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State v. Buck Appellant's Brief Dckt. 40634

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
)
 Plaintiff-Respondent,) NO. 40634
)
) CANYON COUNTY NO. CR 2011-
) 28733
 v.)
)
 JACOB JAROME BUCK,) APPELLANT'S BRIEF
)
)
 Defendant-Appellant.)
 _____)

BRIEF OF APPELLANT

COPY

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF CANYON

HONORABLE BRADLY S. FORD
District Judge

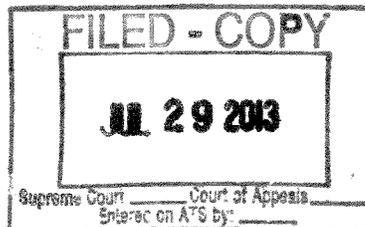
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STATEMENT OF THE CASE

Nature of the Case

Mr. Buck timely appealed from the district court's judgment of conviction. On appeal, Mr. Buck asserts that the district court erred when it denied his motion to suppress the State's evidence.

Statement of the Facts and Course of Proceedings

Mr. Buck was pulled over for failing to stop at an intersection. (R., pp.54-55.) While Mr. Buck's information was being processed, a drug dog, Remko, walked around the perimeter of Mr. Buck's car and alerted. (R., p.55.) A subsequent search of Mr. Buck's car revealed methamphetamine and hydrocodone pills. (R.p.55.)

Mr. Buck was charged, by information, with one felony count of possession of a controlled substance and one misdemeanor count of possession of a controlled substance. (R., pp.22-23.) Mr. Buck was also charged with a persistent violator enhancement. (R., pp.24-25, 27-28.)

Mr. Buck filed a suppression motion seeking suppression of the State's evidence based on a theory that there was no probable cause for the search of the car as Remko was an unreliable drug dog that frequently alerts in instances where drugs are not present. (R., pp.51-53.) Mr. Buck also argued that the Remko was unreliable because the dog was trained pursuant to a discredited training practice. (R., p.66.) The district court denied Mr. Buck's suppression motion. (R., pp.79-85.)

Pursuant to a plea agreement, Mr. Buck entered an *Alford*¹ plea to possession of a controlled substance and, in return, the State dismissed the remaining charges.

¹ See *North Carolina v. Alford*, 400 U.S. 25 (1970).

(R., pp.104-113.) Mr. Buck also reserved the ability to challenge the district court's denial of his suppression motion on appeal. (R., pp.105, 112-113.) Thereafter, the district court imposed a unified sentence of seven years, with three years fixed, but suspended the sentence and placed Mr. Buck on probation. (R., pp.121-124.) Mr. Buck timely appealed. (R., pp.130-132.)

ISSUE

Did the district court err when it denied Mr. Buck's motion to suppress the State's evidence?

ARGUMENT

The District Court Erred When It Denied Mr. Buck's Motion To Suppress The State's Evidence

A. Standard Of Review

This Court applies a bifurcated standard of review upon a challenge to a trial court's ruling on a motion to suppress. First, this Court defers to the district court's findings of fact unless those findings are clearly erroneous. See, e.g., *State v. Willoughby*, 147 Idaho 482, 485 (2009). This Court also gives deference to any implicit findings of fact that are supported by substantial and competent evidence. *State v. Frank*, 133 Idaho 364, 367 (Ct. App. 1999). Second, this Court reviews *de novo* the trial court's application of constitutional principles to the facts as found. *Willoughby*, 147 Idaho at 485-486.

B. The Warrantless Search Was Not Justified By The Automobile Exception Because The Drug Dog Was Exposed To An Out Dated Training Methodology Which Undermines Remko's Reliability And, Therefore, The District Court's Finding Of Probable Cause

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. CONST. amend IV. The Fourth Amendment is enforceable against the states through the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961); *State v. Johnson*, 110 Idaho 516, 524 (1986). The Idaho Constitution provides its own, similar protections against unreasonable searches and seizures. IDAHO CONST. Art. I, § 17; *State v. Donato*, 135 Idaho 469, 471 (2001).

A unanimous United States Supreme Court has held that warrantless searches are *per se* unreasonable. *Mincey v. Arizona*, 437 U.S. 385, 390 (1978). Therefore, a warrantless search is presumed to violate the Fourth Amendment, unless the State demonstrates that one of the well-established and well-delineated exceptions to this requirement is applicable to the facts. *Id.* at 390-91; *see also State v. Holton*, 132 Idaho 501, 503-04 (1999) (holding the same standard applies to Art. I, § 17 of the Idaho Constitution).

One of those exceptions is the automobile exception, which allows officers to search the vehicle and containers therein if they have probable cause that contraband is inside. *United States v. Ross*, 456 U.S. 798, 823-24 (1982); *State v. Gallegos*, 120 Idaho 894, 898 (1991). An alert by a reliable, trained canine unit provides probable cause. *Florida v. Harris*, ___ U.S. ___, 133 S. Ct. 1050, 1059 (2013). “A defendant, however, must have an opportunity to challenge such evidence of a dog’s reliability. . . . The defendant, for example, may contest the adequacy of a certification or training program, perhaps asserting that its standards are too lax or its methods faulty.” *Id.* at 1057. Thus, dog alerts do not always provide probable cause by themselves. *See, e.g., State v. Howard*, 135 Idaho 727, 731 (2001) (holding that, absent a showing of the dog’s reliability, “the dog’s reaction does not provide probable cause by itself” (though when combined with other factors, probable cause was present in that case)); *State v. Gibson*, 141 Idaho 277, 285 (Ct. App. 2005) (holding that a dog’s alert did not provide probable cause to search the defendant in light of other factors known to the officers which dispelled a finding of probable cause). Rather, a dog’s alert is a factor to be weighed in the totality of the circumstances when determining if probable cause

existed in the given situation. *Harris*, 133 S. Ct. at 1057; *Howard*, 135 Idaho at 731; *Gibson*, 141 Idaho at 285.

In this case, Mr. Buck made two challenges to Remko's reliability. The first challenge was that Remko's reliability was undermined due to the fact that in the majority of cases, over 60 percent of the time, Remko would alert in the field and no drugs or paraphernalia would be found.² (R., pp.51-53, 65-66.) Mr. Buck's second challenge to Remko's reliability was that the dog was exposed to an outdated training methodology which undermines the dog's reliability. The specific argument provided to the district court was that the "method used by [Corporal Baldwin] to reward [Remko], by his own admission, may not be the current [and] accepted way of utilizing rewards in K-9 deployments." (R., p.74.) At the suppression hearing, Corporal Baldwin testified on cross examination that Remko was trained by using a positive reinforcement method where the dog gets an award for finding drugs. (Tr., p.41, L.23 - p.42, L.5.) Corporal Baldwin also testified that he gives Remko an award when no drugs are found despite the fact that "there is a big debate on whether you should reward a dog before you" actually discover drugs in the location where the dog alerted. (Tr., p.42, L.6 - p.43, L.10.) The following dialogue occurred on re-cross examination:

Q [Defense counsel]: And then, one last question. This providing a reward when no - - before any drugs are actually found, just after the alert, is that consistent with the training you receive? Is that - - or is that something that you just do with Remko?

² The district court found that this challenge to Remko's reliability was without merit as the State's witness at the suppression hearing, Corporal Baldwin, testified that in all but two incidents, Remko was alerting to residual orders. (R., p.84.) Corporal Baldwin also testified that Remko had not provided any false alerts within the last year of his State certification period. (R., p.84.) In light of the holdings in *Harris, supra*, and *State v. Yeomans*, 144 Idaho 871 (Ct. App. 2007), Mr. Buck is not addressing this challenge to Remko's reliability on appeal.

A [Corporal Baldwin]: Well, I have always done it that way with Remko. I went to a training over in Oregon. And that's when they started saying maybe wait until you actually find the drug, because some dogs, real high driven dogs, they catch on to the reward part and might start lying to you. So that's when I was introduced to that. That was I think a year ago when I went over there.

Q [Defense counsel]: Okay. But you've still continued to - -

A [Corporal Baldwin]: On the hard positives ones, I do.

(Tr., p.71, L.16 - p.72, L.6.)

The district court ultimately found that Remko was reliable. (R., p.84.) However, the district court did not address this challenge to Remko's reliability in its memorandum decision despite the fact that Remko was exposed to six years of a flawed training methodology. (R., pp.79-84.) Remko's reliability was further undermined at the suppression hearing as Corporal Baldwin implicitly testified that Remko was selected as a drug dog due to his strong drive for rewards. (Tr., p.12, Ls.1-1-10.) This is important because Corporal Baldwin also testified that drug dogs with a high incentive to receive awards are the type of dogs which will "lie" to get a reward and are, therefore, the type of dogs that should not get an award until drugs are found. (Tr., p.71, L.16 - p.72, L.6.) Even though Remko has a positive training record, that record is undermined as the dog was exposed to six years of a training methodology which, according to Corporal Baldwin, has been discredited for dogs like Remko.

Finally, if it is determined that the search of Mr. Buck's car was not supported by probable cause all of the incriminating evidence which was obtained subsequent to the illegal seizure should be excluded under the fruit of the poisonous tree doctrine. "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.” *State v. Van Dorne*, 139 Idaho 961, 963 (Ct. App. 2004) (citing to *Wong Sun v. United States*, 371 U.S. 471 (1963)).

In sum, the United State Supreme Court recently held that a drug dog’s reliability can be undermined by challenging the methodology used to train the dog. Remko was exposed to a discredited training methodology for the entirety of the dog’s carrier. This flawed training methodology was exacerbated as Remko is a driven dog which is the very type of dog susceptible to the flaw in the training methodology. This issue was raised below but never directly considered by the district court. As such, the district court erred when it denied Mr. Buck’s suppression motion because Remko’s alert did not provide probable cause for the warrantless search of Mr. Buck’s car.

CONCLUSION

Mr. Buck respectfully requests that this Court reverse the district court’s order denying his motion to suppress and remand this case to the district court for further proceedings.

DATED this 29th day of July, 2013.



SHAWN F. WILKERSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 29th day of July, 2013, 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:

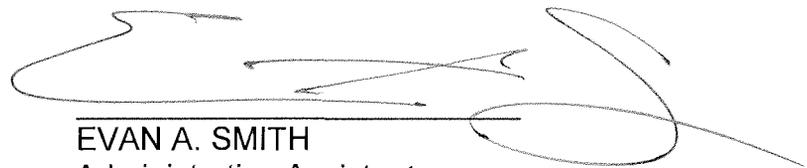
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