

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
) No. 45838
 Plaintiff-Respondent,)
) Ada County Case No.
 v.) CR01-2017-31011
)
 FLORINDA L.I.M.C. HERRERA,)
)
 Defendant-Appellant.)
)
)

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA**

**HONORABLE DEBORAH A. BAIL
District Judge**

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STATEMENT OF THE CASE

Nature Of The Case

Florinda L.I.M.C. Herrera appeals from the judgment of the district court entered upon the jury verdict finding her guilty of possession of methamphetamine and possession of drug paraphernalia. On appeal Herrera argues the district court erred when it denied her motion to suppress.

Statement Of The Facts And Course Of The Proceedings

Officer Shackelford saw an occupied vehicle parked by an office building, which was unusual because it appeared that all the businesses were closed. (See 1/9/18 Tr., p. 13, L. 4 – p. 19, L. 17; Ex. A.) All of the lights in the office building were off and there were almost no other cars parked in the parking stalls. (1/9/18 Tr., p. 16, L. 8 – p. 19, L. 17.) Officer Shackelford had also made multiple drug-related arrests in the same area over the previous five months. (Id.) There was a female driver and a female passenger in the parked car. (1/9/18 Tr., p. 16, L. 20 – p. 19, L. 17.)

The parked vehicle also caught Officer Shackelford's attention because a couple of hours earlier the same vehicle had been parked in almost the same spot, then was gone, but was now again parked in almost the exact same spot. (1/9/18 Tr., p. 16, L. 20 – p. 19, L. 17.) The first time he saw the parked vehicle the passenger was male, but the second time the passenger was female. (Id.)

The second time Officer Shackelford saw the parked vehicle, the vehicle backed out and started to drive away. (1/9/18 Tr., p. 19, L. 18 – p. 21, L. 25.) Officer Shackelford followed behind it to see where it was going. (Id.) He did not activate his

lights or siren. (Id.) He did not do anything to try and stop the vehicle. (Id.) He was “pretty far behind” the vehicle when it pulled out. (Id.) The vehicle drove to the neighboring Jackson’s gas station and “almost collided” into another parked vehicle before backing up and pulling into a parking stall. (Id.) The Jackson’s gas station shared the same parking area with the office building. (1/9/18 Tr., p. 13, L. 16 – p. 15, L. 25, p. 19, L. 18 – p. 21, L. 25; Exs. A, B.)

Officer Shackelford parked his patrol car. (1/9/18 Tr., p. 22, L. 1 – p. 23, L. 8.) He did not block the vehicle. (Id.) He “left enough area for pretty much anybody to be able to drive through there.” (Id.) Officer Shackelford did not turn on his patrol car’s lights. (Id.) He was not initiating a traffic stop. (Id.)

Officer Shackelford asked the occupants of the vehicle if they were okay, if they needed anything and what they were doing. (1/9/18 Tr., p. 23, L. 9 – p. 25, L. 25.) They said they were trying to use the WiFi from the businesses. (Id.) Officer Shackelford asked for identification and the driver provided an identification and the passenger gave a verbal identification. (Id.) The driver was identified as Kristi Bourne and the passenger identified herself as Herrera. (1/9/18 Tr., p. 26, L. 1 – p. 28, L. 13.) Officer Shackelford used his personal radio and ran their names through Ada County dispatch. (1/9/18 Tr., p. 23, L. 9 – p. 25, L. 25.) He did not give the occupants of the car any commands to stay put. (Id.)

Officer Shackelford carried on a conversation with the driver, Ms. Bourne. (1/9/18 Tr., p. 26, L. 1 – p. 28, L. 13.) Officer Shackelford asked Ms. Bourne if they had anything illegal in the vehicle. (Id.) Ms. Bourne said that they had some syringes in the back seat. (Id.) Officer Shackelford had Ms. Bourne step out of the vehicle and asked if

she had anything illegal on her person. (Id.) Ms. Bourne said yes and provided illegal items. (Id.) Officer Shackelford placed Ms. Bourne under arrest and put her in the backseat of the patrol car. (Id.)

During this time, Officer Shackelford had Herrera step out of the vehicle and stand with Corporal Goodspeed who had had arrived on scene. (1/9/18 Tr., p. 28, L. 14 – p. 32, L. 13, p. 40, Ls. 10-12.) During a search of the vehicle Officer Shackelford found a Walmart bag inside of a cheetah print bag that belonged to Herrera. (1/9/18 Tr., p. 30, L. 14 – p. 32, L. 13.) Herrera gave Officer Shackelford permission to open the cheetah print bag and he found a syringe and Herrera’s identification. (Id.) Officer Shackelford placed Herrera under arrest for possession of paraphernalia. (Id.)

The state charged Herrera with possession of methamphetamine and possession of drug paraphernalia. (R., pp. 44-45.) Herrera filed a motion to suppress. (R., pp. 58-64.) The state responded. (R., pp. 69-74.) The district court held a hearing on the motion to suppress. (R., pp. 75-76.) A recording from Officer Shackelford’s body camera was admitted into evidence. (1/9/18 Tr., p. 32, L. 21 – p. 34, L. 3; Ex. C.) The district court denied the motion to suppress. (1/9/18 Tr., p. 55, L. 2 – p. 59, L. 10; R., pp. 77-79.)

The district court found that Ms. Bourne’s and Herrera’s vehicle was not blocked by the police cars, that the officers did not use sirens, lights or guns, and that it was “a pretty low-key encounter all the way.” (See 1/9/18 Tr., p. 56, L. 8 – p. 59, L. 7.)

It’s a quick and pretty friendly encounter. There is no show of force. There is no demand. There is a difference between an officer demanding to see an ID and saying, “May I see your ID?” He’s just asking -- it was really a pretty low-key, very polite, very professional conversation. At no time did it get to be any show of force.

(1/9/18 Tr., p. 58, L. 20 – p. 59, L. 2.)

The case proceeded to jury trial. (R., pp. 84-88.) The jury found Herrera guilty of possession of methamphetamine and possession of drug paraphernalia. (R., pp. 117-118.) The district court entered judgment and sentenced Herrera to four years with two years fixed. (R., pp. 125-130.) The district court suspended the sentence and placed Herrera on probation for two years. (Id.) Herrera timely appealed. (R., pp. 138-141.)

ISSUE

Herrera states the issue on appeal as:

Did the district court err when it denied Ms. Herrera's motion to suppress?

(Appellant's brief, p. 7.)

The state rephrases the issue as:

Has Herrera failed to show the district court clearly erred when it found the initial encounter was consensual and denied her motion to suppress?

ARGUMENT

The District Court Did Not Err When It Found The Initial Encounter Was Consensual

A. Introduction

The district court found that the encounter between Officer Shackelford and Herrera was consensual. (1/9/18 Tr., p. 56, L. 8 – p. 59, L. 7.) The district court found that: Ms. Bourne’s and Herrera’s vehicle was not blocked, the police did not use sirens or lights, Officer Shackelford asked the occupants for identification, the officers did not draw their weapons, there was no demand, or show of force and it was a “a quick and pretty friendly encounter.” (See id.) On appeal, Herrera argues the district court erred. Herrera claims that Officer Shackelford required Herrera to identify herself and restricted Herrera’s movements. (See Appellant’s brief, pp. 13-18.)

Both of Herrera’s arguments are belied by the record. (See, e.g., Ex. C. at 0:34 to 2:45.) Officer Shackelford never demanded or required identification and did not restrict the movements of Herrera or Ms. Bourne until he developed reasonable articulable suspicion of criminal activity based upon Ms. Bourne’s admissions. The district court did not clearly err, because the district court’s factual findings are supported by substantial and competent evidence.

B. Standard Of Review

“The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, the appellate court accepts the trial court’s findings of fact that are supported by substantial evidence, but freely reviews the application of constitutional principles to those facts.” State v. Diaz, 144 Idaho 300, 302, 160 P.3d 739,

741 (2007). The power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court. State v. Valdez-Molina, 127 Idaho 102, 106, 897 P.2d 993, 997 (1995); State v. Fleenor, 133 Idaho 552, 555, 989 P.2d 784, 787 (Ct. App. 1999). The appellate court also gives deference to any implicit findings of the trial court supported by substantial evidence. State v. Brauch, 133 Idaho 215, 218, 984 P.2d 703, 706 (1999).

C. The Initial Encounter Was Consensual Because Officer Shackelford Did Not Exert Physical Force Or A Show Of Authority To Restrain Herrera's Liberty And Hererra Has Failed To Show The District Court Clearly Erred

The district court found the initial encounter between Officer Shackelford and Herrera was consensual until the driver of the car, Ms. Bourne, admitted to having illegal items in the car. (See R., pp. 77-79; see also 1/9/18 Tr., p. 56, L. 8 – p. 59, L. 7.) “An encounter between a law enforcement officer and a citizen does not trigger Fourth Amendment scrutiny unless it is nonconsensual.” State v. Willoughby, 147 Idaho 482, 486, 211 P.3d 91, 95 (2009) (citations omitted). To constitute a seizure, the officer must, “by means of physical force or show of authority,” in some way restrain an individual’s liberty. Id. This “requires words or actions, or both, by a law enforcement officer that would convey to a reasonable person that the officer was ordering him or her to restrict his or her movement.” Id. (citations omitted).

It is well-established Idaho law that police can approach a parked vehicle and ask the occupants questions, even if no obvious criminal activity is afoot. State v. Randle, 152 Idaho 860, 865-866, 276 P.3d 732, 737-738 (Ct. App. 2012) (citing State v.

Zubizarreta, 122 Idaho 823, 827, 839 P.2d 1237, 1241 (Ct. App. 1992); State v. McAfee, 116 Idaho 1007, 1010, 783 P.2d 874, 877 (Ct. App. 1989)).

Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

State v. Pieper, 163 Idaho 732, 418 P.3d 1241, 1243 (Ct. App. 2018), review denied June 7, 2018 (citing United States v. Mendenhall, 446 U.S. 544, 554 (1980)). “Other circumstances that may indicate a seizure include whether an officer used overhead emergency lights or took action to block a vehicle's exit route.” Id. (citing Willoughby, 147 Idaho at 487-88, 211 P.3d at 96-97; State v. Schmidt, 137 Idaho 301, 302-03, 47 P.3d 1271, 1272-73 (Ct. App. 2002); State v. Fry, 122 Idaho 100, 103, 831 P.2d 942, 945 (Ct. App. 1991)).

“[A] request for identification or mere questioning is not enough, by itself[,] to constitute a seizure.” State v. Landreth, 139 Idaho 986, 990, 88 P.3d 1226, 1230 (2004) (citations omitted). “This is so because the person approached need not answer any question put to him and may decline to listen to the questions at all and go about his business.” State v. Osborne, 121 Idaho 520, 523-524, 826 P.2d 481, 484-485 (Ct. App. 1991) (citing Florida v. Royer, 460 U.S. 491, 497-498 (1983)). “Thus, where an officer merely approaches a person who is standing on the street, or seated in a non-moving vehicle located in a public place, and poses a few questions, no seizure has occurred.” Id. (citation omitted). The relevant inquiry is whether, under the totality of the circumstances, “a reasonable person would feel free to disregard the law enforcement

officer”; if so, “then the encounter is consensual.” Willoughby, 147 Idaho at 486, 211 P.3d at 95. The burden of proving that a seizure occurred is on the defendant seeking to suppress evidence. State v. Cardenas, 143 Idaho 903, 907, 155 P.3d 704, 708 (Ct. App. 2006) (citations omitted).

On appeal, Herrera argues that the initial encounter was not consensual because she claims “[t]he district court failed to recognize the necessary legal analysis and apply it to the facts of this case.” (Appellant’s brief, p. 13.) Herrera argues that, “Officer Shackelford’s show of authority over Ms. Herrera was twofold: (1) in requiring her to identify herself, despite her objection; and (2) in telling her she could not ‘go sit over there’ until he first made sure it was lawful.” (Appellant’s brief, p. 13.) Herrera’s arguments challenge the factual findings of the district court. However, both of Herrera’s arguments are without merit as the district court’s factual findings are supported by the record. The district court properly determined the initial encounter between Officer Shackelford and Herrera was consensual.

First, Officer Shackelford did not exercise a show of authority by asking Herrera to identify herself. As cited above, a request for identification or mere questioning is not enough to constitute a seizure. See Landreth, 139 Idaho at 990, 88 P.3d at 1230. Here, the record establishes that Officer Shackelford only requested identification. First, he approached the parked vehicle and asked if they were doing ok:

Officer Shackelford: Hi. How are you guys doing?

Ms. Bourne: Good. How are you?

Officer Shackelford: Good. Are you guys doing ok?

Ms. Bourne: Yeah. We've just been going back and forth and stuff. I'm waiting for my friend to get here. Supposed to be here any time. So...

Officer Shackelford: Okay. So that's the second time I've seen you parked over there today.

Ms. Bourne: Oh. We're doing a back-and-forth...

Officer Shackelford: From the gas station to there?

Herrera: (unintelligible) WiFi...

Officer Shackelford: What's that?

Ms. Bourne and Herrera: WiFi.

Officer Shackelford: Ohhh. I gotcha.

Ms. Bourne: It's stronger here.

Herrera: It's stronger there..

(See Ex. C at 0:34 to 1:01.¹)

Shortly thereafter, Officer Shackelford asked Ms. Bourne and Herrera if they had any identification. (See Ex. C at 1:30 to 2:25.) Officer Shackelford did not demand to see any identification, he only asked. (See id.) Herrera asked why he wanted to see their identification, and Officer Shackelford said that he just wanted to make sure they were not "America's Most Wanted," which elicited laughter from the vehicle. (See id.) Herrera then spelled out her name and gave her birthdate. (See id.)

Officer Shackelford: Do you have a driver's license?

Ms. Bourne: I do.

Officer Shackelford: Do you mind if I see that?

¹ The time citations are approximate. For ease of reference, the transcription of Exhibit C was done by counsel for the Respondent.

Ms. Bourne: No.

Officer Shackelford: Do you have an I.D. on you?

Herrera: I do not.

Officer Shackelford: You don't have one? Have you ever had one?

Herrera: Yeah. Ummmm. Um. I do have one.

Officer Shackelford: Okay. Do you mind if I grab your info?

Herrera: I do. (motorcycle noise)

Officer Shackelford: What's that?

Ms. Bourne: Is there a reason why?

Officer Shackelford: Just cause I'm here talking with you guys. Just want to make sure you're not America's Most Wanted. That's all.

(laughter emanates from the vehicle)

Herrera: It's Florinda. F-L-O-R-I-N-D-A.

Officer Shackelford: F-L-O-R....

Herrera: I-N-D-A.

Officer Shackelford: First name?

Herrera: Yeah.

Officer Shackelford: That's your first name? Oh. What's your last name?

Herrera: Herrera. H-E-R-R-E-R-A.

Officer Shackelford: What's your middle?

Herrera: L.

Officer Shackelford: What is it?

Herrera: L.

Officer Shackelford: “L” for what?

Herrera: Lucia.

Officer Shackelford: L-U-C-I?

Herrera: L-U-C-I-A.

Officer Shackelford: Oh. Ok. What’s your [REDACTED]

Herrera: [REDACTED]

Officer Shackelford: [REDACTED]

(Ex. C at 1:30 to 2:25.)

Contrary to Herrera’s argument on appeal, the district court’s factual findings are supported by substantial evidence. Officer Shackelford never ordered or required Herrera to identify herself. He asked Herrera, “Do you mind if I grab your info?” (See id.) The district court correctly found that this was a “quick and pretty friendly encounter” with “no show of force” and “no demand.” (1/9/18 Tr., p. 58, L. 20 – p. 59, L. 2.) Officer Shackelford was “just asking” for identification and the encounter was “pretty low-key.” (Id.) Herrera’s argument that Officer Shackelford required or demanded that Herrera produce identification fails on the record.

Herrera’s second argument is that Officer Shackelford exercised a show of authority over Herrera when he told her “she could not ‘go sit over there’ until he first made sure it was lawful.” (See Appellant’s brief, pp. 13, 16-18.) Herrera’s argument is not supported by the record. Officer Shackelford did not exercise a show of authority, but rather indicated he did not know the answer to Ms. Bourne’s question about driving back and forth between the Jackson’s gas station and the closed businesses in an attempt to use WiFi.

At the start of the encounter Ms. Bourne and Herrera indicated they were driving back and forth from the closed businesses to the Jackson's gas station in an attempt to use WiFi. (See Ex. C at 0:34 to 1:01.) Officer Shackelford then asked if Herrera and Ms. Bourne had identification. (See Ex. C at 1:30 to 2:25.) Ms. Bourne then asked if they were allowed to "sit over there for a little while and come back here." (See Ex. C at 2:25 to 2:45.) Officer Shackelford said he did not know because he did not know if there were any signs that limited the parking lot to customers only. (Id.)

Ms. Bourne: Now are we allowed to sit over there for a little while and come back over here? Basically trying to make room for the customers here.

Officer Shackelford: I would have to look and see if there are any signs over there. I'm not... I can't give you a definite.

Ms. Bourne: Oh, right. Yes.

Officer Shackelford: Cause some places say its only for customers, usually that's what it's for.

Ms. Bourne: Oh, right. Okay.

Officer Shackelford: K.

Ms. Bourne: We need the rain.

(See Ex. C at 2:25 to 2:45.) Contrary to Herrera's argument on appeal, this is not a show of authority by Officer Shackelford. Officer Shackelford did not give any commands or control the movements of Herrera or Ms. Bourne; he simply said he did not know if there were any signs that prohibited their parking. This is the opposite of a show of authority. Herrera's argument on appeal fails and the district court did not clearly err.

Herrera's argument also fails because it was Ms. Bourne, and not Herrera, who was asking about the parking lot signs. Even if there was any command to Ms. Bourne to

stay put (which there was not) there is even less of a command to Herrera, because Officer Shackelford was talking to Ms. Bourne.

Here, the district court correctly found that the encounter between Officer Shackelford and Herrera was consensual up and until Ms. Bourne, the driver of the vehicle, admitted that there were illegal items in the vehicle. At that point Officer Shackelford had reasonable articulable suspicion to detain the occupants of the vehicle. An officer may seize an individual if the officer has reasonable, articulable suspicion that the individual has committed or is about to commit a crime. See Florida v. Royer, 460 U.S. 491, 498 (1983); Terry v. Ohio, 392 U.S. 1, 22 (1968); Fry, 122 Idaho at 103, 831 P.2d at 945. Up and until Ms. Bourne admitted to the illegal items in the vehicle the encounter between Officer Shackelford and the occupants of the vehicle was consensual. The district court applied the proper law and its factual findings are supported by competent and substantial evidence.

CONCLUSION

The state respectfully requests this Court affirm the judgment of the district court.

DATED this 21st day of February, 2019.

/s/ Ted S. Tollefson
TED S. TOLLEFSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 21st day of February, 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:

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TST/dd