1992

State of Utah v. Julie Harmon : Brief of Appellant

Utah Court of Appeals

R. Paul Van Dam; attorneys for appellee.
Mark R. Moffat, Elizabeth Holbrook; Salt Lake Legal Defender Assoc.; attorneys for appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
JULIE HARMON,	:	Case No. 920463-CA Priority No. 2
Defendant/Appellant.	:	

OPENING BRIEF OF APPELLANT

This is an appeal from a judgment, sentence and commitment for possession of a controlled substance, a third degree felony, in violation of Utah Code Ann. section 58-37-8(2)(a)(i), in the Third Judicial District Court in and for Salt Lake County, the Honorable Anne M. Stirba presiding.

MARK R. MOFFAT
ELIZABETH HOLBROOK
SALT LAKE LEGAL DEFENDER ASSOC.
424 EAST 500 SOUTH, SUITE 300
SALT LAKE CITY, UTAH 84111

Attorneys for Ms. Harmon

R. PAUL VAN DAM
236 STATE CAPITOL
SALT LAKE CITY, UTAH 84114

Attorney for Appellee

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MARK R. MOFFAT
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424 EAST 500 SOUTH, SUITE 300
SALT LAKE CITY, UTAH 84111

Attorneys for Ms. Harmon

R. PAUL VAN DAM
236 STATE CAPITOL
SALT LAKE CITY, UTAH 84114

Attorney for Appellee

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STATEMENT OF JURISDICTION

Utah Code Ann. section 78-2a-3(2)(f) (1992 Supp.) provides this Court's jurisdiction over this non-capital, non-first degree felony criminal conviction from the district court.

STATEMENT OF ISSUES

1. Did the State meet its burden to show that a reasonable hypothetical officer would have arrested Julie Harmon for driving on a suspended driver's license in the absence of Detective Russo's unconstitutional motivation to investigate Ms. Harmon for illegal drugs?

2. Did the State meet its burden to show that Ms. Harmon's consent to the search of her home was voluntary and purged of the taint of her illegal arrest?

STANDARDS OF REVIEW

In reviewing a trial court's denial of a motion to suppress, this Court defers to the trial court's findings of fact under the "clearly erroneous" standard, and reviews legal

conclusions without deference for correctness. E.g. State v. Ramirez, 817 P.2d 774, 781-782 n.3 (Utah 1991).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Appendix 1 to this brief contains the full text of the following controlling constitutional and statutory provisions:

Constitution of Utah, Article I section 12
Constitution of Utah, Article I section 14
United States Constitution, Amendment IV
United States Constitution, Amendment V
United States Constitution, Amendment XIV
Utah Code Ann. section 41-2-136 (1992 Cum. Supp.)
Utah Code Ann. section 77-7-2 (1990 Repl. Vol.)
Utah Code Ann. section 77-7-18 (1992 Cum. Supp.).

STATEMENT OF THE CASE

The State charged Julie Harmon with three counts of possession of a controlled substance, two third degree felony counts, and one class B misdemeanor (R. 6-8). The magistrate bound over one felony and one misdemeanor count relating to drugs found in Ms. Harmon's home (R. 3). The count dismissed involved what appeared to be prescription drugs in Ms. Harmon's purse (R. 3).

Ms. Harmon moved to suppress all of the State's evidence, asserting her rights under Article I section 14 of the Utah Constitution and the Fourth Amendment to the United States Constitution (R. 23-24, 30-74). The trial court denied this motion (R. 79-91). Copies of the trial court's memorandum decision, and findings and conclusions are in appendix 2.

Following the trial court's denial of her motion to suppress, Ms. Harmon entered a conditional Sery plea to one third degree felony count of possession of a controlled substance,

explicitly reserving the right to appeal the trial court's denial of her suppression motion (R. 95-101). The trial court sentenced Ms. Harmon to a zero to five year prison sentence and fined her $1,000 plus a 25% surcharge (R, 110). The court suspended the prison sentence, placing Ms. Harmon on probation (R. 111).

STATEMENT OF FACTS

Detective Robbie Russo, Deputy for the Salt Lake County Sheriff of almost eight years, was working in the Metro Narcotics Strike Force on November 19, 1991. The purpose of the strike force is enforcement of drug laws. He went to Ms. Harmon's address, 2904 South 9100 West, because an informant had accused a Julie Harmon, living at that address, of dealing in narcotics. Russo refused to identify the informant or elaborate on the details of their relationship. Russo's purpose in going to her home was to search the home for drugs. The confidential informant had performed no controlled buys from Ms. Harmon. Russo went to Ms. Harmon's home in the early evening hours, just as she was pulling out of her driveway in her car. When she saw him drive up in his unmarked car, she stopped her car and he approached her and identified himself as a police officer. He told her that she was suspected of dealing in narcotics -- that it was rumored that she was a cocaine drug lord and had all the drugs in Columbia in her house. She denied the allegations. He requested her consent to search her home, and she told him that he would have to wait until she returned from visiting her father, who had had recently had a heart attack and was

returning from the hospital that day. He told her that he did not have a search warrant, and would prefer to search her home before she left to see her father. Again, she told him he would have to wait until she returned. It was clear that she would not allow him to search at that time. During the conversation in her driveway, Russo told her he would have to get a search warrant. He never told her what he admitted to at trial, that he did not have enough evidence to obtain a search warrant. R. 200-203, 219-221, 227-229.

Russo indicated that Ms. Harmon drove around the block a couple of times within five minutes, and testified that he could tell that she was concerned that he was at her home. He ran a warrants and driver's license check on her through dispatch. He then discovered that her driver's license was suspended, and called for back-up. He decided to arrest her for driving on suspension, prior to stopping her.[1] He followed her with another police car containing two uniformed officers behind him, and she stopped two blocks away from her home in a lot off the side of the road, across the street from another officer in a separate car. Russo confronted Ms. Harmon about her driving on suspension, and she explained again that she had needed to go see her father. He placed her under arrest for driving on suspension. She began to cry and told him

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1. In the trial court, it was repeatedly stated that driving on suspension is a class B misdemeanor. E.g. R. 90. While there are class B misdemeanor driving on suspensions, it appears that under Utah Code Ann. section 41-2-136, Ms. Harmon was guilty of a class C misdemeanor driving on suspension. Ms. Harmon testified that her license was suspended when a friend was stopped while driving one of Ms. Harmon's uninsured vehicles (R. 285).

that he could not search her home, but would have to get a warrant. R. 203-205, 232, 235, 246.

Upon arresting Ms. Harmon, Russo conducted what he called a "search and seizure arrest." R. 206. He placed her in handcuffs, placed her in his car, and looked through her purse and vehicle and found vials of prescription drugs, one of which vials bore her name, another of which vials had the label scratched off. He indicated that she had committed an offense involving the possession of prescription drugs without the proper container, and indicated that she also admitted that the pills were her mother's or someone else's. He took the pills and the money from her purse. Russo placed her in his vehicle and informed her of her Miranda rights, and the backup officer proceeded to impound her car. R. 206-207, 233-234.

After he purportedly arrested her for the suspended license and gave her her Miranda warnings, he told her that he knew she had drugs in her home. Russo testified that five minutes into their journey on the way to the jail, Ms. Harmon told Russo that she was afraid to let him search her home because she used to deal drugs, and did not want him to find any residue of this past activity. She told him that she was concerned about her father, and may have told him that she could not bail out of jail because Russo had confiscated the money from her purse. He testified that she then told him that she wished to reform her lifestyle, and would allow him to search her home. He testified that it would be improper for him to go search her home, because he had already placed her under

arrest and did not wish to appear to be coercing her consent to the search by having arrested her. He testified that she told him there would be no problem, and that she said that she would sign anything. It was clear to Russo that Ms. Harmon did not want to go to jail and was upset at the prospect of having to do so. He testified that he told her he would just proceed to get a warrant, but that she mentioned the names of other Metro Narcotics detectives and convinced him that a warrant was unnecessary. During the car ride, Russo mentioned having to get a warrant for the second time, despite his knowledge that he had insufficient probable cause for a warrant. He never told Ms. Harmon that he could not obtain a warrant. He testified that he was making her no promises and that the search did not guarantee her release from custody. At approximately this point in the conversation, after they had driven 70 or 90 blocks, Detective Russo turned his car around to return to her home. He said that on the way back to her house, they discussed the details of her prior drug deals. He admitted that he told Ms. Harmon on the way to the jail that he knew she had drugs, and he admitted to having warned Ms. Harmon on the way to the jail that it would be an unpleasant experience for her if he had to get a warrant. R. 207-210, 236-237, 249-251.

When they arrived at her house, Russo called for back-up, repeated the Miranda warning, and gave her the consent form, which she signed. R. 211. A copy of the consent form is in evidence (State's Exhibit 1), and in Appendix 3 to this brief. The form states, in relevant part,

> I, Julie Harmon, having been informed of my rights per Miranda not to have a search made of the premises, hereinafter mentioned, without a Search Warrant, of my right to refuse to consent to a search, hereby authorize; Det R Russo police officer and his agent of the Metropolitan Narcotics Strike Force to conduct a complete search of my person, premise(s) and/or vehicle at; 2904 S. 9100 W. These officers are authorized by me to search and seize any contraband or fruits of any crime while conducting a search on a narcotics investigation.
>
> This written permission is being given to me to the above mentioned police officer voluntarily and without threats or promises of any kind.

The majority of the blanks in the form were filled out by Russo. R. 241.

The police approached her home, and had her secure her dog so they would not have to shoot it in executing the search. She put her dog in the back yard and proceeded to show Russo where her drugs and paraphernalia were. The detectives also found some on their own. During the course of the search, she called her brother, a deputy sheriff, who also spoke with Russo. Detective Brenneman testified that her demeanor during the search was friendly and cordial. R. 212-214, 253, 258.

At the conclusion of the search, Russo did not take Ms. Harmon back to jail for driving on suspension or possession, but elected to leave Ms. Harmon at home, with the understanding that she would call him in the morning to discuss her willingness to work off her charges doing under cover work. While he denied bargaining with her to trade her consent to the search for avoiding going to jail, he admitted that once she gave him the drugs he was looking for, she was not going to jail anymore. R. 214-215.

Julie Harmon testified that after she refused to consent to the search of her home, Russo told her he could get a warrant and refused to move so she could leave. She told him he could search after she returned from her parents', and that he then allowed her to leave. She testified that after she was stopped by the three police cars, and after Russo asked her about the suspended license, Russo requested her permission to search her car and then Russo asked her if she would let him search her house, and she said no. He then said, "Then, you are going to jail." She asked him if he would let her go if she consented to the search of her house, and he said he would. She testified that on the way to the jail, he told her he knew she had drugs in her house, and told her he would get a warrant and tear her house apart. She asked if she could use the $285 she had in her purse to bail out of jail, and he told her no. She was crying and worried about what the additional stress from her arrest would do to her father, and told Russo that he could have the drugs belonging to someone else that were in her home. She testified that she first heard Russo on his radio informing the jail that he was bringing in a female, and later heard him call the jail to cancel the first call, informing the jail, "She's changed her mind." She said that when they got to her house, he told her that he did not want to have to shoot her dog, and had her sign the consent form prior to going to secure her dog. She signed it without reading it first. She was cooperative during the search because her brother is a policeman and because Russo had warned her that they would rip her house apart. R. 277-290.

Russo never cited her for any traffic offense, nor did the State charge her with any traffic offense (R. 164).

Russo testified that he had placed people under arrest for driving on suspension several dozen times "counting citations and custodial arrests," and then he clarified that he had performed custodial arrests for driving on suspension maybe a dozen times. He could not recall how many of those custodial arrests involved DUIs. R. 205-206, 233.

Detective Sterner testified that in three years, he had arrested people for driving on suspension six or seven times, and had given simple citations twenty to thirty times. He indicated that three or four of the custodial arrests involved DUIs. It was his general practice to handle driving on suspension with a citation. R. 268-269.

Detective Ben Anjewierden testified that at the time of Ms. Harmon's arrest, as a result of a consent decree relating to jail overcrowding, the jail's policy called for releasing without formal booking of those charged solely with driving on suspension. He indicated that the policy was not mandatory. R. 273, 276. The trial court would not allow defense counsel to make a record of whether Russo knew about the jail policy of releasing misdemeanants such as Ms. Harmon without booking them, finding that under State v. Lopez, 831 P.2d 1040 (Utah App. 1992), the officer's intent was not relevant. R. 244.

The trial court found that the arrest for driving on suspension was within Detective Russo's discretion, explicitly

declining to consider Detective Russo's subjective intent, and without applying the reasonable hypothetical officer test. The court then found that Ms. Harmon's consent to the search of her home was voluntary. R. 104-108, 243-244.

SUMMARY OF ARGUMENT

Driving on suspension is normally handled by citation unless a DUI is involved. Nonetheless, when Detective Russo discovered Ms. Harmon's suspended driver's license, he decided to arrest the rumored "drug lord" who allegedly had "all of the drugs in Columbia" in her house. He did in fact then execute what he tellingly referred to as a "search and seizure arrest," finding what appeared to be illegal prescription drugs on Ms. Harmon's person, and later obtaining her consent to search her home where illegal drugs were found. Prior to obtaining her consent to search her home, Russo was driving Ms. Harmon to the jail, purportedly for driving on suspension. Yet during the drive to the jail, he informed her that he knew she had drugs and warned her that it would be unpleasant if he had to resort to a warrant. After Ms. Harmon consented to the search of her home, Russo did not take her to jail for driving on suspension or cite her for this offense, for which she was never charged, but left her at her home, instructing her to call him in the morning.

In failing to address the officer's unconstitutional motivation and in failing to then apply the reasonable hypothetical officer test, the trial court misapplied the law. The illegal

arrest requires the exclusion of all derivative evidence.

The major flaw in the trial court's consent analysis is her failure to recognize the illegal arrest, and then assess whether the State met its burden to show that the consent was not only voluntary, but also independent from the illegality preceding the consent. The State cannot meet this burden on the facts of this case, and reversal is necessary.

ARGUMENT

I.
THE STATE DID NOT MEET ITS BURDEN TO SHOW THAT A REASONABLE HYPOTHETICAL OFFICER WOULD HAVE ARRESTED MS. HARMON ABSENT DETECTIVE RUSSO'S UNCONSTITUTIONAL MOTIVATION.

In State v. Lopez, 831 P.2d 1040 (Utah App. 1990), the majority of this Court maintained and clarified the pretext doctrine.[2] The trial court relied on Lopez during the hearing on

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2. In Lopez, the State conceded the validity of the pretext doctrine in the context of misdemeanor traffic arrests, stating,

> [T]he State's argument that this Court should abandon the pretext analysis adopted in Sierra is directed only at traffic stops and does not extend to misdemeanor traffic arrests. The State shares defendant's concern that a misdemeanor traffic arrest could be misused by a police officer as a pretext to conduct a highly intrusive search of the arrested person and his or her vehicle without reasonable suspicion, probable cause, or a warrant. While an officer appears to have the authority to arrest for a misdemeanor traffic violation under Utah law, that clearly is not the usual practice.

Reply brief of Appellee in State v. Lopez, Case No. 900484-CA, at 5 (footnote omitted).

Tellingly, in the trial court the prosecutor argued that traffic stops and arrests are valid tools for officers to use in investigating drug crimes and enforcing drug laws. T. 5/22/92 p. 57.

the motion to suppress, and cited and quoted Lopez in crafting her memorandum decision, from which the prosecutor drafted the findings of fact and conclusions of law. The trial court's initial summary of Lopez in her memorandum decision is accurate but incomplete.[3]

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3. The trial court's memorandum decision, in Appendix 2, states,

> The Utah Court of Appeals recently clarified what constitutes a "pretext stop" in the state of Utah in State of Utah v. Lopez, ___P.2d___ (Utah App. Decided May 5, 1992). Lopez reiterates the well-established principal that under the Fourth Amendment, the right to be free from unreasonable searches and seizures extends to automobiles. Id., at 3. "Thus, the Fourth Amendment prohibits police officers from randomly or arbitrarily stopping vehicles on the highway." Id. Lopez then describes three situations in which an officer is justified in stopping a vehicle without a warrant:
>
> > (1) When the officer observes the driver commit a traffic violation; (2) When the officer has a reasonable articulable suspicion that the driver is committing a traffic offense, such as driving under the influence of alcohol or driving without a license; and (3) When the officer has a reasonable articulable suspicion that the driver is engaged in more serious criminal activity, such as transporting drugs.
>
> Id. at 4, [citations o[]mitted].
>
> Lopez articulates that the "pretext doctrine" applies in two distinct situations. First, it applies where the facts demonstrate the driver did not commit a traffic violation. Under such circumstances, the stop would almost always be unconstitutional. This situation does not exist in this case because it is undisputed that a traffic violation was committed by Harmon. Lopez, supra, at 6, Fn.7. The second situation is
>
> > [W]here the driver committed a minor traffic violation or the vehicle had a minor equipment problem, but where the court concludes that a reasonable

(footnote continues)

What is missing from the trial court's summary of Lopez, and is also reflected in the trial court's ruling at the hearing ("I disagree with that especially in light of the State vs. Lopez case. The reasonable officer standard does not involve the intent of the officer." R. 243), is the role of the officer's subjective intent in the hypothetical reasonable officer test. Under Lopez, the officer's subjective intent is a fundamental part of the hypothetical reasonable officer test: the unconstitutional or illegal motivation. See e.g. Lopez, 831 P.2d at 1047 ("[T]he issue of whether a traffic stop is a pretext stop cannot turn on the issue of an officer's subjective intent, but rather, must turn on the objective question of whether a reasonable officer would have made the stop absent the illegal motivation.")(emphasis added and deleted).

Because the trial court misperceived that Detective Russo's subjective intent was not relevant at all, the trial court did not

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(footnote 3 continued)

> police officer [could have but] would not have stopped the vehicle absent the unconstitutional motivation.

Id. at 6 [emphasis added].

> Lopez goes on to explain that [t]he proper inquiry is whether a reasonable officer would have stopped the defendant solely for commission of the traffic offense. . . . The proper inquiry does not focus on whether the officer could validly have made the stop. . . . Further . . . the officer's subjective motivation is not the relevant inquiry.

Id., at 9-10 [emphasis in original].

(R. 84-85).

recognize Russo's desire to investigate the "rumored drug lord" who had "all the drugs in Columbia" in her house, when he decided to arrest Ms. Harmon for a misdemeanor traffic offense and then conducted a "search and seizure arrest." Nor did the trial court apply the reasonable hypothetical officer test. Her memorandum ruling demonstrates how she resolved the legal issue, stating,

> The second issue raised by Harmon in relation to this stop is that it was not reasonable for Detective Russo to arrest her for this offense. As to this issue, Detective Russo had discretion whether to cite Harmon for this traffic violation or to arrest her. The testimony at the hearing was that officers in the field occasionally arrest persons driving on a suspended license, even if the driver does not appear to be intoxicated. They routinely exercise discretion as to whether they arrest the offender or merely issue a citation. This discretion exists in a multitude of situations in which an individual may be subject to arrest, bu[t] the officer decides not to take that action. This discretion, which is inherent in the work of the police officers, will not be disturbed in this case in light of all the circumstances. Moreover, it does not appear to this Court that Detective Russo abused this discretion.
>
> Thus, it appears to this Court that a reasonable officer would have stopped and arrested this defendant; and therefore, Detective Russo's actions were not based upon a pretextual scheme, but upon his legal authority to stop Harmon from committing a Class B misdemeanor: namely, driving with a suspended license.

(R. 86-87).

The trial court's findings of fact similarly make no mention of Russo's motivation to investigate Ms. Harmon's drug involvement, but indicate that "Detective Russo had stopped and arrested approximately 12 persons for driving on a suspended license within the past year. . . . Officers routinely ex[]ercise

discretion as to whether they arrest for Driving on Suspension or issue a citation." (R. 106). The conclusions of law echo this analysis, stating, "Police officers exercise discretion as to whether they arrest the offender or issue a citation. This discretion was not abused by Detective Russo when he arrested Harmon for Driving on Suspension." (R. 107).

While the trial court was likely correct that the evidence before her demonstrated that a reasonable officer would have stopped Ms. Harmon for driving on suspension, neither the evidence nor the law support the conclusion that a reasonable hypothetical officer would have arrested Ms. Harmon for the offense, absent Russo's unconstitutional motivation to evade the warrant requirement.

Detective Russo testified that he had placed people under arrest for driving on suspension several dozen times "counting citations and custodial arrests," and then he clarified that he had performed custodial arrests for driving on suspension in maybe a dozen times. He could not recall how many of those custodial arrests involved DUIs. R. 205-206, 233. Detective Sterner testified that in three years, he had arrested people for driving on suspension six or seven times, and had given simple citations twenty to thirty times. He indicated that three or four of the custodial arrests involved DUIs. It was his general practice to handle driving on suspension with a citation. R. 268-269. Detective Anjewierden testified that at the time of Ms. Harmon's arrest, as a result of a consent decree relating to jail overcrowding, the jail's policy called for releasing without formal booking of those charged

solely with driving on suspension. He indicated that the policy was not mandatory. R. 273, 276.

The trial court ruled that under State v. Lopez, 831 P.2d 1040 (Utah App. 1992), Detective Russo's intent was not relevant, and refused trial counsel's efforts to make a record of Russo's knowledge of the jail's no-booking release policy. R. 244. However, the record demonstrates that Russo would not have arrested Ms. Harmon for driving on suspension absent his desire to investigate his drug suspicions. While Russo initially arrested Ms. Harmon for driving on suspension, once he got what he wanted (full search of her person, car and home without a warrant), he did not take her to jail, or even issue a citation for driving on suspension.

As trial counsel argued to the trial court, the law does not permit a police officer to evade the warrant requirements of the State and Federal Constitutions by arresting traffic misdemeanants (R. 33, 152). In State v. Parker, 834 P.2d 592 (Utah App. 1992), the police wished to investigate Mr. Parker for a burglary. Upon witnessing Mr. Parker speeding twenty miles over the limit in a residential section into a driveway where he stopped, a police officer ordered Mr. Parker from his car at gunpoint, handcuffed him and arrested him. Id. at 593. Reasoning that "a traffic stop is a limited seizure and is more like an investigative dentention than a custodial arrest," this Court assessed the Fourth Amendment reasonableness of the officer's conduct under the two pronged test of Terry v. Ohio, 392 U.S. 1, 19-20 (1968):

> (1) Was the officer's action justified at its inception?, and (2) Was his action reasonably related in scope to the circumstances which justified the interference in the first place?

Parker at 594. In Parker, as in the instant case, the officer's decision to stop the traffic misdemeanant was objectively reasonable. See id. at 594. However, the scope of the officers' conduct in both cases went far beyond the circumstances that justified the initial stop. In both cases, rather than issuing a traffic citation and allowing the drivers to proceed on their way (Ms. Harmon was approximately two blocks from her home, within easy walking distance), the officers arrested the drivers. See id. at 594-95 and n.1 (recognizing statutory discretion to arrest for misdemeanor traffic violations, but noting that for purposes of Fourth Amendment analysis, traffic stops must be accomplished through the least intrusive means). Just as the officer in Parker had no reasonable articulable suspicion to justify detaining Mr. Parker for the burglary, id. at 595, Detective Russo had no reasonable articulable suspicion to detain Ms. Harmon for suspicion of trafficking in drugs. Detective Russo's wholly unsubstantiated statement from a confidential informant that Julie Harmon was dealing illegal drugs does not meet the constitutional standard of a reasonable articulable suspicion, and certainly does not provide the probable cause required for her warrantless arrest. See e.g. State v. Sykes, 198 Utah Adv. Rep. 35 (Utah 1992)(discussing what does and does not constitute a reasonable suspicion of drug trafficking); Beck v. Ohio, 379 U.S. 89 (1964)(explaining probable cause for

arrest; holding that warrantless seizure and search of Mr. Beck, disclosing illegal clearinghouse slips, could not be justified as a valid search incident to arrest on basis of officer's testimony that the officer had a photograph of Mr. Beck and knew what he looked like, knew of his prior record for similar violations, and had received unspecified "information" and "reports" from unidentified sources); Alabama v. White, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990)(officers had reasonable suspicion to stop Ms. White on the basis of an anonymous tip, the details of which accurately predicted her future behavior, indicating the anonymous informer's unique knowledge of Ms. White); Draper v. United States, 358 U.S. 307 (1959)(probable cause to arrest justified by reliance on known informer who had proved reliable over a period of six months, when arresting officer received and personally verified numerous details provided by the informer).

The trial court's ruling that Detective Russo's arrest of Ms. Harmon was within his discretion was incorrect. There is no evidence that at the time of Ms. Harmon's arrest, when there were three police cars and at least four police officers present, she posed any threat of violence or escape. Nor was there a reasonable suspicion or probable cause of drug trafficking to justify her arrest. Cf. Parker at 595 ("After witnessing Parker speed into his grandmother's driveway, Corporal Naylor pulled his vehicle behind Parker's unholstered his gun, removed Parker from his vehicle, handcuffed him, and placed him under arrest. There is no evidence that Parker was making any attempt at escape; to the contrary, the

vehicle was in neutral and pointed toward the garage. At this point, Corporal Naylor had no reasonable articulable suspicion that Parker had committed or was about to commit a crime. Under the circumstances present here, it is patently offensive to suggest that a police officer acting as Corporal Naylor did here was within the realm of discretion granted to police officers under the law."). See also State v. Lopez, 831 P.2d 1040, 1045 (Utah App. 1992)("Allowing police officers to stop vehicles for any minor violation when the officer in fact is pursuing a hunch would allow officers to seize almost any individual on the basis of otherwise unconstitutional objectives. Such unfettered discretion offends the Fourth Amendment.")(citations omitted); United States v. Walker, 933 F.2d 812, 816 n.1 (10th Cir. 1991), cert. denied, 112 S.Ct. 1168, 117 L.Ed.2d 414 ("[I]t appears that Utah law does not allow an officer in these circumstances to make a custodial arrest for a speeding violation. See Utah Code Ann. §77-7-18 et seq.").

In addition to reversing the trial court's ruling that the arrest was legal, this Court may wish to consider an independent ruling under Article I section 14 of the Utah Constitution that the officer's subjective intent is a relevant consideration in the assessment of the reasonableness of an officer's conduct. Trial counsel's motions to suppress invoked Ms. Harmon's rights under Article I section 14 (R. 23-24, 31-32). Trial counsel argued in writing that the protections of Article I section 14 are broader than those of the fourth amendment, citing State v. Larocco, 794 P.2d 460 (Utah 1990), and citing and attaching a copy of

K. Wallentine, "Heeding the Call: Search and Seizure Jurisprudence Under the Utah Constitution, Article I section 14." (R. 33-64). At the hearing on the motion, trial counsel reiterated this history of the state and constitution, and argued specifically that under Article I section 14 of the Utah Constitution, intent should be a relevant factor in this case (R. 145-150, 243). The trial court declined to rule on independent state constitutional grounds (R. 80, 108).

The unique history of this state justifies broad protection of Article I section 14 rights. See R. 33-64. An additional basis for adopting the Utah Constitutional ruling sought by trial counsel is that federal law on the role of an officer's subjective intent in search and seizure cases is confusing. See State v. Larocco, 794 P.2d 460, 469 (Utah 1990)(main opinion makes independent Utah constitutional law under Article I section 14 because search and seizure law has grown confusing and unworkable in the federal courts).

The federal rule is that courts must assess the reasonableness of police conduct objectively. E.g. Scott v. United States, 436 U.S. 128, 137 (1978)("[A]lmost without exception in evaluating alleged violations of the Fourth Amendment the Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him.").[4]

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4. It is arguable that the objectivity rule in Scott is dicta, see Burkoff, "The Pretext Search Doctrine Returns After Never Leaving," 66 U. Detroit L.Rev. 363, 366-368 (1989); Burkoff, "Bad
(footnote continues)

Unfortunately, many courts, like the trial court in this case, misperceive that an "objective" assessment must exclude consideration of an officer's subjective intent. As the court explained in United States v. Guzman, 864 F.2d 1512 (10th Cir. 1988), such a misunderstanding of the objective test in pretext cases hinders the goal of limiting excessive police discretion.

> It is the need to restrain the arbitrary exercise of discretionary police power that has been the driving force behind the Court's decisions forbidding police practices not amenable to objective review. Brown v. Texas, 443 U.S. 47, 52, 99 S.Ct. 2637, 2641, 61 L.Ed.2d 357 (1979)("When ... a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits."); Delaware v. Prouse, 440 U.S. 648 661, 99 S.Ct. 1391, 1400, 59 L.Ed.2d 660 (1979)("[S]tandardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed"). Determining the constitutionality of intrusions by the prosecution's ability to justify them under some set of objective circumstances would undermine the Court's concern with limiting unreviewable discretion in the name of the objective test designed to safeguard that concern.

Id. at 1516. See also United States v. Keller, 499 F.Supp. 415, 417

(footnote 4 continued)
Faith Searches," 57 N.Y.U.L.Rev. 70, 83-84 (1982); Burkoff, "The Pretext Search Doctrine: Now You See It, Now You Don't," 17 U.Mich.J.L.Ref. 523 (1984); and that the legal underpinnings of that dicta are wanting, see LaFave Search and Seizure, section 1.4, pages 81-83; A. Eisemann Note, 63 B.U.L.Rev. 223, 242-244 (1983); Burkoff, "Bad Faith Searches," 57 N.Y.U.L.Rev. 70 (1982).

(N.D. Ill. 1980)("If every arrest were judged by an objective standard and upheld if there was a valid basis for arrest, then there could never be a pretextual arrest. The concept assumes that there is a basis for an arrest, but that the arrest is made for the purpose of conducting a search for which there would not otherwise be a justification. Although proving subjective motives is unquestionably problematic, to judge an arrest by an objective standard ignores, instead of solves, the problem.")(citation omitted).

Under Scott, the subjective intent of the officer is pertinent to evaluating the police officer's credibility, and in determining whether exclusion of evidence is an appropriate remedy. The Scott Court stated,

> This is not to say, of course, that the question of motive plays absolutely no part in the suppression inquiry. On occasion, the motive with which the officer conducts an illegal search may have some relevance in determining the propriety of applying the exclusionary rule. For example, in United States v. Janis, 428 U.S. 433, 458, 49 L.Ed.2d 1046, 96 S.Ct. 3021 (1976), we ruled that evidence unconstitutionally seized by state police could be introduced in federal civil tax proceedings because "the imposition of the exclusionary rule . . . is unlikely to provide significant, much less substantial, additional deterrence. It falls outside the offending officer's zone of primary interest." See also United States v. Ceccolini, 435 U.S. 268, 276-277, 55 L.Ed.2d 268, 98 S.Ct. 1054 (1978). This focus on intent, however, becomes relevant only after it has been determined that the Constitution was in fact violated. We also have little doubt that as a practical matter the judge's assessment of the motives of the officers may occasionally influence his judgment regarding the credibility of the officers' claims with respect to what information was or was not

> available to them at the time of the incident in question. But the assessment and use of motive in this limited manner is irrelevant to our analysis of the questions at issue in this case.

436 U.S. 128, 139 n. 13. Several cases following Scott recognize that the subjective intent of police officers is a relevant factor to be considered. E.g. United States v. Cummins, 920 F.2d 498, 501 n.3 (8th Cir. 1990); United States v. Causey, 834 F.2d 1179, 1182 n. 7 (5th Cir. 1987).

The United States Supreme Court has been inconsistent in its application of the objectivity rule,[5] and its application of a two-step violation/exclusion Fourth Amendment effectively defeats Fourth Amendment challenges and remedies.[6]

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5. For cases examining subjective intent, see e.g. Jones v. United States, 357 U.S. 493, 500 (1958); Abel v. United States, 362 U.S. 217, 226, 230 (1960); Ker v. California, 374 U.S. 23, 42-43 (1963); South Dakota v. Opperman, 428 U.S. 364, 376 (1976); Colorado v. Bannister, 449 U.S. 1, 4 n.4 (1980)(per curiam); Steagald v. United States, 451 U.S. 204, 215 (1981); Michigan v. Clifford, 464 U.S. 287, 292 (1984)(plurality opinion); Colorado v. Bertine, 479 U.S. 367, 371, 372 (1987); Maryland v. Garrison, 480 U.S. 79, 85, 87 (1987); O'Connor v. Ortega, 480 U.S. 709, 729 (1987)(plurality opinion). See also Burkoff, "Bad Faith Searches," 57 N.Y.U.L.Rev. 70, 75-83 (1982); Burkoff, "The Pretext Search Doctrine: Now You See It, Now You Don't," 17 U.Mich.J.L.Ref. 523, 544-548 (1984); A. Eisemann Note, 63 B.U.L.Rev. 223, 242-244 (1983).

For cases citing the objectivity rule and ignoring the subjective intent, see e.g. United States v. Villamonte-Marquez, 462 U.S. 579, 584 n.3 (1983); Maryland v. Macon, 472 U.S. 463, 471 (1985). See also Burkoff, "The Pretext Search Doctrine: Now You See It, Now You Don't," 17 U.Mich.J.L.Ref. 523, 524-525, 528-532 (1984).

6. For criticism of this two-step approach, see Burkoff, "The Court that Swallowed the Fourth Amendment," 58 Ore.L.Rev. 151, 187-190 (1979).

This Court should act under the Utah Constitution and vitalize the pretext doctrine by recognizing that the subjective intent of the officer is relevant, and may be proved by traditional objective evidence, or by the officer's direct testimony on his subjective intent. Such an approach would be consistent with State v. Larocco, 794 P.2d 460 (Utah 1990), wherein the court explicitly held that under the Utah Constitution, "exclusion of illegally obtained evidence is a necessary consequence of police violations of article I section 14." Id. at 472 (emphasis added). Under the federal Fourth Amendment Scott decision, the subjective intent of the officer is not entirely irrelevant, but is pertinent to determining whether exclusion of evidence is an appropriate remedy. United States v. Scott, 436 U.S. 128, 139 n. 13. Because exclusion of evidence is a necessary consequence of an Article I section 14 violation under Larocco, the Scott rule, limiting the relevance of the officer's subjective intent to the exclusion question, does not apply.

In sum, because the State failed to meet its burden to show that a reasonable hypothetical officer would have arrested Ms. Harmon absent Detective Russo's illegal motivation, all evidence derived from the warrantless arrest must be excluded. See State v. Lopez, 831 P.2d 1040, 1049 (Utah App. 1992)(the State carries the ultimate burden of proof in pretext cases).

II.
THE STATE DID NOT MEET ITS BURDEN TO SHOW *THAT MS. HARMON'S CONSENT WAS VOLUNTARY AND* PURGED OF THE TAINT OF THE ILLEGAL ARREST.

The State's burden in attempting to justify warrantless searches and seizures with consent is described in State v. Robinson and Towers, 797 P.2d 431 (Utah App. 1990), as follows:

> Two factors determine whether consent to a search is lawfully obtained following police action that violates the fourth amendment, such as the unlawful detention here: (1) the consent must be voluntary in fact; and (2) the consent must not be obtained by police exploitation of the prior illegality. Both tests must be met in order for evidence obtained in searches following police illegality to be admissible.
>
> Whether a consent to a search was in fact voluntary
>
> > or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances. While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent.
>
> In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, a court must take into account both the details of police conduct and the characteristics of the accused, which include "subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents." It is the State's burden to prove that a consent to search was voluntary.
>
> ....
>
> As the Utah Supreme Court recently stressed, a prosecutor attempting to prove voluntary consent after illegal police action "'has a much heavier burden to satisfy than when proving consent to search' which does not follow police misconduct.

797 P.2d at 437 and n.7 (citations omitted).

Because the trial court failed to appreciate the fact that Ms. Harmon's arrest was illegal, the trial court did not assess whether the State met its burden to show that Ms. Harmon's consent was not only voluntary, but also was purged of the taint of the illegal arrest.

A. THE CONSENT WAS TAINTED BY THE ILLEGAL ARREST.

This Court has recognized that consents that appear to be wholly voluntary are nonetheless inadequate to justify warrantless searches if the consents are not sufficiently attenuated from preceding police illegalities. E.g. State v. Small, 829 P.2d 129, 132 (Utah App. 1992)(addressing the issue in original appellate findings, this Court found no evidence that the consent was involuntary, but reversed denial of suppression ruling because consent was tainted by illegal roadblock). In fact, this Court need not even address whether the search was voluntary if this Court agrees that the State has failed to demonstrate that the consent was purged of the taint of the illegal stop and detention. State v. Godina-Luna, 826 P.2d 652, 656 (Utah App. 1992).

As the court explained in State v. Arroyo, 796 P.2d 684 (Utah 1990),

> The basis for the second part of the two-part analysis is found in the "fruit of the poisonous tree" doctrine of Wong Sun v. United States, 371 U.S. 471 (1963), which stated that a trial court must determine in such a case "'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead of

> means sufficiently distinguishable to be purged of the primary taint.'" 371 U.S. at 488 (quoting Maguire, Evidence of Guilt 221 (1959). The "fruit of the poisonous tree" doctrine has been extended to invalidate consents which, despite being voluntary, are nonetheless the exploitation of a prior police illegality.

Id. at 690.

The court further explained the factors to be considered in determining whether the State has met its burden of demonstrating that the consent was not tainted by preceding illegality: whether warnings of rights were given, the temporal proximity of the illegality and the consent, intervening circumstances,[7] and the purpose and flagracy of the illegality. Id. at 690-691 n.4.

The pertinent facts and circumstances demonstrate that the State cannot meet its burden of proving that the consent was separate from, rather than a product of and/or tainted by the preceding illegalities. The encounter between Ms. Harmon and Detective Russo began in the evening, when he drove up to her house in an unmarked car, identified himself as a police officer, and accused her of being a rumored "drug lord" and of having "all the drugs in Columbia" in her house. She did not consent to the search of her home at that time.

When Ms. Harmon next encountered the detective, she was stopped in a parking lot by three separate police cars, frisked and

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7. For examples of intervening circumstances, see e.g. Juarez v. State, 758 S.W.2d 772 (Tex. Crim. App. 1988)(the defendant was allowed to consult with his companion in his car); Reyes v. State, 741 S.W.2d 414 (Tex. Crim. App. 1987)(the defendant was admonished that his consent was not mandated).

handcuffed. Detective Russo found incriminating evidence -- prescription drugs belonging to other people, and a prescription bottle with the label scratched off in her purse.

When she was arrested, Ms. Harmon was crying, and again informed Detective Russo that he could not search her home without a warrant.

Russo confiscated her bail money and began driving her alone with him in his unmarked car to the jail. While he purportedly was arresting her for driving on suspension, he told her on the way to the jail that he knew she had drugs, and that it would be unpleasant if he had to get a warrant. After driving some 70 or 90 blocks with him, Julie Harmon finally agreed that he could search her home. When they arrived there, Detective Russo had her sign the nonsensical consent form, a copy of which is in Appendix 3 to this brief. During this time, Ms. Harmon was concerned about the stress that her arrest would place on her father, who had just returned from the hospital, having suffered a heart attack. Detective Russo told her that it would be unpleasant if he had to get a warrant, and mentioned the possibility that her dog would be shot, allowing her to precede the police into her home to secure the dog.

While Russo steadfastly denied that he bargained with Ms. Harmon for her consent to the search in exchange for his not taking her to jail for driving on suspension, the record demonstrates that once Russo obtained the consent that she had previously denied him twice, he did not take her to jail, or even cite her for driving on suspension.

Ms. Harmon's consent was inextricably intertwined with the illegal arrest.

B. THE CONSENT WAS NOT VOLUNTARY.

To show voluntary consent, the State must carry this burden of proof:

> (1) There must be clear and positive testimony that the consent was "unequivocal and specific" and "freely and intelligently given";
> (2) the government must prove consent was given without duress or coercion, express or implied; and
> (3) the courts indulge every reasonable presumption against the waiver of fundamental constitutional rights and there must be convincing evidence that such rights were waived.

State v. Webb, 790 P.2d 65, 82 (Utah App. 1990)(citations omitted).

Ms. Harmon's consent cannot be considered clear and specific, inasmuch as it is memorialized in the garbled consent form in Appendix 3.

More importantly, the consent cannot be considered freely given, for it was a product of coercion and duress. A lack of coercion may be shown by the following:

> 1) absence of a claim of authority to search by the officers; 2) the absence of an exhibition of force by the officers; 3) a mere request to search; 4) cooperation by the owner ...; and 5) the absence of deception or trick on the part of the officer.

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

Here, Detective Russo at least twice mentioned that he would have to get a warrant if Ms. Harmon would not consent, despite the fact that he knew he could obtain no such warrant. Rather than

honestly telling Ms. Harmon that he could not obtain a warrant, or simply refraining from mentioning a warrant, Russo implied that he could obtain a warrant. Russo was very forceful, and Ms. Harmon was especially susceptible to his force. It was Russo who first mentioned the possibility that the police might shoot Ms. Harmon's dog during the course of the search, and the State presented no evidence disputing Ms. Harmon's testimony that she was under strain because her father had just returned home from the hospital following a heart attack. Inasmuch as Ms. Harmon's brother is a deputy sheriff, it is safe to assume that the State could easily have presented any evidence to impeach her on the strain she was suffering from this family circumstance, had such evidence existed. In his purported zeal to enforce the traffic code prohibiting driving on suspension as a class C misdemeanor, Russo summoned two additional police cars containing at least three other officers, to surround Ms. Harmon's car. He handcuffed her, frisked her, went through her purse, confiscated her bail money and apparently illegal prescription drugs, informed her of her Miranda rights, and put her in the police car. Shortly thereafter, on the way to the jail, rather than discussing the evils of driving on suspension, he again informed her that he knew she had drugs in her home, and warned her that it would be unpleasant if he had to get a warrant. At the time he made these statements, Ms. Harmon had refused to consent to the search of her home at least twice. While Russo contradicted Ms. Harmon's testimony that her consent to search was exchanged for his promise to take her home and not to the jail, the facts on the

record remain. Once Russo obtained without a warrant during the "search and seizure arrest" the evidence against the rumored drug lord (although perhaps a bit less than all the drugs in Columbia), he did not incarcerate or even cite Ms. Harmon for driving on suspension.

These facts demonstrate far less freedom and far more coercion than existed in State v. Robinson and Towers, 797 P.2d 431 (Utah App. 1990), in which this Court determined for the first time on appeal that the consent given was not voluntary, stating,

> Here, the defendants were first questioned about their right to possession of the van during the brief, initially valid traffic stop. Once the legal basis for that stop had ended, after a short period of detention, they were nonetheless not free to leave. They were detained and questioned about matters other than the traffic violation on the side of the interstate by two armed police officers with apparent, though false, authority to do so, then ordered by one trooper to remain at the van and await his return. They complied with his commands. Next, they were questioned about whether they were carrying any contraband and asked to consent to a search of the vehicle. There is no evidence that Robinson was aware or was informed that he did not have to accede to the trooper's request. At that time, it was apparent that the defendants would be kept in that custodial environment until the troopers satisfied their curiosity about the contents of the van, particularly the area under the bed. In light of the troopers' questioning and conduct, the coercive atmosphere at the time, and the other surrounding circumstances, we conclude that the State has not borne its burden of proving that Robinson's consent to search the vehicle was voluntary.

Id. at 10.

In short, in this case, as in Robinson and Towers, the prosecution did not meet its burden of proving voluntary consent.

CONCLUSION

This Court should reverse the trial court's denial of Ms. Harmon's motion to suppress.

RESPECTFULLY SUBMITTED this 7 day of Dec., 1992.

MARK R. MOFFAT
Attorney for Ms. Harmon

ELIZABETH HOLBROOK
Attorney for Ms. Harmon

CERTIFICATE OF MAILING

I, Elizabeth Holbrook, hereby certify that I have caused to be served eight copies of the foregoing to the Utah Court of Appeals and two copies of the foregoing to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 7 day of Dec., 1992.

ELIZABETH HOLBROOK

DELIVERED by _____ this _____ day of Dec., 1992.

_____

APPENDIX 1

Statutes and Constitutional Provisions

TEXT OF CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 12 of the Constitution of Utah provides:

> **Sec. 12. [Rights of accused persons.]**
> In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Article I, Section 14 of the Constitution of Utah provides:

> **Sec. 14. [Unreasonable searches forbidden--Issuance of warrant.]**
> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

Amendment IV to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV to the Constitution of the United States provides:

> **Section 1.**
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> **Section 2.**
> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Utah Code Ann. section 41-2-136 (1992 Cum. Supp.) provides:

41-2-136. Operating vehicle prohibited while license denied, suspended, disqualified, or revoked--Penalties.

(1) A person whose license has been denied, suspended, disqualified, or revoked under this chapter or under the laws of the state in which his license was issued and who operates any motor vehicle upon the highways of this state while that license is denied, suspended, disqualified, or revoked shall be punished as provided in this section.

(2) A person convicted of a violation of Subsection (1), other than a violation specified in Subsection (3), is guilty of a class C misdemeanor.

(3) (a) A person is guilty of a class B misdemeanor whose conviction under Subsection (1) is based on his operating a vehicle while his license is suspended, disqualified, or revoked for:

(i) a refusal to submit to a chemical test under Section 41-6-44.10;

(ii) a violation of Section 41-6-44;

(iii) a violation of a local ordinance that complies with the requirements of Section 41-6-43;

(iv) a violation of Section 76-5-207;

(v) a criminal action that the person plead guilty to as a result of a plea bargain after having been originally charged with violating one or more of the sections or ordinances under this subsection;

(vi) a revocation or suspension which has been extended under Subsection 41-2-127(2); or

(vii) where disqualification is the result of driving a commercial motor vehicle while the person's CDL is disqualified, suspended, canceled, or revoked under Subsection 41-2-715(1).

(b) A person is guilty of a class B misdemeanor whose conviction under Subsection (1) is based upon his operating a vehicle while his license is suspended, disqualified, or revoked in his state of licensure for violations corresponding to the violations listed in Subsection (a).

(c) A fine imposed under this subsection shall be at least the maximum fine for a class C misdemeanor under Section 76-3-301.

Utah Code Ann. section 77-7-2 (1990 Repl. Vol.) provides:

77-7-2. By peace officers.

A peace officer may make an arrest under authority of a warrant or may, without warrant, arrest a person:

(1) for any public offense committed or attempted in the presence of any peace officer; "presence" includes all of the physical senses or any device that enhances the acuity, sensitivity, or range of any

physical sense, or records the observations of any of the physical senses;

(2) when he has a reasonable cause to believe a felony has been committed and has reasonable cause to believe that the person arrested has committed it;

(3) when he has reasonable cause to believe the person has committed a public offense, and there is reasonable cause for believing the person may:

(a) flee or conceal himself to avoid arrest;

(b) destroy or conceal evidence of the commission of the offense; or

(c) injure another person or damage property belonging to another person.

Utah Code Ann. section 77-7-18 (1992 Cum. Supp.) provides:

77-7-18. Citation on misdemeanor or infraction charge.

A peace officer, in lieu of taking a person into custody, or any public official of any county or municipality charged with the enforcement of the law, may issue and deliver a citation requiring any person subject to arrest or prosecution on a misdemeanor or infraction charge to appear at the court of the magistrate before whom the person should be taken pursuant to law if the person had been arrested.

APPENDIX 2

Trial Court's Memorandum Decision and Findings of Fact and Conclusions of Law

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	MEMORANDUM DECISION
Plaintiff,	:	CIVIL NO. 921900308
vs.	:	
JULIE HARMON,	:	
Defendant.	:	

The above-entitled matter comes before the Court pursuant to defendant Julie Harmon's Motion to Suppress various evidence obtained by the prosecution. Specifically, defendant seeks to suppress incriminating statements she made to an arresting police officer and illegal drugs that were discovered in a search of her residence on November 19, 1991. Based upon defendant's motion, the memoranda of both parties, the evidence at the suppression hearing, the arguments of counsel, and for good cause appearing, the Court hereby enters the following ruling.

Defendant Harmon claims she was illegally stopped on a pretext by a police officer in Salt Lake County in violation of her constitutional right to be free from unreasonable searches

and seizures as guaranteed by the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Utah Constitution.[1] Harmon also alleges that Detective Russo illegally obtained her written consent to search her home by placing her under duress. Based on these two alleged violations, Harmon seeks to suppress any evidence obtained following her arrest and the subsequent search of her home.

The underlying facts relevant to this motion are that on or about November 19, 1991, Detective Robbie Russo, a deputy county sheriff with the Salt Lake County Sheriff's Office on assignment to the Metro Narcotics Task Force, received a telephone tip from an informant that Julie Harmon was distributing narcotics at a single family dwelling located at 2904 South 9100 West in Salt Lake County. At approximately 6:00 p.m. that evening, Detective Russo went to that address to conduct a "knock and talk," which means that the officer went to

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[1] Harmon argues that Article I, Section 14 of the Utah Constitution should be interpreted more restrictively than the Fourth Amendment to the United States Constitution, but the Court is not persuaded by this view under the facts presented in this case.

the address with the intention to walk up to the door, knock and ask for information to confirm or rebut the allegations in the telephone complaint.

When Detective Russo arrived at the residence, he observed a person he later identified as Julie Harmon was in her car beginning to back out of the driveway of the residence. Detective Russo approached Harmon, told her he had received a complaint that she was distributing narcotics and asked if he could search her house. She refused, stating that her father, who had recently suffered a heart attack, was due to return home from the hospital and that she was on her way to visit him. According to Detective Russo, she then told Russo twice that he could search her home when she returned. At the suppression hearing, however, Harmon disputed this testimony.

Following this conversation, Harmon drove to her parent's home. Detective Russo, sitting in his patrol car in front of the house, called to check on Harmon's driver's license and was informed that her license was suspended. Shortly thereafter, Harmon returned to her home and drove around the block two times, evidently to observe what Detective Russo was doing. Detective Russo called in a marked patrol car to assist him in

stopping her for driving on a suspended license. Detective Russo and a uniformed police officer then stopped Harmon in a parking lot near her home. Harmon was placed under arrest for driving on a suspension. Detective Russo placed her in his unmarked vehicle, read Harmon her Miranda rights and proceeded to take her to the Salt Lake County Jail.

According to Detective Russo, on the way to the jail, post-Miranda, Harmon admitted to Detective Russo that she had been afraid to let him into her residence because at one time she had sold drugs and the house contained drug paraphernalia, but that she was trying to clean up her act. According to Detective Russo, Harmon told him that if he drove her back to her house, she would let him in so that he could retrieve those items. According to Detective Russo, Harmon said she would sign a consent form to search her house. Detective Russo testified that he did not promise her any benefit for permitting a search of her home, and that she would still probably go to jail anyway. According to Detective Russo, Harmon again told Detective Russo she would consent to the search of her home and at that point Detective Russo turned his car around and drove back to Harmon's house. On the way, he called in for assistance to search her home. Upon arriving

back at Harmon's home and before exiting the vehicle, Harmon was Mirandized again and she then signed a written consent to search her home.

Having obtained Harmon's written consent to search, Detective Russo, together with some uniformed officers who had arrived on the scene, then proceeded inside, at which time Harmon pulled various items of drug paraphernalia and illegal drugs out from underneath a sofa in the living room.[2] During the search of the home, Harmon was permitted to telephone her brother, who she testified is himself a police officer and who was then at her parent's home. This call was made by Harmon to seek her brother's advice about what she should do under the circumstances.

Defendant Harmon's contention is that the traffic stop was made under the pretext of a lawful stop, but that the real reason for stopping her was to obtain her consent to search her house through coercive means. Based upon this premise, Harmon argues that Russo's actions amounted to an unlawful "pretext stop."

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[2] The drugs were subsequently identified as marijuana and methamphetamines. Additional testimony was presented pertaining to other controlled substances in the possession of Harmon at the time of her arrest, but the Court has not considered them in the context of this motion to suppress.

The Utah Court of Appeals recently clarified what constitutes a "pretext stop" in the state of Utah in State of Utah v. Lopez, ____P.2d___ (Utah App. Decided May 5, 1992). Lopez reiterates the well-established principal that under the Fourth Amendment, the right to be free from unreasonable searches and seizures extends to automobiles. Id., at 3. "Thus, the Fourth Amendment prohibits police officers from randomly or arbitrarily stopping vehicles on the highway." Id. Lopez then describes three situations in which an officer is justified in stopping a vehicle without a warrant:

> (1) When the officer observes the driver commit a traffic violation; (2) When the officer has a reasonable articulable suspicion that the driver is committing a traffic offense, such as driving under the influence of alcohol or driving without a license; and (3) When the officer has a reasonable articulable suspicion that the driver is engaged in more serious criminal activity, such as transporting drugs.

Id., at 4, [citations ommitted].

Lopez articulates that the "pretext doctrine" applies in two distinct situations. First, it applies where the facts demonstrate the driver did not commit a traffic violation. Under such circumstances, the stop would almost always be

unconstitutional. This situation does not exist in this case because it is undisputed that a traffic violation was committed by Harmon. Lopez, supra, at 6, Fn.7. The second situation is

> [w]here the driver committed a minor traffic violation or the vehicle had a minor equipment problem, but where the court concludes that a reasonable police officer [could have but] would not have stopped the vehicle absent the unconstitutional motivation.

Id., at 6 [emphasis added].

Lopez goes on to explain that

> [t]he proper inquiry is whether a reasonable officer would have stopped the defendant solely for commission of the traffic offense. . . . The proper inquiry does not focus on whether the officer could validly have made the stop. . . . Further. . . the officer's subjective motivation is not the relevant inquiry.

Id., at 9-10 [emphasis in original].

In the instant case, Harmon was stopped due to a traffic violation: namely, driving with a suspended license. Until Detective Russo learned that Harmon had a suspended license, he made no effort to stop her; and in fact, Harmon drove away from him. Detective Russo certainly was authorized to enforce the law to stop someone known by him to be driving on a suspended license. Moreover, driving on a suspended license is a Class B Misdemeanor in the State of Utah, and Detective Russo testified that he himself within the last year had made approximately 12

stops for driving on a suspended license. The mere fact that Russo was assigned to the Metro Narcotics Strike Force instead of performing traffic duty does not render him less authorized to intervene if he has knowledge that someone is driving on a suspended license. It is the opinion of this Court, therefore, that a reasonable officer would have stopped Harmon for driving on a suspended license.

The second issue raised by Harmon in relation to this stop is that it was not reasonable for Detective Russo to arrest her for this offense. As to this issue, Detective Russo had discretion whether to cite Harmon for this traffic violation or to arrest her. The testimony at the hearing was that officers in the field occasionally arrest persons driving on a suspended license, even if the driver does not appear to be intoxicated. They routinely exercise discretion as to whether they arrest the offender or merely issue a citation. This discretion exists in a multitude of situations in which an individual may be subject to arrest, bu the officer decides not to take that action. This discretion, which is inherent in the work of police officers, will not be disturbed in this case in light of all of the circumstances. Moreover, it does not appear to this Court that Detective Russo abused this discretion.

Thus, it appears to this Court that a reasonable officer would have stopped and arrested this defendant; and, therefore, Detective Russo's actions were not based upon a pretextual scheme, but upon his legal authority to stop Harmon from committing a Class B Misdemeanor: namely, driving with a suspended license. Harmon's incriminating statements were, therefore, not illegally obtained; and Harmon's motion to suppress her statements is therefore denied.

With regard to the evidence of drug paraphernalia, drugs and additional incriminating statements made by Harmon during the search of her home, the issue is whether this evidence was obtained through an unconstitutional search. Harmon claims her consent to this warrantless search is invalid because it was obtained under duress.

The Utah Court of Appeals addressed the requirements for obtaining a voluntary consent in State v. Bobo, 803 P.2d 1268 (Utah App. 1990). Specifically, Bobo held that the "[v]oluntariness of consent must be decided after consideration of the totality of the circumstances." Id., at 1273 [quoting State v. Whittenback, 621 P.2d 103, 106 (Utah 1980]. The factors to be weighed in determining the voluntariness of a consent to search are as follows:

> (1) the absence of a claim of authority to search by the officers; (2) the absence of an exhibition of force by the officers; (3) a mere request to search; (4) cooperation by the owner. . . and (5) the absence of deception or trick on the part of the officer(s).

Id.

Moreover, "[c]onsent while in custody does not, per se, render the consent involuntary. It is but a single element for the trial court to consider." Id., at 1273-4.

In this case, Harmon testified that Detective Russo told her he would have to shoot her dog if it attacked the officers and that this statement caused her to feel under duress prior to her signing the written consent. Detective Russo testified that all discussions concerning the dog occurred after Harmon signed the written consent to search. The Court is inclined to believe Detective Russo's testimony over that of Harmon's. First, Harmon appeared to be very evasive as a witness and not credible on this point. Second, she was, in fact, permitted to go into the house alone after giving her consent to take the dog out into the back yard. Finally, the dog was never jeopardized by the search by the officers.

Harmon's other argument why she did not give her written consent voluntarily is that because her father had just been released from the hospital, she felt pressure not to reveal her arrest to him and other family members. However, she also testified that prior to being stopped and arrested, she had gone to her parent's home where her mother was cooking dinner and learned that her father had gone for a visit to the countryside. These facts do not support Harmon's claim that she was under particular duress because of any health problem on the part of her father at the time of signing the written consent form. Certainly it is not unusual for someone to be apprehensive that family members will be upset to learn of that person's arrest and pending criminal charges. In light of the totality of the circumstances in this case, the Court is not persuaded that Harmon was in particular distress such that she could not voluntarily sign the written consent to this search.

It further appears to the Court that Detective Russo acted appropriately in obtaining Harmon's oral and written consent. He testified he had informed Harmon multiple times that he was not authorized to search her house without her consent and that if she would not consent, he would have to obtain a warrant before he could search.

Further, Russo made no exhibition of force. Although Harmon was arrested for committing a Class B Misdemeanor, the arrest was made subsequent to an open violation of the traffic laws and, as such, it does not constitute a show of force within the meaning of the guidelines set forth under Bobo, supra.

Further, Russo's testimony shows he merely made requests to search and that Harmon understood Russo could not search without her permission in the absence of a warrant. Indeed, Harmon refused to consent to a search when Detective Russo arrived at her home for the "knock and talk" and was permitted to leave when she refused.

Finally, Detective Russo employed no deception or tricks to induce her consent. Harmon understood Russo would need either her consent or a warrant to search her home. Russo indicated nothing more than that he would have to apply for a warrant. He made no representations that he would most likely be granted a warrant. Further, Russo had Mirandized Harmon on two separate occasions: the final occasion being just before Harmon signed the consent form.

All these actions clearly show that Russo did nothing to limit Harmon's freedom of choice to give consent. At the time

consent was obtained, Harmon had been stopped for driving with a suspended license and was enroute to jail pursuant to a lawful stop and subsequent search which indicated that she had possession of controlled substances on her person. No deception or coercion was employed to obtain consent, and Harmon was not under duress or acting involuntarily when she gave consent. Thus, her motion to suppress due to allegedly unconstitutional conduct by Russo is denied.

Counsel for the State is to prepare Findings of Fact and Conclusions of Law, and an Order consistent with this ruling.

Dated this 3rd day of June, 1992.

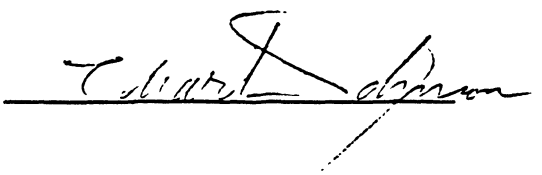
ANNE M. STIRBA
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 4 day of June, 1992:

Richard G. Hamp
Deputy County Attorney
Attorney for Plaintiff
2001 S. State, Room S3700
Salt Lake City, Utah 84190-1200

Mark R. Moffat
Attorney for Defendant
424 East 500 South, Suite 300
Salt Lake City, Utah 84111



DAVID E. YOCOM
Salt Lake County Attorney
RICHARD G. HAMP, Bar No. 4048
Deputy County Attorney
2001 South State Street, Room 3700
Salt Lake City, Utah 84190-1200
Telephone: (801) 468-3422

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,	)	
Plaintiff,	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
v.	)	Case No. 921900308
JULIE HARMON	)	
Defendant.	)	Honorable Anne M. Stirba

This matter having come before this Court pursuant to the Defendant's Motion to Suppress and the Court having read the briefs submitted by the parties, having heard the testimony of the witnesses and arguments of counsel and having issued its Memorandum Decision dated June 3, 1991, the Court now hereby makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On or about November 19, 1992, Detective Russo, a Deputy Sheriff on the Metro Narcotics Task Force, received a telephone tip from an informant that Julie Harmon was distributing narcotics at a single family dwelling located at 2904 South 9100 West in Salt Lake County.

2. At approximately 6:00 p.m., that evening, Detective Russo went to the address with the intention to walk up to the door, knock and ask for information to confirm or rebut the allegations in the telephone tip.

3. When Detective Russo arrived at the residence, he observed Harmon in her car beginning to back out of the driveway of the residence. Detective Russo approached defendant Harmon, identified himself, told her he had received a complaint that she was distributing narcotics and asked if he could search her house.

4. Harmon refused to let Detective Russo search her house, stating that her father had recently suffered a heart attack and was due to return home from the hospital and she was on her way to visit him.

5. Harmon then drove away in her car.

6. Detective Russo stayed outside Defendant's residence and called to check on Harmon's driver's license. He was informed that her license was suspended. Harmon returned home and drove around the block two times.

7. Detective Russo saw defendant drive by twice and asked a marked patrol unit to assist him in stopping the defendant for driving on a suspended license. Detective Russo and the uniformed police officer then stopped Harmon in a parking lot near her home.

8. Harmon was placed under arrest for Driving on Suspension. Detective Russo conducted a search incident to the arrest and found a controlled substance on her person.

9. Detective Russo had stopped and arrested approximately 12 persons for driving on a suspended license within the past year.

10. Officers routinely excercise discretion as to whether they arrest for Driving on Suspension or issue a citation.

11. On the way to jail, post Miranda Harmon admitted to Detective Russo that she had been afraid to let him into her residence because, at one time, she had sold drugs and the house contained drug paraphernalia.

12. Harmon told Detective Russo that if he drove her back to her house, she would let him in so that he could retrieve those items. Harmon said she would sign a consent form to search her house. Detective Russo did not promise Harmon any benefit for permitting a search of her house and stated that Harmon would probably go to jail anyway. Harmon again told Detective Russo she would consent to the search of her house and Detective Russo turned the car around and drove back to Harmon's house. On the way back, he called for assistance to search Harmon's house.

13. Upon arriving at Harmon's house and before exiting the vehicle, Harmon was Mirandized again and she then signed a written consent to search her house.

14. After signing the consent form, Detective Russo told Defendant he would have to shoot her dog if it attacked the officers.

15. Harmon was permitted to go into the house alone to take the dog out into the back yard. The dog was never jeopardized in the search by the officers.

16. Detective Russo and some uniformed officers who had arrived at the scene, proceeded inside the house. Harmon pulled various items of drug paraphernalia and illegal drugs out from underneath a sofa in the living room.

17. During the search of the defendant's home, the defendant was permitted to telephone her brother, who was a police officer, to seek his advice about what she should do under the circumstances.

CONCLUSIONS OF LAW

1. Detective Russo, having obtained information that Harmon's driver's license was suspended, properly stopped Harmon after he observed her driving.

2. An objective reasonable officer would have stopped Harmon for driving on a suspended license.

3. Police officers exercise discretion as to whether they arrest the offender or issue a citation. This discretion was not abused by Detective Russo when he arrested Harmon for Driving on Suspension.

4. Hamons's arrest was made subsequent to an open violation of the traffic laws and it does not constitute a show of force within the meaning of the guidelines set forth in State v. Bobo, 803 P2d 1268 (UT App. 1990).

5. Harmons's incriminating statements were made after Detective Russo Mirandized her and were not illegally obtained.

6. No deception or coercion was used by Detective Russo to obtain Harmons' consent to search her house. Harmons' consent to search her house was freely and vonluntarily given, therefore Deputy Russo acted appropriately in obtaining Harmon's oral and

7. The facts in this case do not persuade the Court that a different analysis should be used under Article 1, Section 14, of the Utah Constitution.

8. The search of Harmon's house was a legal search.

DATED this 26th day of June, 1992.

BY THE COURT:

Honorable Anne M. Stirba

approved as to form
MARK R. MOFFAT
Attorney for the Defendant

Through signing, defendant in no way waives her right to appeal the courts decision or object to the content of the findings of fact, conclusions of L or order

DAVID E. YOCOM
Salt Lake County Attorney
RICHARD G. HAMP, Bar No. 4048
Deputy County Attorney
2001 South State Street, Room S3700
Salt Lake City, Utah 84190-1200
Telephone: (801) 468-3422

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,	)	**ORDER**
Plaintiff,	)	
v.	)	
JULIE HARMON,	)	Case No. 921900308
Defendant.	)	Honorable Anne M. Stirba

Based upon the foregoing Findings of Fact and Conclusions of Law, it is therefore ordered that:

Defendant's Motion to Suppress is hereby denied.

DATED this 26th day of June, 1992.

BY THE COURT:

Honorable Anne M. Stirba
District Court Judge

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approved as to form
MARK R. MOFFAT
Attorney for the Defendant

APPENDIX 3

Consent form

Metro Narcotics Strike Force

METROPOLITAN HALL OF JUSTICE
315 EAST 200 SOUTH
SALT LAKE CITY, UTAH 84111
(801) 799-3672

STATE'S EXHIBIT

CONSENT TO SEARCH AUTHORIZATION

Date: NOV 19, 19 91

Add. Location: 2904 So 9100w Apt./Suite No. —

MAGNA, Utah 84044

I, Julie HARMON (Print), having been informed of my rights per Miranda not to have a search made of the premises, hereinafter mentioned, without a Search Warrant, of my right to refuse to consent to such a search, hereby authorize; Pat R RUSSO police officer and his agent of the Metropolitan Narcotics Strike Force to conduct a complete search of my person, premise(s) and/or vehicle at; 2904 S. 9100w.
These officers are authorized by me to search and seize any contraband or fruits of any crime while conducting a search on a narcotics investigation.

This written permission is being given to me to the above mentioned police officer voluntarily and without threats or promises of any kind.

Julie Harmon
Signature

Witnessed By:
R Russo
(Name)
of METRO NARCS
Add. _____
_____, Utah _____

_____
(Name)
of _____
Add. _____
_____, Utah _____

EXHIBIT 1