5-11-2016

State v. Franklin Appellant's Reply Brief Dckt. 42390

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NO. 42390**
	)	
v.	)	**BOISE COUNTY NO. CR 2013-458**
	)	
TRICIA FRANKLIN,	)	**REPLY BRIEF**
	)	
Defendant-Appellant.	)	
_____	)	

_____

REPLY BRIEF OF APPELLANT

_____

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BOISE

_____

HONORABLE PATRICK H. OWEN
District Judge

_____

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STATEMENT OF THE CASE

Nature of the Case

On appeal, the State has conceded that "recent Idaho Supreme Court decisions holding that implied consent may be revoked renders the implied consent exception inapplicable under the facts of this case." Accordingly, that issue is not addressed any further. However, the instant Reply Brief in necessary to address the State's exigent circumstances analysis and its argument, raised for the first time on appeal, that the district court's order denying Ms. Franklin's motion to suppress may be affirmed on an alternative ground, not previously addressed by any party, much less the district court. For the reasons articulated herein and in Ms. Franklin's Appellant's Brief, the district court erred by denying Ms. Franklin's motion to suppress the results of the warrantless blood draw.

Statement of Facts and Course of Proceedings

The statement of facts and course of proceedings were previously articulated in Mr. Franklin's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUE

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

ARGUMENT

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

A. The District Court's Pertinent Factual Findings Were Clearly Erroneous And Not Supported By Evidence Offered By The State

In its briefing, the State challenges Ms. Franklin's argument that the district court made a clearly erroneous factual finding in determining Deputy Tatalian did not request the blood draw until around midnight. (Respondent's Brief, pp.6-8.) Specifically, the State challenges Ms. Franklin's reliance on Deputy Tatalian's adoption of 11:17 p.m. as the time he contacted Boise County to seek a phlebotomist as "mystifying" because the referenced dispatch records were not offered into evidence during the suppression hearing. (Respondent's Brief, p.7.) In presenting its argument, the State's recitation of the underlying record is not entirely forthcoming with this Court. The State fails to acknowledge that, in its objection to Ms. Franklin's motion to suppress, *the prosecutor* argued that "Deputy Tatilian notified dispatch that he needed a phlebotomist to go to St. Alphonsus Hospital for a blood draw at 11:17 p.m." (R., p.63.) Then, at the suppression hearing, the following colloquy occurred between *the prosecutor* and his witness, Deputy Tatilian:

> Prosecutor: At some point did you, by way of radio, contact your dispatch in Boise County to seek a phlebotomist and officer to accomplish a blood draw?
>
> Tatilian: I did.
>
> Prosecutor: Do you recall what time that was?
>
> Tatilian: I don't recall a specific time off the top of my head, no.
>
> Prosecutor: If the dispatch log indicates 11:17, would that be accurate?

Tatilian: It would be within[] a minute or two of me calling, yes.

(12/26/13 Tr., p.14, L.22 – p.15, L.7.)

On appeal, the State characterizes Officer Tatilian's testimony as, just that the dispatch log would be accurate within two minutes of him calling, and seems to conclude that *the prosecutor's* reference to the time reflected on the log of 11:17 at the time of the call as superfluous. (Respondent's Brief, p.7, fn 1.) In addressing this issue, the State omits from its briefing the fact that, in the district court, the prosecutor had taken the position the call occurred at 11:17 p.m. and it was the prosecutor that was asking Officer Tatilian to adopt the time of the requested blood draw being 11:17 p.m. It is clear that Officer Tatilian's response to the prosecutor's question was an adoption of time of the call being 11:17. The specific question from the prosecutor was: "If the dispatch log indicates 11:17, would that be accurate?" (12/26/13 Tr., p.15, Ls.4-5.) Officer Tatilian's answer was: "It would be within[] a minute or two of me calling, yes." (12/26/13 Tr., p.15, Ls.6-7.) Officer Tatilian is clearly answering the question asked by the prosecutor: "It would be [accurate,] within[] a minute or two of me calling, yes." (12/26/13 Tr., p.15, Ls.6-7 (alteration in brackets).) To the extent there was any confusion that Officer Tatilian was adopting the time referenced by the prosecutor, it is removed when the officer concludes his answer with an affirmative, "yes." (12/26/13 Tr., p.15, Ls.6-7 (alteration in brackets).) Accordingly, Officer Tatilian was unequivocally adopting 11:17 p.m. as the time he called to request a phlebotomist and the State's attempts to distance itself from the prosecutor's position below should be disregarded.

Even if there was competent evidence to conclude that Officer Tatilian did not, and could not have sought to obtain a warrant until approximately midnight, the forty

minutes from the time the officer completed his investigation and the blood draw ultimately occurred was ample time to seek and obtain a valid telephonic warrant.[1] As Justice Roberts wrote in his opinion concurring in part and dissenting in part, judges in Utah have been known to issue warrants in as little as five minutes while in one county in Kansas, warrants are processed in less than fifteen minutes. *Missouri v. McNeely*, 133 S.Ct. 1552 (2013) (J. Roberts concurring in part and dissenting in part). Here, the State did not offer any testimony as to how long it would taken to obtain a telephonic warrant, and as such, failed to meet its burden to establish a valid exigent circumstances exception to the warrant requirement. However, even if the State had met its burden, forty minutes is more than sufficient time for Deputy Tatilian to seek and obtain a telephonic warrant.

B. The State Waived Its Allegation That The Search In This Case Was Not Action Taken By A Government Agent By Not Raising That Issue In The District Court

In its Respondent's Brief, the State argues, "Franklin failed to prove that a search protected by the Fourth Amendment occurred when a nurse already drawing blood for medical purposes merely filled additional sample tubes for law enforcement use." (Respondent's Brief, pp.4, 10-11.) At no point in its brief does the State acknowledge that this issue or theory was not presented to the district court and never ruled on by the district court. The State's brief does not indicate that it is raising this new theory for the

[1] Upon reviewing the district court's memorandum order denying Ms. Franklin's motion to suppress, undersigned counsel acknowledges that the district court did not find it would take two to three hours to *obtain* a warrant and hereby withdraws that portion of the Appellant's Brief to the extent it argues that finding was clearly erroneous.

first time on appeal, nor does it admit to this Court that the prosecutor below effectively conceded this issue when he agreed with the district court that the burden had shifted to the State to show a valid exception to the warrant requirement. (12/23/13 Tr., p.6, L.22 – p.7, L.2.) Finally, in arguing that the search was not conducted by a government agent for the first time on appeal, the State fails to disclose controlling legal authority directly adverse to its position. *See Obenchain v. McAlvain Constr., Inc.,* 143 Idaho 56, 57 (2006) ("Appellate court review 'is limited to the evidence, theories and arguments that were presented . . . below.' Consequently, appellate courts will not consider new arguments raised for the first time on appeal."); *see also State v. Frederick*, 149 Idaho 509, 515 n.4 (2010) (recognizing generally that the Respondent cannot raise good faith exception the first time on appeal); *State v. Field*, 144 Idaho 559, 567 & n.5 (2007) (holding that the Respondent cannot invoke the catchall hearsay exception for the first time on appeal); and *State v. Armstrong*, 158 Idaho 364 (2015) (recognizing appellant cannot raise an issue not before the trial court for the first time on appeal).

Thus, the State is foreclosed from arguing a new theory for the first time on appeal and this Court should refuse to consider the State's argument on appeal that the search was not conducted by an agent of the State of Idaho.

CONCLUSION

Ms. Franklin respectfully requests that this Court reverse the district court's order denying her motion to suppress and remand for further proceedings.

DATED this 11th day of May, 2016.

_____/s/_____
ERIC D. FREDERICKSEN
Chief, Appellate Unit

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 11th day of May, 2016, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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PATRICK H OWEN
DISTRICT COURT JUDGE
E-MAILED BRIEF

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_____/s/_____
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EDF/eas