3-27-2013

State v. Shaw Appellant's Brief Dckt. 40195

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. JENNIFER ELAINE SHAW, Defendant-Appellant.	)	NO. 40195 ADA COUNTY NO. CR 2011-8111 APPELLANT'S BRIEF

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

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STATEMENT OF THE CASE

Nature of the Case

Jennifer Shaw appeals from her judgment of conviction for possession of a controlled substance. She was convicted by a jury and sentenced to a unified seven-year term, with three years fixed, subject to a period of retained jurisdiction. She successfully completed the period of retained jurisdiction and her sentence was suspended for a period of probation.

On appeal, Ms. Shaw challenges the district court's denial of her motion to suppress evidence found during a warrantless search of the car she was driving. She contends that the officers did not have probable cause to search the car because, under the totality of the circumstances, the alleged alert by a canine unit at the scene did not provide the officers with probable cause to search her car. She also contends that the State failed to prove that the inventory exception would justify the warrantless search. Therefore, since the warrantless search was not justified by one of the narrow exceptions to the warrant requirement, the evidence found in the car, or at least in the closed containers therein, should have been suppressed. This Court should vacate Ms. Shaw's judgment of conviction, reverse the district court's order denying her motion to suppress, and remand the case for further proceedings.

Statement of the Facts and Course of Proceedings

Officer Terry Hodges stopped a vehicle after observing it cross the center line and change lanes without signaling. (Tr., Vol.1, p.7, Ls.16-23.)[1] The driver, the only

[1] The transcripts in this case are contained in three separately bound and paginated the hearing on the motion to suppress on May 2, 2012. "Vol.2" will refer to the volume containing the transcripts of the trial held on May 3, 2012. "Vol.3" will refer to the volume containing the transcripts of the sentencing hearing held on July 23, 2012.

person in the vehicle, verbally identified herself as Jennifer Thornton. (Tr., Vol.1, p.8, Ls.7-11; Tr., Vol.1, p.9, Ls.11-12.) When the officer ran that name for an information check, it was identified as an alias for Jennifer Shaw. (Tr., Vol.1, p.8, Ls.13-14.) Officer Hodges also learned that Ms. Shaw had an active warrant for failure to obey a citation. (Tr., Vol.1, p.8, L.9 - p.9, L.7.) He placed Ms. Shaw under arrest for that warrant. (Tr., Vol.1, p.9, Ls.8-10.) Officer Hodges also requested a canine unit and a transport unit respond to assist him. (Tr., Vol.1, p.11, Ls.9-11.) Ms. Shaw was put in handcuffs and placed in the back of one of the police vehicles. (Presentence Investigation Report (*hereinafter*, PSI), p.23.)[2]

Officer Daniel Vogt responded with his canine companion, Max. He testified that he and Max had only been certified to work in the field a few months prior. (Tr., Vol.1, p.34, Ls.3-14.) Officer Vogt described the training process, which involved presenting the dog with various boxes, some of which were known to the officer to contain samples of drugs. (Tr., Vol.1, p.21, Ls.17-23.) When the dog sniffed at the box with the sample of drugs, the officer would reward the dog by giving him a toy, which, according to Officer Vogt, is the only thing the dog really cares about. (Tr., Vol.1, p.21, L.23 - p.22, L.7.) The idea is that the dog would make a connection between the odor he had been presented with and his toy, and start reacting to it in the field. (Tr., Vol.1, p.21, L.24 - p.22, L.1.) According Officer Vogt, while Max had a good record in controlled, training situations, he will "fairly frequently" alert in the field when no drugs are present. (Tr., Vol.1, p.36, L.24 - p.37, L.20.)

[2] PSI page numbers correspond with the page numbers of the electronic PDF file "SHAW JENNIFER psi." Included in this file is the PSI report as well as all the documents attached thereto (medical reports, evaluations, etc.).

Officer Vogt deployed Max on the car Ms. Shaw had been driving.[3] (Tr., Vol.1, p.30, Ls.3-10.) He let Max sniff at the open window at the front of the car. (Tr., Vol.1, p.30, Ls.8-10.) While there was a change in the dog's behavior, Officer Vogt testified that Max did not alert at the open window. (Tr., Vol.1, p.30, Ls.8-10; Tr., Vol.1, p.44, Ls.19-21.) Officer Vogt continued to take Max around the car, and stopped at the gas tank. (Tr., Vol.1, p.30, Ls.3-25.) There was a storm drain in the gutter near the gas tank. (Tr., Vol.1, p.31, Ls.4-5.) Despite the fact that Max is apprehensive about performing his duties when he is on unsure footing, Officer Vogt had Max stand on the storm drain while he sniffed the gas tank. (Tr., Vol.1, p.26, L.24 - p.27, L.17 (describing Max's apprehension when on uncertain footing); Tr., Vol.1, p.31, Ls.4-5 (describing Max's footing when sniffing the vehicle in question).) Officer Vogt testified that he saw Max's body tense up and Max tried to sit, but his paws slipped down the storm drain. (Tr., Vol.1, p.31, Ls.5-17.) Officer Vogt described this behavior as *an attempt* to alert. (Tr., Vol.1, p.31, Ls.4-10.) However, when Officer Vogt had Max return to that area of the car, he did not alert on the car. (Tr., Vol.1, p.31, L.23 - p.32, L.3.)

Some time during the course of the stop, a person identifying himself as Charles Shaw arrived at the scene.[4] (*See* R., p.73; PSI, p.24.) He identified himself with an Idaho driver's license and told Officer Hodges that he was authorized to take the car,

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[3] By the time Officer Vogt deployed Max, Ms. Shaw was already under arrest in the back of another patrol vehicle. (*See* PSI, p.23; Tr., Vol.1, p.39, Ls.4-12.)

[4] The information about the interaction with Charles Shaw who, at that time, was Ms. Shaw's fiancée, (*see, e.g.,* PSI, p.7), is contained in the police reports, which are attached to the PSI. It is not clear whether this information was made available to the district court at the time of the hearing on Ms. Shaw's motion to suppress; however, defense counsel did not present any evidence in that regard at the hearing on the motion to suppress. (*See generally* R., Tr., Vol.1.) Therefore, this information is provided only as background for this Court. Ms. Shaw preserves the right to make a challenge regarding the non-presentation of this evidence at that hearing in post-conviction.

which belonged to his relatives. (PSI, p.24.) Without any further investigation, Officer Hodges decided to impound the vehicle. (Tr., Vol.1, p.11, L.15 - p.12, L.11 (Officer Hodges describing his decision to impound the vehicle; *see generally* PSI, p.24 (Officer Hodges's report of his investigation).) Officer Hodges testified that, once he decided to tow the vehicle, he would have also performed an inventory search on the vehicle. (Tr., Vol.1, p.13, L.24 - p.14, L.3.)

Based on the fact that Max had slipped into the storm drain, which Officer Vogt described as an attempt to alert, Officer Hodges began to search the car without a warrant. He opened a handbag in the car and found several pill bottles in it. (Tr., Vol.1, p.12, Ls.22-23.) He opened one of those bottles, which was labeled with the name Jennifer Thornton, because it had a baggie inside it. (Tr., Vol.1, p.12, L.24 - p.13, L.2 (Officer Hodges describing the search of the handbag); Tr., Vol.1, p.17, Ls.13-19 (Officer Hodges describing why he opened this pill bottle and not the others); PSI, p.30 #12 (picture of the pill bottle).) The bag contained a "crystal-like substance." (Tr., Vol.1, p.12, Ls.23-25.) Officer Hodges admitted he would not open pill bottles during a normal inventory search. (Tr., Vol.1, p.16, Ls.11-13.) The Idaho State Lab subsequently confirmed that the substance in the pill bottle was methamphetamine. (PSI, p.40.)

Ms. Shaw moved to suppress the evidence found during the warrantless search of the car.[5] (R., p.70.) She asserted that the warrantless search was unreasonable and could not be justified under the inventory exception, the automobile exception, or the

[5] According to defense counsel, the prosecutor stipulated that Ms. Shaw had standing to challenge the search. (Tr., p.5, Ls.10-12.) The prosecutor did not object and the district court agreed, saying, "I don't think there's much question about that." (Tr., Vol.1, p.5, Ls.12-13.)

Gant exception to the warrant requirement.[6] (*See* R., pp.72-78.) As part of her challenge in regard to the automobile exception, Ms. Shaw challenged the reliability of the dog's indications and alleged alert. (R., pp.76-77.) The district court found that Max gave reliable alerts, which gave the officers probable cause to search the car. (R., p.101.) It did not address the alternate arguments as a result of finding a valid exception to the warrant requirement in that regard. (R., p.101.)

A jury subsequently convicted Ms. Shaw of possession of a controlled substance. (R., p.120.) The district court imposed a unified sentence of seven years, with three years fixed, but it retained jurisdiction over Ms. Shaw. (R., pp.137-38.) Ms. Shaw successfully completed the rider program during her period of retained jurisdiction and the district court suspended the sentence for a seven-year period of probation. (Augmentation – Order Suspending Sentence and Order of Probation; *see* Augmentation – Minutes of rider review hearing.) Ms. Shaw filed a notice of appeal that was timely from the judgment of conviction. (R., pp.133-36.)

[6] *Arizona v. Gant*, 556 U.S. 332 (2009), allows warrantless searches of areas within the reach of unrestrained suspects or for evidence of the crime of arrest. The prosecutor did not advance any argument in regard to the *Gant* exception. (Tr., Vol.1, p.57, L.10 - p.60, L.5.) Also, the district court did not issue a ruling on that ground. (R., p.101.) Therefore, it is not addressed in this brief.

ISSUES

1. Whether the officers lacked probable cause to search the vehicle because the canine unit's behavior, considered in the totality of the circumstances, was not reliable so as to provide such probable cause.

2. Whether the warrantless search of the closed containers in the car was not justified under the inventory exception because the State did not prove that the search of those containers was conducted pursuant to established policy.

ARGUMENT

I.

The Officers Lacked Probable Cause To Search The Vehicle Because The Dog's Behavior, Considered In The Totality Of The Circumstances, Was Not A Reliable Indication Of The Presence Of Drugs So As To Provide Probable Cause

A. Introduction

While an alert by a trained drug-detection canine is a compelling factor to be considered in the totality of the circumstances for the determination of whether there is probable cause to search a vehicle, the United States Supreme Court and the Idaho Supreme Court have held that, if the totality of the circumstances reveal that the dog or the alert is unreliable, it will not provide probable cause for a search of the vehicle. In this case, Max failed to alert. Rather, the evidence only shows an alleged attempt to alert which occurred while Max, who is known to be apprehensive on unsure footing, was actually on unsure footing. As such, the circumstances surrounding the alleged alert demonstrate it was not reliable. Furthermore, the dog's training, as described by Officer Vogt, does not indicate that he would be reliable in those circumstances. As such, the totality of the circumstances reveals that, even if Max was trying to alert, that alert was not reliable in this situation. Therefore, it did not provide the officers with probable cause to justify their warrantless search.

B. The Warrantless Search Is Not Justified By The Automobile Exception Because The Officer's Did Not Have Probable Cause Based On The Canine Unit's Behavior In This Case

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 exceptional, 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. . . . And even assuming the dog is generally reliable, circumstances surrounding a particular alert may undermine the case for probable cause—if, say, the officer cued the dog (consciously or not), or if the team was working under unfamiliar conditions." *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.

Given the particular circumstances in this case, the alleged attempt to alert,[7] was not reliable, and thus, his indications did not provide the officers with probable cause. Most notably, the dog did not alert where any odor emanating from the vehicle was likely to be the strongest: the open front window. (There was wind blowing from the back of the car toward the front. (Tr., Vol.1, p.41, Ls.4-8.)) Additionally, the only place where the dog purportedly alerted was toward the back of the car. (*See* Tr., Vol.30, Ls.3-10.) As such, any odor emanating from the back of the car would be blown toward the dog at the front of the car. Additionally, the window was open there, giving the dog

[7] The district court's finding that "[B]ecause of Max's alerts, there was probable cause" (*See* R., p.101), is not based on substantial or competent evidence and should be set aside as clearly erroneous. *See State v. Henage*, 143 Idaho 655, 659 (2007). By declaring there were "alerts" the district court ruled the dog alerted more than once. (*See* R., p.101.) Officer Vogt affirmatively testified that the dog's behavior at the front window did not constitute an alert. (Tr., Vol.1, p.44, Ls.14-21.) As such, there could have been only one potential alert, which, based on Officer Vogt's testimony, was only an attempt to alert, not an actual alert. (*See* Tr., Vol.1, p.31, Ls.4-10.) The alleged attempt to alert supposedly occurred while Max, who is apprehensive in performing his duties while on unsure footing, was trying to maintain his footing on a storm drain, into which he ultimately fell. (*See* Tr., Vol.1, p.31, Ls.4-19.) As will be discussed in depth *infra*, that behavior was not sufficient to constitute an alert. In fact, Officer Vogt testified that Max only displayed *some* of the signs of an alert. (*Compare* Tr., Vol.1, p.23, L.25 - p.24, L.3 (Officer Vogt describing Max's usual alert behaviors), *with* Tr., Vol.1, p.31, Ls.7-10 (describing Max's behavior at the gas tank); *and* Tr., Vol.1, p.30, Ls.8-10 (describing almost identical behavior at the open window, which Officer Vogt testified did not constitute an alert).) Therefore, the finding that Max actually did alert was clearly erroneous as it was not based on substantial or competent evidence. *See Henage*, 143 Idaho at 659.

the best possible opportunity to smell the odor of any drugs in the vehicle at the open front window. However, Officer Vogt testified that Max did not alert when he was at the open front window (though he indicated that he might have smelled something). (Tr., Vol.1, p.44, Ls.19-21; Tr., Vol.1, p.30, Ls.18-21.) The dog's failure to alert is a factor which is considered in the totality of the circumstances analysis, indicating the alert is less reliable. *State v. Anderson*, ___ Idaho ___, 2012 Opinion No. 123, p.5 (January 24, 2012). Therefore, the fact that the dog did not alert where the odor (if any) was likely to be strongest indicates that the subsequent alleged attempted alert was less reliable, and was thus insufficient to provide the officers with probable cause.

In fact, the evidence is not clear that the dog was trying to alert at all. When Max was sniffing at the gas tank, he was not on sure footing because of a storm drain at that particular location. (*See, e.g.,* Tr., Vol.1, p.31, Ls.16-17.) This particular dog has a history of being apprehensive when his footing is unsure. (Tr., Vol.1, p.27, Ls.4-17.) Therefore, it is unlikely that a dog that is apprehensive when his footing is unsure, who will hug the walls to avoid such situations, was doing anything more than trying to ensure that his footing was secure, rather than trying to alert to an odor in that particular location. And yet, Officer Vogt had him stop to sniff the car while he was on the storm drain. (Tr., Vol.1, p.31, Ls.4-5.) Furthermore, when Officer Vogt had Max sniff in that area after he fell into the storm drain, Max did not alert. (Tr., Vol.1, p.31, L.24 - p.32, L.3.) That adds to the totality of the circumstances demonstrating the dog's behavior in this case did not provide the officers with probable cause to search the vehicle. *Anderson*, ___ Idaho ___, 2012 Opinion No. 123, p.5.

Additionally, this dog is known to alert "fairly frequently" when drugs are not present.[8] (Tr., Vol.1, p.36, L.24 - p.37, L.2.) That indicates that this dog, only five months out of his initial training (Tr., Vol.1, p.34, Ls.3-14), is less reliable than other drug detection canines. *Compare Harris*, 133 S. Ct. at 1058 (describing the extensive training record of the dog in that case, as well as his record in various tests, including double blind tests which prevent the officer from cuing - consciously or subconsciously – the dog to the presence of narcotics). Furthermore, the training, as described by Officer Vogt, also undermines Max's reliability in this situation. According to Officer Vogt, he would have Max smell a row of boxes, one of which had a sample of drugs in it. (Tr., Vol.1, p.21, Ls.17-22.) When Max sniffed the box known to contain the drugs, he would reward the dog by giving it a toy.[9] (Tr., Vol.1, p.21, L.22-24.) Based on Officer Vogt's description, Max did not need to do anything except smell where the officer indicated to get his toy which, according to Officer Vogt, is the only thing the dog cares about. (*See* Tr., Vol.1, p.22, Ls.2-7.) Therefore, there is no evidence that suggests Max was trained to do anything except sniff where Officer Vogt directed him to sniff and then look to the officer to get his reward. When the dog is reacting to cues from the officer, even if those cues are not consciously given, that undermines the reliability of an alert. *Harris*, 133 S.Ct. at 1057.

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[8] Officer Vogt did not bring the log he keeps of his dog's deployments to verify the dog's record to the suppression hearing. (Tr., Vol.1, p.38, Ls.18-22.) While it is not necessary for the State to present such a log in these cases, it would have provided additional information about Max's reliability. *See Harris*, 133 S. Ct. at 1054 (the deployment logs showed the dog in that case to be more reliable); *id.* at 1056 (discussing the use of such logs in the totality of the circumstances).

[9] *Compare Harris*, 133 S. Ct. at 1058 (describing the better double blind tests which prevent the dog from getting cues from the officer).

As such, given the totality of the circumstances surrounding this dog's supposed alert in this case, as well as the training it received, it did not give officers probable cause to search Ms. Shaw's vehicle. Therefore, this exception does not justify the officer's warrantless search of that vehicle and the evidence found therein should be suppressed.

II.

The Warrantless Search Of The Closed Containers In The Car Was Not Justified Under The Inventory Exception Because The State Did Not Prove That The Search Of Those Containers Was Conducted Pursuant To Established Policy

A. Introduction

When it comes to exceptions to the warrant requirement, the State bears the burden of proving that those narrow exceptions fit the facts of the case. When it comes to the inventory exception, the United States Supreme Court has held that, where there is no established policy regarding searches of containers found during inventory searches, opening those containers violates the Fourth Amendment. Since the State has failed to establish that any such policy existed in this case, the evidence found in the pill bottle, which was itself found in a purse, should be suppressed because the opening of both containers to conduct that search is not justified under the narrow inventory exception absent evidence of such a policy.

B. The State Has Failed To Show That The Search Of The Closed Containers In The Car Was Conducted Pursuant To Established Procedures, Meaning That Search Does Not Fall Within The Well-Defined Bounds Of The Inventory Exception

Another exception to the warrant requirement is the inventory search exception. *South Dakota v. Opperman*, 428 U.S. 364, 369-70 (1976). The warrant exceptions are well-delineated. *Mincey*, 437 U.S. at 390-91. The State bears the burden of proving

that the search falls within the well-delineated bounds of a particular exception, and if it does not, the presumption that the warrantless search is unreasonable remains. *Id.* The United States Supreme Court has specifically considered the question of the bounds of the inventory exception as it relates to opening closed containers found in a vehicle during an inventory search. *See Florida v. Wells*, 495 U.S. 1 (1990). It held that the decision to open such containers must be controlled by established procedures and if such procedures do not exist, the search of those containers violates the Fourth Amendment. *Id.* at 4.

The purpose of the inventory exception is for officers to protect the property now in their custody, to protect the police against claims of lost or stolen property, and to protect against hazards in the vehicle that has been seized. *Opperman*, 428 U.S. at 369-70. An inventory search cannot be a ruse for "general rummaging in order to locate incriminating evidence." *State v. Stewart*, 152 Idaho 868 (citing *Wells*, 495 U.S. 1). "To insure the purpose providing the justification for an inventory search is genuine, the government must show that any inventory search was conducted in accordance with standardized criteria or established procedures." *State v. Reimer*, 127 Idaho 214, 218 (1995); *see Wells*, 495 U.S. at 4. Only in this way will the Fourth Amendment rights be protected during such a search. *See id.* As such, where there is no policy with respect to the opening of containers during inventory searches, such searches are insufficiently regulated, and thus, violate the Fourth Amendment and the evidence found in the container opened during the search is to be suppressed.[10] *Wells*, 495 U.S. at 4;

[10] This forbidding of "uncanalized discretion" does not mean the officers must behave mechanically or simply check off a checklist when conducting an inventory search; all it requires is that the discretion in that regard be guided by established criteria. *Wells*, 495 U.S. at 4.

State v. Owen, 143 Idaho 274, 278 (Ct. App. 2006) (suppressing evidence found in a closed container during an inventory search when there was no established policy in regard to such searches); *but see State v. Bray*, 122 Idaho 375, 381 (Ct. App. 1992) (upholding a search of closed containers (saddlebags) despite the lack of an established procedure by the agency in that regard because the bags were not locked).

Officer Hodges did not testify as to whether there was an established policy in his office regarding the opening of closed containers during inventory searches. (*See generally* Tr., Vol.1.) Since it is the State's burden to show that the search in this case falls within the bounds of one of the well-delineated exceptions to the warrant requirement, *see Mincey*, 437 U.S. at 390-91; *Reimer*, 127 Idaho at 218, and since, to fall within the bounds of the inventory exception, the search must be shown to have been in accordance with established policy and procedures, *Wells*, 495 U.S. at 4; *Owen*, 143 Idaho at 278, the lack of evidence as to whether there was such a policy demonstrates that the State failed to meet that burden in this case and the inventory exception does not justify the warrantless search. As such, the evidence found during the warrantless search should be suppressed.

CONCLUSION

Ms. Shaw respectfully requests that this Court vacate her judgment of conviction, reverse the district court's order on denying her motion to suppress, and remand her case for further proceedings.

DATED this 27th day of March, 2013.

BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 27th day of March, 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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