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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 45284**
Plaintiff-Appellant,	)	
	)	**Ada County Case No.**
v.	)	**CR01-2016-26122**
	)	
CHRISTOPHER JACOB MARTINEZ,	)	
	)	
Defendant-Respondent.	)	
	)	

REPLY 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

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I.
The Police Did Not Abandon The Traffic Stop By Having A Short Conversation Unrelated To The Purposes Of The Stop

When a third officer arrived at the scene of the traffic stop involving Martinez, the officer writing the traffic ticket stopped briefly to inform the newly arrived officer about the general situation facing the officers. (R., p. 150; Exhibit C, first video at 9:20-9:27; Tr., p. 25, Ls. 12-25.) The district court concluded that "the most probable inference is that the conversation concerned the drug investigation and deploying the drug dog," but that "[r]egardless of the topic of conversation," the first officer "deviated from the purpose of the traffic stop (i.e. a citation for failing to signal) in order to coordinate with [the third officer] to effectuate a drug investigation." (R., p. 157.) The district court erred because informing the third officer arriving on the scene about the basic situation the officers confronted was not an unconstitutional deviation from the traffic stop. (Appellant's brief, pp. 4-7.)

Martinez contends that because the officer conducting the traffic stop "stopped writing a citation for the driver for at least 30 seconds in order to coordinate a drug investigation" the district court correctly determined he had abandoned the traffic stop. (Respondent's brief, pp. 7-10.) This argument fails to address the underlying flaw in the district court's analysis because it fails to address how "coordinating" actions with other officers, whether or not those other officers are involved in the traffic investigation, is a deviation from the traffic investigation.

"Like a *Terry* stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission'—to address the traffic violation that

warranted the stop, and attend to related safety concerns." Rodriguez v. United States, ___ U.S. ___, 135 S. Ct. 1609, 1614 (2015). "Counting every pause taken while writing a citation as conduct that unlawfully adds time to the stop is inimical to the Fourth Amendment's reasonableness requirement and is contrary to United States Supreme Court precedent." State v. McGraw, No. 44935, 2018 WL 1660829, at *4 (Idaho Ct. App. Apr. 6, 2018). One officer "coordinating" with another—by communicating the nature of the encounter, including that Martinez was part of it—fulfills a legitimate law enforcement function attendant to the stop and is not an abandonment of the stop.

Martinez argues that coordinating with officers not involved in the traffic investigation is beyond the scope of lawful activity. (Respondent's brief, pp. 7-10.) He apparently relies upon the premise that "a dog sniff is not fairly characterized as part of the officer's traffic mission." Rodriguez, 135 S. Ct. at 1615, and compares the officer's actions to those in State v. Linze, 161 Idaho 605, 389 P.3d 150 (2016). (Id.) Review of those cases do not, however, support Martinez's argument that coordination such as occurred here is constitutionally unreasonable.

In Rodriguez, the officer, after finishing the traffic stop by delivering a warning, ordered Rodriguez to turn off his car and step out of it, and then ran his dog around the car. Rodriguez, 135 S. Ct. at 1613. "All told, seven or eight minutes had elapsed from the time [the officer] issued the written warning until the dog indicated the presence of drugs." Id. Responding to the dissent—which stated the decision finding a Fourth Amendment violation was "arbitrary" because it was premised on "the sequence in which [the officer] chose to perform his tasks" and "perverse" because the officer "chose that sequence for the purpose of protecting his own safety," Rodriguez, 135 S. Ct. at 1624

(Alito, J., dissenting)—the majority stated that "detours" to investigate other crimes and "safety precautions taken in order to facilitate such detours" are outside the scope of the stop. Rodriguez, 135 S. Ct. at 1616.

In Linze, the officer conducting the traffic investigation stopped writing the citation and served a backup function while another officer ran a drug dog around the stopped vehicle. 161 Idaho at 607, 389 P.3d at 152. The question the court addressed was whether the traffic stop "remained reasonable under the Fourth Amendment once [the officer] abandoned the purpose of the seizure in order to aid in a search for contraband." Id. at 608, 389 P.3d at 153. The court held that a stop "remains a reasonable seizure while the officer diligently pursues the purpose of the stop," but "when an officer abandons his or her original purpose, the officer has for all intents and purposes initiated a new seizure with a new purpose; one which requires its own reasonableness under the Fourth Amendment." Id. at 609, 389 P.3d at 154.

In both Rodriguez and Linze the officer conducting the traffic investigation directly participated in the unwarranted investigation, by actually running the drug dog around the car and by providing backup while a different officer did so, respectively. The question presented by this appeal is whether the district court correctly extended the rationale of these cases—where officers conducting the traffic stop actively participated in the drug investigation—to the situation presented here, where the officer did not participate in the drug investigation but merely coordinated with the drug dog handler by informing him of the general circumstances the officers faced.

It seems beyond cavil that the officer in this case would not violate Martinez's constitutional rights by conveying information to dispatch regarding why he was making

a traffic stop, who the driver was, and what other persons were involved. (See, e.g., R., p. 150 (officer did convey information regarding driver to dispatch).) Missing from the district court's (and Martinez's) analysis is how conveying the same information to a fellow officer at the scene violates the Fourth Amendment. Merely coordinating with another officer by conveying information regarding the reasons for the stop and who was involved was no more a Fourth Amendment violation that when the officer relayed essentially the same information to dispatch. The district court erred by concluding that the officer conducting the traffic stop abandoned that stop by pausing the writing of the citation to convey information related to that traffic stop to another officer.

II.
The District Court Erred By Concluding Evidence Found Was Subject To The Exclusionary Rule

A. Introduction

Even if the district court had properly held that coordination among officers violated the Fourth Amendment, it erred in suppressing the evidence because the short delay in writing the traffic stop did not result in the discovery of any evidence. (Appellant's brief, pp. 7-12.) On appeal Martinez argues the inevitable discovery and attenuation exceptions to the exclusionary rule do not apply. (Respondent's brief, pp. 10-14.) Application of the relevant legal standards shows the district court erred by applying the exclusionary rule in this case.

B. The Discovery Of The Contraband Was Inevitable

Evidence that would inevitably have been found by lawful means is not subject to the exclusionary rule. Nix v. Williams, 467 U.S. 431, 444 (1984); Stuart v. State, 136

Idaho 490, 497-98, 36 P.3d 1278, 1285-86 (2001). "Although those lawful means need not be the result of a wholly independent investigation, they must be the result of some action that actually took place (or was in the process of taking place) that would inevitably have led to the discovery of the unlawfully obtained evidence." State v. Rowland, 158 Idaho 784, 787, 352 P.3d 506, 509 (Ct. App. 2015). The district court erred by applying an incorrect legal standard when it held that inevitable discovery can only arise from "an additional line of investigation." (R., p. 161.) Application of the correct legal standard shows that because the coordination delayed both the writing of the ticket and the start of the drug dog open-air sniff, the dog alert would have occurred before the citation was finished regardless of whether the coordination was a detour from the valid stop. (Appellant's brief, pp. 9-10.)

Martinez argues that the "fact that the drug dog ultimately alerted cannot be used to retroactively justify the unlawful seizure." (Respondent's brief, p. 11.) Specifically, Martinez argues that "the drug dog sniff *should not* have taken place—that is, Mr. Martinez's detention should not have been prolonged to permit a drug investigation." (Id. (emphasis original).) Martinez contends the "Court should not guess at how the encounter might have proceeded had Officer Sontag not deviated from the legitimate purpose of the stop to coordinate a drug investigation." (Respondent's brief, p. 12.) This argument fails because the state is not claiming that the dog alert retroactively justifies anything. Nor is the state asking this court to "guess" how matters would have proceeded. The state is merely asking this court to look at what *in fact* happened in this case.

What in fact happened in this case is that the officer conducting the traffic stop "stopped writing the citation" and "had a discussion with the K-9 officer." (R., p. 150.)

After the conversation the K-9 officer began the dog sniff around the car and the traffic officer "returned to writing the traffic ticket." (R., pp. 150-51.) The dog alerted on the vehicle while the traffic officer "was still writing the citation." (R., p. 151.)

Here we know exactly what happened after the diversion the district court found improper. The officer continued writing the ticket while the dog handler ran the dog around the car. Putting the state in the same position it would have been absent the police misconduct, not a worse one, Nix, 467 U.S. at 442-44; State v. Buterbaugh, 138 Idaho 96, 102, 57 P.3d 807, 813 (Ct. App. 2002), shows that the traffic citation would not have been completed before the dog alert regardless of the episode of coordination. The evidence would have been inevitably discovered had the coordination found improper by the district court never occurred.

C. The Discovery Of The Contraband Was Attenuated

Under the attenuation doctrine the court looks to three factors to determine if the police exploited an illegality to discover evidence: "(1) the elapsed time between the misconduct and the acquisition of the evidence, (2) the occurrence of intervening circumstances, and (3) the flagrancy and purpose of the improper law enforcement action." State v. Page, 140 Idaho 841, 846, 103 P.3d 454, 459 (2004) (citation omitted). Although the dog alert was only a few minutes after the "coordination," the dog alert was an intervening circumstance and the "coordination" was not a flagrant violation. (Appellant's brief, pp. 10-12.)

Like the state, Martinez focuses on the second and third prongs of this test. (Respondent's brief, pp. 13-14.) As to the second prong he argues "the dog alert was a

direct consequence of the illegally prolonged detention," and therefore the alert "was not an intervening circumstance." (Id.) This is not correct. The dog alert was a direct consequence of the presence of drugs in the car. The "coordination" conducted by the officers had nothing whatsoever to do with the dog alerting. Nor is the alert an indirect consequence of the "coordination." As set forth above, the "coordination" ended before the dog sniff began, and the ticket would not have been completed before the alert had the coordination never taken place.

Like the district court, Martinez argues the officer's conduct was flagrant because "'it is clear that this was a drug investigation from the moment the officer learned the driver was on parole for a prior drug offense.'" (Respondent's brief, p. 14 (quoting R., p. 164).) The standard, however is the "flagrancy and purpose *of the improper law enforcement action*." State v. Page, 140 Idaho 841, 846, 103 P.3d 454, 459 (2004) (emphasis added). Deploying a drug dog during the course of a traffic stop is not an improper law enforcement action. State v. Aguirre, 141 Idaho 560, 563, 112 P.3d 848, 851 (Ct. App. 2005) (A "drug dog sniff is not a search and therefore may be done during a traffic stop without reasonable suspicion of drug activity."). Thus, the conduct the district court and Martinez asserts was flagrant was not even improper.

The only law enforcement action deemed improper by the district court was the short "coordination" between the officers. The district court found no flagrancy related to this "coordination," and Martinez has not articulated any. The state has articulated why the coordination was not improper, but, even if it was, there is no suggestion in the record that it was "flagrant." Suppression of the evidence was error because its discovery was attenuated from the "coordination" the district court found improper.

The traffic officer briefly interrupted writing the citation to "coordinate" with the drug dog handler by informing him of the general situation related to the stop. As set forth above, the coordination did not violate Martinez's Fourth Amendment rights. Even if it did extend the stop, however, suppression of evidence found as a result of the drug dog alert should not have been suppressed because it was not the fruit of the improper coordination.

CONCLUSION

The state respectfully requests this Court to reverse the district court's order suppressing evidence and remand for further proceedings.

DATED this 4th day of May, 2018.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 4th day of May, 2018, served a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT by emailing an electronic copy to:

ANDREA W. REYNOLDS
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