1986

State of Utah v. Anthony Price Schlosser, and Harris Lowder: Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff-Appellant,	:	
-v-	:	Case No. 860061
ANTHONY PRICE SCHLOSSER, and HARRIS LOWDER,	:	Priority 10
Defendants-Respondents.	:	

BRIEF OF APPELLANT

INTERLOCUTORY APPEAL FROM ORDER SUPPRESSING EVIDENCE, IN THE FOURTH JUDICIAL DISTRICT COURT, IN AND FOR JUAB COUNTY, STATE OF UTAH, THE HONORABLE RAY M. HARDING, PRESIDING.

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STATEMENT OF THE ISSUES

1. Did the District Court erroneously determine that Officer Howard seized Schlosser or searched the car in violation of the Utah and United States Constitution when he opened the car door and asked for identification?

2. Did the District Court erroneously apply a probable cause standard to an investigative detention when Terry v. Ohio, 392 U.S. 1 (1968) and Utah Code Ann. § 77-7-15 (1982); permit such stops based upon a reasonable, articulable suspicion that a suspect had been, was or was about to be engaged in criminal activity?

3. Did the District Court abuse its discretionn by finding that the investigatory detention if there was a detention, and subsequent search of Schlosser was a substantial violation of his constitutional rights under both the Utah and United States Constitutions that was committed in bad faith?

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STATEMENT OF THE CASE

Defendants Schlosser and Lowder were charged with unlawful possession of more than 16 ounces of marijuana, a controlled substance, a third-degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (Supp. 1985).

Defendants were bound over to stand trial after a preliminary hearing on July 3, 1985, in the Justice Court, in and for Nephi Precinct, Juab County, State of Utah, the Honorable Lane Harward, presiding. On July 9, 1985, defendant Lowder moved to suppress all the evidence against him and on July 15, defendant Schlosser joined in that motion (R. 12, 17). On September 3, 1985 Judge Ray Harding denied defendant's motion for failure to submit memoranda (R. 28). Defendants submitted a memorandum on October 8, 1985 in support of their motion to suppress (R. 30) and the State responded on October 24, 1985 (R. 52). On October 29, 1985, Judge Harding waived oral argument of the motion (R. 66). On November 12, 1985 Judge Harding ruled in favor of defendants and, on January 12, 1986, he ordered that the

evidence be suppressed (R. 67, 68-70).

Thereafter, the State filed a petition for interlocutory appeal from the Suppression Order in this Court on January 29, 1986. This Court granted the petition on February 25, 1986.

STATEMENT OF FACTS

On May 17, 1985 at 3:00 - 4:00 p.m. Trooper Howard of the Utah Highway Patrol clocked a pickup truck with two occupants travelling 44 m.p.h. in a 30 m.p.h. zone in Nephi, Utah (R. 86). Trooper Howard, a man with 11 years of law enforcement experience, signaled the pickup truck to pull over (R. 85, 87). As he followed the truck, before it stopped, Trooper Howard saw the passenger moving around; bending forward and to the right and left as if he were trying to hide something (R. 88, 102-103, 106). Immediately upon stopping the truck, the driver, Harris Lowder, hopped out and met Howard between the truck and Howard's patrol car with driver's license and registration in hand (R. 87-88, 101, 106). Based on past experience and the actions of the two occupants; one fidgeting around and nervously glancing back at Howard, the other immediately moving away from the truck; Howard concluded that there was something in the truck the occupants did not want him to see (R. 88, 103, 105).

For these reasons, Howard decided to investigate further and check on the passenger's identification (R. 89, 104-105). Howard walked to the front of the truck, passenger side, and tapped on the closed window (R. 103-104). Receiving no response, he opened the passenger door and asked the passenger, Anthony Schlosser, for identification (R. 103-104).

As Howard opened the door, he observed in plain view a small plastic bag containing what appeared to be marijuana inside a bulging, elasticized pocket attached to the door (R. 89, 99, 105). Howard also smelled the distinct odor of marijuana (R. 89, 105-106). Howard asked for Schlosser's identification and asked him to step out of the truck (R. 89). Howard asked Schlosser if there were any weapons in the truck (R. 90, 97, 107). Schlosser responded that there was a .38 pistol in the glove box and started to reach for it (R. 90, 97). Howard told Schlosser not to open the glove box, just step out of the truck (R. 90). Howard reached in and retrieved an unloaded .38 pistol (R. 90, 92, 97) and shells (R. 92).

Howard also asked Schlosser to remove an object he saw bulging in Schlosser's pants pocket (R. 90, 110-111). Schlosser removed a stone marijuana pipe from his pocket (R. 90, 110). Howard then arrested both Lowder and Schlosser for possession of a controlled substance and told them to stand in front of the pickup truck (R. 91, 97). He did not handcuff them or frisk them (R. 97,. 110). He returned to his patrol car and called for backup officers who responded within minutes (R. 91, 110).

When the backup officers arrived, Howard asked the suspects if there were any more weapons in the truck (R. 91). He did this to protect himself and any other people in the area (R. 97). One of the men said there was a .22 rifle behind the seat (R. 91, 97). When Howard pulled the seat forward to check the rifle, which he found was unloaded, he also discovered a brown paper sack (R. 91, 97). Inside the sack were three larger

bags of marijuana (R. 91). After the truck was impounded, during an inventory search, another small bag of marijuana was also discovered in the truck, possibly in the driver's door compartment, along with other drug paraphernalia and some "speed" tablets (R. 93, 94, 98, 112-117, 121).

Defendants moved to suppress the marijuana that was discovered by Trooper Howard (R. 12, 17, 30-51). Judge Ray M. Harding, Sr. characterized the basis of the motion as lack of probable cause to seize or search Schlosser (see Appendix A). Judge Harding then found that the officer had no valid reason to order Schlosser out of the truck or to search Schlosser and that any action Trooper Howard took "was based on a mere suspicion that the defendant was engaged in criminal activity." Finding that all of the evidence was discovered as a result of an illegal detention and search, and that the detention and search substantially violated defendant's constitutional rights and was not in good faith, Judge Harding suppressed the evidence (R. 68-70).

SUMMARY OF ARGUMENT

The action of Trooper Howard in walking up to the car, opening the door and questioning the passenger was not a search and seizure under the Fourth Amendment, nor should it be under Art. I § 14 of the Utah Constitution. Therefore, there was no violation of Schlosser's constitutional rights and the evidence was erroneously suppressed.

Even if Trooper Howard detained Schlosser, it was because he entertained a reasonable suspicion of criminal

activity. Under the Fourth Amendment, Art. I § 14 and Utah Code Ann. § 77-7-15, an officer may seize a person he reasonably suspects of criminal activity. Under the circumstances of this case, Trooper Howard was justified in detaining Schlosser and the lower court erroneously suppressed the evidence.

Alternatively, if Trooper Howard did not entertain a reasonable suspicion, the intrusion on Schlosser's constitutional and statutory rights was minimal and not substantial or in bad faith. Under Utah Code Ann. § 77-35-12(g), then, the evidence was erroneously suppressed.

ARGUMENT

POINT I

THE EVIDENCE SHOULD NOT HAVE BEEN SUPPRESSED BECAUSE THE OFFICER'S ACTION IN APPROACHING SCHLOSSER WAS NOT A SEARCH OR SEIZURE.

This Court recently expressed concern about the failure of the parties to brief relevant state constitutional questions in criminal cases, particularly in the area of search and seizure, see State v. Earl, 30 Utah Adv. Rep. 3, 4 (1986); State v. Hygh, 711 P.2d 264, 271-73 (Utah 1985) (Zimmerman, J., concurring). The State will first address the question of whether the analysis of the officer's actions in this case should differ under Art. I § 14 of the Utah Constitution from a fourth amendment analysis even though the trial court's ruling assumes that the analysis is the same as that applied under the Fourth Amendment (See Appendix A).

First, although this Court suggested that the state constitutional standard could be construed to expand

constitutional protection beyond that mandated by the United States Supreme Court under the Fourth Amendment, Earl, 30 Utah Adv. Rep. at 4; Hygh, 711 P.2d at 271-73 (Zimmerman, J., concurring), the Court has traditionally construed Art. I § 14 and the Fourth Amendment, which textually are nearly identical, as providing the same scope of protection. See e.g., State v. Criscola, 21 Utah 2d 272, 444 P.2d 517 (1968); State v. Lopes, 552 P.2d 120 (Utah 1976). This may explain, to a certain extent, the absence of any independent discussion of Art. I § 14 by the parties in previous search and seizure cases before this Court and by the lower court in this case. Recognizing, of course, that the Court may be rethinking its past application of Art. I, § 14, it is the State's position that there is no good reason why, in this case, the Court should construe the Utah constitutional provision more narrowly than the Fourth Amendment has been interpreted so as to characterize Officer Howard's action as a search or seizure.

Because it is the State's position that the analysis of this case under Art. I § 14 should be the same as that under the Fourth Amendment, the remainder of this argument does not separately analyze the two constitutions but treats them as if the same analysis applied to both.

Under both constitutional provisions, Trooper Howard did not engage in a search or seizure. There are three separate levels of police encounters with the public. They are:

> (1) An officer may approach a citizen at anytime [sic] and pose questions so long as the citizen is not detained against his will; (2) an officer may seize a person if the

> officer has an "articulable suspicion" that the person has committed or is about to commit a crime; however, the detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop"; (3) an officer may arrest a suspect if the officer has probable cause to believe an offense has been committed or is being committed. See Florida v. Royer, 460 U.S. 491, 498-499 (1983).

United States v. Merritt, 736 F.2d 223, 230 (5th Cir. 1984).

Trooper Howard's initial approach toward Schlosser fits within the first category listed above. Schlosser was not initially detained against his will and Howard merely wanted to check his identity because of the activity he observed which he interpreted as an attempt to hide something. The vehicle in which Schlosser sat waiting was already lawfully stopped for a traffic violation.[1] The issue here is whether an officer may approach a passenger of a lawfully stopped vehicle to ascertain his identity and request information about his activities which appear suspicious.

The United States Supreme Court's opinion in Pennsylvania v. Mimms, 434 U.S. 106 (1977), is instructive. There, the Court held that a peace officer may request the driver of a vehicle, stopped for a mere traffic violation, to step out of the vehicle with no indication of other unlawful activity whatever. The Court characterized the intrusion as "de minimus", as "at most a mere inconvenience", and as one which "hardly rises to the level of a 'petty indignity'." 434 U.S. at 111. The Court

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[1] Defendants did not challenge in the lower court the validity of the initial traffic stop.

held that a generalized concern for the officer's own safety, arising from the percentage of police shootings that occurred when an officer approached a suspect seated in a vehicle, without any evidence of danger in the particular case, was sufficient to justify requiring every driver stopped for a traffic violation to get out of the car.

Some state courts have applied the Mimms analysis to cases similar to this one. In State v. Ferrise, 269 N.W.2d 888 (Minn. 1978), police officers stopped a car which they observed driving the wrong way in their lane of traffic on a divided highway shortly after they had received a radio report of a robbery in the area. Nothing was known by the officers that connected this car to the robbery. The driver stepped out of the stopped car and met one of the officers halfway between the two vehicles. When the driver was unable to produce identification, the officer walked up to the passenger side of the car to talk to the passenger. Unable to see inside the car, the officer opened the car door and, upon doing so, saw a gun which he grabbed. He then removed the passenger and patted him down.

The Ferrise court reasoned:

> If an officer orders a driver to get out of his car, as in Mimms, what he in effect is doing is also ordering the driver to open the door, because that is generally the only reasonable way a person can get out of a car. Operationally then, there is little practical difference between ordering a driver to open his door and get out of his car, on the one hand, and opening the door for the driver and telling him to get out, on the other. In this case, if the driver had not gotten out of the car on his own, the officer could have opened the door and told him to get out.
>
> While the Mimms case involved only the

> right to order a driver to get out of the car, the Mimms analysis would seem also to justify a policy of ordering passengers out. The same concern of the officers for their own safety applies, and the intrusion on the rights of the passengers occasioned by being required to get out of the car is no greater than the intrusion on the rights of the driver.
>
> [3] In this case, the officer who opened the door and told the passenger to get out did not testify that he did this pursuant to any policy or out of any concern for his own safety. The officer, however, had a good reason for going back to the car and talking to the passenger. Specifically, he wanted to see if the passenger could aid them in accurately identifying the driver so a license check could be made. Since the car was covered with snow and the officer could not see the passenger, the officer simply opened the door. While he probably could have tapped on the window to get the passenger's attention, we fail to see how this action in opening the door in order to talk with the passenger could be deemed unreasonable, especially when under the Mimms holding he probably could have done so whether or not he had a particular reason for wanting to talk to the passenger.
>
> We hold that the intrusion into the passenger's privacy was minimal and that it may not prevail when balanced against the important public interests involved. The test is the reasonableness of the intrusion under all the circumstances, and in this case the minimal intrusion was completely reasonable and proper.

269 N.W.2d at 890-91. Similarly, Officer Howard had good reason to approach Schlosser and ask for identification. Howard thought Schlosser was attempting to hide something from Howard's view. Initially, Howard only wanted to talk to Schlosser and merely opened the door to facilitate conversation, after he tapped on the closed window, and asked for identification. At this point, there had been no seizure or detention of Schlosser who sat inside a truck that was validly stopped for a traffic offense. The intrusion was minimal and reasonable under the circumstances.

Schlosser was not asked to get out of the truck until Howard saw the marijuana in the door pouch, even though, under the above analysis, Howard could have requested Schlosser to get out of the truck to restrict his potential access to weapons without having seen the contraband. Once Howard discovered the marijuana, everything which followed was based upon probable cause as a result of the plain view sighting. See State v. Gallegos, 23 Utah Adv. Rep. 23, 24-25 (1986); See also People v. Bradi, 437 N.E.2d 1285 (Ill. App. 1982) (Ordering passenger out of stopped car not seizure; subsequent seizure of cocaine dropped by passenger and search of car lawful); State v. Williams, 371 So.2d 1074 (Fla. App. 1979) (ordering passengers out of stopped car not seizure; subsequent seizure of gun from passenger lawful). Notably, defendants conceded in the lower court that if Howard's initial approach to Schlosser was lawful, then the subsequent discovery of marijuana constituted probable cause based upon plain view observations for the further search of the truck cab. See R. 37.

Because Howard's walking up to the truck, opening the door and asking for identification was not a seizure of Schlosser, but was a minimal intrusion that was reasonable under the circumstances, Schlosser's constitutional rights were not violated. The lower court erred, therefore, in finding such a violation and in suppressing the evidence.

POINT II

EVEN IF THE OFFICER SEIZED SCHLOSSER, THERE WAS NO VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

A. The Standard Employed by the Lower Court On the Issue of the of the Validity of the Investigative Detention Was Erroneous.

The appropriate standard for investigative detentions was articulated by the United States Supreme Court in Terry v. Ohio, 392 U.S. 1 (1968); and Brown v. Texas, 443 U.S. 47, 51 (1979); and is codified in Utah as follows:

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

Utah Code Ann. § 77-7-15 (1982). See also United States v. Recalde, 761 F.2d 1448 (10th Cir. 1985); United States v. Merritt, 736 F.2d 223 (5th Cir. 1984); State v. Swanigan, 699 P.2d 718 (Utah 1985). The reasonable suspicion standard also applies to investigative stops involving vehicles. United States v. Sharpe, ____ U.S. ____, ____, 105 S.Ct. 1568, 1573 (1985).

Under the Fourth Amendment then, the trial court erred in suppressing evidence based upon application of a probable cause standard. The independent question remains, however, whether the evidence was properly suppressed under Art. I § 14 of the Utah Constitution.

As argued in Point I, there is no good reason why this Court should construe this provision more narrowly than the Fourth Amendment has been interpreted so as to undermine the reasonable

suspicion test for investigative detentions which has heretofore been applied in Utah under the Fourth Amendment and Utah Code Ann. § 77-7-15 (1982). See e.g., Swanigan, 699 P.2d at 718.

That test reflects a reasonable and workable approach to the question of when a police officer may approach an individual to investigate suspected criminal activity. It adequately protects an individual's right under Art. I § 14 to be free from unreasonable searches and seizures because it requires that the officer entertain a reasonable suspicion that the individual was, is, or is about to be engaged in criminal activity.

Among the governmental interests protected by the reasonable suspicion test contained in § 77-7-15 are effective crime prevention and detection. Law enforcement officers must be able, "in appropriate circumstances, and in an appropriate manner [to] approach a person for purpose of investigating possibly criminal behavior even though there is no probable cause to make an arrest," United States v. Place, 462 U.S. 696, 704 (1983), quoting Terry, 392 U.S. at 22, in order to protect these governmental interests.

In his order dated January 9, 1986 (see Appendix A), Judge Harding characterized the motion to suppress as being based on a lack of probable cause to detain and search Schlosser. Judge Harding then went on to find that the officer based the detention and search "on a mere suspicion that the defendant was engaged in criminal activity." Apparently, Judge Harding employed the probable cause standard to determine the validity of the detention.

Arguably, Judge Harding may have meant that a "mere suspicion" was something less than a reasonable suspicion, and, thus, have based his decision on the appropriate standard. However, in light of his pretextual characterization of the issue as the existence of probable cause and his failure to cite § 77-7-15 of the Utah Code, that is unlikely. At the least, Judge Harding's ruling is unclear. This Court should remand this case to the District Court with instructions that the appropriate standard be applied.

B. If the Court Had Employed the Reasonable Suspicion Test then The Evidence Would Not Properly Have Been Suppressed.

Howard's approach of Schlosser closely fits the second category of allowable police contact set out in United States v. Merritt, 736 F.2d 223, 230 (5th Cir. 1984) and quoted in Point I, above. This is the Terry stop category. To justify the detention of Schlosser, Howard must have had "a reasonable suspicion, based on objective facts, that the individual [was] involved in criminal activity." State v. Swanigan, 699 P.2d 718, 719 (Utah 1985); quoting Brown v. Texas, 443 U.S. 47, 51 (1979); Utah Code Ann. § 77-7-15 (1982). The reasonableness of the detention must be judged by an objective standard, i.e., "would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" Terry v. Ohio, 392 U.S. 1, 21-22 (1968); see also State v. Carter, 19 Utah Adv. Rep. 26 (Sept. 27, 1985).

The United States Supreme Court has stated:

> A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

Adams v. Williams, 407 U.S. 143 (1972). See also: State v. Torres, 29 Utah 2d 269, 508 P.2d 534 (1973). The temporary detention is an "intermediate response" so that a police officer "who lacks . . . probable cause to arrest [need not] shrug his shoulders and allow a crime to occur or a criminal to escape." Adams, 407 U.S. at 143.

This Court also said that:

> When a police officer sees or hears conduct which gives rise to a suspicion of crime, he has not only the right but the duty to make observations and investigations to determine whether the law is being violated; and if so, to take such measures as are necessary in the enforcement of the law.

State v. Folkes, Utah, 565 P.2d 1125, 1127 (1977); State v. Whittenback, Utah, 621 P.2d 103, 105 (1980).

This Court also considered the "informal arrest" or stop and detention situation in State v. Torres, 29 Utah 2d 269, 508 P.2d 534 (1973). In that case, the Court said, "that the test to be applied on the question as to whether" appellant's constitutional rights have been abridged:

> . . . is one of reasonableness: that is, whether fair-minded persons, knowing the facts, and taking into consideration not only the rights of the individuals involved in the inquiry or search, but also the broader interests of the public to be protected from crime and criminals, would regard the conduct of the officers as being unreasonable [footnote omitted].

29 Utah 2d at 271, 508 P.2d at 536. See also: Terry v. Ohio, supra. Furthermore,

> The determination should be made on an objective standard: whether from the facts known to the officer, and the inferences which fairly might be drawn therefrom, a reasonable and prudent person in his position would be justified in believing that the suspect had committed the offense. State v. Hatcher, 27 Utah 2d 318, 495 P.2d 1295 (1972).

State v. Whittenback, 621 P.2d 103, 106 (Utah 1980).

> This Court has also stated that:
>
> . . . it is essential that a reasonable degree of tolerance be indulged as to the judgment of police officers, so long as they are acting in good faith and within the standards of decent and decorous behavior.

State v. Torres, 29 Utah 2d 269, 508 P.2d 534, 536 (1973).

Finally, although Howard apparently felt no definite physical fear of Schlosser, there is:

> no legal requirement that a policeman must feel "scared" by the threat of danger. Evidence that the officer was aware of sufficient specific facts as would suggest he was in danger satisfies the constitutional requirement . . . so long as it is clear that he was aware of specific facts which would warrant a reasonable person to believe he was in danger.

United States v. Tharpe, 536 F.2d 1098, 1101 (5th Cir. 1976); See also State v. Roybal, 28 Utah Adv. Rep. 9, 10 (1986).

The articulable facts known to Howard and set forth above objectively justified a temporary detention of Schlosser to determine if he was involved in criminal activity. An objective person with ten years of law enforcement experience, See Roybal, 28 Utah Adv. Rep. at 10; Brinegar v. United States, 338 U.S. 160

(1949), would have entertained the same suspicions on viewing Schlosser moving around and nervously glancing over his shoulder, especially in light of Lowder's apparent attempt to keep the officer away from the truck cab. Although Trooper Howard did not say so at the hearing, he could also have thought that what Schlosser was hiding was a weapon that could easily be used against himself or others. Certainly, a reasonably prudent person would have entertained the thought. The fact that Howard asked about weapons indicates that he did think about it at the time.

In a very similar case, State v. Willis, 320 N.W.2d 726 (Minn. 1982), the Minnesota Supreme Court found no constitutional violation. There, a highway patrolman stopped a car for speeding. As the car pulled over and slowed to a stop, the officer saw one of the passengers "lean forward, turn around and look back and then lean forward again." Id. at 727. The driver got out and met the officer part way between the two cars. The officer then walked up to the car to find out what the passenger had been trying to hide. He saw a lifelike rubber mask on the floor and asked the two passengers to get out. He then saw a gun partially protruding from under the seat and reached for it. As he did so, one of the passengers attempted to escape. The officer caught him and arrested him.

On appeal, the defendant-passenger argued that furtive movements were insufficient to establish probable cause. The court said:

> At a minimum, Officer Steffen was justified in going up to the car and investigating further. In State v. Landon, 256 N.W.2d 89 (Minn. 1977), we upheld the

> practice of police officers routinely shining flashlights through the windows of cars lawfully stopped for speeding. See also State v. Vohnoutka, 292 N.W.2d 756 (Minn. 1980); 1 W. LaFave, Search and Seizure, § 2.2(b) (1978). Officer Steffen had a more specific reason for talking with defendant: defendant had acted suspiciously as if he were trying to conceal something. . . .
>
> Given the time, place and the circumstances, Officer Steffen clearly was justified in ordering the passengers out in order to get them away from what might well be a weapon under the seat. . . . by the time Steffen initiated the search, he clearly had probable cause to believe that the car contained a gun. Standing where he had a right to stand when he ordered the passengers out, Steffen saw, in open view, the clip of the gun protruding from under the seat. At this point, he had probable cause to believe that there was a gun under the seat. The additional legal predicate for entering the car and seizing the gun may be found in the automobile exception to the warrant requirement, as well as in Steffen's right to seize the gun to make sure that no one could use it against him.

320 N.W.2d at 728. Based upon all of the circumstances, Officer Howard was justified in approaching Schlosser for further investigation. Minimally, he had a right to approach the truck to investigate further. If opening the door and asking for identification was in fact a detention, it was based upon Howard's reasonable suspicion that there was something in the truck that defendants wanted to hide from him;either weapons or evidence of crime. Opening the door to talk with Schlosser was not an unreasonable intrusion where the window was closed and Howard had already attempted to get Schlosser's attention by tapping on the window. At this point, Howard would have been justified under the above analysis in ordering Schlosser out of the truck. His subsequent detection of the odor of marijuana and discovery of

marijuana in the door pouch for which Howard arrested defendants certainly justified the further search of the truck cab for weapons, which revealed the second package of marijuana, and the search of Schlosser's bulging pants pocket. This is especially so where the occupants, as here, have admitted that there are weapons within the vehicle. The remaining evidence was discovered as the result of an inventory search, the validity of which is not at issue here. The lower court's suppression of the evidence was consequently erroneous and should be reversed.

POINT III

ALTERNATIVELY, IF SCHLOSSER'S CONSTITUTIONAL RIGHTS WERE VIOLATED, IT WAS NOT A SUBSTANTIAL VIOLATION COMMITTED IN BAD FAITH.

Finally, Howard's detention of Schlosser, even if not based upon a reasonable suspicion, was not a substantial violation of Schlosser's fourth amendment or Art. I § 14 rights as required for suppression under Utah Code Ann. § 77-35-12(g) (1982). The detention was minimally intrusive and lasted no longer than reasonably necessary to effect its purpose--to ascertain Schlosser's identity. Nor, was there evidence that Schlosser was detained in bad faith.

Absent a showing of a substantial violation or evidence of bad faith, even without reasonable suspicion, Howard's actions should not result in exclusion of substantial, reliable evidence. See United States v. Leon, ____ U.S. ____, 104 S.Ct. 3405 (1984); United States v. Williams, 622 F.2d 830 (5th Cir. 1980) (en banc), cert. denied, 449 U.S. 1127 (1981); cf. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (holding that, in civil rights actions,

government officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known"). The remedy for an insubstantial violation of constitutional rights does not lie within the criminal trial through suppression of the evidence but is a civil matter under Utah Code Ann. § 78-16-1 (Supp. 1985).

CONCLUSION

Based upon the foregoing, the State requests this Court to find that the evidence was obtained without violating defendant's constitutional rights and to remand the case to the district court for trial with an order that the evidence not be excluded.

DATED this 5th day of May, 1986.

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CERTIFICATE OF MAILING

I hereby certify that I mailed four true and exact copies of the foregoing Brief, postage prepaid, this 5th day of May to:

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ADDENDUM

APPENDIX A

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR
JUAB COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff,	:	ORDER SUPPRESSING EVIDENCE
v.	:	
HARRIS LOWDER and ANTHONY PRICE SCHLOSSER,	:	Case No. 312 - C
Defendants.	:	

This matter came on for consideration on the defendant's pre-trial Motion to Suppress certain evidence procurred by the State as a result of the traffic stop and subsequent arrest of the defendants and search of the automobile. The basis of the motion was that the evidence was seized as the result of the seizure and search of the Defendant Schlosser without probable cause, and the subsequent search of the automobile. The motion was based on a violation of both the United States and Utah Constitutional provisions, prohibiting unreasonable searches and seizures.

The motion was submitted on facts stipulated to by both sides and on memorandums in support of their respective positions.

The Court finds as follows:

1. The police officer had no valid reason to order the defendant Schlosser out of the automobile or to request Schlosser to empty his pocket and search the automobile.

2. Any action taken by the police officer with regards to Defendant Schlosser was based on a mere suspicion that the defendant was engaged in criminal activity.

3. All evidence subject of the motion to suppress was discovered as a direct consequence of the illegal detention and search of Defendant Schlosser and the automobile.

4. The Court finds, as required by Utah Code Anno. 77-35-12(g)(1) that the violation of the defendants constitutional rights was substantial and finds that the officer did not act in good faith, and so finds by a preponderance of the evidence.

The basis for this finding is that the police officer acted without a legitimate law enforcement purpose and further that to allow the conduct of a peace officer under the circumstances of this case would significantly erode Fourth Amendments protections.

DATED this 9th day of ~~December~~ January, 1986.

RAY M. HARDING, SR.
Judge of the District Court

Approved as to form:

STEPHEN R. McCAUGHEY
Attorney for Defendant Schlosser

LONI F. DELAND
Attorney for Defendant Lowder

DONALD EYRE
Juab County Attorney