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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 46158-2018
Plaintiff-Respondent,)	
)	TWIN FALLS COUNTY NO. CR42-17-13157
v.)	
)	
BERNADINO JOSE AVORAN)	APPELLANT'S BRIEF
DURAN,)	
)	
Defendant-Appellant.)	
_____)	

BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF TWIN FALLS**

HONORABLE THOMAS J. RYAN
District Judge

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STATEMENT OF THE CASE

Nature of the Case

In this appeal, Bernadino Jose Avoran Duran asserts the district court erred when it denied his motion to suppress. The arresting officer did not have reasonable suspicion to justify the detention of Mr. Duran.

Statement of the Facts and Course of Proceedings

At the motion to suppress hearing, Officer Matthew Guzman of the Twin Falls Police Department testified he had been patrolling high crime or high drug areas in the early morning hours of December 26, 2017. (*See* Tr. Mar. 12, 2018 (*hereinafter*, Tr.), p.11, L.19 – p.13, L.8.) Based on the officer’s testimony, the district court found he had been a police officer for about three years, had gone through the POST Academy, and had taken courses on identifying when somebody is under the influence of drugs and on DUI. (*See* Tr., p.37, Ls.11-18.)

Officer Guzman testified it was a snowy evening, and around 1:09 am, he saw a male on a sidewalk look in the direction of a marked police car before walking a bike across the roadway. (*See* Tr., p.13, Ls.13-23, p.15, Ls.20-22.) He testified that a nearby apartment complex was known to be a high drug traffic area, and search warrants had been issued in reference to people selling drugs from there. (*See* Tr., p.13, Ls.6-13, p.16, L.17 – p.18, L.2.) The district court found the officer “had specific, articulable facts to know that this was both a high crime and a high drug area,” and he “knew that in the apartment complex where the defendant appeared to be coming away from there had been search warrants issued for apartments in that complex.” (Tr., p.37, Ls.19-24.)

The officer testified on cross-examination that he approached the male, Mr. Duran, without activating the overhead lights on his patrol car, but with the car’s rear emergency lights

activated. (*See Tr.*, p.19, Ls.2-14.) During his conversation with Mr. Duran, he asked for and received Mr. Duran's identification, and he held onto it throughout the incident. (*See Tr.*, p.19, Ls.15-22.) Officer Guzman ran Mr. Duran's information through dispatch, and while he was waiting for a warrants check, Officer Justin Clark arrived at the scene. (*See Tr.*, p.19, L.23 – p.20, L.4.)

On direct examination, the State played a video recording of Officer Guzman's body camera footage from the incident. (State's Ex. 1; *see Tr.*, p.15, L.25 – p.16, L.15.) Officer Guzman testified: "When I first approached Mr. Duran and began talking to him, with his nervous behavior and his hands, he had – he was unable to control his hands. As you see in the video he keeps moving them around in a fidgety manner. People that exhibit signs of methamphetamine use usually have the inability to control small hand movements or anything to that effect." (*Tr.*, p.17, Ls.8-14.) The district court found that the video showed that Mr. Duran was exhibiting behavior which, in the officer's opinion, might indicate that Mr. Duran was under the influence of drugs. (*See Tr.*, p.38, Ls.20-25.)

The officer then explained why he asked to search Mr. Duran's person: "Based on his fidgety movements I believed he could become unpredictable, as far as if he had any weapons." (*Tr.*, p.17, Ls.18-20.) When Officer Guzman asked Mr. Duran if he had any weapons, he put his hands in his pockets and stated he had a knife. (*See Tr.*, p.17, Ls.20-21.) The officer testified he "searched him for weapons, and then based on his behavior I asked him if I could search his pockets." (*Tr.*, p.17, Ls.21-23.) Mr. Duran consented to those searches. (*See R.*, pp.12-13.) On redirect examination, Officer Guzman testified Mr. Duran was not free to leave "[a]t the moment when I located the methamphetamine out of his pocket – or should I say the meth pipes."

(Tr., p.22, Ls.14-16.) Along with the methamphetamine pipes with residue inside, the officer also found marijuana in Mr. Duran's wallet, after Mr. Duran told him about it. (*See R.*, p.13.)

The State charged Mr. Duran by Information with one count of possession of a controlled substance, felony, I.C. § 37-2732(c)(1), for methamphetamine and/or amphetamine, and one count of possession of a controlled substance, misdemeanor, I.C. § 37-2732(c), for marijuana. (*R.*, pp.21-23.) He entered a not guilty plea. (*R.*, p.26.)

Mr. Duran subsequently filed a Motion to Suppress and Memorandum in Support Thereof. (*R.*, pp.32-39.) He requested the district court issue "an order to suppress all evidence seized as the result of an illegal seizure and search in the instant case," in reliance "on the 4th, 5th, 6th and 14th Amendments to the U.S. Constitution and Article 1 Sections 13 and 17 of the Idaho Constitution and Idaho Criminal Rule 12(b)." (*R.*, p.32.) He framed the issue as: "Were officers justified in detaining Mr. Duran by retaining his identification and activating overhead patrol car lights where Mr. Duran was pushing his bicycle at 1:09 am in a reportedly high crime area and appeared anxious and restless while talking to police?"¹ (*R.*, p.34.)

Mr. Duran asserted his "'inability to relax' and his appearance of being 'overly anxious' and 'fidgety' all have innocent explanations." (*R.*, p.37.) "His excess movement could be explained by nervousness or by trying to move around to keep warm." (*R.*, p.37.) Further, "Mr. Duran also explained to the officer that he was anxious to get home because his legs were swelling from gout." (*R.*, p.37.) He asserted, "Similarly, the fact that Mr. Duran was in an allegedly 'high crime area where drug activity was prevalent' has little value in establishing reasonable suspicion as there are undoubtedly many innocent people living around Dierkes Street and 3rd Avenue West." (*R.*, p.37.)

¹ Mr. Duran did not assert that he was detained at the start of the incident.

Mr. Duran then asserted, “A detention occurs when an officer retains a driver’s license or other paperwork of value.” (R., p.37 (citing *State v. Page*, 140 Idaho 841, 844 (2004); *State v. Godwin*, 121 Idaho 491, 492 (1992); *State v. Martinez*, 136 Idaho 436, 439 (Ct. App. 2001)).) Additionally, Mr. Duran asserted that Officer Clark had activated his overhead lights when he arrived. (See R., p.34.) While Mr. Duran was not a motorist, “the overhead lights would likely signal he was not free to leave at the time he granted permission to search,” and “his identification was taken well before the time the officer received permission to search Mr. Duran.” (R., p.37.) Thus, Mr. Duran asserted his detention “was not based on reasonable suspicion but rather on a mere hunch. Because the evidence was obtained as a result of this unconstitutional seizure, the evidence should be suppressed as ‘fruit of the poisonous tree.’” (R., p.38 (quoting *Wong Sun v. United States*, 371 U.S. 471, 488 (1963)).)

At the hearing on the motion to suppress, the parties acknowledged the search at issue here was warrantless. (See Tr., p.6, Ls.15-19.) Alongside the testimony of Officer Guzman and his body camera footage, the district court considered the testimony of Officer Clark and a video recording of that officer’s body camera footage. (See Tr., p.23, L.10 – p.28, L.3; Def. Ex. A.) Officer Clark testified he had also only activated his rear emergency lights during the incident. (See Tr., p.24, L.18 – p.27, L.20.)

The State then argued, “If there is a detention the state thinks that we met our burden of proving that it’s reasonable and justified under the legal standards applicable to this case and we would ask that this motion be denied.” (Tr., p.32, Ls.19-22.) The State contended the officers could have been investigating whether Mr. Duran was in violation of the statute requiring use of a bicycle headlight after dark, or whether he was under the influence of controlled substances in public. (See Tr., p.31, L.14 – p.32, L.16.)

Mr. Duran asserted, “the bicycle light issue was never addressed by the officer.” (Tr., p.35, Ls.21-22.) He also asserted that “under the case law this nervous type of behavior and moving around is just simply not a basis for stopping people, otherwise people who have nervous ticks or anxiety or excessively nervous would be always subject to police detention.” (Tr., p.36, Ls.21-25.)

As indicated above, in its findings of fact, the district court highlighted Officer Guzman’s training, the officer’s knowledge that the incident was in a high crime and high drug area, the officer’s knowledge of search warrants issued for the nearby apartment complex, and the timing of the incident after 1:00 am. (*See* Tr., p.37, L.7 – p.38, L.1.) The district court found, “The officer was suspicious that the suspect, or the defendant now, was under the influence of drugs or perhaps was possessing drugs, both of which would constitute a crime.” (Tr., p.38, Ls.2-5.) However, “The officer was not suspicious that the defendant, Mr. Duran, was violating a law that requires him to have a light on his bicycle.” (Tr., p.38, Ls.6-8.)

Under the totality of the circumstances, the district court found that “the detention was an investigatory detention that was based upon specific articulable facts and rational inferences drawn from those facts.” (Tr., p.38, Ls.11-14.) The district court referenced *State v. Fairchild*, 429 P.3d 877 (Ct. App. 2018), where the Idaho Court of Appeals had reiterated “the existing law that a determination that reasonable suspicion exists need not rule out the possibility of innocent conduct.” (*See* Tr., p.38, Ls.15-19.) As indicated above, the district court then determined: “The conduct that the court observed on Exhibit No. 1, the first tape that was played, showed that Mr. Duran was exhibiting behavior which in the officer’s opinion at that time and that place and based on his training and experience and other knowledge might indicate that the defendant was under the influence of drugs.” (Tr., p.38, Ls.20-25.)

The district court continued: “So the initial investigatory stop, which I believe did ripen into a detention, but, again, the detention was not based on a mere hunch.” (Tr., p.38, L.25 – p.39, L.4.) According to the district court, “From my observation of Mr. Duran’s behavior on the video it’s true that the behavior that he was exhibiting could have been innocent, but on the other hand, it might not have been innocent.” (Tr., p.39, Ls.5-8.) The district court stated, “As I saw Mr. Duran’s behavior, he was doing things like pulling off his gloves and blowing on his hands to warm them up, but he was also engaging in hand movements which the officer said that he knew from his training and experience might be an indication that he was under the influence of drugs.” (Tr., p.39, Ls.9-14.) Thus, the district court found “that the motion to suppress is denied and for the reasons that I’ve stated.” (Tr., p.39, Ls.15-16.)

Pursuant to a conditional plea agreement that reserved his right to appeal the district court’s denial of his motion to suppress, Mr. Duran agreed to plead guilty to both counts. (*See* R., pp.43-53, 56-58.) The district court accepted Mr. Duran’s guilty plea. (R., p.43.) The district court subsequently imposed, for the possession of methamphetamine count, a unified sentence of five years, with two years fixed, and retained jurisdiction.² (R., pp.62-65.)

Mr. Duran filed a Notice of Appeal timely from the district court’s Judgment of Conviction, Order Retaining Jurisdiction. (R., pp.72-75; *see* R., pp.79-83 (Amended Notice of Appeal).)

² For the possession of marijuana count, the district court imposed a sentence of seventy-seven days in jail. (R., p.62.)

ISSUE

Did the district court err when it denied Mr. Duran's motion to suppress?

ARGUMENT

The District Court Erred When It Denied Mr. Duran's Motion To Suppress

A. Introduction

Mr. Duran asserts the district court erred when it denied his motion to suppress, because his detention was unlawful. A limited detention occurred when Officer Guzman took and retained Mr. Duran's identification. Under the totality of the circumstances here, the officer did not have reasonable suspicion to justify that detention. Thus, the detention and following warrantless search were unlawful, and the evidence obtained thereby should have been suppressed.

B. Standard Of Review And Applicable Law

The standard of review for a motion to suppress is bifurcated. An appellate court defers to the trial court's findings of fact unless the findings are clearly erroneous, and freely reviews the trial court's application of constitutional principles to the facts as found. *State v. Hankey*, 134 Idaho 844, 846 (2000).

The Fourth Amendment to the United States Constitution and Article I, Section 17 of the Idaho Constitution preserve the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. U.S. Const. amend. IV; Idaho Const. art. I, § 17. Their purpose "is to protect Idaho citizens' reasonable expectation of privacy against arbitrary governmental intrusion." *State v. Christensen*, 131 Idaho 143, 146 (1998). Evidence obtained in violation of these constitutional protections generally may not be used as evidence against the victim of the illegal government action. *See State v. Bishop*, 146 Idaho 804, 810-11 (2009) (discussing the Fourth Amendment). This exclusionary rule "applies to evidence

obtained directly from the illegal government action and to evidence discovered through the exploitation of the original illegality, or the fruit of the poisonous tree.” *Id.* at 811.

Warrantless searches or seizures are presumptively unreasonable under both the federal and Idaho constitutions unless they come within one of the established exceptions to the warrant requirement. *California v. Acevedo*, 500 U.S. 565, 580 (1991); *State v. Henderson*, 114 Idaho 293, 295 (1988). “When a warrantless search or seizure is challenged by the defendant, the State bears the burden to show that a recognized exception to the warrant requirement is applicable.” *Halen v. State*, 136 Idaho 829, 833 (2002).

One such exception is for “brief investigatory detentions.” *See Bishop*, 146 Idaho at 811 (citing *Terry v. Ohio*, 392 U.S. 1, 19 (1968)). “To determine whether such seizures are reasonable, courts first ask ‘whether the officer’s action was justified at its inception.’” *Id.* (quoting *Terry*, 392 U.S. at 19-20.). “Next, they consider whether the action was ‘reasonably related in scope to the circumstances which justified the interference in the first place.’” *Id.* (quoting *Terry*, 392 U.S. at 19-20.)

“Typically, seizures must be based on probable cause to be reasonable.” *Id.* (citing *Florida v. Royer*, 460 U.S. 491, 499-500 (1983)). “However, limited investigatory detentions, based on less than probable cause, are permissible when justified by an officer’s reasonable articulable suspicion that a person has committed, or is about to commit, a crime.” *Id.* (citing *Royer*, 460 U.S. at 498). “Reasonable suspicion must be based on specific, articulable facts and the rational inferences that can be drawn from those facts.” *Id.* “The quantity and quality of information necessary to establish reasonable suspicion is less than that necessary to establish probable cause.” *Id.* “Still, reasonable suspicion requires more than a mere hunch or ‘inchoate and unparticularized suspicion.’” *Id.* (quoting *Alabama v. White*, 496 U.S. 325, 330 (1990)).

Whether an officer possessed reasonable suspicion is evaluated “upon the totality of the circumstances then known to the officer.” *State v. Sheldon*, 139 Idaho 980, 983 (2003).

C. The Officer Did Not Have Reasonable Suspicion To Justify The Detention Of Mr. Duran

Under the totality of the circumstances, Officer Guzman did not have reasonable suspicion to justify the detention of Mr. Duran at the time he took and retained his identification.

1. A Limited Detention Occurred When The Officer Took And Retained Mr. Duran’s Identification

As a preliminary matter, a limited detention occurred when Officer Guzman took and retained Mr. Duran’s identification to perform a warrants check. The district court determined that “the initial investigatory stop . . . did ripen into a detention”³ (*See* Tr., p.38, L.25 – p.39, L.2.) Here, the parties acknowledged the search of Mr. Duran was warrantless. (*See* Tr., p.6, Ls.15-19.) By implication, any preceding detention or seizure of Mr. Duran was also warrantless.

Like Mr. Duran asserted before the district court (*see* R., p.37), the Idaho Supreme Court addressed this kind of scenario in *State v. Page*, 140 Idaho 841 (2004). In *Page*, the officer approached the defendant while he was walking down the middle of a street around 2:00 am, asked for identification, and took the defendant’s driver’s license back to the officer’s vehicle to check his name with dispatch. *See id.* at 842-43. The district court granted the defendant’s motion to suppress “on the basis that [the defendant] was unlawfully seized at the point in time when [the officer] secured his driver’s license and ran his name through dispatch to check for outstanding warrants.” *Id.* at 844. The *Page* Court observed, “This Court has previously held

³ An investigatory stop is a detention. *See, e.g., State v. Osborne*, 121 Idaho 520, 525-26 (Ct. App. 1991).

that a limited detention does occur when an officer retains a driver's license or other paperwork of value.”⁴ *Id.* (citing *State v. Godwin*, 121 Idaho 491, 493 (1992); *State v. Martinez*, 136 Idaho 436, 439 (Ct. App. 2001)). Thus, a limited detention occurred when Officer Guzman took and retained Mr. Duran's identification to perform a warrants check.

2. The Officer Did Not Have Reasonable Suspicion To Justify The Detention

Under the totality of the circumstances, Officer Guzman did not have reasonable suspicion to justify this detention of Mr. Duran. As discussed above, whether an officer possessed reasonable suspicion is evaluated “upon the totality of the circumstances then known to the officer.” *Sheldon*, 139 Idaho at 983.

Based on the testimony and other evidence presented at the motion to suppress hearing, the district court specifically found that, at the time of the incident: (1) Officer Guzman had been a police officer for about three years; (2) the officer had been through the POST Academy, and had taken courses on identifying when somebody is under the influence of drugs and on DUI; (3) the incident was in a high crime and high drugs area; (4) there had been search warrants issued for apartments in the complex from which Mr. Duran appeared to be coming; (5) it was after 1:00 am; (6) the officer was suspicious that Mr. Duran was under the influence of drugs or was in possession of drugs; and (7) Mr. Duran was exhibiting behavior, such as hand movements, that the officer believed based on his training and experience might indicate he was under the influence of drugs. (*See Tr.*, p.37, L.11 – p.39, L.14.)

⁴ The *Page* Court ultimately held that the defendant was improperly detained at the point the officer seized the identification to perform a warrants check, but the discovery of an outstanding warrant for the defendant's arrest was an intervening circumstance which permitted the officer to arrest the defendant and made the subsequent seizure of evidence admissible. *See Page*, 140 Idaho at 845-47.

Mr. Duran submits that, under the totality of the circumstances as found by the district court, Officer Guzman did not have a reasonable, articulable suspicion that he had committed, or was about to commit, a crime. *See Bishop*, 146 Idaho at 811; *Sheldon*, 139 Idaho at 983. At best, the above facts would have provided the officer with a mere hunch, or inchoate and unparticularized suspicion. *See Bishop*, 146 Idaho at 811.

Under the totality of the circumstances here, Officer Guzman did not have reasonable suspicion to justify the detention of Mr. Duran. Thus, the detention and following warrantless search were unlawful, and the evidence obtained thereby should have been suppressed. *See id.* at 810-11. The district court erred when it denied Mr. Duran's motion to suppress, because his detention was unlawful.

CONCLUSION

For the above reasons, Mr. Duran respectfully requests that this Court vacate his judgment of conviction and reverse the district court's order denying his motion to suppress.

DATED this 1st day of February, 2019.

/s/ Ben P. McGreevy
BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of February, 2019, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

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/s/ Evan A. Smith

EVAN A. SMITH
Administrative Assistant

BPM/eas