3-28-2019

State v. Stark Appellant's Brief Dckt. 46359

Electronically Filed
3/28/2019 11:59 AM
Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 46359-2018**
Plaintiff-Respondent,	)	
	)	**ADA COUNTY NO. CR01-18-8720**
v.	)	
	)	
KEEGAN ALLEN STARK,	)	**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

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District Judge

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STATEMENT OF THE CASE

Nature of the Case

Although they had not seen him commit an offense, officers stopped Keegan Allen Stark in a "high risk" traffic stop, blocking off the car he was driving with multiple police vehicles and ordering him out of the car with their guns drawn. The officers stopped Mr. Stark because, in the weeks and months before the traffic stop, an officer had seen another person driving the same car, and suspected that person of having an outstanding warrant and committing criminal activity. Mr. Stark filed a motion to suppress the evidence discovered as a result of the traffic stop. The district court denied the motion to suppress, on the basis the officers had reasonable, articulable suspicion to justify the stop because they had reasonable, articulable suspicion the other person was inside the car, subject to an outstanding warrant, and had committed a crime.

In this appeal following entry of a conditional plea, Mr. Stark asserts the district court erred when it denied his motion to suppress, because the officers did not have reasonable, articulable suspicion that he in particular had been engaged in criminal activity. Under the totality of the circumstances here, the officers did not have a particularized and objective basis for suspecting Mr. Stark—the particular person actually stopped—of criminal activity.

Statement of the Facts and Course of Proceedings

According to the district court's findings of fact at the motion to suppress hearing, on December 7, 2017, Officer Sikko Barghoorn of the Garden City Police Department saw a red Saturn Ion car with black rims. (Tr., p.51, Ls.8-12, p.53, Ls.8-9; *see* Tr., p.8, L.18 – p.9, L.5.)[1] Officer Barghoorn testified the car caught his attention because he believed it had a fictitious

[1] All citations to "Tr." refer to the transcript of the motion to suppress hearing, conducted on April 26, 2018.

display on the license plate. (*See* Tr., p.12, L.17 – p.13, L.6.) On cross-examination, Officer Barghoorn testified he later discovered the car's license plates were valid, and he had just run the plates wrong. (*See* Tr., p.39, L.25 – p.40, L.6.)

The district court found the officer intended to stop the car, but the car increased its speed, went into the wrong lane of travel, and got away. (*See* Tr., p.51, Ls.13-16.) Officer Barghoorn later found the car parked on the wrong side of the road, and saw a syringe in the car. (*See* Tr., p.51, Ls.17-21.) Law enforcement then searched the car, finding a debit card belonging to a Justin Burns, as well as a convenience store receipt from the day before, December 6, 2017. (*See* Tr., p.51, L.21 – p.52, L.1.) The syringe tested presumptively positive for methamphetamine. (*See* Tr., p.61, Ls.5-7.) Officer Barghoorn testified the car was eventually released to one of the registered owners, who was not Mr. Burns or Mr. Stark. (*See* Tr., p.19, Ls.11-18.)

Officer Barghoorn, the district court found, had not seen the person driving the car enough to identity the driver on December 7. (*See* Tr., p.52, Ls.2-5.) In surveillance video from the convenience store on December 6, the officer saw a person matching the physical appearance of Mr. Burns. (*See* Tr., p.52, Ls.5-13.) The district court determined Officer Barghoorn had the belief that Mr. Burns was in possession of the car on December 6, and the officer inferred Mr. Burns was likely driving the car on December 7. (*See* Tr., p.52, Ls.17-23.) The district court then determined the officer "concluded that Mr. Burns is at least a suspect in an eluding-type investigation, also for the drug materials found in the car on December 7 as well." (Tr., p.52, L.23 – p.53, L.2.) Officer Barghoorn also learned Mr. Burns was a parolee, and an agent's warrant was in process but not yet issued for him. (*See* Tr., p.53, Ls.3-7.)

On February 8, 2018, Officer Barghoorn encountered the red Saturn Ion in the same general area in Garden City. (*See* Tr., p.53, Ls.8-14.) The district court found the officer had positioned himself in a way to see the car's driver, "and he sees that it is the same person that he understands to be Justin Burns based on the investigation he did in relation to the December 7 incident." (Tr., p.53, Ls.15-20.) The officer believed he had information connecting Mr. Burns to the car on two or three prior occasions. (*See* Tr., p.53, Ls.21-25.) However, Officer Barghoorn was not "able to apprehend or make direct contact with this Justin Burns who, once he parks his car, flees on foot, and the officer doesn't arrest or have some sort of a conversation with him." (Tr., p.54, Ls.3-8.) Based on the February 8 encounter, the officer learned that Mr. Burns was now subject to a parole violation warrant. (*See* Tr., p.55, Ls.18-20.)

Officer Barghoorn again encountered the red Saturn Ion on February 20, 2018, in the same general area as the two previous encounters. (*See* Tr., p.54, Ls.9-18.) On cross-examination, Officer Barghoorn testified he essentially did not see who was driving the car before the seizure. (*See* Tr., p.40, Ls.11-15.) The district court found the officer followed the car as it went down State Street in Boise, turned south for a block on 17th Street, turned east onto Jefferson Street, and then turned south on 13th Street. (*See* Tr., p.54, L.19 – p.55, L.2.) Officers stopped the car on 13th and Main in downtown Boise. (*See* Tr., p.55, Ls.2-3.)

Officer Barghoorn testified he was coordinating with other units before he initiated the traffic stop (*see* Tr., p.23, Ls.3-20), and on cross-examination he testified there were approximately eight officers and six police cars involved in the stop (*see* Tr., p.36, Ls.3-17). Some officers blocked the car from the front, while Officer Barghoorn came from behind to prevent the car from getting away. (*See* Tr., p.36, L.18 – p.37, L.8.) He testified on direct examination that the officers treated the stop as a "high risk" or "felony" traffic stop, meaning

the officers did not approach the car but hailed the driver from their vehicles. (*See* Tr., p.24, L.11 – p.25, L.7.) On cross-examination, Officer Barghoorn testified he had his Taser drawn, and other officers had drawn their guns. (*See* Tr., p.37, Ls.19-23.)

The district court determined, "the stop is based on the officer's belief that Justin Burns may be driving this vehicle as he had done on prior occasions, in December and February 8, according to the officers' investigations." (Tr., p.55, Ls.4-8.) The officer had not seen "on this occasion some traffic violation that justifies the stop." (*See* Tr., p.55, Ls.13-14.) However, Mr. Burns was not in the car: "The person in the vehicle was Keegan Stark." (Tr., p.56, Ls.8-9.)

The district court found, "the officer thinks he stopped Justin Burns at first. He eventually realizes that that's not the case, but that's not until a syringe has been revealed in plain view as one falls out of the car as the defendant is exiting the car." (Tr., p.60, L.24 – p.61, L.4.) Officer Barghoorn testified the driver was initially hesitant on following the officers' commands and refused to exit the car, and a syringe fell onto the road when he got out of the car. (*See* Tr., p.25, Ls.8-21.) The officer testified he became aware the driver was not Mr. Burns once he had detained Mr. Stark and found a driver's license for a Daniel Day. (*See* Tr., p.25, L.22 – p.26, L.11.) Mr. Stark did not identify himself at first, and responded when the officer referred to him as Mr. Day. (*See* Tr., p.26, Ls.6-14.) The officer eventually identified the driver as Mr. Stark. (*See* Tr., p.26, Ls.15-19.)

Officer Barghoorn testified that, in a search incident to arrest, he found drugs and drug paraphernalia on Mr. Stark's person. (*See* Tr., p.27, Ls.4-25.) At the time, Mr. Stark had waived his Fourth Amendment rights, in order to participate in drug court in unrelated matters, but the officer was not aware of the waiver. (*See* R., p.56; Tr., p.28, Ls.1-4.) Officers found additional drugs and drug paraphernalia in the car. (*See* R., pp.36, 46.)

The State charged Mr. Stark by Information with two counts of possession of a controlled substance, felony, I.C. § 37-2732(c), two counts of possession of a controlled substance, misdemeanor, I.C. § 37-2732(c), one count of possession of drug paraphernalia, misdemeanor, I.C. § 37-2734A, and one count of providing false information to law enforcement, misdemeanor, I.C. § 18-5413(2). (R., pp.27-29.) He entered a not guilty plea. (*See* R., p.32.)

Mr. Stark subsequently filed a Motion to Suppress. (R., pp.33-34.) In his Memorandum in Support of Motion to Suppress (R., pp.35-40), Mr. Stark discussed reasonable suspicion for a traffic stop, and indicated conduct falling within the broad range of normal driving behavior would not justify a traffic stop (*see* R., pp.37-38). Mr. Stark requested the district court "find that the seizure of the defendant was illegal and suppress all evidence and admissions/confessions discovered as a result of the seizure." (R., p.39.)

The State filed a State's Response and Supporting Brief in Opposition to Defendant's Motion to Suppress, arguing Mr. Stark did not have "standing" to assert a violation of his Fourth Amendment rights on account of his waiver, and Officer Barghoorn had reasonable, articulable suspicion to justify the traffic stop. (R., pp.42-53.) Mr. Stark filed a Supplemental Persuasive Authority in Support of Defendant's Motion to Suppress (R., pp.76-79), as well as a Defendant's Reply Memorandum to State's Response and Opposition to Motion to Suppress. (R., pp.91-95.)

The district court conducted a hearing on the motion to suppress, where Officer Barghoorn testified. (*See* Tr., p.5, L.4 – p.41, L.19.) The State agreed there was no warrant for the traffic stop, but reiterated its position that Mr. Stark did not have standing based on his Fourth Amendment waiver. (*See* Tr., p.6, L.21 – p.7, L.11.)

Mr. Stark asserted, "there must be some time element in these cases. The defendant should not be subject to eight officers, four to five police vehicles, a taser, and a gun being

pointed at him because he happened to be driving the vehicle." (Tr., p.43, Ls.12-16.) He further asserted: "And you cannot be seized by numerous police officers, have guns pointed at you, et cetera, based on this officer's, we would call, baseless suspicions or just hunches." (Tr., p.46, Ls.14-18.)

From the bench, the district court ruled Mr. Stark would be able to challenge the seizure despite the Fourth Amendment waiver, because the officers did not know about the waiver at the time. (*See* Tr., p.46, L.20 – p.50, L.24.) The district court accordingly addressed "the merits of his argument that this seizure was illegal, and that as a result, the resulting evidence found following the seizure ought to be suppressed." (*See* Tr., p.50, L.25 – p.51, L.4.) The district court framed the issue as, "the stop here, the legality of it, rises and falls with whether the officer had a reasonable articulable suspicion that Justin Burns was in this vehicle on this occasion . . . ." (Tr., p.55, Ls.9-12; *see* Tr., p.56, Ls.4-8.)

The district court determined Officer Barghoorn "did develop a clearly reasonable basis for concluding that Justin Burns had been in possession of or driving the vehicle on December 6 at least, possibly also on December 7, and then on February 8." (Tr., p.56, Ls.11-19.) According to the district court, "So the officer can connect the defendant—not the defendant, Justin Burns to the vehicle on that occasion, and he knows this is the same vehicle. He knows that Justin Burns is validly subject to a stop based on an outstanding warrant; potentially also to further investigate the criminal matters occurring on December 7." (Tr., p.56, L.20 – p.57, L.1.)

The district court then determined *State v. Hedgecock*, 147 Idaho 580 (Ct. App. 2009), was "the best case here, the most analogous case we have that I could find, we could find in the Idaho system." (*See* Tr., p.57, Ls.2-6.) The district court discussed the facts of *Hedgecock*, as well as the Idaho Court of Appeals' holding there was reasonable, articulable suspicion that the

Hedgecock defendant was in a vehicle because the defendant had been in the vehicle more than a week earlier, the vehicle was outside the defendant's apartment, and the officers saw the vehicle appear to take note of the officers and then leave. (*See* Tr., p.57, L.7 – p.58, L.22.) The district court thought the situation here was "fairly similar." (*See* Tr., p.58, L.25 – p.59, L.1.)

The district court next mentioned "these two prior occasions that are about two months apart, February 6 and—excuse me, February 8, 2018, December 6, 2017, where the defendant [sic] can clearly be placed inside the vehicle; possibly also on December 7." (Tr., p.59, Ls.1-6.) The district court stated, "And so there is a connection between the defendant [sic] and the vehicle, the fact that they're two months apart." (Tr., p.59, Ls.7-9.) The February 20 encounter "is another 12 days later, is all the more reason I think to think that the defendant—or excuse me, not the defendant, that Justin Burns is inside the vehicle on this occasion. After all, he evidently was inside it on two prior occasions, a couple of months apart, and not entirely dissimilarly from *Hedgecock*." (*See* Tr., p.59, Ls.9-17.)

Additionally, the district court stated, "There's some driving behavior here that while not unlawful, might be thought to be consistent with some level of concern about the officer in the areas." (Tr., p.59, Ls.18-21.) The district court determined, "the vehicle here doesn't drive unlawfully but it does take some turns on its route from where the officer first observed it to where the stop happened that might be viewed as being consistent, if nothing else, with trying to see if the officer will continue to follow after the turns are made." (Tr., p.59, L.21 – p.60, L.2.) The district court thought that because Mr. Stark, "who turned out to be driving the car, certainly didn't take the most direct [route] between where he first entered State Street and the place at which he was stopped on 13th and Main. There was an extraneous turn or two on the route to that location." (Tr., p.60, Ls.3-8.)

The district court determined, "So all of this together I think suggests to me that as in *Hedgecock*, the officer had a reasonable articulable suspicion that Justin Burns was inside this vehicle." (Tr., p.60, Ls.9-12.) Per the district court, Officer Barghoorn "plainly had a reasonable and articulable suspicion that Justin Burns was subject to an outstanding warrant, also a reasonabl[e] articulable suspicion that Justin Burns had committed a crime of eluding and/or drug offenses back on December 7." (Tr., p.60, Ls.12-17.) The district court determined: "So all of these things together it seems to me justified the stop at the outset. That's really what the defense motion challenges is the legality of the stop at the outset. That challenge fails. There was reasonable articulable suspicion justifying the stop." (Tr., p.60, Ls.18-23.)

Officer Barghoorn eventually realized he had not stopped Mr. Burns, but by that time a syringe had fallen out of the car as Mr. Stark was getting out. (*See* Tr., p.60, L.24 – p.61, L.4.) Because the officer knew about the methamphetamine syringe from the December 7 encounter, the district court determined the officer "has a reasonable articulable suspicion of drug activity, and the investigation can proceed from there." (*See* Tr., p.61, Ls.5-11.) The district court denied Mr. Stark's motion to suppress. (Tr., p.61, Ls.12-13.)

Pursuant to a conditional plea agreement preserving his right to appeal the denial of the motion to suppress, Mr. Stark agreed to plead guilty to amended charges of one count of felony possession of a controlled substance and one count of misdemeanor providing false information to law enforcement. (*See* R., pp.96-97, 103-12, 115-17.) The district court accepted Mr. Stark's guilty plea. (*See* R., p.97.) The district court imposed, for possession of a controlled substance, a unified sentence of five years, with one and one-half years fixed. (R., pp.121-24.)

Mr. Stark filed a Notice of Appeal timely from the district court's Judgment of Conviction and Commitment. (R., pp.125-28.)

ISSUE

Did the district court err when it denied Mr. Stark's motion to suppress, because the officers did not have reasonable, articulable suspicion that he in particular had been engaged in criminal activity?

ARGUMENT

The District Court Erred When It Denied Mr. Stark's Motion To Suppress, Because The Officers Did Not Have Reasonable, Articulable Suspicion That He In Particular Had Been Engaged In Criminal Activity

A. Introduction

Mr. Stark asserts the district court erred when it denied his motion to suppress, because the officers did not have reasonable, articulable suspicion that he in particular had been engaged in criminal activity. Under the totality of the circumstances here, the officers did not have a particularized and objective basis for suspecting Mr. Stark—the particular person actually stopped—of criminal activity. Thus, the officers did not have reasonable, articulable suspicion to justify the traffic stop of Mr. Stark. Without an applicable exception to the warrant requirement, the traffic stop as a warrantless seizure was unlawful. Thus, the district court should have granted Mr. Stark's motion to suppress the evidence discovered as a result of the illegal warrantless seizure.

B. Standard Of Review And Applicable Law

"When this Court reviews a district court's order granting or denying a motion to suppress, the standard of review is bifurcated. The Court will accept the trial court's findings of fact unless they are clearly erroneous, but may freely review the trial court's application of constitutional principles in light of the facts found." *State v. Skurlock*, 150 Idaho 404, 405 (2011) (citation omitted).

"The Fourth Amendment of the U.S. Constitution and article I, section 17 of the Idaho Constitution each forbid unreasonable searches and seizures." *State v. Hansen*, 151 Idaho 342, 346 (2011). "Searches and seizures without a valid warrant are presumptively unreasonable and, therefore, illegal, unless they come within a recognized exception to the warrant requirement."

State v. Nunez, 138 Idaho 636, 640 (2003). "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). Under the "exclusionary rule," all evidence obtained by searches and seizures in violation of the Fourth Amendment is usually, by that same authority, inadmissible in a state court. *State v. Frederick*, 149 Idaho 509, 515 (2010).

A traffic stop is a seizure of the vehicle occupants and is therefore subject to the Fourth Amendment prohibition against unreasonable searches and seizures. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *State v. Henage*, 143 Idaho 655, 658 (2007). Without a warrant, limited investigatory detentions are permissible when justified by an officer's reasonable, articulable suspicion that a person has committed, or is about to commit, a crime. *See State v. Fuller*, 163 Idaho 585, 588 (2018). "As such, two possible justifications for a traffic stop exist: (1) the officer has a reasonable, articulable suspicion that the driver has committed an offense, such as a traffic offense, or (2) the officer has a reasonable, articulable suspicion that the driver is engaged in other criminal activity, such as driving under the influence." *Id.* (citing *State v. Neal*, 159 Idaho 439, 442 (2015)). "Reasonable suspicion must be based on specific, articulable facts and the rational inferences that can be drawn from those facts." *Id.* (internal quotation marks omitted). "Reasonable suspicion requires more than a mere hunch or inchoate and unparticularized suspicion." *Id.* (internal quotation marks omitted).

As the United States Supreme Court held in *United States v. Cortez*, 449 U.S. 411 (1981): "the totality of the circumstances—the whole picture—must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Cortez*, 449 U.S. at 417-18. The

assessment of the whole picture "must be based upon all the circumstances," and the process "must raise a suspicion that the particular individual being stopped is engaged in wrongdoing." *Id.* at 418.

C. The Officers Did Not Have A Particularized And Objective Basis For Suspecting Mr. Stark Of Criminal Activity

Mr. Stark asserts the officers, taking into account the totality of the circumstances here, did not have a particularized and objective basis for suspecting him of criminal activity. Thus, the officers did not have reasonable, articulable suspicion to justify the traffic stop of Mr. Stark.

As discussed above, the district court determined reasonable, articulable suspicion justified the traffic stop of Mr. Stark, because the officers had reasonable, articulable suspicion that Mr. Burns was inside the car, subject to an outstanding warrant, and had committed a crime. (*See* Tr., p.60, Ls.9-23.) The district court also framed the issue as, "the stop here, the legality of it, rises and falls with whether the officer had a reasonable articulable suspicion that Justin Burns was in this vehicle on this occasion . . . ." (Tr., p.55, Ls.9-12; *see* Tr., p.56, Ls.4-8.) By focusing on Mr. Burns, rather than the person actually stopped—Mr. Stark—the district court's characterization of the issue and resulting determination were fatally flawed.

"[T]he Fourth Amendment protects people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967); *State v. Pruss*, 145 Idaho 623, 626 (2008). The real issue here is whether the officers had a particularized and objective basis for suspecting Mr. Stark of criminal activity. *See Cortez*, 449 U.S. at 417-18.

The officers did not have a particularized and objective basis for suspecting Mr. Stark of criminal activity. At the time of the traffic stop, the officers did indeed know Mr. Burns had driven the car before, he had an outstanding parole violation warrant, and he had potentially

committed criminal activity. (*See* Tr., p.51, L.8 – p.52, L.23, p.53, Ls.15-20, p.55, Ls.18-22.) However, "the totality of the circumstances—the whole picture—must be taken into account." *See Cortez*, 449 U.S. at 418.

The whole picture includes the fact that the car had been released to one of the registered owners, who was not Mr. Burns or Mr. Stark, following the December 7 encounter. (*See* Tr., p.19, Ls.11-18.) Moreover, while Officer Barghoorn had actually seen Mr. Burns driving the car in the February 8 encounter (*see* Tr., p.53, Ls.15-20), he did not see who was driving the car on February 20 before initiating the traffic stop (*see* Tr., p.40, Ls.11-15). The traffic stop happened some twelve days after the officer saw Mr. Burns driving the car. (*See* Tr., p.54, Ls.9-13.) Thus, it was plausible that someone else, not Mr. Burns, was driving. *See State v. Cerino*, 141 Idaho 736, 738 (Ct. App. 2005) ("[N]othing but the driver's gender 'matched' the officer's information about Cerino. In these circumstances there was little basis to infer that the male registrant [Cerino] was driving; it was as plausible and perhaps more likely, that the driver was someone else.").

The totality of the circumstances also includes that Officer Barghoorn did not see the car's driver commit any traffic violations on the day of the traffic stop. (*See* Tr., p.55, Ls.13-14.) The district court determined Mr. Stark's driving, "while not unlawful, might be thought to be consistent with some level of concern," because the car took some turns "that might be viewed as being consistent . . . with trying to see if the officer will continue to follow after the turns are made," and Mr. Stark "certainly didn't take the most direct [route]" between State Street and 13th and Main. (*See* Tr., p.59, L.18 – p.60, L.8.)

However, as in *State v. Emory*, 119 Idaho 661 (Ct. App. 1991), "The evidence adduced by the officer could just as easily be explained as conduct falling within the broad range of what

can be described as normal driving behavior." *See id.* at 664. The inferences made by the district court "must still be evaluated against the backdrop of everyday driving experience." *See id.* Here, it is self-evident that drivers navigating the streets of downtown Boise may make "extraneous" turns as opposed to following the most-direct route, depending on traffic and other road conditions. Conversely, Officer Barghoorn was aware that the car on December 7, with Mr. Burns as the ostensible driver, got away from him by speeding away and going into the wrong lane of travel. (*See* Tr., p.51, Ls.13-16.)

In sum, the objective facts here did not support reasonable, articulable suspicion particularized and specific to Mr. Stark. While the officers knew about Mr. Burns, they had also last seen Mr. Burns drive the car, which belonged to someone else, twelve days before the traffic stop. The officers also did not know who was driving the car at the time of the traffic stop, nor had they seen the car's driver commit any traffic violations that day. Under the totality of the circumstances here, the officers did not have a particularized and objective basis for suspecting Mr. Stark—the particular person actually stopped—of criminal activity. *See Cortez*, 449 U.S. at 417-18. The whole picture did not raise a suspicion that Mr. Stark in particular had been engaged in wrongdoing. *See id.* at 418. Thus, the officers did not have reasonable, articulable suspicion to justify the traffic stop of Mr. Stark.

The district court relied upon *State v. Hedgecock*, 147 Idaho 580 (Ct. App. 2009) (*see* Tr., p.57, L.2 – p.60, L.17), but *Hedgecock* is readily distinguishable from the present case because the person actually stopped inside the vehicle was the same person for which the police had reasonable suspicion. In *Hedgecock*, officers including the defendant's probation officer were investigating suspicious items at the defendant's apartment when they saw a vehicle pull up to a stop sign nearby. *See Hedgecock*, 147 Idaho at 582. An officer indicated it was the same

vehicle he had stopped about a week before with the defendant inside. *See id.* The vehicle paused briefly, the occupants looked towards the officers, and then the vehicle accelerated quickly away. *See id.* The probation officer directed other officers to stop the vehicle to determine if the defendant was inside, check the vehicle, and detain the defendant until the probation officer arrived. *See id.* Those officers stopped the vehicle, with the defendant inside, and found what they believed to be counterfeit money in the area where the defendant had been sitting. *See id.*

On appeal from the denial of his motion to suppress, the defendant in *Hedgecock* asserted the officers "did not possess reasonable, articulable suspicion to stop the vehicle because they had only a 'hunch' that he was even inside the vehicle." *See id.* at 583. The Idaho Court of Appeals explained the probation officer knew the defendant was under supervision, and had found incriminating evidence. *See id.* Thus, the probation officer "had reasonable suspicion that Hedgecock was still engaged in criminal activity—a fact that became more significant when the officers watched a vehicle in which Hedgecock had been a passenger more than a week earlier, pull to the stop sign approximately fifty yards from the residence." *Id.* The officers saw the vehicle's occupants look towards them and then accelerate away from the scene. *See id.* "Thus, while at the time of the stop, the officers had not yet definitively determined that Hedgecock was a passenger, they did have reasonable suspicion, given the totality of the circumstances, that he was inside." *Id.* The *Hedgecock* Court held, "Under Fourth Amendment strictures, the officers lawfully detained the vehicle in which Hedgecock was a passenger." *Id.*

The district court's determination that this case is analogous to *Hedgecock* (*see* Tr., p.57, Ls.2-6), collapses upon comparison of the respective circumstances. In *Hedgecock*, the officers had reasonable suspicion that the defendant had engaged in criminal activity and was in the

vehicle at issue, and the defendant was the particular person stopped. *See Hedgecock*, 147 at 583. In the instant case, the person for which the police had reasonable suspicion was not the particular person stopped. (*See* Tr., p.56, Ls.3-9.) *Hedgecock* does not stand for the proposition that officers, having reasonable suspicion to believe one person has committed criminal activity, would thereby have reasonable suspicion to stop a second person found in a car the first person had been seen driving weeks prior. Contrary to the district court's determination, *Hedgecock* is not analogous to the instant case and does not control here.[2]

The district court erred when it denied Mr. Stark's motion to suppress, because the officers did not have reasonable, articulable suspicion that he in particular had been engaged in criminal activity. The officers did not have reasonable, articulable suspicion to justify the traffic stop of Mr. Stark. Without an applicable exception to the warrant requirement, the traffic stop as a warrantless seizure was unlawful. *See Nunez*, 138 Idaho at 640. Thus, Mr. Stark's motion to suppress the evidence discovered as a result of the illegal warrantless seizure should have been granted. *See Frederick*, 149 Idaho at 515.

[2] While the district court did not expressly rely upon *State v. Gascon*, 119 Idaho 932 (1991), the State discussed *Gascon* in its response to the motion to suppress. (*See* R., pp.50-51.) *Gascon* is distinguishable from the instant case, because it involved a police roadblock set up immediately after a bank robbery. *See Gascon*, 119 Idaho at 932-33. The police in *Gascon* had a description of the bank robber, and set up a roadblock at a likely place of escape. *See id.* at 934. As the defendant's car approached the roadblock, an officer saw the defendant lean over to the passenger side of the car at least twice and disappear from sight at least once. *See id.* The Idaho Supreme Court in *Gascon* held, "In light of the circumstances, the moves of the driver were aptly characterized as suspicious and gave rise to a reasonable and articulable suspicion that Gascon could have been involved in the robbery and that he could have been armed and dangerous." *Id.*

Unlike *Gascon*, the present case does not involve a roadblock or measures taken by the police immediately after reported criminal activity. Rather, twelve days elapsed between Officer Barghoorn seeing Mr. Burns drive the car and the traffic stop of Mr. Stark. Further, Mr. Stark did not engage in any suspicious moves, for his driving was within the broad range of normal driving behavior for downtown Boise.

CONCLUSION

For the above reasons, Mr. Stark respectfully requests that this Court vacate the district court's order of judgment and commitment and reverse the order which denied his motion to suppress.

DATED this 28th day of March, 2019.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of March, 2019, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
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/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

BPM/eas