

2-19-2013

State v. Tappin Appellant's Brief Dckt. 40377

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/not_reported

Recommended Citation

"State v. Tappin Appellant's Brief Dckt. 40377" (2013). *Not Reported*. 1110.
https://digitalcommons.law.uidaho.edu/not_reported/1110

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact annablaine@uidaho.edu.

COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 40377
)	
v.)	ADA COUNTY NO. CR-FE-12-712
)	
MICHAEL WILLIAM TAPPIN,)	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

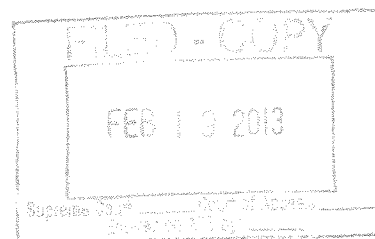
HONORABLE DEBORAH A. BAIL
District Judge

SARA B. THOMAS
State Appellate Public Defender
State of Idaho
I.S.B. #5867

ERIK R. LEHTINEN
Chief, Appellate Unit
I.S.B. #6247

BEN PATRICK MCGREEVY
Deputy State Appellate Public Defender
I.S.B. #8712
3050 N. Lake Harbor Lane, Suite 100
Boise, ID 83703
(208) 334-2712

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534



ATTORNEYS FOR
DEFENDANT-APPELLANT

ATTORNEY FOR
PLAINTIFF-RESPONDENT

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
Nature of the Case	1
Statement of the Facts and Course of Proceedings	1
ISSUE PRESENTED ON APPEAL	5
ARGUMENT	6
A. Under The Totality Of The Circumstances, The Officers Did Not Have The Requisite Reasonable Suspicion To Lawfully Expand The Traffic Stop For Investigation Into Drug Activity	8
B. Because Mr. Tappin Was Being Subjected To An Illegal Detention, His Consent To A Search Was Ineffective	12
CONCLUSION	13
CERTIFICATE OF MAILING	14

TABLE OF AUTHORITIES

Cases

<i>State v. Aguirre</i> , 141 Idaho 560 (Ct. App. 2005).....	8, 9, 10
<i>State v. Bishop</i> , 146 Idaho 804 (2009)	12
<i>State v. DuVal</i> , 131 Idaho 550 (1998)	6, 7
<i>State v. Gutierrez</i> , 137 Idaho 647 (Ct. App. 2002).....	9, 10, 12, 13
<i>State v. Parkinson</i> , 135 Idaho 357 (Ct. App. 2000)	9, 10
<i>State v. Pressley</i> , 131 Idaho 277 (Ct. App. 1998).....	7
<i>State v. Sheldon</i> , 139 Idaho 980 (Ct. App. 2003)	6, 10, 11
<i>State v. Silva</i> , 134 Idaho 848 (Ct. App. 2000).....	9, 10
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968).....	6

Statutes

I.C. § 49-808(1)	7
------------------------	---

STATEMENT OF THE CASE

Nature of the Case

After being arrested on drug charges, thirty-four-year-old Michael Tappin filed a motion to suppress the evidence gathered by the police as a result of a traffic stop. The district court denied the motion to suppress. Pursuant to a plea agreement, Mr. Tappin then pleaded guilty to felony trafficking in heroin. Mr. Tappin's conditional plea reserved his right to appeal the district court's denial of his motion to suppress. The district court imposed a unified sentence of fifteen years, with ten years fixed. On appeal, Mr. Tappin argues that the district court erred when it denied his motion to suppress.

Statement of the Facts and Course of Proceedings

An undercover narcotics detective with the Boise Police Department purchased half a gram of heroin for \$60.00 in pre-recorded funds from Steven McDaniel. (Presentence Investigation Report (*hereinafter*, PSI), pp.2-3.) Mr. McDaniel told the undercover detective that he was preparing to go to Seattle with a friend to purchase heroin that he was willing to sell upon his return. (PSI, p.3.) He offered to sell the undercover detective ten grams of heroin for \$700.00. (PSI, p.3; R., p.75.)

A few days later, Mr. McDaniel told the undercover detective he was back in Boise, and the two agreed to meet at the Shell station on Federal Way in Boise. (PSI, p.3; R., pp.75-76.) Once Mr. McDaniel arrived at the Shell station, he told the undercover detective that he would have to delay the sale because he did not have a digital scale to measure the purchase. (R., p.76.) Mr. McDaniel told the undercover detective he had just returned from a trip to Seattle to purchase the heroin, and that his friend "Mikey" had gone with him. (PSI, p.3.) After the undercover detective drove Mr. McDaniel to a Fred Meyer in search of a digital scale, Mr. McDaniel stated that he

would have to get a digital scale from Mikey. (R., p.76.) The undercover detective drove Mr. McDaniel to the vicinity of Malad and Virginia Streets, where Mr. McDaniel got out of the car to walk to Mikey's house because Mikey did not want people to know where he lived. (R., p.76.) The undercover detective radioed a Boise Police Department surveillance team that Mr. McDaniel was walking north, and the surveillance team saw Mr. McDaniel returning from one of two houses on Virginia Street. (R., p.76.) While the surveillance team saw Mr. McDaniel walking from the yard area of one of the two houses, they did not actually see him exit one of the houses and could not identify the specific address he came from. (Tr., p.65, Ls.5-19.)

Mr. McDaniel got back to the undercover detective's car, and the two drove to the same Shell station to complete the sale. (R., p.76.) Back at the Shell station, Mr. McDaniel weighed out ten grams of heroin and gave it to the undercover detective, who saw an additional large piece of heroin in Mr. McDaniel's backpack. (PSI, p.3.) Mr. McDaniel left on foot, and was then taken into custody by Boise police officers. (PSI, p.3; R., p.76.)

Meanwhile, the surveillance team continued to watch the two houses on Virginia Street. (R., p.76.) A short time later, a gray vehicle arrived in the area. (PSI, p.3.) Officers saw the vehicle stop for a few minutes, make an illegal U-turn, then stop while pointing the other way, and then move a short distance to an area near the intersection. (R., p.76; Tr., p.117, Ls.7-8.) According to Detective Bruner, one of the officers on the surveillance team, the vehicle pulled over multiple times without signaling. (Tr., p.116, L.23 – p.117, L.14.) Mr. Tappin then exited the residence at 2423 Virginia Street (one of the two houses) and got into the passenger seat of the vehicle. (PSI, p.3.)

The officers then made a traffic stop on the vehicle. (PSI, p.3; R., pp.76-77.) Detective Bruner testified that when the officers made the stop, the vehicle was pulling away from the curb without signaling. (Tr., p.117, Ls.14-18.) As the stop began, Mr. Tappin appeared to reach into his waistband area and then move his hands out of sight. (PSI, p.32, R., p.77.) Detectives identified the driver of the vehicle as James Dougal. (PSI, p.3.) Both Mr. Dougal and Mr. Tappin were removed from the vehicle and asked if they had weapons or contraband. (PSI, p.3; R., p.77.) Mr. Tappin consented to a pat down search. (R., p.77.) The officers found a bag containing ten grams of a substance, later confirmed to be heroin, in Mr Tappin's pocket. (PSI, p.3; R., p.77.) Mr. Tappin and Mr. Dougal were then taken into custody. (PSI, p.3.) Later, Mr. Tappin's house at 2423 Virginia was searched pursuant to a search warrant. (R., p.77.)

Mr. Tappin was charged with conspiracy to traffic in heroin, felony, in violation of Idaho Code §§ 37-2732B(a)(6)(C), 18-701, 37-2732(b) and 19-304; trafficking in heroin, felony, in violation of I.C. §§ 37-2732B(a)(6) and 18-204; and possession of drug paraphernalia, misdemeanor, in violation of I.C. § 37-2734A. (R., pp.30-32.) Mr. Tappin initially entered a plea of not guilty to the charges. (R., p.43.)

Mr. Tappin subsequently filed a motion to suppress the evidence gathered by the police as a result of the traffic stop, or in the alternative, to dismiss the charges against him. (R., pp.56-57.) His Memorandum of Law in Support of Motion to Suppress argued that the detectives stopped Mr. Dougal and Mr. Tappin without a warrant or any reasonable suspicion of criminal activity. (R., pp.58-64.)

Evidence was presented and argument was heard on the motion to suppress. (R., p.75.) Later, the district court entered an order denying the motion to suppress.

(R., pp.75-78.) The district court held that “[b]ased on the totality of the circumstances, the stop was justified.” (R., p.78.) “[T]he driver of the car made several traffic violations. . . . [A] traffic stop is justified if there are specific, articulable facts that the vehicle is either being driven contrary to traffic laws or that other criminal activity is afoot.” (R., p.78.) The district court concluded that “[o]nce the stop occurred, nothing precluded the officer from asking [Mr.] Tappin for his consent to a search.” (R., p.78.)

Pursuant to a plea agreement, Mr. Tappin subsequently agreed to plead guilty to the felony trafficking in heroin charge. (R., p.79; Tr., p.138, Ls.7-8, 18-20.) In his conditional plea, Mr. Tappin reserved his right to appeal the district court’s denial of the motion to suppress. (R., p.79; Tr., p.138, Ls.10-13.) The State agreed to dismiss the felony conspiracy to traffic in heroin and the misdemeanor possession of drug paraphernalia charges. (Tr., p.138, Ls.9-10, p.139, Ls.7-9.) The State would also recommend the mandatory minimum sentence of ten years fixed. (Tr., p.138, Ls.14-16.) Pursuant to the plea agreement, each side was free to argue the indeterminate portion of the sentence. (Tr., p.138, L.25 – p.139, L.1.) The district court accepted Mr. Tappin’s guilty plea. (R., p.79; Tr., p.152, Ls.6-12.)

The district court imposed a unified sentence of fifteen years, with ten years fixed.¹ (R., pp.89-90.) Both the State and Mr. Tappin’s counsel had recommended that the district court impose a unified sentence of fifteen years, with ten years fixed. (Tr., p.157, L.25 – p.158, L.5, p.158, Ls. 12-15.)

Mr. Tappin filed a timely Notice of Appeal. (R., pp.94-97.)

¹ Mr. McDaniel was convicted of drug trafficking and sentenced to ten years fixed. (PSI, p.4.) Mr. Dougal was convicted of drug trafficking and sentenced to five years fixed, to run concurrently with his conviction for felony forgery in a separate case. (PSI, p.3.)

ISSUE

Did the district court err when it denied Mr. Tappin's motion to suppress, because the officers did not have reasonable suspicion to lawfully expand the traffic stop for investigation into drug activity, and thus his consent to a search was ineffective?

ARGUMENT

The District Court Erred When It Denied Mr. Tappin's Motion To Suppress, Because The Officers Did Not Have Reasonable Suspicion To Lawfully Expand The Traffic Stop For Investigation Into Drug Activity, And Thus His Consent To A Search Was Ineffective

Mr. Tappin asserts that the district court erred when it denied his motion to suppress. The officers did not have the requisite reasonable suspicion to lawfully expand the traffic stop for investigation into drug activity. Mr. Tappin's consent to a search was therefore ineffective.

The standard of review of an order denying a motion to suppress is bifurcated. "When reviewing an order granting or denying a motion to suppress, [an appellate court] defers to the findings of fact of the trial court unless they are clearly erroneous." *State v. DuValt*, 131 Idaho 550, 552-53 (1998). "Additionally, any implicit findings of the trial court supported by substantial evidence should be given due deference." *Id.* at 553. However, an appellate court "exercises free review over whether constitutional requirements have been satisfied in light of the facts found." *Id.*

"A traffic stop is subject to the Fourth Amendment restraint against unreasonable searches and seizures." *State v. Sheldon*, 139 Idaho 980, 983 (Ct. App. 2003). A routine traffic stop, typically of limited scope and duration, is analyzed under the principles set forth in *Terry v. Ohio*, 392 U.S. 1 (1968), because it is more analogous to an investigative detention than a custodial arrest. *Id.* "Under *Terry*, an investigative detention is permissible if it is based upon specific articulable facts which justify suspicion that the detained person is, has been, or is about to be engaged in criminal activity." *Id.* Under this standard, the "totality of the circumstances then known to the officer . . . must show a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Id.* (internal quotation marks omitted).

“To meet the constitutional standard of reasonableness, an investigative detention must not only be justified by reasonable suspicion at its inception, but also must be reasonably related in scope to the circumstances that justified the stop in the first place.” *Id.* However,

[a]ny routine traffic stop might turn up suspicious circumstances which could justify an officer asking questions unrelated to the stop. The officer’s observations, general inquiries, and events succeeding the stop may—and often do—give rise to legitimate reasons for particularized lines of inquiry and further investigation by an officer.

Id. (internal quotation marks omitted). Thus, “the length and scope of the stop may be lawfully expanded if the detaining officer can point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Id.* (internal quotation marks omitted).

In this case, the district court concluded that the traffic stop was justified because the driver of the car made several traffic violations, and once the stop was made, nothing precluded the officers from asking Mr. Tappin for consent to a search. (R., p.78.) Mr. Tappin concedes that the traffic stop of the vehicle, for failure to signal and for other traffic violations, was valid at its inception. See I.C. § 49-808(1); *State v. Pressley*, 131 Idaho 277, 279 (Ct. App. 1998). A traffic violation, as an unlawful activity, in itself justifies a traffic stop. *DuValt*, 131 Idaho at 553. Thus, this appeal concerns whether the traffic stop remained reasonably related in scope to the circumstances that justified the stop in the first place. Mr. Tappin asserts that the officers did not have the requisite reasonable suspicion to lawfully expand the traffic stop for investigation into drug activity. Mr. Tappin also asserts that because the officers unlawfully expanded the traffic stop, he was being subjected to an illegal detention at the time that he was asked for his consent to a search, and his consent was therefore ineffective.

A. Under The Totality Of The Circumstances, The Officers Did Not Have The Requisite Reasonable Suspicion To Lawfully Expand The Traffic Stop For Investigation Into Drug Activity

Mr. Tappin asserts that, under the totality of the circumstances in this case, the officers did not have the requisite reasonable suspicion to lawfully expand the traffic stop for investigation into drug activity.

Immediately after the traffic stop began, Detective Bruner told Mr. Tappin to place his hands on top of his head. (Tr., p.78, Ls.16-19). Officer McCarthy then asked if Mr. Tappin was in possession of any weapons or contraband, and asked for permission to search Mr. Tappin's person. (Tr., p.79, Ls.21-25.) Detective Bruner then asked Mr. Tappin what his address was. (Tr., p.78, L.24 – p.79, L.2, p.81, L.21 – p.82, L.2.) Both Officer McCarthy's questions and Detective Bruner's question about Mr. Tappin's address happened within a minute or two of the initial stop. (Tr., p.81, L.15 – p.82, L.2.)

Mr. Tappin submits that these questions expanded the length and scope of the traffic stop. After conducting the traffic stop, the officers immediately launched into their questions without any effort to further pursue the initial purpose of the traffic stop, namely the issuance of a citation for failure to signal and other traffic violations. See *State v. Aguirre*, 141 Idaho 560, 564 (Ct. App. 2005). In fact, Detective Bruner did not mention the failure to signal in his police report, and Mr. Dougal was never cited for a traffic violation. (Tr., p.117, Ls.19-24, p.119, Ls.5-12.)

Although the questioning in this case only took a minute or two, it extended the duration of the traffic stop beyond what was necessary to address the traffic violations. The Idaho Court of Appeals, as explored in *Aguirre*, 141 Idaho at 563-64, has decided several cases dealing with this issue. In *Aguirre* itself, the court concluded that the use

of a drug dog, without reasonable suspicion of a drug-related offense, impermissibly extended the duration of a traffic stop. *Aguirre*, 141 Idaho at 564. The officers in *Aguirre* did not concurrently resolve the traffic violation and investigate drug activity. *Id.* Rather, “the collective effort of the police was uniformly directed at a drug investigation completely unrelated to the traffic stop. The purpose that justified the stop---the issuance of a traffic citation---was immediately abandoned.” *Id.* The defendant in *Aguirre* received a traffic citation only after he had been arrested on different charges. *Id.*

Similarly, in another case the court held that it was unlawful for an officer to question a driver about matters unrelated to the traffic stop after the officer fulfilled the purpose of the traffic stop by issuing a written warning to the driver. *State v. Gutierrez*, 137 Idaho 647, 651-53 (Ct. App. 2002). The questioning, even though it only extended the duration of the stop by sixty to ninety seconds, was “an unwarranted intrusion upon the vehicle occupants’ privacy and liberty.” *Id.* at 652.

In contrast, the Idaho Court of Appeals held that an officer’s request to search a car was permissible where the request was made right after the officer completed a traffic citation, and the request lengthened the process only by a second or two. *State v. Silva*, 134 Idaho 848, 852-53 (Ct. App. 2000). Additionally, in another case the court decided it was lawful for one officer to question a vehicle’s driver about drugs and weapons and run a drug dog around the car, while another officer checked the driver’s status with dispatch and completed a traffic citation. *State v. Parkinson*, 135 Idaho 357, 362-63 (Ct. App. 2000). In *Silva* and *Parkinson*, “the questioning and use of a drug dog did not extend the duration of the stop beyond that which was necessary to address the traffic violation.” *Aguirre*, 141 Idaho at 563.

Here, the officers' questioning extended the duration of the traffic stop beyond that which was necessary to address the traffic violations. The circumstances of this case are similar to those in *Aguirre* and *Gutierrez*. Like the officers in *Aguirre*, 141 Idaho at 564, the officers in this case uniformly directed their efforts at a drug investigation, without attempting to resolve the traffic violations. Thus, just as the use of a drug dog extended the duration of the traffic stop in *Aguirre*, 141 Idaho at 564, the questioning extended the duration of the traffic stop in this case. The duration of the questioning here—one to two minutes—is similar to the duration of the impermissible questioning (sixty to ninety seconds) in *Gutierrez*, 137 Idaho at 562.

This case is readily distinguishable from *Silva* and *Parkinson* because, in those cases, the officers had completed or were in the process of completing a traffic citation—the initial purpose of the traffic stop—when the officers requested a search. *Silva*, 134 Idaho at 853, *Parkinson*, 135 Idaho at 363. In this case, the officers never initiated, much less completed, a traffic citation. Further, the questioning in *Silva* only took a few seconds, 134 Idaho at 853, as opposed to one or two minutes in this case. Mr. Tappin therefore submits that the officers' questioning extended the duration of the traffic stop beyond that which was necessary to address the traffic violations.

Thus, to expand the length and scope of the traffic stop with their line of questioning on drug activity, the officers in this case would have needed reasonable suspicion that Mr. Tappin was involved in a drug-related offense. See *Aguirre*, 141 Idaho at 564. However, the totality of the circumstances does not show that the officers had, at the time, "specific and articulable facts which, taken together with rational inferences from those facts, [would] reasonably warrant" expanding the length and scope of the traffic stop. See *Sheldon*, 139 Idaho at 983.

When the officers began questioning Mr. Tappin, they possessed the following information: (1) Mr. McDaniel had traveled with “Mikey” to Seattle to purchase heroin, (2) Mr. McDaniel had walked to Mikey’s house from the vicinity of Malad and Virginia Streets to pick up a digital scale, (3) Mr. McDaniel had been seen walking from the yard area of one of two houses on Virginia Street, (4) Mr. Dougal had driven his vehicle, committed several traffic violations, and parked at several locations in the area, (5) Mr. Tappin had left 2423 Virginia (one of the two houses) and got into Mr. Dougal’s vehicle, and (6) Mr. Tappin had been seen reaching into his waistband area and then moving his hands out of sight. (*Supra*, pp.1-3.)

Mr. Tappin submits that this information is insufficient to establish reasonable suspicion that he was involved in a drug-related offense. Because the surveillance team never actually saw which one of the two houses Mr. McDaniel had exited and could not identify which address he had come from, (Tr., p.65, Ls.5-19), the officers did not have any specific and articulable facts connecting Mr. McDaniel and his drug activity to Mr. Tappin. *Cf. Sheldon*, 139 Idaho at 985 (concluding that officers’ personal knowledge of drug activity committed in a defendant’s house, informants’ tips that the defendant was dealing drugs, the defendant’s association with known drug offenders, officers’ knowledge that the defendant had left a house associated with drug activity, and the defendant’s appearance with bloodshot, glassy eyes apparently not caused by alcohol consumption, were sufficient to create reasonable suspicion of illegal drug activity). Unlike the officers in *Sheldon*, the officers here had no information that Mr. Tappin was dealing drugs or living in a house where drug activity had been committed. Further, the officers had no information showing that Mr. Tappin had even

exited the same house Mr. McDaniel had come from. There was also no testimony or other evidence that Mr. Tappin's appearance indicated any drug activity.

"[R]easonable suspicion requires more than a mere hunch or inchoate and unparticularized suspicion." *State v. Bishop*, 146 Idaho 804, 811 (2009) (internal quotation marks omitted). At best, the officers here had a mere hunch that Mr. Tappin was involved in drug activity. Thus, the above information is insufficient to create reasonable suspicion to justify the officers' expansion of the traffic stop. Mr. Tappin therefore asserts that, under the totality of the circumstances in this case, the officers did not have the requisite reasonable suspicion to lawfully expand the traffic stop for investigation into drug activity.

B. Because Mr. Tappin Was Being Subjected To An Illegal Detention, His Consent To A Search Was Ineffective

Mr. Tappin asserts that he was being subjected to an illegal detention when he was asked for his consent to a search, and his consent was therefore ineffective. "A consent to search given during an illegal detention is tainted by the illegality and is therefore ineffective." *Gutierrez*, 137 Idaho at 652. An illegal detention occurs where an individual is detained "even momentarily without reasonable, objective grounds for doing so," such as where officers have unlawfully extended a traffic stop. *Id.* (internal quotation marks omitted).

Here, Officer McCarthy asked for permission to search Mr. Tappin's person, and Mr. Tappin granted his consent. (Tr., p.79, L.24 – p.80, L.2.) While Mr. Tappin consented to a search of his person, by the time he consented the officers had unlawfully expanded the traffic stop and he was therefore being subjected to an illegal

detention. See *Gutierrez*, 137 Idaho at 652. Thus, Mr. Tappin's consent to a search was ineffective.

The officers in this case did not have the requisite reasonable suspicion to lawfully expand the traffic stop for investigation into drug activity. Mr. Tappin was being subjected to an illegal detention when he was asked to consent to a search, and his consent was therefore ineffective. Thus, the district court erred when it denied Mr. Tappin's motion to suppress.

CONCLUSION

Mr. Tappin respectfully requests that this Court vacate the district court's order of judgment and commitment and reverse the order which denied his motion to suppress.

DATED this 19th day of February, 2013.



BEN PATRICK MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

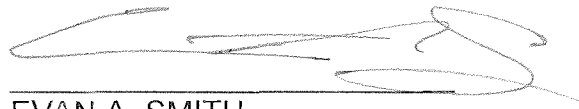
I HEREBY CERTIFY that on this 19th day of February, 2013, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

MICHAEL WILLIAM TAPPIN
INMATE #104821
ICC
PO BOX 70010
BOISE ID 83707

DEBORAH A BAIL
DISTRICT COURT JUDGE
E-MAILED BRIEF

RANDALL BARNUM
ATTORNEY AT LAW
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.



EVAN A. SMITH
Administrative Assistant

BPM/eas