Electronically Filed
3/13/2019 3:23 PM
Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Brad Thies, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 45820**
Plaintiff-Respondent,	)	
	)	**Kootenai County Case No.**
v.	)	**CR-2017-11650**
	)	
KAIRA NOELLE SOUTHWORTH,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

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

HONORABLE LANSING L. HAYNES
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

ANDREW V. WAKE
Deputy Attorney General
Criminal Law Division
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534
E-mail: ecf@ag.idaho.gov

ATTORNEYS FOR PLAINTIFF-RESPONDENT

MAYA P. WALDRON
Deputy State Appellate Public Defender
322 E. Front St., Ste. 570
Boise, Idaho 83702
(208) 334-2712
E-mail: documents@sapd.state.id.us

ATTORNEY FOR DEFENDANT-APPELLANT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

STATEMENT OF THE CASE

Nature Of The Case

Kaira Noelle Southworth appeals from a conviction for felony driving under the influence entered upon her conditional guilty plea. On appeal, she challenges the district court's denial of her motion to suppress, arguing that the traffic stop leading to her arrest was an unlawful seizure.

Statement Of The Facts And Course Of The Proceedings

On July 2, 2017, at about 2:20 a.m., Trooper Jonathan Cushman initiated a traffic stop of a vehicle driven by Kaira Noelle Southworth because he believed that she made an illegal lane change and because he believed that her vehicle was making excessive noise.[1] (R., pp.12-13 (Probable Cause Affidavit).) In speaking with Southworth, Trooper Cushman suspected that she was under the influence of alcohol. (Id.) After road-side sobriety testing, Southworth was arrested for driving under the influence and a breathalyzer test confirmed that she was under the influence of alcohol. (Id.) Southworth was charged with felony driving under the influence, the state alleging that she had two previous convictions for driving under the influence within the previous ten years, and with possessing an open bottle of vodka. (R., pp.57-59.)

Southworth filed a motion to suppress (R., pp.73-75) and argued that Trooper Cushman lacked reasonable suspicion to initiate the traffic stop (R., pp.86-87); that, to the extent that the district court found that the traffic stop was justified by a suspected

[1] That stop was recorded on Trooper Cushman's dash-cam and the recording is Defense Exhibit A.

violation of Idaho Code section 49-937—requiring, in part, that vehicles be equipped with "'a muffler in good working order and in constant operation to prevent excessive or unusual noise'" (R., p.87 (quoting I.C. § 49-937))—that statute is unconstitutional (R., pp.87-89); and that the traffic stop was unlawfully extended (R., pp.89-92). Only the first of these arguments is at issue in this appeal. (Appellant's brief, p.6 (listing only issue on appeal as whether Trooper Cushman had reasonable suspicion to initiate the traffic stop).)

At the hearing on Southworth's motion to suppress, Trooper Cushman testified that he and Southworth were both travelling north on Highway 95. (Tr., p.25, Ls.2-16.[2]) Approximately 100 yards before Highway 95 intersects another road ("Honeysuckle"), two left-turn lanes begin. (Tr., p.17, Ls.18-22; p.20, Ls.18-22.) As she approached those left-turn lanes, Trooper Cushman observed Southworth signal that she was turning left and move from a north-bound lane on Highway 95, across the first left-turn lane, and into the second left-turn lane. (Tr., p.17, L.18 – p.19, L.21; p.27, Ls.14-18.) Her turn signal remained on the entire time, she never established herself in the first left-turn lane, and she "split" the left-turn lanes, driving on or straddling the dashed line separating them a large portion of the 100 yards, finally merging completely into the second left-turn lane just before the intersection. (Id.)

As Southworth turned left onto Honeysuckle, Trooper Cushman noticed that her vehicle was unusually loud and suspected that it was in violation of the Idaho Code. (Tr., p.20, L.23 – p.21, L.4; p.26, L.24 – p.27, L.13.) Trooper Cushman testified that Southworth was driving either a GMC Sierra or a Chevy Silverado (Tr., p.5, L.25 – p.6,

[2] All citations to "Tr." are to the transcript of the hearing on Southworth's motion to suppress, held 10/27/17, unless otherwise indicated.

L.11) and that those two vehicles are "basically the same truck" (Tr., p.32, Ls.15-17).[3] He further testified that, at the time of the stop, he had been a Trooper for over five years, during which time he observed and heard "hundreds and thousands" of vehicles, including GMC Sierra/Chevy Silverado trucks, and that Southworth's was "clearly louder" than "most if not a high percentage of all the other ones driving down the road." (Tr., p.26, L.8 – p.27, L.13; p.32, Ls.7-10.)

The district court denied the motion to suppress (R., p.115) and held that Trooper Cushman had reasonable suspicion to initiate the traffic stop "based upon the officer's testimony that the muffler was too loud" (Tr., p.49, L.22 – p.50, L.4). "The officer testified as to his familiarity with the vehicle or vehicles similar to the defendant's, and that the defendant's muffler was louder than those vehicles. The statement that the muffler was excessively loud or not is not refuted." (Id.) The district court also found that the stop was justified based on reasonable suspicion of an illegal lane change. (Tr., p.49, Ls.6-11; p.50, Ls.5-10.) Finally, the court rejected Southworth's arguments regarding the constitutionality of Idaho Code section 49-937 and concerning the extension of the traffic stop to investigate suspicions of driving under the influence. (Tr., p.50, L.11 – p.51, L.5.)

Southworth thereafter entered a conditional guilty plea, reserving the right to appeal the denial of her motion to suppress. (R., pp.129-30; 11/6/17 Tr., p.7, L.7 – p.8,

[3] According to Trooper Cushman's probable cause affidavit (R., p.13), the Pre-Booking Information Sheet (R., p.14), and the citation issued to Southworth (R., p.15), she was driving a 1997 GMC Sierra.

L.7.) She was sentenced to a unified term of four years with two years fixed and the district court retained jurisdiction. (R., pp.151-53.) She timely appealed. (R., pp.154-57.)

ISSUE

Southworth states the issue on appeal as:

> Did the district court err by denying Ms. Southworth's motion to suppress because Officer Cushman did not have reasonable suspicion to believe that her muffler or lane change violated Idaho Code?

(Appellant's brief, p.6.)

The state rephrases the issue as:

Has Southworth failed to show error in the district court's denial of her motion to suppress because the traffic stop was supported by reasonable suspicion?

ARGUMENT

Trooper Cushman Had Reasonable Suspicion To Initiate The Traffic Stop

A. Introduction

Trooper Cushman cited specific and articulable facts to support his suspicion that the muffler on Southworth's vehicle was emitting noise in excess of 92 decibels, was not properly maintained, or had been modified to amplify noise in violation of Idaho Code section 49-937. He testified that he was familiar with the variety of vehicle driven by Southworth and that her vehicle was "definitely louder" than other vehicles of that variety with which he had experience. (Tr., p.26, L.8 – p.27, L.13; p.32, Ls.7-10.) Southworth's argument that that testimony is insufficient to generate reasonable suspicion is directly contrary to State v. Meyer, 158 Idaho 953, 354 P.3d 515 (Ct. App. 2015), notwithstanding her attempts to distinguish that case.

The district court also correctly determined that Trooper Cushman had reasonable suspicion that Southworth made an illegal lane change. Southworth moved from one lane, across another, and into a third, without establishing herself in the intermediate lane and with her turn signal on the entire time, while driving a significant distance over the dashed line separating lanes. (Tr., p.17, L.18 – p.19, L.25; p.27, Ls.14-18.) When he observed Southworth do so, Trooper Cushman had reasonable suspicion that Southworth violated Idaho Code section 49-637(1), which requires that a vehicle must be driven as nearly as practicable in a single lane of traffic, and Idaho Code section 49-808(1), which requires that a lane change be signaled for 100 feet before the lane change is executed.

B. Standard Of Review

"In reviewing a district court order granting or denying a motion to suppress evidence, the standard of review is bifurcated." State v. Purdum, 147 Idaho 206, 207, 207 P.3d 182, 183 (2009). "This Court will accept the trial court's findings of fact unless they are clearly erroneous." Id. "However, this Court may freely review the trial court's application of constitutional principles in light of the facts found." Id.

C. The District Court Correctly Determined That The Traffic Stop Was Supported by Reasonable Suspicion

"A traffic stop by an officer constitutes a seizure of the vehicle's occupants and implicates the Fourth Amendment's prohibition against unreasonable searches and seizures." State v. Meyer, 158 Idaho 953, 955, 354 P.3d 515, 517 (Ct. App. 2015).[4] "Under the Fourth Amendment, an officer may stop a vehicle to investigate possible criminal behavior if there is a reasonable and articulable suspicion that the vehicle is being driven contrary to traffic laws." Id. "The reasonableness of the suspicion must be evaluated upon the totality of the circumstances at the time of the stop." Id. "The reasonable suspicion standard requires less than probable cause but more than mere speculation or instinct on the part of the officer." Id. "An officer may draw reasonable

[4] "The Fourth Amendment to the United States Constitution and Article I, Section 17 of the Idaho Constitution protect people against unreasonable searches and seizures. The guarantees under the United States Constitution and the Idaho Constitution are substantially the same." State v. Ballou, 145 Idaho 840, 845, 186 P.3d 696, 701 (Ct. App. 2008). Southworth invokes the Idaho Constitution, but does not argue that it should be interpreted or applied differently than the Fourth Amendment to the United States Constitution. (Appellant's brief, p.7.)

inferences from the facts in his or her possession, and those inferences may be drawn from the officer's experience and law enforcement training." Id.

1. Trooper Cushman Had Reasonable Suspicion That Southworth's Vehicle Violated Idaho Code Section 49-937

Idaho Code section 49-937 provides, in part, that "[e]very motor vehicle shall at all times be equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise and annoying smoke." I.C. § 49-937(1). "'Excessive' or 'unusual noise' means any sound made by a passenger motor vehicle or a motorcycle at any time under any condition of grade, speed, acceleration or deceleration, which exceeds ninety-two (92) decibels . . .." State v. Shearer, 136 Idaho 217, 220, 30 P.3d 995, 998 (Ct. App. 2001) (quoting I.C. § 49-106(6)). That section also requires that noise suppressing systems "be maintained in good working order," I.C. § 49-937(1); forbids the operation of any vehicle the "noise suppressing system" of which has been "modified or altered in any manner," except to conform to the manufacturer's specifications, id.; and forbids the modification of "the exhaust system of a motor vehicle or a motorcycle in a manner which will amplify or increase the noise of the vehicle or motorcycle above that emitted by the muffler originally installed on the vehicle by the manufacturer," I.C. § 49-937(3).

These are separate legal prohibitions. "[A]n automobile with a muffler that has never been modified and complies with the manufacturer's specifications may still be in violation of the ninety-two decibel limit." Shearer, 136 Idaho at 221, 30 P.3d at 999. "Conversely, if the vehicle decibel level is below ninety-two decibels, the owner or operator of the vehicle may still be in violation of the statute because the person has

knowingly disconnected or altered the noise suppression system for purposes other than to conform to the manufacturer's specifications." Id.

Trooper Cushman testified that Southworth was driving either a GMC Sierra or Chevy Silverado (Tr., p.6, Ls.3-9), that those two varieties of truck were essentially identical (Tr., p.32, Ls.15-17), that he was familiar with those vehicles, and that Southworth's was "clearly louder" and "definitely louder" than "most if not a high percentage of all the other ones driving down the road" (Tr., p.26, L.24 – p.27, L.13). None of this was contravened in any way. That testimony established that he had reasonable suspicion to believe that Southworth's vehicle violated Idaho Code section 49-937.

That conclusion follows directly from the Court of Appeals' decision in State v. Meyer, 158 Idaho 953, 354 P.3d 515 (Ct. App. 2015). The relevant facts of that case are brief:

> A Kootenai County Sheriff's Deputy (the deputy) was sitting in a parking lot, talking with another deputy, when he heard "a loud exhaust," and the deputy discerned that the sound was coming from a white Pontiac driving on a road approximately 200 feet away. According to the deputy, the sound emitted by that car was about five or six points on a ten-point scale, with ten being the loudest, whereas other cars on the road were producing a sound of two or three points on the same scale. The sound was also louder than a newer-model Pontiac that the deputy had previously owned. The deputy pulled over the louder-than-normal car and talked with Meyer, who was driving the car.

Id. at 954, 354 P.3d at 516. In a motion to suppress evidence gathered as a result of that stop, Meyer argued "that that the deputy lacked reasonable suspicion that her car's exhaust was too loud or that her car's muffler was defective." Id. at 955, 354 P.3d at 517. The Court of Appeals rejected that argument, holding "that an officer's auditory

perception of a loud muffler gives rise to reasonable suspicion." Id. at 956, 354 P.3d at 518. "In short, the deputy's testimony that he was able to identify Meyer's vehicle as producing an exhaust noise louder than that of other cars provided reasonable suspicion that Meyer's car was in violation of I.C. § 49–937(1)." Id. Likewise, Trooper Cushman's testimony that he was able to identify Southworth's vehicle as producing an exhaust noise louder than that of other like vehicles provided reasonable suspicion that her car was in violation of Idaho Code section 49-937.

Southworth tries and fails to meaningfully distinguish Meyer. (Appellant's brief, pp.10-11.) She notes that the deputy in Meyer was "two-hundred feet away" when he heard Meyer's vehicle, while Trooper Cushman was in the next lane. (Appellant's brief, p.11.) But she provides no explanation as to how the fact that Trooper Cushman was somewhat closer to Southworth's vehicle than was the deputy in Meyer renders suspect Deputy Cushman's judgment that Southworth's vehicle was louder than other vehicles of the same type. Meyer certainly does not stand for the proposition that an officer must be at least 200 feet away from a vehicle before making a judgment that it is loud in comparison to other vehicles.

Southworth also notes that the deputy in Meyer "attempted to quantify just how loud the muffler was by describing it as a six on a ten point scale, with the other cars on the road being a two or three," while Trooper Cushman testified that Southworth's vehicle was "'clearly louder' than 'most if not a high percentage of all the other' GMC Sierras or Chevy Silverados he had heard at some unspecified time in the past, without saying how much louder it was and without knowing what decibel level would actually

amount to a violation of I.C. § 49-937." (Appellant's brief, p.11 (quoting Tr., p.27, Ls.2-13).)

As an initial matter, nothing in Meyer suggests that the deputy in that case knew at the time of the traffic stop what decibel level would violate Idaho Code section 49-937. As here, the deputy simply judged that the defendant's vehicle was louder than other like vehicles, not that the volume of the vehicle met or exceeded 92 decibels. Meyer, 158 Idaho at 956, 354 P.3d at 518 ("'[T]he law does not require that every police officer have with him a narcotics sniffing dog, a panoramic breathylizer [*sic*], a radar gun, or a decibel counter to verify what he smells or sees or hears.'" (alterations in original) (quoting State v. Cobbs, 411 So. 2d 212, 213 (Fla. Dist. Ct. App. 1982))). Indeed, as discussed above, a violation of Idaho Code section 49-937 does not even require the emission of sound above 92 decibels if the noise suppression system has been modified to emit increased noise or is malfunctioning.

Nor does anything in Meyer suggest that the officer must form his judgment regarding the volume of the defendant's vehicle in comparison to other vehicles in terms of an arbitrary point scale. Trooper Cushman testified that Southworth's vehicle was "clearly louder" and "definitely louder" than most or a high percentage of other like vehicles, of which he had encountered a large number. (Tr., p.26, L.24 – p.27, L.13.) Though he did not measure the difference in volume on some arbitrary scale, "he was able to identify [Southworth's] vehicle as producing an exhaust noise louder than that of other cars," which "provided reasonable suspicion" that her car was in violation of Idaho Code section 49-937. Meyer, 158 Idaho at 956, 354 P.3d at 518.

Finally, the cases from other jurisdictions cited with approval in Meyer and with which the Court of Appeals explicitly aligned itself show that the distinctions upon which Southworth relies are irrelevant. The Court of Appeals noted that: "In reaching the conclusion that we do, that an officer's auditory perception of a loud muffler gives rise to reasonable suspicion, we join other states that have also reached this conclusion." Id. at 956, 354 P.3d at 518. It then cited State v. Kinkead, 570 N.W.2d 97 (Iowa 1997), and State v. Beyer, 441 N.W.2d 919 (N.D. 1989), as courts in other jurisdictions that had previously reached the same conclusion. Id. In Beyer, the court found reasonable suspicion for a traffic stop where the officer testified only that the vehicle in question was "'quite loud'" and "'louder than the other vehicles or normal vehicles that are driving around.'" Beyer, 441 N.W.2d at 922-23. In Kinkead, the court found reasonable suspicion for a traffic stop where the officer testified only that she "heard Kinkead's muffler clearly despite the fact that her windows were up and her police radio was on," Kinkead, 570 N.W.2d at 100, and "believed [it] to be excessively loud," id. at 99. In neither case did the officers generate some arbitrary scale by which to frame a comparison with other cars, and in neither case did the courts focus on the distance between the officer and the car.

Trooper Cushman judged that Southworth's vehicle was definitely and clearly loud in comparison to other like vehicles with which he had experience. He thereby had reasonable and articulable suspicion that Southworth's vehicle was in violation of Idaho Code section 49-937.

2. Trooper Cushman Had Reasonable Suspicion That Southworth Performed An Illegal Lane Change

Idaho Code section 49-637(1) requires that vehicles be "driven as nearly as practicable entirely within a single lane and shall not be moved from that lane until the driver has first ascertained that the movement can be made with safety." Idaho Code section 49-808 governs the use of turn signals and provides that a driver may not "move a vehicle right or left upon a highway . . . until the movement can be made with reasonable safety nor without giving an appropriate signal." I.C. § 49-808(1). Unless the vehicle is on a controlled-access highway, a signal must be given "for not less than the last one hundred (100) feet traveled by the vehicle before turning." I.C. § 49-808(2).[5]

As Southworth acknowledges, she was travelling on Highway 95 when she "signaled her intent to merge left, and then made two lane changes over the course of approximately fifteen seconds or one-hundred yards, with her blinker on the entire time." (Appellant's brief, p.12.) While doing so, she drove a substantial portion of that time and distance on the dashed line separating the two left-turn lanes. (Tr., p.17, L.18 – p.19, L.25; p.27, Ls.14-18.) Trooper Cushman testified that she did not establish herself in the new lane after the first lane change, but simply drifted across it and eventually into the far left-turn lane. (Id.)

According to Southworth, Trooper Cushman did not have reasonable suspicion to believe she made an illegal lane change because she signaled that she was merging left and the "requirement that vehicles must be driven 'as nearly as practicable entirely within

[5] Neither Southworth nor the state introduced evidence regarding whether Highway 95 is a controlled-access highway.

a single lane' says absolutely nothing about the speed with which a driver must accomplish a lane change." (Appellant's brief, p.12 (quoting I.C. § 49-637(1).) That is, Southworth apparently takes the view that, as long as a turn signal is on continuously, Idaho Law permits a driver to drift across as many lanes as she likes, as slowly or quickly as she likes, and no matter how long she straddles multiple lanes while doing so. This Court should not adopt that view.

First, while any lawful lane change will necessitate that the vehicle is not entirely within a single lane for a brief period of time, Idaho Code section 49-637(1) nevertheless requires driving "as nearly as practicable entirely within a single lane." It is reasonable to suspect a driver who straddles the dividing line between lanes longer than is necessary to change lanes has not driven "as nearly as practicable entirely within a single lane." Though an extreme example, a driver who makes a five minute lane change, with blinker on the entire time, straddling the marked division between lanes for nearly all of that time, clearly does not drive "as nearly as practicable" within a single lane. That is so despite the fact that the driver was making a lane change and her turn signal was on the entire time. Trooper Cushman testified that Southworth "split those [left-turn] lanes and drove down both those lanes for almost the entire length of the – of the – that the lanes existed, and then right before the end of 'em, she finally drifted over into the – the far left lane." (Tr., p.17, L23 – p.18, L.7.) By driving a significant distance and period of time over the line dividing two lanes, more than was necessary to effectuate the lane change, she failed to drive as nearly as practicable within a single lane. After observing that, Trooper Cushman had reasonable suspicion to initiate the traffic stop.

Second, Idaho Code section 49-808 does not permit a driver to change lanes twice, signaling only once and without establishing herself in the intermediate lane, as Southworth did here. That statute governs "the movement" of a vehicle left or right upon a highway, I.C. § 49-808(1), and requires a signal for not less than one hundred feet prior to such a movement. I.C. § 49-808(2).[6] The statute contemplates that each lane change is a separate "movement," and so a driver who desires to change two lanes must signal for 100 feet, move into the intermediate lane, initiate a new turn signal for 100 feet, and then move into the third lane. That understanding of Idaho Code section 49-808 is mandated by the purpose of requiring that drivers signal prior to making lane changes: to "warn other traffic." I.C. § 49-808(2). That is, the requirement ensures that a driver occupying the lane into which the lane-changer intends to merge, or traffic that intends to merge into that lane, recognizes that intention. If a lane-changer is permitted to move across any number of lanes with a single signal and without establishing herself in any intermediate lane for at least 100 feet, drivers in adjacent lanes have no indication whether the lane-changer intends to move into the lane they are occupying or some intermediate lane. See State v. Olivarez, 392 P.3d 1007, 1010 (Utah Ct. App. 2017) (interpreting similar statutory language and holding that: "It is unreasonable to construe the statute to mean that one turn signal is sufficient for an infinite number of movements, even if all are part of a continuous series.").

Southworth initiated her left turn signal, moved across a lane without establishing herself in it, and moved into another lane, all while her turn signal remained on. (Tr.,

[6] Or, where the highway is controlled-access, for five seconds. I.C. § 49-808(2).

p.17, L.18 – p.19, L.25; p.27, Ls.14-18.) She thereby made two "movements"—two lane changes—for purposes of Idaho Code section 49-808, but without establishing herself in the intermediate lane and separately signaling the second lane change for at least 100 feet, as she was required to do. When Trooper Cushman observed this, he had reasonable suspicion to initiate a traffic stop.

Finally, an alternative route to the same conclusion again involves Idaho Code section 49-637(1), requiring that vehicles be "driven as nearly as practicable entirely within a single lane." A driver that makes two lane changes without establishing herself in the intermediate lane does not drive "as nearly as practicable entirely within a single lane." I.C. § 49-637(1). Such a driver occupies no lane at all as she crosses the intermediate lane without establishing herself in it. (Tr., p.18, Ls.10-18 (noting that Southworth "moved across" the intermediate lane, but "never was in it").) By contrast, a driver who changes two lanes by properly establishing herself in the intermediate lane and then signaling a separate lane change is only briefly not "entirely within a single lane" and only as necessary to move into the desired lane.

Because Trooper Cushman observed Southworth make multiple lane changes without separately signaling them and without establishing herself in the intermediate lane, he had reasonable suspicion to initiate the traffic stop.

CONCLUSION

The state respectfully requests that this Court affirm Southworth's judgment of conviction.

DATED this 13th day of March, 2019.

/s/ Andrew V. Wake
ANDREW V. WAKE
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 13th day of March, 2019, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

MAYA P. WALDRON
DEPUTY STATE APPELLATE PUBLIC DEFENDER
documents@sapd.state.id.us

/s/ Andrew V. Wake
ANDREW V. WAKE
Deputy Attorney General