1995

State of Utah v. Rolando Caleb Becker : Brief of Appellee

Utah Court of Appeals

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Kenneth A. Bronston; Assistant Attorney General; Jan Graham; Utah Attorney General; David Leavitt; Juab County Attorney; Attorneys for Appellee.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH	:	
Plaintiff/Appellee,	:	Case No. 950408-CA
v.	:	
ROLANDO CALEB BECKER,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

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APPEAL FROM CONVICTIONS FOR AUTO THEFT, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-4-404 (1995), TAMPERING WITH EVIDENCE, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-8-510 (1995), ESCAPE FROM CUSTODY, A CLASS B MISDEMEANOR, IN VIOLATION OF UTAH CODE ANN. § 76-8-309 (1995), AND UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE, A CLASS B MISDEMEANOR, IN VIOLATION OF UTAH CODE ANN. § 58-37-8(2)(A)(I) (SUPP. 1995), IN THE FOURTH JUDICIAL DISTRICT COURT, IN AND FOR JUAB COUNTY, STATE OF UTAH, THE HONORABLE BOYD C. PARK, PRESIDING.

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May 16, 1996

Marilyn Branch
Clerk of the Court
Utah Court of Appeals
230 South 500 East
Salt Lake City, Utah 84102

Re: State v. Becker, Case No. 950408-CA

Dear Ms. Branch:

I wish to cite to the Court Berkemer v. McCarty, 468 U.S. 420, 104 S. Ct. 3138, 82 LED.2d 317 (1984), in connection with the State's responsive argument that Miranda warnings were not required in this case. Also relevant to that discussion is the Utah Supreme Court's amended opinion in State v. Mirquet, 287 Utah Adv. Rep. 10 (Utah March 27, 1996). Lastly, relevant to the State's discussion of the admissibility of derivative evidence, at pages 31 to 34 of the State's responsive brief, is this Court's opinion in State v. Sampson, 808 P.2d 1100, 1103 (Utah App. 1990), cert. denied, 817 P.2d 327 (Utah 1991), cert. denied, 503 U.S. 914, 112 S. Ct. 1282-83, 117 L. Ed. 2d 507 (1992).

This supplemental authority is submitted pursuant to rule 24(i), Utah Rules of Appellate Procedure. Please note that this case is set for oral argument tomorrow, Friday, May 17, 1996.

Respectfully,

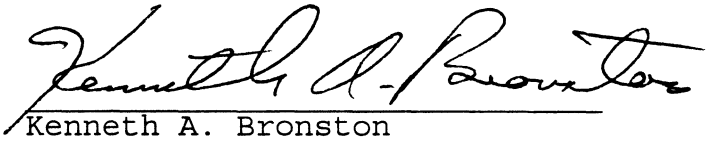
Kenneth A. Bronston
Assistant Attorney General

cc: Douglas L. Neeley

160 EAST 300 SOUTH • P.O. BOX 140811 • SALT LAKE CITY, UTAH 84114-0811 • TEL: 801-366-0300

Certificate of Delivery

I, Kenneth A. Bronston, hereby certify that I have caused to be delivered an original and seven copies of the foregoing letter, provided for by rule 24(1), Utah Rules of Appellate Procedure, to the Utah Court of Appeals, 230 South 500 East, Suite 400, Salt Lake City, Utah 84102, and two copies to Douglas Neeley, attorney for defendant, 96 South Main 5-15, Ephraim, Utah 84267, this 16th day of May, 1996.



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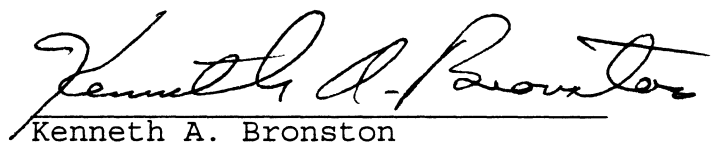

Kenneth A. Bronston

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BRIEF OF APPELLEE

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JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from convictions for auto theft, a second degree felony, in violation of Utah Code Ann. § 76-4-404 (1995), tampering with evidence, a second degree felony, in violation of Utah Code Ann. § 76-8-510 (1995), escape from custody, a class B misdemeanor, in violation of Utah Code Ann. § 76-8-309 (1995), and unlawful possession of a controlled substance, a class B misdemeanor, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (Supp. 1995), in the Fourth Judicial District Court. 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. Should this court consider a challenge concerning the seating of jurors who are no alleged to have been actually biased? An appellate court may decline to review issues held to be without merit. State v. Allen, 839 P.2d 291, 303 (Utah 1992) ("In accord with the established principles of review applicable

to all cases, civil and criminal, we decline to analyze and address in writing every issue or claim raised.") (footnote omitted); State v. Carter, 776 P.2d 886, 888-89 (Utah 1989) (same). Alternatively, did the trial court properly seat one juror challenged for cause and other unchallenged jurors? A trial court's decision not to dismiss a juror challenged for cause is reviewed under an abuse of discretion standard. State v. Saunders, 893 P.2d 584, 587 (Utah App. 1995), cert. granted, __ P.2d__ (Utah October 31, 1995). Where defendant on appeal claims error in seating jurors who should have been removed for cause, but were not challenged below, the appellate court uses a plain error standard of review. State v. Brooks, 868 P.2d 818, 821 (Utah App. 1994), aff'd, 908 P.2d 856 (Utah 1995).

2. Did the trial court properly find that probable cause and defendant's consent justified a search of the car? The appellate court reviews underlying factual findings for clear error. State v. Poole, 871 P.2d 531, 533 (Utah 1994). The trial court's legal conclusion of probable cause is reviewed for correctness, affording some measure of discretion to the trial court. Id.

3. Did the trial court properly refuse defendant's request for a lesser included offense instruction? An appeal of the trial court's refusal to give a lesser included offense instruction presents a question of law reviewed for correctness. State v. Mincy, 838 P.2d 648, 658 (Utah App.), cert. denied, 843

P.2d 1042 (Utah 1992).

4. Did the trial court properly admit testimony concerning the contents of the sack defendant fled with? Admissibility of evidence is reviewed for correctness, incorporating a "clearly erroneous" standard for the review of the underlying factual findings. State v. Reed, 820 P.2d 479, 481 (Utah App. 1991) (citing State v. Ramirez, 817 P.2d 774, 781 n.3 (Utah 1991)).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The following constitutional provisions, statutes and rules pertinent to this issues on appeal are fully set out Addendum A:

Amendments 4 and 5, United States Constitution;
Utah Code Ann. § 76-6-404 (1995);
Utah Code Ann. § 76-8-510 (1995);
Utah Code Ann. § 76-6-401 (1995);
Utah Code Ann. §§ 41-1a-1311, -1314 (1993);
Rule 18, Utah Rules of Criminal Procedure;
Rules 401 - 404, Utah Rules of Evidence

STATEMENT OF THE CASE

Defendant, Rolando Caleb Becker, was charged with auto theft, a second degree felony (Count I), tampering with evidence, a second degree felony (Count II), escape from custody, a class B misdemeanor) (Count III), and unlawful possession of a controlled substance, a class B misdemeanor (Count IV) (R. 1). Defendant made a motion in limine to exclude the investigating officer's opinion that a substance found in a sack was either methamphetamine or crack cocaine (R. 127). Defendant also moved to suppress evidence following the officer's search of the car defendant was riding in (R. 171). Both motions were denied (R.

162; T. 24-27, 54-55, 59-60).

Following a jury trial, defendant was convicted of all counts (R. 374-78). The trial court sentenced defendant to the statutory terms of one-to-fifteen years inprisonment on Counts I and II, and terms of six months in the Juab County Jail on Counts III and IV, all terms to be served concurrently (R. 302). The court stayed execution of the sentences and placed defendant on probation for a period of thirty-six months (R. 302). The trial court denied defendant's petition for a certificate of probable cause (R. 325).

STATEMENT OF THE FACTS

The facts recited below were taken from the transcript of the hearing on the motion to suppress and the trial. On appeal, those facts are recited in a light most favorable to the trial court's findings and the jury's verdict. State v. Delaney, 869 P.2d 4, 5 (Utah App. 1994) (trial court's findings); State v. Strausberg, 895 P.2d 831, 832 (Utah App. 1995) (jury's verdict).

At about 11:45 on the morning of October 7, 1993, Sargeant Paul Mangelson, a 27-year veteran of the Utah Highway Patrol, observed a blue 1993 Mercury Sable on I-15 traveling at 76 miles per hour in a 65 mile per hour zone (T. 16-18, 37). The officer stopped, which had two people in it besides the driver, and asked the driver, Lisa LaBarrie, for her driver's license and registration (T. 18-19). Sargeant Mangelson, who has arrested hundreds of people for marijuana and cocaine related offenses,

smelled the odor of burnt marijuana "almost immediately" upon approaching the open driver's window (T. 17, 20, 43).

LaBarrie said the car was a rental and that her driver's license was in her purse, which was in the trunk (T. 19). She retrieved her license from the trunk, and the officer determined that LaBarrie was properly licensed and the car properly registered; however, none of the persons in the car was the lessee (T. 19, 43). LaBarrie explained that another person had rented the car, but that defendant, who sat beside her in the passenger seat, was listed as an additional driver in the rental agreement (T. 20, 45). Sargeant Mangelson also examined defendant's license, which he retained (T. 48).

Upon concluding that the group appeared to be properly in possession of the car, Sargeant Mangelson asked the group if they were using marijuana (T. 20, 46). Upon their denial, the officer said: "I can smell it plain as day. I know you are using it" (T. 46), whereupon defendant admitted that they smoked a "joint," gesturing towards the ashtray (T. 20, 46). Sargeant Mangelson then retrieved a "roach" from the ashtray (T. 21).[1]

Sargeant Mangelson then asked if there was more marijuana in the car, and the group denied it (T. 21). The officer asked if he could look through the car, and defendant answered, "Go ahead" (T. 22), whereupon Sargeant Mangelson patted down each person for

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[1] A "roach" is the butt of a "joint," a marijuana cigarette (T. 21). The roach was admitted into evidence as Exhibit 1 at both the suppression hearing and at trial (T. 21, 159).

weapons and had them stand off to the side where he could watch them and they would be out of traffic (T. 22). In the interior of the car, he found a baggie of marijuana stuffed under the back seat (T. 22).

Sargeant Mangelson then asked the driver to open the trunk (T. 23). LaBarrie retrieved the keys from the ignition and opened the trunk (T. 23). After searching the driver's purse and other bags, the officer pulled back some carpeting at the rear of the compartment and found a paper sack weighing between a half to a full pound (T. 23-24). Inside the sack there was a plastic bag containing an off-white, rocky substance, which in the officer's experience appeared to be either crack cocaine or methamphetamine (T. 24-27).

At trial, Sargeant Mangelson further testified that he asked driver who owned the sack, but she denied any knowledge of it (T. 163-64). At this point defendant started towards the driver's side of the car, got behind the wheel and reached for the keys to start the car, but they were still in the trunk (T. 164). The officer moved to the front of the car, placing the sack on top of the car (T. 164). As defendant exited the car, Sargeant Mangelson grabbed him by the arms and told defendant he was under arrest (T. 164). While the officer was reaching for his handcuffs, defendant broke free, grabbed the sack, moved to the back of the car and then to the edge of the freeway (T. 165). Sargeant Mangelson drew his gun and ordered defendant to stop,

but defendant turned, looked at the officer, announced that the officer could not shoot him because he was unarmed and continued to run, crossing the freeway fence (T. 165).

From his elevated vantage point on the freeway, Sargeant Mangelson watched defendant run across the freeway fence, over the railroad tracks towards a Tri-Mart Texaco about 600 feet away where a mustard colored car was parked, the paper sack still in his hands (T. 165-66, 193). Defendant got into the car. Just then a woman screamed, "My car, my car." She jumped on the hood and pounded on the windshield for defendant to stop, but defendant put the car in reverse, throwing the woman off, and drove onto Highway 28 (T. 165-66).

At this point Trooper Jim Hillan happened to drive up, and Mangelson, preoccupied with LaBarrie and the other passenger, told Trooper Hillan that defendant had just escaped and was driving away in the mustard colored stationwagon, still in their view (T. 161, 166-67, 189). Trooper Hillan pursued defendant. Within a couple of minutes Trooper Charlie Wilson, responding to Sargeant Mangelson's radio call, arrived and took custody of LaBarrie and the other passenger, allowing Sargeant Mangelson to give chase (T. 167, 328-29).

Hearing that Trooper Hillan failed to overtake defendant, Sargeant Mangelson turned off the highway onto another road and found the car abandoned about one and a half miles further. It had been driven through a barbed-wire fence and over rocks, the

muffler had been ripped off and it would not start (T. 167-68, 174, 195-196). Neither defendant nor the sack could be found (T. 168).

Further search, utilizing a helicopter and dogs, failed to locate defendant (T. 169). The following morning defendant, having spent the night in a haystack, came into a Circle C Truck Stop outside of Levan and was apprehended without incident (T. 170, 196-97, 226). When Sargeant Mangelson asked him about the sack, defendant denied it existed (T. 171).

A search of the farm where defendant was thought to have spent the night failed to uncover the sack (T. 172). During an inventory search of the car driven by LaBarrie, rolling papers and marijuana were found (T. 172-73).

Only Lisa LaBarrie testified for the defense. In substance, she claimed responsibility for having smoked the marijuana prior to being stopped and for the marijuana found in the car (T. 279, 296). She denied that a "roach" was found in the ashtray (T. 281-82), denied there was a paper sack (T. 285, 305) or and denied seeing defendant abscond with the mustard colored car (T. 311).

SUMMARY OF ARGUMENT

POINT I

Defendant's claims, i.e., trial court error and ineffective assistance of counsel regarding the seating of jurors who allegedly should have been removed for cause, fails because there

is no claim, nor does the record show, that any of the jurors were actually biased. Moreover, the trial court did not abuse its discretion in refusing defendant's challenge for cause to a juror who had a neglible connection with the prosecutor. As to two jurors challenged on appeal but who were not challenged in the trial court, defendant has failed to show that their retention was either plain error or ineffective assistance of counsel. Voir dire did not raise and inference of bias concerning one juror who had only pleasant memories of the prosecutor and the investigating officer when he was their high school principal many years earlier, or about another juror whose step-daughter had been convicted of a drug offense. Furthermore, considering the presumption favoring attorney competence, and given counsel was fully engaged in jury selection, his allowing the questioned jurors to remain cannot be considered ineffective assistance of counsel.

POINT II

Defendant's motion to suppress was properly denied for several reasons. First, the trial court properly found that the smell of marijauna gave the investigating officer probable cause to search the entire car, under the Fourth Amendment. Further, while a showing of exigent circumstances is required under both the federal and state constitutions, defendant failed to preserve his claim as to the applicability of the state constitution or the existence of exigent circumstances. In any case, those

circumstances existed given the moveability of the car, the isolated location of the stop and the number of suspects.

Second, defendant gave his voluntary consent to search the car. Further, there is no need to consider whether the consent was attenuated from a prior illegality because there was none under the Fourth Amendment. Further, there was no Miranda violation because defendant was not subjected to the type of interrogation as was the defendant in State v. Mirquet 268 Utah Adv. Rep. 3 (1995), upon which defendant exclusively relies. Even if there was a Mirquet-Miranda violation, that violation does not consitute a violation of constitutional dimension which would trigger an exploitation/attenuation analysis. Also, since there was no evidence of coercion, the marijuana discovered in the car was admissible as derivative physical evidence.

POINT III

Defendant was not entitled to a lesser included offense instruction on class A misdemeanor joyriding because there was no rational basis in the evidence that he intended only to temporarily deprive the owner of possession of the car he stole. The defense was that he had not stolen the car at all, thus precluding a conviction on the requested lesser offense. Even if there was an error in withholding the requested instruction, it was harmless because the jury refused to convict defendant of the given lesser included offense of third-degree felony joyriding. Therefore, it is logically impossible that the jury would have

found defendant guilty of class A misdemeanor joyriding, even if that option had been given.

Point IV

Because defendant has failed to include in the record the transcript of the hearing in which the trial court denied his motion seeking to exclude the investigating officer's opinion of the contents of the sack defendant fled with, the Court should refuse to consider the matter. In any case, defendant's contention that it is inadmissible to identify the nature of the investigation in which evidence is tampered with is without merit. Even if it was improper to admit testimony of the contents of the sack, the error was harmless because the evidence is compelling that defendant fled with the sack, thus proving the offense.

ARGUMENT

POINT I

DEFENDANT FAILS TO SHOW EITHER TRIAL COURT ERROR OR INEFFECTIVE ASSISTANCE OF COUNSEL WHERE THE RECORD SHOWS THAT ANY INFERENCE OF BIAS CONCERNING THE THREE JURORS CHALLENGED ON APPEAL WAS SUCCESSFULLY REBUTTED AT TRIAL

Defendant argues that the trial court erred in seating Wayne Conner, Clark Newell and Clyde Elmer on the jury because they should have been removed for cause. Appellant's Br. at 21. Recognizing that trial counsel did not challenge Newell and Elmer, defendant argues in the alternative that the seating of these jurors was plain error or the result of ineffective

assistance of counsel. Appellant's Br. at 28. However, because defendant only alleges that voir dire raised an inference of bias with respect to these jurors, as opposed to its revealing actual bias, defendant's claim fails at the outset. Further, because voir dire of all of these jurors failed to uncover even an inference of bias and was adequate to rebut any inference of bias that might have existed, the trial court did not err in seating these jurors. Additionally, because counsel was fully engaged in the jury selection process and because the jurors could not reasonably be challenged for cause, trial counsel was not ineffective in choosing neither to challenge the jurors for cause or remove them with peremptory challenges.

A. Defendant's Claim Fails Because It Does Not Allege Actual Bias

In State v. Menzies, the court overruled the automatic reversal rule announced in Crawford v. Manning, 542 P.2d 1091 (Utah 1975), where reversal was mandated whenever a party was compelled "'to exercise a peremptory challenge to remove a panel member who should have been stricken for cause.'" State v. Menzies, 889 P.2d 393, 398 (Utah 1994) (quoting State v. Bishop, 753 P.2d 439, 451 (Utah 1988), cert. denied, 115 S. Ct. 910 (1995). The court held: "To prevail on a claim of error based on the failure to remove a juror for cause, a defendant must demonstrate prejudice, *viz.*, show that a member of the jury was partial or incompetent." Id.

Defendant only alleges that voir dire raised an inference of

bias as to all jurors now challenged on appeal, as opposed to its revealing actual bias. Appellant's Br. at 21. Therefore, defendant's claim is fatally flawed at the outset.[2] However, even under a pre-Menzies analysis, defendant's claim fails.

B. The Trial Court Properly Denied A Challenge For Cause to Juror Conner

"In order to succeed on appeal, a defendant must show that a juror's responses to voir dire questions or other facts in the record raised an inference that the juror harbored some bias, and then demonstrate that the trial court failed to adequately probe and then rebut that inference." Saunders, 893 P.2d at 587 (citations omitted). "The scope of the voir dire is left to the sound discretion of the trial court because only the trial court knows when it is satisfied that a prospective juror is impartial." Brooks, 868 P.2d at 822 (citations omitted).

During voir dire the trial court asked the panel if any of them was acquainted with Mr. Eyre, the prosecutor, Mr. Mangelson or other witnesses in the case (T. 69). Mr. Conner said, "Mr.

---

[2] Defendant's claim would appear even further compromised because he did not even exercise a peremptory challenge against juror Conner, the only panelist he challenged for cause. This Court recently rejected the State's argument that a defendant waives his challenge to the seating of a juror who should have been removed for cause by failing to use a peremptory challenge against that juror. State v. Baker, 884 P.2d 1280 (Utah App. 1995). However, the State's petition for writ of certiorari was granted in that case, 892 P.2d 13 (Utah 1995), and argument has been heard. To the extent that Baker presently governs, it is not applicable because it concerned a juror who was admittedly biased, whereas in this case neither defendant's allegations on appeal nor the record show that Conner was actually biased.

Eyre did write a letter for my grandmother's estate for me (T. 72), moving the court to conduct make further inquiries:

> THE COURT: How long ago was it?
>
> MR. WAYNE CONNER: Approximately three months ago.
>
> THE COURT: Does that complete your transactions with Mr. Eyre?
>
> MR. WAYNE CONNER: Yes sir.
>
> THE COURT: He is not doing anything further on this estate?
>
> MR. WAYNE CONNER: No sir.
>
> THE COURT: Has he represented you in other matters?
>
> MR. WAYNE CONNER: No sir.
>
> THE COURT: Have you paid your bill?
>
> MR. WAYNE CONNER: Yes sir.
>
> THE COURT: He doesn't owe you any further favors?
>
> MR. WAYNE CONNER: No sir?
>
> THE COURT: As a result of that acquaintance, would you be prejudicial for or against either party in this case?
>
> MR. WAYNE CONNER: No sir.
>
> THE COURT: Can you set that acquaintance aside and fairly and impartially decide this case solely on the evidence presented in this courtroom?
>
> MR. WAYNE CONNER: Yes sir.

(T. 72-73).

Defendant challenged Conner for cause, recognizing, however,

that the prosecutor had represented Conner's grandmother's estate, not Conner himself (T. 116). Thereafter, Mr. Eyre explained, "All I did was write a letter for he and his brother. His grandmother's estate was being probated back on the East Coast. I just wrote a letter to an attorney back there" (R. 116). Later, the trial court denied defendant's motion (R. 128). Neither defendant nor the prosecutor exercised a peremptory challenge against Conner, and he sat on the jury (T. 131).

Rule 18(e)(4), Utah Rules of Criminal Procedure, provides that a challenge for cause may be taken against a juror who has a legal or other relationship with a party which "when viewed objectively, would suggest to reasonable minds that the prospective juror would be unable or unwilling to return a verdict which would be free of favoritism." Utah R. Crim. P. 18(e)(4). Relying on this provision and State v. Cox, 826 P.2d 656 (Utah App. 1992), defendant claims the trial court erred in not striking Conner. Neither rule 18(e)(4) nor Cox support defendant's argument.

In Cox, the challenged juror and the prosecutor had a "long term [attorney-client] relationship, renewed periodically when legal services were sought." Cox, 826 P.2d at 660. On the basis of "that relationship of respect and trust," this Court held that the juror could not act with impartiality. Id.

Plainly, Conner's connection with Mr. Eyre is of an entirely different order. The trial court's voir dire and colloquy with

counsel elicited that (1) no attorney-client relationship existed between the juror and the prosecutor, (2) the connection consisted of a single event, i.e., the writing of a letter in connection with the probate of the juror's grandmother's estate, and (3) apart from writing the letter, there was no relationship between the juror and the prosecutor. Moreover, to the extent that any inference of bias may have attached to this one-time event, the trial court rebutted the inference through two questions to which the juror unequivocally answered that he could act without prejudice to either party and weigh the evidence impartially (T. 72-73). Cf. State v. Lacey, 665 P.2d 1311, 1312 (Utah 1983) (per curiam) (upholding denial of challenge for cause to juror who had recently been treated by a physician testifying as a prosecution witness). On these facts the trial court properly concluded that Conner would be able to render a verdict free of favoritism.

C. The Trial Court did not Commit Plain Error, Nor was Trial Counsel Ineffective in Seating Jurors Newell and Elmer

Defendant claims that the seating of jurors Newell and Elmer resulted from both plain error and ineffective assistance of counsel. Appellant's Br. at 28. Even under the less stringent abuse of discretion standard, defendant's claim fails.

"Where, on appeal, defendant challenges the trial court's failure to remove prospective jurors and, at trial defense counsel did not move to strike the prospective jurors for cause,

[the appellate court] utilize[s] a 'plain error' standard of review." Brooks, 868 P.2d at 821 (citations omitted). The requirements for determining whether plain error has occurred are threefold: (1) an error has occurred, which is (2) obvious and (3) affects the substantial rights of the accused, i.e., prejudicial. State v. Dunn, 850 P.2d 1201, 1208-09 (Utah 1993).

In order to establish a claim of ineffective assistance of counsel, defendant must show that counsel's performance was deficient by identifying specific acts or omissions which, under the circumstances of the particular case, demonstrate that "`counsel's representation fell below an objective standard of reasonableness.'" State v. Templin, 805 P.2d 182, 186 (Utah 1990) (quoting Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 2064 (1984)). Second, defendant must establish the prejudice prong by "affirmatively show[ing] that a reasonable probability exists that except for ineffective counsel, the result would have been different." State v. Lovell, 758 P.2d 909, 913 (Utah 1988). "Defendant has the burden of demonstrating that counsel's 'performance fell below an objective standard of reasonable professional judgment,' and that counsel's actions were not conscious trial strategy." State v. Ellifritz, 835 P.2d 170, 174 (Utah App. 1992). "[The reviewing court] 'indulges a strong prresumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . .'" Brooks, 868 P.2d at 822 (citations omitted). A common standard of

prejudice is applied when both plain error and ineffective assistance of counsel is asserted on appeal. Id.

Juror Wayne Newell

In answer to the court's question about being acquainted with the prosecutor and any of his witnesses, Newell answered that he had been the high school principal to Mr. Eyre, Mr. Mangelson and some other troopers, whose names he could not remember (T. 76). The following colloquy ensued:

> THE COURT: Well, being their High School Principal, did that prejudice you in any fashion against any of them?
>
> MR. CLARK NEWELL: Well, I had a pretty good regard for them, beyond that I don't think so.
>
> THE COURT: Didn't give you a lot of trouble?
>
> MR. CLARK NEWELL: Not especially no.
>
> THE COURT: As a result of your acquaintance with the police officers and Mr. Eyre, would you be prejudice [sic] for or against either party in this case?
>
> MR. CLARK NEWELL: I don't think so.
>
> THE COURT: And you could set aside that acquaintance and fairly and impartially try this case based on the evidence that has come forth in this courtroom?
>
> MR. CLARK NEWELL: Yes.

(T. 76).

The relationships between Newell on the one hand and Mr. Eyre and Sargeant Mangelson on the other are akin to that at issue in State v. Cobb, 774 P.2d 1123 (Utah 1989). In that case

the juror had known the prosecutor fifteen years before when he was a senior in high school for about a year, during which time the juror's daughter and the prosecutor were friends. Id. at 1126. Additionally, the juror's and the prosecutor's families belonged to the same church organization, and she remembered him as a "nice kid." Id. The court found that the juror's brief acquaintance with the prosecutor was "not the type of relationship that would warrant an inference of bias, especially in light of a later statement where she expressed no doubts about her ability to decide the case impartially . . . ." Id. See also State v. Hewitt, 689 P.2d 22, 25-26 (Utah 1984) (no abuse of discretion in denying challenge for cause to juror who had gone to high school twenty years previously with one of the detectives on the case); State v. Gray, 851 P.2d 1217, 1222-23 (Utah App.) (no abuse of discretion in denying challenge for cause against juror who had served on the highway patrol for three years in the same rural county fifteen years earlier and knew the sheriff), cert. denied, 860 P.2d 943 (Utah 1993). Compare State v. Brooks, 563 P.2d 799, 800-01 (Utah 1977) (error in seating one juror who was a neighbor and friend of the victim and attended the same LDS ward, and another juror who was good friends with a testifying police officer and had a business relationship with the police officer's wife).

Considering that the threshold requirements necessary to show that the trial court committed plain error are much higher

than those required to show that the trial court abused its discretion, Brooks, 868 P.2d at 824, it is apparent that the trial court's seating juror Newell is not reversible error. Sargeant Mangelson testified that he was a twenty-seven year veteran of the Utah Highway Patrol (T. 16). Discussions concerning another juror indicated that Mr. Eyre had been practicing law for at least eighteen years (T. 126). Juror Newell's statement clearly suggests that he was acquainted with Mr. Eyre and Sargeant Mangelson only when they were high school students, without any subsequent relationship. On these facts defendant could not been prejudiced by either the trial court's seating juror Newell or the conduct of his counsel. Any inference of bias was dispelled by Newell's repeated assertions that he could judge the case fairly and impartially.

Juror Clyde Elmer

Clyde Elmer answered the trial court's inquiry about whether a family member had ever been a crime victim:

> MR. CLYDE ELMER: I have a step daughter that was a victim of drugs.
>
> THE COURT: Victim of drugs?
>
> MR. CLYDE ELMER: Yes.
>
> THE COURT: When you say "a victim of drugs" what do you mean by that?
>
> MR. CLYDE ELMER: She was put on trial and sentenced.
>
> THE COURT: I see so she was actually a defendant in a criminal case?

MR. CLYDE ELMER: Yes.

THE COURT: Is that locally here?

MR. CLYDE ELMER: Yes.

THE COURT: Is there any bias or prejudice created for or against either party as a result of that experience?

MR. CLYDE ELMER: No.

THE COURT: Could you fairly and impartially try this case based on the testimony and evidence that you would hear in the courtroom?

MR. CLYDE ELMER: Yes, I believe I could.

(T. 94-95).

In State v. Tennyson, a burglary case, this Court examined a claim of ineffective assistance of counsel based on counsel's failure to challenge for cause three jurors who had previously been burglary victims and who had initially equivocated on whether they could act impartially. State v. Tennyson, 850 P.2d 461, 463-64 (Utah App. 1993). Noting that it was unaware of any automatic rule of disqualification of prospective jurors whose relatives might have been victims of crimes similar to that at issue in the case, and refusing to second-guess trial counsel's trial tactics, the Court affirmed the conviction. Id. at 469-70.

No inference of bias is raised by juror Elmer's responses. Indeed, his perception of his step-daughter as the victim of crime, rather than a perpetrator, suggests that he would be sympathetically inclined towards defendant rather than prejudiced. Moreover, any inference of bias was rebutted by his

repeated assertions that he could act fairly and impartially. His retention on the jury was plainly not error.

D. Counsel was Fully Engaged in Jury Selection

In Ellifritz, where the defendant on appeal argued both plain error and ineffective assistance of counsel in challenging the seating of a juror, the Court held that "[i]t is clear from the record of the in-chambers session, that defense counsel intentionally, not through inadvertence, decided not to challenge the four jurors for cause and to exercise peremptory challenges to three of them." 835 P.2d at 177. The record is abundantly clear that trial counsel in this case also was actively involved in jury selection and did not inadvertently fail to challenge Newell and Elmer.

Typical of trial counsel's perspicacity and involvement in jury selection generally was his ultimate selection of Conner, despite his initial challenge. Conner initially appeared objectionable, not only because he seemed to have some association with the prosecutor, but also because he was acquainted with another questionable juror, Bruce Hall, who was Conner's mother's employer, a friend of the family and someone who might influence Conner's opinion (T. 82-83). Counsel also challenged Hall for cause because Hall, as County Health Inspector, clearly had a professional connection with the prosecutor (T. 114-15). Counsel also recalled that during voir dire Hall had referred to Mr. Eyre using the prosecutor's first

name and that Hall had deferred to the prosecutor's view as to nature of complaint Hall had once filed (T. 92, 115). At about this point the prosecutor explained his minor connection with Conner (T. 116). Thereafter, in considering counsel's challenge to Conner, the court suggested that Conner might not be objectionable if Hall were not on the jury (T. 116). Trial counsel acknowledged the validity of the observation, and suggested they pass the matter momentarily, which allowed both he and the trial court to weigh the matter as jury selection progressed (T. 116). Ultimately, the trial court granted counsel's challenge for cause against Hall (T. 128).

It is apparent that once Conner's minimal connection to the prosecutor had been explained and Hall had been struck for cause, there existed no reason for continuing to challenge Conner. Indeed, considering counsel's obvious deliberation over Conner and his refusal to exercise a peremptory challenge against the juror, it would appear that counsel deliberately abandoned his challenge for cause against Conner.

Counsel deliberated about other jurors just as long and carefully and as he did about Conner (T. 113-130). He successfully challenged four jurors for cause (T. 128). Thereafter, he exercised all four of his peremptory challenges (R. 174). Although there is nothing in the record to clearly suggest why counsel selected certain jurors and rejected others, his obvious engagement in the selection process indicates that

his choices were not inadvertent. As this Court observed in Tennyson, "[f]or all we know, [the juror that the defense counsel did not exercise a peremptory challenge against] was the most attentive juror, or the only one who glanced disparagingly at the prosecution or sympathetically toward the defendant." Tennyson, 850 P.2d at 469. However, given counsel's obvious engagement in selecting his jury and the strong presumption that trial counsel rendered adequate assistance and used reasonable professional judgment, this Court should reject defendant's claim.

POINT II

THE TRIAL COURT PROPERLY FOUND THAT SEIZURE OF EVIDENCE WAS BASED ON PROBABLE CAUSE AND DEFENDANT'S VOLUNTARY CONSENT TO SEARCH, AND CORRECTLY, IMPLICITLY REJECTED DEFENDANT'S CLAIM THAT HIS MIRANDA RIGHTS WERE VIOLATED; FURTHER, THE DERIVATIVE PHYSICAL EVIDENCE WAS PROPERLY ADMISSIBLE EVEN IF THERE WAS A MIRANDA VIOLATION

Defendant principally argues that he was entitled to warnings under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966), prior to Sargeant Mangelson's inquiring about marijuana, based on State v. Mirquet, 268 Utah Adv. Rep. 3 (Utah 1995), rehearing pending. Because Miranda warnings were not given, he argues, all evidence recovered from a search of the rental car should have been suppressed. Appellant's Br. at 27-28. Secondarily, defendant argues that even though there might have been probable cause to search the passenger compartment of the car, the warrantless search of the trunk was impermissible. Appellant's Br. at 29. Further, he claims, defendant's consent

to search the car was the product of a Miranda violation and was not attenuated from that alleged prior illegality. Appellant's Br. at 30. Finally, defendant urges this Court to refuse to consider that marijuana, i.e., derivative physical evidence, should be admitted after a failure to give Miranda warnings. Appellant's Br. at 31. Neither the facts nor the applicable law support defendant's claims.[3]

A. The Odor of Burnt Marijuana Provided Probable Cause to Search the Car Entirely

1. The Existence of Probable Cause

"A search and seizure conducted without a warrant, like the search of defendant's vehicle, 'is unreasonable per se unless it falls within a recognized exception to the warrant requirement of the fourth amendment.'" State v. Naisbitt, 827 P.2d 969, 972 (Utah App. 1992) (citations omitted). One of the well-recognized exceptions to the warrant requirement is the odor of marijuana found emanating from a vehicle. Id.; State v. Dudley, 847 P.2d 424, 426 (Utah App. 1993).

After Sargeant Mangelson testified at the suppression hearing, the court made the following preliminary findings:

> [T]here is no evidence to the contrary in this hearing. The evidence is clear that the officer made a traffic stop. He clocked him in excess of the speed limit. There was a valid traffic stop and that stop was

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[3] Defendant does not claim that if this Court found that the search of the car was unconstitutional that the evidence tampering charge should be dismissed. State v. Wagstaff, 846 P.2d 1311 (Utah App.), 857 P.2d 948 (Utah 1993).

> appropriate. There is not evidence to the contrary at all. He approached the vehicle and he smelled Marijuana, burnt Marijuana, and immediately upon approaching the vehicle, smelled burnt Marijuana. He asked them if there was Marijuana and if they had been using it and they said, "No." He replied that I can smell it.
>
> Then Mr. Becker, the evidence in front of this court, is that Mr. Becker then said that we smoked a roach and gestured to the ashtray. The officer then retrieved the roach from the ashtray.

(T. 54).

Responding to defendant's attenuation argument, the prosecutor stated: "The officer, based upon the odor of Marijuana had probable cause without consent to make a search anyway. . . . This is a highway stop and the automotive exception of the warrant requirement comes into play" (T. 59).

The trial court responded:

> I agree. I will make the finding that in this particular case, Mr. Means [defense counsel], where the officer smelled the Marijuana. The defendant admitted to having smoked the Marijuana. The officer asked for a search of the vehicle. He searched the compartment and found Marijuana in the backseat as I recall stuffed under the backseat the bag of Marijuana, and this is sufficient evidence to continue the search into the trunk of the vehicle where he discovered other evidence.
>
> Your Motion to Suppress is denied on all counts.

(T. 59-60).

Clearly, the undisputed evidence supports the trial court's finding of probable cause to search the car, including the trunk.

See State v. Spurgeon, 904 P.2d 220, 228 (Utah App. 1995) (finding additional probable cause to search the trunk for contraband based on lawful searches of the defendants and the interior of the car).

2. Failure to Preserve State Constitutional Arguments for Exigent Circumstances

Defendant argues that although there was probable cause to obtain a warrant, search of the trunk was unjustfied without a showing of exigent circumstances under the Utah Constitution. For a variety of reasons, the argument fails.

Notwithstanding defendant's claim to the contrary, neither defendant's "exigent circumstances" or state constitution arguments was preserved in the trial court. "[O]ordinarily, [the reviewing court] will not entertain an issue first raised on appeal in the absence of exceptional circumstances or plain error." State v. Gibbons, 740 P.2d 1309, 1311 (Utah 1987); State v. Price, 837 P.2d 578, 580-81 (Utah Ap. 1992) (same). "Mere allusion to state constitutional claims, unsupported by meaningful analysis, does not permit appellate review." Dudley, 847 P.2d at 426; Spurgeon, 904 P.2d at 224 n.2.

In his motion to suppress defendant merely alluded to the Utah Constitution (R. 59, 170).[4] Defendant's statements do not reference the Utah Constitution by article and section, and do

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[4] The concluding portion of the suppression hearing, i.e., argument of counsel and the trial court's rulings, are attached at Addendum B.

not even mention "exigent circumstances." Plainly, defendant failed to alert the trial court that he claimed the absence of exigent circumstances, and thereby failed to preserve his claim. More emphatically, the statements were utterly inadequate to alert the trial court to a sufficiently particularized state constitutional claim which it could act upon.

Moreover, there is no basis for considering defendant's argument on appeal under the plain error doctrine or on a claim of ineffective assistance of counsel, as defendant suggests, because an argument for the applicability of the state constitution is not even developed on appeal, except to simply cite to State v. Larocco, 794 P.2d 460 (Utah 1990) (plurality holding that under Article I, section 14 of the Utah Constitution, warrantless vehicle searches require both probable cause and exigent circumstances). See Spurgeon, 904 P.2d at 224 n.2. (refusing to consider an inadequately developed state constitutional argument on appeal); Dudley, 847 P.2d at 426 ("Because appellants failed to develop any meaningful state constitutional argument below, our analysis must proceed solely under the federal constitutional law.").

Finally, even if defendant's claims regarding the state constitution and exigent circumstances were properly preserved, their application would effect neither the analysis nor the outcome because exigent circumstances justified the search of the car. See State v. Anderson, No. 940402, slip op. at 13 (Utah

February 2, 1996) (search of moveable automobiles requires showing of probable cause and exigent circumstances under both the Fourth Amendment and article I, section 14 of the Utah Constitution).claim For all these reasons, the Court should decline to consider a requirement that the State show exigent circumstances or that caselaw applying the state, as opposed to the federal, constitution should be applied to this case.

3. Presence of Exigent Circumstances

"[A] warrantless search is justified where the officers have probable cause to believe contraband is contained in the vehicle which may be lost if not immediagely seized." State v. Leonard, 825 P.2d 664, 672 (Utah App. 1991), cert. denied, 843 P.2d 1042 (Utah 1992). At the time he stopped the car, Sargeant Mangelson was without backup support on an isolated section of freeway support. Moreover, he was alone with three persons giving him evasive answers and intially denying the presence of marijuana when its odor was apparent (R. 45, 157). The urgency of the situation was fully realized when defendant tried to take off in the car being searched, followed by his escape with contraband Sargeant Mangelson had just discovered. These circumstances are radically different than those in Larocco, where the car was parked in front of the home of a suspect who had no idea that he was under investigation and there was no indication that the car might be soon moved. Larocco, 794 P.2d at 470.

In sum, the trial court correctly denied defendant's motion

to suppress based on probable cause.

B. Defendant Voluntarily Gave Consent to Search

1. Consent to Search

"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.'" State v. Carter, 812 P.2d 460, 467 (Utah App. 1991) (citing Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043-44 (1973)), cert. denied, 836 P.2d 1383 (Utah 1992).

The trial court not only found probable cause, but it also found that defendant gave his consent to Sargeant Mangelson to search the car: "Not only that but [sic] got permission from Mr. Becker who is the additional driver on the Rental Agreement to make the search and that is what he did" (T. 55).

Defendant does not appear to challenge the trial court's finding that he voluntarily consented to the search of the car.[5] Rather, defendant argues that the consent was not attenuated from the alleged prior illegality, i.e., the failure to give Miranda warnings prior to making inquiries about marijuana. Appellant's

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[5] Defendant's only conceivable challenge to the voluntariness of his consent lies in the following phrase, made in a different context: "While it appears that the facts of this case demonstrate actual coercion on Mangelson's part . . . ." Appellant's Br. at 31. The issue of coercion was never raised in the trial court, and is, therefore, waived on appeal. Price, 837 P.2d at 580-81.

Br. at 30.

2. Because There was No Constitutional Violation, the Exploitation/Attenuation Analysis is Not Triggered

In State v. Thurman, the court reaffirmed the test to be applied in cases in which consent was allegedly obtained through police misconduct:

> (i) the consent was given voluntarily, and (ii) the consent was not obtained by police exploitation of the prior illegality. . . . The parties correctly recognize tht the second test--the exploitation test--is triggered only if the prior illegality is a violation of the Fourth Amendment.

State v. Thurman, 846 P.2d 1256, 1262 (Utah 1993).

Defendant does not challenge that Sargeant Mangelson had probable cause to search based on his detecting the odor of burnt marijuana. Therefore, there is no assertion of a prior illegality under the Fourth Amendment that triggers the application of the Thurman exploitation test. The only illegality suggested by defendant is the alleged Miranda violation. Appellant's Br. at 27-28. However, based on Thurman's explicit limitation of the exploitation test to Fourth Amendment violations, defendant's claim fails.

Arguably, although defendant does not make the argument, the exploitation test might be triggered by another violation of constitutional dimension. See Michigan v. Tucker, 417 U.S. 448, 446-47, 94 S. Ct. 2357, 2365 (1974) (opining that the Fourth Amendment exclusionary rule might be applicable to the Fifth Amendment "in a proper case"). However, defendant cites no

authority in support of the proposition that anything less than a constitutional violation would trigger the exploitation analysis.

Even if there were a violation of defendant's Miranda rights, which the State denies, Appellee's Br. at 34-38, such a violation by itself would be insufficient to trigger the exploitation test because a Miranda violation, without a showing of actual coercion, is not of constitutional magnitude. Miranda warnings are not constitutional rights themselves; rather they are "prophylactic" measures to help safeguard the Fifth Amendment right against self-incrimination. Oregon v. Elstad, 470 U.S. 298, 306, 105 S. Ct. 1285, 1291 (1985). Because the Miranda exclusionary rule "sweeps more broadly than the Fifth Amendment," a Miranda violation does not compel a finding that an accused's Fifth Amendment rights have been infringed. Id. at 470 U.S. at 306-08, 105 S. Ct. at 1291-93 (citing Tucker, 417 U.S. at 445-46, 94 S. Ct. at 2364).

Therefore, because there is no prior illegality of constitutional dimension, there is no basis for applying an exploitation analysis to defendant's voluntary consent to search the car.

3. Derivative Physical Evidence is Admissible

Moreover, the fruits of the search were admissible as derivative evidence even if Sargeant Mangelson violated

defendant's Miranda rights.[6] In State v. Troyer, the defendant, suspected of committing a murder, was subjected to a non-coercive custodial interview without Miranda warnings first being given. State v. Troyer, 279 Utah Adv. Rep 11, 12-15 (Utah 1995). In the course of the interview the defendant told the detective that he had been with his sister on the day of the murder. Id. at 13. Following that lead, detectives interviewed the defendant's sister, who refused to confirm her brother's alibi. Id. The court suppressed the defendant's statements, but found his sister's denial of the alibi admissible, stating:

> "If errors are made by law enforcement officers in administering the prophylactic Miranda procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself . . . ."
>
> Therefore, we hold that where an unwarned statement is voluntary and not the product of "inherently coercive police tactics or methods offensive to due process" there is no Fifth Amendment violation and the fruits may be admissible in the state's [sic] case in chief.

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[6] Defendant mistakenly argues that the State is procedurally barred from raising the admissibility of derivative evidence because this issue was not raised in the trial court, relying on State v. Mirquet, 844 P.2d 995, 1001 (Utah App. 1992), aff'd, 268 Utah Adv. Rep. at 5, rehearing pending. In Mirquet, the State appeared as the appellant, not the appellee as it does in this case. Appellees may advance any alternative legal ground for ***affirming*** a trial court's judgment, even if those grounds were not presented to the trial court or were in fact rejected by the trial court in the course of entering judgment in the appellee's favor. See generally Buehner Block Co. v. UWC Assoc., 752 P.2d 892, 985 (Utah 1988); State v. Gallegos, 712 P.2d 207, 208-09 (Utah 1985).

Id. (citing Elstad, 470 U.S. at 309, 317, 105 S. Ct. at 1293, 1297). In so holding, the court cited with approval cases in which the derivative evidence was physical evidence. Id. See United States v. Sangineto-Miranda, 859 F.2d 1501, 1518 (6th Cir. 1988) ("We conclude that the cocaine found in the truck admissible even though knowledge of the existence and whereabouts of the truck were proximately derived from a Miranda violation."); United States v. Cherry, 794 F.2d 201, 208 (5th Cir. 1986) (murder weapon discovered through voluntary statements given in violation of Miranda held admissible), cert. denied, 479 U.S. 1056 (1987).

On the basis of guiding authority, and since defendant has failed to preserve any claim that he was subjected to coercive interrogation in violation of his Fifth Amendment rights, the derivative physical evidence found after the officer's inquiries is admissible even if defendant's Miranda rights were violated.

C. Defendant was Not Entitled to Miranda Warnings Because He was Not Subjected To Custodial Interrogation

Defendant argues that the supreme court's finding of custodial interrogation in Mirquet should apply to the facts of this case.[7] Appellant's Br. at 27-28.

Mirquet was another case involving a stop by Sargeant

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[7] The State's petition for rehearing in Mirquet, filed July 31, 1995, is still pending in the supreme court.

Mangelson.[8] In that case Sargeant Mangelson asked defendant to enter his patrol car after having stopped the defendant for speeding. Mirquet, 268 Utah Adv. Rep. at 3. Inside the patrol car Sargeant Mangelson smelled burned marijuana on the defendant and told him: "It's obvious to me you've been smoking marijuana. You know, there's no question in my mind. Would you like to go to the car and get the marijuana, or do you want me to go get it?" Id. The defendant went to his car, retrieved two marijuana cigarettes, and gave them to Sargeant Mangelson. Id. The officer then searched the car and found more drugs. Id.

The supreme court affirmed the trial court's suppression of the evidence, holding that the defendant had been subjected to a custodial interrogation requiring the giving Miranda warnings. Id. at 5. In so holding, the court clarified the point at which Miranda warnings should be given, to wit: when "defendant's freedom of action is curtailed to an extent associated with formal arrest." Id. at 4. In assessing whether or not the defendant, who had not been formally arrested, was in custody for Miranda purposes, the court applied the four-factor test adopted in State v. Carner: (1) the site of interrogation; (2) whether the investigation focussed on the accused; (3) whether the objective indicia of arrest were present; and (4) the length and form of interrogation. Id. at 4 (citing State v. Carner, 664

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[8] The stop in this case occurred prior to the issuance of the supreme court's Mirquet decision.

P.2d 1168, 1171 (Utah 1983)).

In Mirquet, the court was particularly impressed that (1) the site of the interrogation was inside the police car, (2) that the investigation focussed solely on the defendant, who was alone, and (3) that the form of the investigation evidenced a coercive intent on the part of the police officer, exemplied by the officer's "virtual command . . . to retrieve evidence of a crime that was clearly incriminating." Id. at 3-4.

The facts of this case are substantially different from those in Mirquet. First, defendant was merely a passenger in a vehicle stopped for speeding (T. 20). Second, at the point Sargeant Mangelson informed the occupants of the car that he smelled marijuana, defendant was just one of three persons to whom the inquiry was directed. Therefore, defendant was not the focus of the investigation in the same way as the lone driver in Mirquet was.

Most importantly, Sargeant Mangelson's remarks in this case stand in sharp contrast to those in Mirquet. In this case the officer said, "I can smell [marijuana] plain as day. I know that you are using it." First, it cannot be contended that anything other than this remark distinguishes this automobile stop from any other routine stop. See Mirquet, 268 Utah Adv. Rep at 5 ("Hinging the issue of whether one is in custody solely, or primarily, on an officer's accusatory questioning would lead the law into a factual morass . . . . We do not read Carner to have

contemplated any such thing."). Second, the remark does not compel a response, as did the "virtual command . . . to retrieve evidence of a crime" in Mirquet did. Rather, the remarks only announce the officer's reasons for believing that the occupants had been breaking the law, the basis for notice to the passengers for his subsequent request to search. Thus, the officer's remarks hardly measure up to the accusatorial character of those in Mirquet.

The stop in this case is more closely akin to that in Strausberg. In that case the defendant jack-knifed his semitrailer, crashing into car, and continued driving. Strausberg, 895 P.2d at 832. The police questioned the defendant and a passenger in the cab of the truck just after defendant arrived at his father's house, challenging the defendant's initial denial of his being in the vicinity of the accident. Id. Applying the Carner test, this Court found that: (1) the setting, i.e., the truck cab, was a site substantially free from compulsion and one in which most investigatory traffic stops occur, which do no require Miranda warnings; (2) while the defendant was a suspect, a passenger was also questioned; (3) there were no more indicia of arrest, i.e., handcuffs, locked doors or drawn weapons, than in any other traffic stop,; and (4) the officer's inquiry about the defendant's whereabouts, including his informing the defendant that witnesses at the scene of accident had described a truck similar to his, was not

coercive. Id. at 833.

In the light of Strausberg, and considering the distinctions from Mirquet, this Court should affirm the trial court's implicit rejection of defendant's Miranda claim. Moreover, even if this Court found defendant's Miranda claim meritorious, suppression would not be warranted based on pre-existing probable cause, defendant's voluntary consent and the admissibility of derivative physical evidence where there is no concommitant showing of a constitutional violation, as argued above. Appellee's Br. at 24-34.

POINT III

DEFENDANT WAS NOT ENTITLED TO A LESSER INCLUDED OFFENSE INSTRUCTION BECAUSE THERE WAS NO RATIONAL BASIS IN THE EVIDENCE TO SUPPORT AN ACQUITTAL ON THE CHARGED OFFENSE AND A CONVICTION ON THE REQUESTED LESSER INCLUDED OFFENSE

Defendant was charged with theft, a second degree felony, and the jury was instructed accordingly. Defendant requested both third degree felony and class A misdemeanor joyriding instructions. The trial court granted defendant's request for the third-degree felony joyriding instruction (failure to return vehicle in 24 hours), but denied the request for the class A misdemeanor instruction (temporary deprivation).[9]

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[9] The trial court's instructions on theft (Jury Instruction #6, R. 213) and third degree felony joyriding (Jury Instruction #7, R. 212), and defendant's requested class A misdemeanor (R. 120) jury instruction (R. 45, 157), are attached at Addendum C. The statutes upon which these jury instructions are based, Utah Code Ann. § 76-6-404 (1995) and Utah Code Ann. §§ 41-1a-1314, -

Defendant claims that the trial court erred in refusing to instruct the jury on class A misdemeanor joyriding because the evidence at trial was sufficient to show that he had the "intent to temporarily deprive the owner" of her property. Appellant's Br. at 31, 34. However, because there is no rational basis in the evidence that defendant intended to temporarily deprive the owner of possession of the vehicle, the trial court did not err in refusing to give the requested lesser included offense instruction.

A. The Law.

Under State v. Baker, 671 P.2d 152 (Utah 1983), two conditions must be satisfied before a trial court is required to give a defense requested lesser included offense instruction: (1) the statutory elements of the offense charged must overlap with those of the included offenses; and (2) the evidence adduced at trial must provide a rational basis for a verdict acquitting defendant of the offense charged and convicting him or her of the included offense. Id. at 158-59.

In this case defendant mistakenly argues that the second prong of Baker is satisfied, thus entitling him to the lesser included offense instructions.[10] Appellant's Br. at 34.

1311 (1993), respectively, are set out in Addendum A.

[10] "The first prong of the Baker analysis is essentially a mechanical, side-by-side comparison of the statutorily defined elements of the crimes." State v. Singh, 819 P.2d 356, 360 (Utah App. 1991), cert. denied, 823 P.2d 476 (Utah 1992). The State

However, defendant's analysis is flawed in both its assessment of the evidence supporting his convictions and in failing to recognize that he could not be acquitted of the greater charge and, simultaneously, convicted of the lesser using the evidence adduced at trial. Moreover, because the jury refused to convict defendant on third-degree felony joyriding in favor of a second degree theft conviction, any error in refusing to give a lesser included offense instruction on misdemeanor joyriding was harmless.

B. The Trial Court Correctly Concluded That The Evidence did Not Support A Class A Misdemeanor Instruction

The evidence adduced at trial supported defendant's conviction for theft of an automobile but did not support defendant's contention that he intended to temporarily deprive the owner of possession. The evidence established that defendant broke loose from Officer Mangelson's grasp, ran towards the Tri-Mart Texaco, crossing two or three fences and railroad tracks in the process, and got into a mustard colored car (T. 164-65). As defendant was stealing the car, the owner began screaming "my car, my car" and "you are taking my car" (T. 165). The owner jumped on the hood of the car and pounded on the windshield.

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does not contest that the statutory elements of the offense charged "overlap with those of the included offenses," joyriding. See State v. Chesnut, 621 P.2d 1228, 1232 (Utah 1980) (holding that theft of a motor vehicle and joyriding both have unauthorized use of a vehicle as a common element).

Defendant put the car in reverse, throwing the owner off the hood of the car (T. 166).

Defendant turned out of the Tri-Mart and headed in the direction of Levan but was never apprehended in the vehicle (R. 167). Later that day the stolen vehicle was recovered in a remote area about a mile and a half from the gas station (R. 167-68, 196). The car had been driven through a barbed-wire fence and across rocky terrain where it stalled (R. 167-68, 195, 209). The car had sustained extensive damage and was inoperable (T. 209, 351).

The only defense witness, Lisa LaBarrie, maintained that defendant absolutely did not get into a car but ran into an open field (T. 309-10). Thus, the only evidence introduced by defense counsel was that the defendant did not steal any car at all, not that he intended to only temporarily deprive the owner of her property.

In the absence of any evidence presented of defendant's intent to temporarily deprive the owner of the vehicle, the trial court was correct in refusing to give the defendant's proposed lesser included offense instruction. See State v. Shabata, 678 P.2d 785, 790 (Utah 1984) (manslaughter instruction properly refused in second-degree murder conviction where all the evidence the defendant presented at trial was to the effect that he had not caused the victim's death). When the trial court denied defense counsel's proposed lesser included instruction it did so

expressly because there was no evidence that defendant "intended to return the vehicle or deprive the owner thereof temporarily" (R. 341). Even if the trial court was incorrect on this point, defendant would not be entitled to the requested lesser included offense instruction.

C. Based on the Evidence, Defendant Could Not Have Been Both Acquitted Of The Charged Offense And Convicted Of The Lesser Offense

It is not sufficient that the evidence simply provides a basis to convict of the lesser included offense. The evidence must simultaneously provide a rational basis for the jury to acquit defendant of the greater offense. State v. Baker, 671 P.2d 152, 157-58 (Utah 1983); see State v. Crick, 675 P.2d 527, 531 (Utah 1983) (defendant not entitled to lesser included offense instruction where acquittal of second degree murder necessarily required acquittal of manslaughter).

At trial, the only exculpatory evidence was LaBarrie's testimony that defendant did not get into a car but ran into a field (T. 286, 309-10). If this testimony were true defendant could not have been convicted of any theft, including the class A Misdemeanor instruction the defendant claims as error. Because LaBarrie's testimony, if believed, would only provide for total acquittal of all charges, the trial court correctly determined that "the evidence presented at trial did not establish any basis on which that lesser included offense could and should be given to the jury" (T. 341).

D. Any Error in Refusing the Requested Instruction was Harmless Error

In Mincy, the Court found that any error in refusing to give a negligent homicide instruction in a second-degree murder conviction was harmless because the jury had rejected the option of convicting the defendant on manslaughter, an offense requiring a showing of intent intermediate between murder and negligent homicide. Mincy, 838 P.2d at 659. Therefore, the Court reasoned, the jury could not possibly have found the defendant guilty of negligent homicide even if it had been given the instruction. Id. The same result applies in this case.

The jury was given the option of convicting defendant of third-degree joyriding, which requires a showing that defendant failed to return the vehicle twenty-four hours. The jury, however, rejected that option in favor of convicting defendant of second degree theft, which requires proof that defendant intended to withhold property permanently.[11] Patently, defendant could not have been convicted of class A misdemeanor joyriding, which requires only an intent to temporarily deprive, if it refused to even find that he intended to deprive the owner of possession for

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[11] Utah Code Ann. § 76-6-401 (1995), provides, in pertinent part:

> (3) "Purpose to deprive" means to have the conscious object:
>
> (a) To withhold property permanently or for so extended a period or to use under such circumstances that a substantial portion of its economic value, or the use or benefit thereof, would be lost[.]

the greater period of twenty-four hours.

In sum, the trial court properly refused to give defendant's requested lesser included offense instruction on class A misdemeanor joyriding.

POINT IV

TESTIMONY THAT THE SACK DEFENDANT ABSCONDED WITH WAS RELEVANT AND NOT UNFAIRLY PREJUDICIAL IN ESTABLISHING DEFENDANT TAMPERED WITH EVIDENCE

Defendant claims that Sargeant Mangelson's testimony, that the sack found in the trunk which defendant ran away with contained either crack cocaine or methamphetamine, was without foundation, irrelevant and unfairly prejudicial in the State's case proving defendant had tampered with evidence. Appellant's Br. at 37-38. The claim fails because (1) defendant has failed to provide the Court with a record adequate to assess the trial court's ruling and (2) defendant misapprehends the tampering with evidence offense. Even if the trial court erred in admitting testimony identifying the substance in the sack, it was harmless because, based on compelling evidence, there is no doubt that defendant ran with away with the sack, regardless of its contents.

A. Failure to Provide Adequate Record Precludes Review

Where defendant fails to provided an adequate record for review, the appellate court is precluded from considering the matter on appeal. State v. Menzies, 845 P.2d 220, 228 (Utah

1992) (finding that trial court did not err in requiring defendant to produce record demonstrating prejudice, citing State v. Taylor, 664 P.2d 439, 447 (Utah 1983), in support).

Prior to trial defendant moved under rules 402 and 403, Utah Rules of Evidence, to exclude "any reference to the investigating officer's speculation of the chemical composition, identity or nature of the substance allegedly observed by him within the paper sack allegedly retrieved from the trunk of the automobile in which defendant was seized" (R. 126-27). Defendant's motion was heard on July 22, 1992, at which time the trial court denied defendant's motion (R. 162). Defendant has not included in the record a transcript of the hearing of July 22; therefore, this Court is prevented from engaging in any meaningful review of the trial court's ruling and must decline to consider on appeal. In any case, the claim is without merit.

B. Contents of the Sack was Relevant and not Prejudicial

Defendant argues that, because the offense of tampering with evidence requires only that "anything" related to the investigation, testimony that the sack contained either crack cocaine or methamphetamine was both irrelevant and prejudicial.

Section § 76-8-510 provides, in pertinent part:

> A person commits a felony of the second degree if, believing that an official proceeding or investigation is pending or about to be instituted, he:
> (1) . . . removes anything with a purpose to impair its . . . availability in the proceeding or investigation.

Utah Code Ann. § 76-8-510 (1995).

Rules 401 and 402, Utah Rules of Evidence, collectively provide for the admission of "all evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." It requires no authority to show that because the statute makes "anything" the basis of an evidence tampering charge, it is therefore irrelevant, and therefore inadmissible, to specifically identify the tampered evidence. Without such evidence the State's case would be prejudiced by an inability to identify the very investigation that was the basis of the charge, an absurd conclusion.

For the same reason, it is not prejudicial to specifically identify the evidence which is the basis of the investigation. Defendant argues that evidence of an uncharged crime is presumptively prejudicial and that it was, therefore, the prosecutor's duty to establish the unusual probative value of the evidence, citing Dunn, 850 P.2d at 1221-22 and State v. Saunders, 699 P.2d 738, 741 (Utah 1985). Defendant's authority has no application to this case. In Saunders the court found prior evidence of burglaries inadmissible character evidence in a subsequent burglary. In this case, the evidence of contents of the sack applies to the very investigation that is basis of the tampering charge. Because the evidence relates directly to this

case, it cannot be "presumptively prejudicial" to identify it.[12]

C. Any Error was Harmless Because the Evidence was Compelling that Defendant Fled with the Sack

Even if defendant is correct that it was both irrelevant and prejudicial to identify the contents of the sack, any error in admitting the evidence was harmless because there can be no serious doubt that defendant fled with the sack, the minimal showing necessary to prove the offense.

Harmless errors are errors which are sufficiently inconsequential that there is no reasonable likelihood that the error affected the outcome of the proceedings. State v. Knight, 734 P.2d 913, 920 (Utah 1987). "For an error to require reversal, the likelihood of a different outcome must be sufficiently high to undermine confidence in the verdict." Id.

Sargeant Mangelson testified that defendant fled with the sack and that he watched defendant run with it across the field (T. 165-66). In support of that testimony, Joseph Walker, a trustee in the Juab County Jail, testified that defendant asked

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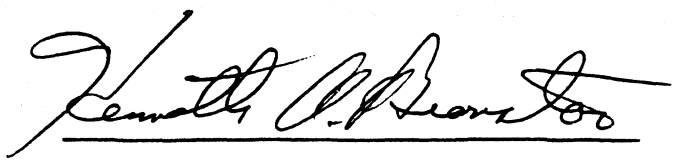
[12] Defendant also appears to challenge, without much conviction, the trial court's admission of Sargeant Mangelson's opinion that the substance in the sack was either crack cocaine or methamphetamine. Appellant's Br. at 36-37. Defendant cites no relevant authority to support his claim, and this Court should decline to consider it. State v. Amicone, 689 P.2d 1341, 1344 (Utah 1984). Moreover, because defendant was never charged with the more serious offenses related to possession of cocaine and methamphetamine, but rather was only under investigation in connection with those offenses, there was no requirement, as defendant suggests, to prove beyond a reasonable doubt the contents of the sack through expert testimony, i.e., a toxicologist report.

him to relay a message to LaBarrie, also a prisoner in the jail, that he had not been found with any drugs, having stashed them and that everything was "okay" (T. 240). While admittedly a very impeachable witness on his record (T. 241-258), two facts buttress his testimony significantly. First, Deputy William Tompkins of the Juab County Sheriff's Office testified that Walker had been a reliable informant, whose information had repeatedly and without exception always been accurate (T. 216, 265). Second, Walker told Deputy Tompkins about the message defendant asked him to relay the night after defendant was arrested, a time at which Walker could not have discovered the facts of the case from any source other than defendant (T. 264).

Only LaBarrie's testimony, that the sack never existed (T. 285, 305, 313), detracts from the State's case. Her testimony, however, is patently unreliable. For example, she claimed that there were no "roaches" in the ashtray (T. 281), in spite of the fact that a roach was introduced into evidence (Exhibit 159-60, 206). She claimed that she never saw defendant, a black man (T. 108) steal the car (T. 286, 311), but a report was received that a "Negro" man had stolen a car from the Texaco Tri-Mart at the same time Sargeant Mangelson broadcast defendant's flight over the radio (T. 240). Moreover, LaBarrie was aware that if she were found with cocaine she would be subject to much more serious charges that possession of marijuana (T. 313). Therefore, she had a very powerful incentive to lie, knowing that the contents

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to Douglas L. Neeley, attorney for defendant, 96 South Main 5-15, Ephraim, Utah 84648, this 20th day of February, 1996.



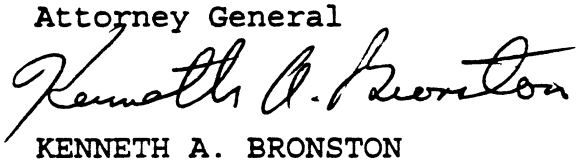
of the sack had never been recovered. In sum, the facts compel a finding that any error in admitting testimony about the contents of the sack was harmless, at most.

CONCLUSION

Based on the foregoing discussion, the State respectfully requests that defendant's convictions be affirmed.

RESPECTFULLY SUBMITTED this 20th day of February, 1996.

JAN GRAHAM
Attorney General



KENNETH A. BRONSTON
Assistant Attorney General

ADDENDA

ADDENDUM A

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.

UNITED STATES CONSTITUTION, AMENDMENT V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Utah Code Ann. § 76-6-401 (1995)

> (3) "Purpose to deprive" means to have the conscious object:
> (a) To withhold property permanently or for so extended a period or to use under such circumstances that a substantial portion of its economic value, or of the use and benefit thereof, would be lost[.]

Utah Code Ann. § 76-6-401 (1995)

> A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.

Utah Code Ann. § 76-8-510 (1995)

> A person commits a felony of the second degree if, believing that an official proceeding or investigation is pending or about to be instituted, he:
> (1) Alters, destroys, conceals, or removes anything with a purpose to impair its verity or availability in the proceeding or investigation[.]

Utah Code Ann. § 41-1a-1311 (1993)

> (1) It is a class A misdemeanor for a person to exercise unauthorized control over a motor vehicle, trailer, or semitrailer not his own, without the consent of the owner or lawful custodian and with intent to temporarily deprive the owner or lawful custodian of possession of the motor vehicle, trailer, or semitrailer.

Utah Code Ann. § 41-1a-1314 (1993)

> (1) It is a third degree felony to exercise unauthorized control over a motor vehicle, trailer, or semitrailer if the person does not return the motor vehicle, trailer, or semitrailer to the owner or lawful custodian within 24 hours after the exercise of unauthorized control.

Rule 18, Utah Rules of Criminal Procedure

> (e) The challenge for cause is an objection to a particular juror and may be taken on one or more of the following grounds:
>
> (4) the existence of any social, legal, business, fiduciary or other relationship between the prospective juror and any party, witness or person alleged to have been victimized or injured by the defendant, which relationship when viewed objectively, would suggest to reasonable minds that the prospective juror would be unable or unwilling to return a verdict which would be free of favoritism . . . .;

Rule 18, Utah Rules of Criminal Procedure (cont'd)

(14) that a state of mind exists on the part of the juror with reference to the cause, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals or common notoriety, if it satisfactorily appears to the court that the juror can and will, notwithstanding such opinion, act impartially and fairly upon the matter to be submitted to him.

Rule 401, Utah Rules of Evidence

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402, Utah Rules of Evidence

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or the Constitution of the state of Utah, statute, or by these rules, or by other rules applicable in courts of this state. Evidence which is not relevant is not admissible.

Rule 403, Utah Rules of Evidence

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404, Utah Rules of Evidence

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ADDENDUM B

THE COURT: Do you rest Mr. Eyre?

MR. EYRE: Yes.

THE COURT: Mr. Means?

MR. MEANS: We have no evidence to present, Your Honor, on the issue of the Suppression Hearing.

THE COURT: All right you rest?

MR. MEANS: Yes.

MR. EYRE: In argument, Your Honor, it would be the position of the State that - -

THE COURT: Well, we don't need argument do we? I mean there is no evidence to the contrary in this hearing. The evidence is clear that the officer made a traffic stop. He clocked him in excess of the speed limit. There was a valid traffic stop and that stop was appropriate. There is no evidence to the contrary at all. He approached the vehicle and he smelled Marijuana, burnt Marijuana, and immediately upon approaching the vehicle , smelled burnt Marijuana. He asked them if there was Marijuana and if they had been using it and they said, "No." He replied that I can smell it.

Then Mr. Becker, the evidence in front of this court, is that Mr. Becker then said that we smoked a roach and gestured to the ashtray. The officer then retrieved the roach from the ashtray.

There is absolutely complete articulable suspicion in

this case to continue with the search. Not only that but got permission from Mr. Becker who is the additional driver on the Rental Agreement to make the search and that is what he did. He found what he testified in this case and the only testimony in front of the court in this Suppression Hearing.

I don't know of a single case that would strike against you in this situation. Mr. Means?

MR. MEANS: I do need to make a record. I am aware of the case law and there are probably two or three cases that allow the officer if he smells Marijuana to conduct that probable cause to conduct a search of the passenger compartment of the vehicle, because as I read those cases, that is probable cause to suspect it has been used by the people in their immediate presence.

I will submit the issue to you on the initial stop by the way , of whether or not there is speeding so there is reasonable suspicion for the initial stop.

Beyond the search of the passenger compartment , my argument is that there needs to be a consent to a search of the trunk. Again I separate the passenger compartment from the trunk. The consent is based upon on the representation that Mr. Becker consented verbally and said that go ahead that is fine.

My argument would be to refer to Mr. Harmon's,

interestingly enough of State vs. Marquette if I am stating that appropriately. Interestingly enough, it is also a matter which Officer Mangelson was the investigating officer.

My reading of that case is that when a defendant has been asked a question that passes over that line from an investigatory question to an accusatory question that the defendant needs to be read his Miranda rights before he responds. My argument would be that the couching of the question to Mr. Becker that as the officer has testified to and I hope I am remembering it correctly. I can smell Marijuana as plain as day or as clear as day. It is beyond that line of investigatory but is accusatory and Mr. Becker needs to have had Miranda Rights read to him according to Marquette prior to his response.

Since they were not read, then his response would be and my argument would be it should be suppressed. That response saying that yes it is here and the response afterwards referring to the consent to search should not then be allowed to be the basis for the search ofthe trunk of the vehicle. So while I agree with you that the stop is proper and that the odor of Marijuana can be a basis for a search of the passenger compartment, I believe the court needs to determine whether or not there is additional legal authority for searching the trunk, and if it is based on

the consent or on Mr. Becker's representation is that a non-verbal representation that there is a roach in the ashtray, and his verbalization that yes we did smoke one and that evidence should have been suppressed because there was no Miranda warning given. Everything that flows from that point on is Fruit of the Poisonous Tree and is tainted.

THE COURT: Mr. Eyre?

MR. EYRE: To respond to this, this case is different than Marquette. In Marquette the officer, Sargeant Mangelson stated that I can smell Marijuana, go get the marijuana. Mr. Marquette went and got the Marijuana. That is not the case in this case.

Mr. Becker merely said that we have been smoking Marijuana and made some reference to the ashtray. The officer retrieved the evidence. He then asked for consent and that was not the case in Marquette. There was no consent given.

The officer in this case went and got consent and then went and found additional Marijuana within the passenger compartment. Clearly, that consent was never withdrawn. He clearly still had sufficient probable cause even without consent to make a search of the trunk . If he found Marijuana in one particular part of the vehicle he has clear additional probable cause to make additional

searches. He is going to make a custodial arrest of these individuals anyway. There is going to be an inventory search to boot.

Further with respect to the Marquette Case, it is still our position that the Court of Appeals is wrong and the Supreme Court has granted Cert on that case and is presently before them, the Supreme Court, for the final decision as to that issue.

THE COURT: Do you want to make any response to that?

MR. MEANS: I am not aware of whether or not Marquette is up on Cert and I will take Mr. Eyre's word for that. I can understand why he doesn't agree with the decision but nevertheless as we stand here today that is the state of the law and the ruling of the Court of Appeals.

I need to make one additional point . If you had found, Your Honor, that Mr. Becker had given consent and the Miranda Warnings are not necessary and he freely gave consent then you also need to find whether or not that consent was attenuated from his previous seizure and the questioning of him by the officer. Again, if the officer had seized the Marijuana illegally , because in my opinion the reference that Mr. Becker made to the marijuana should not have been admitted into evidence.

Then beyond that point any search just because Marijuana is found in one part of the car legally, doesn't allow a search of the rest of the car. It might provide for probable cause but it doesn't provide the authority to search further. It provides a basis for a search warrant The consent of Mr. Becker should be attenuated from the previous seizure of that Marijuana Cigarette in the ashtray if it was not seized properly. The point of the testimony that no time passed for Mr. Becker to seek counsel to consider his response and all of the factors that are necessary in an attenuation.

THE COURT: Mr. Eyre.

MR. EYRE: Your Honor, the attenuation would only come into play if there had been a legal search. There wasn't any legal search. The officer, based upon the odor of Marijuana ,had probable cause without consent to make a search anyway. Since this was a highway stop and was not probable cause to obtain a search warrant, is probable cause to make a warrantless search. This is a highway stop and the automotive exception of the warrant requirement comes into play.

THE COURT: I agree. I will make the finding that in this particular case, Mr. Means, where the officer smelled the Marijuana. The defendant admitted to having smoked the Marijuana. The officer asked for a search

of the vehicle. He searched the compartment and found Marijuana in the backseat as I recall stuffed under the backseat the bag of Marijuana, and this is sufficient evidence to continue the search into the trunk of the vehicle where he discovered the other evidence.

Your Motion to Suppress is denied on all counts.

MR. MEANS: Your Honor, can the record reflect that this is the State's first offering of the Marijuana Roach. It wasn't offered at the Preliminary Examination.

THE COURT: I think you have already established that.

MR. EYRE: There was reference though in the testimony His testimony is not any different.

THE COURT: Just wasn't offered as an exhibit but it was referred to in his testimony. Whatever it says, it says . That can be a part of the record for your purpose of appeal if that is what you want.

MR. MEANS: Thank you.

THE COURT: Anything further?

MR. MEANS: Not on the Motion, Your Honor.

MR. EYRE: No.

THE COURT: What time is the jury coming?

MR. EYRE: 1:00 O'clock.

(WHEREUPON, the Hearing on the Motion to Suppress was concluded)

ADDENDUM C

INSTRUCTION NO. 6

You are instructed that a person commits theft under the laws of the State of Utah if he obtains or exercises unauthorized control over the property of another with the purpose to deprive the owner thereof.

INSTRUCTION NO. 7

As an alternative to reaching a verdict on Count I, Auto Theft, a Second Degree Felony, you may find the Defendant guilty of the lesser included offense of Unlawful Control Over a Motor Vehicle for an Extended Period of Time, a Third Degree Felony, if you find the following:

-The Defendant;

-On or about 7 October, 1993;

-In Juab County, State of Utah;

-*Exercised unlawful control over a motor vehicle;*

-And did not return the motor vehicle to the owner or lawful custodian

- within 24 hours of the exercise of unlawful control.

INSTRUCTION NO. _____

As an alternative to reaching a verdict on Count I, Auto Theft, a Second Degree Felony, you may find the Defendant guilty of the lesser included offense of Unlawful Control Over a Motor Vehicle, a class "A" misdemeanor, if you find the following:

-The Defendant;

-On or about 7 October, 1993;

-In Juab County, State of Utah;

-Exercised unlawful control over a motor vehicle;

- not his own;

- without the consent of the owner or lawful custodian;

- with the intent to temporarily deprive the owner or lawful custodian of possession of the motor vehicle.