

1995

# Jarvis Clark Maycock v. State of Utah : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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JARVIS CLARK MAYCOCK, :  
Defendant/Appellant, : BRIEF OF THE APPELLANT  
V. :  
STATE OF UTAH, : Case No. 950661-CA  
Plaintiff/Appellee. : Argument Priority Number: 2

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THIS IS AN APPEAL FROM A FINAL ORDER OF THE  
HONORABLE JUDGE LYNN W. DAVIS OF THE DISTRICT  
COURT OF THE FOURTH JUDICIAL DISTRICT IN AND  
FOR JUAB COUNTY, STATE OF UTAH.

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ORAL ARGUMENT IS REQUESTED

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**FILED**

**JAN 22 1997**

**COURT OF APPEALS**

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**THERE ARE NO PRIOR OR RELATED APPEALS**

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IN THE UTAH COURT OF APPEALS

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JARVIS CLARK MAYCOCK,

Defendant/Appellant,

vs.

STATE OF UTAH,

Plaintiff/Respondent.

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BRIEF FOR THE APPELLANT

Case No. 950661-CA

STATEMENT OF JURISDICTION

Utah Code Annotated 78-2a-3(f) provides this Court's jurisdiction over this appeal, which appeal is from the final order of the Fourth Judicial District, Juab County, State of Utah entered on September 12, 1995. Counsel for Mr. Maycock filed a timely notice of appeal on 10th, 1995.

### STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the officer who claimed to have smelled an odor of burnt marijuana but actually found no marijuana lack probable cause\reasonable suspicion under the Fourth Amendment to search appellant's vehicle or will the inevitable discovery doctrine allow admission of the evidence?

2. Did exigent circumstances exist to justify a warrantless search as required by the Utah and United States Constitutions?

### STATEMENT OF THE CASE

On November 25<sup>th</sup>, 1994, the State of Utah charged Maycock in a three count indictment alleging as Count I, a violation of Utah's Controlled Substance Act by knowingly possessing methamphetamine contrary to Utah Code Ann. 58-37-8(2)(a)(I), 1953. Maycock was also charged with Count II, driving under the influence of drugs contrary to Utah Code Ann. 44-6-44, 1953 and Count III, possession of drug paraphernalia contrary to Utah Code Ann. 58-37a-5, 1953. Count II was dismissed prior to trial.

Thereafter, at trial on June 26, 1995, Maycock made a motion to suppress evidence. The motion was denied. On July 16, 1995, Maycock was found guilty by a jury of Counts I and III as listed above.

Preserving his right to appeal the trial court's denial of his motion to suppress, Maycock was sentenced on Count I to the



Utah State Prison for an indeterminate amount of time not to exceed five (5) years, plus pay a fine in the amount of \$5,000 and on Count III to the Juab County Jail for six (6) months. Execution of the sentence was suspended and Maycock was placed on probation for a period of 36 months subject to certain terms and conditions.

#### STATEMENT OF THE FACTS

On November 24th, 1992, Maycock was arrested during a traffic stop by Utah Highway Patrol Trooper Fred Swain ("Swain"). He was subsequently charged with possession of methamphetamine in violation of Utah's Controlled Substance Act, Utah Code Ann. 58-37-8 (2)(a)(I), 1953. Maycock was also charged with driving under the influence of drugs in violation of Utah Code Ann. 41-6-44, 1953 and possession of drug paraphernalia contrary to Utah Code Ann. 41-6-44, 1953. The charge of driving under the influence of drugs was dropped prior to trial.

At a trial held in the Fourth Judicial District Court for Juab County, State of Utah on January 10th, 1992, the following facts were revealed:

On November 24th, 1995, at approximately 9:20 a.m., Maycock was driving his vehicle, a white Toyota pickup with a shell on it, near milepost 217 on Interstate 15 (T at 10, 48)<sup>1</sup>. Maycock

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<sup>1</sup> The statement of facts is taken from the trial transcript and the preliminary hearing transcript. Pages of the trial transcript are cited herein as "(T. )."

was the sole occupant of the vehicle.

Swain was also traveling on I-15 on November 24th, 1994, at approximately the same time and location as Maycock (T at 10). Swain stopped Maycock for not having a license plate on the front bumper of his vehicle (T at 10). Swain approached the driver's side of the vehicle and requested Maycock's driver's license and registration (T at 10). When Maycock rolled down his window and gave Swain his drivers license and registration, Swain alleges that he smelled the odor of burnt marijuana emanating from inside the vehicle (T at 10). Swain received Maycock's driver's license and registration and asked Maycock to exit the vehicle (T at 12). A later check of the vehicle's registration determined that the car was registered to Jarvis Maycock. Swain requested that he be allowed to search the vehicle. Maycock said no (T at 13). Swain proceeded to search the vehicle because, he said, "I could smell marijuana" (T at 12, 26).

During his search of the vehicle, Swain first found a bottle of Visine in the driver's side door pouch. (T at 27). As Swain was searching the vehicle, Maycock remarked that he was cold and asked if he could sit in the vehicle. Swain said he did not want Maycock in the vehicle "for safety reasons" and asked him if he would like a jacket. Maycock said yes and before handing Maycock a jacket that was lying on the passenger seat, Swain searched the jacket. Next Swain found a film container and the casing of a pen with the end cut off which Swain described as a "snorting tube"

(T at 27, 28). On the edge of the snorting tube, Swain believes he observed an unidentified orange substance. Next, Swain found in the jacket a razor blade, a clip, and a red pipe with what he believed was marijuana residue inside (T at 30, 31). This belief was never confirmed by a lab analysis of the pipe. The film container found in the jacket pocket contained two small rocks of what a Trooper Swain believed to be methamphetamine. A lab analysis of the substance at the State Crime Lab confirmed that the substance was approximately 130 milligrams of methamphetamine. (T at 36).

When Trooper Swain asked Maycock about the contents of the jacket, Maycock replied that the jacket was not his and that it belonged to a person named Kelly Ebell (T at 37, 38). Maycock said that he did not know the phone number or address of the person (T. at 37).

Swain then handcuffed Maycock and placed him in his patrol car and then conducted an inventory search of the vehicle. The search revealed no other incriminating items. Swain then transported Maycock to the Juab county jail where he was booked (T. at 40).

After arguments by defense counsel, the trial court denied Maycock's motion to suppress (T. at 25). Then, on June 26, 1995, Maycock was found guilty of possession of methamphetamine and possession of drug paraphernalia as stated above.

On July 16, 1995, Maycock was sentenced on Count I to the

Utah State Prison for an indeterminate term not to exceed 5 years, plus pay a fine in the amount of \$5,000; and on Count II to the Juab County Jail for six (6) months. Execution of the sentence was suspended and Maycock was placed on probation for a period of 36 months. Thereafter, Maycock filed a timely notice of appeal on October 10<sup>th</sup>, 1995.

#### SUMMARY OF THE ARGUMENT

The warrantless search of Maycock's vehicle was conducted without probable cause and was not justified by exigent circumstances as required by the Utah and United States Constitutions. The warrantless search was not supported by probable cause because it did not reveal any evidence to corroborate Swain's assertion that he smelled burnt marijuana emanating from Maycock's vehicle. Additionally, the search was not justified by exigent circumstances because Swain could have obtained a telephonic search warrant with relative ease but chose not to do so. Furthermore, the inevitable discovery doctrine will not allow admission of the evidence because no impoundment or inventory search would have been conducted but for the illegal search of the vehicle and any subsequent inventory search is therefore tainted by the preceding constitutional violation. Therefore, the trial court erred in suppressing the evidence. Wherefore, Maycock urges this court to reverse the trial court's

denial of his motion to suppress the evidence and his conviction.

## **ARGUMENT**

### **POINT I**

SWAIN LACKED PROBABLE CAUSE OR REASONABLE SUSPICION TO SEARCH BECAUSE THE VEHICLE DID NOT CONTAIN MARIJUANA AS ALLEGED BY THE OFFICER AND THE INEVITABLE DISCOVERY DOCTRINE DOES NOT APPLY TO THIS SITUATION.

#### ***A. Standard of Review***

In reviewing a trial court's ruling on a motion to suppress, this court accords no deference to the trial courts legal conclusions and reviews them for correctness. State v. Beavers, 859 P.2d 9, 12 (Utah App. 1993). However, this court will disturb the trial court's factual findings only if clearly erroneous. Id.

#### ***B. Erroneous Finding and Conclusion on Probable Cause Requires Reversal.***

The Fourth Amendment to the United States Constitution requires that all searches be conducted pursuant to a warrant based on probable cause. See U.S. Const. amend. IV. A warrantless search is per se unreasonable unless the government shows that the search falls within a recognized exception such as

valid consent. Coolidge v. New Hampshire, 403 U.S. 443, 474 (1971). "The security of one's privacy against arbitrary intrusion by the police is at the core of the Fourth Amendment-is basic to a free society." Wolf v. Colorado, 338 U.S. 25, (1984).

To give effect to the Fourth Amendment's guarantee against unreasonable searches and seizures and to deter illegal police conduct, the court must apply the exclusionary rule and suppress any evidence unconstitutionally obtained. Nix v. Williams, 467 U.S. 431, (1984). The government has the burden of proving by a preponderance of the evidence that a warrantless search meets the requirements of an exception to the warrant requirement. Coolidge 403 U.S. 443 at 455.

The trial court found that probable cause existed to search Maycock's car based solely upon Swain's testimony that he smelled an odor of burnt marijuana emanating from the car after he stopped Maycock for failing to display a license plate on the front of his car. The issue of whether or not an officer of the law has probable cause to search a vehicle based solely upon the alleged smell of marijuana emanating from the vehicle after the vehicle has been lawfully stopped is not a novel one.

This court addressed precisely the same issue in State v. Naisbitt, 827 P.2d 969, 973 (Utah Ct. App. 1992). In that case, after stopping the defendant for a traffic violation, the officer involved testified that he smelled the odor of burnt marijuana emanating from the defendant's car. He then searched and found a

who might seek to circumvent the requirements of the Fourth Amendment by claiming to smell marijuana as the basis to conduct a warrantless search when in fact no such smell of marijuana existed and the assertion was falsely made as a pretext to justify a warrantless search.

To hold that the warrantless search of a vehicle based on the alleged smell of marijuana emanating from that vehicle is lawful even in the absence of any corroborating evidence revealed by the search would be to set a dangerous precedent endangering the principles for which the Fourth Amendment stands - "The security of one's privacy against arbitrary intrusion by the police which is at the core of the Fourth Amendment - is basic to a free society" Wolf 338 U.S. 25 at 27.

This court is not alone in its concern that the Fourth Amendment would be endangered if no corroboration were required to justify a warrantless search based solely on the alleged smell of marijuana. In United States v. Nielsen 9 f.3d 1487 (10th Cir. 1993), the Circuit Court invalidated the search and seizure of evidence in the trunk of the appellant's car. In that case, a search of the passenger area of the car based solely on the trooper's alleged smell of burnt marijuana emanating from that area revealed no marijuana to corroborate the Trooper's assertion. Nonetheless, the Trooper searched the trunk of the appellant's car against his will and discovered cocaine. The court reasoned that although the smell of burnt marijuana might

lead to a belief that the passenger compartment contained marijuana, a search of that area had not revealed any marijuana and that under the circumstances there was no fair probability that the trunk contained marijuana. Id at 1491.

In it's discussion of whether the alleged smell of marijuana is sufficient to support probable cause to conduct a warrantless search of a vehicle, the court noted:

We have made unqualified statements that the smell of marijuana is sufficient to establish probable cause to search. In all of the cases in our circuit however, the search itself established the validity of the smell. In all of the searches pursuant to the smell, marijuana was found in the area it would be expected to be found. The case before us is the first in which there was no corroboration of the smell. If this were a case of an alert by a trained drug sniffing dog with a good record, we would not require corroboration to establish probable cause, The dog would have no reason to make a false alert. But for a human sniffer, an officer with an incentive to find illegal activities and to justify his actions when he had searched without consent, we believe constitutional rights are endangered when limitations are not imposed.

Id.

To hold that Swain's alleged smell of burnt marijuana provided probable cause to search the vehicle even though the search revealed no corroborating evidence would jeopardize the constitutional protections that the court expressed concern about in Nielsen and "would open the door to snooping and rummaging through personal effects. Even a most acute sense of smell might mislead officers into fruitless invasions of privacy where no contraband is found." People v. Marshall, 442 P.2d 665, 671 (Cal. 1968).



Most importantly however, to hold that Swain's warrantless search based on the alleged smell of marijuana was lawful in the absence of any corroborating evidence of marijuana revealed by the search would be to encourage arbitrary, warrantless intrusions into the privacy of citizens by the police. Because Swain's warrantless search of appellant's vehicle based on the alleged odor of burnt marijuana revealed no evidence to corroborate Swain's assertion, the search was conducted without probable cause in violation of the Fourth Amendment and the evidence should have been suppressed by the trial court.

The trial court erroneously sustained the search under the inevitable discovery doctrine on the theory that the car would have been impounded and the evidence revealed during an inventory search. Pursuant to Utah Code Ann. 41-1a-1101, vehicles operated with improper registration may be impounded. In the instant case however, the trial record reflects no testimony by Trooper Swain that the vehicle was improperly registered. Swain testified that he stopped the appellant because no license plate was displayed on the front of his car (T. 10). Swain then testified that he asked to see the appellant's drivers license and registration (T. 12). The testimony regarding Swain's verification of the vehicles registration is as follows:

Q: Okay. What did you do next?

A: Well, I got his drivers license and registration and I asked Mr. Maycock to exit the vehicle.

Q: Did you look at the registration at that time?

A: I don't remember.

Q: Did you have a chance to look at it later on?

A: I'm sure I did.  
Q: Who was the vehicle registered to?  
A: To Mr. Jarvis Maycock

(P.H. at 6)2

The testimony of trooper Swain does not indicate that there was any defect in the vehicle's registration. Indeed, it indicates that the vehicle was validly registered to the appellant. Utah Code Ann. 41-1a-404 requires that vehicles must display license plates in the front and back of the vehicle. The statute does not state that a vehicle may be impounded if a license plate is missing. Neither does Utah Code Ann. 41-1a-1101 indicate that a missing license plate is a defect in registration of a vehicle. Moreover, the trial record reflects no testimony by trooper Swain that a missing front license plate provided any basis to impound the vehicle.

While a front license plate on the appellant's vehicle was not displayed, Swain's testimony indicates that the vehicle was properly registered to the appellant and a missing license plate should be construed merely as a defect in display rather than a defect in the vehicle's registration allowing impoundment of the vehicle.

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2 "(P.H. )" indicates preliminary hearing transcript.

Finally, the trial record reflects no testimony by Trooper Swain regarding whether he would have impounded the car, nor regarding any procedure or policy that would have governed an impoundment and inventory search.

Because there is no evidentiary basis to support the conclusions of the trial court, and because no inventory of appellant's vehicle would have occurred but for the illegal search, the evidence cannot be admissible under the inevitable discovery doctrine. See generally Nix v. Williams, 467 U.S. 431 (1984) (discussing inevitable discovery doctrine).

In United States v. Ibarra, 955 F.2d 1405, 1408-1409 (10th Cir. 1992), the Court of Appeals for the 10th Circuit ruled that evidence seized during an invalid impound search was not admissible under the inevitable discovery doctrine because but for the unlawful impound, no inventory search would have occurred.

The instant case presents a situation which is substantially similar and equally as problematic. As discussed above, the warrantless search of appellant's vehicle violated the Fourth Amendment and the evidence it revealed must be suppressed. It is also clear that no impound or inventory search of appellant's vehicle would have been conducted but for the illegal search. It follows that any inventory search of the vehicle would be tainted by the Fourth Amendment violation and the inevitable discovery doctrine cannot operate to remove the taint.

In order to be justified, an inventory search must comply with standard police procedures and not exceed the bounds of a normal inventory search. Colorado v. Bertine, 479 U.S. 367; United States v. Lugo, 978 F.2d 631, 636-637 (10th Cir. 1992); State v. Shamblin, 763 P.2d 425 (Utah App. 1988). No testimony has been offered to show what procedure is followed by the Utah Highway Patrol with respect to inventory searches or even to establish that a set of procedures exists. Moreover, no evidence has been offered that the Utah Highway patrol follows a procedure of taking an inventory of the pockets of an article of clothing found in a search as opposed to simply recording an inventory of the article of clothing itself.

Because the state has failed to prove that an inventory search would have revealed the evidence, it cannot rely on the inevitable discovery doctrine to allow admission of the evidence. See State v. Hygh, 711 P.2d 264, 269 (Utah 1995) (requiring government to show "established reasonable procedure for safeguarding impounded vehicles and their contents and that the challenged police activity was essentially in conformance with that procedure" in order to justify search as inventory search under South Dakota v. Opperman, 428 U.S. 364 (1976)).

## POINT II

THE SEARCH WAS IMPROPER BECAUSE NO EXIGENT CIRCUMSTANCES EXISTED TO JUSTIFY A WARRANTLESS SEARCH.

**A. Standard of review**

In reviewing a trial court's ruling on a motion to suppress, this court accords no deference to the trial courts legal conclusions and reviews them for correctness. State v. Beavers, 859 P.2d 9, 12 (Utah App. 1993). However, this court will disturb the trial court's factual findings only if clearly erroneous. Id.

**B. Lack of exigent circumstances needed to conduct warrantless search requires reversal**

Assuming arguendo that the search of appellant's vehicle was supported by probable cause, the search was still invalid because no exigent circumstances existed to justify the search. Therefore, any evidence obtained must be suppressed. The Supreme Court of Utah has interpreted Article 1, Section 14 of the Utah Constitution as providing Utah citizens with more protection against warrantless search and seizure than the Fourth Amendment of the United States Constitution. See State v. Larocco, 794 P.2d 460, 470-471 (Utah 1990) (requiring both probable cause and exigent circumstances to conduct a warrantless search of a vehicle. Search of automobile parked in front of home was invalidated because no exigent circumstances existed to justify warrantless search). In basing it's decision on the

state Constitution, the court reasoned:

..the high degree of government regulation does not support the excessive diminution of Fourth Amendment protection of the automobile which accompanies application of the automobile exception.

Id. at 469.

In determining that a warrantless search was not justified, the court relied on the ease with which a telephonic warrant may be obtained in Utah:

Recognizing the delay that is often incurred in procuring a warrant, Utah has adopted a procedure whereby warrants may be issued over the telephone. Section 77-23-4(2)3 of the Utah code allows for the issuance of a search warrant based on the sworn telephonic statement of the officer seeking the warrant, provided that the statement is properly recorded and transcribed.

Id. at 470.

The reasoning of the court in Larocco is no less persuasive in the instant case. Moreover, it seems clear that the Utah legislature provided a mechanism for obtaining telephonic search warrants in order to discourage warrantless searches by making it easier for police to obtain search warrants in situations such as

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3 Utah Code Ann. 77-23-4(2)3 has been renumbered to Utah Code Ann. 77-23-204.

roadside vehicle stops where warrants were previously difficult to obtain.

In the instant case, Trooper Swain testified that his radio did not have the capability of being patched through to court officers or judges who might have granted a search warrant (T. 16). While this assertion is questionable at best, it seems clear that Swain could have called his dispatch and had a sworn statement recorded or transcribed by someone of authority there who could then contact a judge or court officer and obtain a search warrant. See Utah Code Ann. 77-23-204 (The sworn oral testimony may be communicated to the magistrate by telephone or other appropriate means...). In the alternative, Swain could have radioed for another Highway Patrol officer to secure appellant's vehicle while Swain drove to a phone and obtained a warrant telephonically.

As this court noted in a recent case:

..the need for an immediate search must be apparent to the police, and so strong as to outweigh the important protection of individual rights provided by the warrant requirement.

State v. Beavers, 859 P.2d 9, 18 (Utah App. 1993).

This court has also stated:

We must first clarify that the plain view doctrine and its corollary "plain smell" theory do not in and of themselves provide an exception to the requirement of obtaining a valid search warrant.

State v. South, 885 P.2d 795 (Utah App. 1994).

The instant case does not present a situation in which exigent circumstances justify a warrantless search of appellant's vehicle. Trooper Swain had the ability to obtain a search warrant telephonically with relative ease and simply chose not to do so. See State v. Palmer, 676 P.2d 393 (Utah Ct. App. 1990) (warrantless search of defendant's body by X-ray because police believed he had swallowed a diamond ring was held invalid where officers could have obtained a telephonic search warrant with relative ease and failed to do so).

Based on the foregoing, evidence seized from Maycock's vehicle should have been suppressed by the trial court.

#### **CONCLUSION AND PRECISE RELIEF SOUGHT**

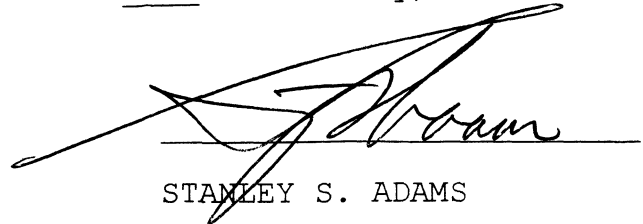
The trial court erred in holding that the warrantless search of Maycock's vehicle, which was conducted without probable cause or justified by exigent circumstances, did not violate the Article I, section 14 of the Utah Constitution and the Fourth Amendment of the United States Constitution. As such, the trial court erroneously denied Maycock's motion to suppress the evidence and his conviction should therefore be reversed.

#### **REQUEST FOR ORAL ARGUMENT**



Oral argument is desired in this case as the issues presented are novel, and oral argument will aid the Court in disposing of them.

RESPECTFULLY SUBMITTED this 22 of January, 1996.

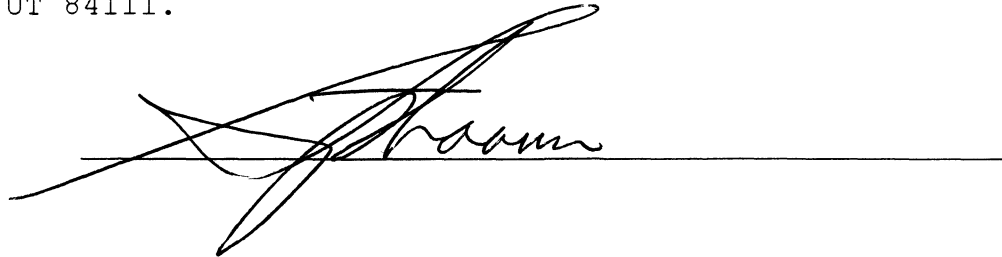
A handwritten signature in cursive script, appearing to read 'S. Adams', written over a horizontal line.


STANLEY S. ADAMS

Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby declare that I mailed a true and correct copy of the foregoing Brief For The Appellant postage prepaid, this 22 day of January, 1996, to Barney Madsen, Assistant Attorney General, at 160 East 300 South, Suite 600, P.O. Box# 140854, Salt Lake City, UT 84111.

A handwritten signature in cursive script, appearing to read 'S. Adams', written over a horizontal line.

*No addendum is necessary to  
this Brief -*  
A handwritten signature in cursive script, appearing to read 'S. Adams', written over a horizontal line.