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State of Utah v. David Vance Grovier : Brief of Appellant

Utah Court of Appeals

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DOCKET NO. 900329-CA IN THE UTAH COURT OF APPEALS

State of Utah,	)	
	)	Docket No.
Plaintiff and Respondent,	)	Priority No. //
	)	Case No. 900329-CA
v.	)	
	)	
David Vance Grovier,	)	
	)	
Defendant and Petitioner.	)	

BRIEF OF APPELLANT

AN INTERLOCUTORY APPEAL FROM AN ORDER ENTERED IN THE FIFTH JUDICIAL DISTRICT IN AND FOR THE COUNTY OF IRON, STATE OF UTAH, THE HONORABLE J. PHILIP EVES, JUDGE PRESIDING.

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BRIEF OF APPELLANT

COMES NOW THE DEFENDANT/APPELLANT (hereinafter "Defendant" or "Mr. Grovier") and hereby submits the following as his Appellate Brief in the above-captioned matter:

JURISDICTION

Jurisdiction is conferred upon the Utah Court of Appeals in this matter pursuant to Rule 5 of the Rules of the Utah Court of Appeals.

NATURE OF THE PROCEEDINGS

1. This is an interlocutory appeal from an order denying Defendant's motion to suppress. Said motion was signed and entered by the Honorable J. Philip Eves, District Court Judge in the Fifth Judicial District Court, in and for Iron County on June 29, 1990. Said order takes the place of a Notice of Appeal.

2. On July 11, 1990 the Utah Court of Appeals ordered that Defendant's petition for permission to appeal from an interlocutory order be granted and that the trial be stayed pending the outcome of the merits on appeal.

3. This is an interlocutory appeal in a criminal case wherein defendant is being charged with unlawful possession of a controlled substance with intent to distribute pursuant to Utah Code Ann. §58-38-8, 1953, as amended. This interlocutory appeal is from an order denying defendant's motion to suppress.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The issues presented for review are as follows:

1. Whether the lower court abused its discretion by finding that defendant's vehicle was stopped due to probable cause.

2. Whether the lower court abused its discretion by failing to find that the detention was illegal.

3. Whether the lower court abused its discretion by failing to find that the defendant's consent to search was unlawfully coerced and that the subsequent search exceeded the test of State v. Marshall, 132 Utah Adv. Rep. 45 (Ct. App. 1990).

4. Whether the lower court abused its discretion by failing to find that the evidence obtained during the warrantless searches should be suppressed.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

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.

Utah Constitution Article 1, Section 14.

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.

United States Constitution, Fourth Amendment.

FACTS

The facts material to a consideration of the questions presented are as follows:

1. On February 23, 1990, Officer Lynn Davis of the Cedar City Police Department, currently assigned to the Iron/Beaver Counties Narcotics Task Force, was at the Circuit Court complex located in Cedar City, Utah, when he received a call on his pager to contact a confidential informant regarding information about the possession or sale of illegal narcotics.

2. Agent Davis contacted the confidential informant (hereinafter referred to as "C.I.") regarding the information relating to illegal drugs at approximately 10:30 a.m. (See page 15 of transcript of March 19, 1990, preliminary hearing, hereinafter referred to as the "transcript" or "Tr.") The

conversation Agent Davis had with the C.I. was all by telephone and lasted approximately two to three minutes. (Tr. 22.)

3. The C.I. informed Agent Davis that (a) there was a green Buick vehicle in town, (b) the persons that were driving the vehicle had controlled substances in the vehicle and that the vehicle was in Cedar City, Utah, (c) the license plate number of the vehicle was 175BAT or 175BAP, (d) there were two (2) persons in the vehicle: one male and one female, (e) the vehicle was at the south end of town the last time the C.I. saw the vehicle, and (f) the C.I. had observed drugs in the vehicle, said drugs described as a white powdery or tan powdery substance. (Tr. 15, 16, 22-31).

4. Thereafter, Agent Davis relayed this information to Cedar City Chief of Police Pete Hansen who, in turn, located the subject vehicle and had one of his officers (Sergeant Dennis Anderson) effectuate a stop of the vehicle on Main Street in Cedar City, Utah, in front of the Iron County/Utah State Correctional Facility. (Tr. 33-35.)

5. Sergeant Anderson was told to stop the vehicle, although he was not told why. He assumed that defendant had been seen smoking marijuana, although this was not true, he told the defendant that was why he was stopped. (June 19, 1990 motion to suppress hearing transcript, hereinafter M.Tr., at p. 95.) The defendant's vehicle was stopped between 11:15 and 11:30 a.m. (Tr. 38.)

6. After the vehicle was stopped, Chief Hansen approached the passenger, co-defendant below, Petie Kay Hale, and observed Officer Kelvin Orton perform a cursory search of her waist area for weapons. Chief Hansen then took Petie Kay Hale's "fanny pack" (a purse-type bag that wraps around the waist) and inside it found a marijuana pipe and a vial which contained traces of cocaine. (Tr. 36-38.)

The district court judge suppressed this evidence on the grounds that it was obtained without a warrant and that no acceptable exception to a warrantless search existed and that therefore it was seized pursuant to an unconstitutional search. (Conclusions of Law No. 8)

7. Thereafter, Chief Hansen gave defendant David Vance Grovier his rights per Miranda (Tr. 39) after Anderson had informed the defendant they had stopped him because they were informed he had drugs in his car and because "a citizen had possibly seen him smoking marijuana." (M.Tr. 95)

8. A request was made to search the car by Chief Hansen, and defendant said, "Go ahead and look." (Tr. 39.)

9. Chief Hansen then "asked him if he understood that--or if he was allowing us, giving us consent to search his entire car. And he said that he was." (Tr. 39.) Thereafter, Chief Hansen instructed Cedar City Police Officers Ken Stapley and Ronnie Judkins to search the car for narcotics, which they did, and after approximately twenty (20) minutes they could not find any narcotics in the vehicle. (Tr. 40.)

10. Sergeant Anderson testified that after the officers began a second search of the car's interior, the defendant repeatedly became upset. Sergeant Anderson testified that the defendant said, "There ought to be a law against this kind of search." and that he, the defendant, "didn't want [his car] torn apart," and that he was going to sue them. (M.Tr. 96.) Defendant claims he withdrew his consent to the search (M.Tr. 61.) at that time.

11. Cedar City Police Chief J. Peter Hansen testified that he told defendant he could either tell them where the drugs were or that he [the chief] would have the car moved into the sally port at the jail and that it was his full intention to dismantle the car "bolt by bolt," until he found the controlled substances in question. Chief Hansen said the defendant then said "Go for it." (Tr. 47.)

12. Chief Hansen testified that, thereafter, he had the vehicle moved to the sally port at the correctional facility based upon defendant's consent as well as for safety factors as the vehicle was parked at or near a highway at a busy time. (Tr. 41.) The distance from the place of the initial stop, to the sally port garage area of the Iron County/Utah State Correctional Facility to where the vehicle was moved, is approximately two hundred (200) yards to a 1/4 mile.

13. The defendant asserts that he demanded the police obtain a search warrant, to "not touch " his car and that the words "go for it" were facetious and arose from his assumption that his demands were falling on deaf ears. (M.Tr. 61 ??)

14. The vehicle was subjected to yet another search when it arrived inside the secure sally port at the Iron County/Utah State Correctional Facility at approximately 12:00 p.m.. Agent Lynn Davis was summoned at that time to conduct a third (or forth) full search of the vehicle.

15. During the sally port searches, defendant David Vance Grovier was taken to the Iron County/Utah State Correctional Facility, was held in a jail [holding] cell in the booking area of the correctional facility, and had another conversation with Chief Hansen in which defendant said, "You do not have permission to dismantle my car," (Tr. 43), whereupon Chief Hansen informed the officers "not to dismantle the car" but to continue with the search for the narcotics. (Tr. 43-44.)

16. Defendant also stated during the search that he didn't want the officers to tear his car apart, that someone was going to get sued over this and that there should be a law against looking in peoples' cars. Sergeant Anderson further reported that the Defendant stated that he didn't want the officers to tear his car apart. (M.Tr. 97-98.)

17. After 12:00 noon but before 1:00 p.m., Agent Lynn Davis of the Task Force arrived at the sally port, searched the vehicle for approximately twenty (20) minutes, and located approximately one-third (1/3) pound of the controlled substance methamphetamine in a heater hose underneath the driver's portion of the vehicle. (Tr. 3-11.)

18. On March 19, 1990, defendant David Vance Grovier was bound over, after a preliminary hearing, on one (1) single count of Unlawful Possession of Methamphetamine with Intent to Distribute, a Second-Degree Felony.

19. Defendants moved to suppress all evidence seized pursuant to the stop, pat down, seizure and search of the vehicle.

20. On June 29, 1990, District Court Judge J. Philip Eves ordered that the cocaine and drug paraphernalia found in defendant Petie Kay Hale's fanny pack be suppressed as a matter of law.

21. In that same order, the judge ordered that the methamphetamine found in the heater hose should not be suppressed. Defendants subsequently filed this interlocutory appeal to challenge that portion of the judge's order.

SUMMARY OF ARGUMENT

The State's seizure and search of defendant's car was without a warrant and outside the recognized exceptions to the warrant requirement. When the State conducts a warrantless search, the State must carry its burden of proof that the search was reasonable and constitutional.

Under the totality of the circumstances, defendant's "consent" to an extended search was not given freely, unequivocally, specifically and intelligently. Rather, such consent was extracted under the shadow of authority, threat, coercion and duress.

Prior to and after defendant was taken to jail, he attempted to withdraw his previous consent to a roadside search when the search escalated at the roadside and at the correctional facility. The State neither carried its burden of proof nor overcame the presumption against the waiver of a fundamental constitutional right. Therefore, the evidence found as a result of the search should be suppressed.

Standard of review.

When reviewing conclusions of law, the appellate court reviews them for correctness and gives no particular deference to the lower court's conclusions. Berube v. Fashion Centre, Ltd., 771 P.2d 1033, (Utah 1989); Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985). (The appellate court is free to reappraise the trial court's legal conclusions.) Furthermore, findings of fact

that proceed from stipulated facts are treated as conclusions of law. Zion's First Nat'l Bank v. National Am. Title Ins., 749 P.2d 651, 656 (Utah 1988).

ARGUMENT

POINT 1: The lower court abused its discretion by finding that the extended detention of the defendant, which exceeded the limits of the Terry search, was legal.

The Fourth Amendment to the United States Constitution, and Article I, Section 14, of the Utah Constitution, require the protection of citizens against unwarranted intrusions into their privacy.

> 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.

Utah State Constitution, Article I, §14.

In the present case, the police seized defendant and his vehicle on the basis of a tip from a confidential informant and searched defendant's car without a warrant. The Utah Supreme Court, in State v. Deitman, 739 P.2d 616, 617 (1987) delineated three recognized levels of permissible police intrusion absent a warrant or an exception to the warrant requirement:

> (1) an officer may approach a citizen at any time and pose questions so long as the citizen is not detained against his will; (2) an officer may seize a person if the officer has "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.

739 P.2d 617 quoting U.S. v. Merritt, 736 F.2d 223, 230 (5th Cir. 1984).

A level two detention based on "articulable suspicion" is now said to be based on "reasonable suspicion." State v. Menke, 128 Utah Adv. Rep. 32, 33-34 (Ct. App. 1990); State v. Droneburg, 120 Utah Adv. Rep. 27, 28 (Ct. App. 1990); State v. Sery, 87 Utah Adv. Rep. 32, 45 (1988) citing United States v. Place, 462 U.S. 6969 (1983). Codified in Utah Code Ann. §77-7-15.

A police officer was directed to defendant by a confidential informant who supplied the police officer with conclusory statements regarding contraband in defendant's car. (Tr. 35-36.) No officer gave testimony of the reliability or credibility of the informant or as to the basis of the informant's information.

The conclusory statements of a confidential informant may create reasonable suspicion, but such statements do not rise to the level of probable cause. Droneburg, 120 Utah Adv. Rep. at 28. Given that the fanny pack evidence was properly suppressed, there was no additional evidence to raise the police power from the level of reasonable suspicion to that of probable cause. Therefore, the initial stop could not have been under a level three, probable cause authority, and the trial court erred in finding that the police officer had probable cause to stop and

seize defendant's vehicle. Indeed, the police found no new evidence in the 20 minute search of the car, or in fact, any evidence at all to support the conclusions of the informant.

If the police were acting under no more than a reasonable and articulable suspicion that a crime had been committed, the police were then limited to the authority to search under Terry v. Ohio, 392 U.S. 1 (1968); Mapp v. Ohio, 367 U.S. 643 (1961). The scope of that search is the minimum intrusion necessary to dispel or confirm reasonable suspicions. 392 U.S. at 29.

In the present case, the officer exercised the full extent of the allowable "minimum intrusion" in the street search of the vehicle. That search took twenty to thirty minutes, and included a search of the passenger compartment, the trunk, beneath the car and the engine compartment.

"Minimum intrusion" was exceeded when defendant was handcuffed, taken to a cell in the police station, and detained for another ninety minutes while the police proceeded to dismantle his car which had been impounded at the police station. This excessive intrusion is a prior illegality exploited by the police to gain the fictitious consent relied on for the subsequent search.

Defendant concedes that a reasonable suspicion may have existed for the initial stop. Thus, the police were entitled to detain the defendant temporarily under a level two detention for reasonable suspicion. That stop, however, grew into a two hour

detention, ninety minutes of which was in a cell at the police station.

This extended detention was longer than necessary to effectuate the purpose of the stop, and so became a de facto arrest. Defendant, however, was never told that he had a right to refuse to consent to the continued search of his car. This illegal act by the police taints any consent making it presumptively coercive. Therefore, any evidence gathered as a result of defendant's "consent" should be suppressed. (See Towers and Robinson, infra, point 5.)

POINT 2: The lower court abused its discretion by finding that the State had probable cause to stop and seize defendant's vehicle, and in applying incorrect inferences from that conclusion.

The trial court misapplied the concept of probable cause in the present case. Because the conclusory statements of a confidential informant may supply only a reasonable suspicion of a crime, and because there was no other evidence to elevate the State's suspicion to probable cause, there was no probable cause for the police to detain defendant for two hours, handcuffed and in a cell, nor to impound his car and search it by way of a bolt by bolt dismantlement.

The trial court misconstrued the effect of probable cause. Even if the police did have probable cause to stop defendant, the corresponding police power is to arrest the suspect. A formal

arrest would result in the defendant being informed of his right to consult with an attorney, who, in turn, could inform the defendant of his right to refuse consent to the search.

A search following the arrest would have been constitutional only if a search warrant were obtained or if there were a legitimate exception to the warrant requirement. State v. Larocco, 135 Utah Adv. Rep. 10, 14, 15 (1990). Presumably, the probable cause for arrest would persuade a neutral, detached magistrate to issue a search warrant for the car.

However, the State's (second) formal arrest of defendant (for the possession of methamphetamine) was made after the search. The police made no attempt to obtain a warrant for the search of defendant's vehicle. The State should not gain additional authority to search by reason of probable cause without an arrest or search warrant on the basis of that probable cause.

Therefore, this court should hold that the trial court erred in concluding that there was probable cause for the search of defendant's vehicle. If this court does allow the trial court's finding of probable cause to stop defendant, then this court should deny any effect of the probable cause that would allow broader justification of police power for the subsequent warrantless search.

POINT 3: The lower court erred in finding that defendant continued to consent to the extended search of his vehicle at the correctional facility.

Warrantless searches are unreasonable per se unless they fall within a recognized exception to the warrant requirement of the fourth amendment. State v. Towers and Robinson, 140 Utah Adv. Rep. 16 (Ct. App. 1990); State v. Menke, 128 Utah Adv. Rep. at 35. In the case at bar, the state relies on the consent exception.

The state claims that the defendant consented to a request to search his car with his reply of "Go for it." Defendant claims he told the police to get a warrant before they searched his car.

A search is legal under the Fourth Amendment if it is conducted as a result of the defendant's voluntary consent. State v. Marshall, 132 Utah Adv. Rep. 45, 49 (Ct. App. 1990); Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); State v. Sierra, 754 P.2d 972, 980 (Utah Ct. App. 1988).

It is the State's burden to prove that a consent to search was voluntary. Robinson, 140 Utah Adv. Rep. 16 (Utah Ct. App. 1990); United States v. Mendenhall, 446 U.S. 544, 557 (1980); Schneckloth, 412 U.S. at 222; Arroyo, 137 Utah Adv. Rep. at 15. That burden of proof is particularly heavy. State v. Marshall, 132 Utah Adv. Rep. 45 (Ct., App. 1990); Bumper v. North Carolina, 391 U.S. 543 (1968); Utah R. Civ. P. 52(a). There is a presumption against the waiver of fundamental constitutional rights. U.S. v. Abbot, 546 F.2d 883, 885 (10th Cir, 1977).

This court should reverse the lower court's findings that defendant's consent was voluntary. As argued below in this memorandum, there was no consent untainted by the atmosphere of coercion and duress and defendant did not consent freely and intelligently. Finally, any consent that defendant may have given was later withdrawn or restricted in scope.

A. Under the totality of the circumstances, defendant's consent was not voluntary, rather it was the product of coercion and duress.

"[T]he question [of] 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." Schneckloth, 412 U.S. at 227. See also, Robinson, 140 Utah Adv. Rep. 16 (Ut. Ct. App. 1990)

In examining the totality of all the circumstances, a court must take into account both the details of police conduct and the characteristics of the accused, State v. Arroyo, 137 Utah Adv. Rep. 13, June 28, 1990, at 15, which include "subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents." Schneckloth, 412 U.S. at 229.

Some of the circumstances to be considered in determining if consent was truly voluntary include (1) the duration of detention, Robinson, 140 Utah Adv. Rep. 16 (Ut. Ct. App. 1990); (2) the conditions of confinement, (3) threats to property, (4)

threats of further detention, Id.; (5) threats to obtain a search warrant, Id. (6) defendant's vulnerability, Robinson, 140 Utah Ad. Rep. at 19; Schneckloth, 412 U.S. at 229; and (7) defendant's knowledge of his right to refuse consent, Robinson, 140 Utah Adv. Rep. at 20 (Ut. Ct. App. 1990).

Taken objectively, the circumstances demonstrate that defendant could not have given consent free of coercion to the extended search of his vehicle. The record shows that defendant was not aware of his right to refuse consent. (M.Tr. 95) Further, after the thirty minute roadside detention, defendant was further detained at the police station for another ninety minutes where he was handcuffed and later placed in jail.

By the time defendant had been moved to the jail, he was no longer free to move about, he was either handcuffed or in a cell, and he was surrounded by the police. In short, defendant was under de facto arrest and subject to more than a shadow of authority.

Defendant was aware that the police had impounded his car and that they were about to dismantle it bolt by bolt absent his consent. The police had stated that he would be further detained during the dismantlement. Officer Hansen told defendant that he intended to get a search warrant to dismantle the car. (Tr. 17.) Short of a strip search, the police had done all they could to render defendant vulnerable.

In addition, the police were on notice of defendant's ignorance of his right to refuse consent to further search of his

car by defendant's statement: "There ought to be a law to prevent this [i.e., the search of his car]." (M.Tr. 95)

Defendant's statement demonstrates that his consent was not intelligently given. There is a law against searches without consent, the fourth amendment of the federal constitution as well as the analogous Utah constitutional provision.

Defendant's statements, "There ought to be a law," "Someone is going to get sued over this," and "Don't take my car apart." (M.Tr. 95-96) show his state of mind that he was withdrawing or restricting his consent as does Anderson's testimony about defendant's agitated condition. (M.Tr. 98)

The State failed to overcome its burden to show that defendant's "consent" was freely given. This court should therefore reverse the lower court's finding that defendant's "consent" was voluntary. Further, this court should suppress all evidence recovered as a result of the coerced consent.

B. As a matter of law, the trial court should have found that defendant effectively withdrew his consent to the search.

By the time the police resumed their search of defendant's car at the police station, the police had already checked the floor, trunk and under the seat of the vehicle during the highway search. The police then informed defendant of their intent to take the car apart as soon as the search resumed at the police station. (Tr. 14.)

Defendant's imperative, '"Don't dismantle my car," (Tr. 45.) should be construed under the circumstances as a termination of any earlier consent he may have given to the warrantless search.

The chief of police was aware of defendant's desire to at least restrict the scope of the search. (Tr. 43) Chief Hansen chose to interpret the defendant's statement as " Don't dismantle my car with tools," a request to not use jackhammers and tools to destroy the vehicle. (Tr.45, 46)

The chief could have asked defendant to clarify his statement, but he chose not to. By choosing not to ask for a clarification of defendant's remarks, the police revealed their bad faith and denied defendant an opportunity to terminate the search in accordance with his constitutional rights.

Defendant had withdrawn his permission for the specific type of search that the police had informed him they were going to do. that is dismantlement. The chief of police should have been alert to the fact that defendant had withdrawn his permission for the police to conduct any type of search concerning his car. Under the circumstances, defendant's continued consent was not specific and unequivocal.

The State failed to support their burden of proof and overcome the presumption against a waiver of a fundamental constitutional right. This court should therefore find that defendant had withdrawn his unequivocal consent to search and that the subsequent search was illegal and that all fruits of the illegal search should therefore be suppressed.

POINT 4: Alternatively, defendant restricted the scope of his consent to search his vehicle.

If this court does not hold that defendant effectively withdrew consent to any search, then this court should hold that defendant restricted the scope of his consent and that the police acted beyond those restrictions.

In the present case, defendant told the police not to take his car apart. Ignoring defendant's request, the police then "accidentally" disassembled the heater hose. The chief of police acknowledged that defendant was limiting the scope of his consent. (Tr. 17.) The chief interpreted defendant's statement to mean that he did not mind a dismantling of his car so long as tools weren't used. Such a self serving interpretation was not warranted by defendant's words, his surroundings, the circumstances or case law.

Any voluntary consent given by defendant allows the police to search only the specific area agreed to by the defendant. Marshall, 132 Utah Adv. Rep. at 49. "The scope of a consent search is limited by the breadth of the actual consent itself. . . . Any police activity that transcends the actual scope of the consent given encroaches on the Fourth Amendment rights of the suspect." United States v. Gay, 774 F.2d 368, 377 (10th Cir. 1985); see, e.g., People v. Thiret, 685 P.2d 193, 201 (Colo. 1984) (scope of consent exceeded when police asked to "look around" the house, then conducted a 45-minute search of rooms,

drawers, boxes and closed containers). In short, defendant's request that his car not be dismantled, means specifically that. His car should be left intact. Defendant has a constitutional right to limit the scope of his consent.

This court should therefore find that the defendant effectively limited his consent so that any dismantling of his car would constitute an illegal search. Therefore, this court should hold that all evidence of the illegal search be suppressed.

Point 5: The only method that can insure that consent to a warrantless search is intelligently given is when that consent follows an explanation by the police that there is a right to refuse to give the required consent.

Defendant was never informed of his right to refuse consent. This court has demonstrated its concern over "consent" searches. State v. Sierra, 754 P.2d 972 (Utah Ct. App. 1988) et al. Most recently, this court noted that the state brought forth no evidence that a defendant "was aware or was informed that he did not have to accede to the trooper's request [to search]." Robinson, 140 Utah Adv. Rep. 16 (Ut Ct. App. 1990). In the present case, Chief Hansen interpreted defendant's statement to the advantage of the police, although the law presumes against a waiver of fundamental constitutional rights.

In Robinson, this court quotes approvingly from U.S. v. Jones, 846 F.2d 358, 361 (6th Cir. 1988) which requires an express explanation of a suspect's right to refuse consent to the

search. Similarly, the law in this jurisdiction should require a specific, express explanation before a suspect can consent to a search.

Absent such an explanation, the average detainee is not likely to know that he or she has a right not to consent or to withdraw consent. Presently, the constitutional right to withhold or withdraw consent is only available to those few who are sophisticated in the intricacies of criminal legal procedure. Schneckloth, 412 U.S. at 226. Absent a specific, express explanation of the right to refuse consent, the courts are left with the difficult evaluation of whether a fundamental constitutional right has been waived or whether the apparent waiver was coerced. Therefore, Utah should require that specific, express explanation be given to suspects of their right to refuse consent to a search without a warrant.

CONCLUSION

For the reasons set forth above, Appellant respectfully requests this Court to reverse the lower court's denial of his motion to suppress and to order that the evidence derived from the search and seizure of defendant's vehicle be suppressed.

DATED this 6 day of September, 1990.

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/s/
Loni F. DeLand

CERTIFICATE OF MAILING

I hereby certify that on this 6 day of _____, 1990, I mailed four true and correct copies of the foregoing Brief of Appellant to Scott M. Burns, Iron County Attorney, 97 North Main Street, Suite 1, Cedar City, Utah 84720.

/s/

ADDENDUM