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State v. Round Appellant's Brief Dckt. 38963

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
)
 Plaintiff-Respondent,) NO. 38963
)
 v.)
)
 AMBER RAE ROUND,) APPELLANT'S BRIEF
)
 Defendant-Appellant.)
 _____)

BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA**

HONORABLE TIM HANSEN
District Judge

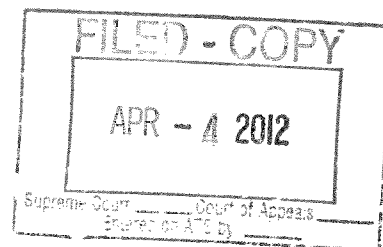
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STATEMENT OF THE CASE

Nature of the Case

Amber Round appeals from the district court's Order Suspending Sentence and Order of Probation. She asserts that the district court erred in denying her motion to suppress evidence obtained in violation of her right to be free from unreasonable seizures, protected by the Fourth Amendment to the United States Constitution and Article I § 17 of the Idaho Constitution.

Statement of the Facts and Course of Proceedings

The State filed a Complaint alleging that Amber Round had committed the crime of possession of methamphetamine. (R., pp.8-9.) A preliminary hearing was held, Ms. Round was bound over into the district court, and an Information was filed charging her with the above crime. (R., pp.26-34; Tr. Prelim.)¹ Ms. Round filed a Motion to Suppress and a Memorandum in Support of Motion to Suppress Evidence. (R., pp.52-57, 67-98.) She asserted that the evidence gathered against her should be suppressed for two reasons: First, her initial warrantless detention was not justified by reasonable, articulable suspicion; Second, even if her initial detention was lawful, her detention was unlawfully extended without further justification. (R., pp.67-98.) The State filed a memorandum in opposition to Ms. Round's motion to suppress and hearing was held on Ms. Round's motion. (R., pp.99-126; Tr. 2/22/10.)

The district court made the following factual findings:

¹ The Preliminary Hearing transcripts are included in the appellate record in the electronic record "38963 State v. Round Preliminary Trans."

1. On the evening of August 10, 2009, Officer Montoya and Detective Holtry assisted other officers in the detention and arrest of an individual named Alfredo Ybarra for possession of ten ounces of methamphetamine.
2. One of the vehicles involved was a white Ford Explorer which was parked in a lot by the Boise Little Theater in Boise City, Ada County, Idaho.
3. A drug detection dog alerted on this vehicle and a search revealed a baggy of methamphetamine and a gun and clip.
4. Officer Montoya contacted Detective Christensen concerning the Explorer somewhere between 3:00 and 4:00 a.m. on the morning of August 11, 2009.
5. Because the officers involved were not sure what action to take, it was left there overnight.
6. Later in the morning of August 11, between 7:10 and 7:15 a.m., Detectives Holtry and Christensen checked on the Explorer.
7. A black Nissan Exterra was about ten to fifteen feet away from the Explorer and a person Detective Holtry recognized from contact the previous evening as Michael Stolp was reaching inside the Explorer.
8. Detective Holtry approached Michael Stolp and Detective Christensen drove after the Exterra which had headed down the alley.
9. Detective Holtry called for the assistance of uniformed officers and a drug detection dog.
10. Detective Christensen initiated a traffic stop to determine the involvement of the driver of the Exterra with the Explorer and Michael Stolp.
11. Detective Christensen recognized the driver as Defendant Amber Rae Round with whom he had previously had contact.
12. About a month earlier, she had been frequenting place where methamphetamine was being used and he had learned that she was involved in using methamphetamine and, perhaps, providing it to others.
13. Detective Christensen approached the Exterra and noted that Defendant appeared nervous and agitated.

14. He estimated contacting Defendant about 7:15 a.m.
15. He discussed his concerns regarding the Explorer and Defendant's proximity to it and Defendant responded she was just dropping someone off.
16. Michael Stolp told Detective Holtry he was there to pick up the Explorer and Defendant had given him a ride.
17. Detective Holtry relayed this information to Detective Christensen.
18. Nonetheless, given Defendant's demeanor and his previous experience with her, Detective Christensen felt she had drugs in her vehicle.
19. He asked for Defendant's consent to search the Exterra and she initially refused.
20. Detective Christensen then explained to Defendant his reasons for asking permission to search.
21. At that point, Defendant said she wanted to call her attorney, D.C. Carr, and Detective Christensen allowed her to do so.
22. There is some question as to whether Defendant had previously exited her vehicle at the direction of Detective Christensen or did so when she was told she could contact Mr. Carr.
23. Nonetheless, she moved a short distance away from Detective Christensen to speak with her attorney on her cell phone.
24. This was sometime around 7:15 to 7:20 a.m.
25. Defendant spoke with Mr. Carr somewhere between five to ten minutes.
26. She then handed the phone to Detective Christensen indicating that her attorney wanted to speak with him.
27. Detective Christensen spoke with Mr. Carr for two to three minutes.
28. While Defendant was still on the phone with her attorney, Ada County Sheriff's Deputy Aaron Teall arrived with his drug detection dog, Nate.
29. Deputy Teall was directed to deploy Nate.

30. They went around the Exterra and, on the first pass, Nate alerted on the driver's side of the vehicle.

31. Deputy Teall then searched the vehicle and found the suspected methamphetamine.

32. Detective Christensen estimated the entire time of his contact with Defendant was fifteen to twenty minutes from the stop of Defendant's vehicle to her arrest for possession of the methamphetamine.

(R., pp.148-149.)² In addition to these facts articulated by the court, Detective Christensen testified that when he first made contact with Ms Round he "believe[s]" he took her driver's license and registration and "guess[ed]" that he gave them to the officer who transported her to jail. (Tr. 2/22/10, p.57, Ls.1-8.) Furthermore, Detective Christensen testified that his investigation changed from trying to determine her connection with the Explorer to wanting to search her car because he "knew she had dope in the vehicle" based upon "her demeanor that day," although she was probably nervous on previous contacts as well as most people are nervous when they have contact with police. (Tr. 2/22/10, p.59, L.2 – p.60, L.10.) The district court ultimately denied Ms. Round's motion to suppress finding that the initial stop was lawful, her detention was related to the purpose of the initial stop, and the length of detention was no longer than necessary to effectuate the purpose of the stop. (R., pp.147-153.)

Ms. Round was found guilty as charged after a jury trial. (R., pp.172-189, 220.) The district court sentenced her to a unified term of seven years, with two years fixed, to run concurrently with unrelated charges, and the court retained jurisdiction. (R., pp.252-256.) Ms. Round successfully completed her rider and was placed on probation for a period of seven years. (R., pp.261-266.) Ms. Round filed a Notice of Appeal timely

from the district court's Order Suspending Sentence and Order of Probation.
(R., pp.267-270.)

² The district court provided these findings of fact in a single paragraph. These findings have been presented as individually numbered findings herein for ease of reading.

ISSUE

Did the district court err when it denied Ms. Round's motion to suppress?

ARGUMENT

The District Court Erred When It Denied Ms. Round's Motion To Suppress

A. Introduction

The district court reached three legal conclusions. First, the court found that Ms. Round's detention was justified from its inception. Second, the court found that officers did not impermissibly expand the scope of the investigation beyond its initial purpose. Finally, the district court found that the duration on the stop was not illegally extended. Ms. Round concedes that her initial detention was justified. However, she asserts that the length of her detention was impermissibly extended solely to allow a drug dog to sniff the exterior of her vehicle, based upon Detective Christensen "hunch" that there were drugs in the vehicle, regardless of whether or not the purported purpose her seizure had changed. Lacking probable cause and denied consent to search, Detective Christensen detained Ms. Round for between 15 and 20 minutes until a drug dog arrived and alerted on Ms. Round's vehicle. Detective Christensen violated Ms. Round's right to be free from unreasonable seizures protected by the Fourth Amendment to the United States Constitution and Article I § 17 of the Idaho Constitution³; therefore, the district court erred in denying Ms. Round's motion to suppress.

³ Although the attorney who presented and argued Ms. Round's suppression motion made a general argument that Article I § 17 of the Idaho Constitution provides greater protection than the Fourth Amendment, no specific argument was made asserting the greater protection of the Idaho Constitution. (R., pp.52-54, 67-98; Tr. 2/22/10.) Therefore, Ms. Round will rely upon Fourth Amendment jurisprudence in this appeal.

B. Relevant Jurisprudence And Standards Of Review

In reviewing an order denying a motion to suppress evidence, Idaho appellate Courts apply a bifurcated standard of review: the Court will accept the trial court's findings of fact, unless they are clearly erroneous, but the Court will freely review the trial court's application of constitutional principles to the facts found. *State v. Purdum*, 147 Idaho 206, 207 (2009).

The stop of a vehicle constitutes a seizure of the occupants that implicates the Fourth Amendment guarantee against unreasonable searches and seizures. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). Law enforcement may stop a person for a brief, investigatory detention if the officer has an objectively reasonable, articulable suspicion that the person stopped is, or is about to be engaged in, criminal activity. *United States v. Cortez*, 449 U.S. 411 (1981) (citations omitted). "The predicate permitting seizures on suspicion short of probable cause is that law enforcement interests warrant a limited intrusion on the personal security of the suspect." *Florida v. Royer*, 460 U.S. 491, 500 (1983). "[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Id.* "Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Id.* (citations omitted). "It is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." *Id.*

An intrusion into an individual's Fourth Amendment rights cannot be justified based upon an officer's mere "hunch" of criminal activity; rather, the facts available at

the time of the intrusion must be judged objectively to determine whether there exists a reasonable suspicion of criminal activity. *Terry v. Ohio*, 392 U.S. 1, 21 (citations omitted). In analyzing the reasonableness of a seizure based upon less than probable cause, the Idaho Court of Appeals has developed a two-part inquiry: First, whether the officer's actions were justified at the seizure's inception; second, whether the seizure was reasonably related in scope to the circumstances justifying the seizure. *State v. Aguirre*, 141 Idaho 560, 562 (Ct. App. 2005) (citing *State v. Parkinson*, 135 Idaho 357, 360 (Ct. App. 2000)). "[W]here officers abandon the initial purpose of a routine traffic stop⁴ and extend it to allow for a drug dog search, the extension must be justified by a reasonable suspicion that criminal activity is afoot." *State v. Danney*, ___ Idaho ___, ___, 2012 Opinion No. 34, pg.6 (Mar. 1, 2012) (citations omitted).

C. The District Court Erred In Denying Ms. Round's Motion To Suppress As Her Continued Detention Was Not Based Upon An Objectively Reasonable, Articulate Suspicion That She Was Engaged In Criminal Activity

The district court found that "Detective Christensen had a 'particularized and objective basis' to suspect that criminal activity was afoot. Therefore, his stop of [Ms. Round] was justified." (R., p.150.) Ms. Round concedes her initial detention was justified at its inception based upon a reasonable, articulable suspicion that she was somehow involved with the Ford Explorer, and she recognizes that Detective Christiensen could lawfully seize her in order to determine her connection to that car. See e.g., *Michigan v. Summers*, 452 U.S. 692 (1981) (holding that the temporary

⁴ Although Ms. Round was stopped while driving her vehicle, her initial detention was not a "routine traffic stop." She was not stopped for any violations of the law; rather, she was stopped because she appeared to have some connection with Ford Explorer that had been linked to criminal activity the night before. (R., pp.147-149.)

detention of individuals found within a home that was the subject of a search warrant, for the purpose of determining the individuals' the connection with the home, was not unreasonable under the Fourth Amendment).) However, her continued detention in order to allow a drug dog to sniff *her vehicle* was in no way related to determining *her connection to the Explorer*, and was not justified based upon any other particularized suspicion of criminal activity.

1. Ms. Round's Continued Detention For The Purpose Of Allowing A Drug Dog To Sniff The Exterior Of Her Vehicle Was Unreasonable, As It Was Not Reasonably Related To Any Suspicion That She Was Involved With The Criminal Activity Associated With The Explorer

When Detective Christensen initially approached Ms. Round, she appeared nervous and agitated, he informed her that he was investigating her connection to the Explorer, and he took her driver's license and vehicle registration. (R., p.148; Tr. 2/22/10, p.57, Ls.1-8.) Detective Christensen recognized Ms. Round from an interaction he had with her about one month prior, where he believed that she "had been involved with a group of subjects using methamphetamine" and he "had information that she had provided methamphetamine for people at that location;" however, Ms. Round was cited for "frequenting a place of drug use," but not with deliver of a controlled substance. (Tr. 2/22/10, p.39, L.4 – p.40, L.1.) When asked about what she was doing in the area, Ms. Round informed Detective Christensen that she was just dropping off a friend - this information was corroborated by Detective Holtry who relayed the same story from Mr. Stolp. (R., p.148.) Ms. Round refused to consent to the search of her car and, after Detective Christensen again asked for her consent, she asked to call her attorney. (R., p.148.) Prior to her refusal, a drug dog was called to the scene.

(R., p.148.) Detective Christensen testified that when he spoke with Mr. Carr, he informed him that the drug dog was on its way and that he intended to have the dog sniff Ms. Round's vehicle. (Tr. 2/22/10, p.43, Ls.2-24.)

Detective Christensen's initial inquiry revealed nothing that would suggest to him that Ms. Round was involved with the Explorer beyond what both she and Mr. Stolp had relayed – that she was just dropping Mr. Stolp off. Ms. Round's previous alleged illegal supplying of methamphetamine to those that she was using with, and her nervous, agitated state, did nothing to add to any suspicion that she was involved with the illegal activities associated with the Explorer from the night before, let alone confirm such suspicions.

The purpose and the length of a warrantless detention must be reviewed in conjunction with each other, a detention must last no longer than is necessary to either confirm or dispel the officer's suspicions, and the investigative means must be the least intrusive means reasonably available. *Royer*, 460 U.S. at 500. Simply put, running a drug dog around the exterior of Ms. Round's vehicle is not in any way related to any suspicion that she was involved with the criminal activities associated with the Explorer. Detective Christensen could not lawfully detain Ms. Round just to pass the time while the drug dog was en route, merely because she would not consent to his searching her vehicle. There were no facts suggesting to a reasonable person that evidence of Ms. Round's connection to the criminal activities associated with the Explorer, would be found in her vehicle. Thus, her continued detention could not be based upon this justification, was unreasonable and violated Ms. Round's Fourth Amendment right to be free from unreasonable seizures.

2. Ms. Round's Continued Detention For The Purpose Of Allowing A Drug Dog To Sniff The Exterior Of Her Vehicle Was Unreasonable, As Detective Christensen Did Not Possess Reasonable, Articulate Suspicion That Ms. Round Possessed Drugs In Her Vehicle That Would Justify Her Detention

The district court reasoned that Detective Christensen's request for consent to search Ms. Round's vehicle was within the scope of her initial detention as "the stop in the case at bar was drug-related from its inception." (R., p.150 (The court distinguishing the present case from *State v. Myers*, 118 Idaho 608, 609 (Ct. App. 1990).)⁵ However, by his own admission, Detective Christensen shifted his investigation from determining Ms. Round's connection to the Explorer, to an investigation into whether Ms. Round *presently* possessed drugs. Regardless of whether reviewed from the standpoint of the initial detention, or upon all of the facts known to Detective Christensen during the course Ms. Round's detention, this latter investigation was based solely upon a hunch.

Detective Christensen testified to the following:

Q. What was the specific reason that you decided to go from investigating what Ms. Round's reason for being in the area with that particular passenger was, wanting to search for narcotics (sic)?

A. I would say my primary thing was, as soon as I contacted Ms. Round, her demeanor.

Q. And she was nervous, you say?

⁵ The district court's apparent conclusion that an investigation does not morph merely because it involves the same generalized area of the law is curious. For example, an officer may lawfully pull a driver over if the car he is driving has a broken headlight. If the facts warrant, that stop may morph into an investigation into whether the driver is wearing a seatbelt, is driving under the influence, or has committed any other number of crimes. However, each investigation must be based upon articulable facts to justify the continued detention. A defendant's detention for investigation into driving under the influence is not "justified at its inception" because he was driving with a broken headlight, although each potential violation of the law is "driving-related."

A. I had had several contacts with Ms. Round in the past, and her demeanor caused me some concern.

Q. So your previously contacts had also caused you –

A. No, her demeanor that day. I knew she had to open the vehicle.

Q. I'm sorry. What was that?

A. I knew she had dope in the vehicle.

Q. And how did you know that?

A. I could tell by the way she was acting.

Q. How many previous contacts had you had with her?

A. I'm guessing probably five.

Q. And you had seen her a month before?

A. Um-hmm.

Q. And she had been cited for frequenting?

A. Um-hmm.

Q. And she wasn't nervous then?

A. I think she was probably a little bit nervous that day.

Q. And what about your previous contacts? Was she ever nervous?

A. I don't know. People probably get nervous most times when they have contact with the police. So yeah, she could have been.

(Tr. 2/22/10, p.59, L.2 – p.60, L.10.)

Detective Christensen's description of his suspicion reveals had no more than a "hunch" that Ms. Round was possessing methamphetamine, based solely upon "the way she was acting." *Id.* Such a detention is not constitutionally reasonable. *Terry v.*

Ohio, 392 U.S. 1, 22 (citing *Beck v. Ohio*, 379 U.S. 89, 97 (1964)). By his own admission, most people who have contact with the police are nervous – if officers may detain a person for the sole purpose of allowing a drug dog to arrive based upon the person being nervous, a person’s right to be free from unreasonable searches and seizures, in reality, would be subject to the total discretion of the police. The Fourth Amendment’s guarantees are not limited by the whim of a governmental agent.

Additionally, even considering all of the facts known to Detective Christensen at the time of his detention of Ms. Round, he did not possess an objectively reasonable suspicion that justified her detention in order to allow a drug dog to perform its law enforcement duties. Detective Christensen knew that Ms. Round was associated with a person looking into a car that had been involved in criminal activity the night before, and she had previously been suspected of being involved with the use and delivery of methamphetamine (although she had only been charged with frequenting, suggesting that there was no probable cause to charge her with actual possession of methamphetamine, let alone delivery of a controlled substance). Additionally, she refused to consent to the search of her car, and she spoke with her attorney on the phone. These facts simply do not supply the reasonable, articulable suspicion necessary to justify Ms. Round’s continued detention.

a. Ms. Round’s Detention Was Not Extended By Her Phone Conversation

The district court found that Ms. Round’s continued detention was caused, in large part, by Ms. Round talking to her attorney on the phone. (R., pp.151-152.) The court found that there was no showing that Detective Christensen allowed Ms. Round to

call her attorney as a delay tactic in order for the drug dog to arrive. *Id.* The court's analysis is irrelevant. Ms. Round was seized the entire time – she was never free to go regardless of the way she chose to spend her detention. Detective Christensen seized Ms. Round when he seized her driver's license and he never ended the seizure by returning the license to her. (Tr. 2/22/10, p.57, Ls.1-8.); *See also Royer*, 460 U.S. at 501. Furthermore, Detective Christensen testified that,

I told [Mr. Carr] that I was in the area and that I had contacted Amber, and that we had requested to search her vehicle, and explained to him the nature of our contact and told him that we were in fact – had requested a drug dog. And as soon as the drug dog arrived on scene and went around her vehicle, that we would just go with things after that point.

(Tr. 2/22/10, p.43, Ls.9-19.) While the district court was undoubtedly correct in finding that Detective Christensen did not unlawfully extend the stop under the guise of allowing Ms. Round to speak to her attorney, it is equally correct to say that Ms. Round's conversation with her attorney did not extend her seizure at all. Detective Christensen had a hunch that Ms. Round possessed drugs in her car. He took her license, a drug dog was called, and she was detained until the drug dog arrived. Ms. Round's detention did not become lawful merely because she was allowed to call her attorney.

D. The District Court Erred In Denying Ms. Round's Motion To Suppress

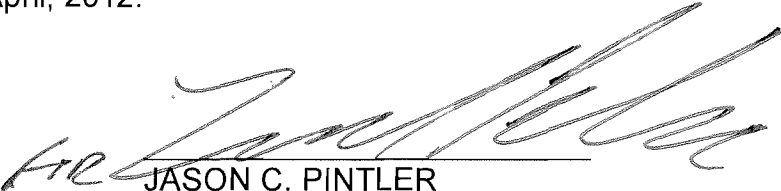
For the reasons stated in section I(C) above, Ms. Round asserts that her continued detention was unreasonable and, thus, violated her Fourth Amendment and Article I § 17 right to be free from unreasonable searches and seizures. Ms. Round asserts that the discovery of the evidence used against her was the product of her illegal detention and should have been suppressed as "fruit of the poisonous tree." *See Wong*

Sun v. United States, 371 U.S. 471, 478-488 (1963). Therefore, Ms. Round asserts that the district court abused its discretion by denying her motion to suppress.

CONCLUSION

Ms. Round respectfully requests that this Court her conviction, vacate the district court's order of judgment and commitment, and reverse the order which denied her motion to suppress.

DATED this 4th day of April, 2012.



JASON C. PINTLER
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 4th day of April, 2012, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

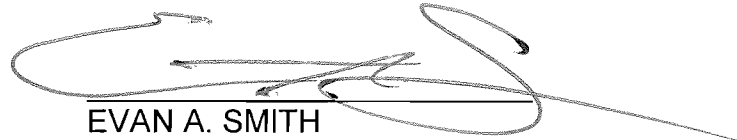
AMBER RAE ROUND
4920 HICKORY TWIG
BOISE ID 83713

TIM HANSEN
DISTRICT COURT JUDGE
E-MAILED BRIEF

BRIAN MARX
ADA COUNTY PUBLIC DEFENDER'S OFFICE
E-MAILED BRIEF

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720-0010

Hand delivered to Attorney General's mailbox at Supreme Court.

A handwritten signature in black ink, appearing to read 'Evan A. Smith', is written over a horizontal line. The signature is stylized and somewhat cursive.

EVAN A. SMITH
Administrative Assistant

JCP/eas