

IN THE UTAH COURT OF APPEALS

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State of Utah,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Plaintiff and Appellee,	)	
	)	Case No. 20060544-CA
v.	)	
	)	F I L E D
Alfredo M. Gutierrez,	)	(June 7, 2007)
	)	
Defendant and Appellant.	)	<span style="border: 1px solid black; padding: 2px;">2007 UT App 196</span>

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First District, Brigham City Department, 051100099  
The Honorable Ben H. Hadfield

Attorneys: Mark A. Flores, Salt Lake City, for Appellant  
Mark L. Shurtleff and Marian Decker, Salt Lake City,  
for Appellee

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Before Judges Bench, Billings, and Orme.

BENCH, Presiding Judge:

Defendant Alfredo M. Gutierrez appeals his convictions for possession of a controlled substance, a third degree felony, see Utah Code Ann. §§ 58-37-8(2)(i), -8(4) (Supp. 2006), and possession of drug paraphernalia, a class A misdemeanor, see Utah Code Ann. § 58-37a-5(1) (2002). Defendant contends that the trial court erred in denying his motion to suppress, alleging that the search of his person prior to arrest violated his constitutional rights. "[W]e review the factual findings underlying a trial court's decision to grant or deny a motion to suppress evidence under a clearly erroneous standard, and we review the trial court's legal conclusions for correctness." State v. Curry, 2006 UT App 390, ¶5, 147 P.3d 483 (quotations and citations omitted). In search and seizure cases, no deference is granted to the trial court's application of the law to the factual findings. See id.

Defendant contends that the search of his person did not constitute a search incident to a lawful arrest. "An arresting officer may, without a warrant, lawfully search the area surrounding the person he or she is arresting if: (1) the arrest

is lawful, (2) the search is of the area within the arrestee's immediate control, and (3) the search is conducted contemporaneously to the arrest." State v. Amirkhizi, 2004 UT App 324, ¶16, 100 P.3d 225 (quotations and citation omitted). Defendant concedes that the second and third prongs were met, but argues that the officers lacked probable cause to arrest him at the time of the search. Probable cause exists when the "facts and circumstances within the officer's knowledge . . . are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." State v. Trane, 2002 UT 97, ¶27, 57 P.3d 1052 (quotations and citations omitted).

After stopping Defendant for speeding and following too closely, Officer Gerfen approached Defendant's vehicle. Officer Panter assisted and approached the passenger side of the vehicle where he "observed an open container of alcohol [by Defendant's side] in plain view."<sup>1</sup> Officer Panter informed Officer Gerfen of the open container. Officer Gerfen requested Defendant to step out of his vehicle and asked him whether he had been drinking. Defendant responded that "he only had one beer." In considering the facts and circumstances known to the officers, we conclude that they had probable cause to arrest Defendant for an open container violation. Therefore, the subsequent search was proper as a search incident to a lawful arrest. See Amirkhizi, 2004 UT App 324 at ¶16.

For the first time on appeal, Defendant contends that the officers did not have probable cause to believe that the beer bottle actually contained alcohol, as required by the statute. "[W]e will not consider an issue brought for the first time on appeal unless the trial court committed plain error or exceptional circumstances exist." State v. Winfield, 2006 UT 4, ¶23, 128 P.3d 1171. Defendant did not argue plain error or exceptional circumstances in his appellate brief. "Therefore, because the issue has not been preserved, and because no

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<sup>1</sup>The open container statute provides that "[a] person may not keep, carry, possess, [or] transport . . . in the passenger compartment of a motor vehicle, when the vehicle is on any highway, any container which contains any alcoholic beverage if the container has been opened, its seal broken, or the contents of the container partially consumed." Utah Code Ann. § 41-6a-526(3) (2005).

justification for appellate review has been articulated, we decline to reach it." Duke v. Graham, 2007 UT 31, ¶28, 575 Utah Adv. Rep. 3.

Accordingly, we affirm.<sup>2</sup>

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Russell W. Bench,  
Presiding Judge

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WE CONCUR:

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Judith M. Billings, Judge

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Gregory K. Orme, Judge

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<sup>2</sup>Because we conclude that the search constituted a search incident to a lawful arrest, we need not address Defendant's additional arguments.