

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20080723-CA
v.)	
)	F I L E D
Perry Parker,)	(December 3, 2009)
)	
Defendant and Appellant.)	2009 UT App 358

Fourth District, Provo Department, 071402548
The Honorable Claudia Laycock

Attorneys: Margaret P. Lindsay, Spanish Fork, for Appellant
Mark L. Shurtleff and Jeanne B. Inouye, Salt Lake
City, for Appellee

Before Judges Greenwood, Orme, and McHugh.

GREENWOOD, Presiding Judge:

Officer John Luke observed Defendant Perry Parker's vehicle parked in Canyon View Park in Provo Canyon, Utah, after curfew at approximately 2:00 a.m. After Officer Luke approached the vehicle and spoke with Defendant, he saw an open container of rum inside the vehicle on the back side of the driver's seat. Officer Luke asked Defendant to exit the vehicle and then conducted a search of the vehicle. During the search, Officer Luke found a small black box on the floor in front of the driver's seat. He opened the box and found syringes that he identified as drug paraphernalia. Officer Luke then cited Defendant for an open container violation and for possession of drug paraphernalia. Officer Luke later discovered that one of the syringes was loaded with a clear liquid that tested positive for methamphetamine.

Defendant was charged with possession of methamphetamine in a drug free zone, possession of drug paraphernalia in a drug free zone, and having an open container of alcohol in a motor vehicle. He filed a motion to suppress the evidence obtained during the search, but the motion was denied. Defendant entered a plea to possession of a controlled substance, preserving his right to

appeal the denial of his motion to suppress. We consider only this issue.

On appeal, Defendant "concedes that Officer Luke had probable cause to search the vehicle pursuant to [the automobile exception] due to his observation of a partially consumed bottle of hard alcohol on the back side of the driver's seat." But Defendant argues that this is the end of the allowable search-- Officer Luke could clearly see the alcohol and thereby conclude that Defendant had an open container, but he did not have authority to continue searching for more contraband. Defendant asserts that Officer Luke's search of the small black box exceeded the scope of the search allowed by the automobile exception "because the object of the search was alcohol--open containers of alcohol, and there was no basis to believe that the small black box was capable of concealing such alcohol."

To be considered on appeal, an issue

must be sufficiently raised to a level of consciousness before the trial court and must be supported by evidence or relevant legal authority. Failure to raise and argue an issue and present pertinent evidence in that forum denies the trial court the opportunity to make any findings of fact or conclusions of law concerning the claimed error.

State v. Dean, 2004 UT 63, ¶ 13, 95 P.3d 276 (citations and internal quotation marks omitted). If the issue was not raised at trial, we will not consider the issue on appeal "unless the trial court committed plain error or the case involves exceptional circumstances." Id.

At trial, Defendant argued only that the search in its entirety was unlawful because it could not be justified as a search incident to arrest and did not specifically address the search of the black box. Defendant's motion to suppress argued that the warrantless search of the vehicle was unlawful and none of the exceptions to the warrant requirement applied. Defendant argued that he had not been arrested when the search occurred so that the search was not incident to arrest. He did not argue that any other exception to the warrant requirement applied. In particular, he did not argue that the search of the box exceeded the scope of the initial search or provide any legal authority for that proposition. At the hearing on the motion to suppress, Defendant's counsel stated, "I'm saying that without an arrest, [the officer] can't take out a box that has been taped, shake it, open it, and then question the defendant about it without an arrest." This comment emphasizes Defendant's position that the

search was unlawful because he had not been arrested. Defendant also stated to the trial court that "[t]his is a search incident to arrest, without an arrest. . . . That's our entire argument." This statement invited the court to disregard any other possible claim. Defendant's position at trial also prevented the State from presenting more or different evidence that would show that Officer Luke's search of the black box was lawful.

This case is similar to State v. Biggs, 2007 UT App 261, 167 P.3d 544, in which the defendant's car was searched by a police dog during a traffic stop. See id. ¶ 3. The defendant argued that the entire investigatory stop was unlawful but on appeal also attempted to argue that the canine search was unlawful because it exceeded the scope of the original stop. See id. ¶ 7 n.4. Because the defendant had not addressed the lawfulness of the canine search at trial, this court refused to hear it on appeal. See id. Similarly, here Defendant challenges the lawfulness of the search on a basis that was not specifically raised before the trial court. As a result, the trial court did not have an opportunity to consider this argument. Thus, Defendant did not preserve the issue. Defendant has not argued plain error or exceptional circumstances, and accordingly, we do not address Defendant's arguments concerning the search of the black box on appeal. See Dean, 2004 UT 63, ¶ 13.

We affirm.

Pamela T. Greenwood,
Presiding Judge

WE CONCUR:

Gregory K. Orme, Judge

Carolyn B. McHugh, Judge