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State v. Orr Appellant's Brief 2 Dckt. 39161

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	
Plaintiff-Respondent,	NO. 39161
	MADISON COUNTY NO. CR 2011-536
v.	
ARLYN ORR,	APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW
Defendant-Appellant.	

STATEMENT OF THE CASE

Nature of the Case

Arlyn Orr asks the Idaho Supreme Court to review the opinion of the Idaho Court of Appeals, 2014 Opinion No. 49 (Ct. App. June 30, 2014) (*hereinafter*, Opinion). He submits that the Opinion, which affirmed his Judgment of Conviction for resisting and obstructing officers results in the virtual elimination of the Fourth Amendment by criminalizing an individual's refusal to submit to a search. Because this issue is of incredible importance, and because the Court of Appeals' Opinion eviscerates the Fourth Amendment rights of all Idahoans, it cannot be allowed to stand, and Mr. Orr

respectfully requests that this Court grant review to reinstate the full protections of the Fourth Amendment in Idaho.[1]

Statement of the Facts & Course of Proceedings

Arlyn Orr was charged with operating a vehicle while under the influence of alcohol and/or drugs, elevated to a felony by virtue of his having been convicted of felony DUI within the preceding fifteen years,[2] and misdemeanor charges of possession of an open container of alcohol in a motor vehicle[3] and resisting and obstructing officers. (R., pp.48-50.) The charge for resisting and obstructing officers reads as follows:

> The Defendant, ARLYN VAL ORR[], on or about March 11, 2011, in the County of Madison, State of Idaho, did willfully resist, delay or obstruct a public officer in the discharge, or attempted discharge, of a duty of his office, to wit: by disobeying and resisting a lawful order to exit his vehicle and/or other lawful requests or commands of Deputy Shawn Scott and/or Deputy Dallin Wrigley of the Madison County Sheriff's Office.

(R., pp.67-68.)

At trial, the State presented evidence that Deputy Scott, of the Madison County Sheriff's Office, while patrolling an isolated parking lot, noticed Mr. Orr asleep behind the wheel of a running car in which there were five open beer cans. It took Deputy Scott quite a while to awaken Mr. Orr, and it involved opening the door and shaking him. Before attempting to shake him awake, Deputy Scott turned off the vehicle's engine. (Tr., p.139, L.14 – p.145, L.3.)

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[1] If this Court grants review, Mr. Orr respectfully requests that it consider a second issue raised in his Appellant's Brief: whether he had to know, subjectively, that the officer's request was lawful.

[2] Mr. Orr was convicted of felony DUI. (R., pp.76-77.) That conviction is not at issue on appeal.

[3] Mr. Orr was acquitted of the open container charge. (Tr., p.437, Ls.11-13.)

Mr. Orr eventually woke up. However, he continued to fall back asleep, and made several attempts to start the car. Deputy Scott spent about twenty minutes trying to get Mr. Orr to participate in field sobriety tests, but "[h]e didn't want to cooperate at all. He didn't want me there, he didn't want to talk to me. At some point, he eventually just started ignoring me." (Tr., p.146, L.2 – p.147, L.20.) Deputy Scott testified that if Mr. Orr had honored his request to get out of the vehicle and perform field sobriety tests "[i]t would have saved me a lot of time," and that his failure to cooperate delayed him in the performance of his duties. (Tr., p.149, Ls.9-15.) With respect to ignoring him, Deputy Scott explained, "he would not talk to me, not answer any of my questions. If he did say something, it was go away or leave me alone, I don't want you here, I'm not going to do that." (Tr., p.149, L.16 – p.150, L.2.) During the encounter, Deputy Scott said, Mr. Orr "repeatedly stated that I was in his vehicle, that I needed to leave, that his vehicle was similar to his house where I couldn't be there unless he wanted me there, things like that. I informed him, hey, no, I'm not going to leave, you need to comply with these things." (Tr., p.149, Ls.16-23.)

Approximately twenty minutes into the encounter, Corporal Wrigley, also of the Madison County Sheriff's Office, arrived with a breath test machine. He described Mr. Orr as uncooperative for refusing to answer questions concerning the open beer cans. (Tr., p.210, Ls.2-11.)

Mr. Orr testified that the reason he wouldn't get out of his vehicle that night was because "I didn't believe I had to. I believed I had rights." (Tr., p.340, Ls.18-20.) When asked about his lack of cooperation with Corporal Wrigley, he testified, "I think I had rights, too, then." (Tr., p.356, Ls.9-11.) When asked why he didn't just cooperate

instead of getting pepper sprayed, he explained, "Not believing you have rights is the same as not having rights." (Tr., p.358, Ls.1-10.) Asked if he would do the same thing today, he responded that he "would have cited the same rights I believe I had." (Tr., p.358, L.22 – p.359, L.2.)

During closing arguments, the State focused on Mr. Orr's refusal to participate in field sobriety tests as providing the basis for the resisting and obstructing charge, arguing that, although Mr. Orr could not be physically compelled to perform field sobriety tests, he had no constitutional right to refuse field sobriety tests, and therefore, no defense for his behavior. Specifically, the State argued,

> If he has a constitutional right to refuse to do what the officers wanted him to do then he couldn't be charged and couldn't be convicted of delaying and obstructing an officer. But if he has no right to refuse those things and he does refuse, if he does delay, he does obstruct, then he's guilty.

(Tr., p.412, L.25 – p.413, L.13.)

With respect to the administration of field sobriety tests, the jury was instructed, by stipulation of the parties,

> Under Idaho law a police officer – excuse me, a peace officer may request an individual to submit to a field sobriety test based on reasonable suspicion that the individual has been driving or was in actual physical control of a motor vehicle while under the influence of alcohol, drugs or other controlled substances. An individual does not have a constitutional right to refuse to cooperate with a lawfully requested field sobriety test even if he or she has the physical power to prevent or avoid the test.

(Tr., p.391, L.25 – p.392, L.10.)

Following deliberations, the jury found Mr. Orr guilty of, *inter alia*, resisting or obstructing an officer. (Tr., p.437, Ls.14-16.) Mr. Orr filed a Notice of Appeal timely from the judgment of conviction. (R., p.85.)

In its Opinion, the Court of Appeals concluded,

> Deputy Scott possessed the requisite reasonable suspicion to investigate Orr for driving under the influence. It therefore follows that the officer's attempt to administer field sobriety tests (and order Orr out of the vehicle to do so) was a permissible component of his investigation – and thus was a lawful act that may comprise the basis of a resisting and obstructing charge. Accordingly, Orr had no "constitutional right" to refuse to comply with Deputy Scott's lawful request.

(Opinion, p.5 (citation omitted).)

Additionally, the Court of Appeals rejected Mr. Orr's argument that its holding in *State v. Buell*, 145 Idaho 54 (Ct. App. 2008), "that an individual who is reasonably suspected of driving under the influence of intoxicants has no right to refuse to perform field sobriety tests" is incorrect because it rests "on a misinterpretation of this Court's case law and misapplication of Idaho and United States Supreme Court precedent" and should be overruled. (Opinion, p.4 n.1.)

Mr. Orr filed a timely Petition for Review with this Court.

ISSUE

Should this Court grant review because the Court of Appeals' Opinion virtually eliminates rights protected by the Fourth Amendment by criminalizing a person's refusal to consent to a search?

ARGUMENT

This Court Must Grant Review Because The Court Of Appeals' Opinion Virtually Eliminates Rights Protected By The Fourth Amendment By Criminalizing A Person's Refusal To Consent To A Search

A. Introduction

The Court of Appeals' conclusion that a person can be convicted of resisting and obstructing an officer for refusing to submit to a search (field sobriety tests) upon request virtually eliminates rights protected by the Fourth Amendment by criminalizing the invocation of a constitutional right. Because this is an issue of pressing concern to the people of Idaho, this Court should grant review to reinstate these Fourth Amendment protections in Idaho.

B. The Evidence Was Insufficient To Support Mr. Orr's Conviction For Resisting And Obstructing An Officer Based On His Refusal To Perform Field Sobriety Tests

Idaho Code § 18-705 provides:

> Every person who wilfully [sic] resists, delays or obstructs any public officer, in the discharge, or attempt to discharge, of any duty of his office or who knowingly gives a false report to any peace officer, when no other punishment is prescribed, is punishable by a fine not exceeding one thousand dollars ($1,000), and imprisonment in the county jail not exceeding one (1) year.

I.C. § 18-705.

It is well-established that the exercise of a constitutional right cannot serve as the basis for a criminal conviction. *See Camara v. Mun. Ct. of City and County of San Francisco*, 387 U.S. 523, 540 (1967) ("[A]ppellant had a constitutional right to insist that [housing] inspectors obtain a warrant to search and that appellant may not constitutionally be convicted for refusing to consent to the inspection."); *see also United*

States v. Prescott, 581 F.2d 1343, 1353 (9th Cir. 1978) (improper to use a defendant's exercise of her Fourth Amendment right to refuse to consent to police entry into her home as evidence of her guilt). The administration of field sobriety tests constitutes a search. *See State v. Ferreira*, 133 Idaho 474, 480-82 (Ct. App. 1999). Therefore, Mr. Orr's refusal to submit to field sobriety tests (a search) cannot form the basis for a criminal conviction for resisting or obstructing officers.

To the extent that defense counsel's unfortunate stipulation to an incorrect jury instruction providing that no person operating a vehicle in this State has a constitutional right to refuse to perform field sobriety tests is relevant to this issue, Mr. Orr will establish why the instruction was legally wrong. First, unlike chemical testing of blood, breath, or urine, there is no statute providing that a person operating a vehicle in Idaho has impliedly consented to perform field sobriety tests. *See* I.C. § 18-8002 (statute providing for implied consent to submit to "evidentiary testing for concentration of alcohol as defined in section 18-8004,[4] Idaho Code . . . [and] to evidentiary testing for the presence of drugs or other intoxicating substances" upon request of a peace officer with reasonable grounds). Field sobriety tests do not fall under the implied consent statute. *See State v. Buell*, 145 Idaho 54, 56 (Ct. App. 2008) (explaining, in a case involving field sobriety tests, "[t]he case before us involves no statutory implied consent" and that consent is not required to administer field sobriety tests).

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[4] Idaho Code § 18-8004(4), in relevant part, provides that "an evidentiary test for alcohol concentration shall be based upon a formula of grams of alcohol per one hundred (100) cubic centimeters of blood, per two hundred ten (210) liters of breath or sixty-seven (67) milliliters of urine." I.C. § 18-8004(4). It further provides that such analysis "shall be performed by a laboratory operated by the Idaho state police or by a laboratory approved by the Idaho state police under the provisions of approval and certification standards to be set by that department, or by any other method approved by the Idaho state police." *Id.*

In *Buell*, the Idaho Court of Appeals explained that the physical ability to refuse to perform field sobriety tests "does not equate to a constitutional right to refuse" to perform those tests. *Buell*, 145 Idaho at 56. Mr. Orr asserts that the Court of Appeals' holding in *Buell* is incorrect because it rests on a misinterpretation of its own case law and a misapplication of Idaho and United States Supreme Court precedent.

At issue in *Buell* was the defendant's claim that his consent to perform field sobriety tests was coerced when an officer, seeking his participation in field sobriety tests, told him, "You're required by law to do them," touched his back, and told him, "Let's do these, okay," at which point he performed the tests. *Buell*, 145 Idaho at 55. The Court of Appeals began its analysis by discussing its decision in *State v. Ferreira*, 133 Idaho 474 (Ct. App. 1999), in which it had "held that field sobriety tests, although searches, are a reasonable and permissible component of an investigation where the officer has detained the individual on reasonable suspicion of DUI." *Id.* at 56 (citing *Ferreira*, 133 Idaho at 479-81). It then reasoned, "In light of our *Ferreira* decision, Buell's argument that his 'consent' to field sobriety tests was involuntary is simply immaterial for if, as Buell concedes, the officer reasonably suspected DUI, then the officer needed no consent from Buell in order to administer the tests." *Id.* It analogized field sobriety tests "to a warrantless pat-down search of an individual for weapons, conducted during an investigative detention." *Id.* (citing *Terry v. Ohio*, 392 U.S. 1 (1967)).

The Court of Appeals then made the holding that provided the basis for the incorrect jury instruction in Mr. Orr's case, explaining, "It must be acknowledged, of course, that an individual who has been instructed by a police officer to perform field

sobriety tests has the power to prevent the tests by refusing to cooperate, but that power does not equate to a constitutional right to refuse." *Buell*, 145 Idaho at 56. In support of this contention, the Court of Appeals cited the Idaho Supreme Court's opinion in *State v. Woolery*, 116 Idaho 368 (1989). The Court of Appeals quoted from *Woolery*, which involved the taking of a blood sample from a driver injured in a car crash without obtaining his actual consent, as follows, "'Consent describes a legal act; 'refusal' describes a physical reality. By implying consent, the statute removes the right of a licensed driver to lawfully refuse, but it cannot remove his or her physical power to refuse." *Id.* (quoting *Woolery*, 116 Idaho at 372).

While the Court of Appeals acknowledged that participation in field sobriety tests, unlike the blood test in *Woolery*, is not something to which a driver in Idaho has impliedly consented, it nonetheless found they "involve a separate exception to the warrant requirement established in *Ferreira*, which allows an officer to conduct field sobriety tests on reasonable suspicion." *Id.* Ultimately, the Court of Appeals concluded, "Like the driver in *Woolery*, Buell had no right recognized in law to refuse the tests, and his mere retention of physical power to prevent the testing does not mean that his consent, in a legal sense, was necessary for lawful administration of the tests." *Id.* at 56-57 (citing, *inter alia*, Alaska Court of Appeals *dicta*).

The problems with the Court of Appeals' Opinion in *Buell* are three-fold. First, it involves an unnecessarily broad reading of the Court of Appeals' holding in *Ferreira* that "both the Fourth Amendment to the United States Constitution and Article I, Section 17 of the Idaho Constitution require reasonable suspicion that a driver is in violation of I.C. § 18-8004 before field sobriety tests can be administered," by expanding an officer's

lawful ability to administer sobriety tests upon only reasonable suspicion to include a *requirement* of participation. *Ferreira*, 133 Idaho at 484. Second, it equates the Idaho Supreme Court's Opinion in *Woolery* that the Fourth Amendment is not implicated when blood is drawn from a driver without explicit consent because of the legal fiction that he has impliedly consented to such a blood draw by driving on the highways of this State, with a requirement that a person must waive his or her Fourth Amendment right to be free from unlawful search by performing field sobriety tests on command. Third, it involves an unnecessary expansion of *Terry* to include a requirement that an individual disclose evidence that is otherwise concealed by engaging in physical tests on command.

With respect to the unnecessary expansion of *Terry*, Mr. Orr begins by noting that the rule adopted in *Terry* was premised on the idea that the search approved of consisted only of what was "minimally necessary" and did not involve "a general exploratory search for whatever evidence of criminal activity he [the officer] might find." *Terry*, 392 U.S. at 30. The warrantless search that occurs via the administration of field sobriety tests is a search for evidence of a crime, the very evil that the Fourth Amendment seeks to prevent.

Additionally, even if the Court of Appeals' conclusion in *Buell* is correct, it does not inexorably lead to the conclusion that failing to participate in the field sobriety tests is itself a violation of the resisting or obstructing statute. That statute appears to require more than a mere refusal to perform some requested action. *See State v. Quimby*, 122 Idaho 389, 391 (Ct. App. 1992) (finding probable cause to arrest for obstructing when, although "Quimby did not touch the officers, he placed himself in the path of the officers,

forcing them to push him out of the way . . . ignored the officers' repeated verbal requests to move away," and "placed himself unnecessarily close to the officers and made hand gestures in front of their faces"); *State v. Wilkerson*, 114 Idaho 174, 179 (Ct. App. 1988) (considering the statute and explaining that "passive disobedience has a legitimate role in testing the limits of" police authority) (citations omitted); *State v. Lusby*, 146 Idaho 506, 509 (Ct. App. 2008) ("[i]t is well established that an individual may not use *force* to resist a peaceable arrest") (emphasis added) (citations omitted).

Furthermore, the fact that the legislature has specifically provided a non-criminal penalty for refusing to provide a breath sample during a DUI investigation implies that conduct such as is at issue here, refusing to provide evidence against oneself in a DUI prosecution, is not criminal conduct under any statute. *See* I.C. §§ 18-8002(3) (providing that, before being requested to submit to chemical testing, a driver must be informed that, *inter alia*, "[h]e is subject to a civil penalty of two hundred fifty dollars ($250) for refusing to take the test") and 18-8002(4) (providing for imposition of such a penalty). Were it a crime to refuse a breath test, then the legislature would have included that provision in the information required to be provided prior to testing.

Because the Court of Appeals' Opinion significantly limits the Fourth Amendment in Idaho, this Court must grant Mr. Orr's Petition for Review, and clarify that it is not a crime to refuse to waive a constitutional right. If this Court fails to do so, similarly situated people of Idaho will be left with only two options: either surrender your constitutional rights upon request of a government official or face criminal prosecution. The Court of Appeals' Opinion should not be allowed to stand.

CONCLUSION

For the reasons set forth herein, Mr. Orr respectfully requests that this Court grant his Petition for Review, and conclude that it cannot be a crime to refuse to consent to a search.

DATED this 27th day of August, 2014.

SPENCER J. HAHN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 27th day of August, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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