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FILED
DISTRICT COURT
2007 JUN 26 AM 6:57
WASHINGTON COUNTY
BY _____

**IN THE FIFTH DISTRICT COURT
WASHINGTON COUNTY, STATE OF UTAH**

STATE OF UTAH,

Plaintiff,

vs.

WARREN STEED JEFFS,

Defendant.

**DEFENDANT'S POST-SUPPRESSION
HEARING MEMORANDUM**

Case No. 061500526

Judge James L. Shumate

Pursuant to this Court's order, the Defendant, Warren Steed Jeffs, respectfully submits this memorandum following the suppression hearing held on June 13, 2007.

ARGUMENT

I. THE STOP WAS UNLAWFUL AT ITS INCEPTION SINCE NRS 472.272(4) AND 472.545(1) DO NOT APPLY TO THE LEGIBILITY OF AN OUT-OF-STATE TEMPORARY TAG.

The State failed to prove that the initial traffic stop was supported by a reasonable suspicion that the vehicle was being operated in violation of the law. A traffic stop is a seizure within the purview of the Fourth Amendment and Article I, Section 14 of the Utah Constitution and, therefore, must be based on reasonable and articulable suspicion that the driver has committed a traffic violation. *State v. Worwood*, 988 P.2d 7, 10-11 (UT. App. 1999); 2007 WL 17912388, *6 (Utah, June 22, 2007), 2007 UT 47; *State v. Friesen*, 988 P.2d 7, 10-11 (UT. App. 1999).

A traffic stop based on an officer's mistake of law is unreasonable from its inception. *United States v. Charthasouat*, 342 F.3d 1271 (11th Cir. 2003)(unlawful stop when officer mistakenly believed law required rearview mirror); *United States v. Lopez-Soto*, 205 F.3d 1101 (9th Cir. 2000)(unlawful stop when officer mistakenly believed law required placement of registration sticker on rear window); *see, Friesen*, 988 P.2d 7, 10-11 (unlawful stop when Utah officer based stop on assumption that Wyoming law required display of front license plate). As the *Friesen* court observed, "To enforce the law, an officer must know what the law is, and what it prohibits." *Id.* at 10. *United States v. Tibbetts*, 396 F.3d 1132, 1138 (10th Cir. 2005)("[W]e have also held that failure to understand the law by the very person charged with enforcing it is not objectively reasonable.")

The State failed to prove that the stop was supported by a suspected violation of Nevada law. Trooper Eddie Dutchover testified that he stopped the vehicle because the Colorado temporary registration tag was partially obstructed by the license plate bracket

which secured the tag to the back of the vehicle. TR. 8-9. The Court found that the lower portion of the temporary tag was obscured, but the numbers "431644D" were visible in a photograph of the tag (Exhibit 1). The Court also found that although the expiration date was partially obscured, it was obviously "September 14, 2006." TR 102-03.

The stop was unreasonable at its inception because it was not based on a violation of the statutes proffered at the suppression hearing. Trooper Dutchover cited two sections of the Nevada Revised Statutes which purportedly required the out-of-state temporary tags to be visible:

Q. Was there a specific, ah, code section from Nevada that you're referring to that requires that temporary registration to being visible or license to be visible.

A. Yes. The statute is – falls under, ah, NRS42545 [sic.]. Ah, that's a kind of catch-all registration, ah, statute. There also is a Nevada revised [sic.] Statute 482275, which is subsection paragraph No. 4, and it clearly states that the vehicle must be, ah, clearly legible. The plate has to be clearly legible. And, ah, it has to be clearly, ah – ah, clearly legible and visibly, ah – I'm sorry. Visibly legible and, ah – and legible. Visible and legible.

TR. 11.

The licensing provision, NRS 482.275(4), applies to license plates issued by the Nevada DMV and reads in pertinent part:

Every license plate must at all times be securely fastened to the vehicle to which it is assigned so as to prevent the plate from swinging and at a height of not less than 12 inches from the

ground, measuring from the bottom of such plate, in a position to be clearly visible, and must be maintained free from foreign materials and in a condition to be clearly legible.

The cited "catch-all registration statute" reads in relevant part:

It is unlawful for any person to commit any of the following acts:

1. To operate, or for the owner thereof knowingly to permit the operation of, upon a highway any motor vehicle, trailer or semi trailer which is not registered or which does not have attached thereto and displayed thereon the number of plate or plates assigned thereto by the Department for the current period of registration or calendar year, subject to the exemption allowed in NRS 482.316 to 482.3175, inclusive, 482.320 to 482.363, inclusive, 482.365 to 482.3965, inclusive, and 482.420.

NRS 482.545.

Neither of the above statutory provisions¹ cited by Trooper Dutchover applies to out-of-state temporary registration tags. The plain language of NRS 482.275 shows that it governs the display of license plates issued by the Nevada DMV. This reading of the statute makes sense because state motor vehicle departments across the country issue temporary registration tags in various sizes and shapes. Each state has its own specific requirements for the placement and display of the temporary registration form. Temporary tags are typically issued to dealerships for completion and distribution to the purchasers. Often times, the dealers handwrite the registration information in various font sizes. The cited Nevada statutes do not seek to regulate the display requirements of other out-of-state temporary registration tags, let alone the penmanship of dealerships.

¹For the Court's convenience, attached hereto is the language of the entire text of NRS 482.275 and 482.545

Trooper Dutchover mistakenly assumed that the cited Nevada law authorized him to stop vehicles with illegible temporary tags. The following dialog shows that the trooper's interpretation of his authority is overly-broad:

- Q. Okay. And does it – if a vehicle is traveling through Nevada with a paper plate, that in your opinion gives you the right to pull it over.
- A. Yes, because it's there Nevada is notorious for stolen vehicles, ah, with people using paper plates. Absolutely.
- Q. Okay. So if anyone comes through with a temporary paper plate, in your opinion that is probably an offense and you have the right to forcibly make them stop, if correct, sir?
- A. Correct. If you cannot see that, ah – if you cannot see it legibly, according to statute that's an offense.

TR. 47

If the trooper's statement of police authority were accurate, the right to travel in interstate commerce, as guaranteed by the Commerce Clause, would be severely hampered. Individuals driving new vehicles with temporary out-of-state tags have a right to travel on interstate highways free from arbitrary interference from law enforcement. *Cf. Friesen*, 988 P.2d at 11 (officer's mistaken application of out-of-state licensing laws impedes individual's right to travel).

The temporary Colorado tag in the instant case was prominently displayed on the rear of the car. Although the bracket may have obscured a tiny portion of the handwritten information, Exhibit 1 clearly shows that the registration number was "431644D" and the expiration date was "September 14, 2006. TR 102-03. Upon exiting the car, Trooper Dutchover glanced at the temporary registration tag, but conducted no further inspection of it. TR 53. Thus, the argument that the trooper stopped the vehicle because he suspected that the handwriting on the temporary tag was altered is disingenuous and belied by the trooper's indifference to the temporary tag after the stop.

In short, the stop was unlawful from its inception. The trooper had no reasonable suspicion to stop the vehicle. The trooper mistakenly believed that the Nevada law authorized him to stop the vehicle even though all the pertinent information on the temporary tag was visible prior to the stop.

II. ASSUMING THE INITIAL STOP WAS VALID, THE MEANS OF INVESTIGATION UNREASONABLY PROLONGED THE LENGTH AND SCOPE OF THE STOP

The Utah Supreme Court's most recent analysis of the permissible boundaries of an investigative stop focused on the reasonableness of the duration and scope of the detention in connection with the purpose of the stop. *Worwood*, WL 1791238, 6-7. In evaluating the reasonableness of the investigative detention, the *Worwood* Court emphasized the need to consider whether the police acted diligently and quickly to confirm or dispel their suspicions. *Id.* at 7. Investigative techniques which are unrelated to quickly resolving the stated grounds for the stop are only permissible if they do not prolong the detention or unreasonably expand the scope of the investigation to further

intrude on an individual's rights. *Id.* at 8, *State v. Chism*, 107 P.3d 706, 710-11 (UT App. 2005).

In the case of a suspected violation of law concerning the display of a temporary registration tag, an officer may quickly dispel suspicion through a closer examination of the registration tag. *United States v. McSwain*, 29 F.3d 558, 561-62 (10th Cir. 1994); see *Chism*, 107 P.3d at 712-13 n. 9 (listing cases holding that officer's observation of valid temporary tag dispels reasonable suspicion of registration violation).

The Utah Highway Patrol trooper in *McSwain* stopped the defendant's car because he believed that the temporary Colorado registration tag was invalid. Before making contact with the driver, the officer noticed that the tag was valid and had not expired. The trooper obtained consent to search the car and discovered cocaine. The Tenth Circuit ruled that the trooper exceeded the scope of the justification for the stop when he requested that the driver produce a license and registration; inquired into the driver's travel plans; and requested permission to search for contraband. *McSwain*, 29 F.3d at 560-62.

A. Suspicion Of Validity Of Temporary Registration Tag Dispelled Upon Closer Inspection

Contrary to *Worwood* and *Chism*, the investigative means employed in the instant case were neither diligent nor related to the purpose of the articulated grounds for the stop. Trooper Dutchover testified that he stopped the vehicle because the temporary registration tag was partially obscured by the bracket and he wanted to ensure that it was properly registered. TR 8-9, 45-48, & 56. Given the grounds for the traffic stop, a reasonable investigation to dispel or confirm the validity of the temporary registration tag should have taken a few minutes.

Like the trooper in *McSwain*, Trooper Dutchover only needed to look at the temporary registration to discern that it was a valid tag and had not yet expired. See, *McSwain*, 29 F.3d at 560-62. As photograph taken from a distance of 10 to 12 feet showed, the pertinent information was visible. (Exhibit A.) The trooper glanced at the paper plate while in close proximity to it. TR 9 & 53. He could obviously see the pertinent information on it. And, his decision not to further inspect it for alteration at anytime shows that he did not suspect that it was altered. Under *McSwain*, the investigatory detention should have ceased at this juncture and the travelers should have been free to proceed. See, *id.*

B. Verifying Identification And Registration Unduly Prolonged And Intrusive

Even assuming that this Court finds that it was reasonable for the trooper to request the driver's license and registration, the detention was unduly prolonged and intrusive beyond the scope of this purpose.

As the *Worwood* court emphasized, a police officer must quickly and diligently investigate a traffic violation. WL 1791238, 6-7. An officer may run a computer check on the license and registration only if doing so would not extend the period of detention beyond what is necessary to resolve the articulated grounds for stopping the vehicle. *Chism*, 107 P.3d at 711; see also, *State v. Lopez*, 873 P.2d 1127, 1133 (Utah 1994). The *Lopez* court held that a warrants check of the driver is permissible so long as it does not significantly prolong the detention beyond the duration that is "reasonably necessary to request a driver's license and valid registration and to issue a citation." 873 P.2d at 1133.

In the instant case, the driver produced a driver's license and registration form, which matched the numbers displayed on the paper plate. He explained that the car belonged to his boss and the boss arranged for him to borrow it. The car was registered at an Iowa address even though the boss now resided in Las Vegas. The suspicions about the driver's entitlement to possess the car could have been confirmed or dispelled by running the VIN number through a computer check. However, the trooper testified that dispatcher's computer server was down. At 9:16 p.m., the CAD report showed that the dispatcher informed him that the system was down. (Exhibit 5.) No evidence suggests that he tried to run the computer check after 9:16 p.m. Instead, he assumed that the computer system would be down for two hours based on his prior experience. Since the trooper did not believe that he could run the computer check, he proceeded to expand the intrusiveness of the investigation far beyond the articulated grounds for the stop.

The trooper did not reasonably undertake to quickly and diligently dispel or confirm any suspicion about the driver's entitlement to possess his boss' car. He did not bother to ask either of the passengers about how the driver came to possess the car.² He did not bother to contact the dispatcher at anytime after 9:16 p.m., to see if the computer system was working. He did not request that the dispatcher telephone the local police or other agency to determine if the car was reported stolen. He did not

²Instead of inquiring about the ownership and possession of the car, the trooper asked the defendant from where they had traveled and where they were going. The defendant stated that they were coming from Las Vegas where they stayed for one night and were going to Denver. The driver stated that they were coming from the San Francisco area and were heading to Hildale. Inasmuch as Las Vegas and Hildale are stops along the way between California and Denver, it would be reasonable to expect the trooper to ensure that there was no understanding. He did not, however, attempt to re-interview anyone to clarify the matter.

attempt to telephone the owner of the vehicle, either by using a cellular phone or requesting the dispatcher to place the call. Instead, the trooper returned the license and registration to the driver and commenced a drug trafficking investigation.

As this Court noted, the instant traffic stop should have taken no longer than 10 or 15 minutes maximum to conduct if the computer system was operating. TR 105. Motorists stopped for traffic violations should not be subject to lengthy detention merely because of the technical difficulties of a computer server. Nor, should they be subject to protracted detention and interrogation unrelated to the articulated grounds for the stop.

C. The Intrusive Investigation For Evidence Of Drugs, Terrorism Or Something Criminal

The trooper in the instant case had no further justification for prolonging the detention beyond establishing the validity of the temporary registration tag. In the wake of an unreasonably prolonged traffic stop, a driver's consent to search is deemed invalid. *McSwain*, 29 F.3d at 562. An officer cannot question a driver about the possession of contraband if such questioning would prolong the traffic stop. *United States v. Guerrero-Espinoza*, 462 F.3d 1302, 1308-09 (10th Cir. 2006); see also, *State v. Hansen*, 63 P.3d 650 (Utah 2002)(unlawful to conduct consensual search for drugs after traffic stop ended). In the instant case, the driver's consent to search was invalid because the traffic stop was unduly prolonged. As such, nothing found during the search may be used to justify the lengthy detention or increased intrusion.

At 9:30 p.m., 26 minutes after the initial stop, Trooper Dutchover acquired consent from the driver to search the vehicle. Shortly beforehand, he returned the license and registration to the driver and asked, "Do you have anything illegal, such as marijuana, cocaine, methamphetamine, ah, illicit U.S. currency?" Trooper Dutchover

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testified that the driver was not free to go at this point in time. He also explained that he routinely asks motorist this question.³ TR 27 & 77.

In expanding the intrusiveness of the investigation, the trooper relied more on a hunch that something was wrong than upon reasonable suspicion. He speculated that the occupants were involved in drug trafficking, transporting weapons, terrorism or some other criminal activity. TR 26-27, 71, 76. In support of his conclusion that some kind of criminal activity was afoot, the trooper placed undue emphasis on the nervous behavior exhibited by the driver and defendant. Nervous behavior, including shaking, avoidance of eye contact, rapid movements, and fidgeting, do not justify elevating a traffic stop into an investigative detention for some other reasonably suspected criminal activity. See, *United States v. Brown*, 405 F. Supp. 2d 1291, 1298 (D. Utah 2005)(listing cases criticizing suspicion based on nervous behavior); *State v. DeMarco*, 952 P.2d 1276, 85 (Kan. 1998)(summarizing 10th Circuit case law on insufficiency of nervousness). In *Brown*, the trooper grounded his suspicion on the nervous behavior of the passengers who sat still, avoided eye contact, and paused before answering questions. 405 F. Supp. 2d at 1298. The *Brown* court noted that reliance on the nervous behavior of people confronted by law enforcement

³On direct examination, the trooper elaborated on his questioning of motorists:

Q. Ah, as an Interdiction Task Force member, were you concerned about the possibility of drug trafficking, as well?

A. Drug trafficking, any type of criminal activity. I mean in the world that we live in now, ah it's the duty for officers to talk to people. It would be bad police officer [sic.] that didn't communicate with the general motoring public. Ah, you know, with the way things are going in this country it's, ah, you know, with terrorist and criminal activity that's going on, um, it's a duty that, ah, law enforcement, ah, talk to people, find out what's going on. TR 26-27.

officers is "nothing more than an 'Inchoate suspicion or hunch.'" Id. [citations omitted].

Even when nervous behavior is combined with other factors consistent with innocent behavior, it does not provide sufficient justification to convert a traffic stop into a prolonged and intrusive detention. See, e.g., DeMarco, 952 P.2d at 1283-1286 (No reasonable suspicion based on nervousness combined with use of rental car, travel along odd route from a location known as a source city for drugs, discrepancies in description of travel by occupants).

In the instant case, the other indicators noted by the trooper were consistent with innocent behavior. The driver borrowed someone else's car but provided a valid registration and explanation for his possession. Like many newer model cars, the vehicle had a GPS system in it. Like many highway travelers, the driver legally possessed a radar detector. As discussed more fully above, the travel itineraries described by the driver and defendant were not irreconcilable. See, infra. n. 2. Finally, the fact that one passenger occupied the second row seat and the other was in the third row is not suspicious. It was about 9:00 p.m., and Hildale is located about 160 miles from Las Vegas. Given the late hour and the long drive ahead, it's not unusual to expect that the passengers would want to stretch out on their own seats, especially the defendant who is a tall man. The trooper also noted that I-15 is a notorious pipeline for drugs. Obviously, I-15 is a more notorious pipeline for the motoring public visiting the tourist destinations and conducting legitimate business.

These indicators, alone and in combination, do not justify converting the traffic stop into an hour and 40 minute detention.

D. The Detention Violated Nevada's 60 Minute Rule

Like Utah and federal law, Nevada recognizes the use of temporary investigative detentions. See, NRS 171.123(1); *Barrios-Lomeli*, 961 P.2d 750 (Nev. 1997). The Nevada law, however, differs in one significant respect in that it prohibits a temporary detention from exceeding 60 minutes. NRS 171.123(4). A detention exceeding this time limit is *per se* unreasonable. *Barrios-Lomeli*, 961 P.2d at 750. The statute reads in relevant part:

1. Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime.

4. A person must not be detained longer than is reasonably necessary to effect the purposes of this section, and in no event longer than 60 minutes. The detention must not extend beyond the place or the immediate vicinity of the place where the detention was first effected, unless the person is arrested.

NRS 171.123 (emphasis added).

Accordingly, the instant detention violates Nevada law in two separate respects. First, in accordance with the above discussion, the defendant's detention was unreasonably prolonged given the purpose of the stop. Additionally, the detention exceeded the 60-minute limitation on the detention.

In short, the prolonged and intrusive detention in the instant case violates the right to be free from unreasonable search and seizure, as guaranteed by Utah, Nevada and federal law. As such, any items seized from the vehicle must be excluded.

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E. Suppression Of The Defendant's Statements

Physical evidence or verbal statements resulting from an illegal detention must be suppressed unless the government bears the heavy burden of showing that the taint of the illegal detention is sufficiently attenuated. *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963). The state did not submit any evidence pertaining to the validity of the defendant's statement to investigators following the illegal search and seizure. As such, it fails to carry its burden of proof.

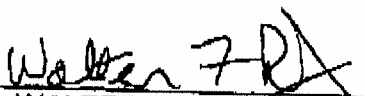
CONCLUSION

Based on the foregoing, the fruits of the unlawful search and seizure must be excluded pursuant to state and federal law. The stop was invalid from its inception since the trooper mistakenly laws inapplicable to out-of-state temporary registration tags. Even if the stop was valid, it was rendered invalid by the unreasonably prolonged and intrusive scope of the detention.

DATED this 25th day of June, 2007.

BUGDEN & ISAACSON, L.L.C.

By:


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CERTIFICATE OF SERVICE

I hereby certify that, on the 26 day of June, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Brock R. Belnap
Washington County Attorney
178 North 200 East
St. George, UT 84770

- HAND DELIVERY
- U.S. MAIL
- OVERNIGHT MAIL
- FACSIMILE:



NRS 482.275 License plates: Display.

1. The license plates for a motor vehicle other than a motorcycle, power cycle or motor vehicle being transported by a licensed vehicle transporter must be attached thereto, one in the rear and, except as otherwise provided in subsection 2, one in the front. The license plate issued for all other vehicles required to be registered must be attached to the rear of the vehicle. The license plates must be so displayed during the current calendar year or registration period.

2. If the motor vehicle was not manufactured to include a bracket, device or other contrivance to display and secure a front license plate, and if the manufacturer of the motor vehicle provided no other means or method by which a front license plate may be displayed upon and secured to the motor vehicle:

(a) One license plate must be attached to the motor vehicle in the rear, and

(b) The other license plate may, at the option of the owner of the vehicle, be attached to the motor vehicle in the front.

3. The provisions of subsection 2 do not relieve the Department of the duty to issue a set of two license plates as otherwise required pursuant to NRS 482.265 or other applicable law and do not entitle the owner of a motor vehicle to pay a reduced tax or fee in connection with the registration or transfer of the motor vehicle. If the owner of a motor vehicle, in accordance with the provisions of subsection 2, exercises the option to attach a license plate only to the rear of the motor vehicle, the owner shall:

(a) Retain the other license plate; and

(b) Insofar as it may be practicable, return or surrender both plates to the Department as a set when required by law to do so.

4. Every license plate must at all times be securely fastened to the vehicle to which it is assigned so as to prevent the plate from swinging and at a height not less than 12 inches from the ground, measuring from the bottom of such plate, in a place and position to be clearly visible, and must be maintained free from foreign materials and in a condition to be clearly legible.

5. Any license plate which is issued to a vehicle transporter or a dealer, rebuilder or manufacturer may be attached to a vehicle owned or controlled by that person by a secure means. No license plate may be displayed loosely in the window or by any other unsecured method in any motor vehicle.

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NRS 482.545 Certain unlawful acts. It is unlawful for any person to commit any of the following acts:

1. To operate, or for the owner thereof knowingly to permit the operation of, upon a highway any motor vehicle, trailer or semi trailer which is not registered or which does not have attached thereto and displayed thereon the number of plate or plates assigned thereto by the Department for the current period of registration or calendar year, subject to the exemption allowed in NRS 482.316 to 482.3175, inclusive, 482.320 to 482.363, inclusive, 482.385 to 482.3965, inclusive, and 482.420.
2. To display, cause or permit to be displayed or to have in possession any certificate of registration, license plate, certificate of title or other document of title knowing it to be fictitious or to have been cancelled, revoked, suspended or altered.
3. To lend to or knowingly permit the use of by one not entitled thereto any registration card or plate issued to the person so lending or permitting the use thereof.
4. To fail or to refuse to surrender to the Department, upon demand, any registration card or plate which has been suspended, cancelled or revoked as provided in this chapter.
5. To use a false or fictitious name or address in any application for the registration of any vehicle or for any renewal or duplicate thereof, or knowingly to make a false statement or knowingly to conceal a material fact or otherwise commit a fraud in an application. A violation of this subsection is a gross misdemeanor.
6. Knowingly to operate a vehicle which:
 - (a) Has an altered identification number or mark; or
 - (b) Contains a part which has an altered identification number or mark.