alvarez was not free to leave during this questioning. R.88:6.

Because “[a] level one encounter ‘is a voluntary encounter where a citizen may respond to an officer's inquiries but is free to leave at any time,’” Salt Lake City v. Ray, 2000 UT App 55, ¶ 11, 998 P.2d 274), the encounter in this case, where officers were questioning Mr. Alvarez regarding a misdemeanor violation made it such that a reasonable person under the circumstances would not have believed he was free to leave.

On the other hand, it is well established law that a level two encounter is a seizure under the Fourth Amendment and must therefore be justified by reasonable suspicion of criminal wrongdoing. State v. Hansen, 2002 UT 125, ¶ 35, 63 P.3d 650. “A level two encounter involves an investigative detention that is usually characterized as brief and non-intrusive.” Id. Under the facts of this case, the officers knew the vehicle of which Mr. Alvarez was operating was not insured. R.88:10. In fact, the very first thing the officers questioned Mr. Alvarez about was the lack of the insurance. Id. at 6. Officer Walling testified: “[i]nitially when I stopped the complainant I asked – or the defendant I asked him if he knew the vehicle that he was driving was uninsured.” Id. To which Mr. Alvarez’s response was: “How’d you know that?” Id. An affirmative statement by a police officer

¹ Utah Code Ann. § 41-12a-302 makes it a class B misdemeanor for a driver to knowingly operate an uninsured motor vehicle on the highways of the state.

that you are violating a law is not a circumstance under which a reasonable person would feel he or she was free to leave. State v. Smoot, 921 P.2d 1003 (Utah Ct. App. 1996).

Imperative to the determination of whether an encounter was voluntary or a seizure is "whether defendant 'remained, not in the spirit of cooperation with the officer's investigation, but because he believed he [was] not free to leave.'" State v. Struhs, 940 P.2d 1225, 1227 (Utah Ct. App. 1997)(internal citations omitted). Thus, "'the test for when the seizure occurred is objective,' and a seizure occurs 'only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" Id. Surely, the state is not advocating that a citizen is free to leave when a police officer confronts him or her about that citizen's violation of law when the officer has a reasonable suspicion of the violation as in this case.

In fact, once a police officer has "articulable suspicion" that a defendant has committed or is about to commit a crime and seizes the defendant by confronting and questioning the defendant about the crime, if the defendant attempts to flee he or she is subject to criminal charges. Accord State v. Smoot, 921 P.2d 1003, 1005-6 (Utah Ct. App. 1996). For instance, in Smoot, police officers received a report from a citizen that the defendant knew a lot about recent burglaries, causing suspicion. Id. The officers located the defendant and first engaged in innocent questions and requested to see his identification. Id. There was no dispute between the parties that this initial encounter was voluntary. Id. at 1007.

However, the police officers then found that the defendant had several outstanding bench warrants and advised the defendant of this fact Id. The officers engaged in a conversation as to whether they would serve the warrants. Id. At this point, the officers had an articulable suspicion of criminal activity and had *alerted* the defendant thereof; he was no longer free to leave. Id. Once the officers advised the defendant they were going to serve the warrants, the defendant attempted to leave. Id. In connection to this attempted flight, the defendant was charged with Interfering with an Officer. Id. Contrary to the state's argument, a person who is being questioned by officers regarding a crime is not free to leave.

As in our case, in Smoot the Utah Court of Appeals did not determine whether the initial detention was a level one or level two because it found that the officers initially had reasonable suspicion to detain the defendant under a level two stop. Id. at 1006-7. What is clear from Smoot, is that once an officer advises a defendant of a definite criminal violation, for instance the outstanding bench warrants in Smoot, or like the lack of insurance in this case, a defendant is seized for purposes of the Fourth Amendment and he is no longer free to leave and disregard the officer's confrontation and resolution of the violation of law.

Moreover, if the defendant does leave once the officer has articulated his reasonable suspicion of criminal activity, the defendant is subject to further criminal charges. Smoot, 921 P.2d at 1005-6. In addition, if someone who is accompanying the defendant urges the defendant to leave or flee once such suspicion is articulated, that third party may also be subject to obstruction of

justice criminal charges. See Utah Code Ann. § 76-8-306 (2005)(“(1) An actor commits obstruction of justice if the actor, with intent to hinder, delay, *or prevent the investigation*, apprehension, prosecution, conviction, or punishment of any person regarding conduct that constitutes a criminal offense: . . . (f) provides a person with transportation, disguise, or other means of avoiding discovery or apprehension; . . .(g) warns any person of impending discovery or apprehension”(emphasis added)).

When the state engages in this prong of its argument, that the encounter was voluntary, what is conspicuously and saliently missing from its analysis is the fact that the officers initially seized Mr. Alvarez based on the lack of insurance on the motor vehicle he was operating and that the very first question directed to Mr. Alvarez concerned this very issue. R.88:6 (Officer Wahlin testified: “[i]nitially when I stopped the complainant I asked – or the defendant I asked him if he knew the vehicle that he was driving was uninsured.”). Instead the state focuses on the supposed *physical* lack of a show of authority, lack of activated squad car lights, lack of display of weapons, lack of blocking defendant’s egress, and lack of initial use of physical force. Respondent’s brief at 8-9. However, a seizure can occur “when the officer, by means of physical force *or show of authority*, has restrained the liberty of a citizen . . .” INS v. Delgado, 466 U.S. 210, 213 104 S. Ct. 1758, 80 L.Ed. 247(1984) (quoting Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968)(emphasis added)). In fact, a seizure results whenever a person believes he or she is not free to leave. Ray, 2000 UT App 55 at ¶ 11. In this case, by demonstrating to Mr.

Alvarez that the officers are aware of an outstanding violation of Utah law on behalf of appellant, they are effectively showing authority such that Mr. Alvarez would not feel free to leave.

The state argues that the United States 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*. ” Respondent’s brief at 10 (citation omitted)(emphasis added). Rather than the police officers merely asking “potentially incriminating questions,” in this case the police officers clearly *showed authority* by demonstrating, the very first thing, that they had reasonable suspicion of criminal activity, thus indicating Mr. Alvarez was not free to disregard their questioning. *Id.* at 10. See R.88:6 (Officer Wahlin testified: “[i]nitially when I stopped the complainant I asked – or the defendant I asked him if he knew the vehicle that he was driving was uninsured.”).

Thus, the state’s reliance on this “potentially incriminating questions” analysis is misplaced. The appellant does not argue that “potentially incriminating questions” were posed to seize him, but rather outright accusatory questioning which indicated that Mr. Alvarez was not free to leave. It is incriminating, not “potentially incriminating” to ask the defendant whether he was aware that he was in violation of Utah law. Thus, this case is distinguished from the case on which the state relies to establish this proposition, INS v. Delgado, 466 U.S. 210 (1984). In Delgado, acting pursuant to warrants issued on a showing of probable cause that numerous unidentified illegal aliens were employed at California Davis Pleating

Co., the INS conducted two factory surveys at the company. In addition, a third survey was conducted pursuant to the employer's consent. Id. at 211-12.

During these surveys, "the agents approached employees and . . . asked them from one to three questions relating to their citizenship." Id. at 212. In its analysis, the United States Supreme Court cited to Florida v. Royer, 460 U.S. 491 (1983), stating it "plainly implies that interrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure." Delgado, 466 U.S. at 216. Compare Brown v. Texas, 443 U.S. 47 (1979)(officers violated Fourth Amendment by detaining defendant without reasonable suspicion after he refused to identify himself). However, as indicated *supra* in Royer, the Supreme Court considered the officers' statement "that an investigation has focused [on the defendant]" in the totality of the circumstances in determining whether "a reasonable person would have believed that he was not free to leave." Royer, 460 U.S. at 491.

Thus, while the Supreme Court has held that "mere police questioning does not constitute a seizure," that questioning cannot convey a message that compliance with [the officers'] request is required, "which is exactly the message conveyed by accusatory statements and questions." Florida v. Bostick, 501 U.S. 429, 434-435 (1991). For instance, the questions posed in Delgado are appreciably distinct from the questioning in this case. For instance, in Delgado, the questions were such as "where [individual employees] were from and from what city"; "where [individual employee] was born"; and "where are your

papers?” Delgado, 466 U.S. at 219-20. The United States Supreme Court held that “[t]he manner in which respondents were questioned, given its obvious purpose, could hardly result in a reasonable fear that respondents were not free to continue working or move about the factory.” Id. at 221.

However, this analysis would be different had the INS agents, armed with information about a specific individual’s criminal violation, questioned that individual by asking “do you know that you are in this country illegally without the proper paperwork?” It is doubtless that if an agent’s question accused a specific individual, rather than merely questioning generally where that individual was born, that individual would no longer feel free to leave. In fact, the officers in this case did not engage in any preliminary questioning that is typical of a level one, voluntary encounter. The officers did not request Mr. Alvarez’s identification or registration of his vehicle, did not ask him what he was doing at the complex, and did not inquire about the reason for his frequent visits to the complex in the past two days.

The encounter was not characteristic of a level one stop because the officers did not even engage in the preliminary, *potentially incriminating questions*, that are normally used to either gain or dispel reasonable suspicion. Rather, the officers immediately signaled to Mr. Alvarez that they had a right to seize him by alerting appellant that they knew the vehicle he was operating was not insured. Furthermore, other jurisdictions have held that consideration of an officer’s accusatory statements or questions are a relevant factor under the totality of the

circumstances in determining whether a defendant was seized. U.S. v. Little, 60 F.3d 708, 712 (10th Cir. 1995)(consideration of “[a]ccusatory, persistent, and intrusive” questioning a factor in the totality of the circumstances test is proper); U.S. v. Saperstein, 723 F.2d 1221, 1226 (6th Cir. 1983)(definite statement by DEA agent that he had information about the defendant and his “probable activities as a drug courier” was a factor to be considered within the totality of the circumstances); U.S. v. Millan, 912 F.2d 1014, 1016 (8th Cir. 1990)(officer showing his badge for a second time along with his questioning and statement that he suspected defendant of carrying drugs in his pocket turned consensual encounter into a Terry stop); State v. Jason, 2 P.3d 856, 862 (N.M. 2000)(“[Q]uestions asked in an ‘accusatory, persistent, and intrusive’ manner can make ‘an otherwise voluntary encounter . . . coercive.’”(citation omitted)); In re J.G., 726 A.2d 948, 953 (N.J. Super. Ct. App. Div. 1999)(recognizing that “[g]enerally, courts throughout the country have ruled that a field inquiry becomes a terry stop upon ‘unsupported outright accusations of criminal activity.’”).

While the incriminating and accusatory question alone signals that this was a level two detention, other factors support a level two detention. These factors include a “stealthy approach,”² “failure to issue a warning or citation before engaging in additional questioning,”³ “a coercive show of authority,”⁴ “block[ing

² State v. Struhs, 940 P.2d at 1227.

³ State v. Hansen, 2002 UT 125, ¶ 41, 63 P.3d 650.

⁴ Id.

the path of Mr. Alvarez's] vehicle,"⁵ and "accusatory" or "investigatory questions."⁶ As argued in petitioner's opening brief for certiorari review, the officers used a "stealthy approach" in confronting Mr. Alvarez. See Petitioner's Brief 11. Both officers waited for Mr. Alvarez behind a full-sized van parked next to the vehicle he was driving. R. 88:5-6. The officers stepped out, in full uniform, and cut off Mr. Alvarez as petitioner was attempting to approach his vehicle. R.88:5-6, 15, 21. The officers confronted Mr. Alvarez about the insurance violation. Id. Wahlin then subjected Mr. Alvarez to a series of accusatory questions that indicated both that he was in violation of law and suspected of being engaged in illegal activity. In Florida v. Royer, 460 U.S. 491 (1983), two of the factors the United States Supreme Court considered in the totality of the circumstances test to determine that defendant was seized for Fourth Amendment purposes were that "the officers identified themselves as narcotics agents, [and] told Royer that he was suspected of transporting narcotics." Id. at 501-2.

Thus, when determining the level of an encounter between an officer and a citizen, it is proper for this Court to use an officer's statement that an investigation has focused on the individual or an officer's accusatory questions or statements as a factor under the totality of the circumstances test. Consideration of this factor is consistent with the U.S. Supreme Court precedent as well as case law from other jurisdictions. In this case, the totality of the circumstances surrounding Mr.

⁵ Struhs, 940 P.2d at 1227-28.

⁶ State v. Hansen, 2000 UT App 353, ¶ 14.

Alvarez's encounter with officers indicate that "a reasonable person would have believed that he was not free to leave." U.S. v. Mendenhall, 446 U.S. 544, 554 (1980). Therefore, Mr. Alvarez was seized for purposes of implicating the Fourth Amendment.

POINT II. OFFICERS DID NOT HAVE A REASONABLE SUSPICION TO EXCEED THE SCOPE JUSTIFYING THEIR INITIAL DETENTION.

As Petitioner indicated in his opening brief on certiorari, reasonable suspicion existed regarding the lack of insurance on the vehicle Mr. Alvarez was driving, allowing the officers to engage in a level two detention. Petitioner's Brief 10. However, while the officers were justified in detaining Mr. Alvarez to question him about the vehicle's lack of insurance, the expanded scope of their detention must have been "supported by reasonable suspicion of more serious criminal activity." State v. Lopez, 873 P.2d 1127, 1132 (Utah 1994).

The state argues that the officer's further detention was supported by a reasonable suspicion that Mr. Alvarez was "selling or buying drugs." Respondent's brief at 15. The state relies on State v. Markland, 2005 UT 26, 112 P.3d 507 as controlling of this issue. However, Markland is distinguishable from the facts of this case. In Markland, the officers received a complaint of a screaming or crying for help near the east side of an apartment complex at 3:14 a.m. Id. at ¶ 2. The officers arrived to the location within five minutes. Id. Upon arrival to the east side of the apartment complex, the only person located in the

area was the defendant. Id. The defendant was carrying two over-the-shoulder cloth bags and was walking toward a dead end of a poorly lit street. Id.

The officers confronted the defendant and asked whether the defendant had heard any screams in the area to which he responded negatively. Id. at ¶ 3. The officer then asked where the defendant was going, to which the defendant responded he was going home which was approximately twenty blocks away. Id. The officer was aware that the direction in which the defendant was walking led to a dead end, which did not correspond with his claim to be going home. Id. Thus, the officer requested identification from the defendant and ran a brief warrants check. Id. Both parties agree that this elevated the encounter to a level two detention. Id. at ¶ 10 n.1. The officer found that the defendant had an outstanding warrant, arrested him, and found drug paraphernalia, methamphetamine, and marijuana during a search incident to arrest. Id. at ¶ 3.

Although Markland's facts amounted to reasonable suspicion, the facts in this case are inapposite to those in Markland. First, the report is distinguished by the type of report and the police response in each case. In Markland, the report was at approximately 3 a.m. of possible screams or cries for help to which the officers responded within five minutes and the defendant was the only person found in the specific area where the screaming was reported. Id. at ¶ 2-3. In this case, the officers had received a general report from an unknown source that the vehicle of which Mr. Alvarez was driving was "*possibly*" dealing drugs at a location twenty blocks away. See Petitioner's Brief at 3-4 (emphasis added). The

officers did not have a report that drugs were being sold or purchased at the specific apartment complex where they happened to located Mr. Alvarez, nor did the report detail what type of drugs were suspected. The police did not respond to a report within five minutes, but rather were “just taking a chance that day to see if anything was going to come in and out of there.” R.88:9.

In addition, the officers in Markland first engaged in preliminary questions in order to establish or dispel reasonable suspicion. For instance, the officers in that case asked whether the defendant had heard any screams in the area and where the defendant was going. Markland, 2005 UT 26 at ¶ 21. The defendant’s answers were “inconsistent with the observable facts,” which further “heightened the already unusual nature of the individual’s presence behind the apartment complex, far from his home, at so late an hour.” Id. Thus, in furtherance of his investigation, the officer requested the defendant’s identification. Id. However, in this case, the officers never even engaged in preliminary questions in order to validate the vague report.

Rather, the officers first questioned Mr. Alvarez whether he was aware the vehicle he was driving was without insurance, then launched into accusations of drug dealing, and then proceeded to a search by requesting Mr. Alvarez open his mouth and show the officers. The officers did not ask Mr. Alvarez what he was doing at this location, why he had frequented the location, whether he lived at the location or for any identification but instead engaged in accusations and a request for a bodily search. R.88:6-7. The officers’ actions in this case were not like

those in Markland where the officers appropriately dealt with a report from an unknown source by engaging in preliminary questions. Those preliminary questions helped the officers ascertain whether or not the defendant had a legitimate purpose for being in the area, or in other words whether there was reasonable suspicion for a level two detention. The officers, in this case, engaged in no such conduct.

Regarding the report in Markland, this Court stated the “question is not whether a noncriminal explanation for the cries might exist, but whether [the officer] could have reasonably suspected that criminal activity was afoot considering his knowledge of the reported cries for help *and the additional information obtained during his subsequent investigation.*” Markland, 2005 UT 26 at ¶ 25, n.2 (emphasis added). That additional information unearthed that the defendant’s answers to preliminary questions did not correlate with the facts the officer observed and included an identification check to further aid the detective in that determination. No similar procedure was involved in this case. The analysis in Markland would only be applicable to this case if the officer responded to the defendant in that case with accusations of criminal wrongdoing and then immediately requested to search the defendant’s cloth bags similar to the accusations in our case immediately followed by the request to look into Mr. Alvarez’s mouth.

There was no reasonable suspicion in this case comparable to that ultimately gathered in Markland after the officers engaged in an appropriate

preliminary investigation. Unlike the early hour, the unlikely story, and the identification check in Markland, in this case as argued in petitioner's brief, the totality of the circumstances surrounding the encounter did not rise to a reasonable suspicion. See Petitioner's Brief at. 15-22. The facts in this case consisted of an uncorroborated "narcotics intelligence report" based on an unknown source that a vehicle Mr. Alvarez was driving was "possibly" dealing drugs at a location twenty blocks away. See Petitioner's Brief at 16. The officers never established whether Mr. Alvarez was in fact the owner of the vehicle in question or asked any other preliminary questions.

The next factor consisted of two short stay visits to an apartment complex of which the officers did not know whether or not Mr. Alvarez resided. Moreover, the officers did not have any specific information that drugs were being sold from anywhere in the complex and did not observe any conduct that would have indicated drugs were being sold there. Id. The final factors were a bottle of water and a facsimile of Jesus Malverde observed inside the vehicle which the trial court gave "very little weight." Id.

"None of these factors, either singly or in the aggregate, necessarily indicate wrongdoing as opposed to innocent actions by [Mr. Alvarez]." State v. Sykes, 840 P.2d 825, 828 (Utah Ct. App. 1992). Nor, do the totality of these factors create a "particularized and objective basis for suspecting" that Mr. Alvarez was engaged in criminal activity. State v. Steward, 806 P.2d 213, 215-16 (Utah Ct. App. 1991)(quotations and citations omitted).

The state, in a footnote, argues that petitioner's reliance on Florida v. J.L., 529 U.S. 266, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000) and State v. Case, 884 P.2d 1274 (Utah Ct. App. 1994) is misplaced because the police officers' actions in those cases was "based solely on the tip of the anonymous informant" or the "unsubstantiated dispatch report." Respondent's Brief at 18, f.n.6. However, the anonymous tip in J.L. is very similar to the tip the police acted on in this case to, according to the state, justify reasonable suspicion to suspect that Mr. Alvarez was involved in drug activity. The tip in J.L. was from an anonymous caller to the police that a young black male wearing a plaid shirt, standing at a particular bus stop, was carrying a gun. J.L., 529 U.S. at 268. The police responded to the bus stop and found a group of young black males, one of which was wearing a plaid shirt. Id. The group of males was just standing there and there was no indication that they were carrying a gun or engaged in any criminal activity. Id. Yet, the police officers frisked them and found a weapon on one of the males. Id.

Just as in J.L., the only reason the officers in this case suspected Mr. Alvarez of drug activity was because of the anonymous report that the vehicle he was driving was "possibly" involved in drug transactions. The identifying factors in J.L. were the description of the young male and the location. In this case, the identifying factor was the vehicle in which Mr. Alvarez was driving. Just as in J.L., the officers in this case did not ask preliminary questions that would develop or dispel reasonable suspicion, but rather immediately accused and attempted to

search the defendant. For full analysis of this argument see Petitioner's Brief on Certiorari Review at 18.

In Case, the officers also acted on a dispatch report that was of a possible car burglary. The report described a male in a white shirt, possibly Hispanic with a "chunky" build. Case, 884 P.2d at 1275. The officer stopped a vehicle leaving the area with a passenger who appeared to fit the description. Id. The officer smelled alcohol upon confronting the occupants of the vehicle and arrested the driver for DUI. Id. Just like in J.L., in Case, the Utah Court of Appeals held that the report merely provided descriptive information and the police acted without the necessary articulable facts of why the stop was made. Id. at 1278. Both J.L. and Case analyze the reliability of anonymous tips and whether these unverified tips alone rise to reasonable suspicion. In this case, the officers merely saw Mr. Alvarez on two occasions on short-stay visits, with bottled water in his vehicle and a facsimile of Jesus Malverde. These facts, along with an unreliable anonymous report of the vehicle "possibly" being involved in drug activity, do not rise to reasonable suspicion. See Petitioner's Brief 18-20.

Therefore, the officers' questioning regarding drugs exceeded the permissible scope of the detention in violation of the Fourth Amendment. See Petitioner's Brief 13-22 for a complete analysis of this point.

POINT III. THE OFFICERS VIOLATED THE FOURTH AMENDMENT WHEN THEY FORCIBLY CONDUCTED A WARRANTLESS SEARCH OF MR. ALVEREZ WITHOUT THE NECESSARY SHOWING OF EXIGENT CIRCUMSTANCES.

The officers were not privy to information before or during the detention, nor was there anything in Mr. Alvarez's behavior during the detention that gave officers a clear indication that drugs would be found in his mouth. See Petitioner's Brief at 23-27.

In this case, the only information the officers had prior to detaining Mr. Alvarez was that the vehicle he was driving was listed on a narcotics intelligence report as possibly dealing drugs twenty blocks away, two short stay visits to a complex where Mr. Alvarez may reside, a bottle of water and a facsimile of Jesus Malverde. After Mr. Alvarez was detained, he responded to the officers' accusatory questions and statements without any difficulty. Officer Walling did not notice any unsightly or unusual bulges in Mr. Alvarez's mouth and even indicated that Mr. Alvarez "talked quite well." R.88:16-17,19. The officers did not see Mr. Alvarez put anything into his mouth. Officer Walling asked to search Mr. Alvarez's mouth not because he had probable cause to believe Mr. Alvarez was carrying drugs but because it is a standard question he asks of those he perceives to be drug dealers. In sum, when Mr. Alvarez began to swallow, the officers were acting on no more than a bare suspicion that Mr. Alvarez had drugs in his mouth. The totality of factors did not amount to probable cause needed to justify a forcible search of Mr. Alvarez.

Even if the officers had a clear indication that drugs would be found in Mr. Alvarez's mouth, exigent circumstances did not exist justifying their forcible search. As argued in Petitioner's Brief, the only evidence the state presented was the officer's belief that if Mr. Alvarez was carrying drugs in his mouth the drugs would be packaged in balloons. Further, Officer Steed testified that the significance of the bottle of water in the car was that "[i]n the past when [he] had been involved in an initiation of, say traffic stops that contain person that [he] believed to have narcotics [he has] seen them use that water to swallow drugs that they contained in their mouths." R.88:29.

In Petitioner's Brief, State v. Hodson, 907 P.2d 1155, 1158 (Utah 1995) (Hodson II), is cited for support that swallowing balloons filled with narcotics does not give rise to exigent circumstances. The state argues that petitioner's reliance on Hodson II is misplaced because Hodson II only held that officers' use of force was unreasonable. Respondent's Brief at 26. While it is true that this Court only overruled the court of appeals determination of the reasonableness of the search procedure, this Court's review of the state's "justification for the force used" is instructive. The state argued that the justification for the use of force was "the need to preserve evidence and protect defendant from harm." Hodson II, 907 P.2d at 1158. This Court stated:

The justification for the force used in this case is the need to preserve evidence and protect defendant from harm. However, we do not know, and cannot ascertain from the record, any of the necessary facts which might have supported a reasonable fear by the officers that swallowing the plastic-wrapped chips would render their contents nondiscoverable or harmful to

the defendant. There is considerable indication in the cases cited by both parties that drug dealers commonly seek to secrete drugs by means of swallowing, and it does not seem likely that they would routinely risk their own safety or lives. Furthermore, drugs ingested in this manner can only follow two paths: Either they will pass through the system intact because of their packaging, or they will be absorbed into the bloodstream of the swallower. In either event, they are susceptible to identification and recovery in supervised, nonviolent post-arrest settings.

Id.

This Court's reasoning of the likelihood of drug dealers risking their own safety and the only "two paths" drugs swallowed can take strongly supports Petitioner's argument that exigent circumstances did not exist in this case. This reasoning also supports that the officers' use of force was not justified in this case.

CONCLUSION

For these reasons and those more fully set forth in Petitioner's Brief for Certiorari Review, Mr. Alvarez, respectfully requests this Court to reverse the court of appeals' opinion affirming the trial court's denial of his motion to suppress and reverse his conviction.

RESPECTFULLY SUBMITTED this 23rd day of December, 2005.

Opie Brumfield for
DEBRA M. NELSON
STEVEN G. SHAPIRO
Attorneys for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, DEBRA M. NELSON, hereby certify that I have caused to be hand-delivered the original and nine copies of the foregoing to the Utah Supreme Court, 450 South State, 5th Floor, P.O. Box 140210, Salt Lake City, Utah 84114-0210, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 23rd day of December, 2005.

Opie Brumfield for
DEBRA M. NELSON

DELIVERED copies to the Utah Supreme Court and the Utah Attorney General's Office as indicated above this 23 day of December, 2005.

A. V