

11-27-2013

# State v. Pendergrass Appellant's Reply Brief Dckt. 40914

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, )  
 )  
Plaintiff-Respondent, ) NO. 40914  
 )  
v. )  
 )  
KIRK LEE PENDERGRASS, ) REPLY BRIEF  
 )  
Defendant-Appellant. )  
\_\_\_\_\_ )

REPLY BRIEF OF APPELLANT

\_\_\_\_\_

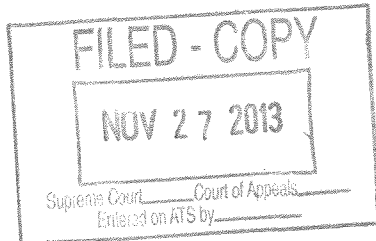
APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF ADA

\_\_\_\_\_

HONORABLE MICHAEL R. McLAUGHLIN  
District Judge

\_\_\_\_\_

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CASES

*State v. Cerino*, 141 Idaho 736, 738, 117 P.3d  
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I. STATEMENT OF THE CASE

A. Nature of the Case

Mr. Pendergrass renews his statement of the Nature of the Case as set forth in Appellant's Brief filed September 12, 2013.

B. Statement of Facts and Course of Proceedings

Mr. Pendergrass renews his Statement of Facts and Course of Proceedings as set forth in Appellant's Brief filed September 12, 2013.

## II. ARGUMENT

### A. The Magistrate Did Not Make A Sufficient Finding That Officer Olson Identified Mr. Pendergrass Prior To Initiating The Traffic Stop.

Mr. Pendergrass does not argue that State v. Cerino requires that Officer Olson positively identify him as the driver before he may initiate the traffic stop, however Mr. Pendergrass does assert that "mere observation of a vehicle being driven by someone of the same gender as the unlicensed owner is insufficient to give rise to a reasonable suspicion of unlawful activity." State v. Cerino, 141 Idaho 736, 738, 117 P. 3d, 876, 878. Here, the testimony presented was that Ofc. Olsen learned that Mr. Pendergrass was the registered owner of a Toyota truck. (6/18/12 Tr. p. 10 Ll. 9-14; Tr. p. 16 L. 1 through p. 17 L. 9) Ofc. Olsen also learned that Mr. Pendergrass' driving privileges were suspended. (6/18/12 Tr. p. 17 Ll. 4-10) Although Ofc. Olson could not remember the traffic stop very well he testified that he most likely ran the plate and "before he was able to get the driver's license returned" he lost sight of Mr. Pendergrass but looked for him for the next ten minutes until he found him. (6/18/12 Tr. p. 18 L. 22 though p. 19 L. 10) These ten minutes "looking for him" were prior to Ofc. Olson seeing a photo of Mr. Pendergrass because the driver's license had not returned before he lost sight of the truck. (6/18/12 Tr. p. 19 Ll. 3-10) Ofc. Olsen stopped Mr.

Pendergrass based upon running the registration and seeing that the registered owner's license was suspended. (6/18/12 Tr. p 20 Ll. 3-6) Ofc. Olson did not witness any traffic violations committed by the truck. (6/18/12 Tr. p. 20 Ll. 7-9) Ofc. Olson could not recall when he first saw Mr. Pendergrass' truck. (6/18/12 Tr. p. 20 Ll. 14-18) Ofc. Olson could not recall where he was when he ran the vehicle's registration and the driver's license of the vehicle's owner. (6/18/12 Tr. p. 21 Ll. 20-24) Ofc. Olson could not recall if he followed the truck or passed the truck when he saw it first. (6/18/12 Tr. p. 22 ll. 6-9) Ofc. Olson could not recall if Mr. Pendergrass' truck was being driven when he first saw the truck. (6/18/12 Tr. p. 22 Ll. 12-14) Ofc. Olson could not recall if he identified Mr. Pendergrass as the driver before he initiated the traffic stop. (6/18/12 Tr. p. 23 Ll. 1-5) Ofc. Olson did testify that he identified Mr. Pendergrass as the driver at the time he pulled him over. (6/18/12 Tr. p. 22Ll. 15-21) Ofc. Olson further testified when the two cars passed that he could identify Mr. Pendergrass as the driver. (6/18/12 Tr. p. 22Ll. 15-25)

Mr. Pendergrass disputes the District Court's finding and the State's argument that the magistrate found in the Memorandum Order Regarding Motion to Suppress that Ofc. Olsen identified Mr. Pendergrass as the driver of the truck. (R. p. 120; Respondent's Brief p. 11; R. pp. 53-59) Further, if the

magistrate did find that Ofc. Olson identified Mr. Pendergrass prior to initiating the traffic stop that finding was not supported by the evidence adduced at the hearing as argued in the Appellant's Brief. The finding that Ofc. Olson identified Mr. Pendergrass was not required by the magistrate's decision as analysis did not include the required Cerino analysis.

The State argues that Mr. Pendergrass ignored the magistrate's finding and cites to the magistrate's Memorandum Order in support. (Respondent's Brief p. 11) The citation to which the State refers is to an earlier mention in the Memorandum Order that Ofc. Olsen "identified Pendergrass as the driver of that truck." *Id.* However, while that quotation does appear in the "Findings of Fact" section of the Memorandum Order it is a recitation of Ofc. Olsen testimony and is at odds with the magistrate's recitation of Mr. Pendergrass' contention. (R. p. 55) In the next sentence, the magistrate found that Ofc. Olsen testified that he "most likely" identified Pendergrass as the driver. (R. p. 55) Mr. Pendergrass asserts that this language in the Memorandum Order does not rise to the level of making a finding that Ofc. Olsen identified Mr. Pendergrass as they passed. The State seeks to examine these "Findings of Fact" and the Concluding paragraph together to determine that the magistrate properly found that Ofc. Olsen identified Mr. Pendergrass as the driver before initiating the traffic stop.



(Respondent's Brief p. 11; See also R. pp. 55, 59) However, taking the entire Memorandum Decision and Order together, Mr. Pendergrass asserts the magistrate did not make a conclusive finding that Ofc. Olson identified Mr. Pendergrass prior to the stop.

The State asserts that the magistrate made a factual finding that Ofc. Olsen identified Mr. Pendergrass as the driver based upon a sentence in the analysis section. However, the State ignores contradictory items in the Memorandum Decision and Order. These include the next sentence in the findings of fact that Ofc. Olson "most likely" identified Mr. Pendergrass; the statement in the analysis that Ofc. Olsen "likely identified Pendergrass as the driver and promptly initiated a traffic stop"; and that the conclusion lacks any discussion as to whether or not Mr. Pendergrass had been identified as the driver before the traffic stop was initiated. (R. p. 55; R. p. 59; R. p. 59)

The magistrate does note in the analysis section of the Memorandum Decision and Order that "Olsen. . . identified Pendergrass as the driver of the Toyota truck." (R. pp. 57-58) However, the magistrate doesn't make an overt finding anywhere else that Ofc. Olsen did identify Mr. Pendergrass. The State may have been referencing this section of magistrate's Memorandum Decision and Order in its argument that Mr.


Pendergrass ignored the magistrate's finding, but at the end of the Analysis section the magistrate again notes that Ofc. Olsen "likely identified" Pendergrass as the driver of the truck. (R. p. 59, Respondent's brief p. 11 *citing to* R. pp. 55, 59) Further, in the Conclusion of the Memorandum Decision and Order the magistrate found that because Ofc. Olsen learned that the truck "was registered to Pendergrass and that Pendergrass's driving privileges were suspended. Thus, there was a valid reason for the traffic stop." (R. p. 59) There is nothing in the Conclusion to support that the magistrate made a finding that the identification occurred prior to the stop or that the magistrate relied upon that finding if it was made.

Ofc. Olsen did testify that he identified Mr. Pendergrass as the driver as they passed each other but in response to the next question indicated that he couldn't say if he had identified Mr. Pendergrass before. (6/18/12 Tr. p. 22 L. 15 through p. 23 L. 4.) He could only give a most likely scenario. *Id.* It's clear from this exchange that Ofc. Olsen could not testify as to when he first identified Mr. Pendergrass. He testified that he identified Mr. Pendergrass but when asked if he had identified Mr. Pendergrass prior, Ofc. Olsen could not remember and again could only give a "most likely" response. (6/18/12 Tr. p. 23 Ll. 1-4)

### **III. CONCLUSION**

This Court should hold that the magistrate's decision, and the District Court's review, denying the defendant's motion to suppress, does not meet the constitutional standard set in *State v. Cerino*, because it does not contemplate whether the officer had a reasonable, articulable suspicion that Mr. Pendergrass was the driver prior to initiating the stop. Even if this court finds that the magistrate court did contemplate the identification as part of its decision, this court should hold the finding is clearly erroneous because it is not corroborated by Ofc. Olsen's testimony or the dashboard video. Ofc. Olsen could not testify with certainty how or when he identified Mr. Pendergrass, but could only offer a "likely" scenario. Ofc. Olsen likely could not have identified Mr. Pendergrass with enough particularized suspicion, in the split second as their vehicles passed, to justify stopping him. As such, this Court should reverse the magistrate's denial of Mr. Pendergrass' Motion to Suppress and the District Court's affirmation of the magistrate's decision.

Dated this 27<sup>th</sup> day of November, 2013.

  
**ADAM KIMBALL**  
**Attorney for Appellant**

IV. CERTIFICATE OF MAILING

I HEREBY CERTIFY, That on this 27th day of November, 2013,  
I mailed a true and correct copy of the foregoing, **APPELANT'S**  
**REPLY BRIEF**, to:

LAWRENCE G. WASDEN  
ATTORNEY GENERAL  
STATEHOUSE ROOM 210  
BOISE IDAHO 83720

by depositing the same in the Interdepartmental Mail.

  
Stephanie Martinez