

2005

Utah v. Ernesto Alvarez : Brief of Petitioner

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. :

**BRIEF OF PETITIONER
ON CERTIORARI REVIEW**

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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JURISDICTIONAL STATEMENT

This Court granted Alvarez's Petition for Writ of Certiorari from the Utah Court of Appeals opinion in State v. Alvarez, 2005 UT App 145, 111 P.3d 808. The court of appeals' opinion in Alvarez is attached hereto as Addendum A. Jurisdiction is conferred on this Court pursuant to Utah Code Ann. § 78-2-2(5) (2002).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Issue: Whether the totality of the circumstances created a reasonable articulable suspicion of criminal activity justifying the detention of Mr. Alvarez. See attached Order dated September 21, 2005 in Addendum B.

Issue: Whether the totality of the circumstances at the time the police officers conducted their search was supported by probable cause. Id.

Issue: Whether the force used to obtain evidence from the defendant's mouth was reasonable. Id.

Standard of Review: On certiorari, this Court reviews “the decision of the court of appeals and not that of the district court.” State v. Markland, 2005 UT 26, ¶7, 112 P.3d 507 (quoting State v. Brake, 2004 UT 95, ¶11, 103 P.3d 699). This Court reviews the decision of the court of appeals for correctness. Id.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The text of the following constitutional and statutory provisions are provided in full in Addendum C.

U.S. Const. amend. IV.
Utah Code Ann. § 77-7-15 (2003).

STATEMENT OF THE CASE

Mr. Alvarez was charged with two counts of Unlawful Possession of a Controlled Substance or Counterfeit Substance with the Intent to Distribute, second degree felonies, in violation of Utah Code Ann. § 58-37-8(1)(a)(iii) (2002). Alvarez, 2005 UT App 145 at ¶6; R. 1-2. Mr. Alvarez filed a motion to suppress the evidence arguing that the officers' warrantless search was constitutionally impermissible. Id.; R. 32-34. At the conclusion of the evidentiary hearing, the trial court denied Defendant's motion. Id.; R. 43-46; 88:38. Mr. Alvarez filed a petition for interlocutory review of the trial court's decision which the court of appeals denied. Id. at ¶7; R. 47-48; 54-59; 88:39.

On January 5, 2004, Mr. Alvarez entered into a conditional guilty plea pursuant to State v. Sery, 758 P.2d 935 (Utah Ct. App. 1988), wherein he pled guilty to one count of unlawful possession of a controlled/counterfeit substance with the intent to distribute, a

second degree felony offense. Id.; R. 62-71.

On appeal, the court of appeals affirmed the trial court's denial of Mr. Alvarez's motion to suppress in a 2-1 published decision. Id. at ¶34.

STATEMENT OF THE FACTS

On June 23, 2003, Officer Don Wahlin and another officer with the Salt Lake City Police Department were observing a condominium complex on 2450 Elizabeth Street because they had “heard there were drug dealings in this [general] area.”¹ Id. at ¶2; R. 88:3-4, 9. Officer Wahlin testified at the motion to suppress hearing that he did not have any specific information that drug dealings were going on in this particular complex but was just taking “a chance that day to see if anything was going to come in and out of there.” R. 88:9. While observing the complex, the officers saw a vehicle pull up. Id.; R. 88:4. Wahlin testified that he recognized this vehicle as one he “had received information on from [his] narcotics department report that was possibly dealing drugs.” Id.; R. 88:3. Wahlin testified that the narcotics report was based on “someone” who had called in to report alleged drug sales near his or her residence around “2nd South and Douglas Street” and reported observing this vehicle in that area which is approximately twenty blocks away from the complex in question. R. 88:9-10.

The officers observed Mr. Alvarez get out of the vehicle, go somewhere into the

¹The probable cause statement indicates that the complex's address is 2430 South Elizabeth Street instead of 2450 as indicated in the motion to suppress hearing. R.2 To the extent that this number represents the whole condominium complex, the address is cited as given in the motion to suppress hearing.

complex and in less than five minutes return to the vehicle and leave. Id.; R. 88:4. Based on the short stay and the previous “information” Wahlin had received, he believed a drug transaction occurred. Id.; R. 88:4, 10. “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.” Id.

The next day, Wahlin and Sergeant Chad Steed, also with the Salt Lake City Police Department, went back to the complex to see whether this same vehicle would return because Wahlin has “found it[] typical for [drug dealers] to frequent the same location.” Id. at ¶3; R. 88:3-4. The officers observed the vehicle pull into the same area of the complex and Mr. Alvarez get out and walk somewhere into the complex. Id.; R. 88:4, 21.

The officers could not see what area or which unit in the complex Mr. Alvarez was going. R. 88:13, 15, 32. Nor did they try to ascertain into which unit Mr. Alvarez was going. R. 88:13-15, 32. Instead, the officers pulled their unmarked vehicle around to where the vehicle Mr. Alvarez was driving was parked. R. 88:4, 21, 31. The officers got out of their vehicle and waited next to the vehicle Mr. Alvarez was driving to see whether he would return in the same manner as previously observed. Id. at ¶3; R. 88:4, 21, 31.

While waiting for Mr. Alvarez to return, Steed noticed “a small bottle of water in the console of the vehicle” which Steed has “seen [individuals believed to have narcotics] use . . . to swallow drugs that they contain in their mouths.” R. 88:29. Steed also observed a facsimile of “Jesus Malverde” which Steed has seen before in drug houses and

“[a]ccording to the people that [he had] talked to [Jesus Malverde is] the patron saint of drug dealing.”² R. 88:22, 29.

The officers stood next to the vehicle behind a full-size van waiting for Mr. Alvarez to return. Id. at ¶3; R. 88:5-6, 15, 21. As Mr. Alvarez came around the van, the officers confronted him. Id. at ¶5; R. 88:5-6, 15, 21. “Initially, when [Wahlin] stopped [Mr. Alvarez he] asked him if he knew the vehicle that he was driving was uninsured.” Id. at ¶5; R. 88:6, 15-16. Mr. Alvarez responded “How’d you know that?” Id.; R. 88:6, 16. Wahlin “then went on to explain to [Mr. Alvarez] that this vehicle that he was driving had been suspected of being a vehicle involved in some drug dealing activities.” Id.; R. 88:6, 16. Mr. Alvarez “stated he knew nothing of that.” Id.; R. 88:6. Wahlin then proceeded to ask Mr. Alvarez “if he had any drugs on his person.” Id.; R. 88:6, 16. Mr. Alvarez responded “No.” Id.; R. 88:6, 17.

While talking with Mr. Alvarez, Wahlin did not have difficulty understanding him nor did he notice any unsightly or unusual bulges in Mr. Alvarez’s mouth. Id.; R. 88:16. In fact, Wahlin thought Mr. Alvarez “talked quite well” and did not notice Mr. Alvarez put anything into his mouth or do anything he would consider unusual. Id. at ¶¶ 5, 23; R. 88:16-17, 19. Wahlin “then asked [Mr. Alvarez] if he minded opening up his mouth to show [Wahlin] he didn’t have any drugs in his mouth.” Id. at ¶5; R. 88:6, 17. Wahlin stated that this is a standard question he asks of people he perceives to be drug dealers.

²The trial court gave “very little weight” under the totality of the circumstances to the bottle of water and the facsimile. R. 88:38.

Id.; R. 88:18. Wahlin thought Mr. Alvarez became nervous when asked this question.

Id.; R. 88:18. Wahlin then “began to . . . observe[] [Mr. Alvarez] attempting to move some objects . . . in his mouth and then . . . [Wahlin] could see some swallowing motion going on.” Id.; R. 88:7, 30. Although Mr. Alvarez’s “mouth was closed,” Wahlin “could see things . . . in the pit of Mr. Alvarez’s lip area” that looked “like his tongue and moving other objects in attempting to swallow at that time.” Id.; R. 88:7, 19. Steed only noticed that Mr. Alvarez “just appeared that he was attempting to swallow.” R. 88:30. Wahlin and Steed immediately grabbed one of Mr. Alvarez’s arms and put him in a wrist lock, bending him forward telling him “to spit out what he had in his mouth.” Id.; R. 88:7-8, 30-31. Mr. Alvarez then spit out 15 balloons containing drugs. Id.; R. 88:7, 31. The time that passed between Wahlin asking to search Mr. Alvarez’s mouth until Mr. Alvarez was forced to spit out the balloons was between five to 10 seconds. Id.; R. 88:8, 17.

On appeal, Alvarez claimed that the officers “unconstitutionally exceeded the scope of their initial encounter with [him] when Wahlin, without reasonable suspicion to do so, questioned [him] about drugs.” Id. at ¶9. Alvarez also argued that even if the court concluded that officers had reasonable suspicion to question him about drugs, the officers were not justified in conducting a forcible warrantless bodily search. Id. The state argued that Alvarez’s detention was a level-one encounter which does not implicate the Fourth Amendment. Id. at ¶10 n.2. The court of appeals’ majority opinion expressly declined to make a determination about whether the level of the encounter constituted a

seizure under the Fourth Amendment. Id. The court analyzed the case as if the detention was a level two seizure concluding “the outcome of the [Alvarez’s] appeal would be the same regardless of our conclusion on the issue.” Id.

The majority concluded that it was “clear that, under ‘the totality of the circumstances,’ [the officers] had ‘specific and articulable facts which . . . warranted [the] detention’ of [Alvarez] and to question him about the uninsured status of the vehicle and about drugs.” Id. at ¶14. The majority opinion also concluded that the totality of these circumstances along with the circumstances that arose when the officers questioned Alvarez about drugs justified the officers’ belief “that there was ‘a fair probability that contraband or evidence of a crime [would] be found’” in Alvarez’s mouth. Id. at ¶19. Relying on its opinion in Hodson I, the majority found that these factors created exigent circumstances allowing the officers to forcibly search Alvarez. Id. at ¶26. The majority found that the forcible search “was a reasonable one, performed in a reasonable manner.” Id. at ¶¶ 27, 32.

The dissent disagreed that the police officers “had the required reasonable, articulable suspicion to question Alvarez about drugs” Id. at ¶36. The dissent concluded that “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 d[id] not provide a legally cognizable factual basis for the officers’ suspicion about

Alvarez.” Id. at ¶37.

SUMMARY OF THE ARGUMENT

This Court should reverse the court of appeals opinion because the totality of the circumstances in this case did not create a reasonable articulable suspicion that Mr. Alvarez was involved in drug activity. The officers conducted a level two detention of Mr. Alvarez based on their suspicion that the vehicle he was driving lacked insurance. However, the officers exceeded the scope of their initial detention when they began questioning Mr. Alvarez regarding drugs without a reasonable suspicion of more serious criminal activity. The state failed to establish that the information relied on by the officers supported a reasonable suspicion that Mr. Alvarez was engaged in drug activity. The totality of the circumstances failed to establish a reasonable suspicion that Mr. Alvarez was involved in drug activity permitting the officers to exceed the scope of their initial detention. Therefore, the officers' additional questions regarding drugs violated the Fourth Amendment.

Even if this Court were to determine that the officers had a reasonable suspicion of drug activity allowing them to exceed the scope of their initial detention, this Court should reverse because the totality of the circumstances did not give the officers probable cause to conduct a forcible bodily search. The state failed to establish by probable cause that there was a “clear indication” that drugs would be found in Mr. Alvarez’s mouth. The state also failed to show that exigent circumstances justified their warrantless search since

it presented no evidence that if the balloons of drugs were swallowed they would not be susceptible to identification or recovery.

Finally, this court should reverse because the force used by the officers to obtain evidence was not reasonable in this case. The state failed to present any evidence that the method of searching Mr. Alvarez was reasonable given the circumstances. In fact, the circumstances demonstrated that there was no compelling need for this search because the officers had little more than a hunch that evidence of a crime would be found and there were other available constitutional methods of conducting the search that were ignored.

ARGUMENT

I. THIS COURT SHOULD REVERSE BECAUSE THE TOTALITY OF THE CIRCUMSTANCES DID NOT CREATE A REASONABLE ARTICULABLE SUSPICION THAT MR. ALVEREZ WAS INVOLVED IN DRUG ACTIVITY.

The court of appeals' majority first expressly declined to make a determination about whether the level of the officers' initial encounter constituted a seizure under the Fourth Amendment, concluding "the outcome of the [Alvarez's] appeal would be the same regardless of our conclusion on the issue." Alvarez, 2005 UT App 145 at ¶10, n.2. The majority then went on to determine that their "review of the record reveals that [the officers] had knowledge of the following 'specific and articulable facts' and made the following 'rational inference from those facts,' which warranted engaging Defendant in a level two encounter to ask him about the potential insurance violation and about drugs." Id. at ¶13. However, while the officers did have a reasonable suspicion to conduct a level

two detention of Mr. Alvarez to question him about the lack of insurance on the vehicle he was driving, they did not have the requisite reasonable articulable suspicion to question him about drugs.

A. A Level Two Seizure Occurs When Under the Totality of the Circumstances A Reasonable Person Would Believe He is Not Free to Leave.

The officers in this case had the requisite suspicion to engage Mr. Alvarez in a level two detention regarding their belief that the vehicle he was driving lacked insurance. See Utah Code Ann. § 41-12a-302 (1998) (“Utah law makes it a class B misdemeanor for a driver to knowingly operate an uninsured motor vehicle on the highways of the state.”).

Under a level-two encounter “an officer may seize a person if the officer has an ‘articulable suspicion’ that the person has committed or is about to commit a crime; however, the “detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop.”” State v. Deitman, 739 P.2d 616, 617 (Utah 1987) (internal quotations and citations omitted); State v. Steward, 806 P.2d 213, 215 (Utah Ct. App. 1991) (quoting State v. Swanigan, 699 P.2d 718, 719 (Utah 1985)); see also United States v. Place, 462 U.S. 696, 706 (1983); State v. Kohl, 2000 UT 35, ¶11, 999 P.2d 7 (“a stop is justified only if there is a reasonable suspicion that a person is involved in criminal activity.”); Utah Code Ann. § 77-7-15 (2003) (officer must have reasonable suspicion to stop person in a public place and request name, address and explanation of actions).

There is no bright line test for what is, or is not, reasonable suspicion. Id. Whether the officer had reasonable suspicion depends on the “totality of the circumstances.” Id. (citations omitted). The “totality of the circumstances” analysis must be

based upon all the circumstances and must “raise a suspicion that the particular individual being stopped is engaged in wrongdoing.” United States v. Cortez, 449 U.S. 411, 418, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981) (emphasis added). Put differently, the officers must have a “particularized and objective basis for suspecting criminal activity by the particular person detained.” State v. Sery, 758 P.2d 935, 941 (Utah Ct. App. 1988) (citing Cortez, 449 U.S. at 417-18, 101 S.Ct. at 694-95).

Steward, 806 P.2d at 215-16 (emphasis added); State v. Trujillo, 739 P.2d 85, 88 (Utah Ct. App. 1987).

A level two “seizure under the fourth amendment occurs when a reasonable person, in view of all the circumstances, would believe he or she is not free to leave. This is true ‘even if the purpose of the stop is limited and the resulting detention brief.’” Salt Lake City v. Ray, 2000 UT App 55, ¶11, 998 P.2d 274 (quotations and citations omitted).

In this case, officers conducted a level two detention of Mr. Alvarez when questioning him regarding the lack of insurance on the vehicle he was driving. Under the totality of the circumstances, Mr. Alvarez would not have believed he was free to leave. Those circumstances included the officers stepping out from behind the full size van as Mr. Alvarez came around it attempting to approach his vehicle. R. 88:5-6, 15, 21. Both officers were wearing full uniforms. R. 88:2. Wahlin then subjected Mr. Alvarez to a series of accusatory questions that indicated he was suspected of being engaged in illegal activity. See State v. Hansen, 2000 UT App 353, ¶14, 17 P.3d 1135 (Hansen I) reversed in part on other grounds Hansen, 2002 UT 125, 63 P.3d 650; 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.’”); R. 88:6, 15-16.

Wahlin initially asked whether Mr. Alvarez “knew the vehicle that he was driving was uninsured.” R. 88:6, 15. The officers never indicated that Mr. Alvarez was going to be cited for not having insurance, never asked Mr. Alvarez for his name or for his identification or even if the vehicle belonged to him. See Hansen I, 2000 UT App 353 at ¶15 (“[T]he fact that [the officer] had not addressed one of the reasons for the initial stop, a reasonable person would not have felt free to terminate the encounter.”). Rather, after Mr. Alvarez inquired how Wahlin knew that the vehicle was uninsured, Wahlin immediately told Mr. Alvarez that the “vehicle that he was driving had been suspected of being a vehicle involved in some drug dealing activities.” R. 88:6, 16. Wahlin then proceeded to ask Mr. Alvarez “if he had any drugs on his person.” R. 88:6, 16. When Mr. Alvarez responded “No,” Wahlin asked if he would open “his mouth to show him that he didn’t have any drugs. . . .” R. 88:6, 17.

Because these were not simply questions posed to Mr. Alvarez which he was free to disregard and walk away, he was seized for the purposes implicating the Fourth Amendment the moment the officers detained him with a question regarding the vehicle’s lack of insurance. However, the officers impermissibly exceeded the scope of that initial detention by questioning Mr. Alvarez regarding drugs without the requisite reasonable

articulable suspicion necessary in violation of the Fourth Amendment.

B. Additional Questions That Further Detained Mr. Alvarez Must Have Been Supported by Reasonable Suspicion of More Serious Criminal Activity.

Once a level two detention is made, “[t]he length and scope of the detention must be ‘strictly tied to and justified by’ the circumstances which rendered its initiation permissible.” State v. Johnson, 805 P.2d 761, 763 (Utah 1991) (quotations and citations omitted). In order to justify exceeding the scope of the initial detention the officers “must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the additional] intrusion.” Id. at 764 (quotations and citations omitted); State v. Lopez, 873 P.2d 1127, 1132 (Utah 1994) (reasonable suspicion must be based on specific, articulable facts from the total circumstances facing the officer at the time of the stop). “Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches” Sery, 758 P.2d at 941 (quoting Terry, 392 U.S. at 21-22). “[T]he State bears the initial burden for establishing the articulable factual basis for the reasonable suspicion necessary to support an investigative stop.” State v. Case, 884 P.2d 1274, 1276 (Utah Ct. App. 1994). If the officers’ expanded detention is not justified by an articulable suspicion that the individual has committed a crime, the Fourth Amendment is violated by the additional intrusion. Id.

In determining whether a “seizure is constitutionally reasonable, [this Court] must first determine whether the officers[’] action[s were] justified at [their] inception.” State

v. Chapman, 921 P.2d 446, 450 (Utah 1996) (quotations and citations omitted). “If so, [this Court] then consider[s] whether the resulting detention was reasonably related in scope to the circumstances that justified the interference in the first place.” Id. (quotations and citations omitted). Therefore, “once a stop is made, the detention ‘must be temporary and last no longer than is necessary to effectuate the purpose of the stop.’” Id. at 452 (quotations and citations omitted).

In this case, questions that would be “reasonably related” to the scope of the detention would be limited to those types of questions that would assist the officers in ascertaining information regarding the vehicle’s insurance status. Instead, Wahlin’s questioning regarding the vehicle’s insurance was limited to one accusatory statement. Wahlin never asked Mr. Alvarez for an explanation regarding the vehicle’s lack of insurance, or identification, or whether he in fact owned the vehicle. Nor did Wahlin indicate how the vehicle’s lack of insurance was going to be handled. Rather, Wahlin immediately told Mr. Alvarez that the “vehicle he was driving had been suspected of being a vehicle involved in some drug dealing activities.” R. 88:6, 16. Wahlin then proceeded to ask Mr. Alvarez “if he had any drugs on his person” and “if he minded opening up his mouth to show [Wahlin] he didn’t have any drugs in his mouth.” R. 88:6, 16-17.

Questions pertaining to Mr. Alvarez’s suspected involvement in drug activity exceeded the scope justifying the initial stop. “Investigative questioning that further

detains [an individual] must be supported by reasonable suspicion of more serious criminal activity.” Lopez, 873 P.2d at 1132. The officers “must be able to articulate a particularized and objective basis for their suspicions that is drawn from the totality of circumstances facing them at the time of the seizure.” State v. Robinson, 797 P.2d 431, 435 (Utah Ct. App. 1990). More specifically, the officers must have a “particularized and objective basis for suspecting criminal activity by the particular person detained.” Sery, 758 P.2d at 941 (emphasis added) (citing Cortez, 449 U.S. at 417-18, 101 S.Ct. at 694-95).

Nothing in Mr. Alvarez’s conduct or response regarding the vehicle’s insurance gave rise to a reasonable suspicion of more serious criminal activity. The information the officers possessed was insufficient to establish a reasonable suspicion that Mr. Alvarez was or had engaged in criminal activity relating to drugs. The majority opinion, however, determined that the totality of factors gave the officers reasonable suspicion to question Mr. Alvarez about drugs in addition to the vehicles lack of insurance. Alvarez, 2005 UT App 145 at ¶13. According to the court, those factors included: a condominium complex under observation by the officers because they had heard there were drug dealings in this general area,³ the officers observation of a vehicle that pulled up to the complex which

³ The officers did not have any specific information that drug dealings were going on in this particular complex but were taking “a chance that day to see if anything was going to come in and out of there.” R. 88:9.

was listed in a narcotic department report as one “possibly dealing drugs,”⁴ the officers’ observation of Mr. Alvarez “get[ting] out of the vehicle, enter[ing] the complex, return[ing] to the vehicle less than five minutes later, get[ting] back into the vehicle, and driv[ing] the vehicle out of the complex,” and Wahlin’s belief that a drug transaction occurred because this visit was consistent with short-stay drug traffic. Id. at ¶13; R. 88:4, 10.

Additional factors included: Wahlin and Steed’s observations of the complex the next day to see whether this same vehicle would return; The officers’ observation of the vehicle pulling into the same area of the complex and Mr. Alvarez getting out and walking somewhere into the complex;⁵ Steed’s observation of “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;” and a “facsimile of ‘Jesus Malverde,’ which Steed recognized to be the patron said of drug dealing.” Id.; R. 88:3-4, 21.

Contrary to the majority’s determination, none of these factors created a “particularized and objective basis for suspecting” that Mr. Alvarez was engaged in

⁴ The only evidence presented by the state regarding this report was that it was based upon a telephone call from “somebody . . . report[ing] drug sales near her place” which was “2nd South and Douglas Street where the vehicle was observed.” R. 88:9-10. This address is approximately 20 blocks away from the complex being observed on 2450 Elizabeth Street.

⁵ The officers could not see what area or which unit in the complex Mr. Alvarez was going, nor did they try to ascertain into which unit Mr. Alvarez was going. R. 88:13-15, 32.

criminal activity. State v. Steward, 806 P.2d 213, 215 (Utah Ct. App. 1991). The State failed in its burden of establishing the articulable factual basis for the reasonable suspicion justifying the additional detention. As recognized by the dissent, under the majority opinion'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."

Alvarez, 2005 UT App 145 at ¶37.

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

Id. at ¶42.

"The specific and articulable facts required to support reasonable suspicion are most frequently based on an investigating officer's own observations and inferences, but under certain circumstances the officer may rely on other sources of information." Case, 884 P.2d at 1276-77 (internal citations omitted). If an officer does rely on external information received from other law enforcement sources, "the [s]tate must introduce . . . evidence showing the informant's [information] was reliable, provided sufficient detail of criminal activity, and could be corroborated by police." Kohl, 2000 UT 35 at ¶14. "[A]n

informant's 'veracity,' 'reliability,' and 'basis of knowledge' are all highly relevant in determining the value of his report." Illinois v. Gates, 462 U.S. 213, 230 (1983).

However, these elements should be viewed under the totality of the circumstances to determine whether reasonable suspicion or probable cause exists. Id.; State v. Saddler, 2004 UT 105, ¶11, 104 P.3d 1265.

In Florida v. J.L., 529 U.S. 266 (2000), an anonymous caller reported that a young black man standing at a bus stop and wearing a plaid shirt was carrying a gun. Id. at 268. The record revealed no information about the informant. Id. Other than the tip, the officers had no reason to suspect the defendant was involved in illegal activity. Id. Despite this, the officers approached the defendant, frisked him and seized a gun. Id. The Supreme Court determined that the tip regarding a gun "arose not from any observations of [the officers] but solely from a call made from an unknown location by an unknown caller." Id. at 270. "Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, 'an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity.'" Id. (citations omitted). The Supreme Court concluded that the anonymous and unsubstantiated tip cannot justify the detention where "[t]he reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." Id. at 272.

As discussed by the dissent in Alvarez,

In Case an officer received a dispatch call directing him to a specific area to

investigate a possible car prowling 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 [the court of appeals] 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, [the court of appeals] 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).

Alvarez, 2005 UT App 145 at ¶39 (Orme, J. dissent).

Similar to the information in J.L. and Case, the state failed to introduce any evidence showing that the information relied on by the officers regarding either the report of drug transactions in the general area or the vehicle “was reliable, provided sufficient detail of criminal activity, [or was] corroborated by police.” Kohl, 2000 UT 35 at ¶14.

In fact, the record indicates that the officers did not have any specific information that drugs were being sold anywhere in this particular complex, rather they had just been told about drug activity in “the Elizabeth Street area of that south.” R. 88:9. The officers focused on this particular complex because they were “just [taking] a chance that day to see if anything was going to come in and out of there.” R. 88:9. While watching the

complex on July 23rd, Wahlin observed Mr. Alvarez enter the complex and return to the vehicle in less than five minutes. R. 88:4. Although, Wahlin testified he believed that a drug transaction had occurred at some unit in the complex, no attempt was made to verify his hunch. R. 88:13. In fact, both Wahlin and Steed testified that they could not see which area of the complex Mr. Alvarez approached or which of the many units he may have entered nor did they make any attempt to find out. R. 88:13-15, 31-32. Rather than investigate, the officers “chose to deal with [Mr. Alvarez]” directly. R. 88:14. In directly dealing with Mr. Alvarez, the officers did not notice anything unusual about his behavior or speech that raised their suspicion that he was engaged in criminal activity. Wahlin testified that he did not have any difficulty understanding Mr. Alvarez or notice any unusual bulges in his mouth. R. 88:16-17. In fact, Wahlin thought Mr. Alvarez “talked quite well.” R. 88:19.

Moreover, in directly dealing with Mr. Alvarez the officers did not ask him any questions within the scope of the initial detention that would have helped determine whether his answers raised their suspicion of criminal activity. The officers did not take any action to determine whether Mr. Alvarez was the actual individual connected with the vehicle suspected of drug activity. For example, the officers could have asked Mr. Alvarez if he in fact owned the vehicle under suspicion. The officers also could have asked for his name or requested identification which would have assisted in determining whether Mr. Alvarez was the individual registered as the owner of the vehicle.

Requesting identification would have also allowed the officers to determine whether Mr. Alvarez actually resided in the complex or allowed them to ask him regarding his purpose in visiting. However, nothing was done to corroborate or confirm the veracity of this report.

The state failed to establish the reliability of the information reported and failed to show that the officers corroborated the report. Due to the state's failure to present any evidence regarding the "information" on which these reports relied, there is no indication as to whether the informant made any personal observations or had first-hand knowledge concerning the alleged drug sales. In sum, there is no indication as to whether the information was based on a mere hunch, a casual rumor or an unconfirmed report from an unidentified third party.

Hence, "[t]he 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" asked by Officer Wahlin if he would open his mouth to show him that he didn't have any drugs in it. Alvarez, 2005 UT App 145 at ¶43 (Orme, J., dissent); R. 88:6, 17. As discussed above, the totality of these circumstances did not "give the officers the required reasonable suspicion to detain Alvarez and question him about drugs." Id.

The officers did not observe anything unusual about Mr. Alvarez's behavior or

speech when questioning him about the vehicle's lack of insurance, they did not observe any contact consistent with a drug buy, or observe anything to suggest that he was engaging in any type of drug activity. The ambiguous observations made by officers previous to detaining him coupled with their failure to corroborate the reports failed to provide the reasonable suspicion necessary to allow the officers to question Mr. Alvarez concerning drugs. The officers had no more than a "inchoate and unparticularized suspicion or hunch" that Mr. Alvarez was dealing drugs, and failed to take any action that might have confirmed or dispelled their hunch. Johnson, 805 P.2d at 764 (quotations and citations omitted). Therefore, the officers' questions regarding drugs exceeded the permissible scope of the initial detention in violation of the Fourth Amendment.

II. THIS COURT SHOULD REVERSE BECAUSE THE TOTALITY OF THE CIRCUMSTANCES DID NOT GIVE THE OFFICERS PROBABLE CAUSE TO CONDUCT A FORCIBLE BODILY SEARCH.

Even if this Court determines that reasonable suspicion existed for the officers to question Mr. Alvarez about suspected drug activities, the evidence seized by the officers should have been excluded because Mr. Alvarez's Fourth Amendment rights were violated when the officers forcibly conducted a warrantless search of his person without the necessary showing of probable cause.

Unless a governmental agency has secured a valid warrant to conduct a search, searches "are *per se* unreasonable under the Fourth Amendment— subject only to a few specifically established and well-delineated exceptions." State v. Ashe, 745 P.2d 1255,

1258 (Utah 1987) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)). The “well-delineated” exception at issue here required the state to establish that “exigent circumstances” existed justifying a forcible bodily search. City of Orem v. Henrie, 868 P.2d 1384, 1388 (Utah Ct. App. 1994); Schmerber v. California, 384 U.S. 757, 768-72, 86 S. Ct. 1826, 1834-36 (1966). In finding exceptions to the warrant requirement, “[t]he State bears [a] particularly heavy burden” of persuasion. State v. Beavers, 859 P.2d 9, 13 (Utah Ct. App. 1993).

In order to meet this burden in the case of a bodily search, the State must establish three elements: (1) a clear indication that evidence would be found; (2) exigent circumstances that justified the warrantless bodily intrusion; and (3) 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), reversed on other grounds, 907 P.2d 1155 (Utah 1995) (citing Schmerber, 384 U.S. at 768-72). A review of the three prongs of the Schmerber test shows that the State failed to meet its burden to justify the warrantless bodily search of Mr. Alvarez.

A. Officers Did Not Have A “Clear Indication” That Evidence Would Be Found.

Given that warrantless searches and seizures must be justified by probable cause, and that the expectation of privacy one has in one’s body is the highest recognized under the Constitution, the Schmerber prerequisite to a search that there is a “clear indication” that evidence would be found must be established by probable cause. See Hodson, 866 P.2d at 560 (“‘Clear indication’ requires that there be probable cause to believe that evidence will be found.” (citation omitted)). “In dealing with probable cause, . . . as the very name implies, we deal with probabilities.” State v. Menke, 787 P.2d 537, 542 (Utah

Ct. App. 1990) (quoting Brinegar v. United States, 338 U.S. 160, 175, 69 S. Ct. 1302 (1949)). Probable cause is “more than bare suspicion.” Id. The “determination[] of whether probable cause exists require[s] a common sense assessment of the totality of the circumstances confronting the arresting or searching officer.” State v. Patefield, 927 P.2d 655, 660 (Utah Ct. App. 1996) (citation omitted). In this case, the officers did not even have a reasonable articulable suspicion to believe Mr. Alvarez was involved in drug activities, see Point I, let alone probable cause to believe that he was swallowing drugs in his mouth.

Once the officers detained Mr. Alvarez, Wahlin first asked “him if he knew the vehicle that he was driving was uninsured.” R. 88:6, 15. Mr. Alvarez responded, “How’d you know that?” R. 88:9. Wahlin then stated to Mr. Alvarez that the “vehicle that he was driving had been suspected of being a vehicle involved in some drug activities.” R. 88:6, 16. Mr. Alvarez responded that “he knew nothing of that.” R. 88:6. Wahlin next proceeded to ask Mr. Alvarez “if he had any drugs on his person.” R. 88:6, 16. Mr. Alvarez said “No.” R. 88:6, 17. Wahlin “then asked [Mr. Alvarez] if he minded opening up his mouth to show [Wahlin] he didn’t have any drugs in his mouth.” R. 88:6, 17. Wahlin did not notice any unsightly or unusual bulges in Mr. Alvarez’s mouth nor did he notice anything he would consider unusual except that Mr. Alvarez became nervous when asked this question. R. 88:16, 18. In fact, Wahlin thought Mr. Alvarez “talked quite well.” R. 88:16-17, 19.

Instead of being based on any reasonable articulate suspicion, Wahlin testified this is a standard question he asks of people he perceives to be drug dealers. R. 88:18. Wahlin then observed what he described as Mr. Alvarez “attempting to move some objects . . . in his mouth” and “some swallowing motion.” R. 88:7, 30. Although Mr. Alvarez’s “mouth was closed,” Wahlin believed he “could see things . . . in the pit of Mr. Alvarez’s lip area” that looked “like his tongue and moving other objects in attempting to

swallow at that time.” R. 88:7, 19. Steed, however, only noticed that Mr. Alvarez “just appeared that he was attempting to swallow” after Wahlin asked if he could search Mr. Alvarez’s mouth for drugs. R. 88:30. Wahlin and Steed immediately grabbed one of Mr. Alvarez’s arms and put him in a wrist lock, bending him forward telling him “to spit out what he had in his mouth.” R. 88:7-8, 30-31. The time that passed between Wahlin asking to search Mr. Alvarez’s mouth for drugs until Mr. Alvarez was forcibly grabbed was between five to ten seconds. R. 88:8, 17.

Under the totality of the circumstances the officers did not have a “clear indication” that drugs would be found in Mr. Alvarez’s mouth. At the time of the requested search, the officers did not know if they would in fact find anything in Mr. Alvarez’s mouth. The officers did not observe Mr. Alvarez put any thing in his mouth, nor did they observe any conduct by Mr. Alvarez that would suggest that his attempt to swallow was indicative of swallowing drugs. Compare Hodson I, 866 P.2d at 560 (“Defendant’s furtive gestures of putting something in his mouth . . . , coupled with the agents’ specific knowledge that [an informant] intended to purchase illegal drugs from defendant provided a clear indication that evidence would be found in defendant’s mouth.”).

Again, Wahlin asked to search Mr. Alvarez’s mouth not because he saw something in there or had a hard time understanding Mr. Alvarez but because that is a standard question he asks of those he perceives to be drug dealers. R. 88:18. “[B]ased upon Wahlin’s experience, drug dealers usually package drugs like cocaine and heroin in small balloons, which they carry in their mouths.” Alvarez, 2005 UT App 145 at ¶18. When the officers acted with force in an effort to have Mr. Alvarez “spit out” whatever was in his mouth, the officers were acting on no more than a “bare suspicion” or hunch that Mr. Alvarez had drugs in his mouth. The only information the officers possessed at this time was based on an uncorroborated report that Mr. Alvarez was driving a vehicle that was

suspected of “possibly” drug dealing in an area more than 20 blocks away. In the vehicle there was a small bottle of water and a facsimile of Jesus Malverde. The vehicle may or may not be Mr. Alvarez’s. Finally, Mr. Alvarez made two short stay visits to a complex in which he may or may not be living. This information, even when coupled with the ambiguous “swallowing” conduct, did not amount to probable cause justifying a forcible search. Therefore, there can be no justification for the search under exigent circumstances.

Despite the failure of the totality of the circumstances to establish reasonable suspicion, the majority opinion used the totality of these same factors to go a step further and conclude that they, along with Alvarez’s ambiguous actions of moving unknown objects in his mouth and making swallowing motions, gave the officers probable cause to conduct a bodily search. According to the majority opinion, these two factors elevated their finding from reasonable suspicion to the much greater “clear indication” level allowing the officers to conduct a bodily search. Id. at ¶19. But these additional factors did not give the officers a clear indication that drugs would be found in Mr. Alvarez’s mouth.

The majority opinion not only allows officers to use unsubstantiated information to support reasonable suspicion but also allows officers to couple that information with bare hunches under the guise of “their experience and training” to establish probable cause allowing them to perform a forcible bodily search of any individual perceived as a drug dealer. Such a broad interpretation of the Fourth Amendment is not in line with current

Fourth Amendment jurisprudence and unconstitutionally expands a police officers' ability to conduct bodily intrusion searches.

Because the state did not meet its burden to show that there was a clear indication that evidence of drugs would be found in Mr. Alvarez's mouth, this Court need not address the other two prerequisites outlined in Schmerber. See State v. Palmer, 803 P.2d 1249, 1252 (Utah Ct. App. 1990). However, even if this Court were to determine that probable cause existed, the exigent circumstances argument still fails because the state did not bear its burden of showing that the evidence would likely have been destroyed had the officers not seized it immediately. Discussion of the other two inter-related prongs further demonstrates how the court of appeals erred in affirming the trial court's denial of Mr. Alvarez's motion to suppress.

B. The Officer's Forcible Bodily Search of Mr. Alvarez Was Not Justified by Exigent Circumstances.

Under the exigent circumstances prong of the Schmerber test, this Court has stated that "the police must . . . believe that . . . either contraband or evidence of a crime . . . may be lost if not immediately seized." State v. Larocco, 794 P.2d 460, 470 (Utah 1990)). The Schmerber requirement of exigent circumstances is a serious one, which is based on the constitutional right to bodily integrity.

Search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned. The requirement that a warrant be obtained is a requirement that the inferences to support the search "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." The importance of

informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great.

Schmerber, 384 U.S. at 770 (citations omitted).

In order to “establish exigent circumstances justifying a warrantless search” the state must show “either that the procurement of a warrant would have jeopardized the safety of the police officers or the public, or that the evidence was likely to have been lost or destroyed.” Hodson I, 866 P.2d at 561 (quoting Palmer, 803 P.2d at 1252).

In finding that exigent circumstances existed in this case justifying the officers' warrantless bodily search of Mr. Alvarez, the majority's reasoning conflicts with its finding of clear indication. Alvarez, 2005 UT App 145 at ¶¶ 18, 23, 26. To support its finding of clear indication, the majority stated:

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 nervous and was using his tongue to move objects around in his mouth. In addition, both 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.”

Alvarez, 2005 UT App 145 at ¶ 18.

Indeed, the only evidence presented by the state at the motion to suppress hearing regarding drug packaging was testimony from the officers of their training and experience on how packaging is done when drugs are carried in the mouth. R. 88:2-3, 21. The state

presented the following testimony from the officers:

State: Are you familiar with how drug - how drugs such as cocaine and heroin are usually packaged?

Wahlin: Yes, I am.

State: And how is that?

Wahlin: Many times they're packaged in a - they'll take like a plastic, piece of plastic, put the drugs inside that, twist that into a small - small ball, you know, probably the size of the end of my fingertip, and then they encompass that with a balloon and tie that off.

....

State: And where are they usually carried that you've seen?

Wahlin: Typically when they package them in this fashion they'll carry them in their mouth.

....

State: Have you done drug arrests before?

Steed: Yes.

State: How many would you say?

Steed: I'd say I've personally been involved in more than 20 arrests at least.

State: Have you ever seen people have balloons of cocaine and heroin in their mouths?

Steed: Yes.

R. 88:2-3, 21.

In fact, the significance of the bottle of water in the vehicle to Steed 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 contain in their mouths.” R. 88:29. The state did not present any evidence that drugs are carried using a different method. In fact, the state’s evidence demonstrates that the officers believed that if Mr. Alvarez was carrying drugs in his mouth the drugs would be packaged in this manner.

Then, in order to support its finding of exigent circumstances, the majority reasoned that “[a]lthough 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.” Alvarez, 2005 UT App 145 at ¶23. The majority then determined that its exigent circumstances analysis in Hodson I was valid despite this Court’s reasoning in Hodson II which addressed the same theory argued by the state in this case regarding “the need to preserve evidence and protect defendant from harm.” Id. at ¶24; Hodson II, 907 P.2d at 1158. The court of appeals concluded that because this Court’s decision in Hodson II only explicitly overruled the reasonableness of the search procedure in Hodson I, it did not affect its reasoning regarding exigent circumstances. Alvarez, 2005 UT App 145 at ¶24. While it is true that this Court only explicitly overruled the reasonableness of the search procedure, the Court’s review of the state’s “justification for the force used” invalidated the court of appeals’ reasoning behind its exigent circumstances finding. Furthermore, the circumstances used to justify the search in

Hodson I were vastly different from those that existed in this case.

In Hodson I, the court of appeals upheld the trial court's conclusion that there was probable cause to believe that evidence of drugs would be found in the defendant's mouth. 866 P.2d at 560. The totality of the circumstances in Hodson consisted of the following: (1) a police informant "had agreed to arrange to purchase heroin from [the] defendant; (2) [the police informant] gave a prearranged signal indicating the drug transaction was complete;" and (3) one of the officers observed the defendant throw "something into his mouth when the officers approached with their lights flashing." Id. Hence, in Hodson I, the officer had prior knowledge that an informant had agreed to purchase drugs from the defendant, received a "prearranged signal" that the defendant had in fact sold drugs to the informant and one of the officers actually saw the defendant throw "something into his mouth" when the defendant realized that the officers were present.

The defendant in Hodson I argued that exigent circumstances did not exist because "the police had no knowledge concerning how the heroin was wrapped or whether it would travel safely through his system." Id. at 561. The court of appeals determined that it is precisely this reason in which exigent circumstances justify a warrantless search and seizure. Id.

"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 to 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 include both possible destruction of evidence and potential harm to defendant.”

Alvarez, 2005 UT App 145 at ¶ 25 (quoting Hodson I, 866 P.2d at 561).

Unlike the officers in Hodson I, the officers in this case did not see Alvarez put anything into his mouth and did not notice any unsightly or unusual bulges. Id. at ¶23; R. 88:16-17. Nor did the officers have any prior information that Alvarez himself was involved in any drug activity. Nevertheless, the majority found that under their Hodson I analysis, because the officers “did not know conclusively what was in defendant’s mouth” and “did not know how the drugs were packaged, exigent circumstances existed in this case.” Id. at ¶¶ 23, 26.

However, in Hodson II, this Court disagreed with the state’s argument that the force used in that case was justified because of the need to preserve evidence and protect the defendant from harm. Hodson II, 907 P.2d at 1158. In reversing Hodson I’s decision on the reasonableness of the search involved this Court stated:

[W]e do not know, and cannot ascertain from the record, any of the necessary fact which might have supported a reasonable fear by the officers that swallowing the plastic-wrapped chips would render their contents nondiscoverable or harmful to 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.

Hodson II, 907 P.2d at 1158.

This Court's reasoning regarding the likelihood of evidence of a crime being destroyed if swallowed is also supported by the California Supreme Court in People v. Bracamonte, 540 P.2d 624, 631 (Cal. 1975). In Bracamonte, narcotics agents had secured a warrant to search defendant's residence, vehicles and person. 540 P.2d at 626. While attempting to execute the warrant, the defendant attempted to flee in her vehicle. Id. An agent then observed the defendant place two balloons in her mouth and swallow them. Id. The agent watched as the defendant made "two more quick hand movements, each time apparently placing more objects into her mouth." Id. After apprehending the defendant, the agents, twenty minutes later, took her to a local hospital to retrieve the objects the defendant had swallowed. Id. After attempting to insert a rubber tube down the defendant's nose and esophagus, the defendant agreed to drink the emetic solution allowing the officers to retrieve seven balloons of heroin. Id. at 626-27.

The court determined that although "there clearly was probable cause to believe that the defendant had swallowed packages containing heroin, there was no [exigency] justifying the intrusion into her body." Id. at 628. So although there was a "'clear indication' that the defendant probably swallowed balloons of heroin, . . . there was no substantial reason to believe that evidence would be destroyed." Id. at 630-31; Hodson II, 907 P.2d at 1158. The testimony presented demonstrated that "[t]he rubber container

would effectively prevent the contents from being absorbed into the system.” Id. at 631 (quotations and citations omitted). Because there is a “high statistical probability that the balloons would ‘pass through,’” the defendant “easily could have been transported to jail and placed in an isolation cell and kept under proper surveillance.” Id.

The court of appeals did not find this Court’s reasoning in Hodson II applicable because it viewed it as limited to the reasonableness of the force used in Hodson I.

Alvarez, 2005 UT App 145 at ¶ 24. The majority also rejected the reasoning and holding of the Bracamonte court because

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.

Alvarez, 2005 UT App 145 at ¶ 23.

The majority then applied its exigent circumstances reasoning from Hodson I, concluding exigent circumstances existed because the officers had “‘probable cause and believed that either contraband or evidence of a crime . . . may [have been] lost if not immediately seized.’” Id. As pointed out, the court of appeal’s reasoning of clear indication and exigent circumstances is internally inconsistent. First, the court of appeals justifies a finding of clear indication based on the officers’ testimony regarding their training and experience that drug dealers carry balloon wrapped drugs in their mouths to

enable them to conceal the drugs by swallowing them. Id. at ¶18. Then, the court of appeals concludes that exigent circumstances exist because officers cannot know, for certain, how drugs carried in the mouth are packaged. Id. at ¶¶ 25-26.

This Court’s reasoning regarding the state’s claim of “the need to preserve evidence and protect the defendant from harm” applies in the determination of whether exigent circumstances existed. In this case, the state presented evidence regarding the officers’ belief on how the drugs would be packaged. The officers’ testimony can only support a conclusion that they believed that if Mr. Alvarez was carrying drugs in his mouth, they would be packaged in accordance with their prior knowledge and experience. The fact that the officers did not have any specific knowledge that Mr. Alvarez was engaged in drug sales and never saw Mr. Alvarez put anything in his mouth in an effort to conceal evidence of a crime further belies the court of appeals’ conclusion that despite the officers’ belief regarding the packaging of drugs carried by dealers in their mouths, their was still “probable cause [to believe that any] . . . evidence of a crime [would be] lost if not immediately seized.” Id. In fact, it weakens the exigent circumstances argument rather than strengthens it.

In addition, the state presented “no justifiable reason to conduct [a] warrant less search since [the] evidence could be retrieved through ‘the ordinary processes of nature.’” Palmer, 803 P.2d at 1253 (citing Bracamonte, 540 P.2d at 631); see also Hodson II, 907 P.2d at 1158; compare Schmerber, 384 U.S. at 770-71 (exigent circumstances exist where

percentage of alcohol in blood rapidly dissipates after drinking stops). The state failed to present any evidence regarding the officers' belief that if in fact the defendant had swallowed drugs they would be lost or destroyed. In fact, the state failed to introduce any evidence about the likelihood that the drugs would have been damaged by going through the human digestive tract or that Mr. Alvarez's health would have been jeopardized.

Hodson II, 907 P.2d at 1158 (regardless of how drugs swallowed are packaged "they are susceptible to identification and recovery in supervised, nonviolent post-arrest setting").

Under the court of appeals' holding, exigent circumstances allowing a forcible search exist whenever officers have a hunch that a defendant is a drug dealer attempting to swallow drugs even if they do not "know conclusively what [is] in [a d]efendant's mouth," have not observed a defendant place any objects in his mouth, and do not know conclusively "how any objects in [a defendant's] mouth [are] packaged." Alvarez, 2005 UT App 145 at ¶23. The court of appeals' holding is contrary to established Fourth Amendment law and directly contravenes this Court's reasoning in Hodson II.

III. THIS COURT SHOULD REVERSE BECAUSE THE FORCE USED BY THE OFFICERS TO OBTAIN EVIDENCE WAS NOT REASONABLE IN THIS CASE.

Under the third prong of the Schmerber test, the state must show that the method chosen was reasonable and the search was done in a reasonable manner. Schmerber, 384 U.S. at 771-72. In Winston v. Lee, 470 U.S. 753, 761-62, 105 S. Ct. 1611 (1985), the Supreme Court reiterated the need for probable cause showing that evidence will be

found and that exigent circumstances are sufficient to dispense with the warrant requirement. Id. at 761. In reviewing Schmerber and the reasonableness prong, the Supreme Court articulated a three-part test. The first factor is “the extent to which the procedure may threaten the safety or health of the individual.” Winston, 470 U.S. at 761; Hodson, 907 P.2d at 1157. While the Court found that a physician’s blood draw was permissible because “[f]or most people, [a blood test] involves virtually no risk, trauma, or pain” Winston, 470 U.S. at 761 (quoting Schmerber, 384 U.S. at 771), the Winston Court found that the risks involved in the surgical removal of a bullet from the defendant were too great to be reasonable. Id. at 764.

In this case, the officers did not have probable cause to believe that evidence would be found nor exigent circumstances to justify the warrantless bodily search, and yet they chose an unreasonable method of investigation that involved both pain and risks to Mr. Alvarez’s health. The officers in this case each grabbed Mr. Alvarez by one of his arms and put him in a very painful wrist lock forcing him to bend forward while ordering him to spit out the contents of his mouth. Alvarez, 2005 UT App 145 at ¶28; R. 88:7-8, 30-31. This method was not only painful but particularly dangerous in light of the officers’ belief that Mr. Alvarez was attempting to swallow balloons of drugs in his mouth. Grabbing Mr. Alvarez in such a manner created a substantial risk of him aspirating on objects in his mouth. Given the state’s evidence of the officers’ experience with how drugs carried in the mouth are packaged, and the “high statistical probability

that balloons would ‘pass through’” the defendant, the officers “easily could have been transported to jail and placed in an isolation cell and kept under proper surveillance.”

Bracamonte, 540 P.2d at 631; Hodson II, 907 P.2d at 1157.

The second factor in the reasonableness analysis is “the extent of intrusion upon the individual’s dignitary interests in personal privacy and bodily integrity.” Winston, 470 U.S. at 761-62; Hodson II, 907 P.2d at 1157. The Court noted that searches of people’s homes and phone conversations, and forcing people to come to the police station were neither painful nor physically dangerous, but did impinge on Fourth Amendment interests and, the “individual’s sense of personal privacy and security.” Winston, 470 U.S. at 762. As stated above, the officers grabbed Mr. Alvarez’s arms and put him in a wrist lock, bending him forward in an attempt to prevent him from swallowing. Having his body subjected to such physical pain and the concomitant risk cause by such a procedure in a public place epitomizes conduct that intrudes on one’s rights to privacy, bodily integrity and dignitary interests. Therefore, the officers’ conduct was constitutionally unreasonable.

The final factor in the reasonableness analysis is “the need to preserve evidence of criminal behavior.” Hodson II, 907 P.2d at 1158. Similar to the argument made by the state in Hodson II, the state argues here that “[t]he justification for the force used in this case is the need to preserve evidence and protect defendant from harm.” Id. As discussed above, this Court rejected the state’s argument stating:

There is considerable indication . . . 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. [People v. Jones, 257 Cal. Rptr. 500, 503 (1989); State v. Tapp, 353 So.2d 265, 269 (La. 1977)]. . . . No emergency or exigency justifies the use of force . . . to preserve evidence which would be readily (if inconveniently) accessible through nonviolent means.

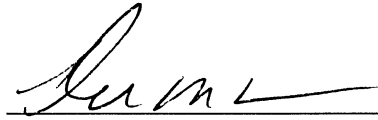
Id.

The majority opinion found this Court’s analysis on the third prong in Hodson II limited to only “to the type of extreme force used by officers in that case.” Alvarez, 2005 UT App 145 at ¶31. However, this Court’s determination in Hodson II applies equally in this case because the state presented no evidence that “might have supported a reasonable fear by the officers that swallowing the [balloon wrapped drugs] would render their contents nondiscoverable or harmful to defendant.” Id. In fact, under the totality of circumstances of this case, the state demonstrated no compelling need for this search, because they had little more than a hunch that evidence of a crime would be found at the time of the search, and there were available constitutional methods of conducting the search that were ignored. Because the state did not meet its burden to justify the warrantless and unreasonable search of Mr. Alvarez, all evidence seized as a result should have been suppressed. Wong Sun v. United States, 371 U.S. 471 (1963).

CONCLUSION

The Appellant, 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.

SUBMITTED this 8 day of November, 2005.



DEBRA M. NELSON

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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 8 day of November, 2005.



DEBRA M. NELSON

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

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.)	2005 UT App 145

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.

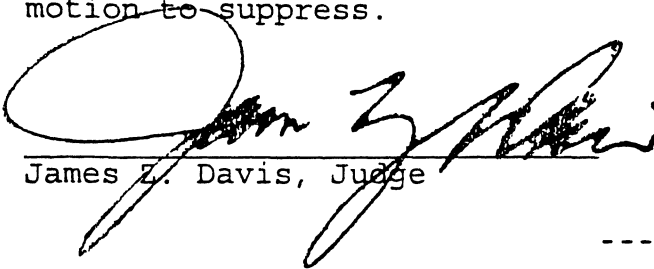
¶31 The Hodson II court held that "[i]n the absence of an urgent need to preserve evidence, there cannot be a justification for the significant risks to health and safety posed by using the kind of force in this case to get a suspect to spit out what is believed to be a mouthful of drugs." Id. (emphasis 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.

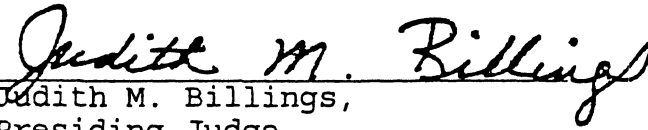
¶33 Because the State has demonstrated the three required elements, see State v. Hodson, 866 P.2d 556, 560 (Utah Ct. App. 1993) (Hodson I), rev'd on other grounds, 907 P.2d 1155 (Utah 1995) (Hodson II), we conclude that Wahlin and Steed's warrantless search of Defendant was lawful.

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 Z. 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 prowl 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"

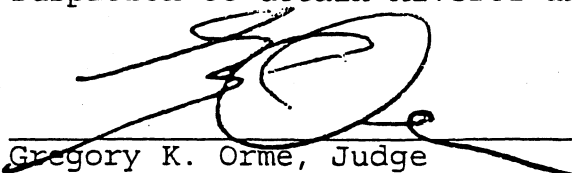
received from some other, undisclosed source. Therefore, in a situation like the instant one, the "reasonable suspicion" inquiry is one step removed from the typical inquiry that focuses on the articulable factual basis behind a police officer's own observations and inferences that give rise to his suspicions 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

SEP 21 2005

IN THE SUPREME COURT OF THE STATE OF UTAH
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State of Utah,

Appellee and Respondent

v.

Case No. 20050468-SC
20040059-CA

Ernesto Alvarez,

Appellant and Petitioner.

ORDER

This matter is before the court upon a Petition for Writ of certiorari, filed on May 23, 2005.

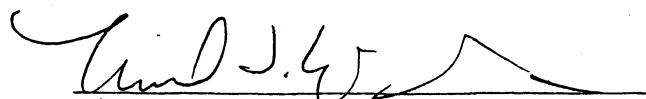
IT IS HEREBY ORDERED, pursuant to Rule 45 of the Utah Rules of Appellate Procedure, the Petition for Writ of Certiorari is granted as to the following issues:

1. Whether the totality of the circumstances in this case created a reasonable articulable suspicion of criminal activity to detain the defendant.
2. Whether the totality of the circumstances at the time the police officers conducted their search in this case demonstrated probable cause for that search.
3. Whether the officers employed reasonable force to obtain evidence from the defendant's mouth in this case.

A briefing schedule will be established hereafter. Pursuant to rule 2, the court suspends the provision of rule 26(a) that permits the parties to stipulate to an extension of time to submit their briefs on the merits. The parties shall not be permitted to stipulate to an extension. Additionally, absent extraordinary circumstances, no extensions will be granted by motion. The parties shall comply with the briefing schedule upon its issuance.

FOR THE COURT:

September 21, 2005
Date


Michael J. Wilkins
Associate Chief Justice

ADDENDUM C

CONSTITUTION OF THE UNITED STATES

AMENDMENT IV

[Unreasonable searches and seizures.]

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

UTAH CODE OF CRIMINAL PROCEDURE

77-7-15. Authority of peace officer to stop and question suspect — Grounds.

A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions.

History: C. 1953, 77-7-15, enacted by L. 1980, ch. 15, § 2.