

2006

Utah v. Rodriquez : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

v.

DAVID MARK RODRIGUEZ

Defendant/Appellant.

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Appeal No. 20061016-CA

BRIEF OF APPELLANT

THIS IS A DIRECT APPEAL FROM A JUDGMENT AND ORDER OF PROBATION
ENTERED IN THE SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR SAN JUAN COUNTY, STATE OF UTAH,
THE HONORABLE LYLE R. ANDERSON, JUDGE, PRESIDING.

-----oOo-----

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FILED
UTAH APPELLATE COURTS

MAR 20 2007

ORAL ARGUMENT/PUBLISHED OPINION REQUESTED

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IN THE UTAH COURT OF APPEALS

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DAVID MARK RODRIGUEZ,

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Appeal No. 20061016-CA

BRIEF OF APPELLANT

JURISDICTION

UTAH CODE ANN. §77-18a-1(1)(a) (2003) and UTAH RULES OF APPELLATE PROCEDURE 3(a) provides this Court's jurisdiction over this appeal from the *Judgment and Order of Probation* entered on October 6, 2006 (the "**Judgment**"), by the Seventh Judicial District Court in and for San Juan County, State of Utah, in this case involving one (1) third-degree felony and two (2) class B misdemeanor convictions from a court of record.

CONSTITUTIONAL AND STATUTORY PROVISIONS, STATEMENT OF

ISSUES PRESENTED ON APPEAL, AND STANDARD OF REVIEW

ISSUE I: *Did the trial court err in denying Rodriguez's Motion to Suppress because the police officer had no reasonable suspicion to stop the vehicle?*

STANDARD OF REVIEW: This Court reviews the "factual findings underlying

a trial court's decision to grant or deny a motion to suppress evidence' under a "clearly-erroneous standard," and this Court reviews the trial court's legal conclusions for correctness. State v. Curry, 2006 UT App 390, ¶5, 147 P.3d 483, *citin*g State v. Peterson, 2003 UT App 300, ¶ 7, 77 P.3d 646 (quotations and citation omitted), *aff'd*, 2005 UT 17, 110 P.3d 699. However, this Court "afford[s] no deference to the trial court's application of the law to the underlying factual findings in search and seizure cases." *Id.*, *see also* State v. Brake, 2004 UT 95, ¶ 15, 103 P.3d 699.

DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS

A. UNITED STATES CONST. AMEND. IV

B. UTAH CONST. ART. I § 14

STATEMENT OF THE CASE

On June 29, 2006, David Rodriguez ("Rodriguez") was charged by *Information* in the Seventh Judicial District Court in and for San Juan County with Possession or Use of a Controlled Substance, a third-degree felony; Possession or Use of a Controlled Substance, a class B misdemeanor; and Possession of Drug Paraphernalia, a class B misdemeanor. R0002. A preliminary hearing was held on July 31, 2006, at which time Rodriguez was bound over on the charges and counsel herein informed the trial court he would be filing a suppression motion on Rodriguez's behalf. R0012.

On August 25, 2006, Rodriguez filed his *Motion to Suppress* (the "**Motion**"). R0015. On August 28, 2006, a hearing was held on Rodriguez's *Motion to Suppress* before the

Honorable Lyle R. Anderson. R0017 At the conclusion of the hearing, the trial court denied the Motion. *Id.*

On October 3, 2006, Rodriguez entered a conditional guilty or no contest plea to the above-stated charges. R0025. In the plea agreement Rodriguez reserved his right to appeal the denial of the Motion. *Id.* On October 6, 2006, the court entered its *Judgment and Order of Probation* (previously defined as the “**Judgment**”), sentencing Rodriguez to the Utah State Prison for a term not to exceed five (5) years and six (6) months in the San Juan County Jail on each of the misdemeanor charges, to be served concurrently, and to pay fines in the amounts of \$1,480, \$555, and \$370, plus a court security surcharge of \$25, plus interest. R0033. The trial court then stayed the prison and jail sentences and placed Rodriguez on probation for thirty-six (36) months. R0034.

On October 30, 2006, Rodriguez timely filed his *Notice of Appeal* from the Judgment. R0036. On November 16, 2006, Rodriguez filed his *Amended Notice of Appeal* R0039. On November 20, 2007, Rodriguez filed his *Docketing Statement*, challenging the denial of the Motion. On November 28, 2007, this Court filed its *Sua Sponte Motion for Summary Disposition* since the *Docketing Statement* failed to indicate whether Rodriguez’s plea was conditional or unconditional. After clarification that the plea was conditional and Rodriguez reserved his right to appeal the Motion, the matter proceeded to briefing on the issue challenged in the *Docketing Statement*.

STATEMENT OF FACTS

A. State's Witness Officer Jaren Adams' Testimony.

On June 25, 2006, Officer Jaren Adams ("Adams") of the San Juan County Sheriff's Office was traveling on SR-95 at approximately milepost 119 at the little junction off a side road coming out of the main road southwest of Blanding, Utah. Tr. at pp. 5-6. As Adams was driving down the highway, he drove past a dirt road and, with a sideways glance, noticed Rodriguez parked under a tree about 100 feet off the main road on the dirt road. Tr. at p. 6. Adams testified that, as he saw the vehicle, he slowed down and came back to check on the occupants. *Id.*

Adams testified that at the time he saw the vehicle he did not see anyone with the vehicle, so he turned around to see why it was parked there. Tr. at p. 10. Adams testified he was not concerned for the safety of the occupants because the vehicle was simply parked on the side of the dirt road. Tr. at p. 10-11. Adams testified that he was just curious. *Id.*

Adams testified that he pulled off the main highway onto the dirt road and saw the vehicle approaching, so he pulled over and waited for it to approach him. Tr. at p. 10. Adams testified that he recalled pulling off the highway onto the dirt road with his vehicle positioned so that it was straight down the side of the road and that he stopped as Rodriguez approached. Tr. at pp. 38-39. Adams testified he did not stop his vehicle twice, just the one time. Tr. at p. 39. Adams testified the road is dirt and gravel and wide enough for two (2) semis to pass each other. Tr. at p. 11.

Adams testified that the vehicle pulled up and stopped on the dirt road. Tr. at pp. 6, 12. Adams testified he did not turn on his overhead lights or flash his headlights to get Rodriguez to stop. Tr. at p. 11. Adams testified that he made eye contact with Rodriguez just like he does with everyone, but that he was not able to establish the eye contact with Rodriguez until he was beside his vehicle because of the glare off the windshield. Tr. at p. 13.

Adams testified that he may have put his hand out to wave at Rodriguez, but that he did not say "hey, stop or anything like" that. Tr. at pp. 6-7. Adams later testified that he waved at Rodriguez to see if he would stop, explaining that he waves at a lot of people and that some stop and some do not stop. Tr. at p. 14. Adams testified that when he waved at Rodriguez he was holding his hand up with his palm upward. Tr. at p. 15.

Adams testified that Rodriguez pulled up beside his vehicle, a fair distance away since Adams could open his door. Tr. at p. 7. Adams testified that he asked Rodriguez how he was doing and Rodriguez told him that he and his wife had just stopped to get a drink of water. *Id.* Adams testified that, for safety reasons and to be professional, he exited his vehicle to speak to Rodriguez. *Id.* He testified that he may have initiated the conversation, but that it seemed like it was a mutual thing. *Id.* Adams testified that he had his window down and he recalled Rodriguez had his window down when they began talking. Tr. at p. 39. Adams testified that it was during this conversation that he smelt the odor of burnt marijuana. Tr. at p. 8.

Adams testified that, once he smelt the burnt marijuana, he asked Rodriguez to step out of his vehicle and come and speak to him behind his police vehicle. *Id.* Adams testified he did not open Rodriguez's door, but may have had his hand on the door so it would not hit him when opened because he was stepped back from the vehicle. Tr. at p. 40. Adams testified that he was in his patrol vehicle and was wearing his uniform. Tr. at p. 8. Adams testified that he did nothing to stop Rodriguez's vehicle. *Id.* Adams also testified that he believed both vehicles had the driver's windows down when they pulled up along side each other, driver side to driver side. Tr. at pp. 8-9.

B. Defense Witness Frida Rahnenfuehrer's Testimony.

Frida Rahnenfuehrer ("**Rahnenfuehrer**"), who is married to Rodriguez, waived husband-wife privilege and chose to testify at the hearing on the Motion in this matter. Tr. at p. 16. Rahnenfuehrer testified that she and Rodriguez were heading to Torrey and pulled off the road in the shade for a drink and some snacks. Tr. at pp. 16-17. She testified they stopped at that location because there was a bit of shade there and they were facing the highway. Tr. at p. 17. She testified that they stopped and got some water from the cooler in the back seat, no one exited the vehicle, the windows were rolled up because the air conditioning was on and the vehicle was still running. *Id.* Rahnenfuehrer testified that, while she was retrieving the water, Rodriguez saw Adams approaching and decided they should head back towards the main highway. Tr. at pp. 17-19. Rahnenfuehrer testified that,

just before they got to the highway, Adams vehicle came onto the dirt road they were on and stopped abruptly in front of their vehicle, blocking them from leaving. *Id.*

Rahmenfuehrer testified that, as Adams drove onto the side road, he stoppec abruptly at an angle in front of them. Tr. at p. 19. She testified that they were pulling out when Adams came and angled in front of them, causing them to not be able to get by him. Tr. at p. 24. Rahmenfuehrer testified that, at this point, Rodriguez came to an abrupt stop to avoid hitting Adams' vehicle. Tr. at p. 19. She testified that, once both vehicles had stopped, Adams made eye contact with Rodriguez and then moved his vehicle so it angled a bit more towards the side. *Id.* Rahmenfuehrer testified that Rodriguez did not move his vehicle after he had stopped. Tr. at p. 20.

Rahmenfuehrer testified that, once both cars had stopped, they were a little kitty-corner to each other. *Id.* Rahmenfuehrer testified that, at this point in time, the driver's side windows were not aligned and the vehicles were not parallel, but that Adams vehicle was still a little bit forward compared to theirs. Tr. at p. 20. Rahmenfuehrer testified that, after the initial wave and stop when Adams had moved his vehicle, it was enough that they could have cleared it if they had wanted to leave and turn onto the highway. Tr. at pp. 21, 25. Rahmenfuehrer also testified that the only detainment at this point was Adams speaking to them. Tr. at p. 26.

Rahmenfuehrer further testified that she observed Adams make eye contact and wave at Rodriguez. Tr. at p. 22. Rahmenfuehrer testified that it was a very short wave, more like

a quick hand motion and that Adams did not have his lights on when he approached. Tr. at p. 23. She also testified that the driver's side window was up when Adams pulled up along side the vehicle and that Rodriguez rolled it down and told Adams they were all right. Tr. at p. 22. She testified that she saw Rodriguez speaking to Adams and that, ultimately, Adams did exit his vehicle. *Id.*

C. Rodriguez's Testimony.

Rodriguez testified that he and his wife had turned off the road onto a little dirt road to get a drink of water for the next leg of the journey heading to Torrey. Tr. at p. 31. Rodriguez testified that they turned off and turned around to face the highway and were stopped underneath a shaded spot to drink some water. *Id.* Rodriguez testified that it was shortly after this that he saw Adams drive by and hit his brakes, so he decided they should leave. *Id.*

Rodriguez testified that he estimated they were about 100-125 feet off the main highway at this point. Tr. at p. 32. Rodriguez testified that, at that point, he had not exited the vehicle and had not turned the vehicle off since they were only going to be there for a few minutes. *Id.* Rodriguez testified that, as he headed for the highway, he saw Adams come very quickly off the highway towards them and angle off the road cutting across the lanes in front of them. Tr. at p. 33.

Rodriguez testified that, when Adams stopped them, Adams' vehicle was blocking their lane of traffic. *Id.* Rodriguez testified that he would have hit Adam's vehicle had he

not stopped . Tr. at p. 34. When he stopped, Rodriguez testified that he kept his position in the vehicle heading straightforward, he did not veer off or go around. *Id.* Rodriguez testified that the stop was very quick and sudden because Adams came off the highway so fast. *Id.*

Rodriguez testified that he recognized the vehicle as a police vehicle because of the logo on the vehicle. Tr. at p. 34. Rodriguez testified that Adams was wearing his uniform and that he made eye contact with him and made a hand gesture, like a stopping movement. Tr. at p. 35. Rodriguez testified that the hand gesture and the angle of Adams' vehicle made him think he was being stopped by Adams. Tr. at p. 35. Rodriguez testified that he stayed in his vehicle and did not move after seeing Adam's hand gesture . *Id.* At this point, Rodriguez testified that Adams proceeded to move his vehicle alongside theirs, with minimal space between the vehicles. *Id.* Rodriguez testified that there was approximately three feet from the nose of his vehicle to the rear end of Adam's vehicle. Tr. at p. 36. Rodriguez testified that the driver's side windows of the vehicles were close to each other, but not completely lined up. Tr. at pp. 36-37. Rodriguez testified that he could have moved forward in his car to the highway at this point but he would have only had about three feet of space. *Id.*

Rodriguez testified that Adams kept staring at him as he pulled his vehicle alongside Rodriguez's vehicle. Tr. at p. 37. Rodriguez testified that he then rolled his window down about seven (7) inches and told Adams they were okay and had just stopped for water. *Id.*

At this point, Rodriguez testified that Adams just stared at him, exited his vehicle very quickly, grabbed hold of his door, opened it, and ordered him out of the vehicle. *Id.* He testified that Adams opened his door, leaving his left hand inside the open part of the window while opening the vehicle door. *Id.* Rodriguez testified that Adams told him to get out of the vehicle, so he placed it in gear, turned off the engine, and stepped out of the vehicle. Tr. at p. 38.

D. Oral Findings by the Trial Court.

On August 25, 2006, Rodriguez filed the Motion. R0015. On August 28, 2006, a hearing was held on the Motion before Honorable Lyle R. Anderson. R0017 At the conclusion of the hearing, the trial court denied the Motion, finding that it was not convinced that the encounter was a level-2 encounter. Tr. at p. 48. Judge Anderson's oral findings indicate that he found the testimony of Adams more credible but that, even had he believed Rodriguez and his spouse, it would not have risen to a level-2 encounter. *Id.* Judge Anderson articulated that, if an individual did not feel free to leave, they would have asked what the problem was rather than just indicating to the officer that they just stopped to get some water. *Id.* at pp. 48-49.

Judge Anderson found that Adams may have pulled in front of Rodriguez's lane, but concluded that there could not possibly be "a rule that says every time a police officer pulls across in front of another vehicle he's made a level-2 stop." Tr. at p. 49. Judge Anderson stated that he did not believe that Adams "stopped and blocked their travel for even a fraction

of a second.” *Id.* Judge Anderson found that Adams “crossed at most in front of them and then pulled side by side with them.” *Id.*

As to the wave Adams made in Rodriguez’s direction, Judge Anderson determined that it was similar to when an officer knocks on a door to see if someone is suspected of growing marijuana. Tr. at p. 49. Judge Anderson indicated that an officer is allowed to ask. *Id.* Judge Anderson found that, “[i]f every other citizen in the world can come and knock on my door to see if I’m growing marijuana in the basement the police can do it too.” *Id.* In applying his analogy to the instant matter, Judge Anderson stated, “[a]nd if every other citizen in the world can pull up along of my car and ask me if I’m okay, the police can do it too. And I think that’s what happened here.” *Id.* The trial court then denied the Motion after entering these oral findings. *Id.*

Counsel herein requested a specific finding as to the wave and Judge Anderson stated that he “didn’t see shoving it out as in stop.” Tr. at p. 49. However, Judge Anderson stated that he also did not “see him saying hello, waving it back and forth either.” Tr. at p. 50. Judge Anderson indicated that all he had was Adams raising his hand. *Id.*

SUMMARY OF THE ARGUMENT

U.S. CONST., AMEND IV guarantees individuals the right to be free from unreasonable searches and seizures. The United States Supreme Court has held that stopping a vehicle and detaining its occupants constitutes a seizure, stating as follows:

“[S]topping an automobile and detaining its occupants constitute a ‘seizure’ within the meaning of [the Fourth and Fourteenth] Amendments, even though

the purpose of the stop is limited and the resulting detention quite brief.” Delaware v. Prouse, 440 U.S. 648, 653, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660 (1979); *accord* State v. Strickling, 844 P.2d 979, 982 (Utah App.1992); *see* Terry v. Ohio, 392 U.S. 1, 16, 88 S.Ct. 1868, 1877, 20 L.Ed.2d 889 (1968) (defining Fourth Amendment seizure as “whenever a police officer accosts an individual and restrains his freedom to walk away”). State v. Case, 884 P.2d 1274, 1276, (Utah App.,1994).

A stop is justified if there is a reasonable suspicion that the defendant is involved in criminal activity.” State v. Case, 884 P.2d 1274, 1276, (Utah App.,1994), *citing* UTAH CODE ANN. § 77-7-15 (1990); *see also*, State v. Carpena, 714 P.2d 674, 675 (Utah 1986) (per curiam) (stating police must base reasonable suspicion on objective facts indicating defendant's criminal activity). “While the required level of suspicion is lower than the standard required for probable cause to arrest, the same totality of facts and circumstances approach is used to determine if there are sufficient ‘specific and articulable facts’ to support reasonable suspicion.” Case, *supra*, *citing* Terry, 392 U.S. at 21, 88 S.Ct. at 1880; *see* United States v. Sokolow, 490 U.S. 1, 7-8, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989); *accord* State v. Bello, 871 P.2d 584, 587 (Utah App.1994); Strickling, 844 P.2d at 983.

In the instant matter, a level-2 seizure occurred in violation of U.S. CONST , AMEND

IV. Adams pulled his vehicle in front of Rodriguez so as to impede his ability to leave, raised his hand with the intent to stop Rodriguez, exited his vehicle, and approached Rodriguez’s vehicle to speak with him. The trial court erred in determining that Adams had not effectuated a stop of Rodriguez’s vehicle. Adams himself testified that he lacked the required reasonable suspicion to perform such a stop. Because Adams lacked this suspicion, Rodriguez’s Fourth Amendment rights were violated and the trial court erred in denying the Motion.

ARGUMENT

THE TRIAL COURT ERRED IN DENYING RODRIGUEZ'S MOTION TO SUPPRESS BECAUSE POLICE HAD NO REASONABLE SUSPICION TO STOP RODRIGUEZ

A. The Stop of the Vehicle Constituted a Seizure.

U.S. CONST., AMEND IV guarantees persons the right to be free from unreasonable searches and seizures. The United States Supreme Court has held that stopping a vehicle and detaining its occupants constitutes a seizure, stating as follows:

“[S]topping an automobile and detaining its occupants constitute a ‘seizure’ within the meaning of [the Fourth and Fourteenth] Amendments, even though the purpose of the stop is limited and the resulting detention quite brief.” Delaware v. Prouse, 440 U.S. 648, 653, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660 (1979); *accord* State v. Strickling, 844 P.2d 979, 982 (Utah App.1992); *see* Terry v. Ohio, 392 U.S. 1, 16, 88 S.Ct. 1868, 1877, 20 L.Ed.2d 889 (1968) (defining Fourth Amendment seizure as “whenever a police officer accosts an individual and restrains his freedom to walk away”).

State v. Case, 884 P.2d 1274, 1276, (Utah App.,1994). “[A] seizure under the fourth amendment occurs when a reasonable person, in view of all the circumstances, would believe he or she is not free to leave.” State v. Jackson, 805 P.2d 765, 767, (Utah App. 1990) *citing* United States v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980). Further in Mendenhall, the United States Supreme Court stated as follows:

We adhere to the view that a person is “seized” only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards. The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but “to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.” United States v. Martinez-

Fuerte, 428 U.S. 543, 554, 96 S.Ct. 3074, 3081, 49 L.Ed.2d 1116. As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification.

Mendenhall, 446 U.S. at 554, 100 S.Ct. at 1877. This Court recently discussed when a seizure is considered reasonable under the Fourth Amendment, when it stated as follows:

To determine whether a search or a seizure is constitutionally reasonable, we must first determine whether the officer's action was 'justified at its inception.' ' ' State v. Chapman, 921 P.2d 446, 450 (Utah 1996) (quoting State v. Lopez, 873 P.2d 1127, 1132 (Utah 1994) (additional citation omitted)). 'If so, we then consider whether the resulting detention was ' "reasonably related in scope to the circumstances that justified the interference in the first place." ' ' Id. (citations omitted). "[A] traffic stop is justified at its inception when the stop is "incident to a traffic violation committed in [an officer's] presence." ' ' State v. Hansen, 2002 UT 125, ¶ 30, 63 P.3d 650 (alterations in original) (citations omitted).

State v. Despain, 2003 UT App 266 ¶7, 74 P.3d 1176. In State v. Tehero, this Court held as follows:

Under our case law, there are three permissible levels of police stops:

- (1) An officer may approach a citizen at any time 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;
- (3) an officer may arrest a suspect if the officer has probable cause to believe an offense had been committed or is being committed."

State v. Markland, 2005 UT 26, ¶ 10 n. 1, 112 P.3d 507 (omission in original) (quotations and citation omitted). A level one encounter is a voluntary encounter during which a citizen may choose to answer a police officer's questions but is free to leave at any time during the questioning. See Salt Lake City v. Ray, 2000 UT App 55, ¶ 11, 998 P.2d 274. " As long as the person

remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification.' " *Id.* (quoting State v. Jackson, 805 P.2d 765, 767 (Utah Ct.App.1990)) (additional quotations and citation omitted). In contrast, a person is seized in a level two stop, and thus afforded the protections of the Fourth Amendment, when the officer by means of physical force or show of authority has in some way restrained the liberty of [the] person." (quotations and citations omitted). A level one encounter becomes a level two seizure when "a reasonable person, in view of all the circumstances, would believe he or she is not free to leave. This is true even if the purpose of the stop is limited and the resulting detention brief." *Id.* (quotations and citations omitted). Circumstances demonstrating that a level two stop is underway include the presence of more than one officer, the display of an officer's weapon, physical touching of the person, use of commanding language or tone of voice, and retaining a person's identification or other documentation. *See id.*

Ibid., 2006 UT App 419 ¶6, 147 P.3d 506. This Court has also indicated as follows:

A level two stop occurs when, in an encounter between a citizen and law enforcement officers, " 'a reasonable person, in view of all the circumstances, would believe he or she is not free to leave.' " State v. Ray, 2000 UT App 55, ¶11, 998 P.2d 274 (quoting State v. Jackson, 805 P.2d 765, 767 (Utah Ct.App.1990)). Such a detention is constitutionally permissible when the officer has reasonable suspicion to believe a person "has committed or is in the act of committing or is attempting to commit a public offense." Utah Code Ann. § 77-7-15 (1999); *see also* United States v. Arvizu, 534 U.S. 266, ---, 122 S.Ct. 744, 750, 151 L.Ed.2d 740 (2002).

State v. Fridleifson, 2002 UT App 322, ¶8, 57 P.3d 1098.

In the instant matter, Rodriguez and his wife were headed to Torrey and decided they needed to stop to get a drink of water and some snacks. They pulled off the main highway onto a dirt road to a shady spot just long enough to get a drink and be on their way. Adams was driving down the highway and passed the dirt road. Adams saw the Rodriguez vehicle

on the dirt road and, although he does not think there is a safety concern, he is curious and decides to turn his vehicle around to investigate.

Rodriguez saw Adams hit his brakes and turn around, so he decided it was time to leave. Before Rodriguez reached the highway, however, Adams appeared on the dirt road, angled his vehicle so Rodriguez had to stop, and waves at him to stop. Adams testified that when he waved at Rodriguez that he was holding his hand up with his palm upward, hoping that he would stop. Tr. at p. 15. This would appear to be the sign to stop, not merely a friendly wave "hello," particularly given Adams testimony that he intended to stop Rodriguez. Rodriguez testified that he felt like he had been stopped and was not free to leave based on the angle of Adams police vehicle and the wave to stop.

Rodriguez and Rahnenfuehrer both testified that Adams was dressed in uniform and in his police vehicle. They both testified that, when Adams initially pulled off the highway, his vehicle was angled to block them in. After they stopped, Adams moved his vehicle so that he could speak to Rodriguez through the driver's side window, then he exited his vehicle to speak to them. Rodriguez and Rahnenfuehrer also testified that, after Adams exited his vehicle to speak to them, they would have been able to get past his car to the highway but that they did not feel they could do so because he was actively engaging them in conversation. Additionally, as he spoke to Rodriguez, Adams testified that he may have had his hand on the car door, so that he would not get hit if Rodriguez opened it.

Based upon the totality of the circumstances, Rodriguez did not believe he was free to leave once Adams had executed a stop on his vehicle. Mendenhall, 446 U.S. at 554, 100 S.Ct. at 1877. Rodriguez did not feel like he was free to disregard Adams and continue on this way. Although Adams did not stop Rodriguez by using the lights on his police vehicle, he made a stop gesture with his hand, with the intent and expectation that it would cause Rodriguez to stop, and Rodriguez likewise responded to the order to stop. Putting his hand out with the palm up was not just a friendly wave “hello,” as the trial court indicated in its oral findings. Tr. at p. 50. Any reasonable person would have construed it to be an order to stop, particularly when coupled with the fact that Adams made eye contact with Rodriguez and intended the stop.

Adams displayed authority as well, which contributed to Rodriguez’s feeling as though he was detained. Adams blocked Rodriguez in with his police vehicle when he entered the dirt road, was wearing his uniform, exited his vehicle to speak to Rodriguez, and placed his hand on the door of the vehicle while speaking to Rodriguez. Further, Rodriguez testified that he did not feel like he was free to go, but that he had to stop. Rahmenfuehrer testified that she also felt like they could not just leave, particularly since Adams was engaging them in questioning.

In looking at the totality of the circumstances, a reasonable person in the same situation would feel as though they had been stopped by Adams and were not free to leave. Adams was wearing his uniform and in a police vehicle when he blocked Rodriguez’s

vehicle from leaving, made eye contact with Rodriguez, and put out his hand in the gesture of a stopping motion with the hope that Rodriguez would stop. Based upon these circumstances, any reasonable person would not feel free to leave. Coupled with the fact that Adams also exited his vehicle to speak with Rodriguez and had his hand on Rodriguez's vehicle door while he was speaking to him, and it is clear that any reasonable person would feel detained. Rodriguez testified that he did not feel like he could just leave and that he had to remain and speak to Adams.

In this matter, based upon the totality of the circumstances, it is clear that Adams executed a level two stop on Rodriguez's vehicle. Because Rodriguez did not feel like he was free to leave and no reasonable person would have felt like he was free to leave, the stop in this matter rose to a level two encounter. The encounter constituted a seizure under the Fourth Amendment and the trial court erred in finding otherwise.

B. Adams Did Not Possess the Required Articulate Reasonable Suspicion to Stop the Vehicle

In State v. Fridleifson, this Court stated as follows with respect to the requisite reasonable suspicion necessary in a level two stop:

[A] level two stop ... must be supported by reasonable suspicion [or it] violates the Fourth Amendment to the United States Constitution. While the required level of suspicion is lower than the standard required for probable cause to arrest, the same totality of facts and circumstances approach is used to determine if there are sufficient specific and articulable facts to support reasonable suspicion. In determining whether this objective standard has been met, the focus necessarily centers upon the facts known to the officer immediately before the stop. Ray, 2000 UT App 55 at ¶ 18, 998 P.2d 274 (citations and quotations omitted) (alterations in original).

Ibid., 2002 UT App 322, ¶8, 57 P.3d 1098. More recently, this Court undertook a further analysis of this issue, stating as follows:

A stop is justified if there is a reasonable suspicion that the defendant is involved in criminal activity.” State v. Case, 884 P.2d 1274, 1276, (Utah App.,1994), *citing* UTAH CODE ANN. § 77-7-15 (1990); *see also*, State v. Carpena, 714 P.2d 674, 675 (Utah 1986) (per curiam) (stating police must base reasonable suspicion on objective facts indicating defendant's criminal activity). “While the required level of suspicion is lower than the standard required for probable cause to arrest, the same totality of facts and circumstances approach is used to determine if there are sufficient ‘specific and articulable facts’ to support reasonable suspicion.” Case, *supra*, *citing* Terry, 392 U.S. at 21, 88 S.Ct. at 1880; *see* United States v. Sokolow, 490 U.S. 1, 7-8, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989); *accord* State v. Bello, 871 P.2d 584, 587 (Utah App.1994); Strickling, 844 P.2d at 983.

In general, “[t]he specific and articulable facts required to support reasonable suspicion are ... based on an investigating officer's own observations and inferences.” at 1276-77. Reasonable suspicion is ‘a particularized and objective basis’ for suspecting the person stopped of criminal activity,” United States v. Tibbetts, 396 F.3d 1132, 1138,(10th Cir. 2005) and whether or not a detention is supported by reasonable suspicion is determined by examining the totality of the circumstances, not through an examination of each individual fact. *See* State v. Brake, 2004 UT 95, ¶ 38, 103 P.3d 699 (concluding that the totality of the circumstances did not support a police officer's warrantless search of the interior of an automobile for weapons). In the case of a traffic stop, such an action is reasonable and the initial seizure will be found to be sound if the defendant commits a traffic offense in the officers presence, *see* State v. Hansen, 2002 UT 125 at ¶ 30, 63 P.3d 650, or if the officer has an articulable reasonable suspicion’ that [the defendant has] violated any one of the multitude of applicable traffic and equipment regulations of the jurisdiction.”Tibbetts, 396 F.3d at 1137 (citation omitted).

State v. Yazzie 2005 UT App 261, ¶7, (Utah App.,2005). In Latta v. Keryte, our 10th Circuit Court of Appeals similarly analyzed an investigative detention and its compliance with the Fourth Amendment by determining as follows:

[w]e must determine whether the officer has reasonable suspicion to detain the individual. [Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 1879-80, 20 L.Ed.2d 889 (1968)]. Reasonable suspicion “requires considerably less than proof of wrongdoing by a preponderance of the evidence, but something more than an inchoate and unparticularized suspicion or hunch.” United States v. Melendez-Garcia 28 F.3d 1046, 1051 (10th Cir.1994) (internal quotations omitted). The officer must be “able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 839 (1968).

Ibid., 118 F.3d 693, 699, (C.A.10 (N.M.) 1997).

In the instant matter, Adams did not have the reasonable articulable suspicion necessary to stop Rodriguez. Adams himself testified that when he passed the dirt road and noticed Rodriguez’s vehicle, he did not think that there was any safety concern but was merely curious as to what the vehicle was doing there. Adams did not suspect that Rodriguez had committed or was about to commit any kind of crime, nor had he seen him commit any kind of offense. There was no evidence that the means by which Rodriguez’s vehicle was parked on the side of the dirt road constituted any sort of “public offense.” Rodriguez was simply stopping on the road to get a drink and snacks before continuing on his journey. Adams admitted “curiosity” cannot rise to the necessary reasonable articulable suspicion to stop Rodriguez. Adams had not seen any criminal activity be committed, nor had Rodriguez done anything at the time of the stop for Adams to construe that criminal activity was about to be committed.

The trial court additionally erred in finding that the burden was on Rodriguez to “show first of all that there was some police action that . . . affected a constitutional right.”

Tr. at p. 48. This Court has clearly indicated, however, that “[t]he State bears the initial burden for establishing the articulable factual basis for the reasonable suspicion necessary to support an investigatory stop.” Yazzie, at ¶6 citing State v. Case, 884 P.2d 1274, 1276 (Utah Ct.App.1994). In Yazzie, this Court ruled that the State had not meet this burden and that the officers decision to detain Yazzie was nothing more than a hunch or bet and therefore, the trial court erred in denying Yazzie’s suppression motion.

The same is true in this matter. The State failed to meet its burden by establishing an articulable factual basis for the reasonable suspicion necessary to support an investigatory stop. As mentioned *supra*, Adams was simply “curious” and had no safety concerns and had witnessed no public offense. Adams lacked the requisite reasonable articulable suspicion to execute the stop of Rodriguez’s vehicle.

As argued *supra*, Rodriguez did not feel free to leave the scene once Adams pulled his vehicle in front of Rodriguez’s and gestured for him to stop. Mendenhall, 446 U.S. at 554, 100 S.Ct. at 1877. This rises to a level two encounter. Fridleifson, at ¶8. However, in order for an officer to conduct a constitutionally sound level two encounter, he must have the required reasonable articulable suspicion that a crime has been or is about to be committed. *Id.* As argued more particularly above, such reasonable articulable suspicion did not exist in the instant matter. The State bore the burden of establishing such and failed to do so. Thus,

the trial court erred in finding that the encounter did not rise to a level two encounter, that Adams did not effectuate a stop of Rodriguez's vehicle, and that it was Rodriguez's burden.

Without the requisite reasonable suspicion, Adams violated Rodriguez Fourth Amendment rights by subjecting him to an unreasonable seizure. U.S. CONST., AMEND IV Adams had no information or knowledge of any kind of criminal act that had been committed or was going to be committed when he motioned to stop Rodriguez. Therefore, based on the fact that no articulable reasonable suspicion existed to stop Rodriguez, the trial court erred in denying the Motion.

CONCLUSION

Wherefore, based upon the foregoing, Rodriguez respectfully requests that this Court reverse the Judgment and the denial of the Motion in this matter and take any such further action as this Court deems necessary.

DATED this _____ day of March, 2007.

William L. Schultz
Attorney for David Mark Rodriguez

the trial court erred in finding that the encounter did not rise to a level two encounter, that Adams did not effectuate a stop of Rodriguez's vehicle, and that it was Rodriguez's burden.

Without the requisite reasonable suspicion, Adams violated Rodriguez Fourth Amendment rights by subjecting him to an unreasonable seizure. U.S. CONST., AMEND IV Adams had no information or knowledge of any kind of criminal act that had been committed or was going to be committed when he motioned to stop Rodriguez. Therefore, based on the fact that no articulable reasonable suspicion existed to stop Rodriguez, the trial court erred in denying the Motion.

CONCLUSION

Wherefore, based upon the foregoing, Rodriguez respectfully requests that this Court reverse the Judgment and the denial of the Motion in this matter and take any such further action as this Court deems necessary.

DATED this 20 day of March, 2007.

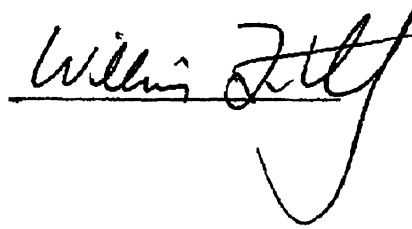


William L. Schultz
Attorney for David Mark Rodriguez

CERTIFICATE OF MAILING

I hereby certify that on this 20th day of March, 2007, I mailed, first class postage prepaid, true and correct copies of the foregoing Appellant's Brief to:

Assistant Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854

A handwritten signature in black ink, appearing to read "William F. Hilly", written over a horizontal line.

CERTIFICATE OF MAILING

I hereby certify that on this _____ day of March, 2007, I mailed, first class postage prepaid, true and correct copies of the foregoing Appellant's Brief to:

Assistant Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854

Addendum ~A~

Judgment and Order of Probation

dated October 6, 2006

FILED OCT 06 2006

CLERK OF THE COURT
BY UK
DEPUTY

IN THE SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR SAN JUAN COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

DAVID MARK RODRIGUEZ,

Defendant.

**JUDGMENT AND ORDER
OF PROBATION**

COURT CASE NO: 0617-79

OCTOBER 2, 2006

HONORABLE LYLE R. ANDERSON

Plaintiff Attorney: Craig C. Halls

Defendant Attorney: William L. Schultz

DEFENDANT, DAVID MARK RODRIGUEZ, having heretofore entered a plea of guilty to the offenses of:

COUNT 1: POSSESSION OR USE OF A CONTROLLED SUBSTANCE, a Third Degree Felony; COUNT 2: POSSESSION OR USE OF A CONTROLLED SUBSTANCE, a Class B Misdemeanor and COUNT 3: POSSESSION OF DRUG PARAPHERNALIA, a Class B Misdemeanor, and no legal reason having been shown why judgment of this Court should not be pronounced, it is the judgment of this Court as follows:

That the defendant be imprisoned in the Utah State Prison for a term NOT TO EXCEED FIVE (5) YEARS on Count 1 and in the San Juan County Jail for SIX (6) MONTHS each on

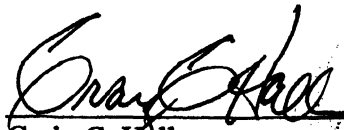
Counts 2 and 3, to be served concurrently, and pay a fine in the amount of \$1,480 on Count 1, \$555 on Count 2 and \$370 on Count 3 and a \$75 court security surcharge, plus interest.

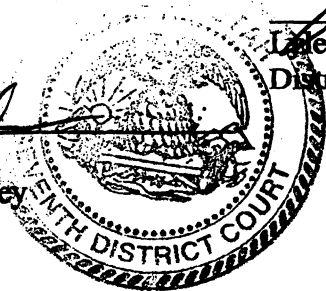
The prison and jail sentences are stayed and defendant is placed on informal probation to the Court for 36 months upon the following conditions:

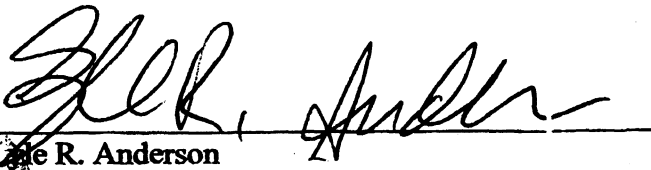
1. That the defendant pay the fine in full today. Payments are to be made by check or money order payable to: SEVENTH DISTRICT COURT, PO BOX 68, MONTICELLO, UT 84535.
2. That the defendant provide DNA specimens and pay the associated costs to the collecting agency.
3. That the defendant violate no law, either Federal, State or Municipal.
4. Defendant shall contact the Court if he cannot pay the payment as scheduled.

The Court retains jurisdiction to make such other and further orders as it may deem necessary from time to time.

DATED this 6th day of October, 2006.


Craig C. Halls
San Juan County Attorney




Dale R. Anderson
District Court Judge

CERTIFICATE OF MAILING/HAND DELIVERY

I HEREBY CERTIFY that on the 6th day of October, 2006, I mailed, postage prepaid, or hand delivered a true and correct copy of the foregoing JUDGMENT AND ORDER OF PROBATION to William L. Schultz, Attorney for Defendant, at PO Box 937, Moab. UT 84532.

Joni Ridgeway
Clerk

Addendum ~B~

Minutes Suppression Hearing

dated August 28, 2006

7TH DISTRICT COURT- MONTICELLO
SAN JUAN COUNTY, STATE OF UTAH

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SUPPRESSION HEARING
	:	
	:	
vs.	:	Case No: 061700079 FS
	:	
DAVID MARK RODRIGUEZ,	:	Judge: LYLE R. ANDERSON
Defendant.	:	Date: August 28, 2006

PRESENT

Clerk: surayaa

Prosecutor: CRAIG C HALLS

Defendant

Defendant's Attorney(s): WILLIAM L SCHULTZ

DEFENDANT INFORMATION

Date of birth: April 19, 1962

Video

Tape Number: 08/28/2006 Tape Count: 1:47

CHARGES

1. ILLEGAL POSS/USE OF CONTROLLED SUBSTANCE - 3rd Degree Felony
Plea: Not Guilty
2. ILLEGAL POSS/USE OF CONTROLLED SUBSTANCE - Class B Misdemeanor
Plea: Not Guilty
3. USE OR POSSESSION OF DRUG PARAPHERNALIA - Class B Misdemeanor
Plea: Not Guilty

HEARING

TAPE: 08/28/2006 COUNT: 1:47

Mr. Schultz states the foundation of the motion. Mr. Halls opening statement.

COUNT: 1:48

Jaren Adams called, sworn, examined by Mr. Halls and cross-examined by Mr. Schultz. Redirect by ATP.

COUNT: 2:00

Frida Rahnenfuhher called, sworn, examined by ATP and cross-examined by Mr. Halls. Redirect by Mr. Schultz and recross by ATP.

Case No: 061700079
Date: Aug 28, 2006

COUNT: 2:16

David Rodriguez called, sworn and examined by Mr. Schultz.

COUNT: 2:24

Jaren Adams is recalled and while still under oath is examined by Mr. Halls. Cross-examination by ATD.

COUNT: 2:29

Mr. Schultz closing arguments.

COUNT: 2:32

Mr. Halls closing arguments. The court states its' ruling. The motion to suppress is denied.