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State v. Stark Appellant's Reply Brief Dckt. 46359

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IN THE SUPREME COURT OF THE STATE OF IDAHO

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

HONORABLE JASON D. SCOTT
District Judge

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STATEMENT OF THE CASE

Nature of the Case

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.

In its Respondent's Brief, the State argues the district court correctly determined the officers' suspicion that it was another person, Justin Burns, driving the car was reasonable. (*See* Resp. Br., p.5.) The officers suspected Mr. Burns of having an outstanding warrant and committing criminal activity. The State contends that this "mistaken identity" did not negate reasonable suspicion to conduct the stop of the car Mr. Stark was driving. (*See* Resp. Br., p.6.)

This Reply Brief is necessary because the State did not present a mistaken identity argument to the district court. Thus, under *State v. Garcia-Rodriguez*, 162 Idaho 271 (2017), the State's mistaken identity argument on appeal should not be considered by this Court. And even if the mistaken identity argument could be considered here, the officers did not reasonably mistake Mr. Stark for Mr. Burns. The officers did not see Mr. Stark before initiating the traffic stop and compare his features to those of Mr. Burns, and there was no showing that Mr. Stark looked like Mr. Burns. The officers' unreasonable mistake, alongside the rest of the totality of the circumstances, did not provide the officers with a particularized and objective basis for suspecting Mr. Stark of criminal activity, and the officers did not have reasonable, articulable suspicion to justify the traffic stop.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Stark'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 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. 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. *See United States v. Cortez*, 449 U.S. 411, 417-18 (1981). Thus, the officers did not have reasonable, articulable suspicion to justify the traffic stop of Mr. Stark. *See State v. Fuller*, 163 Idaho 585, 588 (2018).

1. The Court Should Not Consider The State's Mistaken Identity Argument On Appeal, Because The State Did Not Present A Mistaken Identity Argument To The District Court

The Court should not consider the State's "mistaken identity" argument on appeal, because the State did not present a mistaken identity argument to the district court. In its Respondent's Brief, the State argues, "The district court concluded that the officer's suspicion that [Mr.] Burns was driving the car, based upon evidence that [Mr.] Burns had been driving the car at least three times in the past three months in the same general area, was reasonable." (Resp. Br., p.7.) According to the State, the district court "did not err by concluding the officer's suspicion that [Mr. Burns] was driving the car, although ultimately incorrect, was reasonable." (Resp. Br., p.7.) Put otherwise, the State contends, "[t]he district court did not err by concluding the mistaken identity did not render the initial traffic stop constitutionally unreasonable." (Resp. Br., p.7.) However, the State makes this "mistaken identity" argument for the first time on appeal.

The United States Supreme Court set out the law for mistaken identity arrests in *Hill v. California*, 401 U.S. 797 (1971). The *Hill* Court found no reason to disturb the conclusion of the California appellate courts "that when the police have probable cause to arrest one party, and when they reasonably mistake a second party for the first party, then the arrest of the second party is a valid arrest." *Id.* at 802. The Idaho Court of Appeals, citing *Hill*, later observed that "a search incident to an arrest may be lawful even though the arrest was made of the wrong person where the police were reasonable in their mistaken belief as to the identity of the arrestee." *State v. McCarthy*, 133 Idaho 119, 125 (Ct. App. 1999). Courts in other jurisdictions have applied *Hill* in the context of reasonable suspicion for a limited detention, like the traffic stop at issue here. *See, e.g., State v. Lawton*, 94 P.3d 154, 156 (Or. Ct. App. 2004).

But Mr. Stark remembers what the State argued before the district court. The State did not present to the district court any such mistaken identity arguments—i.e., that the officers had reasonably mistaken Mr. Stark for Mr. Burns. Rather, the State merely argued in opposition to Mr. Stark's motion to suppress that "Officer Barghoorn had reasonable articulable suspicion that (1) the vehicle had been involved in criminal activity . . . and (2) that the driver was a wanted person." (*See* R., p.50.) The State contended the officer "believed the wanted person who had committed those crimes was driving the Saturn." (R., p.51.) Likewise, at the motion to suppress hearing, the State argued, "In this case Officer Barghoorn believed that Justin Burns was driving the vehicle. He believed or knew he was a wanted individual from IDOC. He also knew that he had engaged in criminal activity." (Tr., p.44, Ls.22-25.)

The State's actual argument before the district court, that the officers had reasonable suspicion that Mr. Burns was driving the car, is a step removed from a mistaken identity argument that the officers had reasonably mistaken Mr. Stark for Mr. Burns. If anything, the State's argument before the district court was that the officers reasonably believed Mr. Burns was driving, despite the officers' failure to identify the driver. Thus, the State did not present a mistaken identity argument to the district court. *See Hill*, 401 U.S. at 802.

Because the State did not present a mistaken identity argument to the district court, this Court should not consider the State's mistaken identity argument on appeal. The Idaho Supreme Court has a "longstanding and recently re-affirmed policy of requiring parties to present their arguments to the court below." *State v. Cohagan*, 162 Idaho 717, 721 (2017). As the Idaho Supreme Court explained in *State v. Garcia-Rodriguez*, 162 Idaho 271 (2017), "[i]ssues not raised below will not be considered by this court on appeal, and the parties will be held to the theory upon which the case was presented to the lower court." *Garcia-Rodriguez*, 162 Idaho at

275; *see McCarthy*, 133 Idaho at 125 ("Because this is a theory that was not advanced by the prosecutor at the suppression hearing, McCarthy had no opportunity to respond through evidence and the magistrate did not address it in his findings. Consequently, we will not consider it."). Under *Garcia-Rodriguez*, because the State did not raise its mistaken identity argument before the district court, this Court should not consider the issue on appeal.

The Idaho Supreme Court has also held that, while "ordinarily issues cannot be raised for the first time on appeal," an exception to that rule "has been applied by this Court when the issue was argued to or decided by the trial court." *State v. DuValt*, 131 Idaho 550, 553 (1998). But *DuValt* does not apply here to save the State's mistaken identity argument raised for the first time on appeal, because the district court did not decide the mistaken identity issue. Rather, the district court's determinations closely followed the State's arguments on the officers' belief that Mr. Burns was driving the car, despite the officers' failure to identify the driver. Specifically, the district court determined "the officer had a reasonable articulable suspicion that Justin Burns was inside the vehicle," subject to an outstanding warrant, and had committed eluding and/or drug offenses. (Tr., p.60, Ls.9-17.) The district court did not decide the mistaken identity issue, i.e., whether the officers had reasonably mistaken Mr. Stark for Mr. Burns.

The State did not present a mistaken identity argument to the district court. Thus, this Court should not consider the State's mistaken identity argument on appeal.

2. The Officers Did Not Reasonably Mistake Mr. Stark For Mr. Burns

Even if the State's mistaken identity argument could be considered here, the officers did not reasonably mistake Mr. Stark for Mr. Burns. Before initiating the traffic stop, the officers did not see Mr. Stark and compare his features to those of Mr. Burns, and there was no showing that Mr. Stark looked like Mr. Burns.

Unlike the instant case, in cases where courts in other jurisdictions have held mistaken identity did not negate probable cause for an arrest or reasonable suspicion for a detention of a person, the officers saw the person before the arrest or detention, and the person arrested or detained resembled the suspect sought by the officers. For example, in *Hill*, the leading case on mistaken identity arrests, the United States Supreme Court found, "The police unquestionably had probable cause to arrest Hill; they also had his address and a verified description." *Hill*, 401 U.S. at 802-03. The mailbox at the address listed Hill as the apartment's occupant. *Id.* at 803. The *Hill* Court found, "Upon gaining entry to the apartment, they were confronted with one who fit the description of Hill received from various sources." *Id.*

While "[t]hat person claimed he was Miller, not Hill," the *Hill* Court observed, "aliases and false identifications are not uncommon." *Id.* Further, the door had a lock and Miller's explanation for how he entered the apartment was not convincing, and he denied knowledge of firearms in the apartment even though a pistol was in plain view. *See id.* Thus, "the officers in good faith believed Miller was Hill and arrested him." *Id.* at 803-04. The *Hill* Court cautioned that subjective good-faith belief would not in itself justify the arrest, but held "sufficient probability, not certainty is the touchstone of reasonableness under the Fourth Amendment and on the record before us the officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time." *Id.* at 804.

Similarly, in *United States v. Lang*, 81 F.3d 955 (10th Cir. 1996), the United States Court of Appeals for the Tenth Circuit held it could not conclude an FBI agent's misidentification of Mr. Lang as one Mr. Phommachanh was unreasonable. *Lang*, 81 F.3d at 966. The agent in *Lang* was part of a task force investigating Mr. Phommachanh's involvement in several robberies and a murder. *See id.* at 965. Mr. Lang was the passenger in a Blazer stopped by the agent, because

the agent believed Mr. Lang was Mr. Phommachanh. *See id.* at 959-60. The agent had a mug shot and description of Mr. Phommachanh, but had not seen him in person. *See id.* at 966.

Mr. Lang argued the mistake of identity was unreasonable because of the physical dissimilarities between himself and Mr. Phommachanh, including height, weight, and hairstyle. *Id.* at 966. However, the agent testified he had approximately ten seconds to observe Mr. Lang walking between a mobile home and the Blazer, from a distance of fifty to seventy yards. *See id.* The *Lang* Court also found that the agent "observed [Mr. Lang] by driving alongside the Blazer and making a visual comparison between the mug shot pictures and the physical features of the vehicle's passenger." *Id.* The Tenth Circuit noted, "The brief time period and the difficulty of identifying someone in a moving vehicle must be taken into consideration in evaluating the reasonableness of [the agent's] mistake." *Id.* Additionally, "the district court specifically found the mug shot picture of Mr. Phommachanh 'looked very much like [Mr. Lang].'" *Id.*

The *Lang* Court next found the agent "had the best opportunity" to compare Mr. Lang's facial features with the mug shot, and his opportunity to compare Mr. Lang's height and weight to the suspect's was hindered by the limited time period he saw Mr. Lang outside the mobile home, and Mr. Lang's seated position in the vehicle. *Id.* The Lang Court held: "Under the totality of the circumstances, we cannot conclude [the agent's] misidentification of [Mr. Lang] as Mr. Phommachanh was unreasonable. Accordingly, we hold the Task Force possessed sufficient justification to stop the Blazer." *Id.*

Further, in *United States v. Neeman*, 61 F. Supp. 2d 944 (D. Neb. 1999), officers executed a valid traffic stop when they stopped the defendant's vehicle in reliance on a request from a deputy United States marshal, even though the deputy marshal was mistaken about the identify of a passenger in the vehicle. *See Neeman*, 61 F. Supp. 2d at 946-47, 950-51. In

Neeman, the United States District Court for the District of Nebraska found that when the deputy marshal requested that the defendant's vehicle be stopped, he possessed the following objective facts: "First, he knew that an individual named Richard Maher was wanted for violating the terms of his pretrial release. Second, he saw a man, whom he believed to be Mr. Maher, but later determined to be Gary Borland, leave a residence on North 70th Street, where he believed Maher was staying." *Id.* at 950-51.

The *Neeman* Court held that, although the deputy marshal "was not entirely sure that the passenger was Mr. Maher, considering that it was dark, the passenger had a hat on, and the fact that Mr. Maher and the passenger, Gary Borland, look remarkably similar, especially with Borland wearing a hat, I conclude that it was reasonable for [the deputy marshal] to believe that the passenger in the vehicle was Maher." *Id.* at 951. The Court held that the deputy marshal's belief "provided the requisite 'reasonable suspicion' to stop the vehicle to determine whether the passenger was Mr. Maher." *Id.*

In contrast to *Hill*, *Lang*, and *Neeman*, the officers here did not see Mr. Stark and compare his features to those of Mr. Burns, and there was no showing that Mr. Stark looked like Mr. Burns. Officer Barghoorn did not see who was driving the car on February 20 before initiating the traffic stop. Rather, on cross-examination, when asked, "So essentially you did not see who was driving the vehicle before the seizure?", the officer ultimately answered, "Yes, that is correct." (Tr., p.40, Ls.11-15.) Officer Barghoorn initiated the traffic stop. (Tr., p.23, Ls.19-20.) Thus, unlike the officers in *Hill* and the agent in *Lang*, the officers in the instant case made no effort to compare Mr. Stark's appearance to the description or images of Mr. Burns. *See Hill*, 401 U.S. at 803; *Lang*, 81 F.3d at 966.

Conversely, Officer Barghoorn had confirmed that Mr. Burns was driving the car during the previous February 8 encounter. The district court found the officer on February 8 had positioned "himself in such a way that he can see who the driver is on this occasion, 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." (*See* Tr., p.53, Ls.15-20.) But Officer Barghoorn on February 20 made no such efforts to compare Mr. Stark's facial features with those of Mr. Burns, or to otherwise identify the driver as Mr. Burns, before stopping Mr. Stark.

Moreover, the district court here did not find that Mr. Stark resembled Mr. Burns in appearance. (*See* Tr., p.50, L.25 – p.61, L.23.) By the time of the February 20 traffic stop, Officer Barghoorn knew what Mr. Burns looked like, based on Mr. Burns's images on an identification card and in a surveillance video. (*See* Tr., p.52, Ls.2-20.) As discussed above, the officer had also confirmed that Mr. Burns was driving the car during the February 8 encounter. (*See* Tr., p.53, Ls.15-20.) But unlike the officers in *Hill*, Officer Barghoorn and the other officers never saw Mr. Stark before initiating the traffic stop, meaning they never determined Mr. Stark "fit the description" of Mr. Burns. *See Hill*, 401 U.S. at 803. Further, unlike the district courts in *Lang* or *Neeman*, the district court in the instant case never determined that Mr. Stark looked like Mr. Burns. *See Lang*, 81 F.3d at 966; *Neeman*, 61 F. Supp. 2d at 950-51.

Because the officers here did not see Mr. Stark and compare his features to those of Mr. Burns, and there was no showing that Mr. Stark looked like Mr. Burns, the officers did not reasonably mistake Mr. Stark for Mr. Burns. *See, e.g.*, *Hill*, 401 U.S. at 802-04. What the officers did was fail to identify the driver before stopping Mr. Stark, and that failure to identify did not render their mistake reasonable.

The officers' unreasonable mistake, alongside the rest of the totality of the circumstances here, did not provide the officers with a particularized and objective basis for suspecting Mr. Stark of criminal activity. At the time of the traffic stop, the officers knew about Mr. Burns, his outstanding warrant, and his potential criminal activity. (*See* App. Br., pp.12-13.) But the officers had last seen Mr. Burns drive the car, which belonged to someone else, twelve days before the traffic stop; they did not know who was driving the car at the time; and they had not seen the car's driver commit any traffic violations that day. (*See* App. Br., pp.13-14.)

Thus, under the totality of the circumstances, including the officers' unreasonable mistake, the officers did not have 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 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 State v. Nunez*, 138 Idaho 636, 640 (2003). Mr. Stark's motion to suppress the evidence discovered as a result of the illegal warrantless seizure should have been granted. *See State v. Frederick*, 149 Idaho 509, 515 (2010).

CONCLUSION

For the above reasons, as well as the reasons contained in the Appellant's Brief, 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 12th day of June, 2019.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of June, 2019, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, to be served as follows:

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BPM/eas