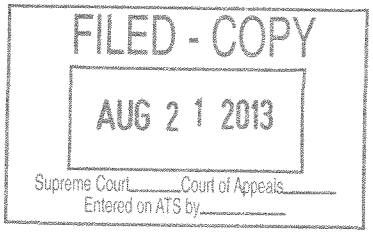
8-21-2013

State v. Hunter Appellant's Brief Dckt. 40950

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	Supreme Court No. 40950
	)	
vs.	)	
	)	
MARK C. HUNTER,	)	
	)	
	)	
Defendant-Appellant.	)	
	)	



APPELLANT'S BRIEF

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada

---

HONORABLE KATHRYN A. STICKLEN

Presiding Judge

ERIK J. O'DANIEL
Ada County Public Defender
200 W. Front, Suite 1107
Boise, Idaho 83702

ATTORNEY FOR DEFENDANT-APPELLANT

LAWRENCE G. WASDEN
Attorney General
Statehouse, Room 210
Boise, Idaho 83720

ATTORNEY FOR PLAINTIFF-RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

I. STATEMENT OF THE CASE

Based on an event occurring on 16 April 2011, Mark C. Hunter (Hunter) was charged with a DUI in Boise, Idaho. (R. at 6.) Defense counsel eventually filed a motion to suppress evidence on the basis of a detention that exceeded the scope allowed by the initial stop, (R. at 34-35.) to which the state objected. (R. at 36-37.) The court required counsel to brief the issue of timeliness.

Hunter filed a Memorandum in support of his motion. (R. at 31-44.) The state filed a Response. (R. at 45-57.)

A short evidentiary hearing was held on 7 November 2011. (R. at 58.) The parties stipulated to admit the police report with a correction as noted in the stipulation of the parties. (R. at 63-73.) On 6 December 2011, the magistrate granted Hunter's motion and suppressed the result of the breath test. (R. at 60-62.) The magistrate's Decision and Order lay out the specific facts found by the court:

> On April 16th at three minutes after midnight the defendant was stopped at eighth and Myrtle for driving without headlights. There was the odor of alcohol and the defendant admitted drinking three vodka tonics between 7:30 and 10:30. Officer Robert Gibson responded and conducted three field sobriety tests. The defendant failed the horizontal gaze nystagmus test, but passed the one leg stand and the walk and turn tests. The defendant was then arrested and submitted to a breath test which resulted in readings of .090 and .088.

Applying the relevant law to these facts, the court concluded that the HGN test was rendered unreliable as a matter of law, pursuant to State v. Garrett, 119 Idaho 878, 881 (1991). The court further concluded that the remaining factors were insufficient to establish probable cause for an arrest. Therefore, the magistrate ordered the result of the breath test suppressed. (R. at 60-62.)

The State appealed this order to the district court. Briefing followed. The District Judge reversed the magistrate's decision, finding that the officer had probable cause to arrest Hunter. (R. at 140-149.)

Hunter timely appeals to this court. (R. at 151-153.)

II. ISSUE PRESENTED

Did the District Judge err in reversing the order of the magistrate?

III. STANDARD OF REVIEW

On review of a decision of the district court, rendered in its appellate capacity, the decision of the district court is reviewed directly. Losser v. Bradstreet, 145 Idaho 670, 672, 183 P.3d 758, 760 (2008). We examine the magistrate record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. Id. Substantial evidence is " such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." State v. Byington, 132 Idaho 589, 593, 977 P.2d 203, 207 (1999) (quoting Bullard v. Sun Valley Aviation, Inc., 128 Idaho 430, 432, 914 P.2d 564, 566 (1996)). Although we defer to the trial court's findings of fact if they are supported by substantial evidence, we exercise free review over questions of law. Losser, 145 Idaho at 672, 183 P.3d at 760; State v. Madden, 127 Idaho 894, 896, 908 P.2d 587, 589 (Ct. App. 1995).

IV. ARGUMENT

A. The Actual Facts

Hunter was stopped shortly after midnight on 16 April 2011, after an officer observed him leave a parking garage and operate a motor vehicle on a city street in downtown Boise with no headlights. Upon speaking with Hunter, the officer smelled the odor of alcoholic beverage, and Hunter admitted to consuming three drinks in the prior four and one-half hours. The officer observed HGN in Hunter's eyes, while he was seated in the driver's seat. The officer had Hunter step out of the vehicle to perform SFSTs. The officer noted that Hunter's eyes were glassy and bloodshot. Hunter indicated he had no physical impairments, head injuries or eye problems. SFSTs ensued. The officer scored Hunter six points on the HGN test. The officer scored Hunter zero points on the Walk and Turn test. This is out of eight possible points, with a failure being two points or more. The officer scored Hunter one point on the One Leg Stand test, out of four points possible, with a failure also being two or more points. The officer then performed a second HGN exam, noting the same scoring errors. The officer then placed Hunter under arrest. (R. at 66-73.)

The facts giving rise to the reasonable suspicion required to administer the SFSTs are not really in dispute. The facts that can be inferred following the SFSTs are at issue. First,

the District Judge noted that Hunter twice failed the HGN test. (R. at 147-148.) This places too much weight on that failure. HGN is an involuntary movement of the eyes, and one failure is the same as ten failures. It is not something a suspect has control over, and the suspect cannot intentionally manipulate this test. As an analogy, a person is either colorblind, or not. If you fail a color vision test twice, you are not "more colorblind."

Second, the agreed facts allow for the conclusions that during the Walk and Turn test, Hunter did not:

1. Start too soon
2. Fail to keep his balance during the instructions
3. Stop too soon
4. Miss heel to toe by more than one-half inch
5. Step off the line
6. Raise his arms more than six inches
7. Take the wrong number of steps
8. Perform an improper turn

(R., at 71.) While Hunter could have done any or all of these things incorrectly, the evidence in this case is that he did all of them correctly. Moreover, many of these scoring errors occur during the walking portion of the test. For example, a suspect has eighteen chances to miss heel to toe. So, for some of these scoring items, success actually means multiple successes.

With regard to the One Leg Stand, Hunter received a scoring result for swaying during the test. He did not receive scoring points for:

1. Raise his arms more than six inches
2. Hoping
3. Putting his foot down

(R. at 71.) Hunter agrees that the facts that give rise to probable cause do not have to be undisputed. However, the overwhelming set of facts is that Hunter did amazingly well on the SFSTs. By the state's own scoring system, he passed both of the physical tests, although he failed the HGN test.

Additionally, the DUI Supplement report contains an "Appearance" section. (R. at 71.) Negatively, Hunter is noted as presenting with the odor of alcoholic beverage, as well as having glassy, bloodshot eyes. Positively, he is indicated to be cooperative. Hunter did not receive negative marks for being vulgar, having mood swings, threatening anyone, speaking slowly or rapidly, slurring his words or being "thick-tongued." He was also not marked as having an impaired memory. Given their appearance on the DUI Supplement, it should be inferred that all these negative characteristics are commonly encountered with intoxicated suspects, but Hunter displayed none of them.

In summation, the only additional suspicious facts that were obtained beyond those possessed by the officer before requesting that Hunter perform the SFSTs, is that he failed the HGN, and he swayed during the One Leg Stand test, but such swaying did not cause him to score sufficient points to constitute a failure of the One Leg Stand test. That is it.

B. The Law

Hunter performed the SFSTs appropriately and did not fail the tests. Idaho law requires that if an individual passes the SFSTs, absent something "unique," the reasonable suspicion for his continued investigatory detention is dispelled. Pursuant to such case law, the suspect is no longer subject to detention, hence he clearly cannot be subject to arrest. The District court erred in finding that probable cause to arrest Hunter existed, and in reversing the magistrate's order suppressing evidence.

In State v. Jones, 115 Idaho 1029, 772 P.2d 237 (Ct. App. 1989), a vehicle was stopped for, at minimum, making an illegal left-hand turn. The driver's eyes were slightly bloodshot and his face was "ruddy." The driver admitted to consuming one martini. The Idaho Court of Appeals held that Terry v. Ohio, 392 U.S. 1 (1968), and Delaware v. Prouse, 440 U.S. 648 (1979) allowed for investigative stops of vehicles, and field sobriety tests were a reasonable attempt by an officer to "to obtain information confirming or dispelling the officer's suspicions." (quoting Berkemer v. McCarty, 468 U.S. 420 (1984).)

In State v. Ferreira, 133 Idaho 474, 988 P.2d 700 (Ct. App. 1999), an individual asserted that probable cause was required prior to administration of SFSTs. The Idaho Court of Appeals rejected this argument under both the Federal and State

Constitutions. In rejecting this heightened requirement under the Idaho Constitution, the Court noted the "dual purpose" of the tests: to confirm or dispel the officer's reasonable suspicion. "Thus, if the individual performs the field sobriety tests in such a manner as to dispel the officer's suspicions, absent other unique circumstances, the driver will be left to go on his way." Id., 133 Idaho at 481, 988 P.2d at 707. This holding differentiates Idaho law from a state like Colorado where, at the time, the "sole purpose of roadside sobriety testing is to acquire evidence of criminal conduct on the part of the suspect." People v. Carlson, 677 P.2d 310, 317 (Colo. 1984). The holding of Ferreira is that SFSTs in Idaho have both an incriminating and exculpatory nature. The Court went on to hold that SFSTs were the least intrusive means reasonably available to verify or dispel the officer's suspicion of drunk driving. This holding is reaffirmed in State v. Buell, 145 Idaho 54, 175 P.3d 216 (Ct. App. 2008).

The District Court relied heavily on State v. Martinez-Gonzalez, ___ Idaho ___, 275 P.3d 1 (Ct. App. 2012) in its Order. While Martinez-Gonzalez is entirely helpful as to what a court should look for in determining if probable cause exists, Martinez-Gonzalez is actually the most recent statement of Idaho's law regarding the Standardized Field Sobriety Tests: "[F]ield sobriety tests are used to either confirm or dispel an

officer's reasonable suspicion that a driver is under the influence of alcohol . . . ." Id., ___ Idaho at ___, 275 P.3d at 2 (emphasis mine)

Martinez-Gonzalez is a SFST refusal case, and Idaho's law is that a refusal to perform such tests can be considered as a negative factor, and may give rise to probable cause.

The state argued below that the magistrate incorrectly applied State v. Garrett, 119 Idaho 878, 811 P.2d 488 (1991). Garrett specifically deals with the admissibility of the HGN results. Garret expressly states that "in conjunction with other field sobriety tests, a positive HGN test result does supply probable cause for arrest…." Garrett, 119 Idaho at 881, 811 P.2d at 491. From that you can conclude that in the absence of other field sobriety tests, a positive HGN test result does not supply probable cause. As Garrett expressly states, HGN can be caused by factors other than alcohol or drug ingestion.

C. Application

Reasonable suspicion is the legal requirement for an officer to request a suspect to perform SFSTs. Here, the officer's reasonable suspicion is not challenged. Pursuant to Jones, Ferreira, Buell, and the 2012 case of Martinez-Gonzalez, the SFSTs are there to confirm or dispel the officer's reasonable suspicion. More specifically, in Ferreira, the SFSTs were held to have a dual purpose in that they can incriminate or

exonerate a suspect, or at least terminate the investigatory detention.

The only additional, suspicious factors disclosed by the SFSTs are the HGN failure, and swaying during the One Leg Stand test. The stipulated evidence shows that Hunter did amazingly well on the SFSTs, and, in fact, passed them. While swaying stands as a suspicious fact, it does not stand on its own - it is part of the scoring system for the Standardized Field Sobriety Tests. If scoring a single point can be held to ripen a reasonable suspicion into probable cause, then the scoring system of the SFSTs does not matter, the science behind the standardization of the test does not matter, and no one will ever pass the field tests. If that is the case, two decades of case law - Jones, Ferreira, Buell and Martinez-Gonzalez - stand for nothing.

IV. CONCLUSION

Based on the foregoing, this Court should vacate the District Court's order reversing the magistrate's order, and remand this case for proceedings consistent with such ruling.

Dated this 21 day of August, 2013.

ERIK J. O'DANIEL
Attorney for Appellant

V. CERTIFICATE OF MAILING

I HEREBY CERTIFY, That on this 21st day of August, 2013, I mailed a true and correct copy of the foregoing, **APPELLANT'S BRIEF**, to:

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATEHOUSE ROOM 210
BOISE IDAHO 83720

by depositing the same in the Interdepartmental Mail.

Stephanie Martinez