BEFORE THE

Supreme Court of the State of Idaho

STATE OF IDAHO,

Petitioner/Appellant,

VS.

JARED BLAKE FRANDSEN,

Defendant/Respondent.

SUPREME COURT CASE
#46240-2018

DISTRICT COURT CASE NO.
MADISON COUNTY CR-2017-1370

APPELLANT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO IN AND FOR MADISON COUNTY
Honorable Alan C. Stephens, District Judge, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

I. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal of the denial of the Defendant's Motion to Suppress and related Motion to Reconsider, based on the District Court's ruling that a police officer may stop a vehicle when he reasonably believes a traffic

violation is about to occur ("future traffic violation") or a violation has occurred some unknown time in the past.

B. Statement of Facts

There is little disagreement as to the pertinent facts which are stated by the District Court in the "Background" section of the District Court's DECISION AND ORDER RE: DEFENDANT'S MOTION TO RECONSIDER ("Dec. Reconsideration"), dated January 16, 2019 (pp 85-59 of the Clerk's Record).

1. On January 2, 2017, Deputy Braden Bestor ("Bestor") was driving on Main Street in Rexburg when he observed a vehicle that he believed belonged to Frandsen. Dec. Reconsideration, p. 2. (Clerk's Record p. 86).

2. Bestor had previously received a tip that Frandsen was involved in selling drugs. *Id.*

3. After Bestor turned around to try and locate the vehicle, he entered the parking lot of a Quality Inn where he observed the vehicle next to a Subaru. *Id.*

4. The Subaru attempted to leave the parking lot and pulled onto the Quality Inn's driveway leading to a Maverik gas station and Main Street. *Id.*

5. Quality Inn's driveway does not lead anywhere else. *Id*.

6. When Bestor observed that one of the Subaru's headlights was out, he pulled the vehicle over while it was still in the driveway. Dec. Reconsideration, p. 2-3. (Clerk's Record p. 86-87).

7. Bestor testified that he believed at the time that the driveway was a public road, but later conceded that the road was not publicly maintained and that he had been mistaken. Dec. Reconsideration, p. 3. (Clerk's Record p. 87).

8. Frandsen was seated in the back of the Subaru. *Id*.

9. As Bestor asked for information from the driver and passengers, he stated that he smelled the odor of marijuana and began questioning the occupants as to whether they possessed any marijuana. *Id*.

10. Frandsen was eventually discovered to have small quantities of marijuana and assorted paraphernalia on his person and in the car. *Id*.

11. The Court held that the stop could not have been justified by Bestor's belief that the driveway where he stopped the vehicle Frandsen was traveling on was a publicly maintained road, since the characteristics of the driveway made such a belief unreasonable. Dec. Reconsideration, p. 1. (Clerk's Record p. 85).

12. The Court also held that the stop could not be justified by

invoking "community caretaking functions." *Id*.

13. However, the Court held that because Bestor could have "reasonably believed that a traffic violation was about to occur," a reasonable suspicion existed, and the stop was justified. *Id*.

14. The Defendant asked the Court to reconsider the final issue, which it denied, holding that the officer "had a reasonable belief that the driver of the Subaru was about to commit a traffic violation, and also justified a belief that a traffic violation had already been committed." *Id*.

C. Course of the Proceedings.

06/05/2017 Case Filed

06/15/2017 Initial Appearance

06/28/2017 Amended Complaint Filed

07/10/2017
Preliminary Hearing - Bound Over to District Court

07/14/2017 Prosecuting Attorney Information

10/11/2017 Arraignment

11/17/2017 Motion to Suppress Hearing

12/07/2017 Order: Defendant's Motion to Suppress

12/18/2017
Defendant's Motion to Reconsider
Denial of Motion to Suppress Evidence

01/16/2018 Order: Defendant's Motion to Reconsider

01/31/2018 Change of Plea

04/11/2018 Sentencing - Probation Ordered

05/16/2018 Appeal Filed in Supreme Court

12/18/2018 Amended Notice of Appeal

II. STATEMENT OF ISSUES

1. Did the District Court err by denying Defendant's Motion to Suppress concerning evidence seized during a traffic stop when it found the stop could be based on a police officer's reasonable belief that a "future traffic violation" was about to be committed?

2. Did the District Court err by denying Defendant's Motion to Suppress concerning evidence seized during a traffic stop when it found the stop could be based on a police officer's reasonable belief that a "past traffic violation" had been committed, although unobserved, unreported and occurred at an unknown time if at all?

III. STANDARD AND SCOPE OF REVIEW

A. Standard of Review

On appeal from a trial court's order resolving a motion to suppress evidence, this Court defers to the trial court's findings of fact if they are supported by substantial evidence, but freely reviews the trial court's

determination as to whether constitutional standards have been satisfied in light of the facts found. *State v. Atkinson*, 128 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct. App. 1996).

IV. ARGUMENT

Introduction

The Appellant does not contest the District Court's findings of facts. The only question is whether the District Court properly applied the standards of the Fourth Amendment to the U.S. Constitution and Article I, Section 17 of the Idaho Constitution to the seizure of the Appellant during a traffic stop.

The Court's first Memorandum Decision addressed three issues:

1. Whether the officer made a reasonable mistake of fact;
2. Whether the officer was exercising his community caretaker function; and
3. Whether the officer could stop someone he suspects is about to commit a traffic violation.

The Court found in favor of the defense as to the first two issues, but then found that the police can make a traffic stop if the officer suspects the motorist is about to commit a traffic offense. Decision on Suppression, Dec. 7, 2017, pp. 3-6 (Clerk's Record pp. 75-78).

The primary issue in this appeal is this "future traffic violation" justification for the stop. The District Court found Bestor based his stop on an unreasonable mistake of fact. The officer in this case believed that a traffic violation (defective headlight) was occurring in his presence on a publicly maintained street. In reality, the car he was observing was on a private business driveway, and thus the traffic law concerning headlights did not apply. *Id*. at 3.

This mistake of fact meant there was not violation of the traffic law being committed in the officer's presence. The District Court however ruled that the stop was justified because an officer could have reasonably believed that a traffic offense was about to occur in the near future, such as if the car had continued forward and reached a public roadway. Id. at 5-6.

The defense argued this was speculative, since the car could have been proceeding to the Maverik gas station, which is also on private property and was accessible without driving onto the public highway. The Court however found that the argument was speculative without evidence that the vehicle intended to go to the gas station. This ignored the fact that there is no evidence other than speculation as to where the car would have gone absent the initiation of the traffic stop by the officer. The vehicle in

this case did pull into the gas station after the activation of the officer's red and blue lights.

Seizures Are Not Reasonable Based on a "Reasonable Belief That a Traffic Offense is About to Occur" (Future Traffic Violations)

The Fourth Amendment to the United States Constitution and Article I, § 17 of the Idaho Constitution prohibit unreasonable searches and seizures. A seizure that is subject to constitutional scrutiny occurs when a law enforcement officer restrains the liberty of an individual through physical force or by show of authority. *State v. Agundis*, 127 Idaho 587, 590–91, 903 P.2d 752, 755–56 (Ct.App.1995). Traffic stops are deemed seizures for the purposes of the Fourth Amendment. *United States v. Valadez*, 267 F.3d 395, 397 (5th Cir.2001). The legality of a traffic stop is analyzed under the framework articulated in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). See *Knowles v. Iowa*, 525 U.S. 113, 117, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998); *Berkemer v. McCarty*, 468 U.S. 420, 439, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984).

A traffic violation alone is sufficient to establish reasonable suspicion. *Whren v. United States*, 517 U.S. 806, 810 116 S.Ct. 1769, 1769, 135 L.Ed.2d 89 (1996); *United States v. Willis*, 431 F.3d 709, 714-17 (9th Cir.2005). In *Whren*, the Court held that, in general, "the decision to stop

an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." 517 U.S. at 810, 116 S.Ct. 1769; *Willis*, 431 F.3d at 715 ("*Whren* stands for the proposition that if the officers have probable cause to believe that a traffic violation occurred, the officers may conduct a traffic stop.").

Standards Differ Between Observed Traffic Violations and "Investigatory Stops"

Although most courts have implicitly adopted two differing standards as applied to criminal behavior and traffic violations, an Ohio court articulated it explicitly. The Ohio Court of Appeals specifically instructed there are actually two types of "traffic" stops:

> First is the typical non-investigatory traffic stop, wherein the police officer witnesses a violation of the traffic code, such as crossing over the center line of a road, and then stops the motorist for this traffic violation. Second is the investigative or "*Terry*" stop, wherein the officer does not necessarily witness a specific traffic violation, but the officer does have sufficient reason to believe that a criminal act has taken place or is occurring, and the officer seeks to confirm or refute this suspicion of criminal activity. See *Terry v. Ohio* (1968), 392 U.S. 1, 21, 88 S.Ct. 1868, 1879-1880. A non-investigatory traffic stop must be supported by probable cause, which arises when the stopping officer witnesses the traffic violation. See *Whren v. United States* (1996), 517 U.S. 806, 810, 116 S.Ct. 1769, 1772; *Pennsylvania v. Mimms* (1977), 434 U.S. 106, 109, 98 S.Ct. 330, 332. By contrast, an investigatory Terry stop is proper so long as the stopping officer has "reasonable articulable suspicion" of criminal activity. *Terry*, 392 U.S. at 21, 88 S.Ct. at 1879-1880,

State v. Moeller, No. CA99-07-128, 2000 WL 1577287, at *2 (Ohio Ct. App.

Oct. 23, 2000).

This distinction is also found in decisions by the Idaho courts as, for example, expressed in *State v. Naccarato*, 126 Idaho 10, 12, 878 P.2d 184, 186 (1994) abrogated on other issues by *State v. Clark*, 135 Idaho 255, 16 P.3d 931 (2000), which found that a non-investigatory traffic stop involves only violations that are occurring in the present or have occurred in the past tense. "A traffic stop, which constitutes a seizure under the Fourth Amendment, must be supported by reasonable and articulable suspicion that the vehicle ***is being driven contrary to traffic laws or*** that either the vehicle or the occupant is subject to detention in connection with ***a violation of other laws***." *Id*. See also *State v. Neal*, 159 Idaho 439, 442, 362 P.3d 514, 517 (2015) ("Thus there are two possible justifications for a traffic stop—the officer has reasonable suspicion that a driver has committed an offense, such as a traffic offense, or the officer has reasonable suspicion of other criminal activity, such as driving under the influence.").

The Majority of Courts Recognize Only "Present Tense" Violations

The exclusive use of the past and present tenses in a large number of court decisions involving traffic stops for observed traffic violations implies that a stop for future tense violations is not contemplated. See *State v. DeBoer,* No. 34512, 2008 WL 9468777, at *1 (Idaho Ct. App. Sept. 19,

2008-Unpublished)(Under the Fourth Amendment, an officer may stop a vehicle to investigate possible criminal behavior if there is a reasonable and articulable suspicion that the vehicle ***is being driven contrary to traffic laws***.); *United States v. Botero–Ospina*, 71 F.3d 783, 787 (10th Cir.1995) ("A traffic stop is valid under the Fourth Amendment if the stop is based on an observed traffic violation or if the police officer has reasonable articulable suspicion that a traffic or equipment violation ***has occurred or is occurring***."); *United States v. Jones*, 501 F. Supp. 2d 1284, 1288 (D. Kan. 2007)("An initial traffic stop is valid under the Fourth Amendment not only if based on an observed traffic violation, but also if the officer has a reasonable articulable suspicion that a traffic or equipment violation ***has occurred or is occurring***."); *U.S. v. Callarman*, 273 F.3d 1284, 1286 (10th Cir.2001)("A traffic stop is valid under the Fourth Amendment if it is "***based on an observed traffic violation*** or if the police officer has reasonable articulable suspicion that a traffic or equipment violation ***has occurred or is occurring***."); *United States v. Nicholson*, 721 F.3d 1236, 1238 (10th Cir. 2013)("The Fourth Amendment requires that a traffic stop be "objectively justified" at its inception. That means a traffic stop must be "based on ***an observed traffic violation***" or a police officer's "reasonable articulable suspicion that a traffic or equipment violation ***has occurred or***

is occurring."); *United States v. Wallace*, 213 F.3d 1216, 1219 (9th Cir. 2000), as amended (July 7, 2000)("[T]he decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation ***has occurred***.")(citing *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996)); *State v. Dewbre*, 133 Idaho 663, 665, 991 P.2d 388, 390 (Ct. App. 1999)(Under the Fourth Amendment, an officer may stop a vehicle to investigate possible criminal behavior if there is an articulable and reasonable suspicion that the vehicle ***is being driven contrary to traffic laws***.)(citing *United States v. Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690, 694, 66 L.Ed.2d 621, 628 (1981)).

This Court should presume that the use of the past and present tenses, and the exclusion of the future tense, was intentional. When an officer suspects criminal activity, the officer may ***investigate*** whether a crime is about to be committed. However, since this case does not involve an investigative stop based on suspected criminal behavior, the non-investigatory traffic stop analysis should be applied.

The Seizure Was Not Reasonable Based on a "Reasonable Suspicion That a Traffic Offense Had Already Been Committed" (Past Traffic Violations)

The overwhelming majority of decisions on the issue involve the use of present and past tense. In its decision, the District Court seemed to

consider, almost hypothetically that perhaps a past tense evaluation in this may also have justified the traffic stop. The Court, in dicta, stated:

> ...the Court notes that Bestor could have possessed a reasonable belief that a traffic law had been violated. Because the property at issue was a hotel and not the home or other private property of the driver of the Subaru, it was reasonable for Bestor to believe that the driver of the Subaru had previously committed a traffic infraction by driving to the hotel parking lot in the first place. It is not likely that the first time the headlight on the Subaru failed to function was when the car attempted to leave the parking lot.

The Court's understanding of the past tense language seems misplaced. The past tense language is intended for offenses which are committed in the officer's presence or with immediate response to a report.

Even if such violations could be investigated, absent speculation, the information in this case would be stale. The "staleness doctrine ... requires that the information supporting the government's application for a warrant must show that probable cause exists at the time the warrant issues." *United States v. Touset*, 890 F.3d 1227, 1237–38 (11th Cir. 2018)(citations omitted). And the staleness doctrine also applies to reasonable suspicion. *Id*.

The focus is not on whether a reasonable officer "could" have stopped the suspect (because a traffic violation had in fact occurred), but on whether this particular officer in fact had probable cause to believe that a

traffic offense had occurred, regardless of whether this was the only basis or merely one basis for the stop. *United States v. Ferguson*, 8 F.3d 385, 391 (6th Cir. 1993). A probable cause determination is fact-dependent and will turn on what the officer knew at the time he made the stop. *Id*. If an officer testifies at a suppression hearing that he in fact did not see the traffic violation or did not have probable cause to believe a violation had occurred, but only discovered after the stop or the arrest that the suspect had committed a traffic violation, a court could not find that probable cause existed. *Id*.

Here, the vehicle may or may not have traveled to the motel on a public highway with a broken headlight. If it did, it was not witnessed or reported by anyone. The officer had no knowledge of any facts which suggested when the vehicle arrived, or when the headlight broke. The officer had no evidence of when or if the vehicle may have travelled on a public highway with a defective headlight. This is simply too speculative to justify a traffic investigation into defective equipment on a vehicle on private property. To create such a holding would open the door for the investigation of any vehicles found parked on private property with an equipment violation.

V. Conclusion

As the officer did not observe the Defendant's vehicle being driven contrary to traffic laws, or that a traffic violation had, or was occurring, then the stop was unreasonable pursuant to the Fourth Amendment of the U.S. Constitution and Article 1 Section 17, and the motion to suppress should have been granted.

WHEREFORE the Appellant requests that the decisions of the District Court as to the Appellant's Motion to Suppress be reversed and the matter remanded to the District Court for further proceedings.

RESPECTFULLY SUBMITTED, this 22nd Day of July, 2019.

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Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify I am a licensed attorney in the state of Idaho and on the date indicated below, I served a true and correct copy of the **Appellant's Brief** on the following by the method of delivery designated:

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DATED THIS 22ND DAY OF JULY, 2019.

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