6-6-2014

State v. Neal Respondent's Brief Dckt. 41534

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	No. 41534
Plaintiff-Respondent,	)	
	)	Ada Co. Case No.
vs.	)	CR-MD-2012-17239
	)	
NATHAN DAVID NEAL,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

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

HONORABLE L. KEVIN SWAIN, Magistrate Judge
HONORABLE MICHAEL R. MCLAUGHLIN, District Judge

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Nature of the Case

Nathan David Neal appeals from the district court's appellate decision reversing the magistrate's order that granted Neal's motion to suppress evidence in his prosecution for driving under the influence of alcohol (DUI).

Statement of Facts and Course of Proceedings

At approximately midnight on November 14, 2012, Boise City Police Officer Ryan Thueson was travelling west on State Street when he observed Neal, who was driving a white pickup truck, "drive onto, but not across, the fog line near the intersection of State [Street] and Ellen's Ferry Drive." (R., p.101; Tr.[1], p.8, Ls.9-25, p.10, Ls.11-24, p.25, Ls.11-24, p.30, L.12 – p.31, L.23, p.33, Ls.16-18, p.37, Ls.18-20.) The officer "follow[ed] the truck and saw the right tires again drive on, but not across, a bike lane about one mile further on," near State Street and Gary Lane. (R., p.101; Tr., p.18, L.24 – p.19, L.6, p.31, L.20 – p.32, L.19, p.33, Ls.10-15, p.37, Ls.21-25.) The officer effectuated a traffic stop and, ultimately, arrested Neal for DUI. (R., p.101; Tr., p.20, Ls.20-24, p.33, L.24 – p.34, L.5.)

The state charged Neal with a second offense DUI. (R., pp.5, 28-29.) Neal moved to suppress the evidence against him, claiming the traffic stop – based on what Neal initially characterized as a "single instance of fog line

[1] All citations herein to "Tr." are to the transcript of the suppression hearing conducted on February 19, 2013, before Magistrate Swain. That transcript is included as an exhibit in the appellate record. (R., p.237.)

touching" – "was not constitutionally permissible." (R., pp.11-12, 32-39; see also R., pp.85-90.) Following an evidentiary hearing at which both Neal and Officer Thueson testified (see generally Tr.), the state proffered three separate justifications for the stop: (1) Neal's acts of driving on the fog line and bicycle lane mark violated Idaho Code § 49-637, (2) Neal's act of driving on the bicycle lane marker violated Boise City Code § 10-10-17, and (3) Neal's driving pattern supplied the officer with reasonable suspicion that Neal was driving under the influence of alcohol, in violation of Idaho Code § 18-8004 (R., pp.78-84). The magistrate rejected each of the state's proffered justifications and granted Neal's motion to suppress. (R., pp.101-03.) The state timely appealed to the district court, which reversed. (R., pp.149-51, 217-29.) Neal timely appealed from the district court's appellate decision. (R., pp.230-36.)

ISSUES

Neal states the issues on appeal as:

A. Whether the district court erred by holding that the fog line is not part of the lane.

B. Whether the district court erred when, among other things, it interpreted Idaho Code § 49-637 to require near-perfect driving by motorists, despite the state's limiting language that driving need only be within a lane "as nearly as practicable."

C. Whether the district court erred when it found, contrary to the magistrate's factual finding, that there existed sufficient evidence to prove that the relevant events occurred within Boise City limits.

D. Whether, if the Boise City Code could apply, the district court erred by concluding that a violation of the code occurred.

E. Whether the district court erred by holding that a law enforcement officer's mistake of law is sufficient to constitute reasonable articulable suspicion that a traffic violation occurred, when the state never argued that the district court should so hold.

(Appellant's brief, pp.2-3.)

The state rephrases the issue as:

Has Neal failed to show error in the district court's appellate decision reversing the magistrate's order suppressing evidence?

ARGUMENT

Neal Has Failed To Show Error In The District Court's Appellate Decision Reversing The Magistrate's Order Suppressing Evidence

A. Introduction

The district court reversed the magistrate's order granting Neal's motion to suppress, ruling that Neal's acts of driving on a fog line and bicycle lane marker supplied the officer with reasonable suspicion that Neal had violated traffic laws. (R., pp.217-29.) Neal challenges the district court's decision, arguing as he did below that his conduct was neither unlawful nor sufficiently outside the normal range of driving behavior to give rise to reasonable suspicion justifying the traffic stop. (See generally, Appellant's brief.) Neal's arguments fail. Correct application of the law to the facts of this case supports the district court's conclusion that the stop was constitutionally reasonable.

B. Standards Of Review

On review of a decision rendered by a district court in its intermediate appellate capacity, the reviewing court "directly review[s] the district court's decision." State v. DeWitt, 145 Idaho 709, 711, 184 P.3d 215, 217 (Ct. App. 2008) (citing Losser v. Bradstreet, 145 Idaho 670, 183 P.3d 758 (2005)).

When a decision on a motion to suppress is challenged, the appellate court accepts the trial court's findings of fact that are supported by substantial evidence, but freely reviews the application of constitutional principles to those facts. State v. Diaz, 144 Idaho 300, 302, 160 P.3d 739, 741 (2007).

The interpretation and construction of a statute present questions of law over which the appellate court exercises free review. State v. Thompson, 140 Idaho 796, 798, 102 P.3d 1115, 1117 (2004).

C. The District Court Correctly Applied The Law To The Facts In Concluding The Traffic Stop Was Justified By Reasonable Suspicion That Neal Had Violated Traffic Laws

"A traffic stop by an officer constitutes a seizure of the vehicle's occupants and implicates the Fourth Amendment's prohibition against unreasonable searches and seizures." State v. Young, 144 Idaho 646, 648, 167 P.3d 783, 785 (Ct. App. 2006) (citing Delaware v. Prouse, 440 U.S. 648, 653 (1979)). Ordinarily, a warrantless seizure must be based on probable cause to be reasonable. Florida v. Royer, 460 U.S. 491, 499-500 (1983); State v. Bishop, 146 Idaho 804, 811, 203 P.3d 1203, 1210 (2009). However, limited investigatory detentions, based on less than probable cause, are permissible when justified by an officer's reasonable, articulable suspicion that a person has committed, or is about to commit, a crime. Royer, 460 U.S.at 498; Bishop, 146 Idaho at 811, 203 P.3d at 1210. "An officer may also stop a vehicle to investigate possible criminal behavior if there is reasonable articulable suspicion that the vehicle is being driven contrary to traffic laws." Young, 144 Idaho at 648, 167 P.3d at 785 (citing United States v. Cortez, 449 U.S. 411 (1981)). "Reasonable suspicion requires less than probable cause but more than speculation or instinct on the part of the officer." State v. Horton, 150 Idaho 300, 302, 246 P.3d 673, 675 (Ct. App. 2010) (citation omitted). Whether an officer possessed reasonable suspicion is evaluated based on the totality of the circumstances known to the officer at or

before the time of the stop. Bishop, 146 Idaho at 811, 203 P.3d at 1210; State v. Sheldon, 139 Idaho 980, 983, 88 P.3d 1220, 1223 (Ct. App. 2003).

In this case, it is undisputed that Officer Thueson stopped Neal because, within the span of approximately one mile, he observed Neal drive on top of a fog line and then on top of a white line demarcating a bicycle lane. (Tr., p.35, Ls.10-23.) Reversing the magistrate, the district court concluded Neal's acts of "driving upon the flog line and upon the bike lane marker" supplied the officer with reasonable suspicion that Neal had violated Idaho Code § 49-637 ("Driving on Highways Laned for Traffic") and Boise City Code § 10-10-17 ("Operating Motorized Vehicles on Bike Lanes and Bike Paths"). (R., pp.222-26.) Contrary to Neal's assertions on appeal, correct application of the rules of statutory construction supports the district court's determination.

1. The District Court Correctly Applied The Law To The Facts In Concluding That Neal's Acts Of Driving On Top Of Both A Fog Line And A Bicycle Lane Marker Violated I.C. § 49-637

The objective of statutory interpretation is to give effect to legislative intent. State v. Pina, 149 Idaho 140, 144, 233 P.3d 71, 75 (2010); Robison v. Bateman-Hall, Inc., 139 Idaho 207, 210, 76 P.3d 951, 954 (2003). Because the best guide to legislative intent is the wording of the statute itself, the interpretation of a statute must begin with its literal words. Verska v. Saint Alphonsus Reg'l Med. Ctr., 151 Idaho 889, 893, 265 P.3d 502, 506 (2011); State v. Doe, 147 Idaho 326, 328, 208 P.3d 730, 732 (2009). The words of a statute "'must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. If the statute is not ambiguous, this Court does not

construe it, but simply follows the law as written.'" Verska, 151 Idaho at 893, 265 P.3d at 506 (quoting State v. Schwartz, 139 Idaho 360, 362, 79 P.3d 719, 721 (2003)). "[W]here statutory language is unambiguous, legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the legislature." Id. (quoting City of Sun Valley v. Sun Valley Co., 123 Idaho 665, 667, 851 P.2d 961, 963 (1993)).

Idaho Code § 49-637 governs the operation of motor vehicles "on highways laned for traffic" and provides, in relevant part:

> Whenever any highway has been divided into two (2) or more clearly marked lanes for traffic the following, in addition to all else, shall apply:
>
> (1) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from that lane until the driver has first ascertained that the movement can be made with safety.

I.C. § 49-637(1). Interpreting this statute, the district court concluded "the lane that the driver is required to stay in or maintain does not include the lane markings. A vehicle has not maintained its lane and is not in its lane, if it is on the lane markings." (R., pp.223-24.) Because it was undisputed that Neal drove on top of both a fog line and a bicycle lane marker, while driving on a highway that had been divided into two or more clearly marked traffic lanes, the district court concluded the officer had reasonable suspicion that Neal violated I.C. § 49-637(1).

Neal challenges the district court's ruling on two bases. First, he argues the court erred by holding a vehicle exits its lane by touching, but not crossing over, a fog line or bicycle lane marker. (Appellant's brief, pp.5-11.) Second, he

argues the court erred by interpreting the statute to require "near-perfect driving" when, according to Neal, the "as nearly as practicable" language of the statute "unambiguously permits minor driving imperfections." (Id., pp.11-17.) Neither of Neal's challenges withstand analysis under established rules of statutory interpretation and relevant case law.

a. The District Court Correctly Concluded A Vehicle Exits Its Lane By Driving Upon A Fog Line And Bicycle Lane Marker

The plain language of I.C. § 49-637(1) requires drivers travelling on highways divided into two or more clearly marked traffic lanes to drive their vehicles "as nearly as practicable entirely within a single lane." For purposes of I.C. § 49-637(1), the word "lane" means "that portion of the roadway for movement of a single line of vehicles." I.C. § 49-121(4). Neither of these statutes expressly indicate whether a painted lane marking – whether it be a centerline, a fog line, a bicycle lane marker, etc. – constitutes part of the traffic lane within which a vehicle must be driven. As found by the district court, however, the only reasonable interpretation of I.C. § 49-637(1) – and the only one that gives effect to both the prefatory language of the statute and the words "entirely within" in subsection (1) – is that painted lane markings are not themselves part of the lanes but are instead merely the markings by which the lanes of a highway are divided. Indeed, when used as a preposition (as it is in I.C. § 49-637(1)), the word "within" ordinarily means "inside (a certain area or space)." See http://www.merriam-webster.com/dictionary/within. Because painted lane markings are what define the area or space that constitutes a lane,

such markings are necessarily not "within" the area or space of the lanes they mark or divide. It therefore follows that a driver who drives his or her vehicle on top of the painted lane markers is not driving "entirely within a single lane" and is therefore guilty of failing to maintain his or her lane in violation of I.C. § 49-637(1).

That painted lane markings are not part of the lanes they mark or divide, such that driving on them constitutes a violation of I.C. § 49-637(1), finds support in at least one Idaho case. See State v. Trottier, 155 Idaho 17, ___, 304 P.3d 292, 297-98 (Ct. App. 2013) (holding officer possessed reasonable suspicion to stop Trottier for violating I.C. § 49-637(1) where the evidence in the record showed that "at least a portion of Trottier's vehicle" "touch[ed] or cross[ed] over the dividing line of the lanes of travel"). In addition, a number of other jurisdictions that have interpreted statutes identical (or nearly identical) to I.C. § 49-637(1)[2] also hold that painted lane markings are not part of the lanes they mark or divide. See, e.g., United States v. Bassols, 775 F.Supp.2d 1293, 1299-1301 (D. N.M. 2011) ("'single lane' contemplated by the New Mexico legislature encompasses only that portion of the roadway that is between the lines or stripes that demarcate the 'single lane'"); State v. Vinson, 734 S.E.2d 182, 183-85 (S.C. Ct. App. 2012) (driver's act of crossing onto, but not over, double yellow lines

[2] The language of Idaho Code § 49-637(1) is nearly identical to that of § 11-309(a) of the Uniform Vehicle Code. See United States v. Jones, 501 F.Supp.2d 1284, 1292 n.10 (quoting, *verbatim*, Uniform Vehicle Code § 11-309(a) (2000)). Because the statute is derived from a uniform act, "a majority of the states in the United States have identical [or nearly identical] statutory provisions." United States v. Bassols, 775 F.Supp.2d 1293, 1299 n.3 (D. N.M. 2011) (and statutes cited therein).

separating opposing lanes of traffic violated plain language of statute that required him to maintain vehicle "entirely within a single lane"); State v. McBroom, 39 P.3d 226, 228 (Or. Ct. App. 2002) ("[T]he phrase 'within a single lane' does not mean 'on' the lines that mark or divide the lanes. Rather, the statute requires that drivers stay 'within' the lines that mark the lanes."). The reasoning of Bassols is particularly instructive.

After an officer witnessed Bassols drive "onto the solid stripe that separated the right lane of Interstate 40 from the shoulder" (*i.e.*, the fog line), the officer stopped Bassols for violating a New Mexico statute that, like I.C. § 49-637(1), states: "'[A] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.'" Bassols, 775 F.Supp.2d at 1298. Bassols challenged the traffic stop arguing, *inter alia*, "that the statutory language 'single lane' includes the lane markers that separate lanes and a lane from shoulder and that a driver who is driving on a lane marker is still 'entirely within a single lane.'" Id. at 1300. The federal district court rejected Bassols' proposed interpretation of the statute, reasoning:

> If a lane of traffic is defined to include the lane dividing lines, then there would be an overlap between each lane on a roadway and two vehicles could legally occupy the same physical space at the same time despite the fact that the vehicles would collide. ... Further, given that the sides of most vehicles extend slightly beyond the outer edge of the tires, a vehicle that is driving with its tire on a lane marker even poses a risk to other vehicles that are not also driving on, but are close to, the lane marker. Thus, the only way to construe [the New Mexico statute] without reaching a result that permits two vehicles to occupy the same physical space is to conclude that the "single lane" contemplated by the New Mexico legislature encompasses only that portion of the roadway

> that is between the lines or stripes that demarcate the "single lane." Because the lane ends at the point that the lane marker begins, a driver who drives on a lane marker has necessarily failed to drive entirely within a single lane.

Id. at 1300-01 (internal citation omitted).

The reasoning of Bassols applies equally in this case. Like the statute at issue in Bassols, the plain language of I.C. § 49-637(1) requires drivers to maintain their vehicles "as nearly as practicable entirely within a single lane." If, as Neal suggests, the painted lines by which lanes of traffic are divided are themselves part of the lanes, the lanes would necessarily overlap such that two vehicles could occupy the dividing lines at the same time. It would also mean that certain parts of a vehicle, such as exterior wheel wells and side view mirrors, would extend beyond the painted lane markers *into* an adjacent lane. Such is not only inconsistent with the unambiguous directive that a "vehicle" be driven "entirely within" a single lane, it also creates an obvious safety concern and could not have been the legislature's intent. In light of the plain language of the statute, and the obvious intent of the legislature in promoting roadway safety, the district court correctly concluded that "the lane that the driver is required to stay in or maintain does not include the lane markings." (R., p.224.)

Without actually discussing the plain language of I.C. § 49-637, Neal argues there are several reasons why the district court misinterpreted it. (Appellant's brief, pp.7-11.) First, he argues that, because he was driving on a fog line, not on a line dividing two lanes of traffic, his conduct did not pose a threat to the safety of any other person or vehicle and, therefore, was not prohibited by I.C. § 49-637(1). This argument fails for two reasons.

First, Neal did not just drive on top of a fog line; he also drove on top of a bicycle lane. (R., p.101.) Although there was no evidence that the bicycle lane was occupied by any cyclists at the time, it is clear that Neal's conduct had at least the potential to endanger other persons or vehicles with whom he was or may have been sharing the road.

Second, and more importantly, the plain language of I.C. § 49-637(1) makes no distinction between center lines, dividing lines, fog lines, bicycle lanes, etc., in defining what a "lane" is. The statute merely provides that when there are "two (2) or more clearly marked lanes for traffic," a vehicle must "be driven as nearly as practicable entirely within a single lane." Just as a center line "clearly mark[s]" the inner boundary of a traffic lane, a fog line and/or bicycle lane "clearly mark[]" the outer boundary of a traffic lane. As such, a driver who maintains his or her vehicle on a fog line or bicycle lane is just as guilty of violating the "single lane" requirement of I.C. § 49-637(1) as one who maintains his or her vehicle on a center lane marker. See Bassols, 775 F.Supp.2d at 1301 ("If a lane does not include the center lane marker of a two lane highway or the lane marker dividing two traveling lanes going in the same direction, then it cannot include the lane marker between the lane and the shoulder."). And, contrary to Neal's assertions, the same safety concerns exist: "Just as a vehicle driving on the line between two lanes could collide with another vehicle driving on that same line, a vehicle driving on the strip between the lane and the shoulder could collide with a vehicle parked on the shoulder." Id. Neal has failed to show any basis for distinguishing between a "fog line" and a center line for purposes of determining whether he

was driving his vehicle "entirely within a single lane" as contemplated by the statute.

Neal next relies on State v. Atkinson, 128 Idaho 559, 916 P.2d 1284 (Ct. App. 1996), for the proposition that "merely touching a line does not constitute exiting one's lane." (Appellant's brief, p.8.) Even a cursory review of Atkinson shows Neal's interpretation of it is incorrect. In that case, an officer conducted a traffic stop after observing Atkinson's vehicle weave back and forth in the roadway, twice touching the center lane marker and once touching the fog line. 128 Idaho at 561, 916 p.2d at 1286. The Idaho Court of Appeals concluded the stop was justified by reasonable suspicion because, "[a]lthough Atkinson's vehicle never *entirely* left its lane of travel," the weaving pattern was an objective indication of impairment. Id. (emphasis added). Relying on the quoted language, Neal argues it is "clear that a lane line is a part of the driver's lane of travel." (Appellant's brief, p.8.) The quoted language says no such thing, however, and, in fact, implies exactly the opposite. If Atkinson's vehicle did not "*entirely leave*" its lane by touching the center line and fog line, it necessarily was not "*entirely within*" its lane when it did so either. Because the plain language of I.C. § 49-637(1) requires a vehicle to be driven "entirely within a single lane," driving the vehicle on the fog line or center line constitutes a violation of the statute.

In a final attempt to show error in the district court's determination that a fog line and bicycle lane marker are not part of the lane within which a driver must maintain his or her vehicle, Neal points to a number of statutes that, he

contends, demonstrate such lines are part of the "roadway" and therefore intended for vehicular travel. (Appellant's brief, pp.8-11.) The state agrees, as a general proposition, that painted lane markings, like the lanes themselves, are usually part of the "roadway" on which both motorized and some non-motorized vehicles travel. Neal, however, was not stopped for leaving the "roadway." He was stopped for failing to maintain his "lane," in violation of I.C. § 49-637(1). Because the question in this case is whether a fog line and bicycle lane marker are part of a "lane," the statutes on which Neal relies to define "roadway" are irrelevant and in no way show error by the district court.

b. The District Court Correctly Interpreted The "As Nearly As Practicable" Language Of I.C. § 49-637(1) As Requiring Motorists To Maintain Their Lanes Of Travel Unless Prevented By Objective Circumstances From Doing So

In addition to challenging the district court's conclusion that a fog line and bicycle lane marker are not part of the lane a driver must maintain under I.C. § 49-637(1), Neal also argues court erred in interpreting the statute "to require near-perfect driving." (Appellant's brief, pp.11-17.) According to Neal, the "as nearly as practicable" language of the statute "provides Idaho's drivers some flexibility" and permits them to stray from their lanes of travel onto painted lane markers, even when there is nothing objectively preventing them from driving entirely within their lanes. (Id.) This Court should reject Neal's proposed interpretation because it is not consistent with the plain language of the statute.

Idaho Code § 49-637(1) unambiguously requires a motorist travelling on a highway with two or more clearly marked lanes to drive his or her vehicle "as nearly as practicable entirely within a single lane." There is no question that the

"as nearly as practicable" language modifies the requirement that a vehicle be driven "entirely within a single lane." Contrary to Neal's assertions, however, the statute does not give motorists the option of failing to maintain their lanes of travel when travelling within lane is possible. The word "practicable," though not defined in the statute, ordinarily means "capable of being put into practice or of being done or accomplished." See http://www.merriam-webster.com/dictionary/practicable. According the word "practicable" this commonly understood meaning leads to the inescapable conclusion that motorists must abide by the requirement to drive "entirely within a single lane" unless something prevents them, or makes them incapable, of doing so.

Relying on case law from other jurisdictions, Neal argues "it is not practicable for a driver to maintain a perfect driving pattern throughout his entire commute" and, as such, minor lane infractions – such as briefly driving on or across a fog line – do not violate the statute and, therefore do not provide any objectively reasonable basis for a traffic stop. (Appellant's brief, pp.13-17 (and cases cited therein).) The state recognizes there is a split of authority on this issue among the jurisdictions that have interpreted similar statutory language. However, the state submits that the better reasoned cases, and the ones that give effect to the plain language of the statutory language at issue, are those that reject a bright-line rule that "minor" lane breaches can never be a violation of the statute and hold instead that whether maintaining a vehicle "entirely within a single lane" is "practicable" is an objective inquiry that will necessarily vary depending on the facts and circumstances of each case. See, e.g., United

States v. Bassols, 775 F.Supp.2d 1293, 1302-03 (D. N.M. 2011) (rejecting argument that single instance of crossing lane marker is insufficient as a matter of law to justify traffic stop for violating statutory provision nearly identical to I.C. § 49-637(1)); United States v. Alvarado, 430 F.3d 1305, 1308-09 (10th Cir. 2005) (determining whether single instance of crossing traffic line violates an "as nearly as practicable" statute necessitates a "fact-specific inquiry into the particular circumstances present during the incident in question in order to determine whether the driver could reasonably be expected to maintain a straight course at that time in that vehicle on that roadway"); State v. Wolfer, 780 N.W.2d 650, 652-53 (N.D. 2010) (joining jurisdictions that "focus on the reasonableness of an officer's suspicion in light of the facts surrounding the stop as they reflect the practicability of maintaining a single lane of traffic"); State v. Hett, 834 N.W.2d 317, 320-23 (S.D. 2013) (same); State v. McBroom, 39 P.3d 226, 228-29 (Or. Ct. App. 2002) ("What is practicable or feasible will vary with the circumstances of each case."). Applying this objective inquiry to the facts of this case easily supports the district court's conclusion that the officer was justified in stopping Neal for failing to drive "as nearly as practicable entirely within a single lane," in violation of I.C. § 49-637(1).

The evidence presented at the suppression hearing established that, when Officer Thueson observed Neal, he was driving on a straight stretch of State Street, at or about midnight, with little or no other traffic. (Tr., p.8, L.9 – p.9, L.24, p.13, Ls.12-20, p.30, L.12 – p.32, L.10, p.34, Ls.16-18; Defendant's Exhibits A-G.) Within the span of approximately one mile on that straight stretch

of otherwise largely unoccupied road, Neal drove on top of the fog line and then on top of a bicycle lane marker. (Tr., p.31, L.17 – p.32, L.24.) Neither Neal nor the officer testified that there was any obstacle in the road or other circumstance that would have prevented Neal from maintaining his vehicle "entirely within" his lane. (See generally Tr.) Given these facts, the officer was reasonably justified in stopping Neal for violating I.C. § 49-637(1). Neal has failed to show any basis for reversal of the district court's appellate decision.

2. Alternatively, The District Court Correctly Concluded That Neal's Act Of Driving On Top Of A Bicycle Lane Marker Violated Boise City Code § 10-10-17

Before the magistrate, the state argued Neal's act of driving on top of the bicycle lane marker near the intersection of State Street and Gary Lane violated Boise City Code § 10-10-17, which prohibits the operation of motorized vehicles on bicycle lanes and paths. (R., pp.80-82.) The magistrate rejected this argument, finding there was no evidence Neal's conduct occurred in Boise. (R., p.102.) The district court gave no deference to the magistrate's factual finding, concluding the testimony at the suppression hearing established the acts upon which the stop was based occurred in Boise. (R., pp.222-23, p.223 n.5.) The court also concluded the traffic stop was justified because Neal's act of driving on the bicycle lane marker violated the Boise City ordinance. (R., pp.222-23.)

Neal argues on appeal that the district court erred by invading the fact-finding province of the magistrate. (Appellant's brief, pp.17-20.) He also argues that even if the evidence supports a finding that his conduct occurred in Boise, the district court erred by finding a violation of Boise City Code § 10-10-17.

(Appellant's brief, pp.20-24.) For the reasons that follow, neither of Neal's arguments has merit.

a. The District Court Acted Within Its Authority And Correctly, Albeit Implicitly, Concluded The Magistrate's Factual Finding – That There Was "No Evidence" Neal's Conduct Occurred In Boise – Was Clearly Erroneous

It is well-settled that, in evaluating a ruling on a motion to suppress, an appellate court must defer to the factual findings of the trial court, unless those findings are clearly erroneous. State v. Diaz, 144 Idaho 300, 302, 160 P.3d 739, 741 (2007). A factual finding is clearly erroneous if it is not supported by substantial and competent evidence in the record. State v. Trottier, 155 Idaho 17, ___, 304 P.3d 292, 298 (Ct. App. 2013). "Clearly erroneous factual findings are not entitled to [the appellate court's] deference." Id.

On appeal, Neal concedes the district court articulated the correct legal applicable to its review of the magistrate's factual findings. (Appellant's brief, p.19.) He argues, however, that the district court failed to correctly apply those legal standards and effectively substituted its view of the evidence for that of the magistrate's with respect to whether Neal's acts of driving on the fog line and bicycle lane marker occurred in Boise. (Id., pp.19-20.) The state agrees with Neal that the "district court afforded no deference" to the magistrate's finding that there was "no evidence" that the relevant driving conduct occurred in Boise. (Id., p.20.) Contrary to Neal's assertions, however, the district court was not required to defer to the magistrate's factual finding because a review of the record shows it was not supported by substantial and competent evidence.

At the suppression hearing, Neal specifically testified that he "lived in the city of Boise," "north of State Street, west of Gary Lane." (Tr., p.8, Ls.14-17.) He also testified that, on the evening Officer Thueson stopped him, he was driving his vehicle westbound on State Street, toward his home. (Tr., p.8, L.9 – p.9, L.16.) Neal testified he was "[v]ery familiar" with the route on State Street between Veteran's Parkway and Gary Lane because he "was born and raised in Boise, [and] grew up in that neighborhood." (Tr., p.9, Ls.20-24.) The remainder of Neal's direct-examination focused entirely on the road conditions on State Street between Ellen's Ferry and Gary Lane and on Neal's own perception of his driving conduct in the moments leading up to the stop. (See Tr., p.9, L.25 – p.24, L.12.) When asked on cross-examination whether he was driving, on November 14, 2012, "[in] the city of Boise, Ada County ... Idaho," Neal admitted he was. (Tr., p.25, Ls.11-21.) Clearly, Neal's testimony established he was driving in Boise at all times relevant to the traffic stop.

Officer Thueson's testimony likewise established the conduct for which he stopped Neal occurred in Boise. Officer Thueson testified that he is a patrol officer with the City of Boise Police Department, that he was on patrol on the evening of November 14, 2012, and that, when he observed Neal's vehicle, he was patrolling "the same area that [he had] worked [his] whole career" as a Boise City Police Officer: "the Ellens Ferry and State area." (Tr., p.29, Ls.3-15, p.30, L.12 – p.32, L.24.) Contrary to the magistrate's finding, this testimony – either alone or in combination with Neal's own testimony – was evidence showing, at

least inferentially, that the conduct that formed the basis for the traffic stop occurred in Boise.

Because the evidence at the suppression hearing showed Neal's driving conduct occurred in Boise, the magistrate's factual finding that there was "no evidence" to that effect was clearly erroneous and not entitled to any deference by the district court. Neal has failed to show error either in the district court's application of the law or in its determination that the conduct at issue occurred in Boise.

b. If Neal's Act Of Driving On The Bicycle Lane Marker Did Not Violate I.C. § 49-637(1), It Did Violate Boise City Code § 10-10-17

Boise City Code § 10-10-17 governs the operation of motorized vehicles on bike lanes and bike paths and provides, in relevant part:

> No person shall drive a motorized vehicle upon any officially marked bike lane, bike path, foot path or other separate right-of-way specifically set aside for use by pedestrians or non-motorized vehicles except at an intersection or when entering or leaving a roadway at a driveway, private road or alley. Prior to crossing a non-motorized right-of-way, the motorist shall yield the right-of-way to any pedestrian or non-motorized vehicle operating thereon. ...

The district court interpreted this ordinance "to prohibit driving in the bike lane and on the bike lane marker" and, as such, held Neal's act of driving "upon the bike lane marker" constituted a violation of the ordinance. (R., pp.224-25.)

Neal challenges the district court's ruling on several bases. First, he argues the ordinance "*criminalizes* the same conduct (leaving one's lane) that the Idaho Legislature has deemed a mere infraction" and, "[t]herefore, ... cannot be enforced." (Appellant's brief, pp.20-21 (emphasis in original) (citation

omitted).) Neal, however, did not raise this argument to either the magistrate or district court. (R., pp.11-12, 32-39, 184-202.) The issue is thus not properly before this Court on appeal. See State v. Bailey, 117 Idaho 941, 943, 792 P.2d 966, 968 (Ct. App. 1990) ("It is well settled that an appellant may not raise issues before this Court that he has not raised and preserved before the district court in its capacity as an intermediate appellate court.").

Next, Neal argues that if, as the state has consistently asserted, a bicycle lane marker is not part of the lane it marks, "then one cannot drive 'upon' a bike lane simply by touching the white paint [of the lane marker], because the white paint is not a part of the lane." (Appellant's brief, p.21.) Neal's argument in this regard is well-taken, but it ultimately does not afford him any relief from the district court's order reversing the magistrate's order of suppression. The lane marker either is or is not part of the lane. If it is not, then for the reasons set forth in Section C.1., *supra*, Neal's act of driving on top of the bicycle lane marker violated I.C. § 49-637(1). If, on the other hand, the lane marker *is* part of the lane, as Neal contends, then Neal's act of driving on top of the bicycle lane marker clearly violated the plain language of Boise City Code § 10-10-17 that prohibits the driving of "a motorized vehicle *upon* any officially marked bike lane." (Emphasis added). Either way, Neal's conduct supplied the officer with the reasonable suspicion necessary to justify the traffic stop.

Finally, Neal contends his act of driving on the bicycle lane marker did not violate Boise City Code § 10-10-17 because the lane breach occurred "at an intersection." (Appellant's brief, pp.21-22.) This assertion finds no support in the

record. Officer Thueson testified he observed Neal drive on the bicycle lane marker "just to the east of Gary Lane, ... where the Jack-in-the-Box is," and then "briefly return[] to his lane of travel before then taking a right-hand turn, northbound onto Gary Lane." (Tr., p.32, Ls.2-6, p.32, Ls.20-24.) When asked on cross-examination to clarify where the bicycle lane violation occurred, Officer Thueson testified: "It's just to the east of – of Gary Lane, right before the dashed lines indicating that you can enter into the turn lane to turn northbound on Gary Lane." (Tr., p.36, L.23 – p.37, L.4.) At best, this testimony establishes that Neal was near – not "at" – the intersection of Gary Lane and State Street when he breached the bicycle lane marker. Moreover, while the state acknowledges the existence of an "intersection" at State Street and the public entrance to Jack-in-the-Box, see Boise City Code § 10-01-01 (defining "intersection" and "highway"), neither the officer's testimony nor the photographic exhibits even hint that Neal was actually "at" – as opposed to merely "near" – that intersection when he drove on top of the "solid white line" indicating the bicycle lane. Neal's arguments to the contrary are without merit.

Even if a bicycle lane marker is part of a lane such that driving on top of it does not violate I.C. § 49-637(1), Neal's act of driving on a bicycle lane marker at a point other than an intersection nevertheless supplied the officer with reasonable suspicion that Neal violated Boise City Code § 10-10-17. Neal has

failed to show any basis for reversal of the district court's appellate decision reversing the magistrate's order granting his motion to suppress.[3]

D. Even Assuming Neal Did Not Violate I.C. § 49-637(1) By Driving On Top Of A Fog Line And Bicycle Lane Marker, This Court Should Conclude The Officer's Mistaken Belief That He Did Was Objectively Reasonable And Did Not Invalidate The Stop

As an alternative basis for reversing the magistrate's order granting Neal's motion to suppress, the district court ruled: "[E]ven if Officer Thueson mistakenly believed that Mr. Neal violated the statute and ordinance by driving on the marker lines, this would not warrant suppression here, as his belief that this was a violation was reasonable." (R., p.227.) On appeal, Neal urges this Court to decline to consider the merits of this issue because neither he nor the state briefed or argued the "reasonable mistake of law" issue to either the magistrate or the district court. (Appellant's brief, pp.22-24.) The state acknowledges that, ordinarily, this Court will not review issues that were not raised to the district court sitting in its appellate capacity. Montgomery v. Montgomery, 147 Idaho 1,

[3] If this Court concludes Neal's conduct did not violate either I.C. § 49-637(1) or Boise City Code § 10-10-17, the district court's appellate decision should nevertheless be affirmed on the alternative basis that Neal's driving pattern supplied the officer with an objectively reasonable basis to stop Neal on suspicion of DUI. See, e.g., McKinney v. State, 133 Idaho 695, 700, 992 P.2d 144, 149 (1999) (appellate court may affirm on correct legal theory). The officer stopped Neal at approximately midnight after observing him twice veer from his lane of travel and drive on top of a solid white fog line and a bicycle lane marker. (Tr., p.30, L.12 – p.32, L.24.) Considered in their totality, these facts provided the officer with an objectively reasonable basis to believe that Neal may be impaired. Compare Atkinson, 128 Idaho at 561, 916 P.2d at 1286 ("Although Atkinson's vehicle never entirely left its lane of travel, this weaving pattern, with the vehicle three times touching the lines on edges of the lane, was not within the range of normal driving behavior and was an objective indication that the driver was impaired.").

10, 205 P.3d 650, 659 (2009). The state submits, however, that where, as here, the district court *sua sponte* rules on an issue not presented to the magistrate, the issue so ruled upon is properly before this Court. The district court's ruling was not an "advisory opinion," as suggested by Neal, but was rather an alternative basis for holding the traffic stop was constitutionally reasonable. Because the state had no duty below to articulate every legal theory applicable to Neal's suppression motion, see State v. Leichty, 152 Idaho 163, 169, 267 P.3d 1278, 1284 (Ct. App. 2011), Neal is no more prejudiced by having to "respond" to the district court's "reasonable mistake of law" ruling than he would be had the magistrate decided the case on a legal theory never presented to it at the suppression hearing stage. The state therefore requests this Court to consider the district court's alternative ruling and hold, for the reasons that follow, that even if the officer was mistaken in his belief that Neal violated I.C. § 49-637(1), the mistake was reasonable and did not invalidate the stop.

Whether an officer's mistake of law will necessarily invalidate a traffic stop is an issue that has never been squarely addressed by Idaho's appellate courts.[4] See State v. Horton, 150 Idaho 300, 246 P.3d 673 (Ct. App. 2010) (declining to address whether mistake of law invalidated traffic stop because "mistake at issue

[4] The state recognizes that in Burton v. State of Idaho Dep't of Transp., 149 Idaho 746, 748-50, 240 P.3d 933, 935-37 (Ct. App. 2010), the Idaho Court of Appeals held that, because the statute upon which the officer effectuated the traffic stop could not be constitutionally applied to Burton, "no legal cause existed to effectuate" that stop. It does not appear, however, that Burton Court considered or decided whether an officer's mistake of law can ever be held to be reasonable such that a stop predicated on the mistake does not run afoul of either the United States or Idaho constitutions.

was primarily one of fact"); State v. Buell, 145 Idaho 54, 175 P.3d 216 (Ct. App. 2008) (where officer's alleged mistake of law did not cause Buell's detention, authorities addressing the viability of detentions based on mistakes of law were "inapposite"); State v. McCarthy, 133 Idaho 119, 982 P.2d 954 (Ct. App. 1999) (finding it unnecessary to "resolve whether a police officer's mistake of law is unreasonable *per se*" because, even "allowing for reasonable mistakes of law by police," there was "nothing in the record from which it might be concluded that the officer's mistake was objectively reasonable"). As noted by the Idaho Court of Appeals in McCarthy, other courts that have considered the issue "are in conflict in their assessment of whether a mistake of law is unreasonable *per se* or is to be tested under the same reasonableness standard that applies to mistakes of fact." 133 Idaho at 125, 982 P.2d at 960, cited in Horton, 150 Idaho at 303, 246 P.3d at 676. It is true, as Neal points out, that many courts hold that a detention based on a mistake of law is always unreasonable. (See Appellant's brief, p.26 (and cases cited therein).) However, a growing number of courts hold that, so long as an officer's mistake of law is objectively reasonable, it can form the reasonable suspicion required to justify a traffic stop. See, e.g., United States v. Martin, 411 F.3d 998 (8th Cir. 2005); State v. Heien, 737 S.E.2d 351 (N.C. 2012); State v. Wright, 791 N.W.2d 791 (S.D. 2010); Moore v. State, 986 So.2d 928, 935 (Miss. 2008); State v. Rheinlander, 649 S.E.2d 828 (Ga. Ct. App. 2007).

While courts on both sides of the issue have articulated persuasive justifications for their holdings, the reasoning of the Supreme Court of North

Carolina in Heien is particularly compelling. In that case, an officer stopped Heien because the vehicle in which he was travelling did not have two properly functioning brake lights. Heien, 737 S.E.2d at 352. On appeal, the Heien Court assumed that the relevant statutory provisions required only one properly functioning brake light. Id. at 354. Because the traffic stop was predicated solely on the officer's mistaken belief that the vehicle was being operated in violation of a statute that, in actuality, did not prohibit the conduct at issue, the question squarely before the Heien Court was whether the officer's mistake of law nonetheless gave rise to the reasonable suspicion necessary to conduct the routine traffic stop. Id.

In resolving this question, the Heien Court examined the conflicting views of the various federal and state courts that have addressed the issue. Id. at 355-56. The court acknowledged the justification for the majority rule – *i.e.*, that, to be constitutionally permissible, "a stop must be objectively grounded in the actual governing law." Id. at 356 (citing United States v. Chanthasouxat, 342 F.3d 1271, 1277-78 (11th Cir. 2003) (and cases cited therein)). The court ultimately found the justifications for the minority rule "more compelling," however, citing the Eighth Circuit's reasoning that allowing for objectively reasonable mistakes of law "is in keeping with the foundational principle that an officer's actions must be 'objectively reasonable in the circumstances.'" Id. (citing Martin, 411 F.3d at 1001).

Expounding on the Eighth Circuit's rationale, the Heien Court proffered a number of convincing reasons why allowing for reasonable mistakes of law does

not offend the Fourth Amendment's prohibition against unreasonable searches and seizures, all of which would apply equally under a state constitutional analysis. First, such a rule is entirely "consistent with the primary command of the Fourth Amendment – that law enforcement agents act reasonably." Id. (citing Delaware v. Prouse, 440 U.S. 648, 653-54 (1979)). Indeed, "[t]he touchstone of the Fourth Amendment is reasonableness." United States v. Knights, 534 U.S. 112, 118 (2001). A rule that prohibits an officer from making even objectively reasonable mistakes, "mandating that he be perfect, would impose a greater burden than that required under the Fourth Amendment." Heien, 737 S.E.2d at 356.

Next, a rule that allows for objectively reasonable mistakes of law by officers, at least as to the interpretation of traffic laws, is also justified by the interests at stake during a traffic stop. As explained by the court in Heien:

> [B]ecause we are particularly concerned for maintaining safe roadways, we do not want to discourage our police officers from conducting stops for perceived traffic violations. A routine traffic stop, based on what an officer reasonably perceives to be a violation, is not a substantial interference with the detained individual and is a minimal invasion of privacy. ... And particularly when judged against society's countervailing interest in keeping its roads safe, we think it prudent to endorse the reasonable interpretation of our traffic safety laws.

Id. at 357. The fact that a traffic stop need only be supported by reasonable suspicion and involves only a minimal intrusion on the privacy of the individual stopped is what differentiates this case from other cases in which the Idaho Supreme Court has declined to apply a "good faith" exception to the exclusionary rule under the Idaho Constitution. See State v. Koivu, 152 Idaho 511, 272 P.3d

483 (2012); State v. Guzman, 122 Idaho 981, 842 P.2d 660 (1992). While providing citizens greater protections from warrantless searches of their person, homes, cars and other property may well be justified in light of the inherently invasive nature of such searches, the same concerns are not present when an officer, having an objectively reasonable (albeit mistaken) belief that a motorist has committed a traffic violation, briefly detains the motorist for the purpose of simply confirming or dispelling that suspicion.

Holding that an officer's objectively reasonable mistake of law does not *ipso facto* render a traffic stop invalid also makes sense because, unlike attorneys, officers are not trained in the intricacies of the substantive law and, as such, cannot be expected "to interpret the traffic laws with the subtlety and expertise of a criminal defense attorney." Heien, 737 S.E.2d at 356 (quoting Martin, 411 F.3d at 1001 (internal quotations and citation omitted).) Again, the Heien Court's reasoning is instructive:

> [C]oncerns about the rules of construction regarding the substantive statutes at issue seem to us to be more applicable to the subsequent judicial interpretation of a statute and not to a routine traffic stop that needs to be based only on reasonable suspicion. A *post hoc* judicial interpretation of a substantive traffic law does not determine the reasonableness of a previous traffic stop within the meaning of the state and federal constitutions. Such a *post hoc* determination resolves whether the conduct that previously occurred is actually within the contours of the substantive statute. But that determination does not resolve whether the totality of the circumstances present at the time the conduct transpired supports a reasonable, articulable suspicion that the statute was being violated. It is the latter inquiry that is the focus of a constitutionality determination, not the former.

Id. at 357. Because law enforcement officers are charged with enforcing the law, not deciding its precise scope, allowing for objectively reasonable mistakes of law does not offend the Fourth Amendment.

In fact, requiring "law enforcement officers to accurately forecast how a reviewing court will interpret the substantive law at issue" is actually "inconsistent with the rationale underlying the reasonable suspicion doctrine." Id. Both the United States Supreme Court and Idaho's appellate courts have recognized that reasonable suspicion cannot be reduced to any precise legal formula, but must instead be based on commonsense judgments considering the totality of all of the circumstances known to the officer. E.g., Illinois v. Wardlow, 528 U.S. 119, 125 (2000); Ornelas v. United States, 517 U.S. 690, 695 (1996); State v. Kessler, 151 Idaho 653, 655, 262 P.3d 682, 684 (Ct. App. 2011). Preventing officers from reasonably interpreting the laws upon which they base traffic stops "would transform this 'commonsense, nontechnical conception' into something that requires much more than 'some minimal level of objective justification'"; instead of "merely requir[ing] that our officers be reasonable," it "would mandate that they be omniscient." Heien, 737 S.E.2d at 357-58. In addition, treating an officer's reasonable mistake of law as dispositive of the reasonable suspicion inquiry would also "insert rigidity into" what is otherwise "a fluid concept" and would render unrecognizable "the traditional constitutional inquiry" that asks "whether a traffic stop is reasonable under *all* the circumstances." Id. at 358 (citations omitted) (emphasis added). Departing from traditional inquiries that guide whether a traffic stop is constitutionally permissible, based solely on an officer's

inability in the field to accurately predict how a reviewing court will ultimately interpret the law, seems neither wise no warranted where the officer's mistake of law is otherwise objectively reasonable.

As a final justification for adopting a rule that allows for reasonable mistakes of law in the reasonable suspicion context, the Heien Court accurately observed that such an "approach allows reviewing court to treat all police mistakes the same." Id. Neither the Supreme Court nor Idaho's appellate courts "demand factual accuracy from our police when determining whether reasonable suspicion exists." Id. (citing Illinois v. Rodriguez, 497 U.S. 177, 185-86 (1990)); see also Horton, 150 Idaho at 302-04, 246 P.3d at 675-77; McCarthy, 133 Idaho at 124-25, 982 P.2d at 959-60. And, as observed by the Heien Court, there simply is "no constitutional requirement to distinguish between mistakes of fact and mistakes of law in this context." Heien, 737 S.E.2d at 358. This is especially true since determining whether a mistake is one of fact or one of law is not always easy. Id.; accord McCarthy, 133 Idaho at 124-25, 982 P.2d 959-60. Indeed, in some instances, the two types of mistakes are "inextricably connected." McCarthy, 133 Idaho at 124, 982 P.2d at 959. Because the line between mistakes of law and mistakes of fact is not always easily ascertainable, the better rule, and the one that is consistent with the reasonableness requirements of both the federal and state constitutions, is that "so long as an officer's mistake is [objectively] reasonable, it may give rise to reasonable suspicion." Heien, 737 S.E.2d at 358.

For all of the reasons set forth above, the state submits that this Court should hold that, so long as an officer's mistake of law is objectively reasonable, it can form the reasonable suspicion required to justify a traffic stop. Assuming this Court adopts such a rule, application of that rule to the facts of this case easily leads to the conclusion that the traffic stop was constitutionally permissible.

As discussed in detail in Section C.1. of this brief, the plain and unambiguous language of I.C. § 49-637(1) requires motorists travelling to highways divided into two or more clearly marked lanes to drive their vehicles "as nearly as practicable entirely within a single lane." Thus, the officer was not mistaken at all in his belief that Neal violated the relevant statutory provision when he drove on top of a fog line and bicycle lane marker. Even assuming, however, that this Court concludes the Neal's conduct did not violate the statute, the officer's mistaken belief that it did was clearly objectively reasonable. At worst the language of I.C. § 49-637(1) is ambiguous – *i.e.*, "susceptible to more than one reasonable interpretation." McCarthy, 133 Idaho at 125, 982 P.2d at 960. Because, for the reasons set forth in Section C, supra, the requirement of I.C. § 49-637(1) that a motorist maintain his or her lane can, at the very least, be reasonably interpreted require a motorist to avoid driving on top of a fog line unless objective circumstances prevent it, the officer's mistaken belief that Neal violated the statute was objectively reasonable and did not invalidate the traffic stop. Compare McCarthy, 133 Idaho at 125, 982 P.2d at 960 (declining to find alleged mistake of law objectively reasonable where the operative law was not

"ambiguous or susceptible to more than one reasonable interpretation."). Neal has failed to show any basis for reversal of the district court's intermediate appellate decision that reversed the magistrate's order granting his motion to suppress.

CONCLUSION

The state respectfully requests that this Court affirm the district court's appellate decision reversing the magistrate's order suppressing evidence and remanding this case for further proceedings.

DATED this 6th day of June 2014.

LORI A. FLEMING
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 6th day of June 2014, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

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