2-16-2012

State v. Smoke Appellant's Brief Dckt. 39064

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 39064
	)	
v.	)	
	)	
KELO RONON SMOKE,	)	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 MICHAEL R. MCLAUGHLIN
District Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

STATEMENT OF THE CASE

Nature of the Case

Kelo Smoke entered a conditional guilty plea to one count of trafficking in a controlled substance, preserving his right to appeal the denial of his motion to suppress. Mr. Smoke asserts that his rights under the Fourth Amendment to the United States Constitution were violated when the State searched his locked vehicle without a warrant after he was already placed under arrest for resisting and obstructing a law enforcement officer. Additionally, Mr. Smoke contends the district court abused its discretion by imposing an excessive sentence upon him in light of the mitigating factors present in his case.

Statement of the Facts and Course of Proceedings

On December 1, 2010, Mr. Smoke was pulled over by Officer James Schiffler after the officer observed that Mr. Smoke had fictitious plates and a canceled registration. (R., p.61; 5/13/11 Tr., p.5, Ls.10-18.) Mr. Smoke parked his vehicle in a Doubletree parking lot and exited the vehicle. (5/13/11 Tr., p.21, Ls.14-24.) Mr. Smoke's vehicle was not blocking traffic in the parking lot and at no point did Doubletree management ask that the vehicle be removed. (5/13/11 Tr., p.21, L.14 – p.22, L.9.) Upon exiting his Ford Ranger, Mr. Smoke locked the vehicle, put his keys in his pocket and fled the scene, despite commands by Officer Schiffler that Mr. Smoke stop and get back into his truck. (5/13/11 Tr., p.5, Ls.11-18, p.20, Ls.6-11; R., p.61.) Officer Schiffler called for backup and pursued Mr. Smoke. (5/13/11 Tr., p.5, Ls.19-22, p.14, Ls.2-9.)

Officer Michael Nance and his canine, Blek, arrived on the scene just before Mr. Smoke was apprehended and taken into custody. (5/13/11 Tr., p.27, L.13 – p.28, L.9.) At that point, Officer Nance deployed Blek to conduct an open air sniff around the vehicle and Blek purportedly alerted on the passenger side door. (5/13/11 Tr., p.28, L.22 – p.29, L.12.) Officer Nance then used Mr. Smoke's keys to open the passenger door, eventually locating methamphetamine inside a backpack. (5/13/11 Tr., p.31, L.13 – p.32, L.3, p.33, Ls.11-23.) At no point did Mr. Smoke ever consent to a search of his vehicle. (R., p.61-62; 5/13/11 Tr., p.33, Ls.8-10.)

Mr. Smoke was charged by Information with trafficking in methamphetamine and possession of a controlled substance.[1] (R., pp.24-26.) Mr. Smoke filed a motion to suppress wherein he argued that his rights under the Fourth Amendment to the United States Constitution were violated because the search was unreasonable under *Arizona v. Gant*, 556 U.S. 332 (2009), the police should have obtained a warrant since, at the time of the search, Mr. Smoke was in custody and his vehicle was locked. (R., pp.48-55.) Following a hearing on the motion, the district court found that the dog sniff of the vehicle provided probable cause for officers to search the vehicle pursuant to the "automobile search" exception to the warrant requirement. (5/13/11 Tr., p.43, L.12 – p.47, L.5.)

Mr. Smoke then entered a conditional plea of guilty to trafficking in a controlled substance, preserving the right to appeal the denial of his suppression motion. (R., pp.81-88.) Pursuant to the plea agreement, the State agreed to dismiss the remaining charge, not file a persistent violator enhancement, and recommend that the district court impose a unified sentence of fifteen years, with five years fixed, with the

[1] Morphine Sulfate was also found.

defense free to argue for less. (R., pp.82-88; 6/1/11 Tr., p.49, Ls.5-11.) The district court imposed a unified sentence of fifteen years, with four years fixed, upon Mr. Smoke. (R., pp.93-95.) Mr. Smoked filed a Notice of Appeal timely from the district court's Judgment of Conviction. (R., pp.100-102.)

ISSUES

1. Did the district court err in denying Mr. Smoke's motion to suppress?

2. Did the district court abuse its discretion by imposing a unified sentence of fifteen years, with four years fixed, upon Mr. Smoke, following his plea of guilty to trafficking in methamphetamine?

ARGUMENT

I.

The District Court Erred By Denying Mr. Smoke's Motion To Suppress

A. Introduction

Following his arrest for resisting and obstructing a law enforcement officer, Officer Nance deployed his canine, Blek, around the outside of Mr. Smoke's vehicle. After Blek allegedly alerted on the vehicle, which was not obstructing traffic, Officer Nance used Mr. Smoke's keys to unlock the truck and eventually located methamphetamine in a backpack on the passenger seat. On appeal, Mr. Smoke asserts that his rights under the Fourth Amendment to the United States Constitution were violated when the State searched his locked vehicle without a warrant after he was already placed under arrest for resisting and obstructing a law enforcement officer.

B. Standard Of Review

The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, the appellate court accepts the trial court's findings of fact which were supported by substantial evidence, but the appellate Court freely reviews the application of constitutional principles to the facts as found. *State v. Atkinson*, 128 Idaho 559, 561 (Ct. App. 1996). At a suppression hearing, the power to assess the credibility of all witnesses, weigh evidence, resolve factual conflicts and draw factual inferences is vested in the trial court. *State v. Valdez-Molina*, 127 Idaho 102, 106 (1995).

C. The District Court Erred By Denying Mr. Smoke's Motion To Suppress

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV; Idaho Const. Art. I § 17. The purpose of these constitutional rights is to "impose a standard of reasonableness upon the exercise of discretion by governmental agents and thereby safeguard an individual's privacy and security against arbitrary invasions." *State v. Maddox*, 137 Idaho 821, 824 (Ct. App. 2002) (citing *Delaware v. Prouse*, 440 U.S. 648, 653-654 (1979)). The United States Supreme Court has held that when evidence is obtained in violation of the Fourth Amendment, the judicially developed exclusionary rule usually precludes its use in a criminal proceeding against the victim of the illegal search and seizure. *Illinois v. Krull*, 480 U.S. 340, 347 (1987) (citing *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914)). If evidence is not seized pursuant to a recognized exception to the warrant requirement, the evidence discovered as a result of the illegal search must be excluded as the "fruit of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471 (1963).

Warrantless searches are *per se* unreasonable unless they fall within one of a few narrowly drawn exceptions to the warrant requirement. *Coolidge v. New Hampshire,* 403 U.S. 443, 454-455 (1971). One such exception is the so-called "automobile exception" wherein officers may search a vehicle, or the contents thereof, if probable cause exists to believe that the automobile contains contraband or evidence of a crime. *Carroll v. United States*, 267 U.S. 132 (1925); *California v. Acevedo*, 500 U.S. 565 (1991). The probable cause necessary to justify a search of an automobile is the same probable cause that is necessary to convince a magistrate to issue a search warrant, that is: facts available to the officer at the time of the search would warrant a

person of reasonable caution in the belief that the area or items to be searched contained contraband or evidence of a crime. *United States v. Ross*, 456 U.S. 798, 823 (1982); *Texas v. Brown*, 460 U.S. 730, 742 (1983). Police use of a "well-trained narcotics-detection dog" during a lawful traffic stop is valid and generally does not implicate legitimate privacy interests. *Illinois v. Caballes*, 543 U.S. 405, 409 (2005). A drug dog's alert, in and of itself, can provide probable cause to support a search if the State can establish the drug dog's reliability. *United States v. Lingenfelter*, 997 F.2d 632, 639 (9th Cir. 1993); *see also State v. Howard*, 135 Idaho 727, 731 (2001); *State v. Gallegos*, 120 Idaho 894 (1991).

Mr. Smoke is mindful of the fact that a reliable drug dog's alert can provide probable cause for the search of a vehicle under the automobile exception to the warrant requirement. *See State v. Howard*, 135 Idaho at 731; *State v. Gallegos*, 120 Idaho at 898. However, Mr. Smoke asserts that his case is distinguishable. In the instant case, at the time of the search, Mr. Smoke was in custody and his vehicle was locked. (5/13/11 Tr., p.5, Ls.11-18, p.20, Ls.6-11; R., p.61.) Additionally, Mr. Smoke's vehicle was parked in the Doubletree parking lot, not on the street, and was not blocking traffic. (5/13/11 Tr., p.21, L.14 – p.22, L.9.) Under the circumstances of this case, Mr. Smoke asserts that officers should have secured the vehicle and obtained a warrant prior to searching the vehicle. The automobile exception requirement is necessary under certain circumstances because a vehicle is readily mobile by nature. *See Pennsylvania v. Labron,* 518 U.S. 938 (1996). Here, where the only driver of the vehicle was in custody, and the vehicle was locked and legally parked, Mr. Smoke asserts that officers should have obtained a warrant prior to searching the vehicle.

Accordingly, Mr. Smoke asserts that the district court erred in denying his suppression motion.

II.

The District Court Abused Is Discretion By Imposing A Unified Sentence Of Fifteen Years, With Four Years Fixed, Upon Mr. Smoke, In Light Of The Mitigating Factors Present In His Case

At sentencing, the State argued that, based upon the nature of the instant offense and Mr. Smoke's criminal history, the district court should impose a unified sentence of fifteen years, with five years fixed, upon Mr. Smoke. (7/20/11 Tr., p.7, L.12 – p.9, L.14.) Defense counsel argued an appropriate sentence would be three years fixed, with between five and seven years indeterminate. (7/20/11 Tr., p.11, Ls.1-12.) The district court imposed a unified sentence of fifteen years, with four years fixed, upon Mr. Smoke. (7/20/11 Tr., p.15, Ls.1-4.) Mr. Smoke asserts that, given any view of the facts, his unified sentence of fifteen years, with four years fixed, is excessive. Where a defendant contends that the sentencing court imposed an excessively harsh sentence the appellate court will conduct an independent review of the record, giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771, 772 (Ct. App. 1982).

The Idaho Supreme Court has held that, "'[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.'" *State v. Jackson*, 130 Idaho 293, 294 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). Mr. Smoke does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, he must show that, in light of the governing criteria, the sentence

was excessive considering any view of the facts. *Id.* The governing criteria, or objectives, of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.* The protection of society is the primary objective the court should consider. *State v. Charboneau*, 124 Idaho 497, 500 (1993). Ergo, a sentence that protects society and also accomplishes the other objectives will be considered reasonable. *Id.*; *see also State v. Toohill*, 103 Idaho 565, 568 (Ct. App. 1982). This is because the protection of society is influenced by each of the other objectives, and therefore, each must be addressed in sentencing. *Charboneau*, 124 Idaho at 500.

Mr. Smoke is the product of his alcohol and drug addictions. Of Mr. Smoke's previous felony convictions, all but the instant offense are felony DUIs. (2/17/05 Presentence Investigation Report (*hereinafter,* PSI), pp.3-7.) Mr. Smoke acknowledges that he has problems with both drugs and alcohol, which have not only caused his legal troubles, but affected his relationships with friends and family. (7/13/11 PSI, pp.4-8.) The good news is that not only does Mr. Smoke understand his addictions, but he has the desire to become drug and alcohol free. (7/13/11 PSI, pp.9-10.) In order to accomplish his sobriety, Mr. Smoke desires to move to Alaska to live with his father. (7/13/11 PSI, pp.5-6, 9-10.) Mr. Smoke's father is fully supportive of his son and is willing to assist Mr. Smoke in becoming a productive member of society. (7/13/11 PSI, pp.5-6.) In fact, Mr. Smoke is a skilled carpenter and has the ability, once released from incarceration, to provide support to his father and two children. (7/13/11 PSI, pp.7-9; 7/20/11 Tr., p.10, Ls.20-25.)

It is also important to note that Mr. Smoke accepts full responsibility and exhibits sincere remorse for his actions. Mr. Smoke's acceptance of responsibility is evidenced by his plea of guilty to the instant offense. Moreover, Mr. Smoke expressed to the court:

> I feel ridiculous, ashamed and embarrassed for having to appear before the courts for the charge of trafficking drugs as this is not who I am or the person I wish to be. I fully see and accept my part in this crime and accept all responsibility and involvement thereof. I wish only to move on with my life free from alcohol and drugs and pray that the court and commission will let me do so as soon as possible.

(7/13/11 PSI, p.11.)

Accordingly, in light of the foregoing, Mr. Smoke asserts that the district court erred in imposing a sentence in excessive of ten years, with three years fixed.

CONCLUSION

Mr. Smoke respectfully requests that this Court reverse the district court's order denying his suppression motion and remand his case for further proceedings. Alternatively, he asks that this Court reduce his sentence as it deems appropriate.

DATED this 16th day of February, 2012.

ERIC D. FREDERICKSEN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 16th day of February, 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:

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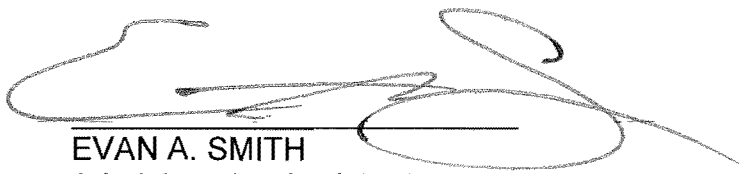

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