2006

# State of Utah v. Michael W. Dennis : Reply Brief

Utah Court of Appeals


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Jeffrey S. Gray; Assistant Attorney General; Mark L. Shurtleff; Utah Attorney General; Gene E. Strate; Carbon County Attorney; Counsel for Appellee.

IN THE UTAH COURT OF APPEALS

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| **STATE OF UTAH,** | : | |
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| Plaintiff Appellant, | : | Appellate No. 20060416 |
| | : | |
| vs. | : | |
| | : | Criminal No. 051700285 |
| **Michael W. Dennis,** | : | |
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| Defendant Appellee, | : | |
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# REPLY BRIEF OF APPELLANT

**INTERLOCUTORY APPEAL FROM SUPPRESSION RULING**
**IN THE SEVENTH JUDICIAL DISTRICT COURT**
**THE HONORABLE SCOTT N JOHANSEN PRESIDING.**


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Defendant Appellant is presently incarcerated in the Utah State Prison.

**A PUBLISHED DECISION IS REQUESTED BY APPELLANT**

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## ARGUMENT

### I. Absent a showing of reasonable suspicion, Law Enforcement exceeded the permissible scope of detention for a traffic stop when they continued to detain and question Defendant about matters which where unrelated to the initial stop.

The State, does not challenge Defendant's first argument that, absent reasonable suspicion, the second time officers approached the vehicle they exceeded the scope of a traffic stop detention. *Brief of Appellee* at 11, 17. The Trial Court found that Officer Anderson's first question to the other occupant of the vehicle was outside of the scope of the traffic detention. R.37:56.

Defendant does not dispute that Officer Anderson had a justifiable reason to stop and detain the vehicle and its driver for purposes of a traffic stop. However, the scope of that detention was exceeded when both Officers' decided to approach the vehicle and interrogate the Defendant about unrelated matters; "the length and scope of the detention must be strictly tied to and justified by the circumstances which rendered its initiation permissible." R.37:16; R.42:19; *State v. Johnson*, 805 P.2d 761, 763. (Utah 1991). Absent reasonable suspicion of further criminal activity, the second approach interrogation, exceeded the scope of a permissible traffic stop. *State v. Cotero*, 873 P.2d 1127, 1132 (Utah 1994).

**II. Upon approaching the vehicle the second time, Officers Anderson and Archuletta did not have a reasonable suspicion that the Defendant had been, was, or was about to engage in criminal activity.**

Prior to a court finding that officers have reasonable suspicion to detain a defendant, a court must first examine the facts available to the officers before that detention began. *State v. Alvarez*, 2006 UT P15, P16 (Utah 2006). In *Alvarez*, the police officers detained a man who they suspected was involved with the possession and distribution of narcotics. *Id.* The Officers were aware of the following information:

1) information from an unidentified source that drug transactions were occurring in the area that the defendant Alvarez was frequenting;
2) information reported to one officer by the Salt Lake City Narcotics Unit, that the vehicle the defendant was driving had been used in a recent drug transaction, 20 blocks from the defendant's current location;
3) the vehicle the defendant was driving had within it an image of Jesus Malverde;
4) the vehicle the defendant was driving had in its interior a small water bottle;
5) the vehicle the defendant was driving was uninsured;
6) one officer had observed the defendant enter the same condominium, which both officers had just observed him enter, at approximately the same time of the day and

remain inside for approximately the same amount of time;

7) and both officers observed the defendant enter the same condominium which he had entered the previous day at approximately the same time of day and remain inside the condominium for approximately the same amount of time.

The Court held that these facts allowed the officers to temporarily detain the defendant for reasonable suspicion of possible criminal activity. *Id.*

In this case, as Officer Anderson approached the vehicle for the Second time with Officer Achuletta, he was aware of the following facts:

1) that the vehicle, not the Defendant, had been seen earlier at the Riverside Motel[1], R. 37:16, 42:20-21;

2) that the occupants of the vehicle were acting nervous,[2] R. 37:16, R. 42:10;

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[1] The Riverside Motel is a multiple residence unit in Helper, Utah, where people live and it is legal to visit. R. 37:38. The officers in this case testified that they were aware of some recent illegal drug activity that had occurred at the Riverside Motel. R. 37:6.

[2] Contrary to the State's assertion Officer Anderson only described the Defendant's conduct as that of extreme nervousness. R.37:16, R42:10. Officer Anderson did not testify that the Defendant behaved in any evasive manner. *Id.* Officer Archuletta contrary to his sworn testimony at the Preliminary Hearing and the Suppression Hearing did not have any contact with the Defendant prior to the initiation of the extended detention. R.37:34.

Defendant objects to the State's characterization that his conduct or behavior was evasive at anytime prior to the extended detention.

3)that it was approximately 3:00 a.m. in the morning, R.37:5;

4)that there was an unconnected amplifier on the floor of the vehicle, R.42:7.

Officer Archuletta as he approached the vehicle for the first time was aware of the following:

1) he had seen two unidentified people working on the vehicle's driver's side door approximately two hours before, from a distance of approximately 20 feet, while he was driving the past the Riverside Motel. R.37:32,38.[3] [4]

In *Alverez*, the Utah Supreme Court was careful to emphasize that the facts in that case supported a finding of reasonable suspicion at its bare minimums; "[T]he totality of the facts barely meets the threshold of reasonable and articulable suspicion" . . . and that "the absence of any one of the facts [would] have dictated a different decision." *Alverez* at P19.. The facts of this case are significantly less than those in

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[3] Contrary to the State's assertion there is nothing in the record to indicate that Officer Archuletta recognized the men he observed were working on the door that night. State's Brief at 12. The State's use of the Officers' statements to the Defendant and the driver in the videotape are not indicative of what the officer knew or who he recognized. They are not sworn statements and could have easily been an interrogation tactic to attempt to get the Defendant to admit something by feigning knowledge of the event.

[4] Neither Officer Anderson or Officer Archuletta testified that in their experience and training it was common for people to hide drugs in a vehicle's doors. Officer Archuletta did not identify this as a concern nor did he indicate, in his testimony at either hearing, that he told Officer Anderson this information.

*Alvarez*.

The Court held in *Alvarez*, that it was very significant that there had been direct testimony from the arresting officer indicating that consistent with his training and experience, the repetitive and observed behavior of the defendant, returning to the same location, at the same time of day, for a short period of time, was indicative of the behavior of a drug dealer. *Id.* at P3-4. In this case there was no such testimony or evidence.

Officer Anderson observed, the early morning hour, the Defendant's nervousness, and an unhooked amplifier. R.37:5,16; R.42:7,20-21. Officer Archuletta told Officer Anderson that the vehicle had been at the Riverside Motel two hours earlier. R.37:6; R.42:6. In *Alvarez*, the vehicle that the defendant was driving had been seen a least three times at two different drug locations. *Alvarez*, at P3-4. Two of those three times the defendant was driving the suspected vehicle. *Id.* The officers did not know whether the Defendant was at Riverside Motel. That the Defendant was a passenger in a car that had been seen at a Riverside Motel is not indicative of criminal activity. *Yabarra v. Illinois*, 444 U.S. 85, 91 (1979).

In both *Alvarez*, and *Terry v. Ohio*, innocuous behavior became reasonably suspicious when that behavior was repeatedly observed or corroborated. *Alvarez*, at P18; *Terry v. Ohio*, 392 U.S. 1, 6-7 (1968). In this case, prior to officer's approaching

the vehicle the second time and commencing their prolonged detention of the Defendant, there was no such repeated behavior nor was there any distinct behavior that officers' testified was in their experience indicative of criminal activity.

It is not the Defendant's intention to use a "divide and conquer analysis," in his appeal of the Trial Court's incorrect suppression ruling. *Alvarez*, at P18; *Terry v. Ohio*, 392 U.S. 1, 6-7 (1968). Objectively the continued detention of the defendant was not justifiable.

The early hour, Defendant's nervous behavior, and the unhooked amplifier, although innocent enough, might be considered as part of a reasonable suspicion analysis. However, they should not be given more weight than the image of Jesus Malvida and the small water bottle in *Alverez*. *Alverez* at P16.

Admittedly, the most suspicious fact of which they were aware was the previous location of the vehicle. R.37:32,38. However, this single sighting had occurred at least two hours earlier. R.37:31. Furthermore, there is no evidence that the Defendant was ever at the Riverside Motel.

It was only from the double interrogation of the Defendant and the other occupant that the zig-zag papers, the speaker bags, the tobacco pipe, and the coin were observed. The only reason the officers engaged in this interrogation technique was to find out more about why the vehicle and the driver had been at the Riverside Motel. R.37:24, 42:21. Prior to approaching the

vehicle the second time, the officers had nothing more than an hunch that the Defendant may have been involved in criminal activity. *Id.*

It is at this moment that the unauthorized detention of the Defendant began. The questions posed to him were accusatory and outside the scope of a routine traffic stop. The evidence in this case should be suppressed.

## III. Defendant's criminal history is not a factor which is to be considered in an analysis of whether it is reasonable to suspect him of current criminal activity.

In April of 2003 the Utah Supreme Court held,

> Those asking us to overturn prior precedent have a substantial burden of persuasion due to the doctrine of stare decisis. ... When we are clearly convinced that a rule was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing form precedent we are not inexorably bound by our own precedents.

*State v. Machley*, 67 P.3d 477, 480 (Utah 2003).

The State, has not met the *Mauchley* standard. *Id.* Its request that *State v. Brooks* and *State v. Ranquist* be overruled is improper. *see* Brief and Appellee at 15; State v. Brooks, 849 P.2d 640 (Utah Ct. App. 1993); *State v. Ranquist*, 128 P.3d 1201 (Utah Ct. App. 2005).

For this court to hold that a person's past recorded criminal conduct allows an officer to suspect that person of recent criminal activity, diminishes the protections afforded all

citizens under the 4th Amendment and Article I, Section 14 of the U.S. and Utah Constitutions. U.S. Constitution. Amend. IV; UT. Const. art. I § 14 (West 2006). It discourages change among those who commit crimes, by never allowing a restoration of their right to privacy.

**CONCLUSION**

The evidence presented to the Trial Court at either hearing viewed subjectively or objectively was not sufficient to support a finding of reasonable suspicion to justify a prolonged detention. Defendant respectfully requests that the Trial Court's ruling on the suppression of evidence be reversed.

DATED this 19 day of January, 2007.

Samuel S. Bailey
Attorney for the Defendant

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**CERTIFICATE OF SERVICE**

I hereby certify that eight (8) copies and one original of the foregoing were Mailed by U.S. First Class Mail, postage prepaid, to the Court of Appeals and that two (2) copies of the forgoing were Mailed by U.S. First Class Mail, postage prepaid, to Office of the Utah Attorney General, Appellate Division at the addresses listed below on this 19th day of January, 2007.

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