1995

# State of Utah v. Kenneth Fox : Brief of Appellant

Utah Court of Appeals


Cy H. Castle; Attorney for Appellee.
Mark R. Madsen; Attorney for Appelant.

IN THE UTAH COURT OF APPEALS

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| STATE OF UTAH,<br><br>Plaintiff/Appellee,<br><br>vs.<br><br>KENNETH FOX,<br><br>Defendant/Appellant. | Case No. 950654-CA<br><br>Priority No. 2 |

# BRIEF OF APPELLANT

Appeal from the Third Circuit Court, Salt Lake County,
the Honorable Judge Michael K. Burton, Presiding

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## STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Rule 26(2)(a) of the Utah Rules of Criminal Procedure and Utah Code Ann. § 78-2a-3(2)(d), whereby the defendant in a circuit court criminal action may take an appeal to the Court of Appeals from a final order on a misdemeanor offense. In this case, the Honorable Michael K. Burton, Judge, Third Circuit Court, in and for Salt Lake County, State of Utah, rendered final judgment and conviction for driving under the influence of alcohol.

## STATEMENT OF ISSUES

Whether the trial court erred in concluding that the State of Utah had reasonable suspicion to stop and detain Mr. Fox since the officer who allegedly had reasonable suspicion was not present at the Motion to Suppress hearing or the trial and was therefore never called as a witness by the State of Utah.

## STANDARD OF REVIEW

A trial court's factual findings for a motion to suppress should not be upset on appeal unless clearly erroneous. State of Utah v. Menke, 787 P.2d 537, 539 (Utah App. 1990). Factual findings are not clearly erroneous unless they "are against the clear weight of evidence, or [unless] the appellate court otherwise reaches a definite and firm conviction that a mistake has been made." Id. The trial court's legal conclusions underlying the motion to suppress are reviewed under a correction

of error standard. State of Utah v. Steward, 806 P.2d 213, 215 (Utah App. 1991).

## RULES & STATUTES

Statutes

Utah Code Ann. § 77-7-15:

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

## STATEMENT OF THE CASE

Defendant filed a motion to suppress evidence prior to trial on the grounds that Officer Schow (SLCPD) lacked "reasonable suspicion" to stop the defendant. Defendant's motion to suppress was argued and an evidentiary hearing was conducted on May 23, 1995 before Judge Cornaby in the Third Circuit Court, Murray Department. (The motion hearing will hereafter be referred to as Motion.)

Testimony on the motion to suppress issue was heard from defendant, George Cassity and Sherri Lee Blackburn. Officer McMorris, the Utah Highway Patrol officer, was present at the May 23, 1995 evidentiary hearing but did not testify since the inquiry was limited to establishing that officer Schow, the Salt Lake City officer, had "reasonable suspicion" to stop the defendant. Noticeably absent from the hearing was officer Schow. As a result, no testimony was received from officer Schow as to the reason he stopped defendant or as to any driving pattern that

may have been observed by officer Schow. Defendant's motion to suppress evidence was denied by Judge Cornaby.

Defendant was later convicted of a DUI after a bench trial before Judge Burton on September 12, 1995 in the Third Circuit Court, Murray Department.

**STATEMENT OF FACTS**

1. On January 7, 1995, George Cassity followed defendant from a restaurant downtown to approximately 3900 South and Main Street when Mr. Cassity saw two Salt Lake City Police vehicles parked near the intersection. Motion, 21-22.

2. Mr. Cassity stopped and gave the Salt Lake City officers certain information regarding Mr. Fox's driving pattern and when asked for his name and address he gave the officers a false name and address. Motion, 23.

3. Sherri Lee Blackburn was a passenger in defendant's vehicle and testified as to the events leading up to the stop and that defendant's driving patterns were not unusual. Motion, 42-43.

4. On January 7, 1995 at approximately 12:00 a.m., defendant was travelling westbound on 4500 South at approximately 350 West in Salt Lake County. Motion, 53-54, 59. Defendant was in his vehicle at a traffic light waiting to turn left when Officer Schow, a Salt Lake City Police officer, pulled up behind defendant. Over his loud speaker Officer Schow directed

defendant to pull through the red light and off to the side of the road. Motion, 53-54.

5. Defendant was subsequently given field sobriety tests and an intoxilyzer test by Utah Highway Patrol Officer McMorris who arrived at the scene at approximately 1:30 a.m. Motion, 34-36. According to Officer McMorris, defendant failed the field sobriety tests. Defendant was then given an intoxilyzer test in which he was required to blow into the intoxilyzer mouthpiece multiple times. After blowing into the mouthpiece a third time defendant registered a .08 blood alcohol level.

## SUMMARY OF ARGUMENT

The Salt Lake City Police Officer who pulled the defendant over failed to articulate his reasonable suspicion that the defendant had committed or was committing a crime or that the defendant was stopped incident to a traffic offense. In fact, the officer was not even present at the motion to suppress hearing or the trial. Therefore, defendant's conviction must be reversed and this case remanded to the trial court with directions to grant defendant's motion to suppress evidence.

## ARGUMENT

### BEFORE A POLICE OFFICER MAY STOP AND DETAIN A CITIZEN, HE MUST FIRST HAVE REASONABLE SUSPICION TO BELIEVE THAT THE CITIZEN HAS COMMITTED OR IS IN THE ACT OF COMMITTING A CRIME.

The starting point in examining police conduct in the search and seizure area lies in state statutes. See Generally, State v.

Black, 721 P.2d 842 (Oregon App. 1986). Utah Code Ann. § 77-7-15 established basic search and seizure ground rules:

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

The level of suspicion contemplated in § 77-7-15 "must be based on objective facts suggesting that the individual may be involved in criminal activity." State of Utah v. Menke, 787 P.2d 537, 541 (Utah App. 1990).[1]

Section 77-7-15 is most often interpreted in conjunction with federal and state constitutional analysis. Menke, 787 p.2d at 540-41 (discussing Fourth Amendment in conjunction with § 77-7-15). Utah appellate courts have determined that § 77-7-15 codifies the Fourth Amendment "reasonable suspicion" requirement first spelled out in Terry v. Ohio, 392 U.S. 1 (1968). See Menke, 787 P.2d at 541. It requires a police officer, before making such a level II stop "to point to specific and articulable

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[1] In State of Utah v. Deitman, 739 P.2d 616, 617 (1987), the Utah Supreme Court recognized three levels of police-citizen encounters: (1) an officer may approach a citizen at anytime [sic] and pose questions so long as the citizen is not detained against his will; (2) an officer may seize a person if the officer has an "articulable suspicion" that the person has committed or is about to commit a crime; however, the "detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop"; and (3) an officer may arrest a suspect if the officer has probable cause to believe an offense has been committed or is being committed.

A traffic stop is a level II encounter. State of Utah v. Sierra, 754 P.2d 972, 975 (Utah App. 1988).

facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Menke, 787 P.2d at 541 (quoting Terry v. Ohio, 392 U.S. at 21). **An arresting officer must be able to articulate why particular facts** lead to an inference of criminal activity. If the officer fails to articulate specific facts, his suspicion is classified as a mere hunch which is not a legitimate basis for such a level II stop. United States v. Sokolow, 490 U.S. 1, 7 (1989).

In the instant cast, the officer who made the level II stop did not appear or testify at defendant's motion to suppress hearing. Therefore, it was impossible for the State to meet its burden of demonstrating "reasonable suspicion" for stopping defendant.

It is well established that a police officer's stop of an automobile is a "seizure" and therefore subject to Fourth Amendment Protections. State of Utah v. Roth, 827 P.2d 255, 257 (Utah App. 1992). Consequently, a stop can be justified only upon a showing of "reasonable suspicion" that an individual had committed or was committing a crime or was stopped incident to a traffic offense. Sandy City v. Thorsness, 778 P.2d 1011, 1012 (Utah App. 1989).

In Roth, the Court of Appeals of Utah cited several cases involving reasonable suspicion. One such case was State v. Black, 721 P.2d 842 (Oregon App. 1986). In Black, the court ruled that an anonymous tip could not be the basis for a stop

where there was no indicia of reliability and the officer's observation did not corroborate the tip.

The facts in Black are similar to the facts in the instant case. In Black, a woman telephoned the police department and stated that a brown Ford Escort was speeding and weaving and identified its approximate location. This information was immediately radioed to a state trooper in the area. Within minutes the trooper observed a car matching the description, but did not observe any erratic driving. The trooper stopped the car and subsequently arrested the driver for DUI.

In applying a Fourth Amendment "reasonable suspicion" analysis, the court in Black set forth the following indicia of reliability of an informant's tip:

> (1) the informant was known to the officer and had supplied information to him in the past;
> (2) the informant came forth personally and gave information that was immediately verifiable at the scent; and
> (3) the informant subjected himself to the possibility of an arrest for making a false report if the officer's investigation was fruitless.

The court recognized that there must be some indicia of reliability of an informant's tip in order to justify police in acting on it by making a stop. In applying this analysis to the facts of that case, the court found that the informant's tip therein had no indicia of reliability. The caller gave insufficient information to identify herself and the trooper's personal observations did not corroborate the tip. The court

stated that the fact that the informant had accurately described the defendant's car was not a sufficient indication of reliability. Black, 721 P.2d at 846.

In the instant case, defendant was stopped in unincorporated Salt Lake County by a Salt Lake City officer approximately three miles outside Salt Lake City limits. No evidence was presented to the trial court as to the basis for the stop since Officer Schow, the Salt Lake Police officer, did not appear at the evidentiary hearing. The trial court relied on testimony from an informant who admittedly disliked the defendant and who gave the Salt Lake City officers false information regarding his name and address. Following the analysis in Black, the trial court should have determined that the informant's tip lacked indicia of reliability and that no officer personally observed any driving pattern that would indicate possible intoxication.

## CONCLUSION

A police officer making a level II stop must **articulate** his reasonable suspicion that the defendant had committed or was committing a crime or that the defendant was stopped incident to a traffic offense. In this case, the officer did not articulate such reasonable suspicion, in fact the officer did not articulate any facts since he was not present at the evidentiary hearing on defendant's motion to suppress evidence. Consequently, defendant's conviction must be reversed and this case remanded to

the trial court with directions to grant defendant's motion to suppress evidence.

DATED this 5th day of July, 1996.

Mark R. Madsen
Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing Brief of Appellant were mailed, first class, postage prepaid, this 8th day of July, 1996 to the following:

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No addendum is necessary in this brief.