4-22-2014

State v. Arrotta Appellant's Reply Brief Dckt. 41632

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	No. 41632
Plaintiff-Appellant,	)	
	)	Latah Co. Case No.
vs.	)	CR-2012-4156
	)	
DEREK MICHAEL ARROTTA,	)	
	)	
Defendant-Respondent.	)	
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

HONORABLE JOHN C. JUDGE, Magistrate Judge
HONORABLE JOHN R. STEGNER, District Judge

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A. Introduction

Both the magistrate and the district judge on intermediate appeal concluded that implied consent is not a viable exception to the warrant requirement, and therefore evidence of a blood draw from Arrotta should be suppressed. (Tr., p. 118, Ls. 13-19; R., p. 118.) The lower courts erred because the conclusion that implied consent is not a valid exception to the warrant requirement is in direct conflict with precedent of the Idaho Supreme Court and the Supreme Court of the United States. (Appellant's brief, pp. 5-7.) Arrotta responds by first contending that the blood draw was not justified by exigent circumstances. (Respondent's brief, pp. 6-9.) He next argues that the blood draw was not taken by voluntary consent. (Respondent's brief, pp. 9-10.) The state agrees that it did not establish either exigent circumstances or voluntary consent in this case. Such is, however, irrelevant to the claim the state does make, which is that the blood draw was justified by implied consent. The state will therefore not respond further to these arguments.

Relevant, but no less erroneous, are Arrotta's arguments that he had the legal authority to revoke his implied consent (Respondent's brief, pp. 10-11); that the Idaho Constitution prohibits implied consent by granting greater rights than the Fourth Amendment (Respondent's brief, pp. 11-12); that implied consent violated the "unconstitutional conditions doctrine" (Respondent's brief, pp. 12-20); and that the Supreme Court of the United States has held that only exigent

circumstances or voluntary consent are viable exceptions to the warrant requirement (Respondent's brief, pp. 20-21). These arguments fail for the following reasons: It is well established that motorists suspected of driving under the influence do not have legal authority to revoke implied consent; the argument that the Idaho Constitution grants broader protections than the Fourth Amendment is neither preserved nor meritorious; the "unconstitutional conditions doctrine" does not apply; and, rather than disapproving, the Supreme Court of the United States has upheld and endorsed implied consent.

B. Standard Of Review

The standard of review of a district court order granting or denying a suppression motion is bifurcated: factual findings are accepted unless clearly erroneous, but the Court freely reviews the application of constitutional principles to the facts found. State v. Purdum, 147 Idaho 206, 207, 207 P.3d 182, 183 (2009). On review of a decision rendered by a district court in its intermediate appellate capacity, the reviewing court "directly review[s] the district court's decision to determine whether it correctly decided the issues presented to it on appeal." Borley v. Smith, 149 Idaho 171, 176, 233 P.3d 102, 107 (2010); see also Losser v. Bradstreet, 145 Idaho 670, 183 P.3d 758 (2008).

C. It Is Well-Established That Motorists Do Not Have The Right To Revoke Implied Consent

In Idaho, motorists suspected of DUI do not have the legal ability to revoke implied consent. State v. McCormack, 117 Idaho 1009, 1013-14, 793 P.2d 682, 686-87 (1990) (although driver has "physical ability" to refuse he has

no right to "withdraw his implied consent"); State v. Woolery, 116 Idaho 368, 372-73, 775 P.2d 1210, 1215-16 (1989)[1]; State v. LeClercq, 149 Idaho 905, 909, 243 P.3d 1093, 1097 (Ct. App. 2010); State v. Cooper, 136 Idaho 697, 699-700, 39 P.3d 637, 639-40 (Ct. App. 2001). Arrotta's argument that because he had the right to revoke voluntary consent he had the right to revoke his implied consent (Appellant's brief, pp. 10-11) is without legal merit.

D. Arrotta's Claim That The State Constitution Has A Different Warrant Requirement Than The Fourth Amendment Is Neither Preserved Nor Meritorious

The state constitution will not be interpreted differently from corresponding provisions of the federal constitution unless there is a "cogent reason" to do so. State v. Schaffer, 133 Idaho 126, 130, 982 P.2d 961, 965 (Ct. App. 1999). Moreover, a claim that the state constitution provides great protection than the federal constitution must be preserved in the trial court. State v. Wheaton, 121 Idaho 404, 407, 825 P.2d 501, 504 (1992). Interpretation of analogous constitutional provisions by the Supreme Court of the United States controls "unless clear precedent or circumstances unique to the state of Idaho or its constitution indicates" greater protections. CDA Dairy Queen, Inc. v. State Ins. Fund, 154 Idaho 379, 384, 299 P.3d 186, 191 (2013).

[1] The portion of the opinion in Woolery holding that that "the destruction of [blood alcohol content] evidence provides an inherent exigency which justified the warrantless search" of a blood draw, 116 Idaho at 370-71, 775 P.2d at 1212-13, was abrogated in Missouri v. McNeely, 133 S.Ct. 1552, 1558 n.2 (2013). The Idaho Supreme Court's interpretation of the Idaho implied consent law remains good law.

Arrotta's motion to suppress was based exclusively upon the Fourth Amendment. (R., pp. 37-41.) The claim the Idaho Constitution provides greater protection in this case is not preserved for appellate review. Even if preserved Arrotta has failed to show a "cogent reason," much less "clear precedent or circumstances unique to the state of Idaho or its constitution" indicating greater protection. Indeed, his only argument is that because the Idaho Supreme Court held that there is no good faith exception to the *exclusionary rule* there should be no implied consent exception to the *warrant requirement*. (Appellant's brief, pp. 11-12.) Having failed to find any cogent reason, unique circumstances, or any precedent indicating that the *warrant requirement* of the Idaho Constitution should be interpreted differently than the Fourth Amendment, Arrotta's argument also fails on the merits.

E. The "Unconstitutional Conditions Doctrine" Has No Application To Idaho's Implied Consent Law

The "unconstitutional conditions doctrine" "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." Koontz v. St. Johns River Water Management Dist., ___ U.S. ___, 133 S.Ct. 2586, 2594 (2013). "Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right ... in exchange for a discretionary benefit conferred by the government ...." Dolan v. City of Tigard, 512 U.S. 374, 385 (1994).

> For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the

> government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.

Perry v. Sinderman, 408 U.S. 593, 597-98 (1972); see also Farnworth v. Femling, 125 Idaho 283, 285, 869 P.2d 1378, 1380 (1994). Thus, for example, the government does not have the "power to compel a private carrier to assume against his will the duties and burdens of a common carrier," which compulsion violates due process, as a "condition precedent to the enjoyment of a privilege" of a business license. Frost v. Railroad Comm'n of Cal., 271 U.S. 583, 592-94 (1926). Neither the Supreme Court of the United States nor the Idaho Supreme Court has applied this doctrine to invalidate implied consent laws. To the contrary, both courts have specifically held that implied consent laws are valid. See, e.g., North Dakota v. Neville, 459 U.S. 553 (1983); State v. Diaz, 144 Idaho 300, 302-03, 160 P.3d 739, 741-42 (2007). Arrotta makes two arguments for extending the unconstitutional conditions doctrine to invalidate implied consent, neither of which have merit.[2]

Arrotta argues that other courts have applied the unconstitutional conditions doctrine to reject implied consent. (Respondent's brief, pp. 15-20.) Review shows that this argument is, at best, overstated. In all of the cases cited

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[2] Despite his request that this Court overrule precedent, Arrotta fails to cite the standard for doing so. Controlling precedent must be followed "unless it is manifestly wrong, unless it has proven over time to be unjust or unwise, or unless overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice." State v. Dana, 137 Idaho 6, 9, 43 P.3d 765, 768 (2002); State v. Humphreys, 134 Idaho 657, 660, 8 P.3d 652, 655 (2000) (quoting Houghland Farms, Inc. v. Johnson, 119 Idaho 72, 77, 803 P.2d 978, 983 (1990)).

the courts suppressed blood draws taken in an absence of probable cause to believe the driver was under the influence. State v. Quinn, 178 P.3d 1190 (Az. App. 2008) (statute allowing blood draw because of involvement in serious accident struck down); Cooper v. State, 587 S.E.2d 605 (Ga. 2003) (same); Hannoy v. State, 789 N.E.2d 977 (Ind. App. 2003) (officers lacked probable cause to believe driver was under the influence). Arrotta has cited to no case that has applied the unconstitutional conditions doctrine to strike down an implied consent statute such as Idaho's, which requires "reasonable grounds to believe" the driver is under the influence. I.C. § 18-8002(1).[3]

Review of the cases cited does not demonstrate that implied consent, validated by both the Idaho Supreme Court and the Supreme Court of the United States, is an "unconstitutional condition." Rather, the courts' holdings that the Constitution does not countenance implied consent in the absence of reason to believe that the driver is under the influence does not advance Arrotta's argument because there was probable cause in this case to believe Arrotta was driving under the influence of alcohol. (Tr., p. 111, L. 24 – p. 112, L. 6.) At least one case from one of those jurisdictions, unrecognized by Arrotta, says as much. See Hough v. State, 620 S.E.2d 380, 383-84 (Ga. 2005) (distinguishing Cooper

[3] The necessity of particularized suspicion is a primary difference between express consent and implied consent. Express consent can be given in the absence of any suspicion, while implied consent requires "reasonable grounds to believe." Properly understood, implied consent is merely an implied waiver of having a judge determine probable cause before, as opposed to after, the blood draw is performed, not a complete waiver of applicable Fourth Amendment rights.

and holding that implied consent is constitutional where officers have probable cause to believe driver is under the influence).

Arrotta also argues that implied consent "was not considered to afoul [sic] of the unconstitutional conditions doctrine due to the fact that under pre-McNeely jurisprudence it was believed that an individual held no constitutional right to be free from warrantless blood draws." (Respondent's brief, p. 15 (citations omitted).) Arrotta's assertion that the implied consent exception justified warrantless blood draws only because the exigency exception justified warrantless blood draws is both nonsensical and directly contrary to this Court's analysis in Diaz. In that case the Court stated: "Because Diaz had already given his implied consent to evidentiary testing by driving on an Idaho road, he also gave his consent to a blood draw. Without addressing whether exigency also justified the blood draw, we hold that the seizure of Diaz's blood fell within a well-recognized exception to the warrant requirement." Id. at 303, 160 P.3d at 742. Thus, in Diaz, the blood draw was justified by the implied consent exception *regardless of whether it was also justified by the exigency exception.* The argument that implied consent justifies a warrantless blood draw only if exigent circumstances also justify the warrantless blood draw is meritless.

The Idaho Supreme Court has upheld implied consent as a valid exception to the warrant requirement. Diaz, 144 Idaho at 303, 160 P.3d at 742. The Supreme Court of the United States has also upheld implied consent statutes against constitutional attack. Illinois v. Batchelder, 463 U.S. 1112 (1983); North Dakota v. Neville, 459 U.S. 553 (1983). In Missouri v. McNeely,

___ U.S. ___, 133 S.Ct. 1552, 1565-66 (2013), the Court endorsed implied consent as a valid law enforcement tool. The district court erred when it affirmed the magistrate's conclusion that implied consent was not a valid exception to the warrant requirement.

F. The Supreme Court Of The United States Has Not Disavowed Implied Consent

Arrotta argues that the "*McNeely* Court gave the clear mandate that '[i]n those drunk driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment *mandates* that they do so.'" (Respondent's brief, p. 20 (emphasis original) (quoting McNeely, 133 S.Ct. at 1561).) Arrotta concludes that this quote means that "after *McNeely*, a motorist arrested on suspicion of DUI now clearly has a constitutional tight to be free from warrantless intrusions into their body absent the existence of either a true showing of exigent circumstances cause [sic] or actual valid consent." (Id.) The quote, however, was given in the context of determining whether the Court "should depart from careful case-by case assessment of exigency and adopt the categorical rule proposed by the State and its *amici*." McNeely, 133 S.Ct. at 1561. In context, then, the Court merely stated that the exigent circumstances exception does not apply "where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search." Id. The Court was not saying that a warrant was required in all DUI investigations absent exigency. Arrotta's acknowledgment

that voluntary consent is not within the scope of the language he quotes belies his claim that implied consent is within that scope.

In McNeely the Supreme Court of the United States determined that to show application of the exigent circumstances exception the state had to show that a warrant could not be obtained without significantly undermining the efficacy of the search. The Court's determination of the scope of the exigent circumstances exception did not limit the scope of any other exception. Moreover, the Court later specifically recognized the implied consent exception as among the "broad range of legal tools to enforce their drunk-driving laws and secure BAC evidence." McNeely, 133 S.Ct. at 1566. Arrotta's argument that McNeely does away with the implied consent exception is without merit.

The district court concluded that the implied consent exception is no longer constitutionally valid, upholding a magistrate determination to the same end. The law simply is opposite; the implied consent exception is a valid exception to the warrant requirement and allowed the blood draw in this case.

CONCLUSION

The state respectfully requests this Court to reverse the lower courts and remand for further proceedings before the magistrate division.

DATED this 22nd day of April, 2014.

KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 22nd day of April, 2014, I caused two true and correct copies of the foregoing REPLY BRIEF OF APPELLANT to be placed in the United States mail, postage prepaid, addressed to:

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