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State v. Barber Appellant's Brief Dckt. 41015

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. JOHN M. BARBER, Defendant-Appellant.	NO. 41015 BOUNDARY COUNTY NO. CR 2012-677 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BOUNDARY

HONORABLE BARBARA A. BUCHANAN
District Judge

SARA B. THOMAS
State Appellate Public Defender
State of Idaho
I.S.B. #5867

ERIK R. LEHTINEN
Chief, Appellate Unit
I.S.B. #6247

SPENCER J. HAHN
Deputy State Appellate Public Defender
I.S.B. #8576
3050 N. Lake Harbor Lane, Suite 100
Boise, ID 83703
(208) 334-2712

ATTORNEYS FOR
DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR
PLAINTIFF-RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Additional Citations

STATEMENT OF THE CASE

Nature of the Case

John M. Barber appeals from the judgment of conviction entered for possession of marijuana (more than three ounces) following a jury trial.[1] On appeal, Mr. Barber asserts that the district court abused its discretion when, over his foundation objection, it allowed a police officer to testify as to the weight of marijuana he obtained by using a scale that was not shown to be accurate or reliable and for which no foundation was required to be laid. The question of the foundation that must be laid before testimony may be admitted as to the weight of drugs measured by a scale is one of first impression in Idaho.

Statement of the Facts and Course of Proceedings

John M. Barber was charged with, *inter alia*, possession of marijuana (more than three ounces). (R., pp.38-40.) The matter proceeded to a jury trial at which the only material element in dispute was whether the marijuana weighed over three ounces. (Tr., p.196, Ls.4-7 (prosecutor arguing, "So why are we here? What – why? The whole sentinel question is whether or not this is three ounces or more. That's really why we're here."); Tr., p.201, Ls.19-20 (defense counsel arguing that there was "absolutely no evidence" that Mr. Barber possessed "over three ounces" of marijuana).)

Officer Cowell of the Bonners Ferry Police Department was the only person to weigh all of the marijuana, and he used a digital scale to do so. (Tr., p.110, Ls.2-19.) He explained that the digital scale has "an internal calibration so that it calibrates itself.

[1] Mr. Barber was also charged with two misdemeanors – driving without privileges and possession of drug paraphernalia – which were resolved via guilty pleas. (Tr., p.62, L.14 – p.65, L.12.) He does not challenge either of these convictions on appeal.

And when it sets itself to – it's 0.0, you know that that calibration is going to be correct on what you are weighing." (Tr., p.110, Ls.4-8.) When Officer Cowell first attempted to testify as to the weight of the marijuana that he obtained using the digital scale, defense counsel objected, arguing, *inter alia*, "proper foundation has not been laid from that to be a correct and official weight at this time."[2] (Tr., p.118, Ls.4-10.) When given an opportunity to elaborate on her argument, defense counsel further explained that the testimony would not be reliable, and that Officer Cowell "still isn't qualified as an expert to testify to exactly" what the weight of the marijuana was. She further explained, "There – certainly we all know machines have a margin of error here. That's not been shown whether there is or is not." (Tr., p.122, L.14 – p.123, L.1.)

In denying the objection, the district court explained,

> First, I believe an adequate foundation was laid. Second, I don't see anything in the code that requires any particular scale, any particular certification. I think the analogy to the radar unit is apt. The code does not say that you have to go to a state certified lab to maintain certain scales, anything like that. And so I think the issue of the scale goes to the weight.

(Tr., p.124, L.24 – p.125, L.6.)

After the objection was overruled, Officer Cowell testified that, when he reweighed the marijuana the day of trial, it weighed 117 grams, which was "still going to be over four ounces of marijuana."[3] (Tr., p.128, L.8 – p.129, L.7.) Officer Cowell testified that he also used a triple-beam scale to reweigh the marijuana. (Tr., p.153, Ls.7-23.)

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[2] Defense counsel also objected on the basis of hearsay. (Tr., p.118, L.8.) Mr. Barber is not pursuing the hearsay objection on appeal.

[3] Officer Cowell testified that one ounce equals 28.3495 grams. (Tr., p.127, Ls.22-23.)

Tina Mattox, a forensic scientist with the Idaho State Police, described the certified scale that is required to be used when weighing drugs submitted to the Idaho State Police lab as follows:

> It's certified annually. We have a cop that comes in and makes sure it's all – the weights are all accurate. And then I also check it monthly against calibrated weights so the weights are sent in to a different company, make sure that they're accurate, and then I'll check every month and record that the scale is accurate.

(Tr., p.190, L.23 – p.192, L.8.) The scales that relied upon by employees of the Idaho State Police lab are purchased by the lab manager "from a scientific company." (Tr., p.191, Ls.17-25.) The marijuana evidence submitted to the lab for chemical analysis weighed 5.81 grams. (Tr., p.189, Ls.9-24.)

Ultimately, Mr. Barber was found guilty of felony possession of marijuana (more than three ounces). (Tr., p.211, Ls.5-13.) Mr. Barber filed a timely Notice of Appeal. (R., p.156.)

ISSUE

Did the district court abuse its discretion when, over Mr. Barber's foundation objection, it admitted testimony concerning the weight of the marijuana when no evidence was presented to establish the accuracy or reliability of the scale used and for which no foundation was required to be laid?

ARGUMENT

The District Court Abused Its Discretion When, Over Mr. Barber's Foundation Objection, It Admitted Testimony Concerning The Weight Of The Marijuana When No Evidence Was Presented To Establish The Accuracy Or Reliability Of The Scale Used And For Which No Foundation Was Required To Be Laid

A. Introduction

Mr. Barber asserts that the district court abused its discretion when, over his foundation objection, it admitted testimony concerning the weight of the marijuana when no evidence was presented to support the accuracy or reliability of the scale used to weigh the marijuana and for which no foundation was required to be laid. While this issue appears to be one of first impression in Idaho, it has been addressed in a number of other states, with the Supreme Courts of Nebraska and Hawai'i providing detailed opinions that support Mr. Barber's argument. Additionally, a similar issue – regarding the foundation necessary for the admission of speed evidence obtained via radar and laser devices, respectively – has been twice decided by the Idaho Court of Appeals in a manner that supports Mr. Barber's argument.

In overruling Mr. Barber's foundation objection, the district court determined that no legal standards applied to the admission of testimony concerning the weight of drugs as measured by the scale used by Officer Cowell. Specifically, the district court reasoned,

> First, I believe an adequate foundation was laid. Second, I don't see anything in the code that requires any particular scale, any particular certification. I think the analogy to the radar unit is apt. The code does not say that you have to go to a state certified lab to maintain certain scales, anything like that. And so I think the issue of the scale goes to the weight.

(Tr., p.124, L.24 – p.125, L.6.) In addition to its incorrect conclusion that no legal standards applied to the decision whether to admit the testimony, the district court

misinterpreted Idaho case law governing the situation it stated was analogous: the admissibility of radar evidence. In light of this clear abuse of discretion, as demonstrated *infra*, Mr. Barber maintains that his conviction must be set aside, with this matter remanded for a new trial at which only properly-admitted evidence will be allowed.

B. Standard Of Review

"Whether evidence admitted by the trial court is supported by a proper foundation is reviewable under an abuse of discretion standard." *State v. Bush*, 131 Idaho 22, 34 (1997) (citation omitted).

When a district court's discretionary decision is reviewed on appeal, the appellate court conducts a three part inquiry to determine whether that discretion was abused. First, the district court must have perceived the issue as one of discretion. Second, the district court must have acted within the outer boundaries of such discretion and consistently with any applicable legal standards. Third, the district court must have reached its decision in an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600 (1989).

C. The District Court Abused Its Discretion When, Over Mr. Barber's Foundation Objection, It Admitted Testimony Concerning The Weight Of The Marijuana When No Evidence Was Presented To Establish The Accuracy Or Reliability Of The Scale Used And For Which No Foundation Was Required To Be Laid

Idaho Rule of Evidence 901, in relevant part, provides:

> (a) The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
>
> (b) By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

. . .

(9) Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Any method of authentication or identification provided by Supreme Court rule or by a statute or as provided in the Constitution of this State.

I.R.E. 901.

The Idaho Court of Appeals, interpreting the foundational requirements for admission of a breath test result under Rule 901, has held that subsection (b)(10)'s requirement is satisfied by Idaho Code § 18-8004(4)'s provision that any test performed in accordance with rules approved by the Idaho State Police is admissible "'without the necessity of producing a witness to establish the reliability of the testing procedure for examination.'" *State v. Van Sickle*, 120 Idaho 99, 103 (Ct. App. 1991) (quoting I.C. § 18-8004(4)).

Although no Idaho appellate court has ruled on the issue of the foundation necessary to admit testimony concerning the use of a scale to establish the weight of drugs, the Idaho Court of Appeals has addressed a similar issue regarding the use of laser and radar devices, respectively, to measure a driver's speed. *See State v. Williamson*, 144 Idaho 597 (Ct. App. 2007) (laser device); *State v. Kane*, 122 Idaho 623 (Ct. App. 1992) (radar device).

In *Williamson*, initially addressing the question of the general reliability of the method of determining speed via laser, the Court of Appeals reasoned, "On the basis of decided cases and law in other jurisdictions, and in the absence of any relevant Idaho statute, we hold that laser speed detection devices are generally reliable and their results may be admitted into evidence in Idaho courts." *Williamson*, 144 Idaho at 600.

The Court of Appeals then went on to caution that such results were not automatically-admissible absent a proper foundation, explaining,

> As with radar devices . . . when a laser device is used to determine a defendant is driving in excess of the maximum speed limit, *the proper use and accuracy of the device in question must be established by the state in order to introduce the evidence at trial.* Therefore, in each speeding prosecution that seeks to introduce laser evidence, *the state must prove that the officer was qualified to operate the device, that the unit was properly maintained, and that it was used correctly.*

Id. (citations to *Kane* omitted) (emphases added)[4]; *see also Kane*, 122 Idaho at 624-25 ("The question of the accuracy of the radar unit was addressed by the officer's testimony that he was qualified to operate the machine, that the unit was properly maintained and that it was used correctly. *It is necessary that these questions be proved in each speeding prosecution.*") (emphasis added).

The Nebraska Supreme Court has held that, despite the absence of any statute, "foundation regarding the accuracy and proper functioning of the device is required to admit evidence obtained from using the device . . . when the electronic or mechanical measuring device at issue is a scale used to weight a controlled substance." *State v. Richardson*, 830 N.W. 2d 183, 187-88 (Neb. 2013). In reaching its conclusion, the Nebraska Supreme Court cited cases from six other jurisdictions which it described as being "consistent" in requiring that a proper "foundation [be laid] regarding the accuracy of a scale prior to admitting evidence regarding weight measured by using the scale." *Id.* (citations omitted).

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[4] Ultimately, the Court of Appeals concluded that testimony from the officer "that he was certified in the use of laser, that the laser had been calibrated by city maintenance shops, and that he had tested the laser to make sure it was working correctly on the day in question," would have satisfied any objection on foundation (although one was not made). *Williamson*, 144 Idaho at 600-01.

In *Richardson*, a chemist with the Nebraska State Patrol's crime laboratory testified "that she routinely used the crime laboratory's scale," "had gone through the weighing procedure '[t]housands' of times," "that the crime laboratory had its scale calibrated by the manufacturer once a year and that laboratory personnel checked every Friday to make sure the scale was working and would calibrate if necessary." *Richardson*, 830 N.W.2d at 185 (brackets in original). The chemist further "testified that if there was an inconsistency with the [weekly] calibration, the scale would be taken out of use until the manufacturer came in to repair it," and "that during the time she had been at the laboratory, she had never had an issue with the calibration of the scale, and that she was not aware of any issue with the calibration of the scale at the time she tested the cocaine in this case." *Id.* at 186.

In rejecting the sufficiency of the chemist's testimony regarding the scale and its calibration, the Nebraska Supreme Court explained that "although [she] testified that the calibration of the scale in the laboratory was checked once a week, she did not provide further testimony regarding the procedures used to perform such calibration and whether such calibration involved testing against a known weight." *Richardson*, 830 N.W.2d at 190. The Court further explained, "Although [she] stated the calibration was checked, the accepted definition of calibration includes comparison to a standard, and thus the foundation in this case should have specifically addressed whether the scale was tested using a known reliable weight." *Id.* Ultimately, the Court held, "[t]he foundation needed to be more specific to the particular scale used in this case," including "greater detail regarding the procedures used in the calibration, including specifically whether the scale was tested against a known weight." *Id.*

Noting that "[a] court's decision regarding sufficient foundation inevitably involves discretion . . . [and that it did not intend] to catalog the manner by which proper foundation is to be laid," the Nebraska Supreme Court nevertheless held, "at a minimum where accuracy is claimed based on calibration, the details of the object by which calibration is satisfied should be described." *Richardson*, 830 N.W.2d at 190.

Officer Cowell's testimony concerning the "calibration" of the scale used in this case is almost identical the "calibration" method found to be insufficient in *Podgurski*. As in this case, the evidence cited by the prosecutor "as indicative of calibration" included the fact that "the scale remained in the possession of the police department for fifteen years prior to trial [and] that Detective Morrissey 'zeroed' the scale at trial." *Podgurski*, 961 N.E.2d at 123 (footnote omitted). The Appeals Court of Massachusetts, concluding that "zeroing" a scale does not constitute calibration, explained,

> The term "zero" refers to the practice of "adjust[ing] (and instrument, etc.) to a zero point or to an arbitrary point from which all positive and negative readings are to be measured." Webster's New World College Dictionary 1666 (4th ed. 1999). The Commonwealth uses the word "calibrated" in its brief, as did the officer in his testimony, but the act described by the officer of "zeroing" the scale is not the equivalent of "calibration," for which the scale may thus be shown to be accurate when the weight upon it is "zero," it has not been thereby shown to be accurate at any other weight.

Id. n.17. As in *Podgurski*, the only testimony concerning calibration offered in support of Officer Cowell's weighing of the marijuana was that the digital scale "calibrates itself" such that "when it sets itself to – it's 0.0, you know that that calibration is going to be correct on what you are weighing." (Tr., p.110, Ls.4-8.)

To the extent that the State may argue that Officer Cowell's testimony that he used a "triple beam balance scale" to "corroborate" the weight he obtained when using the digital scale is the equivalent of calibration, Mr. Barber notes that such a conclusion is unsupportable, especially in light of the Hawai'i Supreme Court's decision in *State v.*

Manewa, 167 P.3d 336 (Haw. 2007). In *Manewa*, the prosecution argued that it had laid a proper foundation for testimony as to the weight of drugs because the criminalist had "personally verified and validated the balance [scale] monthly" using another balance. *Manewa*, 167 P.3d at 347 (internal quotation marks omitted). In rejecting the argument and concluding that the lower courts had "gravely erred" in finding a proper foundation to have been laid, the Hawai'i Supreme Court explained,

> [T]he evidence failed to establish (1) that [the criminalist] had any training or expertise in calibrating the balance, (2) that the balance had been properly calibrated by the manufacturer's service representatives, (3) that there was an accepted manufacturer's established procedure for "'verify[ing] and validat[ing]'" that the balance was in proper working order and that if such a procedure existed, that [the criminalist] followed it, and (4) that his balance was in proper working order at the time the evidence was weighed.

Id. (some brackets in original).

Furthermore, it would be illogical to conclude that using one scale that has not been calibrated or shown to be accurate to "calibrate" or verify another scale that has not been calibrated or shown to be accurate is appropriate. It would be like asking two people to estimate the temperature outside, and then rely on the fact that each gave the same (or a similar) estimate in order to establish the actual temperature. Using a scale that has not been established, through foundational testimony, to be accurate and reliable violates the Idaho Rules of Evidence, case law interpreting them in analogous situations, and case law on the same issue from other jurisdictions that have addressed the issue.

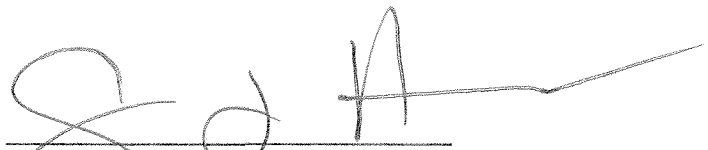
The district court's conclusion that there was no foundational requirement for the admissibility of evidence of drug weight obtained via a scale, including its analogizing it to radar evidence in speeding prosecutions (which does, as shown above require a foundational showing in each prosecution), represented a clear abuse of discretion. In

light of this objected-to error, Mr. Barber respectfully requests that the judgment of conviction for possession of marijuana (more than three ounces) be vacated, with this matter remanded for a new trial.

CONCLUSION

For the reasons set forth herein, Mr. Barber respectfully requests that this Court vacate his conviction for possession of marijuana (more than three ounces), and remand this matter for a trial at which only properly-admitted evidence will be allowed.

DATED this 7th day of February, 2014.



SPENCER J. HAHN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

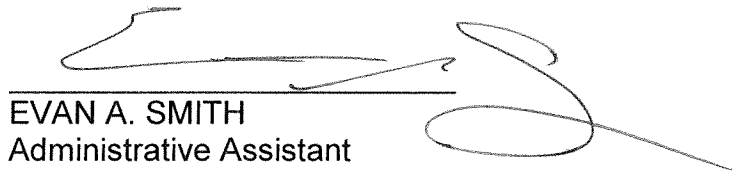
I HEREBY CERTIFY that on this 7th day of February, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

JOHN M BARBER
INMATE #107246
CAPP
15505 S PLEASANT VALLEY ROAD
KUNA ID 83634

BARBARA A BUCHANAN
FIRST DISTRICT COURT JUDGE
E-MAILED BRIEF

SERRA S WOODS
ATTORNEY AT LAW
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720-0010
Hand delivered to Attorney General's mailbox at Supreme Court.



EVAN A. SMITH
Administrative Assistant

SJH/eas