

Uldaho Law

Digital Commons @ Uldaho Law

Not Reported

Idaho Supreme Court Records & Briefs

5-23-2019

State v. Damian Appellant's Brief Dckt. 46636

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/not_reported

Recommended Citation

"State v. Damian Appellant's Brief Dckt. 46636" (2019). *Not Reported*. 5752.
https://digitalcommons.law.uidaho.edu/not_reported/5752

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ Uldaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ Uldaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 46636-2018
Plaintiff-Respondent,)	
)	ADA COUNTY NO. CR01-18-12907
v.)	
)	
JON THOMAS DAMIAN,)	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**

HONORABLE PETER BARTON
District Judge

ERIC D. FREDERICKSEN
State Appellate Public Defender
I.S.B. #6555

BEN P. MCGREEVY
Deputy State Appellate Public Defender
I.S.B. #8712
322 E. Front Street, Suite 570
Boise, Idaho 83702
Phone: (208) 334-2712
Fax: (208) 334-2985
E-mail: documents@sapd.state.id.us

**ATTORNEYS FOR
DEFENDANT-APPELLANT**

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

**ATTORNEY FOR
PLAINTIFF-RESPONDENT**

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE CASE	1
Nature of the Case	1
Statement of the Facts and Course of Proceedings	1
ISSUE PRESENTED ON APPEAL.....	6
ARGUMENT.....	7
The District Court Erred When It Denied Mr. Damian’s Motion To Suppress	7
A. Introduction	7
B. Standard Of Review.....	7
C. The Stop Of Mr. Damian’s Van Was Unlawful.....	7
CONCLUSION.....	10
CERTIFICATE OF MAILING	10

TABLE OF AUTHORITIES

Cases

Halen v. State, 136 Idaho 829 (2002)8, 9

State v. Bishop, 146 Idaho 804, 810 (2009)7, 8

State v. Emory, 119 Idaho 66 (Ct. App. 1991)2, 4

State v. Hankey, 134 Idaho 844 (2000).....7

State v. Henage, 143 Idaho 655 (2007).....8

State v. Koivu, 152 Idaho 511 (2012).....7

State v. Morgan, 154 Idaho 109 (2013)8

State v. Neal, 159 Idaho 439 (2015).....8, 9

State v. Stewart, 145 Idaho 641 (Ct. App. 2008).....8

Terry v. Ohio, 392 U.S. 1 (1968).....8

Utah v. Strieff, 136 S. Ct. 2056 (2016).....3

Statutes

I.C. § 37-2732(c).....1

I.C. § 37-2734A1

I.C. § 49-6378, 9

I.C. § 49-808.....5, 9

Constitutional Provisions

Idaho Const. art. I, § 17.....7

U.S. Const. amend. IV.....7

STATEMENT OF THE CASE

Nature of the Case

Jon Thomas Damian asserts the district court erred when it denied his motion to suppress. Mindful of the applicable authorities, Mr. Damian asserts the stop of his van was unlawful.

Statement of the Facts and Course of Proceedings

According to the district court's findings of fact in its Order Re Motion to Suppress and Restitution: "Officer Tiner was working as a patrol officer for the Boise City Police. He was parked on Orchard Street when he saw a blue van traveling westbound on Cassia Street come to a stop at the intersection with Orchard and then make a northbound turn." (R., p.71.) The officer "testified that the van did not signal to turn and so he decided to follow the blue van." (R., p.71.) Officer Tiner "subsequently saw it straddle a lane as it turned westbound from Orchard to Franklin Street turning into the left, or center, westbound lane of Franklin," and then "saw the van signal to the right and immediately merge[] out of the center lane." (R., pp.71-72.)

Officer Tiner "activated his lights and stopped the blue van on Franklin." (R., p.72.) Mr. Damian was driving the van and provided his driver's license. (R., p.72.) "Dispatch informed Officer Tiner that Mr. Damian was wanted on a warrant," and the officer "conducted a search of Mr. Damian incident to arrest and discovered methamphetamine and a pipe in Mr. Damian's pocket." (R., p.72.)

The State charged Mr. Damian by Information with possession of a controlled substance, felony, I.C. § 37-2732(c), and possession of drug paraphernalia, misdemeanor, I.C. § 37-2734A. (R., pp.24-25.) Mr. Damian entered a not guilty plea to the charges. (*See* R., p.30.)

Mr. Damian later filed a Motion to Suppress, asserting he "and the vehicle he was driving were illegally stopped and seized without reasonable suspicion or probable cause to believe that

a crime had been committed and that one of the occupants of the vehicle committed that crime,” in violation of his “rights under Article I, Section 13 and 17 of the Constitution of the State of Idaho, and under the Fourth and Fourteenth Amendments, Section 1, to the Constitution of the United States of America.” (R., pp.39-41.) He asserted, “Because the seizure of the Defendant was not supported by reasonable articulable suspicion, or probable cause, all evidence derived from the seizure of the Defendant must be suppressed as fruit of the poisonous tree.” (R., pp.39-40.)

In his Memorandum in Support of Motion to Suppress, Mr. Damian asserted Officer Tiner did not have reasonable suspicion to conduct an investigatory stop because Mr. Damian’s driving conduct fell within the broad range of normal driving behaviors. (R., p.44.) Mr. Damian believed “the evidence at hearing will show that he did use his turn signal properly before turning from Cassia onto Orchard, and that Tiner was mistaken in believing he did not.” (R., p.44.) He also believed “that his tires were not on or over the dotted line while making the turn from Orchard onto Franklin, and that Tiner was mistaken in believing that they were.” (R., p.44.)

Further, Mr. Damian asserted “his action in turning west onto Franklin from Orchard, and then signaling immediately before changing lanes, was necessary for him to access the Fred Meyer located at that intersection and was within the broad range of normal driving behaviors.” (R., p.44.) He asserted, “The Idaho Court of Appeals has long held that conduct falling within the broad range of normal driving behavior does not give rise to reasonable suspicion.” (R., p.44 (citing *State v. Emory*, 119 Idaho 661, 664 (Ct. App. 1991)). According to Mr. Damian: “With respect to the second failure to signal for 100 feet prior to turning right into the Fred Meyer . . . this was impossible for someone turning left onto Franklin from Orchard. That driver would

need to indicate a left turn to negotiate the intersection, and once in the intersection, the right turn into Fred Meyer is less than 100 feet away.” (R., p.44.)

Moreover, Mr. Damian asserted: “There are many locations in this city where several possible turns exist within a 100-foot distance. To require an automatic 100-foot signaling distance in all situations would require drivers to turn on their signals and then pass several turns before making their desired turn.” (R., p.44.) He asserted, “This would not provide notice to others that the driver was turning as the statute is designed to do, but would rather confuse other drivers into thinking that [the] driver was unaware his turn signal was on since he passed so many turns.” (R., pp.44-45.) Thus, Mr. Damian’s “actions with respect to this signal [were] in the broad range of normal driving behavior.” (R., p.45.)

The State filed a State’s Objection to Defendant’s Motion to Suppress, arguing Mr. Damian’s three actions at issue “all give rise to reasonable, articulable suspicion that the defendant was violating traffic laws.” (R., pp.48-52.) The State also contended that, even if Officer Tiner did not have reasonable, articulable suspicion for the traffic stop, the attenuation doctrine exception to the exclusionary rule applied because the pre-existing valid arrest warrant was a significant intervening factor that made exclusion of the evidence inappropriate. (*See* R., p.51 (citing *Utah v. Strieff*, 136 S. Ct. 2056 (2016).)

The district court conducted a hearing on the motion to suppress, where Mr. Damian and Officer Tiner testified. (*See* R., pp.65-66.) Mr. Damian also presented four video clips of footage taken from a neighbor’s surveillance system, and testified the footage reflected his driving pattern as he was turning onto Cassia from Orchard, including his turn signal blinking clearly. (*See* Def. Ex. A; Tr., p.16, L.21 – p.31, L.2.)¹ Mr. Damian asserted the traffic stop was

¹ All citations to “Tr.” refer to the transcript of the August 14, 2018, motion to suppress hearing.

unlawful, and attenuation would not apply to save the evidence from the exclusionary rule. (*See* Tr., p.61, L.11 – p.64, Ls.12.)

The district court subsequently issued an Order Re Motion to Suppress and Restitution. (R., pp.71-77.) The district court determined that “Officer Tiner testified credibly that he saw Mr. Damian pull onto Orchard from Cassia without signaling.” (R., p.74.) While Mr. Damian testified “that he signaled properly when turning out of Cassia,” and also presented video evidence showing a vehicle turning onto Orchard from Cassia with the rear turn signal visible and activated, the district court determined “the video clips do not show what Officer Tiner saw that night.” (R., p.74.) Per the district court, “They do not show whether the front turn signal of Mr. Damian’s van—the signal visible to Officer Tiner—was activated.” (R., p.74.)

Next, the district court determined: “Officer Tiner testified that he observed that Mr. Damian, while driving on Orchard and Franklin, twice failed to maintain his lane. Mr. Damian argues that he did not leave his lane. Officer’s Tiner’s testimony was credible.” (R., p.74.)

Further, “Officer Tiner testified that Mr. Damian changed lanes too soon after turning onto Franklin and too soon after beginning to signal left.” (R., p.74.) The district court noted, “Mr. Damian does not dispute the timing of his signal or merge but argues that some of the entrances to the Fred Meyer parking lot are only fifty or sixty feet from the intersection and so he did not have more time to merge or signal.” (R., pp.74-75.) The district court explained the conduct at issue in *Emory* “that the officer used to justify his stop was that the car delayed at the traffic light for five to six seconds,” which was “not a violation of law and does fall ‘within the broad range of what can be described as normal driving behavior.’” (R., p.75 (quoting *Emory*, 119 Idaho at 664).) The district court determined that, in contrast, “Mr. Damian violated a traffic

statute, Idaho Code Section 49-808(2), which is a violation of law.” (R., p.75.) Thus, the district court determined: “Whether Mr. Damian was charged or prosecuted is not relevant. The violation of the traffic law provides the basis for the stop.” (R., p.75.)

The district court therefore determined: “When viewed under the totality of the circumstances at the time of the stop, Officer Tiner had a reasonable and articulable suspicion that the vehicle was being driven contrary to traffic laws. Officer Tiner pulled over Mr. Damian for three traffic violations. Any of the three reasons was sufficient. The stop was justified.” (R., p.76.) The district court denied the motion to suppress.² (R., p.76.)

Pursuant to a conditional plea agreement which preserved his right to appeal the district court’s denial of his motion to suppress, Mr. Damian agreed to plead guilty to possession of a controlled substance. (See R., pp.79-86.) The district court imposed a unified sentence of three years, with one year fixed, suspended the sentence, and placed Mr. Damian on probation for a period of three years. (R., pp.89-96.)

Mr. Damian filed a Notice of Appeal timely from the district court’s Judgment of Conviction, Suspended Sentence and Order of Probation. (R., pp.99-102.)

² The State had also filed a Motion for Cost, related to the State’s payment for the presence of Officer Tiner at a hearing which ultimately was not held because Mr. Damian did not appear. (R., pp.59-60.) The district court, after observing, “No rule in the Idaho Criminal Rules directly authorizes the State to be reimbursed for the cost of having its witness present,” denied the motion for cost “in an exercise of this Court’s discretion.” (R., p.76.)

ISSUE

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

ARGUMENT

The District Court Erred When It Denied Mr. Damian's Motion To Suppress

A. Introduction

Mr. Damian asserts the district court erred when it denied his motion to suppress, because the stop of his van was unlawful. Thus, the evidence obtained as a result of the traffic stop should have been suppressed.

B. Standard Of Review

The standard of review for a motion to suppress is bifurcated. An appellate court defers to the trial court's findings of fact unless the findings are clearly erroneous, and freely reviews the trial court's application of constitutional principles to the facts as found. *State v. Hankey*, 134 Idaho 844, 846 (2000). "Findings of fact are not clearly erroneous if they are supported by substantial and competent evidence. Decisions regarding the credibility of witnesses, weight to be given to conflicting evidence, and factual inferences to be drawn are also within the discretion of the trial court." *State v. Bishop*, 146 Idaho 804, 810 (2009) (internal citation omitted).

C. The Stop Of Mr. Damian's Van Was Unlawful

Mr. Damian asserts the stop of his van was unlawful. The Fourth Amendment to the United States Constitution and Article I, Section 17 of the Idaho Constitution, prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Idaho Const. art. I, § 17. Evidence obtained in violation of these constitutional protections generally may not be used as evidence against the victim of the illegal government action. *See Bishop*, 146 Idaho at 810-11; *State v. Koivu*, 152 Idaho 511 (2012). This exclusionary rule "applies to evidence obtained directly from

the illegal government action and to evidence discovered through the exploitation of the original illegality, or the fruit of the poisonous tree.” *See Bishop*, 146 Idaho at 811.

“Any warrantless search or seizure of a citizen is presumptively unreasonable unless it falls within certain specific and well-delineated exceptions.” *Halen v. State*, 136 Idaho 829, 833 (2002). “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.” *Id.*

“Traffic stops constitute seizures under the Fourth Amendment.” *State v. Henage*, 143 Idaho 655, 658 (2007). However, because a traffic stop is limited in scope and duration, it is analogous to an investigative detention and is analyzed under the principles set forth in *Terry v. Ohio*, 392 U.S. 1 (1968). *State v. Stewart*, 145 Idaho 641, 644 (Ct. App. 2008). “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.” *State v. Morgan*, 154 Idaho 109, 112 (2013). “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). “The test for reasonable suspicion is based on the totality of the circumstances known to the officer at or before the time of the stop.” *Id.*

Thus, a traffic stop is justified where “the officer has reasonable suspicion that a driver has committed an offense, such as a traffic offense” *State v. Neal*, 159 Idaho 439, 442 (2015). Idaho Code § 49-637 provides that, “Whenever any highway has been divided into two (2) or more clearly marked lanes for traffic . . . [a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from that lane until the driver has first

ascertained that the movement can be made with safety.” I.C. § 49-637(1). Idaho Code § 49-808 provides that, “No person shall turn a vehicle onto a highway or move a vehicle right or left upon a highway or merge onto or exit from a highway unless and until the movement can be made with reasonable safety nor without giving an appropriate signal.” I.C. § 49-808(1). Section 49-808 also provides: “A signal of intention to turn or move right or left when required shall be given continuously to warn other traffic. On controlled-access highways and before turning from a parked position, the signal shall be given continuously for not less than five (5) seconds and, in all other instances, for not less than the last one hundred (100) feet traveled by the vehicle before turning.” I.C. § 49-808(2).

Mindful of the above authorities on traffic violations and on appellate court deference to the district court’s findings of fact and credibility determinations regarding motions to suppress, Mr. Damian asserts the stop of his van was unlawful. (*See R.*, p.44.) Thus, Mr. Damian submits there was no basis for the officer to have reasonable suspicion that he had committed a traffic offense. *See Neal*, 159 Idaho at 442. The stop of Mr. Damian’s van was therefore unlawful. *See Halen*, 136 Idaho at 833.

The stop of Mr. Damian’s van was unlawful, and the evidence obtained as a result of the traffic stop should have been suppressed. The district court erred when it denied Mr. Damian’s motion to suppress.

CONCLUSION

For the above reasons, Mr. Damian respectfully requests that this Court vacate the district court's judgment of conviction and order of probation, and the order which denied his motion to suppress, and remand the case to the district court for further proceedings.

DATED this 23rd day of May, 2019.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of May, 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
E-Service: ecf@ag.idaho.gov

/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

BPM/eas