6-9-2017

State v. Nott Appellant's Brief Dckt. 44651

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	**NO. 44651**
	)	
Plaintiff-Respondent,	)	**ADA COUNTY NO. CR-FE-2016-7046**
	)	
v.	)	
	)	
VIRGIL LYNN NOTT,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

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

HONORABLE DEBORAH A. BAIL
District Judge

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STATEMENT OF THE CASE

Nature of the Case

A Boise City police officer seized Virgil Lynn Nott after the officer saw him enter a single-stall bathroom with another male and grocery bag of beer at Rhodes Skate Park. The officer uncovered controlled substances and paraphernalia in Mr. Nott's possession. The State charged him with three drug offenses. Mr. Nott moved to suppress the evidence from the warrantless seizure and subsequent search, arguing the officer did not have reasonable suspicion for the investigatory detention. The district court denied his motion. Mr. Nott entered a conditional guilty plea. He now appeals from the district court's judgment of conviction and contends the district court erred by denying his motion to suppress.

Statement of Facts and Course of Proceedings

On June 2, 2016, in the early afternoon, Boise City Police Officer Tom Shuler approached Mr. Nott and girlfriend, Ms. Torres, on 15th Street and Washington Street, near the Albertson's grocery store. (R., p.64; Tr. Vol. I,[1] p.15, L.6–p.16, L.11.) Mr. Nott and Ms. Torres were wearing backpacks and carrying a duffel bag. (R., p.64.) They also had a grocery bag with a six-pack of beer inside.[2] (R., p.64; Tr. Vol. I, p.17, Ls.6–17.) Officer Shuler, who frequently interacted with the homeless community due to his patrol area,[3] decided to introduce himself to

[1] There are two transcripts on appeal. The first, cited as Volume I, contains the motion to suppress hearing, held on September 21, 2016, and the sentencing hearing, held on November 14, 2016. The second, cited as Volume II, contains the entry of plea hearing, held on September 28, 2016.

[2] Officer Shuler noticed that one of the beers was missing. (Tr., p.17, L.15.) He could not recall who was holding the bag. (Tr., p.17, Ls.18–22.)

[3] Officer Shuler is a "bicycle patrol officer whose area of responsibility includes downtown Boise, the greenbelt along the Boise River and the Boise parks. His area also includes Cooper Court, a former homeless encampment, the homeless shelters and non-profits which serve the

Mr. Nott and Ms. Torres because they looked new to town. (R., p.64.) Mr. Nott told Officer Shuler that they had just arrived on a Greyhound bus from Washington, had Section 8 vouchers, and hoped to find housing in Boise. (R., p.64; Tr. Vol. I, p.19, Ls.6–7.) Officer Shuler gave them information on housing shelters and food. (R., p.64.) He also told them that it was illegal to drink in any park except Ann Morrison Park and gave them directions to the park. (R., p.64.) Mr. Nott told Officer Shuler that he had a medical marijuana card. (R., pp.64-65.) Officer Shuler advised Mr. Nott that marijuana use was illegal in Idaho. (R., p.65.) Officer Shuler then left. (R., p.65.)

Later that day, Officer Shuler saw Mr. Nott and Ms. Torres at Rhodes Skate Park, which was a few blocks from their first encounter. (R., p.65.) Officer Shuler frequently patrols this area because the police have had a lot of trouble with alcohol, drugs, and other illegal activity in the park's bathrooms. (R., p.65.) Officer Shuler explained that Rhodes Skate Park is near all the homeless shelters, so "you will have from five to twenty individuals just kind of sitting next to the sidewalk on the west end of the park." (Tr. Vol. I, p.21, Ls.17–21.) Officer Shuler saw Ms. Torres coming out of the bathroom area and drinking out of a beer can.[4] (R., p.65) It is illegal to drink alcohol at Rhodes Skate Park. (R., p.65.) Officer Shuler talked to Ms. Torres, and she told him that she was not drinking beer but had put water in the can. (R., p.65.) She poured some clear liquid out of the can for him. (Tr. Vol. I, p.22, L.24–p.23, L.2.) He suggested a different container for water and reminded her about drinking alcohol in only Ann Morrison Park. (R., p.65; Tr. Vol. I, p.23, Ls.2–9, Ls.17–24.)

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homeless community. His work involves frequent contact with the homeless community." (R., p.64.)

[4] Officer Shuler could not say for sure if Ms. Torres's beer can was the same as the beer cans he saw earlier in their grocery bag. (Tr. Vol. I, p.23, Ls.10–14.)

Officer Shuler then saw Mr. Nott and another man walk towards the park bathrooms. (R., p.65.) Mr. Nott had the grocery bag with beer. (R., p.65.) Officer Shuler saw the men look around and go into one of the bathrooms. (R., p.65.) The bathrooms are single stall, single occupant. (R., p.65.) Officer Shuler went to the bathrooms, and Ms. Torres followed. (R., p.65.) Officer Shuler reminded her again of their conversation about drinking alcohol in Ann Morrison Park only. (R., p.65.) He asked her why Mr. Nott was going into the bathroom. (R., p.65.) She remarked that it was "weird" and "something might be up," but also said, "I think he did go to the bathroom." (R., p.65; State's Ex. 1, 00:03–00:13.) Officer Shuler waited outside. (R., p.65.) He testified that he thought "they were going in there to share a beer or each have a beer." (Tr. Vol. I, p.27, Ls.18–24.) He also testified that he thought "something is going to happen in that bathroom that's not legal" and "when I see an individual go look around then that's raising my awareness that something probably is not right." (Tr. Vol. I, p.27, Ls.12–13, p.42, Ls.20–23.)

About three to five minutes later, Officer Shuler saw Mr. Nott look out of the bathroom, see him, and try to shut the door. (R., p.65; Tr. Vol. I, p.28, Ls.1–4.) Officer Shuler opened the door and told both men to come out and sit down. (R., p.65.) He said that he told them to sit because:

> As a police officer, I need to control the situation. So I'm obviously – it appears a crime potentially could have occurred. So I can't just have, you know, I need everyone outside. So I can find out what's going on and have them sit down, so just to do a quick check.

(Tr. Vol. I, p.29, Ls.2–7.) Officer Shuler also did a quick look in the bathroom. (Tr. Vol. I, p.28, Ls.21–23.) He saw the bag, but it "didn't appear that beer had been consumed." (Tr. Vol. I, p.45, L.25–p.46, L.1.) He also did not see any cans lying around or the men holding any cans. (Tr. Vol. I, p.46, Ls.1–3.) After some "hem hawing around" for a moment, the men sat down. (R., p.65; Tr. Vol. I, p.29, L.25–p.30, L.9; State's Ex. 1, 3:27–3:49.)

Officer Shuler reminded Mr. Nott of their conversation earlier and how Mr. Nott was new to town. (R., p.65; State's Ex. 1, 3:49–3:55.) Mr. Nott immediately responded that he had medical marijuana. (R., p.65.) Officer Shuler asked for the marijuana and intended to issue a citation for marijuana possession. (R., p.65.) Officer Shuler observed Mr. Nott fumbling for a while and trying to hide a baggie behind his legs. (R., p.65.) Officer Shuler asked for the baggie. (R., p.65.) It was a clear plastic baggie with suspected methamphetamine. (R., p.65–66.) Officer Shuler arrested Mr. Nott. (R., p.66.) Officer Shuler also found marijuana and two pipes in Mr. Nott's bag. (*See* State's Obj. & Mem. in Resp. to Def.'s Mot. to Suppress, p.57.) "Once it was all said and done," Officer Shuler testified, "it was determined that they had not consumed alcohol" in the bathroom. (Tr. Vol. I, p.34, Ls.21–25.)

The next day, June 3, 2016, the State filed a Complaint alleging Mr. Nott committed the crimes of felony possession of a controlled substance, methamphetamine, in violation of I.C. § 37-2732(c), misdemeanor possession of a controlled substance, marijuana, in violation of I.C. § 37-2732(c), and misdemeanor possession of drug paraphernalia, in violation of I.C. § 37-2734A. (R., pp.8–9.) Mr. Nott waived a preliminary hearing, and the magistrate bound him over to district court. (R., pp.23–25.) The State filed an Information charging him with the three drug offenses. (R., pp.33–34.)

Mr. Nott moved to suppress the evidence from the search.[5] (R., p.47.) He argued Officer Shuler did not have reasonable suspicion to detain him. (R., pp.49–51.) The State objected. (R., pp.55–61.) The district court held a hearing on the motion. (*See* Tr. Vol. I, p.5, L.1–p.64, L.23.) The district court admitted Officer Shuler's audio recording of the incident, and Officer

[5] The State argued the motion was untimely, but the district court found good cause to enlarge the time. (R., p.58; Tr. Vol. I, p.5, L.13–p.11, L.4.) *See also* Idaho Criminal Rule 12(e).

Shuler testified. (*See* Tr. Vol. I, p.36, L.9 (State's Ex. 1).) The district court also admitted a photograph of Mr. Nott at the time of the arrest, which shows dark tattoos covering his face and neck. (Tr. Vol. I, p.37, L.17 (Def.'s Ex. A).) At the end of the hearing, the district court informed the parties that it would most likely deny the motion, but would issue a written decision. (Tr. Vol. I, p.59, L.4–p.63, L.6.) The district court issued a written decision two days later. (R., pp.64–68.) After providing factual findings, the district court reasoned:

> When Officer Shuler saw the defendant and another man enter into a one-stall restroom with the grocery sack of beer at a park where consumption of alcohol was not permitted, and then saw the defendant peek out and start to shut the restroom door when he saw the police officer, it was permissible for Officer Shuler to investigate further and to briefly detain the defendant and the other man as he investigated the situation more fully. . . . Knowing all that he did from the entire day, there was reasonable suspicion to detain the defendant and investigate more fully. The defendant was observed going into a single occupant restroom with another person and the grocery bag which the officer knew had beer in it. When the defendant peeked out of the restroom and then tried to close the door when he saw the officer, the officer's reasonable suspicion that a crime had been committed or was about to be committed increased. It only increased more justifiably after that point. The first thing the defendant said after he sat down at the officer's instruction was that he had medical marijuana and then he engaged in a very obvious effort to hide a baggie from the officer.
>
> Based upon the totality of the circumstances, Officer Shuler's actions were reasonable. There is no basis to suppress the evidence in this case.

(R., pp.66–67.) The district court denied the motion. (R., p.67.)

After the district court denied the motion, Mr. Nott entered a conditional guilty plea to possession of methamphetamine. (R., pp.77–78; Tr. Vol. II, p.18, L.2–p.19, L.6.) The State agreed to dismiss the two misdemeanor charges. (Tr. Vol. II, p.5, Ls.14–15.) Mr. Nott reserved the right to appeal the district court's denial of his motion to suppress. (R., pp.77–78; Tr. Vol. II, p.5, Ls.8–10, p.10, Ls.12–14, p.19, Ls.6–7.) The district court sentenced Mr. Nott to three years, with one year fixed, and commuted his sentence to 170 days in Ada County Jail, with 166 days

of credit for time served. (R., pp.81–82; Tr. Vol. I, p.70, Ls.19–22) Mr. Nott timely appealed from the district court's judgment of conviction. (R., pp.84–85.)

ISSUE

Did the district court err when it denied Mr. Nott's motion to suppress?

ARGUMENT

The District Court Erred When It Denied Mr. Nott's Motion To Suppress

A. Introduction

Mr. Nott asserts the district erred by denying his motion to suppress because the district court incorrectly determined Officer Shuler had a lawful justification to detain Mr. Nott. Based on the totality of the circumstances, Officer Shuler did not have a reasonable, articulable suspicion that Mr. Nott had committed, or was about to commit, a crime. Rather, Officer Shuler had nothing more than an inchoate and unparticularized suspicion or hunch, which was insufficient to justify his warrantless seizure of Mr. Nott.

B. Standard of Review

The Court uses a bifurcated standard to review a district court's order on a motion to suppress. *State v. Danney*, 153 Idaho 405, 408 (2012). "The Court accepts the trial court's findings of fact if supported by substantial evidence." *State v. Watts*, 142 Idaho 230, 234 (2005). "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. Hunter*, 156 Idaho 568, 570 (Ct. App. 2014). The Court exercises free review of "the trial court's application of constitutional principles to the facts found." *Danney*, 153 Idaho at 408. Determinations of reasonable suspicion are reviewed de novo. *State v. Morgan*, 154 Idaho 109, 111 (2013).

C. The District Court Erred When It Denied Mr. Nott's Motion To Suppress Because Officer Shuler Did Not Have Reasonable Suspicion To Detain Mr. Nott

"The Fourth Amendment of the United States Constitution protects citizens from unreasonable search and seizure." *State v. Hansen*, 138 Idaho 791, 796 (2003). "Article I, Section 17 of the Idaho Constitution nearly identically guarantees that '[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated.'" *State v. Green*, 158 Idaho 884, 886 (2015) (alteration in original). "A search and seizure, conducted without a warrant issued on probable cause, is presumptively unreasonable." *Hansen*, 138 Idaho at 796.

"[T]ypically, seizures must be based on probable cause to be reasonable. However, limited investigatory detentions,[6] 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." *State v. Bly*, 159 Idaho 708, 710 (Ct. App. 2016) (internal citations omitted) (citing *Florida v. Royer*, 460 U.S. 491, 498, 499–500 (1983) (plurality opinion)). "An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *State v. Smith*, 159 Idaho 15, 21 (Ct. App. 2015) (citing *Danney*, 153 Idaho at 409). "The scope of the detention must be carefully tailored to its underlying justification." *Royer*, 460 U.S. at 500 (plurality opinion). The burden is on the State "to establish that the seizure was based on reasonable suspicion and sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." *State v. Bordeaux*, 148 Idaho 1, 8, 217 P.3d 1, 8 (Ct. App. 2009) (citing *Royer*, 460 U.S. at 500 (plurality opinion)).

[6] These limited investigatory detentions are often called *Terry* stops. *See, e.g., State v. Henage*, 143 Idaho 655, 663 (2007); *see also Terry v. Ohio*, 392 U.S. 1 (1968).

"Reasonable suspicion must be based on specific, articulable facts and the rational inferences that can be drawn from those facts." *Morgan*, 154 Idaho at 112 (quoting *State v. Bishop*, 146 Idaho 804, 811 (2009)). "[A]n officer may take into account his experience and law enforcement training in drawing inferences from facts gathered," *Danney*, 153 Idaho at 410, but "[t]he officer, of course, must be able to articulate something more than an 'inchoate and unparticularized suspicion or 'hunch.'" *United States v. Sokolow*, 490 U.S. 1, 7 (1989); *see also Morgan*, 154 Idaho at 112 (same). "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." *Morgan*, 154 Idaho at 112.

Here, there is no dispute Mr. Nott was seized when Officer Shuler ordered him to sit down after exiting the bathroom. The State recognized an investigatory detention (or *Terry* stop) took place. (R., pp.58–61.) The district court also determined Officer Shuler detained Mr. Nott: "it was permissible for Officer Shuler to investigate further and to briefly detain the defendant and the other man as he investigated the situation more fully." (*See* R., p.67.) As such, the only issue on appeal is whether the limited investigatory detention was lawful under the Fourth Amendment.

Mr. Nott contends the investigatory detention was unlawful because Officer Shuler did not have reasonable suspicion. At the time of the *Terry* stop, the circumstances known to Officer Shuler did not justify Mr. Nott's warrantless seizure. Officer Shuler knew that Mr. Nott had just arrived from Washington on a Greyhound bus. Mr. Nott carried all of his belongings with him, and he did not have any prearranged housing. In short, Mr. Nott was homeless. Like many homeless individuals in the area, Mr. Nott went to Rhodes Skate Park. (Tr. Vol. I, p.21, Ls.17–21.) Rhodes Skate Park is "a popular spot," but also attracts criminal activity and other unseemly

behavior for a city park. (Tr. Vol. I, p.21, L.13–p.22, L.9.) Regardless, Mr. Nott's presence in a high-crime area, without more, is insufficient to support a particularized suspicion that Mr. Nott was committing a crime. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) ("An individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable particularized suspicion that the person is committing a crime."); *see also State v. Bly*, 159 Idaho 708, 710 (Ct. App. 2016) (same). Once at the park, Mr. Nott went into the bathroom with another man. He also had a six-pack, or less, of beer. Possession of beer, however, is not a crime. It is also not a crime to go into the bathroom with another person. Thus, there was nothing unlawful about Mr. Nott's conduct. His conduct may have been unusual, but it was not enough to establish he committed or was about to commit a crime. *See Bly*, 159 Idaho at 710 ("And, [the defendant's] lawful, albeit unusual, conduct of entering the car numerous times and then relocating it within the same parking lot is not enough.").

Although innocent acts can give rise to reasonable suspicion, they do not rise to that level in this case. "The Supreme Court has previously held that otherwise innocent acts, when considered together, can be sufficiently suspicious so as to justify an investigative detention." *State v. Kelley*, 160 Idaho 761, 764 (Ct. App. 2016) (citing *Sokolow*, 490 U.S. at 9–10). Here, the totality of the circumstances are not "sufficiently suspicious" to create a reasonable, articulable suspicion of criminal activity specific to Mr. Nott. Officer Shuler was unable to articulate anything more than an unparticularized suspicion or hunch. He initially thought that Mr. Nott and the other man "were going in there to share a beer or each have a beer." (Tr. Vol. I, p.27, Ls.18–24.) But that hunch was quickly dispelled. Officer Shuler saw no opened beer cans in the bathroom or in the men's hands when he opened the bathroom door and took a quick look. (Tr. Vol. I, p.28, Ls.21–23, p.45, L.25–p.46, L.1, p.46, Ls.1–3.) At this point, Officer Shuler had

no reason to detain Mr. Nott and order him to sit down. *See Royer*, 460 U.S. at 500 (plurality opinion) (detention must last "no longer than is necessary" to effectuate its purpose and its scope must be "carefully tailored" to its justification). Officer Shuler's only other suspicions were that "something" illegal was going to happen in the bathroom, "something probably is not right," and it appeared "a crime potentially could have occurred." (Tr. Vol. I, p.27, Ls.12–13, p.29, Ls.2–7, p.42, Ls.20–23.) This is pure speculation of vague, generalized criminal activity. Ultimately, Mr. Nott's conduct was not illegal. Officer Shuler was acting upon hunch because two men—one of them homeless with extensive face tattoos—went into a bathroom together. Therefore, the district court erred by determining Officer Shuler had reasonable suspicion to detain Mr. Nott.

The evidence obtained from Officer Shuler's search of Mr. Nott and his possessions "would not have come to light but for the government's unconstitutional conduct" in detaining Mr. Nott without reasonable suspicion. *State v. Wigginton*, 142 Idaho 180, 184 (Ct. App. 2005). Mr. Nott made the comment about his marijuana possession *during* the unlawful detention. (R., p.65; State's Ex. 1, 3:49–3:55.) Due to the unlawful seizure, the district court should have suppressed all evidence obtained from the police's warrantless search. *See Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (evidence obtained through unconstitutional police conduct subject to exclusion); *Bishop*, 146 Idaho at 810–11 (same).

CONCLUSION

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

DATED this 9th day of June, 2017.

/s/
JENNY C. SWINFORD
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of June, 2017, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, as follows:

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