7-20-2017

State v. Nott Respondent's Brief Dckt. 44651

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 44651**
Plaintiff-Respondent,	)	
	)	**Ada County Case No.**
v.	)	**CR-FE-2016-7046**
	)	
VIRGIL LYNN NOTT,	)	
	)	
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

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District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Virgil Lynn Nott appeals from his conviction for possession of methamphetamine. Nott challenges the denial of his suppression motion.

Statement Of The Facts And Course Of The Proceedings

The state charged Nott with possession of methamphetamine, possession of marijuana, and possession of drug paraphernalia. (R., pp. 33-34.) He moved to "suppress any and all evidence obtained as a result of the seizure and detention of the Defendant." (R., p. 47.) He argued that an initial seizure of Nott to determine if he had been drinking alcohol or using marijuana in a park bathroom "may have been warranted," but that "the seizure in this matter was unreasonably extended." (R., p. 50.) At oral argument he later expanded his theory to include the initial seizure being unconstitutional. (9/21/16 Tr., p. 55, L. 6 – p. 59, L. 3.) After an evidentiary hearing on the motion, the district court found the following facts:

> Officer Tom Shuler is a Boise City 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 homeless community. His work involves frequent contact with the homeless community. Early in the afternoon of June 2, 2016, Officer Shuler encountered Virgil Nott and a female friend at 15th Street and Washington, not far from the Albertson's at 15th and State. They were wearing backpacks and carrying a duffle. They looked new to town so he introduced himself. Mr. Nott told him that they had just arrived from Bellingham, Washington, had Section 8 vouchers and were hoping to find housing in Boise. Officer Shuler told them where the shelters were and where they could get food. Because they had a grocery sack with a six pack of cold beer in it, he told them that it

was legal to drink in Ann Morrison Park but not the other parks and gave them directions to Ann Morrison Park. Mr. Nott told Officer Shuler that he had a medical marijuana card from Washington and was advised that marijuana use was not legal in Idaho. Officer Shuler then left.

Later in the same day, Officer Shuler saw Mr. Nott and his friend, Ms. Torres, at Rhodes Skate Park, a few blocks from where he had earlier encountered them. The park has had lots of trouble with both alcohol and drug use and illegal activity in the bathrooms so it is an area he frequently patrols. It is not legal to drink alcohol in Rhodes Skate Park. When he arrived he saw Ms. Torres coming out of a bathroom and drinking out of a beer can. He went to talk to her and she said she was not drinking beer but had put water in the can. He suggested a different container. He told her again that drinking was legal in Ann Morrison Park.

He saw Mr. Nott and another man move towards a restroom. The park's restrooms are single stall/one occupant. He watched both of them look around and then go into one of the units. Mr. Nott was carrying the grocery sack with the beer in it. Officer Shuler went to the front of the restroom where he was joined by Ms. Torres. Officer Shuler reminded her that they had just discussed that alcohol use was only permissible in Ann Morrison Park, not the other parks, and asked why Mr. Nott was going into one of the restrooms. Ms. Torres said it was "weird" and that there might be something going on so Officer Shuler continued to wait outside of the restroom.

Mr. Nott peeked out of the restroom, saw Officer Shuler and tried to close the door. Officer Shuler opened the door and directed both men to come out and sit down. He suspected illegal behavior was either occurring or about to occur. Both men sat down. Officer Shuler reminded Mr. Nott that they had already discussed that alcohol use was banned in all parks except for Ann Morrison. Mr. Nott immediately said that he had medical marijuana. Officer Shuler asked him to give it to him because he intended to give him a citation for marijuana possession. At that point, Mr. Nott tried to hide a baggie behind his legs after fumbling around for a while. Officer Shuler saw him trying to conceal the baggie and asked for it. It was a clear plastic baggie with a white powdery substance which Officer Shuler suspected was methamphetamine. At that point, Mr. Nott was arrested.

(R., pp. 64-66 (paragraphs breaks altered for readability).)

The district court held:

> 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.

(R., pp. 66-67.) The district court also rejected the defense theory that reasonable suspicion dissipated shortly after the seizure started by noting that Nott almost immediately stated that he possessed marijuana and "engaged in a very obvious effort to hide a baggie from the officer." (R., p. 67.) On this basis the district court denied the suppression motion. (Id.)

Nott entered a conditional guilty plea to possession of methamphetamine, preserving his right to appeal the denial of his suppression motion, and the state dismissed the two misdemeanor counts. (R., pp. 77-78; 9/28/16 Tr., p. 5, Ls. 7-21; p. 18, Ls. 2-19.) The district court sentenced Nott to three years with one year determinate but commuted the sentence to time served (less four days) and entered judgment. (R., pp. 81-82.) Nott filed a notice of appeal timely from the entry of judgment. (R., pp. 84-85.)

ISSUE

Nott states the issue on appeal as:

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

(Appellant's brief, p. 7.)

The state rephrases the issue as:

Has Nott failed to demonstrate error in the district court's determination that the officer had reasonable suspicion to conduct an investigative detention?

ARGUMENT

The Investigative Detention Was Supported By Reasonable Suspicion Under The Totality Of The Circumstances

A. Introduction

The district court concluded that, under the totality of the circumstances, Officer Shuler had reasonable suspicion that Nott was engaged in illegal activity in a park bathroom and therefore was constitutionally justified in conducting an investigative detention. (R., pp. 64-67.) Nott contends that the district court erred by concluding that the facts justified an investigative detention. (Appellant's brief, pp. 9-12.) Application of constitutional search and seizure standards to the totality of circumstances found by the district court shows no unreasonable detention.

B. Standard Of Review

"When reviewing 'seizure' issues, we defer to the trial court's factual findings, unless they are clearly erroneous. We freely review, de novo, the trial court's legal determination of whether or not an illegal seizure occurred." State v. Bainbridge, 117 Idaho 245, 247, 787 P.2d 231, 233 (1990).

C. The Investigative Detention Was Supported By Reasonable Suspicion

"An investigative detention is a seizure of limited duration to investigate suspected criminal activity and does not offend the Fourth Amendment if the facts available to the officer at the time gave rise to reasonable suspicion to believe that criminal activity was afoot." State v. Stewart, 145 Idaho 641, 644, 181 P.3d 1249, 1252 (Ct. App. 2008) (citing Terry v. Ohio, 392 U.S. 1 (1968)).

"The justification for an investigative detention is evaluated upon the totality of the circumstances then known to the officer." State v. Sheldon, 139 Idaho 980, 983, 88 P.3d 1220, 1223 (Ct. App. 2003) (citing United States v. Cortez, 449 U.S. 411, 418 (1981)). Evidence sufficient to establish reasonable suspicion is "less than that necessary to establish probable cause" but requires "more than a mere hunch." State v. Bishop, 146 Idaho 804, 811, 203 P.3d 1203, 1210 (2009). Reasonable suspicion "does not require a belief that any *specific* criminal activity is afoot to justify an investigative detention; instead, all that is required is a showing of objective and specific articulable facts giving reason to believe that the individual has been or is about to be involved in *some* criminal activity." State v. Perez-Jungo, 156 Idaho 609, 615, 329 P.3d 391, 397 (Ct. App. 2014) (emphasis original). In addition, "innocent acts, when considered together, can be sufficiently suspicious so as to justify an investigative detention." State v. Neal, 159 Idaho 919, 367 P.3d 1231, 1237 (Ct. App. 2016) (citing United States v. Sokolow, 490 U.S. 1, 9-10 (1989)).

The totality of the circumstances found by the district court included, but was not limited to, the following. Nott went into a single-person park bathroom with another man. Nott was carrying beer that could not legally be consumed in the park (including the restroom). Police have had difficulty with people consuming alcohol and drugs in the park bathrooms. The officer knew Nott was aware he could not consume beer in the park, because he had told Nott as much himself. The officer had seen Nott's girlfriend carrying an open beer can out of a park bathroom, although the beer was gone and had been replaced by water.

Nott's girlfriend stated she did not know why Nott would enter the bathroom with another man, and characterized this behavior as "weird." As the officer waited outside the bathroom, Nott peeked out and, seeing the officer, quickly attempted to retreat back into the bathroom and close the door. (R., pp. 64-65.) The district court concluded that the officer had reasonable suspicion justifying an investigative detention before Nott retreated back into the bathroom to avoid the officer, and that activity merely strengthened his reasonable suspicion. (R., pp. 66-67.) The district court did not err in concluding that the information available to the officer under the totality of the circumstances amounted to more than a mere hunch that Nott was involved in illegal activity.

Nott contends otherwise. He argues that his "presence in a high-crime area, without more, is insufficient to support a particularized suspicion that [he] was committing a crime." (Appellant's brief, p. 11.) Although true, the district court properly included the fact that the park had a high incidence of crimes involving drugs and illegal consumption of alcohol as part of the totality of the circumstances. Nott also points out that mere possession of beer and going into a single user bathroom with another person is not itself illegal. (Appellant's brief, p. 11.) Again true, but again this fact was properly included by the district court in the totality of circumstances. Nott's arguments, which do not address the facts in their totality, do not show any error by the district court.

Nott next contends that the officer's "hunch" that Nott may have been involved in illegal consumption of beer was "quickly dispelled" by the fact he "saw no open beer cans in the bathroom or in the men's hands when he opened the

bathroom door and took a quick look." (Appellant's brief, p. 11.) Nott does not articulate how failure to spot open cans in plain view dissipated the officer's suspicion. Certainly the investigation associated with the stop was not limited to a quick check of the men's hands and immediately visible parts of the bathroom for open containers. A few questions regarding what the men were doing, a request to see if the beers in the sack remained closed, and a possible look at the less open parts of the bathroom (such as trash cans), would not have been unreasonable. Failure to immediately confirm the officer's suspicions did not "dispel" them.

Finally, Nott argues that the officer had only "pure speculation of vague, generalized criminal activity." (Appellant's brief, p. 12.) This argument is contrary to the law and the record. As noted above, the officer did not need suspicion of a specific crime. Perez-Jungo, 156 Idaho at 615, 329 P.3d at 397. Here the totality of the circumstances indicated criminal activity related to drugs or illegal consumption of alcohol. Indeed, part of the totality of suspicious circumstances is the inference that Nott and the other man entered the bathroom not to use it for its intended purposes, but in an attempt to hide their actions, an inference strengthened when Nott attempted to retreat back inside once he realized an officer was waiting for them outside. That the totality of the circumstances included apparent efforts to conceal Nott's activities did not reduce the officer's reasonable suspicions to "pure speculation."

The district court correctly held that the totality of the circumstances gave rise to reasonable suspicion to believe that criminal activity was afoot. Nott has failed to show error in the ruling.

CONCLUSION

The state respectfully requests this Court to affirm the judgment of conviction.

DATED this 20th day of July, 2017.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 20th day of July, 2017, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

JENNY C. SWINFORD
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/dd