6-19-2017

State v. Kiepke Appellant's Brief Dckt. 44713

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 44713**
Plaintiff-Respondent,	)	
	)	**ADA COUNTY NO. CR-FE-2016-8110**
v.	)	
	)	
WILLIAM CHRISTIAN KIEPKE,	)	**APPELLANT'S BRIEF**
	)	
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

William Kiepke contends the district court erred when it denied his motion to suppress evidence of drugs and paraphernalia found during a traffic stop. Specifically, in concluding that officers had not impermissibly delayed Mr. Kiepke's detention by abandoning the mission of the traffic stop in order to conduct a dog sniff, the district court erroneously concluded the delay was permissible because it was only *de minimus*. Both the United States Supreme Court and the Idaho Supreme Court have clearly rejected that sort of analysis.

Under the proper analysis, the officer did not have reasonable suspicion to justify the dog sniff, and so, his decision to abandon the mission of the traffic stop to conduct that dog sniff unlawfully prolonged the detention. All the evidence found during the ensuing searches of Mr. Kiepke's car and of his person should have been suppressed as poisonous fruit because it was all come at by exploiting the illegal prolongation of that detention. As such, this Court should reverse the order denying Mr. Kiepke's motion to suppress and remand this case for further proceedings.

Statement of Facts & Course of Proceedings

Mr. Kiepke was at a gas station around midnight and was having what he described as a verbal argument with his girlfriend, Rachel. (Tr., p.7, Ls.11-12; Exhibit 1, 1:24.)[1] He started out talking through the window of her car before he went into the convenience store. (Tr., p.20,

[1] All citations to "Tr." in this brief refer to the volume containing the transcript of the motion to suppress hearing held on October 6, 2016. Exhibit 1 is the video from the officer's body camera, which was admitted during the motion to suppress hearing. (*See* Tr., p.18, L.14 - p.19, L.16.) If it is appropriate, a reference to the relevant time stamp in the video will be included in the citation.

Ls.10-17.) When he came back out, he got into his own car, and his girlfriend got into the passenger seat. (Tr., p.10, Ls.17 - p.11, L.3.) She got out soon after, and Mr. Kiepke began to drive away. (Tr., p.11, Ls.11-13.)

A police officer had been observing their interactions. Specifically, he was watching Rachel,[2] who the officer considered to be a person of interest in a drug investigation. (*See* Tr., p.7, Ls.24-25.) The officer also considered this gas station to be a "high drug trafficking area." (Tr., p.7, Ls.11-17.) However, he did not provide any details to explain why he thought Rachel was a person of interest, nor did he report seeing any exchange occur between Mr. Kiepke and Rachel. (*See generally* Tr.) In fact, the officer admitted he did not make note of anything particularly suspicious about Mr. Kiepke's behavior at the gas station in his report. (Tr., p.20, L.22 - p.21, L.2.) He simply felt "the whole thing was suspicious." (Tr., p.20, L.25 - p.21, L.1.) However, he also ran Mr. Kiepke's license plate information and learned that Mr. Kiepke did not have an Idaho driver's license and his driving privileges were suspended in two other states. (Tr., p.8, L.20 - p.9, L.14.) As a result, he ultimately pulled Mr. Kiepke over for failing to signal as he left the gas station and because he did not have a valid driver's license. (Tr., p.12, Ls.5-6.)

The officer did not mention the failure to signal at all when he approached Mr. Kiepke; instead he only asked about his lack of a driver's license. (*See* Exhibit 1.) Mr. Kiepke admitted he did not have a valid license, but was working to get one. (Tr., p.12, Ls.4-21; Exhibit 1.) Mr. Kiepke provided the officer with an identification card as well as the registration information and proof of insurance for the car. (Tr., p.12, Ls.23-25.) After only a minute and one-half, the

[2] The officer indicated that one "Rachel Vaughan" was the driver of the other car. (Tr., p.8, Ls.11-12.)

officer had Mr. Kiepke get out of the car so that he could conduct a dog sniff on the car. (Exhibit 1; Tr., p.13, Ls.6-14.) The officer frisked Mr. Kiepke, found nothing of note, and had Mr. Kiepke sit on the front of the patrol car while he went to conduct the dog sniff. (*See* Exhibit 1; Tr., p.13, Ls.4-5.) The officer admitted that, while he was conducting the dog sniff, none of the other officers on scene were writing tickets for the traffic violations. (Tr., p.26, Ls.11-19.)

The dog alerted on the car, and a subsequent search of the car found marijuana and various items of drug paraphernalia. (Tr., p.14, Ls.6-7, p.15, L.21 - p.16, L.15.) At that point, the officer placed Mr. Kiepke under arrest for possession of marijuana, possession of drug paraphernalia, and failure to purchase a driver's license. (Tr., p.15, Ls.13-15.) Officers then searched Mr. Kiepke incident to that arrest and found methamphetamine in one of his socks. (Tr., p.16, L.16 - p.17, L.17.)

Mr. Kiepke subsequently moved to suppress the evidence found in this case based on the fact that the officer had unlawfully prolonged the detention by abandoning the mission of the traffic stop in order to conduct the dog sniff. (R., pp.56-62.) The district court denied that motion. (Tr., p.34, Ls.20-22.) Specifically, it concluded the dog sniff was valid because "[t]here is no appreciable delay whatsoever between the time of justified stop for driving without a license and failing to use a turn signal and the canine circling the vehicle and alerting"; "[t]his is unlike a number of cases where stops were prolonged for multiple minutes on questionable grounds." (Tr., p.33, Ls.18-22; p.34, Ls.16-22.) As such, it concluded the search of the car was valid based on the dog's alert, and the search of Mr. Kiepke's person was valid because it was incident to a valid arrest. (Tr., p.33, L.24 - p.34, L.7.)

As a result of the district court's ruling, Mr. Kiepke entered a conditional guilty plea, by which he pled guilty to possession of methamphetamine while reserving his right to appeal the

district court's decision on his motion to suppress. (*See* Tr., p.36, Ls.10-13.) The district court ultimately imposed and executed a unified sentence of five years, with one year fixed, concurrent to another case in which Mr. Kiepke had been on parole. (R., pp.92-93.) Mr. Kiepke filed a notice of appeal timely from the judgment of conviction. (R., pp.95-96.)

ISSUE

Whether the district court erred when it denied Mr. Kiepke's motion to suppress.

ARGUMENT

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

A. Standard Of Review

The standard of review of a motion to suppress is bifurcated, meaning the appellate court will accept the facts as found by the district court unless they are clearly erroneous, but it will review the application of the law to those facts *de novo*. *State v. Kelley*, 160 Idaho 761, 762 (Ct. App. 2016), *rev. denied*.

The Fourth Amendment of the United States Constitution forbids unreasonable searches and seizures. U.S. CONST. amend IV. Warrantless searches and seizures are presumptively unreasonable. *Mincey v. Arizona*, 437 U.S. 385, 390 (1978). Therefore, a warrantless search is presumed to violate the Fourth Amendment unless the State demonstrates that one of the exceptional, well-established, and well-delineated exceptions to this requirement is applicable to the facts. *Id*. at 390-91.

B. The District Court Should Have Suppressed All The Evidence Found In This Case Because It Was Found As The Result Of The Officer Unlawfully Prolonging The Traffic Stop To Conduct An Unjustified Dog Sniff

The district court decided the dog sniff was properly conducted because "[t]here is no appreciable delay whatsoever between the time of justified stop for driving without a license and failing to use a turn signal and the canine circling the vehicle and alerting"; "[t]his is unlike a number of cases where stops were prolonged for multiple minutes on questionable grounds." (Tr., p.33, Ls.18-22; p.34, Ls.16-19.) Basically, it concluded the dog sniff was proper because it was only a *de minimus* delay.

Both the Idaho Supreme Court and the United States Supreme Court have expressly rejected that sort of analysis: "The rule isn't concerned with when the officer deviates from the original purpose of the traffic stop, it is concerned with the fact that the officer deviates from the original purpose of the stop at all." *State v. Linze*, 161 Idaho 605, ___, 389 P.3d 150, 154 (2016); *accord Rodriguez v. United States*, ___ U.S. ___, 135 S. Ct. 1609, 1616 (2015). That means, "[w]hile such a brief period of time could reasonably be considered *de minimus*, the United States Supreme Court was clear in *Rodriguez* that *de minimus* exceptions are no longer available." *Linze*, 389 P.3d at 154. Rather, "[t]he critical question then, is . . . whether conducting the sniff prolongs—*i.e.* adds time to—the stop." *Rodriguez*, 135 S. Ct. at 1616 (internal quotation marks omitted). Therefore, the district court's decision on the motion to suppress was based on an improper legal analysis and should be vacated.

Furthermore, the sniff actually did add time to the detention, and thus, was impermissible. The United States Supreme Court has held that "the tolerable duration of police inquires in the traffic-stop context is determined by the seizure's 'mission'—to address the traffic violation that warranted the stop. *Id.* at 1614. As such, the detention "may last no longer than is necessary to effectuate that purpose." *Id.* (internal quotation marks and modifications omitted). Furthermore, "a dog sniff is not fairly characterized as part of the officer's traffic mission." *Id.* at 1615. Thus, delaying completion of the mission of a traffic stop in order to conduct a dog sniff (absent some additional fact establishing reasonable suspicion to extend the scope of the investigation) constitutes an unlawful prolongation of the seizure. *Id.* at 1616; *accord Linze*, 389 P.3d at 154; *Kelley*, 160 Idaho at 764.

The officer in this case abandoned the mission of the traffic stop so as to conduct a dog sniff. The purpose of the stop, according to the officer, was "[b]ecause he didn't have a driver's

license as well as a turn signal violation." (Tr., p.12, Ls.5-6.) The video from the officer's body camera reveals that the officer never mentioned the failure to signal to Mr. Kiepke at all. (*See generally* Exhibit 1.) As such, that aspect of the traffic stop was immediately abandoned. Rather, the officer focused his initial investigation on the status of Mr. Kiepke's driving privileges. (Exhibit 1; Tr., p.12, Ls.14-21.) However, after just a minute and one-half, the officer abandoned that investigation as well, deciding to have Mr. Kiepke exit the car so that he could conduct a dog sniff of the car instead. (Exhibit 1; Tr., p.13, Ls.6-14.) The officer admitted that, while he conducted the dog sniff, none of the other officers on scene were writing tickets for either of the reasons Mr. Kiepke was pulled over. (Tr., p.26, Ls.11-19.) Therefore, the officers abandoned the mission of the traffic stop, and the dog sniff added time to Mr. Kiepke's detention.

Such a prolongation is unlawful if the sniff was not independently justified by reasonable suspicion. *Linze*, 389 P.3d at 154 ("This new seizure cannot piggy-back on the reasonableness of the original seizure.") The State failed to carry its burden to prove there was a reasonable, particularized suspicion of drug activity in this case which would have justified expanding the scope of the investigation and deploying the dog. *See, e.g.*, *Kelley*, 160 Idaho at 763; *see also State v. Bishop*, 146 Idaho 804, 811 (2009) (quoting *Alabama v. White*, 496 U.S. 325, 329 (1990)) ("[R]easonable suspicion requires more than a mere hunch or 'inchoate and unparticularized suspicion.'").

The Court of Appeals decision in *Kelley* is particularly applicable to this case, because it was evaluating a case with similar facts in regard to the same question – whether those facts justified prolonging the stop to allow for a dog sniff. *See Kelley*, 160 Idaho 761. The *Kelley* Court explained that, although reasonable suspicion is reviewed on the totality of the

circumstances, when the basis for the alleged suspicion is set forth by drawing adverse inferences from a collection of otherwise-innocuous facts (such as nervous behavior or unusual travel plans), there has to be some objective fact connecting those innocuous facts to criminal activity by this particular suspect. *See id.* at 764 ("The officer did not testify to any facts connecting Kelley's nervous behavior with criminal activity. Likewise, the officer did not testify to any objective facts linking Kelley's unusual travel plans to drug activity."). *Id.* Furthermore, the fact that "he was driving on the same road others have used to transport drugs," is not enough to establish the necessary *particularized* suspicion. *Id.* ("The use of a commonly travelled road does not give an officer reasonable suspicion to prolong a traffic stop."). Rather, in such cases, the officer is acting on nothing more than a hunch. *Id.*

As in *Kelley*, the officer in this case did not testify to any facts connecting Mr. Kiepke's behavior in the parking lot with criminal or drug activity. (*See generally* Tr.) Rather, the evidence here only shows a collection of otherwise-innocuous behavior: that Mr. Kiepke was at a gas station around midnight, went into the store, and argued with his girlfriend. (*See* Tr., p.7, L.6 - p.12, L.6; Exhibit 1, 1:24.) There was no evidence offered that any exchange of physical objects took place between Mr. Kiepke and Ms. Vaughan. (*See generally* Tr.) Furthermore, when the officer frisked Mr. Kiepke, he did not find anything noteworthy. (*See* Exhibit 1.) Thus, the totality of the circumstances does not show a *particularized* suspicion that Mr. Kiepke was involved in any sort of illicit activity. The officer's testimony actually bears this out. He admitted his report did not indicate any of Mr. Kiepke's actions were particularly suspicious; he testified he just felt "the whole thing was suspicious." (Tr., p.20, L.22 - p.21, L.2.) In other words, the officer admitted he only had an inchoate, unparticularized hunch.

Furthermore, as in *Kelley*, the only fact presented which might tend to connect Mr. Kiepke's otherwise-innocuous actions to drug activity was the officer's description of the location as a "high drug trafficking area." (*See* Tr., p.7, Ls.11-17.) However, as the Court of Appeals made clear in *Kelley*, the mere fact that this person was in an area which was open to the public, even though it has been the sight of others' past nefarious conduct, is not sufficient to establish the necessary *particularized* suspicion to justify prolonging this traffic stop to conduct a dog sniff of this person's car. *See Kelley*, 160 Idaho at 764. Therefore, just as in *Kelley*, a consideration of the totality of the circumstances in this case shows the officer was acting on a hunch when he decided to abandon the mission of the traffic stop and conduct the dog sniff. Since that dog sniff was not independently justified by reasonable suspicion, prolonging the detention to conduct that sniff was unlawful, and the evidence found as a result of that sniff should have been suppressed. *See Linze*, 389 Idaho at 154.

The suppression of the evidence should include the evidence found during the search of both Mr. Kiepke's car and his person, because all that evidence was "come at by the exploitation of the illegality." *Wong Sun v. United States*, 371 U.S. 471, 485 (1963). As such, all that evidence is fruit of the poisonous tree. *Id.*; *State v. Page*, 140 Idaho 841, 846 (2004).

The connection between the illegal action and the search of the car is straightforward. As the district court indicated, the officers only gained probable cause to search the car through the dog's alert. (*See* Tr., p.33, Ls.23-24.) However, the dog sniff itself occurred during the time the detention was being unlawfully prolonged. Therefore, the evidence in the car was come at by exploiting the illegal prolongation of the detention.

The evidence found on Mr. Kiepke's person was similarly tainted. According to the officer, Mr. Kiepke was placed under arrest after the search of his car for several different

offenses: "driving without a driver's license, possession of paraphernalia, [and] possession of marijuana." (Tr., p.15, Ls.11-15.) As the district court indicated, the search Mr. Kiepke's person was only potentially justified as a search incident to arrest. (*See* Tr., p.34, Ls.2-4.) Because that search was only conducted due to that arrest and that arrest was premised on evidence which was found during the search of Mr. Kiepke's car, and because the search of the car was itself unlawful since the probable cause to conduct that search arose during an unlawfully-prolonged detention, the search of his person was come at, at least in part, by the exploiting the illegal prolongation of the detention.[3] That means it was tainted by the unlawfully prolonged detention and should be suppressed as poisonous fruit. *Wong Sun*, 371 U.S. at 485; *Page*, 140 Idaho at 846.

Therefore, under the proper analysis, the evidence found on Mr. Kiepke's person, along with the evidence found in his car, should have been suppressed.

[3] While, as the prosecutor argued below, the officer might have been able to arrest Mr. Kiepke for driving without a valid license from the outset of the encounter (an action which Mr. Kiepke does not concede would have been proper), the evaluation of whether the exclusionary rule applies turns on what the officer actually did, not what he might have, but did not, do. *See, e.g., State v. Liechty*, 152 Idaho 163, 170 (Ct. App. 2011); *State v. Bunting*, 142 Idaho 908, 917 (Ct. App. 2006); *cf. Rodriguez*, 135 S. Ct. at 1616 ("[t]he reasonableness of a seizure, however, depends on what the police in fact do."). Additionally, this sort of alternative justification for the search will not expunge the taint of illegal conduct when the alternative basis is intertwined with the illegal conduct. *See, e.g., State v. Barwick*, 94 Idaho 139, 142 (1989) (holding that, even though the defendant had consented to a search, that consent was given after he was illegally arrested, and the two events were so intertwined that the consent exception did not expunge the taint of the illegal arrest). Since the actions the officer actually undertook in this case indicate the arrest did not occur until after the unlawful prolonging of the detention, and that arrest was actually intertwined with that illegal conduct, this hypothetical alternate justification does not expunge the taint in this case.

CONCLUSION

Mr. Kiepke respectfully requests this Court reverse the order denying his motion to suppress and remand this case for further proceedings.

DATED this 19th day of June, 2017.

_____/s/_____
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 19th day of June, 2017, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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