2006

State of Utah v. Robert Nicholas Despain : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

OF UTAH	:	
Plaintiff/Appellee,	:	
		Case No. 20060769-CA
	:	
NICHOLAS DESPAIN,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION OF POSSESSION OF A CONTROLLED SUBSTANCE, A THIRD DEGREE FELONY, VIOLATION OF UTAH CODE ANN. § 58-37-8 (1)(a)(iii) (WES AND DRIVING UNDER THE INFLUENCE OF ALCOHOL/DR CLASS B MISDEMEANOR, IN VIOLATION OF UTAH COD 41-6-44 (WEST 2004), IN THE THIRD JUDICIAL DISTRICT C SALT LAKE COUNTY, UTAH, THE HONORABLE DENISE P LINDBERG PRESIDING

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH	:	
Plaintiff/Appellee,	:	Case No. 20060769-CA
v.	:	
ROBERT NICHOLAS DESPAIN,	:	
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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF THE PROCEEDINGS

This is an appeal from a conviction of possession of a controlled substance, a third degree felony, in violation of UTAH CODE ANN. § 58-37-8(1)(a)(iii) (West 2004), and driving under the influence of alcohol/drugs, a class B misdemeanor, in violation of UTAH CODE ANN. § 41-6-44 (West 2004). This Court has jurisdiction of this appeal under UTAH CODE ANN. § 78-2a-3(2)(e) (West 2004).

ISSUES ON APPEAL AND STANDARD OF APPELLATE REVIEW

Issues

1. Did police have probable cause to arrest defendant for driving under the influence of alcohol or drugs when witnesses reported his dangerous and erratic driving pattern, he crashed into a parked trailer off the road, his speech was slurred, and he behaved erratically?

2. Was the search of defendant's car permissible under the automobile exception?

Standard of Review

"In search and seizure cases, we review the district court's factual findings 'under a clearly erroneous standard.'" *State v. Ranquist*, 2005 UT App 482, ¶ 5, 128 P.3d 1201 (quoting *State v. Brake*, 2004 UT 95, ¶ 15, 103 P.3d 699). "We review the trial court's legal conclusions for correctness, giving no deference to the court's application of the law to the facts." *Id.* (citations omitted).

CONSTITUTIONAL PROVISION AND STATUTES

The following constitutional provisions and statutes are attached at Addendum A:

United States Constitution, Amendment IV;
UTAH CODE ANN. § 41-6-44 (West 2004);
UTAH CODE ANN. § 41-6-44.30 (West 2004).

STATEMENT OF THE CASE

On August 2, 2004, the State filed an information charging defendant with two counts of unlawful possession of a controlled substance with intent to distribute, second and third degree felonies (Count I - methamphetamine; Count II - marijuana), driving under the influence (Count III), and unlawful possession of drug paraphernalia (Count IV). R1–3.

Defendant moved to suppress the drugs and paraphernalia discovered in his vehicle during a police search. R29–39. After a hearing, the court denied defendant's motion. R127; R316 (motion hearing). Defendant objected to the findings of fact and conclusions of law proposed by the State. R136–37. On October 28, 2005, the court heard further argument regarding the theories justifying the search, and again denied the motion. R180–81; R322 (hearing). On December 16, 2005, the court made final amendments to the

State's proposed findings of fact and conclusions of law. R182–83; *see* R184–90 (Second Amended Findings of Fact, Conclusions of Law, and Order) (attached at Addendum B); *see also* R322 (hearing).

This Court denied defendant's petition for interlocutory appeal. R249.

Defendant subsequently entered a guilty plea to a reduced count of possession of a controlled substance, a third degree felony, and driving under the influence, a class B misdemeanor, reserving his right to appeal the suppression issue. R290–99. On July 28, 2006, the trial court sentenced defendant to serve statutory terms concurrently on both counts, and suspended the prison term. R303–04.

Defendant timely appealed. R306.

STATEMENT OF THE FACTS

On the evening of May 6, 2004, defendant smashed his car into a parked trailer after he swerved in and out of his lane of traffic. R316:4, 6-7. Three eyewitnesses informed the investigating officers of his erratic driving pattern, and they and attending medical personnel noted that he was acting erratically, his speech was slurred, and he was paranoid about the contents of his car. R316:6-9, 22, 29, 36-37. The officers recovered large quantities of marijuana and methamphetamine from defendant's vehicle. R316:40. Following an evidentiary hearing, the court made the following factual findings:

1. On May 6, 2004, Deputy Edward Spotten of the Salt Lake County Sheriff's Office was dispatched to 2660 South 8000 West on a reported traffic accident. [R316:4]

2. Arriving upon the scene at approximately 6:25 p.m., Deputy Spotten

observed that a 2001 Blue Saturn SL2 was the vehicle involved in the accident. [R316:5, 18]

3. Deputy Spotten observed that this was a single car accident and the car had crashed into the back end of a parked trailer off the side of the road. [R316:4]

4. Deputy Spotten encountered the defendant, Robert Nicholas Despain, who was the driver of the vehicle. Deputy Spotten also encountered three other witnesses. [R316:4, 6]

5. Deputy Spotten approached the defendant to ask some questions. At this time, the defendant was leaning against the trailer. In response to Deputy Spotten's questions, the defendant denied having consumed alcohol or having used any drugs. [R316:7-8, 12-13]

6. Deputy Spotten noticed that the defendant's speech was slurred while he was speaking with him. [R316:29]

7. Deputy Spotten did not smell the odor of alcohol nor marijuana emanating from the defendant. [R316:13, 15, 32]

8. Deputy Spotten did not observe drugs or paraphernalia in "plain view" prior to the search. [R316:25]

9. The three other witnesses, Brett Lowe, Sasha Strasburg, and Marsha Gallyer, described to Deputy Spotten what they had observed. They told Deputy Spotten that they had observed the defendant driving erratically that [sic] prior to striking the parked trailer. Specifically, they indicated that the defendant ran another car off the road, ran over a reflector post, nearly hit a semi tractor trailer, and was swerving across the entire road. [R316:6-7][1]

10. After speaking with the witnesses, Deputy Spotten decided that he had probable cause to arrest the defendant for Driving Under the Influence ("DUI") based on the defendant's reported driving pattern, the accident, and his demeanor. [R316:8, 15-16, 21, 30-31]

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[1] Deputy Spotten testified not that defendant's car ran over a reflector post, but that the car that he ran off the road went over the reflector post. R316:6.

11. Deputy Spotten determined that based on probable cause to arrest the defendant [for] DUI, the car would be searched "incident to arrest" and

"for inventory purposes" because the vehicle was to be impounded. [R316:8]

12. Deputy Spotten did not place the defendant under arrest immediately because Salt Lake County Fire Department medical personnel had arrived and had placed the defendant in the ambulance to treat the cut on the defendant's head that he had sustained from the accident. [R316:8-9]

13. Because Salt Lake County Fire was preparing to transport the defendant to the hospital, Deputy Spotten chose not to administer field sobriety tests. [R316:10, 13-14]

14. Medical personnel indicated to Deputy Spotten that the defendant was acting paranoid. They indicated that he was continually worried about his car. [R316:8-9, 22]

15. Medical personnel told Deputy Spotten that the defendant had locked his car to keep people out. [R316:9]

16. Deputy Spotten retrieved the keys for the car from the defendant to perform a search of the car. [R316:9]

17. Deputy Spotten believes that he told the defendant that he was under arrest when he retrieved the keys, but does not recall. [R316:9, 17]

18. After unlocking the car but before performing the search, two individuals, one male and one female, claiming to be related to the defendant[,] arrived on the scene. [R316:9, 24, 39]

19. These individuals went to the car and the male attempted to retrieve a backpack from the back seat. [R316:9]

20. Deputy Spotten instructed the male to stop and return the backpack to the car. [R316:9-10, 24-25]

21. Sergeant Jason Mazuran of the Salt Lake County Sheriff's Office also responded to the scene. [R316:10, 35]

22. Sergeant Mazuran interacted [with] and observed the defendant. [R316:36, 42]

23. Sergeant Mazuran described the defendant's behavior as panicked. [R316:36-37, 41-42]

24. In order to assist Deputy Spotten, Sergeant Mazuran initiated an inventory search of the vehicle. [R316:[R316:10, 37-38, 43]

25. The search of the vehicle commenced at approximately 6:45 p.m. [R316:19]

26. Sergeant Mazuran characterized the search of the vehicle as an inventory search, in preparation for the vehicle's State Tax Impoundment. [R316:37-38]

27. Sergeant Mazuran was aware of the Salt Lake County Sheriff's Office procedure for impounding vehicles. [R316:38, 40, 43, 47]

28. The policy required that the vehicle be searched, items located and listed on an inventory. [R316:27-28, 38, 43-44]

29. As he found particular items in the vehicle, Sergeant Mazuran took those items to Deputy Spotten, and indicated orally where the items had been found. [R316:44]

30. Sergeant Mazuran did not personally record in writing the specific items found or where they were found. [R316:44, 46]

31. Sergeant Mazuran did not personally prepare a vehicle impound report in this case, but another deputy on the scene did. [R316:45]

32. While Sergeant Mazuran began the search, medical personnel indicated to Deputy Spotten that they were ready to transport the defendant. Deputy Spotten followed the ambulance to the hospital. [R316:21]

33. Prior to Deputy Spotten's departure, Deputy Mazuran discovered a bag of marijuana in the door compartment on the driver's side. [R316:38-39]

33.[2] Deputy Spotten stayed in the defendant's presence at all times at the hospital. [R316:11]

34. After medical personnel were finished, Deputy Spotten clearly remembers placing the defendant under arrest. This was at approximately 7:20 p.m. [R316:18, 21]

35. Sergeant Mazuran's search of the vehicle produced a backpack and a box. [R316:40]

34. Sergeant Mazuran's search of the backpack produced marijuana that was prepared for distribution. [R316:40]

35. Deputy Mazuran's search of the box produced a quantity of methamphetamine. [R316:40]

R184–90 (Second Amended Findings of Fact, Conclusions of Law, and Order, attached at Addendum B).

Based on these factual findings, the trial court concluded that "Deputy Spotten had probable cause to arrest the defendant for Driving Under the Influence." R188. It based that conclusion on "the erratic driving pattern reported by the witnesses, the single car accident with a stationary trailer that was off the road, the defendant's panicked and paranoid demeanor, and the defendant's slurred speech." *Id.* The court rejected the legitimacy of the search as incident to arrest. *Id.* And although the court found there was probable cause to impound the car under UTAH CODE ANN. 41-6-44.30 (West 2004), it ruled that the prosecution had failed to present sufficient information for the court to determine whether the inventory search was properly conducted according to departmental policy. *Id.* Nevertheless, the court concluded that "had the vehicle been towed to the impound lot and

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[2] The court's findings use the number "33" twice.

a proper inventory search been conducted, the contraband would have been inevitably discovered." *Id.*

SUMMARY OF ARGUMENT

The trial court correctly concluded that defendant's arrest for driving under the influence of alcohol or a controlled substance was based on sufficient probable cause: Defendant's sustained, erratic driving pattern—running another car off the road, swerving in and out of his lane of traffic, nearly hitting a semi-tractor trailer, and then colliding with a parked trailer on the side of the road—strongly indicated chemical impairment; when the officer who first arrived at the scene contacted defendant, he found defendant's speech to be slurred; at the scene, medical personnel and another officer witnessed defendant acting paranoid and erratic. Based upon the totality of the circumstances, the officers had sufficient probable cause to believe that defendant was driving under the influence.

The trial court's ultimate conclusion, that the search of defendant's car was justified, was correct, albeit on different grounds than relied on by the court. The court ultimately concluded that evidence of defendant's possession of contraband would inevitably have been discovered following a properly conducted inventory search at the impound lot. Aplt. Br. at 16-23. The State concedes that this ruling was mistaken because no evidence showed that the police would have conducted a second inventory search. Nevertheless, the court's ultimate conclusion should be affirmed on an alternative ground: The search was justified under the automobile exception.

Under the automobile exception, even if a car is not readily mobile, police may search

the vehicle if probable cause exists to believe it contains contraband. The scope of an otherwise justified search under the automobile exception extends not only to the interior of the vehicle, but also to closed containers within. The record is unclear whether defendant's car was mobile after he crashed it into a trailer by the side of the road. Nevertheless, the search of the interior of the car, and the box and backpack within, was justified under the automobile exception because the officers had probable cause to believe that contraband was in defendant's car: Undisputed evidence showed that defendant drove dangerously and erratically and that his speech was slurred, indicating recent impairment. He also exhibited unusual paranoia about the contents of his car, and he called two family members to remove items from the car before the officers could search it. Those facts which, along with facts indicating drug impairment, would have indicated to an experienced police officer that there might be contraband in defendant's car.

ARGUMENT

THE SEARCH OF DEFENDANT'S VEHICLE DID NOT VIOLATE THE FOURTH AMENDMENT.

Defendant asserts that "the arresting officer did not have probable cause to place the Defendant under arrest for Driving Under the Influence and therefore the officer obtained evidence in violation of the Defendant's constitutional rights . . . ." Aplt. Br. at 10.[3] Specifically, he argues that the factors relied upon by the trial court "are clearly insufficient to establish probable cause to arrest the Defendant for Driving Under the Influence of alcohol or a controlled substance." Aplt. Br. at 14. Defendant agrees with the court's conclusion that the search of his vehicle was not justified under the "search-incident-to-lawful-arrest" exception, and that the inventory search was not properly conducted. Aplt. Br. at 17. Therefore, defendant challenges the trial court's ultimate conclusion, that the contraband would have been inevitably discovered in a subsequent properly conducted inventory search. *Id.*

Contrary to defendant's claim, his arrest and the police search of his vehicle did not violate the Fourth Amendment. The trial court correctly concluded that the officers had probable cause to arrest defendant for DUI. And because an even greater quantum of

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[3] Although defendant claims that the search violated his rights under both the federal and state constitutions, he has not engaged in any independent analysis for his state constitutional claim. Therefore, this Court should only consider his claim under the federal constitution. *See State v. Griffith*, 2006 UT App 291, ¶ 6 n.1, 141 P.3d 602 (citing *State v. Rynhart*, 2005 UT 84, ¶ 12, 125 P.3d 938). "Without analysis, the court can make no informed decision regarding whether the state constitutional provision in question was intended to mirror its federal counterpart . . . ." *Midvale City Corp. v. Haltom*, 2003 UT 26, ¶ 75, 73 P.3d 334.

evidence establishes probable cause to believe that contraband would be found in defendant's car, the officers also were entitled to search the car under the automobile exception to the warrant requirement. In sum, the police acted within the constraints of the Fourth Amendment, and, consequently, the trial court properly denied defendant's motion to suppress the evidence recovered from his car.

A. The police had probable cause to arrest based on his erratic and dangerous driving pattern, his paranoid and erratic behavior, and his slurred speech.

Defendant challenges the trial court's determination that Deputy Spotten had probable cause to arrest him for driving under the influence. He argues that the "only factors" presented by the State to establish probable cause were that "witnesses observed the Defendant driving erratically before the accident" and that "emergency personnel told Deputy Spotten that the Defendant kept worrying about objects inside his vehicle." Aplt. Br. at 14. "These factors alone," he contends, "are clearly insufficient to establish probable cause to arrest the Defendant." *Id.* Although defendant identifies additional evidence supporting probable cause, namely, his panicked and paranoid behavior, *see id.*, he does not include it in his analysis under the totality of the circumstances. More importantly, because defendant misapprehends the test for probable cause, his claim fails. The trial court properly concluded that police had probable cause to arrest defendant for DUI.

"[T]o justify a warrantless arrest 'an officer must have probable cause . . . to believe that the suspect has committed or is committing an offense.'" *State v. Hechtle*, 2004 UT App 96, ¶ 10, 89 P.3d 185 (quoting *State v. Trane*, 2002 UT 97, ¶ 26, 57 P.3d 1052) (additional

citations and internal quotations omitted). "[W]e do not examine these facts in isolation, but rather, we examine the totality of the circumstances to determine whether '"a prudent person, or one of reasonable caution would believe, based upon the circumstances shown, that the suspect has committed, is committing, or is about to commit"' the offense for which he is arrested." *Id.* at ¶ 11 (quoting *State v. Chansamone*, 2003 UT App 107, ¶ 11, 69 P.3d 293 and *State v. Trane*, 2002 UT 97, ¶ 27, 57 P.3d 1052). "[P]robable cause is '"only the probability, and not a prima facie showing, of criminal activity."'" *State v. Spurgeon*, 904 P.2d 220, 227 (Utah Ct. App. 1995) (citations omitted). "[I]t does not demand any showing that such a belief be correct or more likely true than false." *Griffith*, 2006 UT App 291, ¶ 7 (quoting *Texas v. Brown*, 460 U.S. 730, 742 (1983)). Rather, "[a] 'practical, nontechnical' probability that incriminating evidence is involved is all that is required." *Id.*

Defendant asserts that Deputy Spotten lacked probable cause because defendant could drive erratically and act paranoid about the contents of his car for several innocent reasons. Aplt. Br. at 14-15. However, "[a]lthough there might be innocent explanations for particular conduct, it is not necessary that all legitimate reasons be absent before an officer finds probable cause." *State v. Poole*, 871 P.2d 531, 535 (Utah 1994). In this case, although defendant has explained his conduct, post hoc, in innocent terms, this does not eviscerate probable cause. Indeed, in finding probable cause, this Court need not hold that the inferences of criminal behavior outweigh those of innocent behavior. *See Griffith*, 2006 UT App 291, ¶ 7. The facts presented by the State at the suppression hearing show that there was at least a "probability . . . of criminal activity." *Id.*; *See* R191–95 (Addendum B).

An officer has probable cause to arrest when there is a probability that a person "operate[d] or [was] in actual physical control of a vehicle . . . [and] is under the influence of alcohol, any drug, or the combined influence of alcohol and any drug to the degree that renders the person incapable of safely operating a vehicle." UTAH CODE ANN. § 41-6-44(2)(a)(ii) (West 2004).[4] The evidence established probable cause that defendant was driving under the influence of drugs. Deputy Spotten arrived on the scene of a single car accident, in which defendant had "crashed into the back end of a parked trailer off the side of the road." R184. Deputy Spotten spoke briefly with defendant, who was leaning against the trailer, and noticed that defendant's speech was slurred. R185. In Deputy Spotten's experience, slurred speech indicated that a suspect might be under the influence of drugs or alcohol. R316:31. Three eyewitnesses "told Deputy Spotten that they had observed defendant driving erratically . . . swerving across the entire road." R185. Specifically, they saw him run another car off the road, causing it to run over a reflector post. R316:6. Defendant, they said, continued driving west on highway 201, "driving erratically." R316:7. When defendant reached the intersection of 80th West, he swerved in front of a semi-truck to make a left-hand turn, nearly getting hit. *Id.* Defendant made the turn, and continued south on 80th West, "again driving erratically, barely staying on the road, and then . . . swerved left of center and crashed in the back of the parked trailer." *Id.* Medical personnel told Deputy Spotten that defendant was acting paranoid about the items in his car. R316:22;

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[4] In 2005, the Legislature renumbered this section as UTAH CODE ANN. § 41-6a-502 (West Supp. 2006.) 2005 Utah Laws 56–60. However, because the arrest and search took place in 2004, the State refers to the statutes in force at the time of the offense.

R186. In Deputy Spotten's experience, "after an accident most people aren't going to worry about that at all." *Id.* Deputy Mazuran verified that defendant was acting panicked. R186; 316:36-37.

Under the totality of the circumstances, defendant's driving pattern substantially increased the probability that defendant was under the influence of a controlled substance, and was "incapable of safely operating [his] vehicle." Utah CODE ANN. § 44-6-44(2)(a)(ii) (West 2004). Defendant did not merely veer off the road and strike a parked trailer; he endangered the lives of several other drivers as he swerved in and out of his lane, forced another motorist off the road, and nearly crashed into a semi truck. R184–85; R316:7. This driving pattern indicated to Deputy Spotten, based upon his experience and training as an officer, that defendant "was under the influence of something." R316:8. At the accident scene, defendant was leaning against the trailer and his speech was slurred, further increasing the probability that defendant had been driving while impaired. R185. Moreover, Deputy Spotten did not witness any other indicia of alcoholic intoxication, which implicitly suggested to Deputy Spotten that defendant was under the influence of a controlled substance. R316:8. Although Deputy Spotten did not perform further sobriety tests at the scene, he explained that he does not perform sobriety tests after an accident. R316:8, 14. These factors, in combination, established probable cause that defendant was driving under the influence. *See Spurgeon*, 904 P.2d at 227 ("Probable cause is only the probability, and not a prima facie showing, of criminal activity." (citations and quotation marks omitted)). Therefore, defendant's arrest did not violate the Fourth Amendment.

B. The search was permissible under the automobile exception to the warrant requirement because the officers had probable cause to believe that controlled substances or evidence of crime were inside defendant's vehicle.

The trial court 's ultimate conclusion, that the search of defendant's car was justified, was correct, albeit on different grounds than relied on by the court. Here, notwithstanding probable cause to arrest and to impound defendant's car, the trial court ruled that the prosecution failed to show that there was sufficient information that the inventory search was conducted according to policy. R188.[5] Nevertheless, the court upheld the warrantless search because the evidence would inevitably have been discovered in a second, properly conducted inventory search at the impound lot. The State concedes that the court's ruling was mistaken because no evidence showed that the police would have conducted a second inventory search. *See State v. Topanotes*, 2003 UT 30, ¶ 14, 76 P.3d 1159 (requiring prosecution to demonstrate that police would have inevitably discovered the improperly discovered evidence through other lawful means. 2003 UT 30, ¶ 14. Nevertheless, the court's ultimate conclusion should be affirmed on the alternative ground that the search was justified under the automobile exception to the warrant requirement.

"[A]n appellate court may affirm the judgment appealed from 'if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the [district] court to be the basis of its ruling . . . , was not raised in the

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[5] The trial court also ruled that the search was not justified incident to arrest. R188. On appeal, the State neither concedes that the court's rejection of its search-incident-to-arrest or inventory-search theories was correct, but does not contend that it was incorrect.

lower court, and was not considered or passed on by the lower court.'" *State v. Robison*, 2006 UT 65, ¶ 19, 147 P.3d 448 (quoting *Bailey v. Bayles*, 2002 UT 58, ¶ 10, 52 P.3d 1158 (internal quotation marks omitted)).

Generally, the Fourth Amendment prohibits warrantless searches and seizures, unless the search falls under an exception to the warrant requirement. *State v. Strickling*, 844 P.2d 979, 985 (Utah Ct. App. 1992). One of those recognized exceptions is the "automobile exception." Generally, "'[i]f a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment . . . permits police to search the vehicle without more.'" *State v. Griffith*, 2006 UT App 291, ¶ 6, 141 P.3d 602 (quoting *Maryland v. Dyson*, 527 U.S. 465, 467 (1999)) (additional citations omitted). The State need not show a separate exigency. "'[A vehicle] search is not unreasonable if based on facts that would justify the issuance of a warrant, *even though a warrant has not been actually obtained.*'" *Maryland v. Dyson*, 527 U.S. 465, 467 (1999) (per curiam) (emphasis in original) (quoting *United States v. Ross*, 456 U.S. 798, 809 (1982)). Further, the scope of a search justified under the automobile exception extends not only to the interior of the vehicle, but also to closed containers within. *Wyoming v. Houghton*, 526 U.S. 295, 302 (1999) ("When there is probable cause to search for contraband in a car, it is reasonable for police officers . . . to examine packages and containers without a showing of individualized probable cause for each one.")

1. The automobile exception applies even if a defendant's car is immobilized by an accident.

The automobile exception does not necessarily hinge upon whether a vehicle is readily mobile. "It is thus clear that the justification to conduct such a warrantless [vehicle] search does not vanish once the car has been immobilized; nor does it depend upon a reviewing court's assessment of the likelihood in each particular case that the car would have been driven away, or that its contents would have been tampered with, during the period required for the police to obtain a warrant." *Michigan v. Thomas*, 458 U.S. 259, 261 (1982) (per curiam). Indeed, the exception applies "even after it has been impounded and is in police custody." *Id.* (citing *Chambers v. Maroney*, 399 U.S. 42 (1970). Although the car's ready mobility "alone was perhaps the original justification for the vehicle exception, [the United States Supreme Court's] cases have made clear that ready mobility is not the only basis for the exception." *California v. Carney*, 471 U.S. 386, 391 (1985). "Even in cases where an automobile was not immediately mobile, the lesser expectation of privacy resulting from its use as a readily mobile vehicle justified application of the vehicular exception." *Id.*

Under *Carney*, the automobile exception extends to automobiles immobilized due to a recent accident. *See* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE, § 7.2(b) at 555 (4th ed. 2004) ("[I]f it appears that the car has only recently and suddenly become disabled (perhaps as a result of an accident while pursued by police), then it seems likely that the *Carney* doctrine *is* applicable. True, the car is not 'readily mobile,' but its recent use as transportation establishes the 'reduced expectation of privacy' which the language of *Carney*

. . . makes the dominant consideration."); *see also Cady v. Dumbrowski*, 413 U.S. 433, 442–43 (1973) (holding that search of car disabled by accident, while stored in police impound lot, was reasonable under automobile exception); *United States v. Donnelly*, 475 F.3d 946, 955 (8th Cir. 2007) (holding automobile exception applicable after accident); *State v. Vassar*, 99 P.3d 987, 999 (Wyo. 2004) (rejecting argument that automobile exception did not apply simply because defendant "was hospitalized and his vehicle was damaged and allegedly immobile").

In this case, defendant had recently operated his vehicle, causing an accident on a public road. R184. Although the record does not indicate whether defendant's car was readily mobile *after* the accident, it was clearly readily mobile *prior* to the accident. Therefore, the automobile exception applies to the search in this case if the police had probable cause to believe that contraband or evidence of crime would be found in defendant's vehicle. *See Thomas*, 458 U.S. at 261; *Carney*, 471 U.S. at 391.

Moreover, an independent exigency justified the search. Defendant had called "family members" to remove items from the vehicle, and they attempted to do so as soon as the car doors were unlocked. R186, R316:37, 39. Thus, the officers were on notice even before they searched the car that a search was necessary to prevent the destruction or removal of evidence. *See State v. Ashe*, 745 P.2d 1255, 1258 (Utah 1987) (noting that "[n]umerous cases have sustained warrantless entries where the circumstances indicated that evidence might be destroyed or removed if entry was delayed until a warrant could be obtained," and citing cases) (emphasis added); *State v. Morck*, 821 P.2d 1190, 1194 (Utah Ct. App. 1991)

(finding exigent circumstances to search when truck was being towed away and officers faced situation where defendants were not under arrest and could "have gone with the tow truck and removed any incriminating items").

2. Under the totality of the circumstances, the police had probable cause to believe that defendant's car contained contraband or evidence of crime.

As discussed above, *supra* point A, "probable cause is '"only the probability, and not a prima facie showing, of criminal activity."'" *State v. Spurgeon*, 904 P.2d 220, 227 (Utah Ct. App. 1995) (citations omitted). "[I]t does not demand any showing that such a belief be correct or more likely true than false. A 'practical, nontechnical' probability that incriminating evidence is involved is all that is required." *Griffith*, 2006 UT App 291, ¶ 7 (quoting *Brown*, 460 U.S. at 742). In this case, the officers had probable cause to believe that defendant's vehicle contained contraband or other evidence of crime, justifying their search under the automobile exception to the warrant requirement.

When officers arrived at the scene, the circumstances of defendant's car accident raised their suspicions that defendant was driving under the influence of drugs: Defendant had swerved off of the road and struck a parked trailer. R184. These suspicions were confirmed when Deputy Spotten interviewed several witnesses who explained defendant's erratic driving pattern. R185. This evidence alone would not be sufficient to establish probable cause that *the vehicle* contained contraband or evidence of crime. However, Deputy Spotten was also informed by paramedics that defendant was "acting paranoid." R186. Additionally, Deputy Spotten observed that defendant's speech was slurred. All of this

evidence suggested to the officer that defendant was DUI for drugs. R316:8. As argued above, *see* Pt. A, this evidence sufficiently justified the trial court's ruling that there was probable cause to arrest defendant for DUI. R186. This evidence, however, augmented by evidence of defendant's highly suspect concern about his car—he was "continually worried about his car" and its contents—gave rise to probable cause that defendant's DUI was related to existence of contraband inside the car. R186.

In the suppression hearing, Deputy Spotten explained why this behavior was unusual:

> Q: Is it common when people are at an accident scene and they know their car is being towed they want to secure any personal items, valuables that may be in the vehicle, before it is towed?
>
> A: Not to this extent usually, no. Usually they – they're usually just – when people are in accidents they usually don't have concerns of the car until later on. Then they'll come back and call us and say, "I left this in my car." Usually after an accident most people aren't going to worry about that at all.
>
> Q: So if somebody has got stereo equipment, CDs?
>
> A: Typically not. Typically, not –
>
> Q: Laptops?
>
> A: Typically not the ones that I see, no.
>
> Q: They're not going to be concerned at all about making sure those items are secure before their vehicle is towed to Impound?
>
> A: In my training and experience in the accident field, that's not something they are. Most people are concerned about their injuries and what's going to happen to them.

R316:23. Defendant had even "locked his car to keep people out." R186. Sergeant Mazuran

confirmed that defendant was acting panicked. R186.

Moreover, "[a]fter unlocking the car but before performing the search, two individuals, one male and one female, claiming to be related to the defendant arrived on the scene." R186. "These individuals went to the car and the male attempted to retrieve a backpack from the back seat." R186. Sergeant Mazuran testified that "[i]t was very suspicious how it was done," and ordered the male to return the backpack to the car. R186, 316:39. When Sergeant Mazuran searched the car, he found a baggie of marijuana in the compartment of the driver's door, a backpack containing marijuana that was prepared for distribution, and a box containing methamphetamine. R187-88.

The officers had probable cause to believe that contraband or evidence of crime was in the car. The totality of the circumstances provided the officers with the "probability that incriminating evidence [was] involved." *Griffith*, 2006 UT App 291, ¶ 7. This included the following evidence: The unusual circumstances of defendant's accident; his reportedly dangerous and erratic driving pattern preceding the accident; his demeanor and slurred speech; his paranoia regarding the contents of his locked car; and his summoning two individuals to remove items from the vehicle just before the police began their search. When viewed together, these circumstances established probable cause to believe that defendant was under the influence of a controlled substance, and that there was evidence of that substance inside the vehicle.

Because the automobile exception applies in this case and the officers had probable cause, the warrantless search of defendant's car was reasonable.

CONCLUSION

Based on the foregoing discussion, the State respectfully requests that this Court affirm the trial court's denial of defendant's motion to suppress on the alternative ground that the search of defendant's car was justified under the automobile exception, and that it affirm defendant's convictions.

RESPECTFULLY SUBMITTED this 24th day of April, 2007.

MARK L. SHURTLEFF
Attorney General

KENNETH A. BRONSTON
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to Jason Schatz, Shatz & Anderson, attorney for defendant, 356 East 900 South, Salt Lake City, Utah 84111, this 16th day of April, 2007.

Kenneth A. Bronston
Assistant Utah Attorney General

Addenda

Addendum A

Amendment IV. Search and seizure

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.

§ 41-6-44. Driving under the influence of alcohol, drugs, or a combination of both or with specified or unsafe blood alcohol concentration—Measurement of blood or breath alcohol—Criminal punishment—Arrest without warrant—Penalties—Suspension or revocation of license

(1) As used in this section:

(a) "assessment" means an in-depth clinical interview with a licensed mental health therapist:

(i) used to determine if a person is in need of:

(A) substance abuse treatment that is obtained at a substance abuse program;

(B) an educational series; or

(C) a combination of Subsections (1)(a)(i)(A) and (B); and

(ii) that is approved by the Board of Substance Abuse and Mental Health in accordance with Section 62A-15-105.

(b)(i) "conviction" means any conviction for a violation of:

(A) this section;

(B) alcohol, any drug, or a combination of both-related reckless driving under Subsections (9) and (10);

(C) Section 41-6-44.6, driving with any measurable controlled substance that is taken illegally in the body;

(D) local ordinances similar to this section or alcohol, any drug, or a combination of both-related reckless driving adopted in compliance with Section 41-6-43;

(E) automobile homicide under Section 76-5-207;

(F) Subsection 58-37-8(2)(g);

(G) a violation described in Subsections (1)(b)(i)(A) through (F), which judgment of conviction is reduced under Section 76-3-402; or

(H) statutes or ordinances in effect in any other state, the United States, or any district, possession, or territory of the United States which would constitute a violation of this section or alcohol, any drug, or a combination of both-related reckless driving if committed in this state, including punishments administered under 10 U.S.C. Sec. 815;

(ii) A plea of guilty or no contest to a violation described in Subsections (1)(b)(i)(A) through (H) which plea is held in abeyance under Title 77, Chapter 2a, Pleas in Abeyance, is the equivalent of a conviction, even if the

charge has been subsequently reduced or dismissed in accordance with the plea in abeyance agreement, for purposes of:

(A) enhancement of penalties under:

(I) this Chapter 6, Article 5, Driving While Intoxicated and Reckless Driving; and

(II) automobile homicide under Section 76-5-207; and

(B) expungement under Section 77-18-12.

(c) "educational series" means an educational series obtained at a substance abuse program that is approved by the Board of Substance Abuse and Mental Health in accordance with Section 62A-15-105;

(d) "screening" means a preliminary appraisal of a person:

(i) used to determine if the person is in need of:

(A) an assessment; or

(B) an educational series; and

(ii) that is approved by the Board of Substance Abuse and Mental Health in accordance with Section 62A-15-105;

(e) "serious bodily injury" means bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death;

(f) "substance abuse treatment" means treatment obtained at a substance abuse program that is approved by the Board of Substance Abuse and Mental Health in accordance with Section 62A-15-105;

(g) "substance abuse treatment program" means a state licensed substance abuse program;

(h) a violation of this section includes a violation under a local ordinance similar to this section adopted in compliance with Section 41-6-43; and

(i) the standard of negligence is that of simple negligence, the failure to exercise that degree of care that an ordinarily reasonable and prudent person exercises under like or similar circumstances.

(2)(a) A person may not operate or be in actual physical control of a vehicle within this state if the person:

(i) has sufficient alcohol in the person's body that a subsequent chemical test shows that the person has a blood or breath alcohol concentration of .08 grams or greater at the time of the test;

(ii) is under the influence of alcohol, any drug, or the combined influence of alcohol and any drug to a degree that renders the person incapable of safely operating a vehicle; or

(iii) has a blood or breath alcohol concentration of .08 grams or greater at the time of operation or actual physical control;

(iv)(A) is 21 years of age or older;

(B) has sufficient alcohol in the person's body that a subsequent chemical test shows that the person has a blood or breath alcohol concentration of .05 grams or greater at the time of the test;

(C) has a passenger under 16 years of age in the vehicle at the time of operation or actual physical control; and

(D) committed the offense within ten years of a prior conviction; or

(v)(A) is 21 years of age or older;

(B) has a blood or breath alcohol concentration of .05 grams or greater at the time of operation or actual physical control;

(C) has a passenger under 16 years of age in the vehicle at the time of operation or actual physical control; and

(D) committed the offense within ten years of a prior conviction.

(b) The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug is not a defense against any charge of violating this section.

(c) Alcohol concentration in the blood shall be based upon grams of alcohol per 100 milliliters of blood, and alcohol concentration in the breath shall be based upon grams of alcohol per 210 liters of breath.

(3)(a) A person convicted the first or second time of a violation of Subsections (2)(a)(i) through (iii) is guilty of a:

(i) class B misdemeanor; or

(ii) class A misdemeanor if the person:

(A) has also inflicted bodily injury upon another as a proximate result of having operated the vehicle in a negligent manner;

(B) had a passenger under 16 years of age in the vehicle at the time of the offense; or

(C) was 21 years of age or older and had a passenger under 18 years of age in the vehicle at the time of the offense.

(b) A person convicted of a violation of Subsection (2) is guilty of a third degree felony if the person has also inflicted serious bodily injury upon another as a proximate result of having operated the vehicle in a negligent manner.

(c) A person convicted of a violation of Subsection (2)(a)(iv) or (v) is guilty of:

(i) a class B misdemeanor; or

(ii) a class A misdemeanor if the person has also inflicted bodily injury upon another as a proximate result of having operated the vehicle in a negligent manner.

(4)(a) As part of any sentence imposed the court shall, upon a first conviction, impose a mandatory jail sentence of not less than 48 consecutive hours.

(b) The court may, as an alternative to all or part of a jail sentence, require the person to:

(i) work in a compensatory-service work program for not less than 48 hours; or

(ii) participate in home confinement through the use of electronic monitoring in accordance with Subsection (13).

(c) In addition to the jail sentence, compensatory-service work program, or home confinement, the court shall:

(i) order the person to participate in a screening;

(ii) order the person to participate in an assessment, if it is found appropriate by a screening under Subsection (4)(c)(i);

(iii) order the person to participate in an educational series if the court does not order substance abuse treatment as described under Subsection (4)(d); and

(iv) impose a fine of not less than $700.

(d) The court may order the person to obtain substance abuse treatment if the substance abuse treatment program determines that substance abuse treatment is appropriate.

(e)(i) Except as provided in Subsection (4)(e)(ii), the court may order probation for the person in accordance with Subsection (14).

(ii) If there is admissible evidence that the person had a blood alcohol level of .16 or higher, the court shall order probation for the person in accordance with Subsection (14).

(5)(a) If a person is convicted under Subsection (2) within ten years of a prior conviction under this section, the court shall as part of any sentence impose a mandatory jail sentence of not less than 240 consecutive hours.

(b) The court may, as an alternative to all or part of a jail sentence, require the person to:

(i) work in a compensatory-service work program for not less than 240 hours; or

(ii) participate in home confinement through the use of electronic monitoring in accordance with Subsection (13).

(c) In addition to the jail sentence, compensatory-service work program, or home confinement, the court shall:

(i) order the person to participate in a screening;

(ii) order the person to participate in an assessment, if it is found appropriate by a screening under Subsection (5)(c)(i);

(iii) order the person to participate in an educational series if the court does not order substance abuse treatment as described under Subsection (5)(d); and

(iv) impose a fine of not less than $800.

(d) The court may order the person to obtain substance abuse treatment if the substance abuse treatment program determines that substance abuse treatment is appropriate.

(e) The court shall order probation for the person in accordance with Subsection (14).

(6)(a) A conviction for a violation of Subsection (2) is a third degree felony if it is:

(i) a third or subsequent conviction under this section within ten years of two or more prior convictions; or

(ii) at any time after a conviction of:

(A) automobile homicide under Section 76-5-207 that is committed after July 1, 2001; or

(B) a felony violation under this section that is committed after July 1, 2001.

(b) Any conviction described in this Subsection (6) which judgment of conviction is reduced under Section 76-3-402 is a conviction for purposes of this section.

(c) Under Subsection (3)(b) or (6)(a), if the court suspends the execution of a prison sentence and places the defendant on probation the court shall impose:

(i) a fine of not less than $1,500; and

(ii) a mandatory jail sentence of not less than 1,500 hours.

(d) For Subsection (6)(a) or (c), the court shall impose an order requiring the person to obtain a screening and assessment and substance abuse treatment at a substance abuse treatment program providing intensive care or inpatient treatment and long-term closely supervised follow-through after treatment for not less than 240 hours.

(e) In addition to the penalties required under Subsection (6)(c), if the court orders probation, the probation shall be supervised probation which may include requiring the person to participate in home confinement through the use of electronic monitoring in accordance with Subsection (13).

(7) The mandatory portion of any sentence required under this section may not be suspended and the convicted person is not eligible for parole or probation until any sentence imposed under this section has been served. Probation or parole resulting from a conviction for a violation under this section may not be terminated.

(8)(a)(i) The provisions in Subsections (4), (5), and (6) that require a sentencing court to order a convicted person to: participate in a screening; an assessment, if appropriate; and an educational series; obtain, in the discretion of the court, substance abuse treatment; obtain, mandatorily, substance abuse treatment; or do a combination of those things, apply to a conviction for a violation of Section 41-6-44.6 or 41-6-45 under Subsection (9).

(ii) The court shall render the same order regarding screening, assessment, an educational series, or substance abuse treatment in connection with a first, second, or subsequent conviction under Section 41-6-44.6 or 41-6-45 under Subsection (9), as the court would render in connection

with applying respectively, the first, second, or subsequent conviction requirements of Subsections (4), (5), and (6).

(b)(i) The court shall notify the Driver License Division if a person fails to:

(A) complete all court ordered:

(I) screening;

(II) assessment;

(III) educational series;

(IV) substance abuse treatment; and

(V) hours of work in compensatory-service work program; or

(B) pay all fines and fees, including fees for restitution and treatment costs.

(ii) Upon receiving the notification described in Subsection (8)(b)(i), the division shall suspend the person's driving privilege in accordance with Subsections 53-3-221(2) and (3).

(9)(a)(i) When the prosecution agrees to a plea of guilty or no contest to a charge of a violation of Section 41-6-45, of an ordinance enacted under Section 41-6-43, or of Section 41-6-44.6 in satisfaction of, or as a substitute for, an original charge of a violation of this section, the prosecution shall state for the record a factual basis for the plea, including whether or not there had been consumption of alcohol, drugs, or a combination of both, by the defendant in connection with the violation.

(ii) The statement is an offer of proof of the facts that shows whether there was consumption of alcohol, drugs, or a combination of both, by the defendant, in connection with the violation.

(b) The court shall advise the defendant before accepting the plea offered under this Subsection (9)(b) of the consequences of a violation of Section 41-6-44.6 or of Section 41-6-45.

(c) The court shall notify the Driver License Division of each conviction of Section 41-6-44.6 or 41-6-45 entered under this Subsection (9).

(10) A peace officer may, without a warrant, arrest a person for a violation of this section when the peace officer has probable cause to believe the violation has occurred, although not in the peace officer's presence, and if the peace officer has probable cause to believe that the violation was committed by the person.

(11)(a) The Driver License Division shall:

(i) suspend for 90 days the operator's license of a person convicted for the first time under Subsection (2);

(ii) revoke for one year the license of a person convicted of any subsequent offense under Subsection (2) or if the person has a prior conviction as defined under Subsection (1) if the violation is committed within a period of ten years from the date of the prior violation; and

(iii) suspend or revoke the license of a person as ordered by the court under Subsection (12).

(b) The Driver License Division shall subtract from any suspension or revocation period the number of days for which a license was previously suspended under Section 53-3-223 or 53-3-231, if the previous suspension was based on the same occurrence upon which the record of conviction is based.

(12)(a)(i) In addition to any other penalties provided in this section, a court may order the operator's license of a person who is convicted of a violation of Subsection (2) to be suspended or revoked for an additional period of 90 days, 180 days, one year, or two years to remove from the highways those persons who have shown they are safety hazards.

(ii) The additional suspension or revocation period provided in this Subsection (12) shall begin the date on which the individual would be eligible to reinstate the individual's driving privilege for a violation of Subsection (2).

(b) If the court suspends or revokes the person's license under this Subsection (12)(b), the court shall prepare and send to the Driver License Division an order to suspend or revoke that person's driving privileges for a specified period of time.

(13)(a) If the court orders a person to participate in home confinement through the use of electronic monitoring, the electronic monitoring shall alert the appropriate corrections, probation monitoring agency, law enforcement units, or contract provider of the defendant's whereabouts.

(b) The electronic monitoring device shall be used under conditions which require:

(i) the person to wear an electronic monitoring device at all times;

(ii) that a device be placed in the home or other specified location of the person, so that the person's compliance with the court's order may be monitored; and

(iii) the person to pay the costs of the electronic monitoring.

(c) The court shall order the appropriate entity described in Subsection (13)(e) to place an electronic monitoring device on the person and install electronic monitoring equipment in the residence of the person or other specified location.

(d) The court may:

(i) require the person's electronic home monitoring device to include a substance abuse testing instrument;

(ii) restrict the amount of alcohol the person may consume during the time the person is subject to home confinement;

(iii) set specific time and location conditions that allow the person to attend school educational classes, or employment and to travel directly between those activities and the person's home; and

(iv) waive all or part of the costs associated with home confinement if the person is determined to be indigent by the court.

(e) The electronic monitoring described in this section may either be administered directly by the appropriate corrections agency, probation monitoring agency, or by contract with a private provider.

(f) The electronic monitoring provider shall cover the costs of waivers by the court under Subsection (13)(d)(iv).

(14)(a) If supervised probation is ordered under Section 41–6–44.6 or Subsection (4)(e) or (5)(e):

(i) the court shall specify the period of the probation;

(ii) the person shall pay all of the costs of the probation; and

(iii) the court may order any other conditions of the probation.

(b) The court shall provide the probation described in this section by contract with a probation monitoring agency or a private probation provider.

(c) The probation provider described in Subsection (14)(b) shall monitor the person's compliance with all conditions of the person's sentence, conditions of probation, and court orders received under this article and shall notify the court of any failure to comply with or complete that sentence or those conditions or orders.

(d)(i) The court may waive all or part of the costs associated with probation if the person is determined to be indigent by the court.

(ii) The probation provider described in Subsection (14)(b) shall cover the costs of waivers by the court under Subsection (14)(d)(i).

(15) If a person is convicted of a violation of Subsection (2) and there is admissible evidence that the person had a blood alcohol level of .16 or higher, the court shall order the following, or describe on record why the order or orders are not appropriate:

(a) treatment as described under Subsection (4)(d), (5)(d), or (6)(d); and

(b) one or both of the following:

(i) the installation of an ignition interlock system as a condition of probation for the person in accordance with Section 41–6–44.7; or

(ii) the imposition of home confinement through the use of electronic monitoring in accordance with Subsection (13).

§ 41–6–44.30. Seizure and impoundment of vehicles by peace officers—Impound requirements—Removal of vehicle by owner

(1) If a peace officer arrests or cites the operator of a vehicle for violating Section 41–6–44, 41–6–44.6, or 41–6–44.10, or a local ordinance similar to Section 41–6–44 which complies with Subsection 41–6–43(1), the peace officer shall seize and impound the vehicle in accordance with Section 41–6–102.5, except as provided under Subsection (2).

(2) If a registered owner of the vehicle, other than the operator, is present at the time of arrest, the peace officer may release the vehicle to that registered owner, but only if:

(a) the registered owner:

(i) requests to remove the vehicle from the scene; and

(ii) presents to the peace officer sufficient identification to prove ownership of the vehicle or motorboat;

(b) the registered owner identifies a driver with a valid operator's license who:

(i) complies with all restrictions of his operator's license; and

(ii) would not, in the judgment of the officer, be in violation of Section 41–6–44, 41–6–44.6, or 41–6–44.10, or a local ordinance similar to Section 41–6–44 which complies with Subsection 41–6–43(1), if permitted to operate the vehicle; and

(c) the vehicle itself is legally operable.

(3) If necessary for transportation of a motorboat for impoundment under this section, the motorboat's trailer may be used to transport the motorboat.

Laws 1982, 2nd Sp. Sess., c. 4, § 1; Laws 1983, c. 194, § 1; Laws 1984, c. 37, § 1; Laws 1987, c. 138, § 43; Laws 1991, c. 171, § 2; Laws 1992, c. 1, § 187; Laws 1992, c. 229, § 2; Laws 1996, c. 170, § 44, eff. July 1, 1996; Laws 1996, c. 223, § 3, eff. July 1, 1996; Laws 1998, c. 125, § 2, eff. May 4, 1998; Laws 1998, c. 270, § 15, eff. March 21, 1998; Laws 2000, c. 334, § 5, eff. May 1, 2000; Laws 2001, c. 202, § 2, eff. July 1, 2001; Laws 2002, c. 200, § 3, eff. July 1, 2002.

Addendum B

IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT,

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, -vs- ROBERT N. DESPAIN, Defendant.	SECOND AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER Case No. 041904962 JUDGE DENISE POSSE LINDBERG

Having heard the facts of this case and having heard argument by both parties, the Court enters the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. On May 6, 2004, Deputy Edward Spotten of the Salt Lake County Sheriff's Office was dispatched to 2660 South 8000 West on a reported traffic accident.
2. Arriving upon the scene at approximately 6:25 p m , Deputy Spotten observed that a 2001 Blue Saturn SL2 was the vehicle involved in the accident.
3. Deputy Spotten observed that this was a single car accident and the car had crashed into the back end of a parked trailer off the side of the road.
4. Deputy Spotten encountered the defendant, Robert Nicholas Despain, who was the driver of the vehicle. Deputy Spotten also encountered three other witnesses.

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5. Deputy Spotten approached the defendant to ask some questions. At this time, the defendant was leaning against the trailer. In response to Deputy Spotten's questions, the defendant denied having consumed alcohol or having used any drugs.

6. Deputy Spotten noticed that the defendant's speech was slurred while he was speaking with him.

7. Deputy Spotten did not smell the odor of alcohol nor marijuana emanating from the defendant.

8. Deputy Spotten did not observe drugs or paraphernalia in "plain view" prior to the search.

9. The three other witnesses, Brett Lowe, Sasha Strasburg, and Marsha Gallyer, described to Deputy Spotten what they had observed. They told Deputy Spotten that they had observed the defendant driving erratically that prior to striking the parked trailer. Specifically, they indicated that the defendant ran another car off the road, ran over a reflector post, nearly hit a semi tractor trailer, and was swerving across the entire road.

10. After speaking with the witnesses, Deputy Spotten decided that he had probable cause to arrest the defendant for Driving Under the Influence ("DUI") based on the defendant's reported driving pattern, the accident, and his demeanor.

11. Deputy Spotten determined that based on probable cause to arrest the defendant DUI, the car would be searched "incident to arrest" and "for inventory purposes" because the vehicle was to be impounded.

12. Deputy Spotten did not place the defendant under arrest immediately because Salt Lake County Fire Department medical personnel had arrived and had placed the defendant in the ambulance to treat the cut on the defendant's head that he had sustained from the accident.

13. Because Salt Lake County Fire was preparing to transport the defendant to the hospital, Deputy Spotten chose not to administer field sobriety tests.

14. Medical personnel indicated to Deputy Spotten that the defendant was acting paranoid. They indicated that he was continually worried about his car.

15. Medical personnel told Deputy Spotten that the defendant had locked his car to keep people out.

16. Deputy Spotten retrieved the keys for the car from the defendant to perform a search of the car.

17. Deputy Spotten believes that he told the defendant that he was under arrest when he retrieved the keys, but does not recall.

18. After unlocking the car but before performing the search, two individuals, one male and one female, claiming to be related to the defendant arrived on the scene.

19. These individuals went to the car and the male attempted to retrieve a backpack from the back seat.

20. Deputy Spotten instructed the male to stop and return the backpack to the car.

21. Sergeant Jason Mazuran of the Salt Lake County Sheriff's Office also responded to the scene.

22. Sergeant Mazuran interacted and observed the defendant.

23. Sergeant Mazuran described the defendant's behavior as panicked.

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24. In order to assist deputy Spotten, Sergeant Mazuran initiated an inventory search of the vehicle.

25. The search of the vehicle commenced at approximately 6:45 p.m.

26. Sergeant Mazuran characterized the search of the vehicle as an inventory search, in preparation for the vehicle's State Tax Impoundment.

27. Sergeant Mazuran was aware of the Salt Lake County Sheriff's Office procedure for impounding vehicles.

28. The policy required that the vehicle be searched, items be located and listed on an inventory.

29. As he found particular items in the vehicle, Sergeant Mazuran took those items to Deputy Spotten, and indicated orally where the items had been found.

30. Sergeant Mazuran did not personally record in writing the specific items found or where they were found.

31. Sergeant Mazuran did not personally prepare a vehicle impound report in this case, but another deputy on the scene did.

32. While Sergeant Mazuran began the search, medical personnel indicated to Deputy Spotten that they were ready to transport the defendant. Deputy Spotten followed the ambulance to the hospital.

33. Prior to Deputy Spotten's departure, Deputy Mazuran discovered a bag of marijuana in the door compartment on the driver's side.

33. Deputy Spotten stayed in the defendant's presence at all times at the hospital.

34. After medical personnel were finished, Deputy Spotten clearly remembers placing the defendant under arrest. This was at approximately 7:20 p.m.

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35. Sergeant Mazuran's search of the vehicle produced a backpack and a box.

36. Sergeant Mazuran's search of the backpack produced marijuana that was prepared for distribution.

37. Deputy Mazuran's search of the box produced a quantity of methamphetamine.

CONCLUSIONS OF LAW

1. Deputy Spotten had probable cause to arrest the defendant for Driving Under the Influence. The probable cause was based on the erratic driving pattern reported by the witnesses, the single car accident with a stationary trailer that was off the road, the defendant's panicked and paranoid demeanor, and the defendant's slurred speech.

2. The defendant was not actually placed under arrest at the scene; rather, he was placed under arrest at the hospital.

3. The State's theory of "search incident to arrest" under these facts is not consistent with Utah case law.

4. There was probable cause to impound the car pursuant to Utah Code § 41-6-44.6 and §41-6-44.30.

5. Insufficient information was presented to the Court to allow it to conclude, one way or another, whether the inventory search was done according to policy.

6. The State must show that the inventory search was done according to policy.

7. The State has failed to carry its burden of showing that the inventory search was properly carried out.

8. However, had the vehicle been towed to the impound lot and a proper inventory search been conducted, the contraband would have been inevitably discovered.

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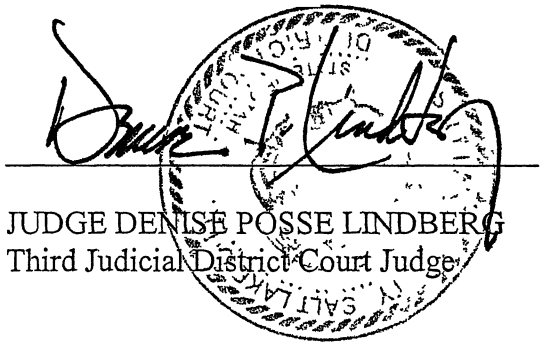
ORDER

It is hereby ordered that Defendant's Motion to Suppress Evidence is DENIED.

SIGNED this 16thday of December, 2005.

BY THE COURT:



JUDGE DENISE POSSE LINDBERG
Third Judicial District Court Judge

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