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State v. Herrera Appellant's Brief Dckt. 45838

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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 45838**
Plaintiff-Respondent,	)	
	)	**ADA COUNTY NO. CR01-17-31011**
v.	)	
	)	
FLORINDA L.I.M.C. HERRERA,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

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

ERIC D. FREDERICKSEN
State Appellate Public Defender
I.S.B. #6555

SALLY J. COOLEY
Deputy State Appellate Public Defender
I.S.B. #7353
322 E. Front Street, Suite 570
Boise, Idaho 83702
Phone: (208) 334-2712
Fax: (208) 334-2985
E-mail: documents@sapd.state.id.us

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

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STATEMENT OF THE CASE

Nature of the Case

After the district court denied Florinda Herrera's motion to suppress, a jury convicted her of possession of methamphetamine and misdemeanor possession of drug paraphernalia. On appeal, Ms. Herrera asserts that the district court erred by denying her motion to suppress evidence because police unlawfully seized her absent reasonable, articulable suspicion of criminal conduct.

Statement of the Facts and Course of Proceedings

On August 5, 2017, at approximately seven o'clock in the afternoon/evening, officers made contact with a vehicle in the parking lot shared by several businesses, including a motel, a restaurant, and a Jackson's gas station. (1/9/18 Tr., p.13, Ls.4-21; p.15, L.21 – p.16, L.12; Defense Exh. C.) The officers had previously seen the white car parked in a parking stall with the same female driver and a male passenger; a little while later, the officer saw the same car, with the same driver, but a female passenger, Florinda Herrera, instead of a male passenger. (1/9/18 Tr., p.17, L.20 – p.19, L.25.) Just before the officer could make contact with the car, it backed out and then parked at the Jackson's gas station. (1/9/18 Tr., p.20, Ls.2-16; p.21, Ls.11-25.) The officer did not turn on his overhead lights or siren or signal them to stop in any way.[1] (1/9/18 Tr., p.20, L.17 – p.21, L.1.) The officer made contact with the two women inside the car, and asked them why they were in the area of the parking lot. (1/9/18 Tr., p.23, Ls.9-14; Defense Exh. C.) The women told him it was to use the free wifi signal provided by one of the

[1] At the hearing on Ms. Herrera's motion to suppress, the officer testified that he did not have a basis to conduct a traffic stop based on what he had witnessed. (1/9/18 Tr., p.23, Ls.1-4.)

businesses. (1/9/18 Tr., p.23, Ls.12-22; Defense Exh. C.) Thereafter, Officer Shackelford (Officer 1) began inquiring about the male he had seen in the car earlier that afternoon:

> Officer 1: His name's Joshua?
>
> Officer 1: Is he staying here or something?
>
> Driver: No, no we came into town to see some friends and we're going back to Caldwell, well, actually Nampa to take everyone back.
>
> Officer 1 to Driver: Do you have a driver's license? Do you mind if I see that?
>
> Officer 1 to Passenger: Do you have an ID? On you?
>
> Passenger: I do not.
>
> Officer 1 to Passenger: You don't have one. Have you ever had one?
>
> Passenger: Yeah. Um. I do have one.
>
> [Officer 2 walks up to passenger side. Driver hands Officer 1 her driver's license]
>
> Officer 1 to Passenger: Do you mind if I grab your info?
>
> Passenger: I do.
>
> Officer 1: What's that?
>
> Passenger: Is there a reason why?
>
> Officer 1: Just 'cuz I'm here, talking with you guys, make sure you're not America's Most Wanted.
>
> [Passenger gives him her full name, Florinda Lucia Herrera, and date of birth, he writes it down and calls both the driver's license and passenger's name in to dispatch while he stands in front of the car, on the driver's side.]
>
> [Conversation between Officer 1 and Driver continues.]
>
> Driver to Officer 1: Now are we allowed to sit over there for a little while and then come back over here? Basically trying to make room for the customers.
>
> Officer 1: I would have to look to see if there's any signs over there, I can't give you a definite cuz some places say its only for customers, usually that's what it's for, K?

> [Conversation between Officer 1 and Driver continues re: Joshua and the mall.]
>
> Officer 1 [still holding Driver's driver's license]: Hey Christy, just out of curiosity, is there anything illegal in the vehicle? If so, I can work with you on it, okay, but I want you to be honest with me up front.
>
> Driver: Yes. It's just syringes.

(Defense Exh. C, 1:17-3:55.)[2] Upon learning the information about syringes, the officers removed both the driver and passenger from the car, and proceeded to investigate for the presence of drugs in the car. (1/9/18 Tr., p.28, Ls.6-18; p.29, Ls.1-4.) Ms. Herrera told the officer that her identification was in a Walmart bag in the backseat of the car. (1/9/18 Tr., p.30, L.14 – p.31, L.18.) Inside the cheetah print bag was a syringe at the top of the bag. (1/9/18 Tr., p.31, Ls.16-25.) The syringe was believed to be drug paraphernalia; it contained a clear substance which tested presumptively positive for methamphetamine. (1/9/18 Tr., p.32, Ls.1-3.) Ms. Herrera's identification card was also in the cheetah bag, as was the Walmart bag she described. (Trial Tr., p.137, Ls.16-24.) Ms. Herrera was handcuffed and arrested for possession of methamphetamine and drug paraphernalia. (1/9/18 Tr., p.32, Ls.6-13.)

Based on these facts, the State filed an Information which alleged that Ms. Herrera committed one count of possession of methamphetamine and one count of misdemeanor possession of drug paraphernalia. (R., pp.44-45.) Thereafter, Ms. Herrera filed a Motion to Suppress and a Memorandum in Support of Defendant's Motion to Suppress. (R., pp.58-64.) She asserted that "any consensual element of the contact ended when Officer Shackelford demanded identification of the driver and identifying information from Ms. Herrera." (R., p.62.) She asserted that the evidence gathered against her should be suppressed because she was illegally detained. (R., pp.62-63.)

A hearing was held on Ms. Herrera's motion. (*See* 1/9/18 Tr.) Officer Shackelford's body camera was admitted during the hearing as Defense Exhibit C. (1/9/18 Tr., p.32, L.21 – p.34, L.3.) In addition to the bodycam video, the district court heard testimony from Officer Shackelford. (1/9/18 Tr., p.11, L.1 – p.41, L.16.) At the conclusion of the hearing, the district court denied Ms. Herrera's motion to suppress finding that the initial contact was a consensual encounter, and discovery of the syringes constituted reasonable, articulable suspicion such that the officers began a drug investigation. (1/9/18 Tr., p.55, L.5 - p.59, L.10; R., pp.77-79.)

The district court concluded:

> There is not an unconstitutional seizure of a person because a police officer approaches someone on a street or in another public place and asks him questions. And that is a very well established law, both under United States Supreme Court decisions and Idaho Supreme Court, Court of Appeals decisions.
>
> In this case, still light out because it's August 5, 6:50 p.m., there is no problem with the officer following the car and seeing where it's parked. It's parked in front of the Jacksons. And this entire encounter is quite short. I find that significant and the driver, Ms. Bourne, and the passenger are stopped in front of the Jacksons.
>
> You can see from the camera on the video, really, the car is not blocked by either police vehicle. And at no point does the officer use his sirens or lights. He just comes up to the car and he walks up to the driver. It's a public place. Anybody can walk up to a driver in a public place like that including a law enforcement officer without implicating any constitutional right.
>
> And he just simply walks up, asks if they were okay or if they need anything, and why they are in the area. And there's a very brief discussion about the occupants in the car looking for WiFi. And then the officer simply asked the -- officer asked the driver -- if she -- if they would mind if I have your information. And, well, actually, asked the passenger. Asked the driver for identification. Asked if they would mind if they provided their identification. Asked the passenger what her name is, and she gives it and spells it.
>
> It's really a pretty low-key encounter all the way. And it's also very short encounter. It seems to me that the other officer was visible on the video camera about a minute after we get started, pretty early. And I did notice at one point he

[2] The pertinent portions of the video were transcribed and described by Ms. Herrera's appellate counsel and are accurate to the best of counsel's ability.

> put his hand on the car, but most of the time he is backed away from the car, but he's close. He's close enough to see things.
>
> Neither officer has on – they are not drawing their weapons. They are just standing there. Their vehicles don't have any lights going. There is no indication of any actual detention of the vehicle. The vehicle is just there. The officer walks up and talks to the occupants.
>
> And very early on in this encounter, the driver says there are syringes in the back of the car. And the question that she is answering is, "Is there anything illegal in the car?" And she says, "Yes." And so from that point on, it's certainly fair for the officer to continue to inquire.
>
> And when she says, "There's syringes in the back" which she makes a reference to her daughter having diabetes she has already said, "Yes, there's syringes" in response to the question, "Is there anything illegal in the car?"
>
> And so I think this is an acceptable encounter. It doesn't amount to a stop and detention. It's very brief.
>
> When the officer knows that there are syringes in the car in the back, there's certainly nothing improper about asking the passenger to step out. And then -- I see no basis for a motion to suppress in this case. I can write-up the Court's factual findings, but it's very clear from the video that the car is not blocked. It's a brief encounter. It's the kind of encounter that is okay where an officer just goes up and talks to people. They provide the information. It's all done.
>
> 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.55, L.18 – p.59, L.2.) The court denied the motion to suppress. (1/9/18 Tr., p.59, Ls.4-7; R., pp.77-79.)

A one-day jury trial was held. (*See* Trial Tr.) The jury convicted her of felony possession of a controlled substance and misdemeanor possession of drug paraphernalia. (Trial Tr., p.235, Ls.1-12; R., pp.117-118.) The district court sentenced Ms. Herrera to four years, with two years fixed and placed her on probation for two years. (2/9/18 Tr., p.14, L.13 – p.15, L.8;

R., pp.125-130.) Ms. Herrera filed a Notice of Appeal timely from the district court's Judgment, Suspended Sentence and Order of Probation. (R., pp.138-141.)

ISSUE

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

ARGUMENT

The District Court Erred When It Denied Ms. Herrera's Motion To Suppress

A. Introduction

Ms. Herrera was seized absent reasonable, articulable suspicion of criminal wrongdoing. The facts known to the officer were insufficient to establish a reasonable suspicion of criminal activity by Ms. Herrera, and the encounter stopped being consensual when Officer Shackelford obtained the driver's license and then demanded Ms. Herrera's identification over her objection—a request with which she eventually complied. Ms. Herrera's unlawful seizure continued when the officer denied the driver's request asking if they could get out of the vehicle, and Ms. Herrera acquiesced and remained in the car. Because the officer did not have reasonable and articulable suspicion of criminal wrongdoing when he seized Ms. Herrera, the district court erred by denying Ms. Herrera's motion to suppress the evidence obtained.

B. Standard Of Review

"The standard of review of a suppression motion is bifurcated." *State v. Holland*, 135 Idaho 159, 161 (2000). When a decision on a motion to suppress is challenged, the appellate court should "accept the trial court's findings of fact which were supported by substantial evidence, but freely review the application of constitutional principles to the facts as found." *Id.*

C. The District Court Erred When It Denied Ms. Herrera's Motion To Suppress Where Officer Shackelford Unlawfully Seized Ms. Herrera Absent Reasonable, Articulable Suspicion Of Criminal Wrongdoing

Ms. Herrera, as a passenger in the car, initially objected to the officer's request that she identify herself. After obtaining the driver's license, Officer Shackelford insisted that Ms. Herrera give him her name because he was a police officer and he wanted to check for

warrants. (Defense Exh. C, 1:32-1:55.) Ms. Herrera complied with the officer's directive and provided him her name and date of birth. (Defense Exh. C, 1:55-2:24.) The officer's show of authority, combined with Ms. Herrera's acquiescence, constituted a seizure. The seizure violated Ms. Herrera's Fourth Amendment rights as it was not supported by reasonable articulable suspicion of criminal wrongdoing.

Ms. Herrera's seizure continued when, after the driver inquired as to whether "they could be over there and sit over here," Officer Shackelford indicated that he did not know but would have to check before he could agree to let them do it. (Defense Exh. C, 2:27-2:42.) The officer did not permit the women to leave the car, and his response constituted a show of authority such that, when combined with Ms. Herrera's passive submission in remaining where she was, constituted a seizure absent reasonable, articulable suspicion of criminal wrongdoing.

"The Fourth Amendment of the United States Constitution protects citizens from unreasonable search and seizure." *State v. Hansen*, 138 Idaho 791, 796 (2003). "Article I, Section 17 of the Idaho Constitution nearly identically guarantees that '[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated.'" *State v. Green*, 158 Idaho 884, 886 (2015) (alteration in original). A warrantless search is presumptively unreasonable, unless it falls within "one of several narrowly drawn exceptions." *State v. Anderson*, 154 Idaho 703, 706 (2012). The State bears the burden of demonstrating a warrantless search or seizure falls into an exception to the warrant requirement. *State v. Worthington*, 138 Idaho 470, 472 (Ct. App. 2002).

This prohibition against unreasonable searches and seizures applies to investigatory detentions of a person falling short of arrest, as well as formal arrests. *State v. Gutierrez*, 137 Idaho 647, 65 (2002); *State v. Knapp*, 120 Idaho 343, 346 (Ct. App. 1991). Although an arrest of

an individual must be based on probable cause, police may seize a person through an investigatory stop without probable cause, provided there is a reasonable articulable suspicion of criminal activity. *Terry v. Ohio*, 392 U.S. 1, 30 (1968); *Knapp*, 120 Idaho at 346-47; *State v. Cook*, 106 Idaho 209, 220 (1984). An investigative detention is permissible if it is based upon specific articulable facts which justify suspicion that the detained person is, has been, or is about to be engaged in criminal activity. *State v. Sheldon*, 139 Idaho 980, 983 (Ct. App. 2003). The purpose of a traffic stop is not permanently fixed at the moment the stop is initiated, however, for during the course of the detention there may evolve suspicion of criminality different from that which initially prompted the stop. *State v. Parkinson*, 135 Idaho 357, 362 (Ct. App. 2000).

"Reasonable suspicion must be based on specific, articulable facts and the rational inferences that can be drawn from those facts." *State v. Morgan*, 154 Idaho 109, 112 (2013) (quoting *State v. Bishop*, 146 Idaho 804, 811 (2009)). The State bears the burden of proving that an investigatory stop or detention is based on reasonable suspicion and is limited in its scope and duration to the issue being investigated. *Florida v. Royer*, 460 U.S. 491, 500 (1983). "In order to satisfy constitutional standards, an investigative stop must be justified by a reasonable suspicion on the part of the police, based upon specific articulable facts, that the person to be seized has committed or is about to commit a crime." *State v. Sevy*, 129 Idaho 613, 615 (Ct. App. 1997).

In *Royer*, (plurality opinion), the United States Supreme Court held:

> [L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. *The person approached*, however, need not answer any question put to him; indeed, he *may decline to listen to the*

> *questions at all and may go on his way*. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.

Florida v. Royer, 460 U.S., at 497-98 (citations omitted) (emphasis added).

A seizure occurs when officers detain someone through physical force or show of authority. *State v. Page*, 140 Idaho 841, 843 (2004). "A seizure initiated through a show of authority 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." *State v. Willoughby*, 147 Idaho 482, 486 (2009) (citing *California v. Hodari D.*, 499 U.S. 621 (1991)). A seizure occurs "when an officer, by means of physical force or show of authority, restrains the liberty of a citizen." *State v. Liechty*, 152 Idaho 163, 167 (Ct. App. 2011).

> Examples of circumstances that might indicate 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.

Id. at 168 (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). So long as law enforcement "does not convey a message that compliance with their requests is required, the encounter is deemed consensual and no reasonable suspicion is required." *State v. Randle*, 152 Idaho 860, 862 (Ct. App. 2012). "The critical question is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he or she was not at liberty to ignore the police presence and go about his or her business." *State v. Robertson*, 134 Idaho 180, 184 (Ct. App. 2000). However, an individual is not seized unless the individual actually submits to the officer's show of authority. *Hodari D.*, 499 U.S. at 626-29; *Willoughby*, 147 Idaho at 486. Therefore, in determining whether an individual was seized for purposes of the Fourth Amendment, the reviewing court

examines: (1) whether the officer's show of authority was such that a reasonable person would not feel free to leave; and (2) whether the individual submitted to that show of authority. *See Willoughby*, 147 Idaho at 486.

Idaho appellate courts have concluded that an individual in a parked car can be seized either by physical force or a show of authority to which the individual submits. For example, the Court of Appeals held a seizure occurred when an officer knocked on the driver's side window of the defendant's vehicle and, after the defendant rolled his window down, asked what he was doing and for his driver's license. *State v. Fry*, 122 Idaho 100, 103 (Ct. App. 1991). The Court of Appeals found it significant that another officer was directly behind the defendant's vehicle, so the defendant could not drive away without running over the officer. *Id.* Along the same lines, in *State v. Cardenas*, 143 Idaho 903 (Ct. App. 2006), the Court of Appeals held the defendant was seized when an officer commanded the defendant that "he needed to come speak to me." 143 Idaho at 905, 908. In *Cardenas*, two officers went to a house looking for a juvenile runaway. *Id.* at 905. The officers saw the defendant sitting in a parked car in the driveway. *Id.* As an officer approached, the defendant exited the car and walked towards the house. *Id.* The Court of Appeals determined the officer's "inherently coercive" language to speak with him rendered the contact non-consensual and thus a seizure. *Id.* at 908.

In *Willoughby*, the Idaho Supreme Court held that the defendant's actions of remaining at the scene and stepping from the car as the officer approached constituted submission to the officers' show of authority. 147 Idaho at 488. In reaching this holding, the *Willoughby* Court analyzed the holdings of state courts in other jurisdictions to determine whether passive acquiescence to an ambiguous show of authority constitutes submission such that a seizure

occurred. 147 Idaho at 488-89. The Court concluded that inaction is a form of compliance and a submission to authority. *Id.*, 147 Idaho at 489.

In this case, Ms. Herrera voiced her objection to identifying herself to the officer. (Defense Exh. C, 1:32-1:47.) The officer persisted, telling her he needed her to identify herself, "Just 'cuz I'm here, talking with you guys, make sure you're not America's Most Wanted." (Defense Exh. C, 1:49-1:54.) Ms. Herrera was seized when she complied with the officer's request. Ms. Herrera's unlawful seizure continued when: (1) in response to the driver's question about sitting over there and then coming over here, Officer Shackelford said he would have to check before he could okay that, and (2) when Ms. Herrera acquiesced to his authority by staying in the car. (Defense Exh. C, 2:27-2:44.)

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. Because Ms. Herrera acquiesced in each instance, she was "seized" within the meaning of the Fourth Amendment and her seizure was not justified by reasonable and articulable suspicion of criminal wrongdoing.

The district court's finding that the entirety of the encounter was consensual—the driver and passenger were never seized during the encounter until the discussion of the syringes began—was erroneous. The court failed to recognize that an officer's show of authority, combined Ms. Herrera's submission to the authority, could constitute a seizure. *See Willoughby*, 147 Idaho at 488-89. The district court failed to recognize the necessary legal analysis and apply it to the facts of this case.

Ms. Herrera was seized when the officer insisted on obtaining her identification, and her seizure continued when he indicated that they were not free to go. The district court erred.

1. Ms. Herrera Was Unlawfully Seized When The Officer Persisted In Obtaining Her Identity, Despite Her Voicing An Objection, Using His Authority As An Officer To Require Her To Submit To A Warrants Check

Ms. Herrera submitted to the officer's show of authority by giving him her name, despite saying she *did* mind giving it to him. She succumbed to authority after he insisted that he needed to see it "Just 'cuz I'm here, talking with you guys, make sure you're not America's Most Wanted." (Defense Exh. C, 1:49-1:54.)

Officer Shackelford testified as to what he asked the women, and his body camera video was admitted by stipulation as Defense Exhibit C. (*See* 1/9/18 Tr. p.32, L.21 – p.34, L.3; Defense Exh. C.) After viewing the video, the district court found:

> It's a brief encounter. It's the kind of encounter that is okay where an officer just goes up and talks to people. They provide the information. It's all done.
>
> 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.15 – p.59, L.2.) The district court's finding that Officer Shackelford's actions did not constitute a "show of force" was clearly erroneous. Factual findings must be supported by substantial and competent evidence. *State v. Henage*, 143 Idaho 655, 659 (2007). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *State v. Green*, 149 Idaho 706, 708 (Ct. App. 2010) (quoting *State v. Byington*, 132 Idaho 589, 593 (1999)).

The district court erred in its analysis. The relevant consideration is whether the officer engaged in either a show of physical force is submission to the assertion of authority to determine whether the encounter became a seizure. "The word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even

when it is ultimately unsuccessful. . . . An arrest requires *either* physical force [ ] *or*, where that is absent, *submission* to the assertion of authority." *California v. Hodari D.*, 499 U.S. 621, 626 (1991) (holding a seizure does not occur unless the subject yields to a show of authority) (emphasis in original); *Terry v. Ohio*, 392 U.S. 1, 20 n. 16 (1968) (noting "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred.").

Despite Ms. Herrera's objection wherein she told the officer that she *did* mind identifying herself, Officer Shackelford obtained the driver's license and then persisted in obtaining Ms. Herrera's identity, telling her that she had to identify herself because: (1) he (a police officer) was talking to them, and (2) he had to check to make sure she wasn't "America's Most Wanted." (State's Ex. C, 1:32-1:54.) Officer Shackelford's insistence constituted a show of authority—Ms. Herrera was obviously not free to decline the request, and this was no longer a consensual encounter. "[I]f the persons refuses to answer and the police take additional steps—such as those taken in *Brown*—to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure." *I.N.S. v. Delgado*, 466 U.S. 210, 216-17 (1984) (citing *United States v. Mendenhall*, 446 U.S. at 554; *Terry v. Ohio*, 392 U.S. at 21).

In *Brown v. Texas*, 443 U.S. 47 (1979), the defendant refused the officers' request to identify himself so the officers then physically detained him in order to determine his identity. The United States Supreme Court held that absent some reasonable suspicion of criminal conduct, the detention of the defendant to determine his identity violated the defendant's Fourth Amendment right to be free from unreasonable seizures. *Id.*, at 52.

In light of this uncontroverted evidence of the body cam video, the district court's conclusion that the entire encounter was consensual because the officers were polite was erroneous. The facts of Ms. Herrera's case are similar to those in *Brown v. Texas*, the only difference is where the officers used physical force on Mr. Brown, here, the officer asserted his authority as a law enforcement officer to which Ms. Herrera acquiesced. "An arrest requires . . . *submission* to the assertion of authority." *Hodari D.*, 499 U.S. at 626.

2. Ms. Herrera Continued To Be Unlawfully Seized Absent Reasonable And Articulable Suspicion Of Criminal Wrongdoing When She Submitted To The Officer's Show Of Authority After Permission Was Requested To Go Somewhere Else

After Ms. Herrera submitted to the show of authority by identifying herself to the officer, her unlawful seizure continued when Officer Shackelford denied the request to get out of the car when he was waiting for the dispatch results. Where Officer Shackelford said he did not know if it was okay for them to do what they were asking, and that he would have to check for signs placed by the property owner, he demonstrated his authority over Ms. Herrera's movement. Under that show of authority, coupled with Ms. Herrera's acquiescence to this authority by remaining in the car, Ms. Herrera continued to be seized.

In ruling on Ms. Herrera's motion to suppress, the district court did not address whether the driver's request to sit outside the car, which was denied, changed the nature of the encounter from consensual, to a detention. (*See* 1/9/18 Tr.; R., pp.77-79.) The district court did not make any factual findings or conclusions of law regarding the driver's question to the officer, or regarding his response. The driver asked Officer Shackelford, "Now are we allowed to sit over there for a little while and then come back over here?" (Defense Exh. C, 2:27-2:31.) Officer Shackelford said, "I would have to look to see if there's any signs over there, I can't give you a

definite cuz some places say its only for customers, usually that's what it's for, K?" (Defense Exh. C, 2:32-2:44.) Thereafter, Ms. Herrera stayed in the car until she were told by the officers to exit it. (Defense Exh. C.)

At the hearing on Ms. Herrera's motion to suppress, defense counsel asked Officer Shackelford:

> DEFENSE COUNSEL: We see on the video recording Ms. Bourne asks when you are running the ID if they are allowed to get out of the vehicle. And you comment to her at that point that you have to look to see if there are any signs over there.
>
> You never actually went over there to look and see if there were any signs that prohibit them from sitting; correct?
>
> . . .
>
> But during the interaction you have with Ms. Bourne and Ms. Herrera.
>
> OFFICER SHACKELFORD: Uh-huh.
>
> DEFENSE COUNSEL: You are talking with them. A couple of minutes elapse, and there is a time period where Ms. Bourne asked to step out of the vehicle and go sit on the sidewalk.
>
> . . .
>
> You indicated you would have to look at signs on the building to see if them being on the sidewalk would be allowed. Did you ever leave the vehicle and walk over to the building to see if there were any sign prohibiting them from sitting there while you are waiting for their ID to run?

(1/9/18 Tr., p.38, L.2 – p.39, L.7.) Officer Shackelford testified that he did not recall the interaction or whether he left his vehicle to check for the signs. (1/9/18 Tr., p.38, L.17 - p.39, L.8.)

As discussed in Section 2, incorporated herein by reference, an officer's show of authority, followed by the individual's submission to the authority, constitutes a seizure. Officer Shackelford demonstrated his authority over Ms. Herrera's movement when he said he did not

know if it was okay for them to do what they were asking, and that he would have to check for signs placed by the property owner. Ms. Herrera's passive act of remaining in the vehicle was the same type of passive acquiescence recognized by the *Willoughby* Court.

However, none of the circumstances known to Officer Shackelford at the time of the seizure(s) establish a reasonable suspicion of criminal wrongdoing. The fruits of the search of Ms. Herrera that followed that illegal seizure must therefore be suppressed as "fruit of the poisonous tree." *See Wong Sun v. United States*, 371 U.S. 471, 478-488 (1963); *State v. Schrecengost*, 134 Idaho 547, 549 (Ct. App. 2000).

CONCLUSION

Ms. Herrera respectfully requests that this Court vacate the district court's judgment and order of probation and reverse the order which denied her motion to suppress.

DATED this 30th day of November, 2018.

/s/ Sally J. Cooley
SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of November, 2018, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
E-Service: ecf@ag.idaho.gov

/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

SJC/eas