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State v. Howell Appellant's Brief Dckt. 42277

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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 42277
Plaintiff-Respondent,)	
)	KOOTENAI COUNTY NO. CR 2013-
)	13847
v.)	
)	
KERRY A. HOWELL,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

BRIEF OF APPELLANT

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

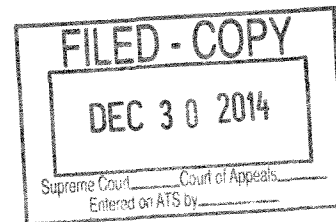
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STATEMENT OF THE CASE

Nature of the Case

Kerry A. Howell timely appeals from the district court's judgment of conviction. On appeal, Mr. Howell argues that the district court erred when it denied his motion to suppress evidence. Specifically, he argues that he was seized within the meaning of the Fourth Amendment when law enforcement officers took his driver's license and car registration. He further argues that this seizure was illegal because the officers did not have reasonable suspicion that Mr. Howell was engaged in criminal activity at the time of his seizure.

Statement of the Facts and Course of Proceedings

Officer Howard was on duty and received an anonymous report from a concerned citizen about two suspicious pickup trucks parked on a street named Syllas Court. (03/04/14 Tr., p.9, L.12 - p.10, L.2; R., p.16.) The anonymous tipster also suggested that the men were possibly changing their oil and dumping it. (03/04/14 Tr., p.62, Ls.8-11; R., p.69.) Officer Howard arrived at Syllas Court in a marked patrol car at approximately 7:00 AM and noticed that Mr. Howell's truck was attached to a trailer by a hitch. (03/04/14 Tr., p.11, L.25 - p.13, L.5.) Officer Howard was accompanied by Deputy Broesch who parked his patrol car behind Officer Howard's car. (03/04/14 Tr. p.13, L.21 - p.14, L.2.)

It should be noted that Syllas Court is a cul-de-sac and Officer Howard's car was parked in such a manner that it might have been difficult, but possible, for Mr. Howell to drive away. (03/04/14 Tr., p.10, Ls.7-9, p.29, L.24 - p.30, L.1, p.31, Ls.5-9, p.63, Ls.20-22; Plaintiff's Exhibit 1; Plaintiff's Exhibit 2.) In fact, Officer Howard's car was so close

to Mr. Howell's truck, Mr. Howell might not have been able to drive away if there had been curbing on the side of the road. (03/04/14 Tr., p.53, Ls.12-16.)

Officer Howard initially asked Mr. Howell what he and his friend were doing. (03/04/14 Tr., p.14, Ls.9-15, p.32, L.25 - p.33, L.2.) Mr. Howell said that he was headed to Spirit Lake and that he pulled over to fix the trailer on his truck, which was not "trailing correctly." (03/04/14 Tr., p.14, L.16 - p.15, L.16.) Between thirty seconds and two minutes after Officer Howard initially contacted Mr. Howell, he asked to see Mr. Howell's driver's license and Mr. Howell complied. (03/04/14 Tr., p.33, L.8 - p.34, L.6.) Officer Howard also asked to see the registration for Mr. Howell's truck, which indicated that Mr. Howell was the registered owner of the truck. (03/04/14 Tr., p.34, L.24 - p.35, L.5.)

After taking Mr. Howell's driver's license and registration, Officer Howard started asking Mr. Howell questions about the trailer. (03/04/14 Tr., p.33, L.8 - p.34, L.8.) Officer Howard first asked Mr. Howell if he owned the trailer and Mr. Howell said it belonged to his girlfriend, Kelly Gilbert. (03/04/14 Tr., p.15, L.17 - p.16, L.10.) Officer Howard then asked Mr. Howell if he had Ms. Gilbert's permission to use the trailer, and Mr. Howell said that it was actually his sister's boyfriend's trailer. (03/04/14 Tr., p.16, Ls.11-25.) Officer Howard then asked Mr. Howell if he knew his sister's boyfriend's name and he said no. (03/04/14 Tr., p.16, Ls.23-25.) At this point in time, Officer Howard had dispatch run a registration query on the trailer's license plate. (03/04/14 Tr., p.17, Ls.1-8.) Dispatch then informed Officer Howard that the trailer was not owned by either Mr. Howell's sister or his sister's boyfriend. (03/04/14 Tr., p.17, Ls.13-23.) Mr. Howell was arrested for possession of stolen property approximately two hours after

Officer Howard first contacted Mr. Howell.¹ (03/04/14 Tr., p.17, L.24 - p.18, L.3, p.36, L.11 - p.37, L.4.) During this two hour period, Officers Howard and Broesch also discovered evidence indicating that Mr. Howell might have been involved in multiple burglaries. (R., pp.16-19.)

Mr. Howell was charged, by information, with one count of grand theft by possession of stolen property and two counts of burglary. (R., pp.48-49.) Mr. Howell then filed a suppression motion, wherein he argued that Officers Howard and Broesch placed him under the functional equivalent of arrest when they parked their patrol cars in a location which prevented Mr. Howell from driving away. (R., pp.68-78.) Mr. Howell also argued that he was at least seized within the meaning of the Fourth Amendment when Officer Howard took his driver's license.² (03/04/14 Tr., p.59, Ls.9-16, p.61, Ls.13-21.) A hearing was held on the suppression motion. (R., pp.96-104.) At the hearing, the district court first found that the anonymous tip did not create reasonable suspicion to seize Mr. Howell. (03/04/14 Tr., p.62, L.20 - p.63, L.3.) The district court then found that the police officers' testimony was credible and ruled that Mr. Howell was neither seized nor under the functional equivalent of arrest because his truck was not

¹ Sometime during this two hour period, Officers Howell and Broesch searched Mr. Howell's cell phone without consent or a warrant. (03/04/14 Tr., p.41, Ls.2-5, p.51, L.22 - p.52, L.1.) During this search, the officers went through Mr. Howell's list of contacts and read some of his text messages, discovering incriminating evidence which was used to develop probable cause to arrest Mr. Howell. (03/04/14 Tr., p.41, Ls.2-5, p.51, L.22 - p.52, L.1; R., pp.16-19.) However, this evidence was not challenged in Mr. Howell's suppression motion. See *Riley v. California*, — U.S. —, —, 134 S.Ct. 2473, 2493–94 (2014) (holding, absent exigent circumstances, a search warrant authorizing the search of a cell phone is required before law enforcement can search the data on a cell phone).

² Mr. Howell recognizes that his primary argument was that he was arrested without probable cause when Officer Howard and Officer Broesch parked their patrol cars in a manner, according to Mr. Howell, prevented him from driving away. (03/04/14 Tr., p.5, Ls.14-20, p.59, Ls.14-16.) However, he also argued that taking the driver's license constituted an illegal seizure. (03/04/14 Tr., p.59, Ls.9-16, p.61, Ls.13-21.)

blocked by the officers' patrol cars and he was, therefore, free to drive away. (03/04/14 Tr., p.63, L.18 - p.65, L.10.) Accordingly, the district court denied Mr. Howell's motion to suppress evidence. (03/04/14 Tr., p.65, Ls.9-10; R., p.111.)

Pursuant to a plea agreement, Mr. Howell pleaded guilty to one count of burglary and preserved his ability to challenge the denial of his suppression motion on appeal. (04/24/14 Tr., p.5, L.13 - p.6, L.6; R., pp.205-209, 213.) Thereafter, the district court imposed a unified sentence of ten years, with five years fixed, and retained jurisdiction.³ (R., pp.222-223.) Mr. Howell timely appealed. (R., pp.219-221.)

³ According to the Idaho Supreme Court's online data repository, Mr. Howell is currently on probation.

ISSUE

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

ARGUMENT

The District Court Erred When It Denied Mr. Howell's Motion To Suppress The State's Evidence

A. Introduction

Mr. Howell argues that he was illegally seized within the meaning of the Fourth Amendment when Officer Howard took Mr. Howell's driver's license and registration. The initial reason Officer Howard spoke with Mr. Howell was based on an anonymous tip about suspicious behavior. The district court found that the anonymous tip did not create reasonable suspicion to seize Mr. Howell. It was only after Officer Howard seized Mr. Howell by taking his driver's driver's license and registration that Officer Howard developed reasonable suspicion that Mr. Howell was engaged in criminal activity. As such, the State's evidence must be suppressed because Mr. Howell was illegally seized at the time Officer Howard discovered evidence indicating that Mr. Howell was possibly in possession of stolen property.

B. Standard Of Review

Idaho appellate courts apply a bifurcated standard of review upon a challenge to a trial court's ruling on a motion to suppress. First, an appellate court defers to the district court's findings of fact unless those findings are clearly erroneous. See, e.g., *State v. Willoughby*, 147 Idaho 482, 485 (2009). Second, Idaho appellate courts review *de novo* the trial court's application of constitutional and legal principles to the facts as found. *Id.* at 485-486.

C. The State's Evidence Must Be Suppressed Because Officer Howard Seized Mr. Howell Without First Developing Reasonable Suspicion And All Of the Incriminating Evidence In This Case Was The Result Of That Illegal Seizure

Mr. Howell has liberty interests which are protected by the Fourth Amendment of the United States Constitution, which provides 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.” Mr. Howell has similar liberty interests protected under Article I Section 17 of the Idaho Constitution. See *State v. Christensen*, 131 Idaho 143, 146 (1998) (“Like the Fourth Amendment, the purpose of Art. I, § 17 is to protect Idaho citizens’ reasonable expectation of privacy against arbitrary governmental intrusion.”).

The burden is on the defendant to establish that s/he was seized within the meaning of the Fourth Amendment. *State v. Page*, 140 Idaho 841, 843 (2004). If a seizure occurs it is “incumbent upon the State to prove a proper justification for the seizure.” *State v. Zapata-Reyes*, 144 Idaho 703, 707 (Ct. App. 2007). “The Fourth Amendment is not implicated, however, by every contact between police and citizens.” *State v. Nickel*, 134 Idaho 610, 612 (2000). A seizure within the meaning of the Fourth Amendment occurs “when [an] officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.” *Id.* at 612-613. “The proper inquiry in determining whether a seizure occurred is whether, under all the circumstances surrounding an encounter, a reasonable person would have felt free to leave or otherwise decline the officer’s requests and terminate the encounter.” *Zapata-Reyes*, 144 Idaho at 707. It has been held that “a seizure occurs when an officer secures the driver’s license of a pedestrian or the passenger of an automobile and runs his or her name through dispatch to check for outstanding warrants.” *Id.*

There are various factors which support the conclusion that Mr. Howell was seized when Officer Howard took Mr. Howell's license and registration. Officer Howard and Officer Broesch arrived at Syllas Court in two separate marked police cars. (03/04/14 Tr., p.11, L.25 - p.12, L.10.) If there was curbing on Syllas Court, Mr. Howell might not have been able to drive away due to the close proximity of the two patrol cars to Mr. Howell's truck. (03/04/14 Tr., p.53, Ls.12-16.) Officer Howard took Mr. Howell's driver's license and his registration between thirty seconds and two minutes after his initial contact with Mr. Howell. (03/04/14 Tr., p.32, L.25 - p.35, L.5.) Officer Howard testified that he returned Mr. Howell's driver's license at some time, but could not remember when. (03/04/14 Tr., p.35, Ls.3-14.) However, Officer Broesch unequivocally testified that he had Mr. Howell's driver's license when he booked Mr. Howell into jail. (03/04/14 Tr., p.50, L.8 - p.51, L.1.) The combination of the arrival of two marked police cars, the close proximity of those cars to Mr. Howell's car, and Officer Howard's decision to take Mr. Howell's drivers license and his registration constituted a seizure within the meaning of the Fourth Amendment because a reasonable person would not feel free to drive away under those circumstances.

At the time Mr. Howell was seized, Officer Howard did not have reasonable suspicion that Mr. Howell was engaging in criminal activity. According to the district court Officers Howard and Broesch "came to the scene on the report of suspicious activity from an anonymous caller, and that in and of itself isn't determinative of anything at this point. There would be needed something more if they were going to seize the defendant from the inception." (03/04/14 Tr., p.62, L.23 - p.63, L.1.) It was only after Mr. Howell's driver's license was taken that Officers Howard and Broesch developed

reasonable suspicion that Mr. Howell might have been in possession of stolen property. (03/04/14 Tr., p.64, Ls.15-22.)

The factual basis for the district court's legal conclusion that there was no reasonable suspicion to immediately seize Mr. Howell was supported by the record. Officer Howard was responding to an anonymous tip that something suspicious was occurring at Syllas Court. (03/04/14 Tr., p.9, L.12 - p.10, L.2; R., p.16.) The suspicious activity was the possibility that Mr. Howell and Mr. Stevenson were dumping engine oil.⁴ (R., pp.69.) Mr. Howell's initial statements to Officers Howard and Broesch did not give rise to reasonable suspicion, as Mr. Howell merely stated that he was pulled over due to mechanical problems and was on his way to Spirit Lake. (03/04/14 Tr., p.14, Ls.18-25.) At that point in time, Officer Howard had not observed or otherwise learned of anything which would suggest that the trailer was stolen. It was only after Officer Howard took Mr. Howell's driver's license and registration that he started asking questions about the owner of the trailer. (03/04/14 Tr., p.32, L.6 - p.35, L.5.) Moreover, the anonymous tip did not relay any general information about a potential theft crime or specific information about a stolen trailer. (03/04/14 Tr., p.9, Ls.15-21.) As such, Officer Howard did not have reasonable suspicion that criminal activity was afoot at the time he seized Mr. Howell.

If it is determined that Mr. Howell was illegally seized when Officer Howard began questioning him about the trailer, the remedy, pursuant to the Fourth Amendment

⁴ It is not entirely clear if Officer Howard was aware of the tipster's allegation that Mr. Howell was either changing or dumping oil. (03/04/14 Tr., p.9, Ls.15-21.) There was no testimony or argument about engine oil at the suppression hearing. (See *generally* 03/04/14 Tr.) The only reference to engine oil was a statement made by Mr. Howell's defense counsel in the memorandum in support of Mr. Howell's suppression motion. (R., p.69.)

of the United States Constitution and Article I Section 17 of the Idaho Constitution, is suppression of the State's evidence. *State v. Arregui*, 44 Idaho 43 (1927); *State v. Guzman*, 122 Idaho 981 (1992). Additionally, all of the incriminating evidence which was obtained subsequent to the illegal seizure should be excluded under the fruit of the poisonous tree doctrine. *State v. Van Dorne*, 139 Idaho 961, 963 (Ct. App. 2004) (citing *Wong Sun v. United States*, 371 U.S. 471 (1963)). This includes all of the evidence used to establish a basis for Mr. Howell's burglary conviction.

In sum, Mr. Howell was seized within the meaning of the Fourth Amendment at the time Officer Howard took his driver's license and registration. At that time, Officer Howard did not have any reason to detain Mr. Howell and question him about the trailer. As such, all of the evidence obtained after the illegal seizure must be suppressed.

CONCLUSION

Mr. Howell respectfully requests that this Court reverse the district court's order denying his motion to suppress and remand this case to the district court for further proceedings.

DATED this 30th day of December, 2014.



SHAWN F. WILKERSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 30th day of December, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

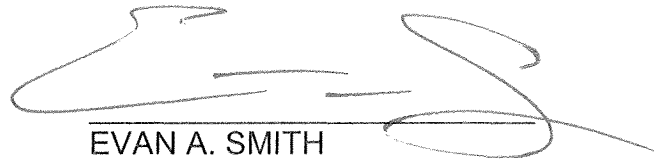
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