7-27-2016

State v. Noeller Respondent's Brief Dckt. 43700

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Appellant,	)	**NO. 43700**
	)	
v.	)	**BANNOCK CO. NO. CR 2015-2545**
	)	
DEBRA J. NOELLER,	)	**RESPONDENT'S BRIEF**
	)	
Defendant-Respondent.	)	
_____	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

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District Judge

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STATEMENT OF THE CASE

Nature of the Case

In February of 2015, the Idaho State Police stopped Debra J. Noeller for purportedly committing a traffic offense, detained her for over an hour, and ultimately searched the car she was driving. The district court granted Ms. Noeller's motion to suppress all the evidence against her because the Idaho State Police had no reasonable suspicion to stop Ms. Noeller. The State appeals from the district court's order granting the motion to suppress and argues that the stop was lawful. The State's cursory argument fails to show that the district court erred.

Statement of the Facts and Course of Proceedings

On February 10, 2015, Debra Noeller and Roman Tonche were driving on Interstate 86; their car was registered in Arizona and bore Arizona license plates. (R., pp.117-18.) Idaho State Trooper Peeples observed that the car appeared to have darker window tinting than allowed under Idaho state law.[1] (R., p.117.) Trooper Peeples called dispatch to check on the license plate and was told there were no warrants associated with the car. (R., pp.117-18.) He then stopped the car at 12:22 p.m. (R., p.118; Prelim. Tr., p.69, L.18.)

Trooper Peeples testified that when he approached the car, he noticed that Ms. Noeller was driving, and there was a male passenger in the car. (R., p.118.) He said that he walked up to the car on the passenger side, and the passenger rolled down the window, so he spoke with the occupants through that window and explained the

[1] Idaho Code § 49-944 sets the standards for window tinting in Idaho.

reason for the stop. (Prelim. Tr., p.7, L.25 – p.8, L.15.) Trooper Peeples then asked for Ms. Noeller's license, registration, and proof of insurance. (R., p.118; Prelim. Tr., p.8, Ls.23-25.) According to Trooper Peeples, "there was no indication of drug use and both driver's and passenger's demeanor was calm." (R., p.118.)

As Ms. Noeller was looking for the documents, Trooper Peeples said he asked where they were coming from, and both Ms. Noeller and Mr. Tonche, said they had driven up from Arizona. (Prelim. Tr., p.9, Ls.2-6, p.49, L.24 – p.50, L.2.) Trooper Peeples then asked where they were going, and Mr. Tonche said they were going to "the casino" and asked if the trooper knew where it was. (Prelim. Tr., p.10, Ls.18-23.) The trooper said that Mr. Tonche told him his mother was sick, and he was going to the casino to meet with someone who knew where her house was located and then driving to see her.[2] (Prelim. Tr., p.11, Ls.1-6.) Trooper Peeples then asked how long they were planning on staying in Idaho; Ms. Noeller "shrugged her shoulders and shook her head," and Mr. Tonche said it all depended on his mother's health. (Prelim. Tr., p.11, Ls.14-21.)

Once Trooper Peeples had the documents from Ms. Noeller, he performed a records check, which returned no warrants. (R., p.118.) Because he noticed that the name on the registration was different than Ms. Noeller's, Trooper Peeples went back to the car and asked who the car belonged to, and Mr. Tonche said that it belonged to his wife. (R., p.118; Prelim. Tr., p.12, Ls.6-16.) Trooper Peeples then asked for Mr. Tonche's identification and conducted a records check on him, which also revealed

[2] Later, Trooper Call, the backup trooper, testified that Ms. Noeller told him that they got lost, and they were trying to meet a family member of Mr. Tonche's at the casino. (Prelim. Tr., p.82, Ls.1-8.)

no warrants. (R., p.118; Prelim. Tr., p.12, Ls.16-23.) The trooper had a "Tint Meter" to measure the light transmission of the windows but was not carrying it when he initially approached the car, and never used it during the course of the stop, even though measuring the window tint was supposedly the purpose of the stop.[3] (R., p.118.)

At that point, Trooper Peeples said he "requested that additional units respond" to his location. (Prelim. Tr., p.12, L.24 – p.13, L.1.) When asked why he did that, he said, "[B]ased on the conversation that Mr. Tonche and I had, as well as the lack of conversation that Ms. Noeller and I had, I felt that there was, that there was more to – I felt that possible criminal activity was involved with this vehicle or these individuals. And I wanted to deploy my K9 partner, Apollo." (R., p.118; Prelim. Tr., p.13, Ls.3-8.)

Trooper Call arrived on the scene, eight minutes into the detention, at 12:30 p.m., and Trooper Peeples asked him to take over the investigation of the stop, giving him the driver's licenses of Ms. Noeller and Mr. Tonche, as well as the registration and insurance documents for the car. (R., p.118.) Trooper Peeples testified that he had abandoned the initial purpose of the stop at that time. (R., p.119.) And Trooper Call admitted that he never addressed the initial purpose of the stop; he did not have a tint meter, and made no attempt to check the tint of the windows. (R., p.119; Prelim. Tr., p.92, L.24 – p.93, L.3.) Instead, at approximately 12:50 p.m., he told Ms. Noeller and Mr. Tonche to get out of the car and stand apart from each other while Trooper

[3] In its Appellant's Brief, the State submits that "a trooper also checked the window tint, and found the sides and back windows ranging from 32% to 12% light transmission, generally darker than allowed by Idaho law." (Appellant's Brief, p.1.) This was not done, however, until after the entire stop was over, just prior to the car being towed. (Prelim. Tr., p.32, L.15 – p.34, L.4, p.50, L.15 – p.51, L.21.)

Peeples had his K9 partner do a "free air sniff" around the car. (R., p.119; Prelim. Tr., p.97, L.19 – p.98, L.6.) The K9 did not alert. (R., p.119.)

During the free air sniff, Trooper Call continued questioning Ms. Noeller, and, after the sniff produced no alert, Trooper Peeples continued questioning Mr. Tonche. (R., p.119.) Trooper Peeples and Trooper Call said that they did not inform Ms. Noeller or Mr. Tonche that they were free to leave at that point and did not return their driver's licenses, registration, or insurance paperwork. (R., p.119; Prelim. Tr., p.96, Ls.6-20.) Then, after deciding that "things still weren't making sense with the stop," and Ms. Noeller's and Mr. Tonche's "stories were not matching," Trooper Call re-contacted Ms. Noeller and asked for her consent to search the car. (R., p.119; Prelim. Tr., p.95, L.12 – p.96, L.2.) Ms. Noeller consented, and the troopers took the K9 into the car and discovered methamphetamine and a pipe in Ms. Noeller's purse. (R., p.119.) At that point, Ms. Noeller was arrested, and Mr. Tonche was placed in handcuffs to detain him until the investigation was over. (R., p.119.) Subsequently, approximately 500 grams of methamphetamine was found in the bumper of the car, and both Ms. Noeller and Mr. Tonche were charged with trafficking in methamphetamine. (R., pp.119-20.) Despite its concerns about the length of the stop and the potential right to travel issues with the stop, the magistrate court ultimately bound the case over to the district court after the preliminary hearing. (Prelim. Tr., p.111, L.9 – p.113, L.2; R., pp.36-37.)

Ms. Noeller filed a motion to suppress, and a hearing was held on June 9, 2015. (R., p.120.) After the hearing, the parties submitted briefs. (R., pp.82-111.) Ms. Noeller argued that there was no reasonable suspicion to justify the stop, the troopers unlawfully prolonged the stop, and her consent was invalid. (R., pp.87-93.)

The district court granted the motion to suppress. (R., pp.117-23.) Relying primarily on the Idaho Supreme Court's decision in *State v. Morgan*, 154 Idaho 109 (2013), it held that there was no reasonable suspicion to stop a car registered in Arizona "for a possible window tint violation under Idaho law." (R., p.123.) The State timely appealed.

ISSUE

Has the State failed to show that the district court erred by granting Ms. Noeller's motion to suppress?

ARGUMENT

The State Has Failed To Show That The District Court Erred By Granting Ms. Noeller's Motion To Suppress

> The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, we accept the trial court's findings of fact which are supported by substantial evidence, but we freely review the application of constitutional principles to the facts as found. At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court.

State v. Cutler, 143 Idaho 297, 301 (Ct. App. 2006) (internal citations omitted).

The district court correctly granted Ms. Noeller's motion to suppress all evidence seized in this case because the initial stop was not supported by reasonable suspicion. Ms. Noeller also argued that the extended duration of the stop and the invalidity of her consent supported her motion to suppress. (R., pp.88-93.) Although the district court did not reach these issues, as argued below, granting the motion to suppress was also supported on those bases.

The United States and Idaho Constitutions prohibit unreasonable searches and seizures. U.S. CONST. amend. IV; IDAHO CONST. art. I, § 17. Warrantless searches and seizures are presumptively unreasonable. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *Halen v. State*, 136 Idaho 829, 833 (2002). To overcome that presumption, the State has the burden of proving that the search or seizure falls within a well-recognized exception to the warrant requirement and was reasonable in light of the surrounding circumstances. *Schneckloth*, 412 U.S. at 219; *Schmerber v. California*, 384 U.S. 757, 767 (1966) (overruled on other grounds in *Missouri v. McNeely*, 133 S. Ct. 1552, 1555 (2013)); *Halen*, 136 Idaho at 833. If the government fails to meet its burden, the evidence acquired as a result of the illegal search or seizure, including later-

discovered evidence derived from the original illegality, is inadmissible. *Wong Sun v. United States*, 371 U.S. 471, 485 (1963); *State v. Koivu*, 152 Idaho 511, 518–19 (2012).

A. Trooper Peeples Stopped Ms. Noeller Without Reasonable Suspicion

The district court found that Trooper Peeples did not have reasonable suspicion to justify the stop in this case. (R., pp.120-23.) "Reasonable suspicion must be based on specific, articulable facts and the rational inferences that can be drawn from those facts. Reasonable suspicion requires more than a mere hunch or inchoate and unparticularized suspicion. The test for reasonable suspicion is based on the totality of the circumstances known to the officer at or before the time of the stop." *State v. Morgan*, 154 Idaho 109, 112 (2013) (internal citations and quotations omitted). Because warrantless seizures must generally be based on probable cause, *Florida v. Royer*, 460 U.S. 491, 499–500 (1983); *State v. Bishop*, 146 Idaho 804, 811 (2009), limited investigatory detentions such as traffic stops are impermissible unless "justified by an officer's reasonable articulable suspicion that a person has committed, or is about to commit, a crime." *Morgan*, 154 Idaho at 112.

The district court held that, while I.C. § 49-944 establishes standards for window tinting in Idaho, a potential violation of those standards on an out-of-state vehicle could not create reasonable and articulable suspicion that the car had violated a traffic law.[4] (R., p.123.) In reaching its decision, the district court relied primarily on *Morgan*, *supra*,

[4] The district court took judicial notice of the Arizona window tinting statute. (R., p.120.) Arizona's tinting requirements for front windows are similar to Idaho's, but Arizona does not limit the degree of tinting that can be applied to the back window and rear windows of a vehicle. (R., pp.115-16.) The district court also noted that there was no argument made that the car Ms. Noeller was driving did not comply with that statute. (R., p.122.) At the preliminary hearing, Trooper Peeples admitted that the front windows were in compliance with both Idaho and Arizona law. (Prelim. Tr., p.47, Ls.5-6.)

and *State v. Salois*, 144 Idaho 344 (2007). In *Morgan*, the Idaho Supreme Court held that the Idaho requirement that cars use both front and rear license plates did not apply to cars registered in other states. *Morgan*, 154 Idaho at 112. As such, there could be no reasonable suspicion to justify a traffic stop when an out-of-state car displayed only a rear license plate. *Id.* at 112-13.

The State argues that the holding in *Morgan* was "limited to the statute at issue." (Appellant's Brief, p.7.) It asserts that, unlike the statute in *Morgan*, the plain language of I.C. § 49-944(2) "shows it applies to *any* car driven in Idaho." (Appellant's Brief, pp.6-7.) The State also claims that "[b]ecause the holding of Morgan was limited to the statute at issue, the district court erred by reading Morgan as holding that Idaho's traffic laws generally do not apply to motorists from out-of-state." (Appellant's Brief, p.7.) Similarly, the State argues, "[b]ecause Morgan was based on the scope of the statute in question, and not on some broad unarticulated concept that none of Idaho's traffic laws apply to out-of-state motorists, the district court's expansion of Morgan's holding was erroneous." (Appellant's Brief, p.7.)

First, this mischaracterizes the district court's holding. The district court did not hold that Idaho's traffic laws generally do not apply to out-of-state motorists. In fact, it specifically said, "[w]hile an out-of-state driver's *conduct*, such as their speed, is enforced by Idaho law, out-of-state vehicles driven through Idaho cannot be expected to comply with all other Idaho vehicle requirements, such as the one at issue here." (R., p.123, emphasis added.) The district court also noted that a different statute may result in a different outcome. (R., p.123.) Thus, the district court made it clear that while an out-of-state driver's conduct is certainly subject to regulation under Idaho law,

a vehicle's equipment, such as license plates or window tinting, which are legal in other states, cannot be regulated by Idaho law. "Otherwise, out-of-state vehicles that are only required to have a front license plate or that are allowed to have lesser restrictions on window tinting would never be able to freely travel through Idaho." (R., p.123.)

Second, the district court's reliance on *Salois* was well-founded. In *Salois*, the State claimed that the officer had reasonable suspicion to stop a car and investigate whether its temporary permit was valid. *Salois*, 144 Idaho at 348. The Court of Appeals rejected that idea: "[T]he presence of a properly displayed temporary permit . . . dispels any reasonable suspicion of a violation of I.C. § 49-456(1) [the relevant statute]." *Id*. Allowing otherwise, the Court held, "would allow law enforcement officers of this state unfettered discretion to stop each and every vehicle being operated with a temporary registration to 'investigate' its validity." *Id*. That was unacceptable because "an officer must have a reasonable suspicion of criminal activity before a traffic stop is initiated, not after." *Id*. The court went on to say, "[a] temporary permit displayed in compliance with I.C. § 49-432(3) carries with it a presumption of validity, not of invalidity." *Id*.

Subsequently, the Idaho Court of Appeals held that, like temporary permits, "a properly displayed dealer plate carries with it a presumption of validity and cannot serve as the sole basis for reasonable suspicion to allow an officer to stop a vehicle." *State v. Case*, 159 Idaho 546 (Ct. App. 2015).

In this case, the district court's reasoning was similar. It said, "If an officer notices that a vehicle has out-of-state plates as well as window tinting, possibly darker than allowed by Idaho law, then the officer is on notice that the window tinting on the out-of-state vehicle is not controlled by Idaho law, but by the home state." (R., pp.122-

23.) The district court went on to say, "[t]he test for reasonable suspicion is based on the totality of the circumstances and here, the trooper knew the vehicle was registered in Arizona before initiating the stop. The rational inference drawn from that fact is that the vehicle's window tinting is valid in Arizona." (R., p.123.) Indeed, the reasoning in *Salois* and *Case* applies here; a properly displayed out-of-state license plate carries with it the presumption that the car's window tinting is valid in the state where it is registered. In other words, because the other state licensed the car, there is a presumption of validity as to its equipment.

Third, the scope of the statute actually does support the district court's decision. I.C. § 49-944 provides, in relevant part:

> (1) It is unlawful for any person to place, install, affix, or apply any window tinting film or sunscreening device to the windows of any motor vehicle, except as follows: [subsections (a) though (f) delineate various requirements of light transmission and other technicalities]
>
> (2) No person shall operate on the public highways . . . any motor vehicle with a windshield or windows which are not in compliance with the provisions of this section.

"The language of a statute should be given its plain, usual and ordinary meaning. Where a statute is clear and unambiguous, the expressed intent of the legislature shall be given effect without engaging in statutory construction. The literal words of a statute are the best guide to determining legislative intent." I.C. § 73-113(1). However, "[i]f a statute is capable of more than one conflicting construction, the reasonableness of the proposed interpretations shall be considered, and the statute must be construed as a whole. Interpretations which would render the statute a nullity, or which would lead to absurd results, are disfavored." I.C. § 73-113(2); *see also Verska v. St. Alphonsus Reg'l Med. Ctr.,* 151 Idaho 889, 896 (2011) ("A statute is ambiguous where the

language is capable of more than one reasonable construction.") Additionally, in construing a statute, "[l]anguage of a particular section need not be viewed in a vacuum. And all sections of applicable statutes must be construed together so as to determine the legislature's intent." *Lockhart v. Dep't of Fish and Game*, 121 Idaho 894, 897 (1992), quoting *Umphrey v. Sprinkel*, 106 Idaho 700, 706 (1983).

In this case, the use of the terms "any person," "no person," and "any motor vehicle"—as they are used in sections 1 and 2 of I.C. § 49-944—render the statute ambiguous as those terms are capable of more than one conflicting construction. The State interprets the statute to "foreclose the district court's analysis that cars registered in Arizona fall outside the scope of this statute" because section 2 uses the term "any motor vehicle." (Appellant's Brief, p.6.) But the State's interpretation ignores the fact that the same term is used in section 1, where it cannot be interpreted as applying to out-of-state vehicles. As such, the State's interpretation violates the rule that statutes must be construed as a whole without separating one section from another.

In *Lockhart*, the Department of Fish and Game argued that because I.C. § 67-5317(3) of the Personnel System Act did not "specify which district court was referred to," this "left a void" which required referencing the Administrative Procedure Act. *Id.* at 896. The Court disagreed. It said, "supplying I.C. § 67-5317(3) with the definition of 'district court' contained in I.C. § 67-5317(2),[5] we not only give effect to the probable legislative intent but we also follow the rule of statutory construction that statutes should be construed as a whole." *Id.* at 897.

[5] The definition of district court in section 2 was "the district court for the county in which any party to the proceeding resides." *Id.*

In this case, the same logic applies; I.C. § 49-944(1) states that it is "unlawful for any person to . . . apply window tinting film . . . to the windows of any motor vehicle" that does not meet the Idaho specifications. Despite this seemingly broad language, section 1 clearly cannot control the citizens of other states, or the window tinting they may lawfully apply to their vehicles. Indeed, it is not unlawful for *any person in the country* to apply darker window tinting than is allowed under Idaho law, only any person in Idaho. A resident of Alaska, for example, would not fall under the scope of section 1 and be required to follow its requirements when applying window tinting to his car that is registered in his home state. As such, the implicit definitions of "any person" and "any motor vehicle," as used in section 1, are "any person in Idaho," and "any motor vehicle registered in Idaho."

Therefore, when construing the statute as a whole, I.C. § 49-944(2) cannot apply to out-of-state cars. Section 2 cannot be separated from section 1 and considered in a vacuum. Indeed, I.C. § 73-113(2) requires that the term "any motor vehicle" in section 2 be interpreted the same way as it is in section 1. Similarly, "no person," as it is used in section 2, must be defined as "no person in Idaho."

Morgan supports such a reading. The statute at issue in *Morgan*, I.C. § 49-428, does not specifically indicate that it applies only to vehicles registered in Idaho. It states, "License plates assigned to *a motor vehicle* shall be attached, one (1) in the front and the other in the rear . . . ." I.C. § 49-428(1) (emphasis added). Nevertheless, the Idaho Supreme Court held that "[t]his requirement does not extend to vehicles registered in other states." *Morgan*, 154 Idaho at 112.

Finally, if this Court were to adopt the State's interpretation of I.C. § 49-944(2), then the only way for citizens of other states with more liberal tinting regulations to avoid infractions would be to simply stay out of Idaho. As the district court explained, drivers of vehicles registered in states with "lesser restrictions on window tinting would never be able to freely travel through Idaho."[6] (R., p.123.) Surely the legislature does not intend that out-of-state citizens, who own cars that comply with their own state's laws, should be responsible for checking all Idaho vehicle equipment laws and making modifications—such as installing a front license plate or somehow modifying window tinting—to their vehicle before taking a vacation in or driving through Idaho. *Morgan* certainly supports this. Thus, the district court's reliance on *Morgan* was appropriate, and the State's interpretation of the statute is unreasonable.

B. Trooper Peeples Unlawfully Prolonged The Traffic Stop

Trooper Peeples stopped Ms. Noeller because he suspected that the car's window tinting might be in violation of Idaho Code. (R., pp.117-18.) However, Trooper Peeples admitted that he never checked the tinting level, and abandoned that purpose within eight minutes of the initial stop. (R., pp.118-19; Prelim Tr., p.69, L.18 – p.70, L.4.) He testified that he asked Trooper Call, when he arrived at the scene, to continue the investigation of the tinting. (R., p.118; Prelim. Tr., p.70, Ls.3-6.) But Trooper Call

[6] The magistrate court was concerned about this issue also. It said, "Everybody with an out-of-state plate is not up to no good and carrying drugs through this state. And I'm a bit concerned that the right to freely travel the roads of this state is becoming something that is of concern for anybody with an out-of-state plate." (Prelim. Tr., p.112, Ls.1-5.) The magistrate court went on to say, "There is a right to travel freely around these United States and I think we have to be careful when we stop folks, that we've got a reason to stop them, and a good reason to stop them." (Prelim. Tr., p.112, Ls.18-21.)

admitted that he never pursued the purpose of the stop either. (R., p.119, Prelim. Tr., p.92, L.24 – p.93, L.3.)

Once the purpose of the stop is achieved, the detention must end. "[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Florida v. Royer*, 460 U.S. 491, 500 (1983); *see also Illinois v. Caballes*, 543 U.S. 405, 420 (2005). Even though a routine traffic stop can "turn up suspicious circumstances which could justify an officer asking questions unrelated" to the initial purpose for the stop, *State v. Myers,* 118 Idaho 608, 613 (Ct. App.1990), law enforcement cannot extend a completed traffic stop to conduct a canine sniff without reasonable suspicion. *Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015). The *Rodriguez* Court specifically stated that "a police stop exceeding the time needed to handle *the matter for which the stop was made* violates the Constitution's shield against unreasonable seizures. A seizure justified only by a police-observed traffic violation, therefore, 'become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission' of issuing a ticket for the violation." *Id.* at 1612 (quoting *Illinois v. Caballes*, 543 U.S. at 407) (emphasis added). The Court made it clear that unless there was additional reasonable suspicion of criminal activity, the officer had to allow the seized person to depart once the purpose of the stop was completed. *Id.* at 1614.

Although the required information leading to formation of reasonable suspicion in the mind of the police officer is less than the information required to form probable

cause, it still "must be more than mere speculation or a hunch on the part of the police officer." *State v. Cerino*, 141 Idaho 736, 738 (Ct. App. 2005) (citations omitted). The reasonableness of the suspicion must be evaluated based on the totality of the circumstances at the time of the stop, and the "'whole picture' must yield a particularized and objective basis for suspecting that the individual being stopped is or has been engaged in wrongdoing." *State v. Sevy*, 129 Idaho 613, 615 (Ct. App. 1997) (citing *United States v. Cortez*, 449 U.S. 411, 417-18 (1981)).

In this case, Trooper Peeples prolonged the stop based on nothing more than a hunch, and he never addressed the supposed purpose for the stop. He had a tint meter in his vehicle, but, as the district court found, he "was not carrying it and did not make any attempt to check the window tint . . . during the stop." (R., p.118.) When questioned as to why, Trooper Peeples said that the tint meter was approximately six inches long — a little bigger than a wallet — but he did not want to carry it in his pocket because he was concerned about officer safety and did not want to approach a car with the "hazard of carrying a tint meter . . . ." (Prelim. Tr., p.48, Ls.1-14.) Even if this explanation is rational, Trooper Peeples never went back to his car for the tint meter during the stop. Clearly, from the beginning, he was only interested in fishing to find some evidence of a crime, no matter how long it took.

Trooper Peeples also attempted to characterize his interaction with Ms. Noeller as justifying his prolonged detention of her. He admitted that he approached the car on the passenger side and spoke to the occupants through that window. (Prelim. Tr., p.7, L.17, p.8, L.12.) He said that he asked, "[H]ow are you doing or how's things going or something like that," and told them why he had stopped them. (Prelim. Tr., p.8, Ls.13-

15.) He said, "[D]uring this time, I had eye contact with the driver, as I do with all other stops I've done. I have contact with the driver because that's the person I'm talking to." (Prelim. Tr., p.8, Ls.15-18.) He then said, "And I noticed the passenger was, was answering all the questions, or was answering and making the conversation with me." (Prelim. Tr., p.8, Ls.18-20.) On cross-examination, however, Trooper Peeples admitted that he actually said nothing that would require an answer at that point; he just addressed the couple by saying "[G]ood afternoon or how are you doing or something like that." (Prelim. Tr., p.50, Ls.3-9.) He also admitted that Ms. Noeller answered the first question he asked. He said he asked where they were coming from, and both Ms. Noeller and Mr. Tonche said they were coming from Arizona. (Prelim. Tr., p.49, L.24 – p.50, L.14.)

After he had Ms. Noeller's license, registration, and insurance, Trooper Peeples said he took the documents back to his vehicle and conducted a records check on Ms. Noeller. (Prelim. Tr., p.12, Ls.6-7.) The check revealed no warrants. (R., p.118.) Because the name on the registration was not Ms. Noeller's, Trooper Peeples went back to the car and — upon being told that the car belonged to Mr. Tonche's wife — asked for Mr. Tonche's identification. (Prelim. Tr., p.12, Ls.7-17.) Trooper Peeples then conducted a records check on him. (Prelim. Tr., p.12, Ls.18-21.) This check also revealed no warrants. (R., p.118.) Trooper Peeples also admitted that he "confirmed the names and address on . . . the registration and insurance versus Mr. Tonche's identification that he gave to me." (Prelim. Tr., p.12, Ls.22-23.)

Nevertheless, Trooper Peeples then called for backup. When asked why, he said, "[B]ased on the conversation that Mr. Tonche and I had, as well as the lack of

conversation that Ms. Noeller and I had, I felt that there was, that there was more to – I felt that possible criminal activity was involved with this vehicle or these individuals. And I wanted to deploy my K9 partner, Apollo." (R., p.118; Prelim. Tr., p.13, Ls.3-8.)

This alleged lack of conversation, if it could be characterized as such, was entirely normal under the circumstances and cannot be the basis for reasonable suspicion. First, Trooper Peeples approached the car on the *passenger side* where Mr. Tonche was sitting, so it was logical that Mr. Tonche would feel compelled to speak to him. Second, most of the initial questions involved their destination, which was to visit Mr. Tonche's mother. Thus, it was perfectly reasonable for Mr. Tonche to tell Trooper Peeples about that situation instead of Ms. Noeller.

Indeed, at that point, based on the interaction he had with Ms. Noeller and Mr. Tonche, the documentation provided to him, the fact that both Ms. Noeller and Mr. Tonche were, as Trooper Peeples said, calm and showed no signs of drug use, and the fact that the records checks revealed no warrants, Trooper Peeples had no particularized and objective basis for suspecting that Ms. Noeller or Mr. Tonche were or had been engaged in any criminal activity.[7] Any suspicion that Trooper Peeples had was not reasonable. Therefore, he should have either finally checked the tint on the car and issued a citation or told them they were free to go. There should have been no dog sniff and no further questioning. *Rodriguez*, made that abundantly clear.

[7] Trooper Peeples also said that he thought the fact that there was no luggage in the backseat was "odd" because they were on an "extended trip." (Prelim. Tr., p.16, Ls.7-16.) It is common knowledge that people often put luggage in the trunk, and entirely innocent behavior cannot be considered a fact that would contribute to reasonable suspicion of criminal activity. *See State v. Kelley*, No. 43392, 2016 WL 3361870, at *2 (Idaho Ct. App. June 16, 2016) (holding that driving on Interstate 84 is insufficient to establish reasonable suspicion).

Instead, Trooper Peeples continued the detention to perform a free air sniff with his drug dog. (R., p.119.) The drug dog did not alert. (R., p.119.) Still the detention continued. (R., p.119.)

While the dog sniff took place, Trooper Call questioned Ms. Noeller. (R., p.119.) But after the drug dog did not alert, Trooper Peeples never told Ms. Noeller that she was free to leave. (R., p.119.) Instead, he started questioning Mr. Tonche, and Trooper Call retained their drivers' licenses as well as their registration and insurance documents. (R., p.119.)

This was yet another juncture at which Trooper Peeples should have let the couple drive away. Trooper Peeples admitted that at that point he had no warrant, no consent to search, no search incident to an arrest, nothing in plain view, and no alert by the dog. (Prelim. Tr., p.60, Ls. 1-10.) Nevertheless, Trooper Call continued to question Ms. Noeller while Trooper Peeples went back to questioning Mr. Tonche. (R., p.119.) An officer may not continue asking questions unrelated to the purpose of the stop unless suspicious circumstances justify that questioning. *Myers*, 118 Idaho at 613.

The troopers had no reasonable suspicion to justify telling Ms. Noeller and Mr. Tonche to get out of the car so Trooper Peeples could run his drug dog around the car, and they certainly had no reasonable suspicion to justify prolonging the stop after the drug dog did not alert.[8]

[8] The magistrate court was clearly also concerned about this. It said, "I think the envelope's being pushed on this case. A 30-minute detention before a fresh air sniff that took about five-minutes, no more than five-minutes, more. We're at 40-minutes on a tinted window on an out-of-state car. They were detained and free to leave and being asked for consent 40-minutes later. Based on the testimony I have, reasonable, articulable suspicion is questionable." (Prelim. Tr., p.111, Ls.11-17.)

C. Ms. Noeller's Consent To A Search Of The Car Was Ineffective Because It Was Tainted By The Prolonged Stop

Consent given when the defendant is illegally detained is invalid. "[C]onsent to search, given during an illegal detention, is tainted by the illegality and, thus, is ineffective." *State v. Zavala*, 134 Idaho 532, 535 (Ct. App. 2000), citing *Florida v. Royer*, 460 U.S. 491, 507-08 (1983). In *Zavala*, the Idaho Court of Appeals held that "there is no distinction between an illegal arrest and an illegal detention for purposes of the rule" that an illegal arrest taints any subsequent consent to search. *Id.* Here, because Ms. Noeller was illegally detained well beyond the purpose of the stop, her consent was tainted and therefore ineffective.

CONCLUSION

The district court properly suppressed the evidence seized as a result of the unlawful stop, detention, and arrest. Therefore, Ms. Noeller respectfully requests that this Court affirm the order suppressing the evidence.

DATED this 27th day of July, 2016.

_____/s/_____
REED P. ANDERSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 27th day of July, 2016, I served a true and correct copy of the foregoing RESPONDENT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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RPA/eas