

1994

Utah v. Richard Rodriguez : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DOCKET NO.

940700CA

STATE OF UTAH :
 Plaintiff/Appellee, : Case No. 940700-CA
 v. :
 RICHARD RODRIGUEZ : Priority No. 2
 Defendant/Appellant. :

BRIEF OF APPELLEE

- - - - -

APPEAL FROM CONVICTIONS FOR ATTEMPTED
 UNLAWFUL POSSESSION OF A CONTROLLED
 SUBSTANCE, A CLASS A MISDEMEANOR (COUNT I),
 AND UNLAWFUL POSSESSION OF A CONTROLLED
 SUBSTANCE, A CLASS B MISDEMEANOR (COUNT II),
 BOTH IN VIOLATION OF UTAH CODE ANN.
 § 58-37-8(2)(A)(I) (SUPP. 1994), IN THE THIRD
 JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE
 COUNTY, STATE OF UTAH, THE HONORABLE ANNE M.
 STIRBA, PRESIDING.

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Request for Oral Argument
and Full Published Opinion

FILED

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BRIEF OF APPELLEE

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JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from convictions for attempted unlawful possession of a controlled substance, a class A misdemeanor (Count I), and unlawful possession of a controlled substance, a class B misdemeanor (Count II), both in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (Supp. 1994), in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Anne M. Stirba, presiding. This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1995).

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

1. Was there reasonable suspicion of an imminent drug transaction to justify defendant's detention? A trial court's determination of whether an investigative stop was supported by reasonable suspicion is a conclusion of law that is reviewed for correctness. State v. Pena, 869 P.2d 932, 939 (Utah 1994). The

trial court's ruling should not, however, be subjected to "a close de novo review." Id. Rather, some deference is accorded the trial court because the reasonable suspicion standard itself "conveys a measure of discretion to the trial judge[s]" so that they can "grapple with the multitude of fact patterns that may constitute a reasonable-suspicion determination." Id. at 939-40. In contrast, the trial court's findings of purely factual issues that underlie its reasonable suspicion determination, such as witness credibility and historical facts, are subject to reversal only if clearly erroneous. Id. at 939 n.4.

2. Is defendant's voluntary consent to search subject to an exploitation analysis under State v. Thurman, 846 P.2d 1256 (Utah 1993), when the court found both (1) that there was no prior illegality, i.e., there was reasonable suspicion to detain, and (2) defendant consented to a search even before the officer asked for his consent? These are conclusions of law that are reviewed for correctness. Id. at 1272-73. Assuming, arguendo, the applicability of the Thurman exploitation analysis, was defendant's consent valid where the officer's conduct was not even negligent? The trial court's ultimate conclusions on voluntariness and attenuation are reviewed for correctness, while the trial court's underlying factual findings will not be set

aside unless they are found to be clearly erroneous. Id.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

United States Constitution

Amendment IV

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

Utah Code Annotated (Supp. 1994)

Section 77-7-15

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.

STATEMENT OF THE CASE

Defendant was charged with two counts of unlawful possession of controlled substances, class A and B misdemeanors (Counts I and II, respectively), in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (Supp. 1994) (R. 07-08). Prior to trial defendant filed a motion to suppress evidence, which the trial court denied

(R. 16). Thereafter, defendant entered a conditional plea of guilty to attempted unlawful possession of a controlled substance and unlawful possession of a controlled substance, Counts I and II, respectively (R. 18), reserving the right to appeal the trial court's denial of his motion to suppress (R. 20). The trial court sentenced defendant to a term of twelve months in the Salt Lake County Jail on Count I, to be served concurrently with a six month term on Count II (R. 31-32).

STATEMENT OF THE FACTS¹

The facts adduced at the suppression hearing are recited below in the light most favorable to the trial court's ruling. See State v. Delaney, 869 P.2d 4, 5 (Utah App. 1994) (When reviewing a trial court's ruling on a motion to suppress, appellate courts recite the facts in the light most favorable to that ruling.).

At 6:53 p.m., on July 27, 1994, Salt Lake City Police Officer Kenneth Dailey was patrolling on his motorcycle along Second South, near Pioneer Park, an area well-known for drug trafficking (R. 114-15, 121). As he turned north onto Fifth West

¹ The parties stipulated to submitting to the trial court the facts of the case based on the preliminary hearing, a transcript of which is attached in its entirety as Addendum A.

he saw defendant and another man on the west side of the street in the middle of the block (R. 115, 122). Defendant was straddling his bicycle and moving toward the other man (R. 115, 125). The other man was a white male in his thirties, who was dressed in new clothes, i.e., tennis shorts, golf shirt and tennis shoes, and seemed out of place in that area (R. 118, 126). As they approached each other closely, they appeared to talk to each other and make eye contact (R. 115, 123, 129). At this point the other man took a wad of money from his pocket (R. 115-16, 123).

As Officer Dailey closed to within twenty-five feet of the men, the other man put the money back into his pocket, and the two started to separate from each other and walk away from the officer (R. 116, 124-25). Officer Dailey acknowledged that defendant had not then violated the law or taken money from the other man (R. 124), but he suspected that the two were involved in a drug transaction (R. 116). He asked the two men to stop, explained his suspicions to them, and asked them to wait until another officer arrived (R. 116, 125). In response, both men said that the officer could search them (R. 116).

At this point Officer Wolrich arrived (R. 116-17). The officers searched defendant and found a bag of marijuana in his

shoe (R. 117). In the interim they also discovered that defendant had outstanding warrants against him (R. 117). Defendant was then arrested for both a controlled substance violation and the outstanding warrants (R. 118). When Officer Wolrich turned the bicycle over to check to see if it was stolen, a piece of paper containing a white powder fell from a bag tied to the handlebars (R. 118, 128). The powder field tested positively for cocaine (R. 119).² The other man was released, but admitted in informal conversation with Officer Dailey that he was in the area to buy cocaine (R. 127).

SUMMARY OF ARGUMENT

POINT I

Both this Court and United States Supreme Courts have stated that a finding of reasonable suspicion sufficient to justify an investigative detention is a determination based on a common-sense conclusion about human behavior, and that the Fourth Amendment requires only a showing based on objective facts that suggest that crime may be afoot, which is not defeated because a defendant's conduct is arguably innocent. Applying these

² The parties stipulated to the toxicology report, which showed that the cocaine weighed 1.8 grams and the marijuana, 4.0 grams (R. 134).

standards, the trial court properly concluded that defendant's approach, in an area known for drug trafficking, to another individual who tendered money which was then stashed away, followed by defendant's attempt to avoid contact with law enforcement, gave rise to an experienced police officer's reasonable suspicion of a drug transaction justifying an investigative stop.

The crucial fact, in connection with the other circumstances, is the tender of a "wad of money," and act peculiarly indicative of a drug transaction in an area known for drug trafficking. The trial court's conclusion, especially given the somewhat deferential standard of review applied to determinations of reasonable suspicion, was proper on the facts of this case.

POINT II

Since the trial court properly ruled that the police officer had reasonable suspicion to justify his detaining defendant, there exists no prior illegality justifying the application of the Thurman exploitation/attenuation test to determine the validity of defendant's consent to search. Further, defendant voluntarily gave his consent to search without the police officer's having asked for it, a fact not disputed on appeal.

Thus, the giving of consent cannot be the result of exploitation. For both of these reasons the exploitation/attenuation test should not even be applied in this case.

Even applying the exploitation/attenuation test, defendant's consent is valid. Under Thurman, the test is only appropriately applied where official conduct is at least negligent. Given the split-second decision-making required of the police officer in the rapidly unfolding circumstances of this case, the police officer was not negligent in detaining defendant.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY CONCLUDED THAT
THERE WAS REASONABLE SUSPICION TO JUSTIFY
DETAINING DEFENDANT TO INVESTIGATE AN
APPARENT, IMMINENT DRUG TRANSACTION

The trial court properly determined that detaining defendant was lawful because the police officer reasonably suspected that defendant was then involved, or had just completed, an illegal drug transaction (R. 79).³ As discussed below, the facts

³ In finding reasonable suspicion to detain defendant, the trial court also rejected the prosecution argument that Officer Dailey's encounter with defendant was a level I encounter (R. 79-80), see State v. Bean, 869 P.2d 984, 986 (Utah App. 1994) ("A level one stop 'is a voluntary encounter where a citizen may respond to an officer's inquiries but is free to leave at any time.'" (citation omitted)). The trial court noted that in

observed by the officer, in light of his experience as a police officer having worked undercover narcotics, satisfy the minimal objective justification standard for establishing reasonable suspicion. This Court should therefore uphold the trial court's finding of reasonable suspicion.

A. The Standard for Proving Reasonable Suspicion is Considerably Less Than a Preponderance of the Evidence.

The reasonable suspicion test for making an investigative stop is well-known: "where an officer observes unusual conduct which reasonably leads him to conclude in light of his experience that criminal activity may be afoot" a brief investigative stop and detention to dispel the officer's suspicion or prevent criminal activity is justified. Terry v. Ohio, 392 U.S. 1, 22, 30, 88 S. Ct. 1868, 1880, 1884-85 (1968) (emphasis added); Bean, 869 P.2d at 986 ("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") (emphasis in original).⁴ As the

informing defendant that he believed a drug transaction was going on the officer also told defendant and the other man that they were to wait until the officer's backup arrived (R. 78-80). On appeal, the State does not dispute this ruling.

⁴ The reasonable suspicion standard is also codified:

A peace officer may stop any person in a

term "may" in Terry implies, an officer's on-the-spot determination of whether there is reasonable suspicion to support an investigative stop requires a weighing of probabilities:

"The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same -- and so are law enforcement officers."

United States v. Sokolow, 490 U.S. 1, 8, 109 S. Ct. 1581, 1585

(1989) (quoting United State v. Cortez, 449 U.S. 411, 418

(1981)); State v. Smith, 833 P.2d 371, 372 (Utah App. 1992) ("In developing a reasonable articulable suspicion, law enforcement officers are entitled to reach 'common-sense conclusions about human behavior,'" citing United States v. Sokolow, 490 U.S. 1, 109 S.Ct. 1581, 1585 (1989)).

That is not to say that officers have unbridled discretion to stop and detain citizens without being able to articulate some

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.

Utah Code Ann. § 77-7-15 (Supp. 1994).

basis for doing so:

The officer, of course, must be able to articulate something more than an inchoate and unparticularized suspicion or hunch.

Sokolow, 490 U.S. at 7, 109 S. Ct. at 1585 (citations and internal quotation marks omitted).

It is clear, however, that the standard for establishing reasonable suspicion is a low threshold of proof:

The Fourth Amendment requires "some minimal objective justification" for making the stop. That level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence. We have held that probable cause means "a fair probability that contraband or evidence of a crime will be found," and the level of suspicion required for a Terry stop is obviously less demanding than probable cause

Sokolow, 490 U.S. at 7, 109 S. Ct. at 1585 (citations and some internal quotation marks omitted) (emphasis added). Accord Terry, 392 U.S. at 30, 88 S. Ct. at 1884.

Shortly after Sokolow was decided, the Utah Supreme Court similarly recognized that the standard of proof needed to establish reasonable suspicion was less than that needed for probable cause. In State v. Bruce, 779 P.2d 646 (Utah 1989), the defendant, suspected of robbery, was stopped and questioned by an officer. Significantly, the defendant argued that his initial

detention was unsupported by probable cause. Id. at 650. The Supreme Court, however, relying upon Terry and its own post-Terry case law, upheld the stop on the less strict, reasonable suspicion standard: "We have held that a brief investigatory stop of an individual by police officers is permissible when the officers have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." Bruce, 779 P.2d at 650 (quoting authorities; internal quotations omitted).

In the wake of Sokolow and Bruce, this Court also recognized that reasonable suspicion requires only a minimal level of certainty by stating, in State v. Menke, 787 P.2d 537, 541 (Utah App. 1990), that reasonable suspicion "must be based on objective facts suggesting that the individual may be involved in criminal activity" (emphasis added). Bruce and Menke comport with the fourth amendment's "minimal objective justification" standard for establishing reasonable suspicion, set forth in Sokolow.

The Sokolow standard for establishing reasonable suspicion recognizes that limited, non-arrest detentions serve not merely to apprehend criminals, but also to dispel suspicion and prevent criminal activity. E.g., Terry, 392 U.S. at 22, 88 S. Ct. at 1880 (limited detentions supported by interest in "effective

crime prevention and detection"). That definition contemplates the very real likelihood that many such detentions will reveal no criminal evidence. That likelihood, however, does not erode the validity of acting upon facts that, at the moment in question, would warrant a person of "reasonable caution" in taking action. Terry, 392 U.S. at 22, 88 S. Ct. at 1880.

In evaluating the validity of an investigative stop or detention, a court must consider "'the totality of the circumstances -- the whole picture.'" Sokolow, 490 U.S. at 8, 109 S. Ct. at 1585 (quoting United State v. Cortez, 449 U.S. 411, 417 (1981)). See also State v. Strickling, 844 P.2d 979, 983 (Utah App. 1992). Accordingly, "dissecting the facts that confronted [the officer]" and [l]ooking at each fact in isolation . . . is not proper." Strickling, 844 P.2d at 983.

There may also have been wholly innocent explanations and alternative inferences to be drawn from every one of the factors confronting the officer. That, however, has never been a proper basis for ruling that an investigative detention was invalid:

We said in Reid v. Georgia, 448 U.S. 438, 100 S. Ct. 2752, [] (1980) (per curiam), "there could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot." . . . Indeed, Terry [v. Ohio] itself involved "a series of acts, each of them perhaps

innocent" if viewed separately, "but which taken together warranted further investigation." 392 U.S., at 22, 88 S. Ct., at 1881.

Sokolow, 490 U.S. at 9-10, 109 S. Ct. at 1586-87.

Utah courts also have recognized that potentially innocent behavior may nonetheless give rise to reasonable suspicion. In State v. Chapman, 841 P.2d 725, 727-28 (Utah App. 1992), rev'd on other grounds, 272 Utah Adv. Rep. 6 (Utah 1995), the defendant argued that 'all of the factors justifying reasonable suspicion listed by the [officer] [we]re consistent with innocent behavior and thus, [could not] amount to reasonable suspicion." This Court rejected that argument and held that "[t]he trial court's findings of fact show that a reasonable person would conclude that Chapman had violated the [law]." Id. at 728 (footnote omitted).

Similarly, in Menke, this Court correctly held that the behavior of an individual outside a shopping mall, "although conceivably consistent with innocent--albeit highly eccentric--activity," was, nevertheless, also consistent with shoplifting. 787 P.2d at 541. Therefore, the detention of that individual by the observing officers was deemed reasonable. Id. This Court reiterated its adherence to Menke in Provo City v. Spotts, 861

P.2d 437 (Utah App. 1993). Further, this Court has recognized that

[t]he trained law enforcement officer is in a different position than the average citizen in that he or she "may be able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer.... The officer is entitled to assess the facts in light of his experience." [State v.] Trujillo, 739 P.2d [85], 88-89 [(Utah App. 1987)].

Menke, 787 P.2d at 541.

In Spotts, as in Chapman, the defendant argued that "prior to the stop, [the officer] observed no activity inconsistent with innocent behavior" and that the officer therefore lacked reasonable suspicion of criminal activity. Id. at 32. The Spotts court easily rejected that claim and reviewed all of the circumstances known to the officer at the time of the stop before concluding that "although defendant's activity was conceivably consistent with innocent behavior, it was strongly indicative of criminal activity[.]" Id. at 33. The court therefore upheld the trial court's finding of reasonable suspicion. Id.

In this case, while defendant's conduct was conceivably innocent, the evidence supports the trial court's findings and conclusion that the officer had reasonable suspicion justifying defendant's detention.

**B. The Trial Court Correctly Concluded
That the Facts Supported the Officer's
Reasonable Suspicion.**

The facts surrounding Officer Dailey's detaining defendant are not disputed and support the trial court's findings and conclusions: Officer Dailey, a Salt Lake City policeman with eight years experience, including one year with undercover narcotics in Las Vegas, saw defendant approaching another man in an area well-known for its high incidence of drug trafficking (R. 114-15). The other man, wearing sports clothing, looked out of place (R. 118, 126). He and defendant appeared to be talking to each other as they approached each other, at which point the other man pulled a wad of money from his pocket (R. 116). Defendant did not reach for the money; however, as Officer Dailey approached them, the other man put the money back in his pocket, and he and defendant began to separate from one another and walk away from the police officer, at which point Officer Dailey interceded (R. 116, 124-25).

Upon these facts, the trial court made the following findings in concluding that Officer Dailey had reasonable suspicion justifying his detaining defendant: (1) Officer Dailey was an experienced police officer with a year in narcotics enforcement; (2) Officer Dailey came upon defendant and the other

man in a high drug trafficking area; (3) defendant was moving toward the other man while straddling his bicycle; (4) the other man was dressed in something like a tennis outfit; (5) defendant and the other man spoke briefly with each other; (6) the other man took a wad of money from his pocket, the officer approached and the other man put the money back into his pocket (R. 80, 85).

In holding that Officer Dailey acted with reasonable suspicion, the trial court noted that if defendant had produced something in exchange for the money, Officer Dailey would have witnessed "what appeared to be a completed drug transaction" (R. 81).⁵ [Emphasis added.] Thereafter, the court concluded:

It seems to me that under the circumstances, that the officer had a reasonable articulable suspicion to approach those individuals and make that stop and detain those individuals based on what the officer had observed. The only thing that the officer really -- that's not too many steps from a completed transaction, if you will. Some of that conduct -- obviously that conduct could also be interpreted as innocent conduct because there was not a completed drug transaction observed. But by the same token, it would give rise to a reasonable articulable suspicion that a crime was about to occur, justifying a level II stop.

⁵ The record does not contain written findings of fact and conclusions of law. That portion of the suppression hearing containing the trial court's findings and conclusions is attached at Addendum B (R. 78-87).

(R. 86).

Instead of applying the totality of the circumstances test in challenging the trial court's conclusion, defendant dissects each of the court's findings, attempting to show that none of the officer's observations, in isolation, is sufficient to justify his reasonable suspicion of criminal activity. Thus, defendant argues that the entire incident is consistent with panhandling, that the incident's occurring in a locality known for drug trafficking is insignificant, that defendant's approaching the other man by straddling his bicycle is plainly innocent, that the other man's out-of-place appearance does not bear on reasonable suspicion of defendant's criminal activity and that defendant's not reaching for the stranger's money or exchanging anything for it all betokens innocent behavior, insufficient to justify a level II stop. Appellant's Br. at 13-16.⁶

⁶ Defendant also argues that Officer Dailey acknowledged that he only had a "hunch" when the officer approached him. Appellant's Br. at 13. "Hunch," as developed in Fourth Amendment jurisprudence, is that level of suspicion insufficient to justify a level II stop. See State v. Lovegren, 829 P.2d 155, 158-59 (Utah App. 1992) (officer's decision to search car containing drugs based on a "hunch," unjustified where based on observation of a cluttered car, and the defendants' bloodshot eyes and nervous behavior). That defense counsel was able to elicit this characterization of the officer's view of the situation (R 130, 132) is meaningless in view of the specificity of the officer's observations and recitation of facts at the preliminary hearing,

Defendant's atomistic approach flies in the face of the totality of circumstances test and should be rejected. See Sokolow, 490 U.S. at 3, 9-10, 109 S. Ct. at 1583, 1586-87 (noting that the defendant's purchase of airline tickets for \$2100 from a roll of \$20 bills, travel to Miami, a source city for illicit drugs, and the defendant's nervous appearance, while being factors individually consistent with innocent travel, when taken together with other facts amounted to reasonable suspicion of illegal conduct). Indeed, defendant's attempt to "dissect the facts" is precisely the approach this court has rejected in other cases. See Strickling, 844 P.2d at 983; State v. Bradford, 839 P.2d 866, 870 (Utah App. 1992) (fact, taken in isolation, that a defendant is outside a car, does not overcome an officer's reasonable fear that the defendant may reach a weapon under the circumstances).

In similar fashion, defendant relies on cases subtly though distinctly different from this one. See Gipson v. State, the court found 537 So.2d 1080, 1081-82 (Fla. Dist. Ct. App. 1989) (no reasonable suspicion to detain suspect discovered huddling

which led to the officer's detaining defendant. See Sokolow, 490 U.S. at 7, 109 S. Ct. at 1585 (equating an "inchoate and unparticularized suspicion" with a "hunch").

behind bar with others in high crime area and who fled from police where police did not observe an exchange of drugs or money); State v. Ellington, 495 N.W.2d 915, 919-20 (Neb. 1993) (detention unjustified where the defendant, leaning into a car in high crime area, arms extended, quickly walked away upon seeing policeman where the defendant was not observed to approach the car or exchange money or an object); Brown v. Texas, 443 U.S. 49, 99 S. Ct. 2637, 2641 (1979) (no reasonable suspicion where police stopped the defendant, then walking away from another, in high crime area alley).

In each of these cases the states' claim of reasonable suspicion failed because the defendants' engagement with others in suspicious circumstances did not sufficiently suggest or identify the particular criminal conduct suspected by the police. Thus, in Gipson and Ellington, while the defendants' conduct suggested illegal transactions, the appellate courts noted that there were no gestures, i.e., an exchange of money or drugs, that might reasonably give rise to more than mere suspicion. Gipson, 537 So.2d at 1082; Ellington, 495 N.W.2d at 919-20.

The slight, but crucial, distinction in the totality of circumstances which gives rise to a reasonable suspicion is illustrated in Thornton v. State, 559 So.2d 438 (Fla. Dist. Ct.

App. 1990). A police officer saw the defendant standing on the corner of an intersection known as a place where cocaine was sold. Id. at 439. Another man was seen looking into the defendant's outstretched, cupped hand, but the officer, although a short distance away, could not see anything in the defendant's hand. Id. When the defendant noticed the officer approaching, he quickly turned his back and moved his hands to his groin area. Id. Suspecting a drug deal by an armed criminal, the officer asked the defendant to withdraw his hands. When the defendant hesitated, the officer drew his gun, after which the defendant withdrew his hands, dropping a baggy of cocaine to the ground. Id. Distinguishing Gipson, the court noted the additional fact which justified the officer's investigatory stop, i.e., the concealment of the defendant's hands. Id. See also State v. Doleman, 1995 WL 339184 (Del. Super.) (reasonable suspicion to stop where the suspect twice returned and leaned into car after having avoided police in area known for drug trafficking).

This case also contains, among the totality of circumstances, that crucial, additional fact justifying Officer Dailey's reasonable suspicion, i.e., the observation of the other man's producing a wad of bills, following a verbal exchange with defendant at close range. It requires no citation to authority

or resort to judicial notice to adequately argue that drug transactions are almost invariably negotiated with cash. The incident took place in an area known for its high incidence of drug trafficking. As Officer Dailey approached defendant, the prospective buyer stashed the wad of money, and defendant began to remove himself from the scene. Thus, conduct which might only be considered suspicious in another context, was indicative of specific criminal behavior, i.e., possession with intent to distribute controlled substances. The minimal level of certainty required by the reasonable suspicion standard does not require that the transaction be completed, but merely that the suspected offense "may be afoot," Terry, 392 U.S. at 30, 88 S. Ct. at 1884, or that defendant is "about to commit a crime," Bean, 869 P.2d at 986, or "is attempting to commit a public offense," section 77-7-15, and that the officer simply use his "common-sense" in evaluating the circumstances. Sokolow, 490 U.S. at 8, 109 S. Ct. at 1585-86. Under the circumstances, Officer Dailey would have been remiss in failing to investigate as he did. See Menke, 787 P.2d at 540-41 (noting that when a police officer observes conduct giving rise to suspicion of crime, he has not only a right but the duty, within constitutional limits, to investigate and take the necessary measures to enforce the law) (citations

omitted).

Finally, the trial court was impressed that Officer Dailey "witnessed what appeared to be a completed drug transaction," in which case "there would be very little or no question about the officer's right to stop" (R 81), i.e., a transaction giving rise to probable cause to arrest. See Menke, 787 P.2d at 542

(probable cause is more than bare suspicion and exists where facts and circumstances warrant a reasonably cautious man in the belief that an offense has been or is being committed). Numerous courts have found probable cause in circumstances where criminal conduct was only slightly more apparent than in this case. See

People v. Shaw, 596 N.Y.S.2d 832, 833-34 (N.Y. App. Div. 1993)

(experienced officer witnessed four transactions in which the

defendant exchanged some objects for currency with nervous

participants who fled upon officer's approach); Com. v. Albino,

652 A.2d 953 (Pa. Super. 1995) (trained officer in area of

frequent drug arrests observes the defendant remove a purse from

his pants and remove an object then exchanged for currency). If

the crucial element of exchange of currency in these cases is

sufficient to establish probable cause for arrest, then

equivalent conduct displaying an interrupted exchange of currency

should establish reasonable suspicion to justify a stop. See

Sokolow, 490 U.S. at 7, 109 S. Ct. at 1585 ("the level of suspicion required for a Terry stop is obviously less demanding than probable cause").

In sum, the totality of the circumstances known to law enforcement meets the "minimal objective justification" standard needed to establish reasonable suspicion. The trial court's finding that Officer Dailey's detaining defendant was proper should therefore be upheld.

POINT II

DEFENDANT VOLUNTARILY GAVE CONSENT TO SEARCH
EVEN BEFORE THE OFFICER REQUESTED IT;
THEREFORE, THE ATTENUATION TEST UNDER STATE
V. THURMAN, DOES NOT APPLY TO THIS CASE; EVEN
APPLYING THE THURMAN TEST, THE OFFICER'S
CONDUCT WAS NOT SO FLAGRANT THAT EVIDENCE
SHOULD BE EXCLUDED

Even assuming this Court were to reverse the trial court's finding of reasonable suspicion, defendant's convictions should still be affirmed because the consent was valid. Defendant attacks the trial court's ruling upholding Officer Dailey's search on the ground that defendant's consent did not vitiate his unlawful detention founded on a lack of reasonable suspicion. Appellant's Br. at 17-21. The argument lacks merit upon the unusual circumstance that defendant not only consented, but volunteered the search of his person even before the officer

requested consent to search. Therefore, the attenuation test developed under State v. Arroyo, 796 P.2d 684 (Utah 1990), and refined by State v. Thurman, 846 P.2d 1256 (Utah 1993), does not apply to this case. Even if the Arroyo/Thurman test were applied to this case, suppression would be inappropriate because the test is primarily focussed on the deterrent function of the exclusionary rule in cases of police misconduct, not flagrant or even negligent in this case, if there was misconduct at all. See Brown v. Illinois, 422 U.S. 590, 611-12 (1975) (J. Powell, concurring) (because the search can be sanctioned under the attenuation test, there is "no legitimate justification for depriving the prosecution of reliable and probative evidence"). Accordingly, this Court should affirm the denial of defendant's motion to suppress.

A. The Validity Of Defendant's Consent Under The Voluntariness Prong of Thurman.

Under Thurman, the inquiry into whether a consent to search is lawfully obtained following illegal police action must focus on two factors: (1) whether the consent was voluntary, and (2) whether the consent was obtained by police exploitation of the prior illegality. In this case, the record shows that defendant offered Officer Dailey the opportunity to search him as soon as

the officer had explained the reason for the detention (R. 116). The record does not show that the officer ever requested defendant's consent to search, and it is apparent that the officer acted upon defendant's freely given consent. The trial court found that defendant said, "Go ahead and search us," impliedly finding that the consent to search was voluntarily given (R. 86).

On appeal, defendant does not challenge that his consent was voluntary, instead focussing his argument exclusively on the Thurman exploitation/attenuation analysis. Appellant's Br. at 18-21. Therefore, this Court should uphold the search of defendant's person because there was ample evidence to show that it was undertaken in response to defendant's voluntarily given consent. See State v. Carter, 812 P.2d 460, 467 (Utah App. 1991), cert. denied, 836 P.2d 1383 (Utah 1992) ("Although a warrantless search is generally violative of the fourth amendment [sic], it is well settled that 'one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent,'" citing Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043-44 (1973)); State v. Sepulveda, 842 P.2d 913, 918-919 (Utah App. 1992) (officer's uncontroverted testimony

demonstrated defendant voluntarily consented to search of his vehicle). The first prong of Thurman, therefore, is not at issue. Moreover, for two reasons independent of each other, the second prong, i.e., the exploitation/attenuation test, of Thurman, should not even be applied to this case: (1) defendant consented to a search independent of any request by the officer, and (2) the trial court found that defendant's detention was founded on reasonable suspicion, and therefore, there exists no prior illegality compelling an attenuation analysis. See Thurman, 846 P.2d at 1262 ("[T]he second test--the exploitation analysis--is triggered only if the prior illegality is a violation of the Fourth Amendment."). This latter point has been fully discussed above. Appellee's Br. at Point I.

**B. Because Consent Was Not Requested
There is No Issue of Exploitation.**

In Thurman, the court stated:

The second determination to be made in deciding whether a consent following police illegality is valid is "whether the consent was obtained by police exploitation of the prior illegality," Arroyo, 796 P.2d at 688; see also Sims [v. Collection Div of the State Tax Comm'n], 841 P.2d [6], 10 [(Utah 1992)]; cf. [State v.] Allen, 839 P.2d [291] 300 [(Utah 1992)], or in other words, "whether the 'taint' of the Fourth Amendment violation was sufficiently attenuated to permit introduction of the evidence," [New York v.]

Harris, 495 U.S. [14], 19, 110 S. Ct. [1640], 1643-44 [(1990)] (citing United States v. Crews, 445 U.S. [463], 471, 100 S. Ct. [1244], 1436 [(1980)]). The principle underlying the exploitation test is that the Fourth Amendment should not permit law enforcement to "ratify their own illegal conduct by merely obtaining a consent after the illegality has occurred." Arroyo, 796 P.2d at 689.

Thurman, 846 P.2d at 1263.

As discussed below, the exploitation/attenuation analysis used to invalidate an otherwise voluntary consent is driven by the deterrent purpose of the exclusionary rule. The rationale for exclusion is founded on the idea that the consent to search is the result of the "chain of presumptive coercion" resulting from the prior illegality. United States v. McCoy, 839 F. Supp. 1442, 1445 (D. Or. 1993) (citing Nardone v. United States, 308 U.S. 338, 341, 60 S. Ct. 266, 268 (1939)). However, under the Arroyo/Thurman test, suppression also requires a showing of police exploitation, initiated by the officer's request for consent. See Arroyo, 796 P.2d at 689 (rejecting the Tenth Circuit Court of Appeals' attenuation analysis in which law enforcement's request for consent was not an element in determining exploitation).

In this case the trial court found that defendant consented

to the search without Officer Dailey's even having asked him for consent (R. 86). Because there was never an official request for a consent to search, defendant cannot credibly argue that law enforcement exploited his alleged illegal detention. Therefore, the second prong of the Arroyo/Thurman test should not even be applied to this case, and this Court should simply find that defendant's consent to search was valid. However, even applying the exploitation test, the consent was valid.⁷

C. Arroyo's Attenuation/Exploitation Prong As Clarified In Thurman.

The Utah Supreme Court recently clarified the analysis to be conducted under the exploitation (or attenuation) prong of

⁷ The trial court found that defendant's detention was based on reasonable suspicion, and that the search was based on defendant's consent. Therefore, the court did not make specific findings with respect to defendant's attenuation argument; however, this Court may affirm the lower court's decision on any proper ground. State v. Elder, 815 P.2d 1341, 1344 n.4 (Utah App. 1991); see also Thurman, 846 P.2d at 1273 (assessing elements of the attenuation test where the trial court failed to make findings because the record was sufficient to make such determination). In this case the record is sufficient to show that even if the trial court was required to have engaged in an attenuation analysis because there was a prior illegality, i.e., lack of reasonable suspicion to detain, suppression is not warranted because it cannot be said that Officer Dailey "exploited" the prior illegality in order to obtain defendant's consent.

Arroyo. State v. Thurman, 846 P.2d at 1262-64. Significantly, the Court began its discussion of the exploitation prong with an unequivocal statement of the policy consideration that underlies

Arroyo:

Arroyo's primary goal was to deter the police from engaging in illegal conduct even though that conduct may be followed by a voluntary consent to the subsequent search.

The deterrence rationale discussed in Arroyo is grounded in the United States Supreme Court's decision in Brown v. Illinois, 422 U.S. 590 (1975). There, Justice Powell, in a concurring opinion joined by now Chief Justice Rehnquist, made it clear that the analysis used to invalidate consent on the basis of exploitation was grounded firmly in the deterrent purposes of the exclusionary rule. Id. at 608-12. Justice Powell's admonition that the exploitation analysis "always should be conducted with the deterrent purpose of the Fourth Amendment exclusionary rule sharply in focus," id. at 612, has become a cornerstone of search and seizure jurisprudence. See 4 Search & Seizure § 11.4(a), at 373: see also Anthony G. Amsterdam, Search, Seizure, and Section 2255: A Comment, 112 U. Pa. L. Rev. 378, 390 (1964) [hereinafter Amsterdam].

Thurman, 846 P.2d at 1263.

Having identified the deterrent purpose of the exclusionary rule as the underpinning of the Arroyo exploitation prong, the Thurman Court reiterated the factors to be considered by courts: "[1]] 'the purpose and flagrancy of the official misconduct, [2]] the 'temporal proximity' of the illegality and the consent, and [3]] 'the presence of intervening circumstances.'" Id. at

1263 (citations omitted). The Thurman Court then discussed each factor in greater detail, emphasizing the deterrent purpose of the exclusionary rule throughout its discussion.

Clearly, the "purpose and flagrancy" factor is the most significant of the three because it is "directly related to the deterrent value of suppression." Id. at 1263 (citations omitted). As such, the first task a court should complete under the exploitation prong is to characterize the nature and degree of the prior illegality based on a continuum of "flagrancy" and "egregiousness." Id. See also State v. Bello, 871 P.2d 584 (Utah App.), cert. denied, 883 P.2d 1359 (Utah 1994) (post-Thurman case in which this Court began its attenuation analysis by evaluating police misconduct on scale of purposefulness and flagrancy).

To put the Thurman continuum into perspective, it must first be recognized that "'[t]he deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which [sic] has deprived the defendant of some right.'" Id. (quoting Brown, 422 U.S. at 612 (Powell, J., concurring) in turn quoting Michigan v. Tucker, 417 U.S. 433, 447 (1974)). Further, "[t]he nature and degree of the illegality will usually be inversely related to the

effectiveness of time and intervening events to dissipate the presumed taint. Thurman, 846 P.2d at 1264.

Thus, at one end of the continuum is police misconduct that is "flagrantly abusive, [such that] there is a greater likelihood that the police engaged in the conduct as a pretext for collateral objectives," or instances in which "the purpose of the misconduct was to achieve the consent[.]" Id. (citations omitted). In such cases, court "will require a clean break in the chain of events between the misconduct and the consent to find the consent valid." Id. In the absence of such a clean break, "suppressing the resulting evidence will have a greater likelihood of deterring similar misconduct in the future." Id. (footnote and citation omitted).

Next in line to purposeful or flagrant misconduct on the Thurman continuum is negligent police misconduct. "[W]here it appears that the illegality arose as the result of negligence, the lapse of time between the misconduct and the consent and the presence of intervening events become less critical to the dissipation of the taint." Id. at 1264.

At the other extreme of purposeful and flagrant misconduct are instances where "the police had no 'purpose' in engaging in the misconduct--for example, if the illegality arose because [a

court] later invalidated a statute on which the police had relied in good faith--suppression would have no deterrent value." Id. (citations omitted).

**D. Officer Dailey's Conduct Was Not
Negligent Under the Circumstances.**

In Thurman, the police sought a warrant authorizing no-knock authority. In spite of the magistrate's clear refusal to issue such a warrant, police battered down the defendant's door thirty seconds after having announced their presence, roused him from his bed naked, and kept him in shackled for six hours before he gave the crucial consent to search. Id. at 1273.

Notwithstanding this very purposeful conduct, "calculated to cause at least surprise, if not confusion and fright," the court found that suppression was not required because there was a clean break between the misconduct and the consent. Id. at 1273-74.

Patently, the misconduct in this case, if there be any, does not nearly approach that in Thurman. Rather, it more closely resembles that in State v. Buck, 756 P.2d 700 (Utah 1988), wherein the court found that suppression was not required where police entered the premises without announcing their presence, mistakenly thinking they were executing a no-knock warrant.

In this case Officer Dailey rounded a corner on his

motorcycle and witnessed at close range an exchange that, given the circumstances and his observations, would have roused the suspicions of any experienced law enforcement agent, even if insufficient to satisfy a legal determination of reasonable suspicion. However, the situation required a split-second assessment. See United States v. Sharpe, 470 U.S. 675, 105 S. Ct. 1568 (1985) (the court "should take care to consider whether police are acting in a swiftly developing situation, and in such cases the court should not engage in unrealistic second-guessing"). Considering the officer's duty to observe and investigate such suspicious encounters, see Menke, 787 P.2d at 540, Officer Dailey's decision to intercede and detain defendant should not be considered negligent. Since the officer's conduct was not negligent, the fact that the consent followed the alleged misconduct almost immediately, without any intervening event, should not weigh heavily in the attenuation analysis.

In sum, even assuming a prior illegality in detaining defendant without reasonable suspicion, this Court should find that the police did not exploit that illegality to obtain defendant's consent to search. Rather, it should recognize that defendant volunteered to be searched and that his consent was therefore not the product of police misconduct. The Court should

further recognize that, given the reasonability of Officer Dailey's conduct, the deterrent purposes of the exclusionary rule would not be served by suppression of evidence in this case.

REQUEST FOR ORAL ARGUMENT AND WRITTEN OPINION

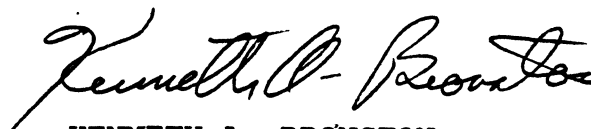
Given the fact sensitivity of search and seizure cases, the State believes that this Court's decision-making process aided by oral argument in this case and therefore requests oral argument. Further, because the scope of reasonable suspicion and the application of the exploitation/attenuation analysis is so fact sensitive, this case warrants a written published opinion to further clarify Utah law in these areas.

CONCLUSION

Based on the foregoing discussion, the State respectfully requests that the trial court's denial of defendant's motion to suppress and judgment of conviction be affirmed.

RESPECTFULLY SUBMITTED this 17th day of October, 1995.

JAN GRAHAM
Attorney General


KENNETH A. BRONSTON
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to Joan C. Watt and Mark R. Moffat, Salt Lake Legal Defender Assoc., attorneys for appellant, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, this 8th day of October, 1995.

Kenneth A. Branton

ADDENDA

ADDENDUM A

STATE OF UTAH
v.
RICHARD RODRIGUEZ

MAY 2 5 1995

By B. Adams
Deputy Clerk

CHARGE: Possession of a Controlled Substance 3°
CASE #: 941011948FS
PROSECUTOR: Vincent Meister
DEFENSE: Mark R. Moffat

JUDGE: Sheila K. McCleve

TRANSCRIPT OF
PROCEEDINGS
(Preliminary Hearing)

EXCLUSIONARY RULE INVOKED.
SWEARING IN OF WITNESSES.
FORMAL READING OF THE INFORMATION WAIVED.

District Court Case
941901145

DIRECT EXAMINATION

Court of Appeals
940700-CA

Q. Please state your name and spell your last name for the record.

A. It's Kenneth Dailey, D-A-I-L-E-Y.

Q. What's your occupation?

A. A police officer with Salt Lake City Police.

Q. Are you a certified category one police officer?

A. Yes.

Q. How long have you been with the Salt Lake City Police Department?

A. I've been with them four years with eight years in law enforcement.

Q. A total of eight years?

A. Yes.

Q. Who before Salt Lake City Police?

A. The University of Utah.

Q. Does that training include the detection and apprehension of

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COURT OF APPEALS
940700-CA

persons involved in drug issues?

A. Yes. I also worked a year of undercover narcotics. So, yes, I've had a lot of training.

Q. Can you tell me about your training and experience involving drugs?

A. I've had several classes through POST, and also been to different seminars and stuff the year I worked narcotics in Las Vegas. I wouldn't know the total hours.

Q. Let's take your attention to July 27, 1994, at 150 South 500 West, approximately 6:53 p.m. Were you on duty at that time at that location?

A. Yes.

Q. To your knowledge, is that location in Salt Lake County?

A. It is.

Q. What were you doing at that time at that location?

A. I was in an area that is well known for drug trafficking. I work on the motorcycle squad and we were asked to go and check out the Pioneer Park area.

Q. Were you in uniform at that time?

A. I was.

Q. Were you on your motorcycles?

A. Yes.

Q. Is that a marked motorcycle?

A. Yes.

Q. What did you observe at that time at that location?

A. I observed two males approach each other. One had pulled some

money out of his pocket.

Q. Did you actually see money?

A. Yes. It was in a wad in his hand.

Q. How far were you from that individual when you saw that?

A. Well, I got as close as maybe 25 feet before he actually put it back in.

Q. Then what.

A. They started to separate and I asked them....I got off and detained them both and asked them to wait for another officer to come.

Q. Were you riding alone?

A. I was.

Q. What happened then?

A. Another officer pulled up shortly and was talking to both of them. I explained to them what I observed and what I felt could be going on.

Q. What did you tell them.

A. I told them that we were having a terrible problem with drug activity in the area and that I felt there was a drug transaction going on and that we were waiting for another officer to arrive.

Q. What did they say when you told them that?

A. Their response was that both of them said that I could search them.

Q. What did you do?

A. At that point, the officer was getting out of his car and so I waited for him and we searched.

Q. What officer?

A. Officer Wolrich.

Q. And, huh, you're saying that they said that you could search them?

A. Yes.

Q. Did you ask to search them?

A. No. Um, they just blurted out the statement from both of them.

Q. And so you did search them?

A. Yea, meantime for the one came back with some warrants too.

Q. Which individual, do you recall?

A. The defendant, uh the gentleman sitting at the defense table.

Q. The two individuals that you observed, would you recognize them if they were in court today? One or both?

A. Huh, one for sure.

Q. Is that person in court today?

A. Yes.

Q. Would you point him out and describe what he is wearing?

A. The gentleman at the defense tale in the gray jumpsuit.

Q. Your honor, may the record reflect the identification.

Judge M: Yes.

Q. You searched the individuals. Did you find anything?

A. Yes, there's um, in the defendant's shoe there was a bag of marijuana.

Q. In what shoe? Do you recall?

A. I don't recall exactly what shoe without reading the report

but it was in, actually under the liner of the shoe that he was wearing. At that point, he was under arrest for both the warrant and that. Um, Officer Wolrich turned the bike over to check to see if that was stolen.

Q. How far were you from Officer Wolrich when this was going on?

A. Just a couple feet.

Q. Where was the other person with the money at this time?

A. He had been released on just like a field card information cause there was nothing that we felt we did have anything on him.

Q. O.K., Can you describe that individual?

A. He was white male, mid-thirties. He was dressed different from the usual person we're seeing in that area.

Q. Describe him.

A. He was dressed in um like new clothes, huh, shorts looked like he was going to play tennis. He had like a golf shirt, new shoes, tennis shoes, um..

Q. That person was released. What did you do with the defendant?

A. He was placed under arrest for the warrant and also for having marijuana.

Q. Tell me about the bicycle.

A. The bicycle that I had actually seen him on and riding, there was a white plastic sack, like your Smiths' garbage or grocery sack, um, on bicycle tied to the handle bars. And when the officer turned it over, some white powder and item came out of the bag that was on the bag.

Q. What did you do with that?

A: Well they, the one, the powder that was on the ground, just cleaned up that and then there was a container, like I said it was a paper that we grabbed that still had some of the light powder in it. And we field tested that.

Q: What did you field test it with?

A: A cocaine test kit.

Q: How do you know huh, that the field test kit was ok?

A: It was indicted. All the vials was intact, everything was indicted and hadn't been used.

Q: Can these kits be used twice?

A: No.

Q: Ok and what was the results of that test?

A: It was positive for huh, cocaine.

Q: Alright. And what did you do after that?

A: We had, Officer Wolrich and I huh, I took the evidence and placed it in police evidence and we transported the individual to jail.

Q: Did you have conversation with the defendant huh, regarding what it was that you found in the plastic sack?

A: Yes, huh, well there was also some spontaneous comments that were made too.

Q: Can you tell me about those?

A: The individual, he said that the marijuana was his, and he smokes marijuana something to the effect huh, cause that's a misdemeanor and the cocaine is a felony. So that wasn't his. He claimed that the cocaine didn't come out of the bag. You know.

Q: Where did he claim it came from?

A: From Officer Wolrich.

Q: No further questions.

CROSS EXAMINATION

MM: You have been with the Salt Lake City Police Department for 4 years. Is that correct?

A: Yes.

Q: And on this particular day you were on motorcycle patrol?

A: Yes.

Q: Were you part of any huh, detail assigned to Pioneer Park area?

A: Yes, that day I believe huh, about once a week we're assigned to go down there.

Q: And who assigns you there.

A: Just our Sargent, its kind of an informal type assignment.

Q: And you were assigned there on that particular day?

A: Um huh, for that ..

Q: By your Sargent?

A: Yes.

Q: With what orders?

A: Its just a verbal informal, instead of going out and responding to calls, they want us to go down and do that. Not respond to calls.

Q: Go down and do what?

A: Check just the area for the problems that have been going on.

From everything from traffic problems to drug problems to DUI problems but the difference is that we just don't respond to calls.

Q: So you go down there and just investigate if there's any ..

A: Just anything that happens.

Q: Is that part of the zero tolerance policy that the police department have enforce at this time?

A: I've never heard it stated that way, other than just by other officers.

Q: What have your heard?

A: What's that?

Q: The other officers refer to it as that?

A: Like our Captain has said that you know, we don't want kind of a zero tolerance. Not exactly those words but they want to take care or clean up the area.

Q: And your detail on that particular day was part of this clean up effort? Is that whats your testimony?

A: In an informal way.

Q: You say that this area is known for drug trafficking? This is an area down around the Shelter, is it not?

A: Yes.

Q: You have been given intelligence reports about the activity in the area, I take it?

A: Several times, yeah.

Q: Now, you were on your motorcycle, and that's a marked unit?

A: Yes.

Q: And you were wearing a uniform?

A: Yes.

Q: This takes place at about 6:00 at night?

A: I wouldn't know the exact time but yeah it was probably around there.

Q: It was still light out?

A: Yes.

Q: You were traveling which direction on your motorcycle?

A: Um, I would have been coming from 2nd South, so Northbound.

Q: Northbound on which street?

A: 500 West.

Q: You see two men on the sidewalk. Where are they, which side of the sidewalk?

A: Um, there's only one in that area and that's on the West side.

Q: The West side of 5th West?

A: Of 5th West yes.

Q: How far away from them were you when you first noticed them?

A: I noticed them when I turned the corner ..

Q: How far away is that?

A: You know its maybe half a block.

Q: They were facing which direction? First of all, Mr. Rodriguez? Which direction is he facing?

A: Right now?

Q: When you first saw him.

A: They were facing away from me. They were facing each other. They weren't looking my direction at that point.

Q: Mr. Rodriguez was on a bicycle?

A: Yes.

Q: His back was to you?

A: He just wasn't looking my direction. It could have been the side or what.

Q: The other gentleman was ..

A: They were facing each other.

Q: Yes, and what I'm trying to get from you is that Mr. Rodriguez was facing which way? The other gentleman was facing which way? I can understand them facing one another, which?

A: I know. I believe that Mr. Rodriguez was facing in an Northeast direction, the other gentleman would have been a Southwest. That's what I can recall.

Q: What businesses are in that area?

A: I couldn't tell you. There's a bar, there's a car lot type place and I think the one is a moving storage type place.

Q: The two gentleman are, seem to be talking to one another?

A: Yes.

Q: And you say you saw the one gentleman pull something out of his pocket, isn't that correct?

A: Um huh.

Q: And you were how far away when you saw that?

A: Well as I got close to them I could see that and like I say, when I finally realized that I felt it was money, huh..

Q: You felt it was money?

A: I could see that it was green. It was like a wad and it looked like money, yes.

Q: You have no idea of the relationship between the two men on the side of the sidewalk when you first saw them?

A: When I first saw them, no.

Q: And the gentleman that seemed out of place to you huh, had his hands in his pockets?

A: No, like I said he had his hand out of his pocket.

Q: Did you ever see his hand in his pocket?

A: Yeah, and he pulled the green wad out of his pocket.

Q: They noticed you and walked away? Is that correct?

A: They attempted, like I said, I was fairly close at that point and I asked them to stop which they did.

Q: Ok, let me ask you another thing, you asked them to stop, they would include Mr. Rodriguez and the other gentleman?

A: Yes.

Q: Mr. Rodriguez had nothing at that point which was in violation of the law, is that correct?

A: No.

Q: That's a no?

A: No.

Q: You didn't see Mr. Rodriguez break the law at that point did you?

A: Not at that point, no.

Q: And all you saw this other individual do was pull something that you thought was money out of his pocket?

A: That's correct.

Q: And Mr. Rodriguez made no effort to get that money from him did

he?

A: No.

Q: He simply sat there on his bicycle.

A: No. Well huh, there were approaching each other like they were getting closer.

Q: So Mr. Rodriguez is riding down the street on this bicycle and the other man is walking?

A: He was straddling his bicycle with his feet on the ground.

Q: Moving the bicycle along the sidewalk?

A: Towards the ..

Q: And the other gentleman is walking down the sidewalk as well towards Mr. Rodriguez.

A: No, they weren't that far apart at all. Um, they were just approaching each other and like I say, he was straddling his bicycle and maybe just walked a few steps towards the gentleman.

Q: At that time Mr. Rodriguez was not free to leave is that correct?

A: No.

Q: You told it while (inaudible). They started to separate, correct?

A: Yeah.

Q: They attempted to move away from you, isn't that right?

A: Yes.

Q: You told them to stop?

A: I asked them to, yes.

Q: At that point in time, they were not free to leave?

A: I explained why.

Q: My question is that they were not free to leave at that point? Isn't that right?

A: No.

Q: It's not right?

A: I just answered that were not free to leave, no.

Q: Ok. Ok. And you at that point in time indicated to them that you were having problems in the area with drugs and that you felt that there was a drug transaction going on?

A: Yes.

Q: And prior to that point in time, you had not mirandized either individual, is that correct?

A: That's correct.

Q: Mr. Rodriguez certainly was not mirandized?

A: No.

Q: So you made these statements to them about what you were doing and they responded?

A: Yes.

Q: The other person seemed out of place, is that right?

A: Yes.

Q: And you let him go, is that correct?

A: Yes. After the investigation.

Q: You let him go because you had nothing to hold him on, isn't that right?

A: After we did like huh, record checks and stuff like that.

Q: How long did that take?

A: Just a few minutes.

Q: He never indicated that he was there to buy cocaine?

A: He did.

Q: Where is that in your report?

A: Um, I just remember informally talking to him and I asked him. I don't know if that is in my report, I just ..

Q: It's an important fact isn't it?

A: What's that?

Q: That is an important fact isn't it?

A: Sure. I don't know if it is but I can recall it right now the gentleman's .. He told me that he was there to do that but that hadn't even taken place. He was there to purchase drugs but that didn't take place.

Q: Yet you let him go?

A: Cause we did have anything on him. He had no warrants. All we had on him was ..

Q: You had probable cause to believe that he was attempting to purchase drugs, isn't that correct?

A: No because they were still a couple feet away. I didn't feel, I didn't have any drugs on him, all I had on him was money.

Q: So you didn't feel he was in any way in violation of the law himself?

A: No. Other than suspicious.

Q: Mr. Rodriguez gave permission to search his person, isn't that correct?

A: Yes.

Q: He never gave you permission to search his bicycle.

A: That's correct.

Q: Now, you indicated in your report that the substance that fell out of the white bag had spilled out, isn't that correct?

A: Yes.

Q: Isn't it true that the substance was on the sidewalk prior to the time that you confronted Mr. Rodriguez?

A: No. That's not true.

Q: Never found any substance spilled out in the plastic bag that was on Mr. Rodriguez's bicycle, did you?

A: What's that?

Q: Substance, there was no cocaine spilled out inside the white plastic bag on the handle bars was there?

A: Um, I'm not sure I understand how your saying that. There was an item that came out of that with the substance. Coming out of it.

Q: And the substance was coming out of this item?

A: Yes.

Q: But none of the substance was inside, the item didn't spill inside the plastic bag did it?

A: No.

Q: It didn't recover any cocaine from the plastic bag itself.

A: No.

Q: You at no point in time mirandized Mr. Rodriguez, did you?

A: I didn't question him.

Q: The question is you never mirandized him did you?

A: No.

Q: This individual, did you take note of his name?

A: A field card by the other officer.

Q: Do you know what his name was?

A: I couldn't tell you.

Q: You say he was a white male?

A: Yes.

Q: In his mid-thirties?

A: Approximately.

Q: Had shorts on?

A: Yes.

Q: And a golf shirt?

A: Yes.

Q: By his own admission, he was attempting to purchase cocaine?

A: I recall him saying drugs.

Q: Describe the item that fell out of the plastic bag?

A: It looked to me like a crumbled up paper ball.

Q: Alright, at the time that you saw the two men, at the time that you saw them on the sidewalk together, you didn't hear any conversation between them?

A: No.

Q: I just want to make sure that I understand what Mr. Rodriguez was doing. The other man was pulling something from his pocket, Mr. Rodriguez was on his bicycle?

A: And they were close to each other.

Q: Close to each other. And Mr. Rodriguez at no time made any

gesture with his hand or with whatever the person was pulling out of his pocket?

A: No.

Q: At the time that you saw the two men, you had no idea what they were doing?

A: Um, well huh, I don't know how to answer that question.

Q: You had a hunch that something was going on?

A: Yes.

Q: That's all your honor.

RE DIRECT

VM: Just a couple of questions your honor.

Judge M: Go ahead.

Q: Officer, did you search the defendant before the bike was searched?

A: Yes.

Q: Was the marijuana found before the bike was searched?

A: Yes.

Q: Ok. And when you approached these two individuals, could you tell if they were communicating with each other?

A: It looked like they were. Like I said, they were really close to each other.

Q: How were they communicating with each other?

A: Looked like talking.

Q: Did you notice any eye contact?

A: Yes. They were looking at each other.

Q: Any physical gestures besides talking?

A: Other than moving you know, towards each other, no that I recall.

Q: But you didn't hear what it was that they were saying?

A: No.

Q: Ok. No further questions your honor.

RE CROSS

MM: The individual that indicated he was there to purchase drugs, didn't say which drugs he was there to purchase, is that correct?

A: I don't recall that, no.

Q: The substance that was tested to be cocaine was found in a piece of paper rolled up?

A: Like a ball, yes.

Q: Like a ball? Was it in a type of plastic twist?

A: No, it was in that balled paper. There was leaf, what it was, there was the paper and then a leaf on that and then the white substance and then that was rolled up. And it partially opened when it fell out.

Q: So it easily spilled out then?

A: Um huh.

Q: The leaf? It is an actual leaf, a drawing of a leaf, what is it?

A. I didn't open it up anymore than it was opened; just sealed it after the test. But, it looked like me to just a normal, like a maple leaf-type thing.

Q. When Mr. Rodriguez was initially detained by you, you say that he indicated that you could go ahead and search him, isn't that correct?

A. Yes.

Q. You didn't do that immediately, did you?

A. It was relatively short after that because I explained to him that I was going to wait for my safety. I was waiting for the other officer to arrive.

Q. During that period of time he wasn't free to leave.

A. No. It was a real short period of time and there was a lot of officers in that area. The officer pulled up just momentarily.

Q. So, you detained him initially for something, you had a hunch that this was some type of drug transaction, isn't that correct?

A. Yes.

Q. And Mr. Rodriguez and the other individual are detained and you tell them why you are there, isn't that right?

A. Yes.

Q. And then you wait for backup.

A. Yes.

Q. You did nothing in that period of time to verify anything that was going on, isn't that correct?

A. I didn't open it up anymore than it was opened; just sealed it after the test. But, it looked like me to just a normal, like a maple leaf-type thing.

Q. When Mr. Rodriguez was initially detained by you, you say that he indicated that you could go ahead and search him, isn't that correct?

A. Yes.

Q. You didn't do that immediately, did you?

A. It was relatively short after that because I explained to him that I was going to wait for my safety. I was waiting for the other officer to arrive.

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Q. So, you detained him initially for something, you had a hunch that this was some type of drug transaction, isn't that correct?

A. Yes.

Q. And Mr. Rodriguez and the other individual are detained and you tell them why you are there, isn't that right?

A. Yes.

Q. And then you wait for backup.

A. Yes.

Q. You did nothing in that period of time to verify anything that was going on, isn't that correct?

A. I said, I explained why I was there and the officer arrived

like simultaneously. It was a real short period.

Q. Mr. Rodriguez indicated to you, at that point in time, that he wasn't doing anything improper, isn't that correct?

A. The only thing he said to me was that I could go ahead and search him.

Q. Meaning to you that he didn't feel that there was anything to hide, isn't that correct?

A. Um, that's probably what he thought. I wouldn't entertain what he was thinking, I don't know.

Q. That's how you interpret it, though, isn't that correct?

A. I didn't interpret it, but that's just what he said.

Moffat: Nothing further, your Honor.

Judge: You may step down.

Pros: That's the States only witness, your honor, for the purposes of this hearing there is a stipulation as far as the tox report; and if I may read that. "Cocaine was identified in the plastic bag. The total weight of the sample was 1.8 grams. The plastic bag was found to contain 4.0 grams of crushed marijuana. Kevin L. Smith, Criminalist."

Judge: Mr. Moffat?

Moffat: Your honor, we will be calling no witnesses. Richard, you have the right to testify today but my advice to you is that you not testify. Will you follow my advice?

Richard: I will follow your advice.

Moffat: We will submit it, your honor.

ADDENDUM B

1 IN THE THIRD JUDICIAL DISTRICT COURT
2 IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

3 * * *
4 THE STATE OF UTAH, :
5 Plaintiff, : Case No. 941901145 FS
6 v. : Transcript of:
7 RICHARD RODRIGUEZ, : PROCEEDINGS ON MOTION
8 Defendant. : TO SUPPRESS
9 * * *

10 BEFORE THE HONORABLE JUDGE ANNE M. STIRBA
11 Salt Lake City, Utah
12 Wednesday, September 21, 1994
13
14

15 APPEARANCES
16 For the Plaintiff: VINCENT MEISTER
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21 For the Defendant: MARK R. MOFFAT
22 Attorney at Law
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24 424 East 500 South, Suite 300
25 Salt Lake City, Utah 84111

23 REPORTER: SUZANNE WARNICK, CSR, RPR-01 **FILED** **THIRD JUDICIAL DISTRICT COURT**
24 Official Court Reporter Third Judicial District
25 240 East 400 South, #304 **DEC 30 1994**
 Salt Lake City, Utah 84111 **JAN 19 1995**
 Phone: 801-535-5470

By Deputy Clerk
COURT OF APPEALS
940700-CA00053

1 MR. MOFFAT: Your Honor, I think the officer's
2 testimony that he detained the individuals speaks for itself.
3 That takes it right out of Dietman's Level I encounter.

4 MR. MEISTER: Your Honor, if we look at -- defense
5 counsel is using "detention" and "seizure" interchangeably.
6 And the case law is clear that you can have detention without
7 seizure. All detentions do not equate with seizure. Terry
8 is the first case on that.

9 MR. MOFFAT: When detention occurs, your Honor,
10 there is a seizure within the meaning of the Fourth
11 Amendment.

12 MR. MEISTER: Not true.

13 THE COURT: Just a minute.

14 MR. MOFFAT: I think that's what Terry says.

15 Your Honor, if I may direct the Court's attention
16 to page 361 of the opinion of Brown v. Texas, under the
17 Roman numeral II it says,

18 "When an officer retained appellant for the
19 purpose of requiring him in this case to identify
20 himself, they performed a seizure of his person
21 subject to the requirements of the Fourth
22 Amendment."

23 THE COURT: I am actually persuaded by
24 Mr. Rodriguez's arguments as to what level of stop this was.
25 The testimony that's before the Court and any evidence that's

2 a drug transaction in process or about to go on or had just
3 concluded. And, in fact, what he told these two individuals
4 when he approached them was that they were having a terrible
5 problem with drug activity in the area and that he felt there
6 was a drug transaction going on and that, quote, "We were
7 waiting for another officer to arrive."

8 That's his conversation with --

9 MR. MOFFAT: I believe that's his conversation with
10 the officer.

11 MR. MEISTER: No, the conversation with the
12 defendant and the other individual that was in attendance.

13 MR. MOFFAT: What page are you on?

14 THE COURT: On page 3.

15 "Q Were you riding alone?

16 "A I was.

17 "Q What happened then?

18 "A Another officer pulled up shortly and was
19 talking to both of them. I explained to them
20 what I observed and what I felt was going on.

21 "Q What did you tell them?

22 "A I told them we were having a terrible
23 problem with drug activity in the area and that I
24 felt there was a drug transaction going on, and
25 that we were waiting for another officer to

1 arrive.

2 "Q What did they say when you told them that?

3 "A Their response was that both of them said
4 that I could search them."

5 So the way I first read it, and as I read it
6 again, it does look as though he actually informed the
7 defendant and this other individual that when he approached
8 them that he felt there was a drug transaction going on. And
9 in light of also the dialogue that he was going to call for
10 backup, it seems to the Court that the weight of the evidence
11 is that this was not a Level I search -- or a stop, rather.
12 That this was a Level II stop.

13 Now, the question was, is there a reasonable
14 articulable suspicion as to whether these individuals were
15 about to commit a crime or were in the process of committing
16 a crime? And the evidence as to that is, first of all, this
17 is an experienced officer with a year in narcotics
18 enforcement. He saw these two individuals. While this was
19 in a high drug trafficking area, he saw Mr. Rodriguez on a
20 bicycle, sort of not peddling but moving his bicycle along
21 with his feet toward the other individual. And the other
22 individual is dressed in what appeared to the officer to be
23 something like a tennis outfit, shorts and a Polo kind of
24 shirt. And that he saw this individual take out of his
25 pocket a wad of money, what appeared to him to be money.

now, obviously, if the officer had seen

2 Mr. Rodriguez produce something from him in exchange for this
3 money, I think it could be fairly said the witness witnessed
4 what appeared to be a completed drug transaction and there
5 would be very little or no question about the officer's right
6 to stop. On the other hand, it would be just as clear on the
7 other side of the scale if the officer saw these two
8 individuals on the street have a brief encounter, no wad of
9 money and move on, even though it's in a high trafficking
10 area, that would be wholly consistent with lawful activity.

11 What this case turns on is whether looking at the
12 totality of the circumstances the officer had a reasonable
13 articulable suspicion.

14 Mr. Moffat, I need to ask you, is it your position
15 that the officer himself has to bring all these elements
16 together, or can the officer testify to what he observed and
17 then have that presented in the form of argument to the
18 Court? You seem to be suggesting that the officer has to do
19 some kind of running commentary on, Well, in my training
20 this, and, In my training that. Is that what you feel is
21 necessary?

22 MR. MOFFAT: I would, your Honor, especially in a
23 situation such as this where we have behavior that is wholly
24 consistent with innocent conduct taking place in front of the
25 officer's eyes. And I needn't remind the Court this is in an

1 area very close to the shelter. These gentlemen could have
2 been doing anything. Again, the officer testified that he
3 did not know the relationship between the two men. He didn't
4 know if they knew one another. This could have been
5 Mr. Rodriguez, a homeless person, at the shelter panhandling
6 money from another person in the shelter. There is nothing
7 wrong with that, your Honor.

8 It could have been a situation where this person
9 owes Mr. Rodriguez money. It could have been a situation
10 where Mr. Rodriguez sees money and pulls his money out of his
11 pocket to assure he is in possession and puts it back in.
12 Because that's what occurs: He has it out, he has it in his
13 hands, and then he puts it back in his pocket.

14 I think there has to be an articulated basis on
15 the record as to how all of these elements intertwine into
16 the officer's decision to detain. And that's my argument.
17 This behavior in my estimation, your Honor, is completely
18 consistent with innocent conduct, and there is nothing more
19 than innocent conduct going on here.

20 THE COURT: Mr. Meister, do you wish to add
21 anything to this?

22 MR. MEISTER: Well, your Honor, I disagree that
23 it's completely consistent with innocent conduct or
24 noncriminal conduct. In this case what we have to look at is
25 what the officer, in his training and experience, how he sees

1 this. And the case law -- again if we look at State v.
2 Kaminski, it says, if the officer sees this, he has a duty,
3 a sworn duty, to investigate this. If he investigates and
4 finds what Mr. Moffat says, that this is innocent behavior,
5 then they go on. But he has a duty to investigate this.

6 But in the officer's opinion, this is not
7 consistent with legal behavior in this particular area. If
8 it was consistent, then he has no reason to stop them and
9 probably wouldn't have stopped them. In this case he has
10 articulated, and he did articulate in the preliminary
11 hearing -- and maybe we can all articulate things better than
12 we do -- but he articulated enough, and the case law is
13 clear, that he had a reasonable suspicion. And the probable
14 cause does not have to be correct. They can be wrong in
15 their reasonable suspicions. They can be wrong in their
16 probable cause, but that doesn't mean that things get
17 suppressed if they are wrong and have an unreasonable
18 suspicion.

19 The officer articulated what he thought. And not
20 only did he articulate to the Court in a preliminary hearing
21 but he articulated it to the defendant. He articulated it to
22 the other officer that was there, and he articulated it to
23 the other individual in the tennis suit, as far as what he
24 thought was going on and what he was going to do about it and
25 what they were going to do about it. And their comment was,

1 I consent, go ahead and search us.

2 THE COURT: All right. Anything else, Mr. Moffat?

3 You get the last word.

4 MR. MOFFAT: Simply this: There is nothing about

5 the behavior that these individuals were engaged in that

6 factored into any of the officer's training. Again, it's not

7 articulated on the record. He doesn't say anything on the

8 record at the hearing that says, Look, I was trained in this

9 and this and this. And we were trained to look at what drug

10 transactions were, and when a drug transaction takes place, X

11 Y and Z goes down, and you look for people out of character

12 in the area, or you look for Mexicans or something like that.

13 There is nothing like that articulated on the

14 record, your Honor. All we have in this case, your Honor, is

15 the officer saying he had a hunch. It isn't articulated

16 beyond a hunch.

17 MR. MEISTER: I don't see the hunch.

18 MR. MOFFAT: It's page 17. I believe it's your

19 last question on recross, isn't it?

20 Let me find it.

21 THE COURT: Or your last question on cross, I

22 believe. I remember seeing it.

23 MR. MOFFAT: Yes. There were two areas where I

24 spoke to him about what he was -- page 17 is one.

25 MR. MEISTER: Well then, your Honor, in all

1 fairness as far as that type of question, I can say, Did you
2 have a reasonable suspicion of something going on, and
3 defense counsel using that language that comes out in certain
4 cases, his answer would have probably been yes, too.

5 MR. MOFFAT: And you may have the second page, your
6 Honor.

7 MR. MEISTER: I think if we are going to get
8 technical, your Honor, on the transcript itself from the
9 hearing, maybe we do need a rehearing as far as an
10 evidentiary hearing, or are we going to take this in the
11 spirit of the preliminary hearing?

12 MR. MOFFAT: I think you have pages 19 and 20. I
13 believe there is a second reference to a hunch.

14 Aside from that, your Honor -- I think I made my
15 point fairly clear on that.

16 THE COURT: Yes. Page 17, that's the only place I
17 recall seeing it. That was a question in cross examination.

18 Well, again, what the officer had was a high drug
19 traffic area, an individual on a bicycle moving along, not
20 peddling but by his feet, approach -- two individuals
21 approaching one another, speaking briefly. The individual
22 not on the bicycle has a wad of money in his pocket, takes it
23 out. The officer approaches. The money goes back into the
24 pocket at some point in this sequence and the individuals
25 separate. The officer approaches and asks them to stop. And

1 that is what the officer had.

2 It seems to me that under the circumstances, that
3 the officer had a reasonable articulable suspicion to
4 approach those individuals and make that stop and detain
5 those individuals based on what the officer had observed.
6 The only thing that the officer really -- that's not too many
7 steps from a completed transaction, if you will. Some of
8 that conduct -- obviously that conduct could also be
9 interpreted as innocent conduct because there was not a
10 completed drug transaction observed. But by the same token,
11 it would give rise to a reasonable articulable suspicion that
12 a crime was about to occur, justifying a Level II stop.

13 Based on the testimony, the Court finds that the
14 stop therefore was not illegal.

15 With regard to the search then, the testimony
16 before the Court is that the individuals weren't even asked
17 if they could be searched but rather they said, Go ahead and
18 search us. Then the officer waited for backup to come and
19 backup came very shortly. The officer emphasized that
20 several times during his testimony, and there didn't seem to
21 be any evidence before the Court that the detention was a
22 lengthy detention.

23 Frankly, the tougher question in this particular
24 matter was the stop, not the search. The Court doesn't find
25 anything illegal about the search that was conducted.

1 Accordingly, the Motion to Suppress is respectfully denied
2 for those reasons.

3 And Mr. Meister, I want to you prepare Findings of
4 Fact and Conclusions of Law consistent with the Court's
5 ruling here today.

6 Is there anything else, counsel?

7 MR. MOFFAT: There is one issue I suppose we should
8 talk about now, your Honor. We have a trial date set in this
9 case for October the 18th. And in speaking with Mr. Meister,
10 it does not appear that we'll be able to proceed with trial
11 on that date. One of the officers who is a chain officer in
12 this case and who turned the bicycle Mr. Rodriguez was riding
13 upside down is in Haiti and will be unavailable for quite a
14 few months.

15 MR. MEISTER: Until April of '95, without any
16 indication of how long "we" are in Haiti. I got a message
17 from him and it said that, On mandatory, mandatory military
18 leave of absence until April of '95.

19 MR. MOFFAT: And I suppose, your Honor, given that
20 I would ask for this Court to release Mr. Rodriguez. He
21 certainly can't be incarcerated for that length of time
22 awaiting trial on a case for a delay that is not attributable
23 to him.

24 If the Court would allow him to be released, your
25 Honor, I'm sure that there could be appropriate terms and