

2006

Utah v. Rodriquez : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
	:	
Plaintiff/Appellee,	:	
	:	
v.	:	
	:	
DAVID MARK RODRIGUEZ,	:	Case No. 20061016-CA
	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM CONVICTIONS FOR POSSESSION OF PSILOCYBIN MUSHROOMS, A THIRD DEGREE FELONY, AND MARIJUANA, A CLASS B MISDEMEANOR, BOTH IN VIOLATION OF UTAH CODE ANN. § 58-37-8(2)(a)(i) (Supp. 2006), AND POSSESSION OF DRUG PARAPHERNALIA, A CLASS B MISDEMEANOR, IN VIOLATION OF UTAH CODE ANN. § 58-37a-5(1) (West 2004), IN THE SEVENTH JUDICIAL DISTRICT COURT, SAN JUAN COUNTY, UTAH, THE HONORABLE LYLE R. ANDERSON, PRESIDING

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UTAH APPELLATE COURTS
MAY 17 2007

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
 :
 Plaintiff/Appellee, :
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BRIEF OF APPELLEE

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APPEAL FROM CONVICTIONS FOR POSSESSION OF PSILOCYBIN MUSHROOMS, A THIRD DEGREE FELONY, AND MARIJUANA, A CLASS B MISDEMEANOR, BOTH IN VIOLATION OF UTAH CODE ANN. § 58-37-8(2)(a)(i) (Supp. 2006), AND POSSESSION OF DRUG PARAPHERNALIA, A CLASS B MISDEMEANOR, IN VIOLATION OF UTAH CODE ANN. § 58-37a-5(1) (West 2004), IN THE SEVENTH JUDICIAL DISTRICT COURT, SAN JUAN COUNTY, UTAH, THE HONORABLE LYLE R. ANDERSON, PRESIDING

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
DAVID MARK RODRIGUEZ,	:	Case No. 20061016-CA
Defendant/Appellant.	:	

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from convictions for possession of psilocybin mushrooms, a third degree felony, and marijuana, a class B misdemeanor, in violation of UTAH CODE ANN. § 58-37-8(2)(a)(i) (Supp. 2006), and possession of drug paraphernalia, a class B misdemeanor, in violation of UTAH CODE ANN. § 58-37a-5(1) (West 2004).

STATEMENT OF THE ISSUE AND STANDARD OF REVIEW

Did the trial court correctly rule that defendant voluntarily stopped his vehicle alongside Deputy Adams's stopped vehicle, so that no seizure occurred?

This Court “review[s] a ruling on a motion to suppress for correctness, without deference to the district court’s application of the law to the facts.” *State v. Tehero*, 2006 UT App 419, ¶ 5, 147 P.3d 506. “On appeal from a denial of a motion to suppress, we

review the trial court's factual findings for clear error.'" *State v. Merworth*, 2006 UT App 489, ¶ 4, 153 P.3d 775 (citation omitted).

STATEMENT OF THE CASE AND FACTS

Charge. Defendant was charged with possessing psilocybin mushrooms, marijuana, and paraphernalia. R2-3.

Motion to suppress. Defendant moved to suppress the drugs and paraphernalia seized, alleging that Deputy Adams detained his vehicle in violation of the Fourth Amendment. Tr. at 4;¹ *see also* R15 (motion). Deputy Adams, defendant, and defendant's wife testified at an evidentiary hearing held on 28 August 2006, following which the trial court orally denied the motion. Tr. at 48-49 (a copy of the suppression hearing transcript, including the trial court's oral ruling, is attached in the addendum).

On 25 June 2006, Deputy Adams was on patrol in a marked sheriff's vehicle on SR-95 south of Blanding, Utah, when he spotted defendant's car parked 100 feet from the highway on a shady stretch of dirt road. *Id.* at 5-6. The deputy made a U-turn, turned left onto the dirt road, and came to stop in his lane of traffic when he saw defendant's car moving toward him. *Id.* at 6, 12, 38. The dirt road was formerly used to access a gravel crusher and was therefore wide enough for two semi trucks to pass each other. *Id.* at 11; *see also id.* at 41 ("[T]hat's a very wide road, that semis come in and out of . . . so there was plenty of room. I pulled

¹"Tr." refers to the suppression hearing transcript, which was not numbered in the record on appeal.

down and around and stopped as I faced in an and out of the road, parallel with the road”). Although Deputy Adams stopped his patrol vehicle, he did not turn on his emergency lights, flash his headlights, or otherwise signal defendant to stop. *Id.* at 6, 8, 12.

As defendant’s car pulled alongside him, Deputy Adams made eye contact with defendant, raised his hand, and through his open window asked defendant, “[H]ow are you doing?” *Id.* at 7, 9, 13, 39. The deputy responded negatively to defense counsel’s suggestion that he “waved to [defendant] to see if he [would] stop.” *Id.* at 13. (“That’s not correct”). Rather, the deputy “waited to see if [defendant] would . . . stop, and if everything was all right and [defendant] pulled up and stopped.” *Id.* at 14; *see also id.* (“I wave to a lot of people. Some people stop, some people don’t. . . . I waved to see if [defendant] was going to stop. Some people go by. I was going to just see if everything was all right”). The deputy also demonstrated his wave for the trial court: “May the record reflect, Your Honor, that what the officer demonstrated was holding his hand up with his palm upward[.]” *Id.* at 15.

Upon stopping next to Deputy Adams’s vehicle, defendant replied through his own open window that he and his wife had been getting a drink of a water. *Id.* at 7, 9, 39. Defendant also explained that they were taking a break during their drive from Arizona. *Id.* at 8. During the conversation, Deputy Adams stepped from his car for safety reasons, and to be more professional. *Id.* at 7. As he approached defendant’s car, he immediately smelled the odor of burnt marijuana emanating from inside. *Id.* at 8. Consequently, Deputy Adams ordered defendant out of the car and initiated an investigation that revealed illegal drugs and

paraphernalia. *Id.* at 9. After smelling the marijuana and asking defendant to step out of his car, the deputy may have touched the driver's side door "to keep it from hitting [him] as it opened." *Id.* at 40.

Defendant and his wife, on the other hand, testified that Deputy Adams abruptly pulled his patrol vehicle in front of their car, forcing them to stop, and additionally signaled them to stop with a hand motion. *Id.* at 18, 21, 33-35. Defendant denied that he engaged in conversation with the deputy, but rather testified that Deputy Adams simply stared at him. *Id.* at 37. According to defendant, Deputy Adams did not say anything until he ordered defendant to step out of his car. *Id.*

Ruling. As noted, the trial court denied defendant's motion to suppress after finding that Deputy Adams was more credible than defendant and his wife, and that consistent with the deputy's testimony, no detention, in fact, occurred:

I think in these circumstances it's the burden of the accused to show first of all that there was some police action that, that a, affected a constitutional right. And so he'd have to show that this was a level-[two] encounter. He hasn't convinced me of that. I find the testimony of the officer about what, about what happened more credible. Even if I believed the defendant and his spouse[,], I'm not sure even that would rise to a level-[two] encounter.

Id. at 48. The trial court specifically found that it did not believe that the deputy had "stopped and blocked [defendant's] travel for even a fraction of second." *Id.* at 49. The trial court also found that when Deputy Adams raised his hand, he was not "shoving it out as in stop," nor was he "waving it back and forth." *Id.* at 49-50. Rather, the deputy merely "rais[ed] his hand, that's it." *Id.*

Conditional guilty plea and sentence. Defendant entered a conditional guilty plea to all three charges. R25-32. On 6 October 2006, the trial court placed defendant on a thirty-six month term of probation. R33-34.

Timely appeal. Defendant filed a timely notice of appeal on 30 October 2006. R36.

SUMMARY OF THE ARGUMENT

The trial court ruled that defendant's initial contact with Deputy Adams constituted a level one voluntary encounter, or that no level two seizure occurred here. In so doing, the trial court credited Deputy Adams's testimony over that of defendant and his wife. On appeal, defendant challenges the trial court's ruling, but ignores Deputy Adams's testimony and merely reargues the evidence he presented in the trial court. This is insufficient to meet defendant's marshaling burden. He thus fails to show any error, let alone clear error, in the trial court's credibility determination. This Court should therefore uphold the trial court's ruling and affirm defendant's convictions.

ARGUMENT

THE TRIAL COURT CORRECTLY RULED THAT DEFENDANT VOLUNTARILY STOPPED HIS VEHICLE ALONGSIDE DEPUTY ADAMS'S STOPPED PATROL VEHICLE, SO THAT NO SEIZURE OCCURRED

"Not every encounter between a police officer and a citizen is a seizure" requiring justification under the Fourth Amendment.² *State v. Higgins*, 884 P.2d 1242, 1244 (Utah

²Defendant cites the state constitution in his brief, but engages in no analysis thereunder. *See* Aplt. Br. at 2. His reliance on the state constitution is therefore nominal

1994) (citing *Florida v. Bostick*, 501 U.S. 429, 437 (1991)). Indeed, Utah recognizes three levels of police-citizen contacts, two of which are at issue here: a level one voluntary encounter requiring no Fourth Amendment justification and a level two temporary seizure requiring reasonable suspicion. *State v. Markland*, 2005 UT 26, ¶ 10 n.1, 112 P.3d 507 (quotations and citation omitted). The third level of police citizen encounter, arrest, must be supported by probable cause, *see id.*, but is not at issue in this case. *See* Aplt. Br. at 13-18. Defendant does not dispute that, following the initial contact, when Deputy Adams smelled the odor of burnt marijuana emanating from his (defendant's) vehicle, the subsequent seizure of drugs and paraphernalia was justified under the Fourth Amendment. *Id.*; *see also* Tr. at 9 (defense counsel: "I don't care what happened after he smelled the marijuana").

As set forth in detail above, the trial court credited Deputy Adams's testimony over that of defendant's and his wife's testimony, and found that defendant voluntarily brought his vehicle to stop alongside the deputy's stopped vehicle. Tr. 48-49. In other words, the trial court found that the initial encounter constituted a level one voluntary encounter that needed no Fourth Amendment justification. *Id.* On appeal, defendant asserts that the trial

and should not be considered. *See American Bush v. South Salt Lake City*, 2006 UT 40, ¶¶ 10-12, 140 P.3d 1235 (discussing proper framework for state constitutional claims, including analysis of historical evidence of framers' and voters' intent); *Brigham City v. Stuart*, 2005 UT 13, ¶ 14, 122 P.3d 506 ("[W]e are resolute in our refusal to take up constitutional issues which have not been properly preserved, framed[,] and briefed"), *rev'd on other grounds*, 126 S.Ct. 1943 (2006) (citation omitted). *See also State v. Lafferty*, 749 P.2d 1239, 1247 n.5 (Utah 1988) ("[W]e will not engage in state constitutional analysis unless an argument for different analyses under the state and federal constitutions is briefed").

court “erred in determining that [Deputy] Adams had not effectuated a stop of [his] vehicle.” Apl’t. Br. at 12; *see also* Apl’t. Br. at 13 (“The stop of the vehicle constituted a seizure” (bolding, capitalization, and underlining omitted)). He further asserts that the alleged traffic stop was made in the absence of reasonable suspicion.³ Apl’t. Br. at 18 (“Adams did not possess the required articulable reasonable suspicion to stop the vehicle” (bolding, capitalization, and underlining omitted)). Defendant’s claims lack merit and should therefore be rejected.

Fourth Amendment standard. As noted, a level one voluntary encounter requires no Fourth Amendment justification. *Bostick*, 501 U.S. at 437. During such an encounter, “a citizen may choose to answer a police officer’s questions but is free to leave at any time during the questioning.” *State v. Adams*, 2007 UT App 117, ¶ 10, ___ P.3d ___. *See also Bostick*, 501 U.S. at 434 (“Our cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions). An officer may approach and question any individual in a public place, so long as a “reasonable person would feel free to decline the officer’s requests or otherwise terminate the encounter.” *United States v. Drayton*, 536 U.S. 194, 202 (2002) (citation omitted). Indeed, the “[t]he Fourth amendment proscribes [only] unreasonable searches and seizures[,] . . . not [] voluntary cooperation.” *Bostick*, 501 U.S. at 439.

³The State has never argued that this was a traffic stop supported by reasonable suspicion, nor does it now.

In contrast, the second level of police-citizen encounter is a temporary seizure requiring Fourth Amendment justification. *Adams*, 2007 UT App 117, ¶ 10. Fourth Amendment protections are afforded whenever an officer “by means of physical force or show of authority [] in some way restrain[s]” an individual’s liberty. *Id.* (citation and quotation omitted); *see also State v. Tehero*, 2006 UT App 419, ¶ 7, 147 P.3d 506 (same). Thus, the critical distinction between “a level one encounter and a level two stop depends on whether, through an official show of physical force or authority, a reasonable person would believe that his freedom of movement is restrained.” *State v. Merworth*, 2006 UT App 489, ¶ 8, 153 P.3d 775. Relevant factors may include “the presence of more than one officer, the display of an officer’s weapon, physical touching of the person, or use of commanding language or tone of voice.” *Adams*, 2007 UT App 117, ¶ 10. “A person is seized under the Fourth Amendment when, considering the totality of the circumstances, the police conduct would have communicated to a reasonable person that the person was not free to decline the officer’s requests or otherwise terminate the encounter and go about his or her business.” *State v. Higgins*, 884 P.2d 1242, 1244 (Utah 1994). *Accord Drayton*, 536 U.S. at 202. Because it is a seizure, an officer effecting a level two detention must have a reasonable suspicion that a suspect has committed or is about to commit an offense. *Adams*, 2007 UT App 117, ¶ 9 (citing *Markland*, 2005 UT 26, ¶ 10 n.1). “Typically, a traffic stop is considered to be an investigative detention (i.e., a level two encounter).” *State v. Hansen*, 2002 UT 125, ¶ 37, 63 P.3d 650.

Analysis. This case does not involve a traffic stop. Indeed, as found by the trial court, it was not a traffic stop at all because defendant voluntarily brought his vehicle to stop alongside the deputy's stopped vehicle. Tr. 48-49. Deputy Adams did not block or impede in any manner defendant's travel, "even for a fraction of a second." *Id.* at 49. Nor did Deputy Adams activate his emergency lights or make any other show of authority. Tr. at 48-50. See *Tehero*, 2006 UT App 419, ¶ 7; *Merworth*, 2006 UT App 489, ¶ 8. Rather, the deputy merely stopped his vehicle when he saw defendant's vehicle traveling toward him. Tr. 48-49. Finding the deputy's testimony more credible than that of defendant and his wife, the trial court concluded that Deputy Adams had not "stopped and blocked [defendant's] travel," or that no level two seizure occurred. Tr. at 49. "Where," as here, "contradictory testimony is offered . . . , the fact finder is free to weigh the conflicting evidence presented and to draw its own conclusions." *State ex rel. Div. of Forestry, Fire & State Lands v. Six Mile Ranch Co.*, 2006 UT App 104, ¶ 17, 132 P.3d 687 (citation and quotation omitted).

On appeal, notwithstanding the trial court's well-supported ruling, defendant asserts that a level two seizure in fact occurred. Aplt. Br. at 13-18. Defendant ignores Deputy Adams's testimony and relies solely on his own and his wife's testimony. For example, defendant broadly asserts that "[Deputy] Adams . . . angled his vehicle so [defendant] had to stop, and wave[d] at him to stop," *id.* at 16; see also *id.* at 17 ("[Deputy] Adams blocked [defendant] in with his police vehicle"), and that Deputy Adams "made a stop gesture with his hand, with the intent and expectation that it would cause defendant to stop," *id.* at 17, see

also id. at 16, 18 (Deputy Adams “*intended* to stop [defendant],” and “[Deputy] Adams . . . blocked [defendant’s] vehicle . . . and put out his hand in the gesture of a stopping motion”). Defendant does not acknowledge Deputy Adams’s contrary testimony, *see, e.g.*, Tr. at 6, 14, 40-42, or otherwise attempt to demonstrate that it is insufficient to support the trial court’s ruling. *Id.*

It has long been recognized that the trial court “is in a far superior position to assess the credibility of the witnesses.” *State v. Earl*, 2004 UT App 163, ¶ 11, 92 P.3d 167 (citing *State v. Lafferty*, 2001 UT 19, ¶ 45, 20 P.3d 342); *State v. Mogen*, 2002 UT App 235, ¶ 16, 52 P.3d 462 (recognizing that reviewing court defers to trial court’s “assessment of witness credibility”). A trial court’s credibility determination, like other factual findings, will not be overturned unless it is shown to be clearly erroneous. *See State v. Humphrey*, 2006 UT App 221, ¶ 15, 138 P.3d 590 (“Because a trial court is in a unique position to assess witness credibility and weigh evidence, we may not substitute our judgment concerning a question of fact unless the trial court’s finding is clearly erroneous”). Accordingly, defendant cannot successfully challenge the trial court’s credibility determination without marshaling all the supporting evidence, viewing it in a light most favorable to the trial court’s ruling, and showing it to be insufficient to support the credibility determination. *See United Park City Mines Co. v. Stichting Mayflower Mountain Fonds*, 2006 UT 35, ¶ 24, 140 P.3d 1200; *State v. Earl*, 2004 UT App 163, ¶ 11, 92 P.3d 167; *see also* Utah R. App. P. 24(a)(9) (requiring “[a] party challenging a finding of fact [to] first marshal all record evidence that supports the

challenged finding”). Moreover, defendant cannot dodge this duty by merely “re-argu[ing] the factual case [he] presented in the trial court.” *Chen v. Stewart*, 2004 UT 82, ¶ 77, 100 P.3d 1177. Because defendant makes no attempt to show that the trial court’s reliance on Deputy Adams’s testimony was clearly erroneous, this Court should affirm the trial court’s credibility determination and ruling that defendant’s initial contact with the deputy constituted a level one voluntary encounter rather than a level two seizure. See *United Park City Mines*, 2006 UT 35, ¶¶ 26-27 (affirming trial court’s factual findings where party failed to marshal); *State v. Pinder*, 2005 UT 15, ¶ 40, 114 P.3d 551 (assuming trial court’s ruling was adequately supported absent proper challenge to its factual findings).

In any event, the trial court’s ruling that defendant’s initial contact with Deputy Adams constituted a voluntary encounter is well-supported. As set forth in greater detail in the Statement of the Case, Deputy Adams testified that he stopped in his lane of traffic when he saw defendant’s automobile moving toward him on the dirt road. *Id.* at 6, 12, 38. Although Deputy Adams stopped his patrol vehicle, he did not turn on his emergency lights, flash his headlights, or otherwise signal defendant to stop. *Id.* at 6, 8, 12, 13. The two-lane road was more than wide enough for defendant to pass, but he stopped instead. *Id.* at 11; see also *id.* at 41. As he did so, Deputy Adams’ raised his arm in greeting and asked, “[H]ow are you doing?” *Id.* at 7, 9, 13-14, 39. Defendant said that he and his wife had been getting a drink of a water, and also explained that they were taking a break during their drive from Arizona. *Id.* at 7-9, 39. During the conversation, Deputy Adams stepped from his patrol car and


immediately smelled the odor of burnt marijuana emanating from inside defendant's vehicle. *Id.* at 7-8. Given this evidence, defendant has not, and cannot show, that the trial court's ruling is against the clear weight of the evidence. *State ex rel Z.D.*, 2006 UT 54, ¶ 33, 147 P.3d 401 (holding review court "may only disturb findings that offend the 'clear weight' of the evidence," and that "[i]t must forebear disturbing the 'close call'").

CONCLUSION

This Court should uphold the trial court's ruling denying the motion to suppress and affirm defendant's convictions.

RESPECTFULLY submitted on 17 May 2007.

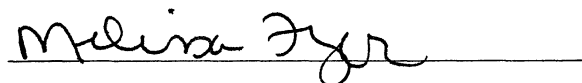
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CERTIFICATE OF MAILING

I certify that on 17 May 2007, two copies of the foregoing Brief of Appellee were mailed, postage prepaid, to the following:

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Addendum

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IN THE SEVENTH JUDICIAL DISTRICT - MONTICELLO COURT
SAN JUAN COUNTY, STATE OF UTAH

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STATE OF UTAH,)	SUPPRESSION HEARING
)	
PLAINTIFF,)	
)	
vs.)	
)	
DAVID MARK RODRIGUEZ,)	CASE 061700079
)	APPEAL 20061016-CA
)	
DEFENDANT.)	JUDGE LYLE R. ANDERSON
)	

BE IT REMEMBERED that this matter came on for hearing
before the above-named court on August 28, 2006.

WHEREUPON, the parties appearing and represented by
counsel, the following proceedings were held:

OFFICIAL CERTIFIED TRANSCRIPT
(From Copy Video Recording)

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2 (August 28, 2006)

3 THE JUDGE: Then do you want to do the Rodriguez
4 preliminary hearing?

5 MR. SCHULTZ: Yes. We're ready. Come on up.

6 THE JUDGE: State of Utah versus David Mark
7 Rodriguez 0617-79. This is a motion to suppress, right?

8 MR. SCHULTZ: That's correct, Judge.

9 THE JUDGE: Have we narrowed down the issues.

10 MR. SCHULTZ: Judge, yes. It's just specifically
11 that it was an illegal stop and that a, the stop that the
12 officer made was violative of Mr. Rodriguez's Fourth
13 Amendment to be free from unreasonable (short inaudible, two
14 speakers).

15 THE JUDGE: That he shouldn't have been stopped in
16 the first place?

17 MR. SCHULTZ: That's correct.

18 OPENING STATEMENT BY MR. HALLS

19 MR. HALLS: Your Honor, and our position by way of
20 just an opening statement very brief is that Mr.,
21 Mr. Rodriguez was not stopped at all. The officer observed
22 a vehicle parked off the highway, he pulled over there, had
23 no lights on. He, he stopped the car. Mr. Rodriguez
24 started towards, towards him, stopped his car and engaged in
25 a conversation with the officer.

1 But we'll put the officer on to testify. Call
2 Jaren Adams.

3 WHEREUPON,

4 OFFICER JAREN ADAMS

5 having been duly placed under oath by the clerk of the court
6 and sworn to testify truthfully, upon examination testified
7 as follows:

8 MR. HALLS: May I question the witness from
9 counsel table, Your Honor?

10 THE JUDGE: Yes.

11 DIRECT BY MR. HALLS.

12 Q. (MR. HALLS:) State your name and occupation.

13 A. (THE WITNESS:) Jaren Adams, San Juan County Deputy
14 Sheriff.

15 Q. Did you have an opportunity on or about, just a
16 minute, I'm looking for the day, the 25th day of June of 2006
17 to come in contact with a David Mark Rodriguez?

18 A. I did.

19 Q. And you recall the location of that contact?

20 A. It was on a, out on SR-95 about milepost 119 and
21 the junction of a little side road coming out off of the,
22 onto the main road.

23 Q. And where is 119 approximately if you--

24 A. It's approximately two miles from Shirttail Corner
25 or the junction of a, 191, south of Blanding.

1 Q. It's towards Blanding or away from Blanding?

2 A. It's south of Blanding, southeast, west of
3 Blanding.

4 Q. Okay. And what was it you observed about
5 Mr. Rodriguez's vehicle, first thing you observed?

6 A. I was just going on the highway. And I glanced
7 over as I went past the, the road that he was parked on, I
8 observed his vehicle parked in a, the shade approximately 100
9 feet off the road. And I was just going by so as I saw it I
10 slowed down and turned around and come back to check on the
11 car. And a, I pulled down off the road and stopped by that,
12 because by that time I seen the vehicle starting to come out
13 so I just pulled off of the road off the main highway onto
14 the side road or the dirt road and stopped and waited for his
15 vehicle to come up. And it pulled up and stopped.

16 Q. Did you do anything... Were your lights on?

17 A. No.

18 Q. Your overhead lights?

19 A. No.

20 Q. Did you flash your headlights or do anything to, to
21 signal Mr. Rodriguez to stop?

22 A. No.

23 Q. Did you put your hand out and wave him to stop or
24 anything like that?

25 A. I don't recall. I may have waved at him but I

1 didn't, you know, say hey, stop or anything like.

2 Q. So what happened?

3 A. He pulled up beside my vehicle a, a fair distance
4 between because I was able to open my door. I just said hey,
5 how are you doing. And he said oh, we're just stopped to get
6 us a drink of water. And during this conversation on
7 opening my vehicle and, and getting out to talk to him--

8 Q. Why, why do you do that? What's the purpose?

9 A. One reason safety reasons. You don't want to be
10 stuck in your car while you're talking to someone and--

11 Q. So--

12 A. -- and it's also kind of unprofessional to just
13 sit there and talk to somebody. You get out and talk to
14 them.

15 Q. Who engaged the other in conversation?

16 A. I think it was just a mutual thing, we both just
17 talked.

18 Q. Okay. So who's the first... You didn't signal him
19 to stop?

20 A. No.

21 Q. He stopped, and who started to talk?

22 A. I don't recall. I just remember saying how are you
23 doing. And he, it may have been me, but we just, he pulled
24 up and stopped and I started how are you doing and--

25 Q. Okay. And so you got out of your car and then

1 what happened?

2 A. I'm just, you know, talking to him. And he said
3 yes, we just pulled off here to take a little break, we're
4 going on a vacation from Arizona out to Canyonlands or
5 somewhere, I'm not sure, I can't remember where he said they
6 were going. And, and a, during this conversation is when I
7 smelled the, the odor of the burnt marijuana.

8 Q. So what did you do?

9 A. Asked him to step out of his car and come back and
10 talk to me, back behind his vehicle.

11 Q. Were you in uniform?

12 A. Yes.

13 Q. What kind of vehicle were you in?

14 A. My patrol car, patrol vehicle, Dodge Durango, got
15 the sheriff markings on it.

16 Q. What emergency lighting did you have in operation?

17 A. None. Zero.

18 Q. And what do you recall, if anything about what you
19 did to stop the Rodriguez vehicle?

20 A. I did nothing.

21 Q. What was the, what was the condition of his...

22 So was his driver side and your driver side
23 together?

24 A. Yes, side by side.

25 Q. What was the status of your window when you pulled

1 up there?

2 A. I believe it was down.

3 Q. What was the status of his window?

4 A. I believe it was down.

5 Q. What do you recall you did, did you, do you recall
6 if anything you did to have him lower his window?

7 A. I recall nothing of trying to get him to roll his
8 window down or anything. It was already down.

9 Q. I think from the standpoint of the stop,
10 Your Honor, I can get into what the officer did after he
11 smelled the marijuana. But I think after he smelled the
12 marijuana we're okay.

13 MR. SCHULTZ: I don't care what happened after he
14 smelled the marijuana.

15 MR. HALLS: Well, for the purposes of the
16 suppression.

17 THE JUDGE: Are you done?

18 MR. HALLS: I am.

19 THE JUDGE: Mr. Schultz?

20 CROSS BY MR. SCHULTZ.

21 Q. (MR. SCHULTZ:) Deputy, you were westbound on 95.
22 Is that correct?

23 A. (THE WITNESS:) Yes.

24 Q. And you looked down and you see a vehicle parked
25 under a tree in a shady spot on a side road?

1 A. Well, I guess you'd call it under a tree. It was
2 on the side of the road, the sun was down. The trees aren't
3 very big out there.

4 Q. Okay. (Short inaudible, no mic)?

5 A. Yes.

6 Q. And a, you can't, the vegetation is sufficient
7 enough that you can't really see a, down that road other than
8 just if you're just looking down the path itself, the road
9 itself. Is that correct?

10 A. Probably coming from the other side I probably
11 could see it. But there's a hill or oh, yes, there's a hill
12 embankment just before you get to that road where it turns
13 off, so coming from the east to the west you wouldn't see it
14 until you looked down the road.

15 Q. All right. And so you had to look down.

16 So what's, what is your concern when you look down
17 and see this vehicle parked there?

18 A. I didn't see anybody around it as I went by so I
19 turned around just to see what the vehicle was parked out
20 there for.

21 Q. Were you concerned that there was something that
22 was dangerous to the life or limb of somebody?

23 A. No.

24 Q. All right. So you turned around and you bring
25 your vehicle back to the road. Describe the road, the side

1 road for me.

2 A. It's dirt, gravel. It comes from a place that
3 they used to get a lot of a, they used to have a gravel
4 crusher there so it's a fairly wide road where you can semis
5 in and out of there. It's a pretty wide dirt road.

6 Q. All right. And so it's wide enough for two
7 vehicles to pass each other?

8 A. It's wide enough for two semis to pass each other.

9 Q. When you come back are you, is this like an
10 emergency type situation you come back, or are you just
11 coming back because you're curious?

12 A. Just coming back because I'm curious.

13 Q. All right. When you get to the road do you turn
14 your directional on and stop and make a left turn or did you
15 just kind of angle in to come in?

16 A. I don't recall.

17 Q. All right.

18 A. Usually I... I don't recall.

19 Q. All right. As you a, come back now at some point
20 you see Mr. Rodriguez in his vehicle. Is that correct? You
21 see it again?

22 A. Yes.

23 Q. And it's not in the same spot it was when you saw
24 it the first time, is it?

25 A. No. It's driving towards the--

1 Q. All right?

2 A. -- highway.

3 Q. So when you see the vehicle the vehicle is moving.
4 Is that correct?

5 A. I believe I see it, yes, I believe it was moving as
6 I pulled down off the highway.

7 Q. All right. And it's, it's moving from off the
8 side road onto the highway itself?

9 A. Not right onto the highway. He's back far enough
10 that I'm down off the highway before it ever, and get stopped
11 before it ever gets to me.

12 Q. Okay. Your estimate was that Mr. Rodriguez's
13 vehicle was only 100 feet off the road?

14 A. Yes, that's correct.

15 Q. All right. And a, and a, when you pulled over
16 there did you make...

17 So you're in a marked police vehicle. Is that
18 correct?

19 A. Yes.

20 Q. Anyone could see from the side or from the front is
21 going to know it's a police car. Is that right?

22 A. Locals recognize it more from the front than people
23 from the area. You can definitely recognize it on the side.

24 Q. Fine. And so Mr. Rodriguez saw the side of your
25 vehicle?

1 A. Yes, he did.

2 Q. All right. And did you make eye contact with
3 Mr. Rodriguez?

4 A. I do with everybody. Yes.

5 Q. All right. And so you, you and Mr. Rodriguez were
6 looking at each other while he's approaching you. Is that
7 correct?

8 A. I don't... Not while he's approaching. I don't
9 remember look, see, being able to see with the glare from his
10 windshield. But as he comes up beside me I've got eye
11 contact with him.

12 Q. All right. And deputy, then at that point you
13 waved to Mr. Rodriguez to see if he will stop. Is that
14 correct?

15 A. That's not correct.

16 Q. Okay. Deputy, do you remember your testimony at
17 the preliminary hearing?

18 A. I'm sure you'll show me to remind me.

19 Q. The answer is no?

20 A. No.

21 Q. Would you like to have your recollection
22 refreshed?

23 A. Sure.

24 Q. I'll be happy to do that. So Mr. Rodriguez
25 stopped next to your vehicle what, were your windows aligned

1 with each other (short inaudible, away from mic)?

2 A. Yes. Our, our drivers windows aligned. I just
3 pulled up to the side, had my window down and waited to see
4 if they would, you know, stop, and if everything was all
5 right and he pulled up and stopped.

6 Q. He pulled up. At the preliminary hearing did you
7 give your testimony?

8 A. Yes, I did.

9 Q. Do I need to lay any foundation?

10 THE JUDGE: For the, for the preliminary hearing?
11 I don't think so.

12 Q. (MR. SCHULTZ:) Okay. So your testimony at the
13 preliminary hearing was that you waved to him to see if he
14 would stop. Did you hear what you said?

15 A. (THE WITNESS:) Well, yes.

16 Q. Okay. So does that refresh your recollection
17 about why you waved to--

18 A. Well, but if I can say what I meant with, with
19 that is to see if he's going to stop. I wave to a lot of
20 people. Some people stop, some people don't.

21 Q. So tell me what you meant when you said I waved to
22 him to see if he would stop. Explain that to me.

23 A. I waved to see if he was going to stop. Some
24 people go by. I was going to just see if everything was all
25 right.

1 Q. All right. That's all I have.

2 REDIRECT BY MR. HALLS.

3 Q. (MR. HALLS:) Why don't you show us how you
4 waved.

5 THE WITNESS: Okay.

6 MR. SCHULTZ: May the record reflect, Your Honor,
7 that what the officer demonstrated was holding his hand up
8 with his palm upward?

9 THE JUDGE: Yes.

10 MR. SCHULTZ: Thank you.

11 MR. HALLS: That's all I have.

12 MR. SCHULTZ: Judge, I'm prepared to call
13 witnesses. Can I made an argument for a directed verdict at
14 this point, or directed judgment or...

15 THE JUDGE: You'd better call witnesses.

16 MR. SCHULTZ: All right. We'd call
17 Mrs. Rodriguez.

18 WITNESSES FOR DEFENSE

19 WHEREUPON,

20 FRIDA RAHNENFUEHRER

21 having been duly placed under oath by the clerk of the court
22 and sworn to testify truthfully, upon examination testified
23 as follows:

24 DIRECT BY MR. SCHULTZ.

25 Q. (MR. SCHULTZ:) Mrs. Rodriguez, we've, tell us your

1 name for the record.

2 A. (THE WITNESS:) It's Frida Rahnenfuehrer.

3 Q. And you're married to Mr. Rodriguez--

4 A. Yes.

5 Q. -- is that right?

6 And we've met and had a conversation about a, about
7 this incident where you and your husband were stopped. Is
8 that correct?

9 A. Yes, we have.

10 Q. And I've also advised you that you and your husband
11 have spousal privilege and you wouldn't have to testify
12 today, but your husband (short inaudible, no mic) testify.
13 Is that right?

14 A. Yes, you did.

15 Q. And are you agreeable to testify?

16 A. Yes, I am.

17 Q. Your husband indicated that he wanted you to
18 testify in this case?

19 A. Yes.

20 Q. Do you remember being off to the side of the road
21 on the day that you were stopped by Deputy Adams?

22 A. Yes.

23 Q. And tell us what was going on at that location
24 before the officer drove by.

25 A. We were headed to Torrey. And it's a long drive so

1 we had stopped to get a little bit more situated and I needed
2 to get some water and some smacks.

3 Q. And so that's, is that why you pulled into that
4 location?

5 A. Yes, because there was a little bit of shade there.

6 Q. All right. And what happened after you pulled
7 into that location?

8 A. We simply stopped. I had turned around, the cooler
9 was in the back seat, and went to get some water.

10 Q. All right. Did a, did anyone exit the vehicle?

11 A. No.

12 Q. And a, so what, what do you do? You turned
13 around. You're not, the vehicle was, had you turned the
14 vehicle around, had your husband turned the vehicle around so
15 it was facing the highway again?

16 A. Yes, we had. It was a very short stop and we had
17 turned around facing the highway again in this piece of
18 shade.

19 Q. All right. And where you were stopped facing the
20 highway how far would you estimate it was to the road, back
21 to the main road?

22 A. About 50 yards.

23 Q. And a, while you were turning around getting water
24 or do whatever, what happened?

25 A. My husband said a sheriff, let's go.

1 Q. All right. And a, was, you said no one exited the
2 car. Was the vehicle still running?

3 A. Yes. It was hot so we wanted the air conditioning
4 on.

5 Q. All right. Were the windows rolled up?

6 A. Yes.

7 Q. What happened after your husband said that?

8 A. I turned around and I put back my seatbelt on and
9 we proceeded towards the highway.

10 Q. Okay. And what happened as you approached the
11 highway?

12 A. Just before we had reached the highway the
13 sheriff's a, vehicle had come in to a, the dirt road that we
14 were on and came to an abrupt stop in front of our vehicle.

15 Q. Describe what you mean by abrupt stop.

16 A. Well, he had come off the highway so he had veered
17 off a, and pulled into the side road so that when he came to
18 a stop--

19 Q. Did the officer come up to the intersection... Is
20 this a T intersection or a cross intersection?

21 A. It would have been a T.

22 Q. All right. Did the officer come up to make a left
23 turn, signal and make a left turn into the intersection?

24 A. No.

25 Q. How did he come into the side road?

1 A. He simply drove into the side road, came to an
2 abrupt stop angled in front of us. It was dirt so it was
3 obvious that he had come to an abrupt stop.

4 Q. And a, what, what did you see that made you
5 conclude it was an abrupt stop?

6 A. A little bit of gravel because it a, didn't come
7 quite to a sure--

8 Q. What happened in your vehicle when the officer, was
9 it apparent it was a police car?

10 A. Yes. It's got a huge sheriff's sign on the side.

11 Q. All right. And what happened when the vehicle
12 stopped in front of you?

13 A. My husband also came to an abrupt stop to avoid
14 hitting him.

15 Q. And describe what you mean by an abrupt stop,
16 what--

17 A. Just pushing on the brakes. We weren't going very
18 fast.

19 Q. All right. And what happened next?

20 A. At that point the policeman had made eye contact
21 with my husband and then had angled a little bit towards the
22 side.

23 Q. Okay. So did the officer move his car after your
24 vehicle had stopped?

25 A. Yes. After we both had stopped he moved into a

1 different position.

2 Q. And, and did your husband move again after he had
3 stopped his car?

4 A. No.

5 Q. And what happened then after... So tell us how the
6 vehicles end up after the officer (short inaudible, no mic)?

7 A. They were a little bit kitty-corner to each other a
8 little bit because he was, had angled in so we were still a
9 little bit angled by each other.

10 Q. This, this a road that's wide enough for two
11 vehicles to be in to pass each other?

12 A. Yes.

13 Q. All right. Is the officer's vehicle, what, where
14 is his driver's window in relationship to your husband's
15 driver's window?

16 A. For the first stop or the--

17 Q. No, after the point we are now.

18 A. Oh. He was a little bit forward, a, from where we
19 are.

20 Q. Okay. Are the windows, are the driver's windows
21 pretty much aligned or is his window, the officer's window
22 (short inaudible, two speakers)?

23 A. Well it's still really angled. We're not parallel
24 by any means.

25 Q. And tell us what you... So the cars are kind of

1 cantered?

2 A. Uh-huh (affirmative).

3 Q. And tell us how extreme that is.

4 A. I suppose a little bit angled.

5 Q. All right. And if your husband had tried to pull

6 forward would, would he have been able to clear the vehicle

7 or would it, would it--

8 A. No.

9 Q. -- the police vehicle have been in the way?

10 A. When he first stopped, yes, he didn't stop us

11 completely.

12 Q. All okay. And I'm talking about the second time

13 now when the officer's window is (short inaudible, two

14 speakers).

15 A. Yes, we could have cleared him.

16 Q. And how, and would it have been by a wide margin or

17 by a little bit? How close were the vehicles?

18 A. No. We would have been able to pull forward if we

19 had--

20 Q. Okay.

21 A. -- turned onto the highway.

22 Q. Did you observe a, the officer wave to stop your

23 husband?

24 A. Yes.

25 Q. All right. Did you observe the eye contact?

1 A. Yes.

2 Q. All right. Did you, when the officer pulled up
3 alongside of the vehicle, do you remember if your husband's
4 window was up or down?

5 A. It was up.

6 Q. All right. And do you remember when your
7 husband's...

8 Do you know what happened next after the officer
9 pulled up alongside?

10 A. Not so clearly because both engines were running at
11 that time and I didn't hear.

12 Q. Oh, what did you see?

13 A. At one point my husband did roll his window down a,
14 and say that we were okay.

15 Q. Okay. And what happened? Where was the officer
16 when your husband rolled the window down?

17 A. I couldn't see clearly.

18 Q. Okay. Well (short inaudible, no mic)?

19 A. Yes, he was talking to the officer.

20 Q. And did you see the officer in his car or next to
21 the car? Did you ever see (short inaudible, no mic) see the
22 officer exit his vehicle?

23 A. He did exit it ultimately.

24 Q. Okay. And was that before or after your husband
25 said something to him? Do you remember or do you know?

1 A. I don't know.

2 Q. Okay. That's all I have. Mr. Halls is going to
3 ask some questions

4 CROSS BY MR. HALLS.

5 Q. (MR. HALLS:) I'm sorry, I didn't catch the last
6 name. It wasn't Rodriguez, was it?

7 A. (THE WITNESS:) No, it's not.

8 Q. What was it?

9 A. Rahmenfuehrer.

10 Q. Okay.

11 THE JUDGE: You can you spell that for us?

12 A. (THE WITNESS:) R-A-H-N-E-N-F-U-E-H-R-E-R.

13 Q. (MR. HALLS:) Okay. I may have been distracted.
14 I didn't hear. Could you describe for me what the wave of
15 the officer looked like? Or did you see it?

16 A. It was a very short wave. I mean it was a, just a
17 hand motion.

18 Q. That kind of thing? Okay. And did the officer
19 ever turn his lights on?

20 A. No, sir.

21 Q. And he didn't... You say he pulled, he was
22 sideways to you as you were pulling out. You were pulling
23 out this way and he is sideways to you when he pulls off the
24 road?

25 A. No, sir.

1 Q. How is he?

2 A. When we were pulling out and the officer came in
3 front of us.

4 Q. Okay.

5 A. He was in front of us angled.

6 Q. 90 degrees--

7 A. we could not have gone by him.

8 Q. 90 degrees angled?

9 A. Perhaps. 90 degrees would be perpendicular so no,
10 more of a, anywhere between 90 and 45.

11 Q. And so he's, and he stops that way blocking both
12 lanes of traffic?

13 A. Well, our lane because we were on the right-hand
14 side going to turn.

15 Q. So he is, he is stopped in front of you more on
16 your side of what the two lane traffic would be than on his
17 side?

18 A. Yes.

19 Q. But isn't it curious to you that if he intended to
20 stop you why would he have left his vehicle in that location,
21 got out and confronted you in the car?

22 A. I don't know.

23 Q. So he's in front of you like that. He sees you
24 coming out. And then as you approach him he pulls further
25 forward so that your, your way to the highway is

1 unobstructed. Correct?

2 A. Yes.

3 Q. You had plenty of room to get by the officer to get
4 to the highway?

5 A. This was after eye contact had been made and the
6 stop.

7 Q. So he did that, when he was parked across your path
8 to the highway he does this?

9 A. No recorded response.

10 Q. All right. Was his window down?

11 A. No.

12 Q. And your window was not down at that point?

13 A. No.

14 Q. Then you tell me what he does.

15 A. He pulled a little bit more forward and reangled
16 his vehicle.

17 Q. And what is it you recall he said? Or you don't
18 know any of that? Did you say you didn't hear any of that?

19 A. I couldn't hear him clearly at all.

20 Q. And you couldn't hear Mr. Rodriguez either?

21 A. I could only hear him respond that we were okay.

22 Q. Did you, did you hear him saying we were just
23 getting a drink of water?

24 A. Yes.

25 Q. All right. And then as that is occurring the

1 officer gets out of his vehicle? Or was he out of his
2 vehicle already?

3 A. At some point he got out of his vehicle, I can't be
4 certain at what point.

5 Q. And he was talking to Mr. Rodriguez at
6 Mr. Rodriguez's window? Did that occur?

7 A. At some point.

8 Q. Were the lights on the car at that time or any kind
9 of emergency flashers or anything like that?

10 A. No.

11 Q. And at that point you had a free access to the
12 highway, you could have gone forward or backward?

13 A. Outside of the officer speaking to us and engaging
14 with us.

15 Q. Okay. And is it, it's at that point I believe the
16 officer said he could smell the odor of burnt marijuana from
17 your vehicle?

18 A. I didn't hear any of that.

19 Q. Okay. But is there... You wouldn't disagree
20 that he could smell the odor of burnt marijuana from your
21 vehicle?

22 A. I didn't smell any.

23 Q. You didn't smell any?

24 A. And I told that to him that day.

25 Q. All right. That's all I have.

1 REDIRECT BY MR. SCHULTZ.

2 Q. (MR. SCHULTZ:) Frida, I'm going to ask you just
3 to do a little illustration for us.

4 A. (THE WITNESS:) Sure.

5 Q. Actually do two. And show us on the (short
6 inaudible, away from mic) if you want to go to the piece of
7 paper, (short inaudible, away from mic) paper. But on the
8 top show us how the police officer's vehicle approached the
9 intersection, and show the relative relevant position of your
10 vehicle and the police officer's vehicle in the
11 intersection. And underneath that just draw how the vehicles
12 came to rest the second time. Got them both?

13 A. Yes, as best I could.

14 Q. Let me get this marked. I'm going to show you
15 what I've got marked as DEFENDANT'S EXHIBIT #1 and ask you if
16 you can identify it for me?

17 A. Sure.

18 Q. Tell me what it is.

19 A. That's what I just drew.

20 Q. And what's, what are the two illustrations on
21 there?

22 A. I have them marked 1 and then 2 because I'm not
23 such a good drawer. So 1 indicates the first position when
24 he first came to the first abrupt stop.

25 Q. Uh-huh (affirmative).

1 A. And then number 2 is, shows sort of when he had
2 driven a little bit forward and sort of repositioned and
3 angled his vehicle.

4 Q. And, and the first illustration on there where it
5 shows a--

6 A. Number 1.

7 Q. -- how the officer approached the, does that show
8 how he approached the intersection? He came in and--

9 A. That's when he came to the stop.

10 Q. Okay.

11 A. So he, had been driving across this way and he just
12 came in angled and stopped right there.

13 Q. And are those drawings to scale?

14 A. No, sir.

15 Q. So tell me in that first illustration then how far
16 is a, your vehicle from the police officer's vehicle?

17 A. I would say at the closest point where the, it's a
18 triangle sort of in between.

19 Q. Uh-huh (affirmative).

20 A. Maybe a foot or two at most.

21 Q. No, no, no. I'm sorry. (Short inaudible, away
22 from mic) I'm asking. What I'm asking is on this one--

23 A. The points?

24 Q. No, no. Yes. Where he's, where the officer
25 approached your vehicle, your husband's vehicle was still

1 moving. Is that right?

2 A. Right. We were--

3 Q. When the officer got to that location, how far was
4 your vehicle back from his vehicle?

5 A. Oh, I suppose when we came to a stop we were right
6 close.

7 Q. Okay. I'm not asking you again how close it was
8 when you came to a stop. I'm asking when the officer got to
9 that location, your husband is driving the car, how far were
10 you from the police officer's vehicle when it got to that
11 location? Just tell me the distance. I understand this is
12 where the vehicles finally stopped. But when you first saw
13 the officer at that location how far back were you?

14 A. Maybe 10 yards.

15 Q. Okay. And, and then tell me what the second thing
16 is there in the illustration?

17 A. Then because we had both been stopped here he
18 repositioned his vehicle and drove around a little bit more.
19 Obviously he's still not being able to be paralegal to where
20 we were, just sort of a little bit kitty-corner to each
21 other.

22 Q. Okay. And that shows what you think is the
23 relative position of the vehicle?

24 A. Yes.

25 Q. Okay. Judge, I'd move the admission of

1 EXHIBIT #1.

2 MR. HALLS: And I have no objection.

3 THE JUDGE: EXHIBIT #1 is received.

4 MR. SCHULTZ: That's all I have.

5 RECROSS BY MR. HALLS.

6 Q. (MR. HALLS:) How close were you when you were
7 side by side, when the cars were side by side?

8 A. (THE WITNESS:) That I can't say for certain
9 because I was in the passenger side.

10 THE JUDGE: Is that (short inaudible) the officer
11 opened his door to get out bang against your car?

12 A. (THE WITNESS:) I do not remember him banging
13 against us. So however he got out, no, he was able to do so
14 without hitting each other.

15 Q. Okay. That's all I have.

16 MR. SCHULTZ: We call, actually we call
17 Mr. Rodriguez.

18 WHEREUPON,

19 DAVID MARK Rodriguez

20 having been duly placed under oath by the clerk of the court
21 and sworn to testify truthfully, upon examination testified
22 as follows:

23 DIRECT BY MR. SCHULTZ.

24 Q. (MR. SCHULTZ:) Mr. Rodriguez, tell us your name.

25 A. (THE WITNESS:) David Mark Rodriguez.

1 Q. And Mr. Rodriguez, you're a, you're a, (short
2 inaudible away from mic) you were the driver of the vehicle
3 that was stopped on this day?

4 A. That's correct.

5 Q. Tell us what was happening immediately before,
6 before you saw the officer the first time.

7 A. I'm sorry. Could you... I have a little hearing--

8 Q. I'm sorry. Tell us, tell us what you were doing
9 there when you first observed the officer?

10 A. Oh, we had pulled off to get a, some water out for
11 the next leg of the journey going to Torrey.

12 Q. And where had you pulled off?

13 A. A little dirt road up on the side of state highway
14 I believe 95 was the number.

15 Q. What happened when you turned off?

16 A. When we turned off we pulled in, made a little
17 turn back and parked under a shaded spot. My wife Frida had
18 a, taken off her seatbelt and a, bent over between the little
19 bit of a bucket seat and the console there to grab some water
20 out from behind. And a, shortly thereafter I noticed the
21 sheriff's vehicle come flying very quickly through the little
22 opening there and I saw him immediately hit the brakes as he
23 went by. And I said the sheriff, let's go.

24 Q. All right. And a, so your vehicle, you turned the
25 vehicle around and you're facing the main road again?

1 A. Yes, sir.

2 Q. All right. And how long would you estimate that
3 you had been at that location before?

4 A. Oh, just minutes.

5 Q. Okay. And a, how far off the main highway would
6 you estimate that you were?

7 A. Oh, between 100 and 125 feet.

8 Q. What happened after you said sheriff, let's go?

9 A. Frida returned to the front seat, buckled her
10 seatbelt. I put it in gear, and I still had mine on, and we
11 just started proceeding towards the highway.

12 Q. At that location had you a, ever exited the
13 vehicle?

14 A. Exited the vehicle?

15 Q. Yes.

16 A. No, sir.

17 Q. Okay. Had you ever turned the engine off?

18 A. No, sir.

19 Q. Why not?

20 A. We were only going to be there for a short while
21 and a, grab the water and pursue on our way.

22 Q. All right. What happens as you started
23 approaching the main road again?

24 A. I started heading up towards the road and a, I saw
25 the sheriff coming very quickly off of the highway in our

1 direction at an angle towards, angle off of the road cutting
2 across the lanes in front of us.

3 Q. So does his vehicle stop?

4 A. Beg your pardon?

5 Q. Does his vehicle stop?

6 A. Yes. His vehicle stops right in front of us.

7 Q. And so when it stops is it blocking your lane of
8 travel?

9 A. Yes, sir.

10 Q. And how far is the vehicle in front of you when it
11 stops?

12 A. To the best of my recollection it was probably
13 maybe a, 10 feet, something in that. Close, very close.

14 Q. And look at EXHIBIT #1 at the first illustration.
15 It's right there. And that's something that Frida just drew
16 for us.

17 A. Yes, sir.

18 Q. Would you say that EXHIBIT #1 and the first drawing
19 in that is accurate to your recollection as to how--

20 A. Yes, sir. The number 1 and, yes, sir.

21 Q. All right. And a, so had the officer come up to
22 the intersection, turned on his directional and then made
23 like a 90 degree turn and--

24 A. Not at all. Sir.

25 Q. All right. And at the point that the officer

1 stops his vehicle a, would you have been able to proceed
2 forward without hitting him?

3 A. No, sir.

4 Q. All right. And a, what did you do when the
5 officer stopped in front of you?

6 A. I just looked forward, I kept my position in the
7 vehicle heading straightforward. I didn't a, veer off or go
8 around.

9 Q. All right. Did he stop your vehicle?

10 A. Yes, he did. If I had not stopped we would have
11 made contact with the vehicle--

12 Q. So describe the stop (short inaudible, two
13 speakers)?

14 A. The stop was very quick and sudden because he came
15 off the highway very quick.

16 Q. All right. So a, so now you're stopped. What
17 happens between you and, and the police vehicle. First off
18 did you recognize this was a police car?

19 A. Oh, most definitely.

20 Q. Why do you know it's a police car?

21 A. Beg your pardon?

22 Q. How do you know it's a police car?

23 A. Oh, it's white with a the logo of San Juan, I
24 believe San Juan Sheriff right across the side very plainly
25 labeled.

1 Q. Did you see the occupant of the vehicle?

2 A. Yes, I did.

3 Q. What was he wearing?

4 A. His uniform.

5 Q. And a, so what happens now?

6 A. He made eye contact with me right there and made a
7 hand gesture--

8 Q. Show me his hand gesture?

9 A. -- of stopping. It wasn't a hi how are you, it
10 was a stop movement.

11 Q. When you saw that hand gesture what were you
12 thinking?

13 A. What was I thinking? I was thinking I was being
14 stopped. It was apparent to me that the hand gesture and the
15 angle of the vehicle was, was a forceful...

16 Q. All right. So when he told, when he made the hand
17 gesture were you already stopped or did, did, was that--

18 A. It was all simultaneous I believe.

19 Q. All right. And so what happens after you see this
20 hand gesture?

21 A. After I see his hand gesture I sat in the car,
22 still hadn't a move. He began to proceed up and cantered up
23 a, his vehicle up along the side there. Barely, there was
24 minimal room between our two vehicles on that, but at an
25 angle much like this drawing.

1 Q. So you'd say that Frida's drawing, the second
2 drawing on that EXHIBIT #1 is fairly accurate?

3 A. Very accurate.

4 Q. And how far apart would you say the vehicles are?

5 A. To the best of my recollection I would probably say
6 three, three feet from the nose of my car to the rear end of
7 his vehicle.

8 Q. Okay. Where, how are the driver's side windows
9 lined up, if at all?

10 A. He was a, they were, they were close across but not
11 identical. He was at a bit of an angle, not an extreme but a
12 bit of an angle and our windows were close to each other.

13 Q. What would have happened if you had tried to pull
14 forward at that time? Would you have had a clear shot to the
15 freeway--

16 A. I could have.

17 Q. -- to the main road?

18 A. I could have.

19 Q. All right. So you, you would have missed his
20 vehicle if you had gone forward. But how, how close would
21 you have come to the (short inaudible, two speakers)?

22 A. Just as a safety I'm sure I would have veered a
23 little to the right to go around him, but a,--

24 Q. Had you not veered, if you had gone straight ahead
25 how close to his vehicle, the tail of his vehicle would you

1 have come?

2 A. It seems to me maybe three, three feet.

3 Q. Okay. So what happens now? So the officer pulls
4 the vehicle alongside you, you're stopped. What happens?

5 A. He still had not remained a locking eye contact
6 with me. Pulled alongside and just sat there staring at
7 me. Made no comments or... He just stared at me through my
8 window.

9 Q. Okay.

10 A. And I rolled my window down just a little bit,
11 about seven inches or so. And I said we're okay, I just
12 stopped for some water. And at that point he just continued
13 to stare at me. And exited his vehicle very quickly and
14 grabbed ahold of my door, opened it up and told me to step
15 out of the vehicle.

16 Q. Okay. So how did your door get opened?

17 A. He opened it. He had a hand, one hand, his left
18 hand was inside the open part of the window and opened the
19 vehicle door up and--

20 Q. Does he tell you to do something, does he ask you
21 to do something?

22 A. Pardon?

23 Q. What, what is... When he opens your door what,
24 what does he say, what does he do?

25 A. He told me to step out of the vehicle. And a, I

1 shut the engine off, put it in gear and stepped out of the
2 vehicle.

3 Q. That's all I have.

4 MR. HALLS: I don't think I have any questions,
5 Your Honor.

6 MR. SCHULTZ: We rest, Judge. We have argument.

7 THE JUDGE: Any rebuttal?

8 MR. HALLS: Call Jaren Adams.

9 REBUTTAL WITNESS FOR THE STATE

10 WHEREUPON,

11 OFFICER JAREN ADAMS

12 having been previously duly placed under oath by the clerk of
13 the court and sworn to testify truthfully, retok the witness
14 stand and upon examination testified as follows:

15 DIRECT BY MR. HALLS.

16 Q. (MR. HALLS:) Officer Adams, you're still under
17 oath.

18 A. (THE WITNESS:) Excuse me?

19 Q. You're still under oath?

20 A. Yes.

21 Q. What do you recall about how you vehicle, how you
22 stopped your vehicle, where you stopped your vehicle when you
23 pulled off the highway?

24 A. I recall pulling down off the highway, come to a
25 where I'm straight up and down the road and stopped--

1 Q. Did you stop--

2 A. -- and then they approached.

3 Q. Did you stop once on the entrance of the highway
4 and again as you pulled out of the where the car would have
5 been going?

6 A. No.

7 Q. Did you stop twice?

8 A. No, I did not.

9 Q. All right. You got out of your vehicle, you got
10 out of your vehicle at some point and approached Mr. Excuse
11 me, Mr... Excuse me, that's--

12 MR. SCHULTZ: Mr. Rodriguez.

13 Q. (MR. HALLS:) You approached Mr. Rodriguez. Tell
14 me what happened when you approached. What, what was the
15 circumstances regarding his window?

16 A. (THE WITNESS:) When we started talking I opened my
17 door and got out and we were talking. My window was down. I
18 recall his window being down. And we were just talking. And
19 then I, you know, that's when I smelled the marijuana and
20 asked him to step out.

21 Q. Okay. So you smelled the odor of marijuana and
22 asked him to step out. Did you open the door?

23 A. No, I did not.

24 Q. Did you have your hand on the, the latch or on the
25 window?

1 A. I may have, because you're, because I'm standing
2 right here. Normally when I ask somebody to step out of a
3 vehicle I can step back. But because my vehicle is side by
4 side with his, you know, and I was kind of there, I just kind
5 of stepped back. I may have had my hand on his door to keep
6 it from hitting me as it opened.

7 Q. But you didn't open it?

8 A. No, I did not.

9 Q. This eye contact, you indicated that you don't
10 recall any eye contact until he got parallel with you?

11 A. I couldn't see him with the windshield. No. I
12 just pulled down and as he come up I just waved at him and
13 he, you know, stopped and talked to him.

14 Q. Have you seen the diagram?

15 A. Just briefly, yes.

16 Q. Number 1 indicates a place where I think a,
17 Mr. Rodriguez's wife says that you stopped up towards the
18 highway?

19 A. Yes.

20 Q. And a, your testimony has covered that?

21 A. Yes.

22 Q. Did that occur?

23 A. That did not.

24 Q. The second drawing shows where the, the relative
25 positions of the vehicles when you, as you stopped and had

1 conversation.

2 A. Yes.

3 Q. As I understand her testimony you were more at an
4 angle than straight, parallel, you were more on an angle.
5 What's your recollection?

6 A. I recall just being parallel. Now to be exact
7 whether my tail was still out there a little bit because as I
8 turned in and stopped. But I recall it being parallel.

9 Q. You had plenty of room to pull to a parallel
10 position other than just right in front of him?

11 A. Oh, yes. That's a, like I said, stated before
12 that's a very wide road, that semis come in and out of there
13 so there was plenty of room. I pulled down and around and
14 stopped as I faced in and out of the road, parallel with the
15 road.

16 Q. That's all I have, I think.

17 CROSS BY MR. SCHULTZ.

18 Q. (MR. SCHULTZ:) Deputy, I asked you some questions
19 on examination your first time up about how you approached
20 this intersection. You were I think a little bit merky, you
21 said you didn't recall what had happened. What, what
22 refreshed your recollection about a, about your approach to
23 the Rodriguez vehicle?

24 A. (THE WITNESS:) Will you be a little more... I
25 don't understand what you're saying. I pulled off and they

1 approached me from where they were stopped.

2 Q. Okay. All right. So I guess actually what you
3 told Mr. Halls here on rebuttal is that you're clear that you
4 didn't stop twice, that you only made the one stop?

5 A. That is correct.

6 Q. All right. And I think actually what you told me
7 on cross examination is that you weren't clear how you
8 approached the intersection, you didn't remember that.

9 A. What?

10 Q. Has anything refreshed your recollection about how
11 you approached the intersection?

12 A. No. If I may, what you asking me, if you asking
13 if I made a 90 degree turn or pulled down off there and I
14 said I don't recall if it was a 90 or I pulled down, I just
15 pulled down off the road.

16 Q. Okay. And, and in your recollection, so you still
17 don't doesn't have any recollection about that?

18 A. That's correct.

19 Q. That's all I have. Thank you.

20 MR. HALLS: I don't have anything on that,
21 Your Honor.

22 THE JUDGE: Step down.

23 MR. SCHULTZ: Are you done?

24 MR. HALLS: I'm done.

25 MR. SCHULTZ: Do you want to argue first or

1 (short inaudible, no mic).

2 MR. HALLS: I'll respond.

3 CLOSING ARGUMENT BY MR. SCHULTZ

4 MR. SCHULTZ: Your Honor, in my conversations
5 with Mr. Halls about this case, I mean, I think it's apparent
6 to me that what the state wants to argue on this case that
7 this was a community caretaker type situation.

8 THE JUDGE: It wasn't clear to me. I think they're
9 saying it's a Level-1 stop. What is your
10 argument, Mr. Halls?

11 MR. HALLS: It's not community caretaker because
12 we don't claim it's a stop. You have to have a stop for
13 community caretaker, and then you have to have... I can see
14 where he's going, one of the items there is that you have to
15 have--

16 THE JUDGE: So you're not arguing community
17 caretaker?

18 MR. HALLS: No.

19 MR. SCHULTZ: All right. So, Your Honor, we're
20 arguing that this is an illegal stop, that my client has the
21 right to be free from unwarranted governmental intrusion.
22 The acts of the police officer on this occasion are clearly a
23 stop. He, he does not contest that the vehicle was moving
24 when he came back to that intersection, he doesn't have a
25 recollection had how he approached the intersection.

1 But the two people that have talked to you about
2 that do have a recollection of it have provided an
3 illustration EXHIBIT #1 that shows that the officer a, cut
4 across their lane of travel as, as they approached.

5 At the very beginning when the officer first saw
6 the road vehicle he said it was about 100 feet off the road.
7 He went by, you know, he turned around. There was some
8 (inaudible word) time where Mrs. Rodriguez are free to get to
9 be situated. But then approached.

10 But the officer doesn't dispute that when he saw
11 the vehicle again it was moving, it wasn't stopped. The
12 officer was clear about that. All three witnesses have told
13 the court that fact.

14 So with the officer cutting across a lane of travel
15 at a distance that must have been somewhat less than 100
16 feet, with their vehicle moving, even on a gravel road, they
17 had no choice but to stop to avoid him. At that point,
18 Your Honor, the officer himself told you that he made a
19 motion to the vehicle to stop. He tried to characterize it
20 today as some type of wave. But when he, but when I cross
21 examined him or showed him the a, video of the, of his
22 testimony, his prior testimony, his prior testimony was, and
23 then he corrected his testimony today, was that he did stop,
24 he did wave to the vehicle to see if they would stop. Those
25 were his exact words both times. When he demonstrated what

1 he did, Your Honor, I asked the court to take note of what
2 the motion was. He extended his, his hand out a, palm
3 forward with his fingers upraised. And I don't see, in a
4 gesture which I don't see how it can be construed as anything
5 other but stop, stay there. At that point the officer pulls
6 his vehicle up alongside the Rodriguez vehicle. He doesn't
7 maintain, excuse me, he doesn't break the eye contact. All
8 of the witnesses I think were clear about that. And a, he
9 makes contact with the individual. So I don't think it's
10 really relevant whether the officer stopped once or twice. I
11 think clearly his actions of cutting across their lane of
12 travel necessitated to them stop. At that point he clearly
13 indicates to them by hand gesture that I want you to stay
14 there. That he is detaining them at the that point. I'm
15 not going to argue that he doesn't have his signal lights on,
16 that he doesn't have any other show of force. But he is in a
17 marked vehicle. The officer himself said that he a, that it
18 would be obvious to him that they would see the sign on his
19 vehicle. The officer said that maybe people that were
20 from out of town wouldn't recognize that as a police vehicle
21 but it says sheriff. And they both said that we say the
22 insignia when we read San Juan County Sheriff on, there they
23 knew that he was a sheriff's deputy. They were not free to
24 go at that time, it's a stop. It was a stop without
25 justification and under those circumstance. And we're asking

1 the court to suppress everything from that point forward.

2 Thanks.

3 CLOSING ARGUMENT BY MR. HALLS

4 MR. HALLS: Your Honor, cutting across somebody's
5 path doesn't constitute a stop. Was it reasonable for
6 Mr. Rodriguez to believe that he was being stopped under this
7 circumstance? Each sees the officer going down the road and
8 he immediately wants to get out of there. And it's probably
9 obvious to the court with the little bit of extra information
10 the court has why that was the case.

11 But so the officer testifies... If the officer is
12 really going to stop this person why doesn't he turn his
13 lights on, why doesn't he pull across the access to the
14 highway and stop right there, the person can't get out. If
15 he's, if he's going to make, if he's determined to make
16 contact and determined to stop these people he stops his
17 vehicle in the road, he turns his lights on or does one or
18 the other. He gets out of his vehicle before Mr. Rodriguez
19 gets up to the highway and he, and he stands in front and
20 doesn't let him pass.

21 The testimony of both of these people was that they
22 always had access to the highway. Now she said well he, he
23 kind of comes to a sliding stop off the road, they're coming
24 towards the highway, then he pulls around like this. I mean
25 so he's... He engages them in conversation in the, in the a,

1 in the vehicle. I know Mr. Schultz wants to make it sound
2 like halt, but the officer said I went like this. I mean, I
3 guess if you're in their position you construe that as a halt
4 signal, the officer construed it as a wave. So he waves at
5 the person, he starts talking to them, he says we're okay,
6 we've had water. The officer gets out of his vehicles goes
7 over and approaches and says that's an officer safety thing,
8 he can smell the marijuana.

9 There is not the indications is that the, of what,
10 that the officer was attempting to stop this vehicle, he
11 didn't pull his vehicle in front, he doesn't block the access
12 of this, of this person to where they had been if they wanted
13 to back up or to where they wanted to go if they wanted to
14 get on the highway. Both of them testified to that. They
15 initiated the conversation.

16 I think you have to take all of the circumstances
17 of this case and say what is really reasonable here. And I
18 think even if it's perceived by these people that this is a
19 signal of some kind when they, when they stop it is that
20 reasonable for him to just say to them is everything okay.
21 And he starts to engage them in conversation. I think it's a
22 level-1 stop and, and an officer is entitled to a level-1
23 stop, he's entitled to a police citizen encounter.
24 Especially in these kind of circumstances, especially in the
25 remote area that we have in San Juan County. They would be

1 criticized if they go by these vehicles and then we get in
2 here and people say well five cops passed my car and nobody
3 would stop and see if I needed any help or talk to me.

4 I think it's a Level-1 encounter. I don't think
5 it's been shown that he made, that he did what would be the
6 traditional things to try to detain this vehicle. The
7 Rodriguezes were not detained. It's a Level-1 stop and I
8 don't think that the court suppress the evidence.

9 THE JUDGE: Did you want to offer EXHIBIT #1,
10 Mr. Schultz?

11 MR. SCHULTZ: I thought I had. If I didn't I do
12 so now.

13 THE JUDGE: All right. I'll receive it.

14 COURT'S RULING

15 THE JUDGE: I think in these circumstances it's
16 the burden of the accused to show first of all that there was
17 some police action that, that a, affected a constitutional
18 right. And so he'd have to show that this was a level-2
19 encounter. He hasn't convinced me of that. I find the
20 testimony of the officer about what, about what happened more
21 credible. Even if I believed the defendant and his spouse
22 I'm not sure even that would rise to a level-2 encounter.

23 I would expect that when if you really think you're
24 stopped by the police the first question you would ask would
25 be what's the problem, why have you stopped me, not I just

1 stopped to get some water.

2 And a, but I, what I believe happened is as the
3 officer described it. He pulled off, he may have pulled in
4 front of their lane. But I don't, I don't see how we could
5 possibly have a rule that says every time a police officer
6 pulls across in front of another vehicle he's made a level-2
7 stop. And I don't believe that he stopped and blocked their
8 travel for even a fraction of a second. I think he crossed
9 at most in front of them and then pulled side by side with
10 them.

11 And when he said that he waved to see if they would
12 stop, that's like an officer knocking on the door to see if
13 someone is suspected of growing marijuana and talk to them
14 about whether he's growing marijuana. He can ask. If every
15 other citizen in the world can come and knock on my door to
16 see if I'm growing marijuana in the basement the police can
17 do it too. And if every other citizen in the world can pull
18 up along of my car and ask me if I'm okay, the police can do
19 it too. And I think that's what happened here.

20 So I'm denying the motion to suppress.

21 MR. SCHULTZ: Your Honor, may I have a finding as
22 to a, what the court believes the officer's hand gesture
23 was?

24 THE JUDGE: It was like this. I didn't see, I
25 didn't see shoving it out as in stop. I realize hand signals

1 can be misunderstood. But I did not see him describe forcing
2 it out like stop, I didn't see him saying hello, waving it
3 back and forth either. So all I have is him raising his
4 hand, that's it.

5 WHEREUPON, the hearing was concluded.

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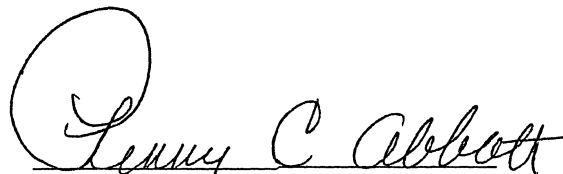
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REPORTER'S CERTIFICATION

STATE OF UTAH)
) SS.
COUNTY OF UTAH)

I, Penny C. Abbott, a Certified Shorthand Reporter and Notary Public in and for the State of Utah, do hereby certify that I received the electronically recorded videotape in the matter of State vs. Rodriguez, hearing date August 28, 2006, and that I transcribed it into typewriting and that a full, true and correct transcription of said hearing so recorded and transcribed is set forth in the foregoing pages numbered 1 through 50, inclusive except where it is indicated that the tape recording was inaudible.

WITNESS my hand and official seal this 16th day of January, 2007.



PENNY C. ABBOTT, COURT REPORTER/NOTARY
License 22-102811-7801
Notary Public, Comm Exp 9-24-08

