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State v. Britton Appellant's Brief Dckt. 46825

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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 46825-2019**
Plaintiff-Respondent,	)	
	)	**KOOTENAI COUNTY NO. CR28-18-9328**
v.	)	
	)	
DONALD RAY BRITTON,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

HONORABLE CYNTHIA K.C. MEYER
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Donald Britton contends the district court erred when it denied his motion to suppress. Since the officer did not have reasonable suspicion to justify immediately deviating from the mission of the traffic stop, he unlawfully prolonged the detention by conducting a DUI investigation instead of completing the mission of the traffic stop. As such, this Court should reverse the order denying the motion to suppress.

Statement of the Facts and Course of Proceedings

At approximately eight in the morning, Officer Justin Klitch saw a series of cars drive past him on the interstate. (*See* Exhibit 1, ~8:02:16.)[1] He looked specifically at Mr. Britton's pickup within that group of cars because he believed it had an excessively loud muffler.[2] (Tr., p.114, Ls.8-19.)[3] As he looked, he saw that Mr. Britton was not wearing a seatbelt, and so, "I was focused on him to go stop him" once he saw "that violation."[4] (Tr., p.114, Ls.11-15.)

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[1] Where applicable, citations to the video exhibit will identify the relevant time stamp on the video. If quotations to the video are necessary, they are reproduced to the best of appellate counsel's ability.

[2] Officer Klitch testified he did not believe there was any particular standard against which to determine whether a muffler is excessively loud. (Tr., p.79, L.12 - p.80, L.6.) He was mistaken in that regard, as the relevant statute defines excessive muffler sound as sound in excess of ninety-two decibels. I.C. §§ 49-937, -106(8). As such, the stop could not be justified based on Officer Klitch's estimate that the muffler was too loud. *Compare State v. McCarthy*, 133 Idaho 119, 125 (Ct. App. 1999) (holding an officer cannot stop a person based on his estimation the person was speeding when the officer did not know what the speed limit actually was).

[3] Citations to the transcript refer to the electronic document entitled "Transcript Appeal Volume 1.pdf." As the transcripts of each hearing in that file are independently numbered, citations thereto will use the electronic page number instead.

[4] The applicable statute is clear that an officer cannot initiate a traffic stop based on the failure to wear a seat belt. I.C. § 49-673(5).

The video shows the officer begin to accelerate back on to the interstate at that time. (*See* Exhibit 1, ~8:02:16.)

While he was accelerating toward Mr. Britton's pickup, Officer Klitch testified that, despite the fact that other cars were moving in between him and Mr. Britton's pickup, he was able to see Mr. Britton signal for less than the required five seconds before changing lanes. (*See* Tr., p.114, L.5 - p.115, L.12; *compare* Exhibit 1, ~8:02:16; *see also* R., p.132 (the district court finding the officer's testimony on this point to be credible).) He moved in behind Mr. Britton's pickup and activated his overhead lights. (Exhibit 1, ~8:02:47.) Mr. Britton immediately began pulling onto the shoulder and slowed to a stop. (*See* Exhibit 1, ~8:02:50-8:03:15.)

Mr. Britton was unable to provide his current insurance information, explaining he had just got the pickup back during a "bad separation" and the paperwork to get his insurance put on the pickup was still being processed. (Exhibit 1, ~8:04:15.) During the approximately one-minute long conversation at the pickup's window, Officer Klitch testified he noticed two things – that Mr. Britton's eyes were bloodshot, glassy, and "slightly dilated," and that his movements were exaggerated and fidgety. (Tr., p.14, Ls.9-12.)[5] At the hearing on the motion to suppress, Officer Klitch added the description that Mr. Britton's actions were similar to someone who is "tweaking." (Tr., p.97, Ls.12-21.) The officer explained these behaviors were most visible in the way Mr. Britton was constantly moving and reaching around with his arms during the walk-and-turn test. (Tr., p.97, L.25 - p.98, L.5; *but see* Exhibit 1, ~8:13:55-8:15:31 (the walk-and-turn portion of the video, showing Mr. Britton mostly with his hands at his sides, except when they went out to maintain balance).)

[5] At the motion to suppress hearing, the district court took judicial notice of Officer Klitch's testimony at the preliminary hearing. (Tr., p.68, L.15 - p.69, L.5.)

Based on those observations, he decided to order Mr. Britton out of the car and directed him to perform the modified Romberg field sobriety test. (Tr., p.111, Ls.3-7; Tr., p.111, Ls.8-18 (the officer describing the Romberg test).) Officer Klitch noted that Mr. Britton's estimation of the thirty seconds in that test was fast (only twenty-two seconds), and that he swayed and his eyelids tremored during the test. (Tr., p.24, Ls.10-12.) Nevertheless, Officer Klitch explained he did not cite Mr. Britton for DUI because he "was not impaired" and he had "passed field sobriety tests."[6] (Tr., p.20, L.23 - p.21, L.4.)

Nevertheless, after conducting the Romberg test, Officer Klitch proceeded to question Mr. Britton about whether he had used drugs that day, and he told Mr. Britton he was going to have a drug dog come and sniff his car. (Tr., p.111, L.19 - p.112, L.6.) In response, Mr. Britton admitted there was a pipe in his car which he had used to smoke methamphetamine the day before. (*See* Tr., p.5, Ls.12-17; p.112, Ls.7-11.) Officer Klitch then had Mr. Britton perform three other field sobriety tests (horizontal gaze, walk-and-turn, and one-leg stand), which he also passed. (*See* Exhibit 1, ~8:12:10; Tr., p.21, Ls.1-4.)

Officer Klitch and another officer, who arrived during the field sobriety tests (*see* Exhibit 1, ~8:13;55), proceeded to search Mr. Britton's pickup. (*See generally* Exhibit 1, ~8:20:57.) Inside, they found the pipe as well as a baggie with what they suspected was methamphetamine. (Tr., p.5, L.23 - p.6, L.10) The State ultimately charged Mr. Britton with possession of a

[6] At the preliminary hearing, however, Officer Klitch had testified the Romberg test is not truly a "pass/fail" test, just that it potentially reveals indicators that the person is currently under the influence of a stimulant. (*See* Tr., p.31, Ls.18-23.) Thus, his explanation that he did not cite Mr. Britton with DUI because he "passed field sobriety tests" necessarily means the facts he observed during the Romberg test did not demonstrate Mr. Britton was currently impaired by a stimulant.

controlled substance, possession of paraphernalia, as well as driving without insurance. (R., pp.58-59.)

Mr. Britton filed a motion to suppress all the evidence found in his case, arguing, *inter alia*, that Officer Klitch deviated from the mission of the traffic stop and unlawfully prolonged the detention when he ordered Mr. Britton out of the car to perform the Romberg test without reasonable suspicion to justify a DUI investigation.[7] (R., pp.79-80, 92-102; Tr., p.122, Ls.5-12.) The district court found that the officer had reasonable suspicion, given his training and experience, based on his observations that Mr. Britton "had glassy, bloodshot eyes and slightly dilated pupils. Further [Mr. Britton's] movements were 'exaggerated,' as if he was 'tweaking,' and was described by Sgt. Klitch as 'fidgety.'" (R., p.134.) As such, it denied the motion to suppress in that regard. (R., pp.133-35.)

Thereafter, Mr. Britton entered a conditional guilty plea, reserving his right to challenge the decision on his motion to suppress. (Tr., p.153, Ls.8-16; R., p.142.) The district court subsequently imposed a unified sentence of three years, with one and one-half years fixed, which it suspended for a two-year period of probation, on the felony conviction and to time served on the two misdemeanor convictions. (Tr., p.171, Ls.5-9; p.172, Ls.12-16.) Mr. Britton filed a notice of appeal timely from that judgment. (R., pp.148, 156.)

[7] Though defense counsel also suspected Officer Klitch had received information that Mr. Britton was in possession of drugs, the officer expressly disavowed that idea. (*See* Tr., p.9, Ls.7-19, p.79, Ls.4-11.) In doing so, he disavowed knowledge of any information that would give rise to a reasonable suspicion that Mr. Britton was currently in possession of drugs (as opposed to having ingested them) at the time he deviated from the mission of the stop.

ISSUE

Whether the district court erred when it denied Mr. Britton's motion to suppress because the officer did not have reasonable suspicion to justify deviated from the mission of the traffic stop.

ARGUMENT

The District Court Erred When It Denied Mr. Britton's Motion To Suppress Because The Officer Did Not Have Reasonable Suspicion To Justify Deviated From The Mission Of The Traffic Stop

A. Standard Of Review

The appellate courts use a bifurcated standard when reviewing the denial of a motion to suppress – they will accept the trial court's factual findings if they are not clearly erroneous, but will freely review the trial court's application of constitutional principles to those facts. *State v. Linze*, 161 Idaho 605, 607 (2016).

When an officer stops a vehicle for a traffic violation, the Fourth Amendment requires that detention last no longer than the time it takes, or reasonably should have taken, to complete the mission of the traffic stop. *Rodriguez v. United States*, ___ U.S. ____, 135 S. Ct. 1609, 1614 (2015). As such, the officer may conduct other, unrelated checks during a traffic stop without additional reasonable suspicion only if those other tasks do not prolong the time it takes, or should have taken, to complete the mission of the traffic stop. *Id.* However, if the deviation increases the time the stop should have taken, effectively, a new seizure has occurred. *Linze*, 161 Idaho at 609. The Fourth Amendment requires that new seizure be justified by its own reasonable suspicion; it "cannot piggy-back on the reasonableness of the original seizure." *Id.*

"Whether an officer possessed reasonable suspicion is evaluated based on the totality of the circumstances known to the officer at or before the time of the stop." *State v. Bishop*, 146 Idaho 804, 811 (2009). Thus, at the time Officer Klitch deviated from the mission of the traffic stop to conduct a DUI investigation, he must have been aware of circumstances giving rise to a reasonable suspicion that Mr. Britton was driving under the influence, or else, that detention violated the Fourth Amendment. *See Rodriguez*, 135 S. Ct. at 1614; *Linze*, 161 Idaho at 609.

B. The Totality Of The Circumstances Observed By Officer Klitch Did Not Create A Reasonable Suspicion To Justify Immediately Deviating From The Mission Of The Traffic Stop And Conduct A DUI Investigation Instead

Officer Klitch deviated from the mission of the traffic stop almost immediately, starting a DUI investigation with the Romberg test after only approximately one minute of talking to Mr. Britton. (*See generally* Exhibit 1.) The district court pointed to only two facts which it felt gave rise to a reasonable suspicion to justify doing so – that Mr. Britton's eyes were bloodshot, glassy, and slightly dilated; and that his movements were exaggerated and fidgety, as if he were "tweaking."[8] (R., pp.134-35.) Because those two facts do not give rise to a reasonable suspicion that under the totality of the circumstances that Mr. Britton was driving under the influence, that conclusion was in error.

Notably, the condition of a person's eyes – that they are bloodshot, glassy, or dilated (particularly only "slightly dilated") –cannot, by itself, establish reasonable suspicion of drug or

[8] Notably, although the officer had mentioned the fact (Tr., p.87, Ls.6-12), the district court did not include the manner in which Mr. Britton slowed to a stop as contributing to the finding of reasonable suspicion. (*See generally* R., pp.133-35.) That is not surprising because the video exhibit actually indicates a little time was needed to safely decelerate from highway speeds and come to a stop on the side of the interstate highway. (*See* Exhibit 1, ~8:02:50-8:03:15 (showing Mr. Britton's brake lights and the indicator for the officer's brakes (indicator 6 on the video player display) were both on during the twenty seconds or so between the time Mr. Britton started to brake on the shoulder and coming to a complete stop).)

In fact, the video shows that none of the other cars on the road had to break or swerve to avoid Mr. Britton's pickup, either as he changed lanes or pulled over. (*See* Exhibit 1, ~8:02:16.) As such, the video shows there was no pattern of erratic or unsafe driving that might provide reasonable suspicion of impaired driving. *Compare State v. Anderson*, 154 Idaho 703, 704 (2012) (describing erratic driving behavior which supported an initial traffic stop as "nearly sidewip[ing] another vehicle attempting to pass on the right, forcing the passing vehicle to swerve to avoid collision"); *cf. State v. Neal*, 159 Idaho 439, 444 (2015) (holding that two instances of driving on the fog line did not create a driving pattern that gave rise to stop the car and investigate a potential DUI, and comparing to, *inter alia*, *United States v. Wendfeldt*, 58 F.Supp.3d 1124 1130 (D.Nev. 2014), in which the district court had held that, despite touching the fog line several times, "'he was not speeding or driving erratically in any way, and his driving posed no danger to any other motorists'").

alcohol use. *State v. Perez-Jungo*, 156 Idaho 609, 616 (Ct. App. 2014); *State v. Grigg*, 149 Idaho 361, 364 (Ct. App. 2010). Rather, it is only when that fact appears within a constellation of other facts does the image of drug or alcohol impairment reasonably emerge. *Id.*

The traditional constellation in that regard involves a person with bloodshot, glassy, and/or dilated eyes, who has also been observed driving erratically, is slurring their speech, and smells of alcoholic beverages. *See, e.g.*, *State v. Diaz*, 144 Idaho 300, 302-03 (2007), *overruled on other grounds*; *Thompson v. State*, 138 Idaho 512, 515 (Ct. App. 2003); *State v. Armbruster*, 117 Idaho 19, 19 (Ct. App. 1989). This case is a far cry from that traditional constellation. There was no indication Mr. Britton was slurring his words. (*See generally* R., Tr., Exhibit 1.) There was also no observed pattern of erratic driving. (*See* note 4, *supra*.) Nor was there any indication the officer smelled the odor of alcoholic beverages or other drugs (such as burnt marijuana, for example). (*See generally* R., Tr.)

The totality of the circumstances in this case also do not create any other pattern in that regard. Notably, the officer admitted he looked for, but did not see any signs of recent ingestion on Mr. Britton, such as injection marks, raised taste buds, or white coating on the tongue. (Tr., p.109, L.9 - p.110, L.6.) He also admitted the way Mr. Britton was answering his questions did not raise his suspicions, as Mr. Britton was not giving incorrect answers, forgetting answers, or repeating answers. (*See* Tr., p.110, L.12 - p.111, L.2.) The video also shows Mr. Britton did not appear to have trouble maintaining his balance as he got out of the pickup. *Compare State v. Mace*, 133 Idaho 903, 905 (Ct. App. 2000) (pointing to the defendant's poor balance as a fact evidencing his intoxication). In fact, Mr. Britton was able to react quickly when the officer said "Hey, watch your dog!" to keep it from jumping out of the pickup. (*See* Exhibit 1, ~8:05:00.) Without any of those points, it is difficult indeed to draw a constellation showing reasonable

suspicion of impairment in this case. *Compare Perez-Jungo*, 156 Idaho at 616 (holding that the fact the defendant was parked in a remote area without viable explanation and had pro-drug iconography in the car, along with him having bloodshot, glassy eyes, gave rise to a reasonable suspicion); *Grigg*, 149 Idaho at 364 (holding that reddened conjunctiva and eyelid tremors, along with bloodshot and glassy eyes, gave rise to a reasonable suspicion).[9]

That conclusion remains the same even in light of the other fact to which the district court pointed – Mr. Britton's fidgety, exaggerated, "tweaking" movements. That fact, like the condition of a person's eyes, is actually "of limited significance in establishing the presence of reasonable suspicion because it is common for people to exhibit signs of nervousness when confronted with law enforcement regardless of criminal activity." *State v. Neal*, 159 Idaho 919, 924 (Ct. App. 2016) (upholding the district court's determination that behaviors such as bouncing a leg or speaking quickly or rapidly are consistent with signs of nervousness and do not give rise to a reasonable suspicion of driving under the influence of a stimulant). In other words, there needs to be something connecting such behaviors with criminal conduct, rather than just nervousness, before they can carry any sort of significant value within the totality of the circumstances. *See State v. Kelley*, 160 Idaho 761, 762-63 (Ct. App. 2016) (holding there was no reasonable suspicion in that case because the officer had not testified to any facts which connected the person's nervous behaviors – lack of eye contact, trembling, and a pulsing carotid artery – to potential *criminal* activity).

[9] In this case, Officer Klitch did observe eye tremors, but admitted he only saw them during the Romberg test. (*See* Tr., p.104, Ls.2-4.) Therefore, that fact cannot contribute to the determination of whether he had reasonable suspicion to prolong the detention because it was not a fact known at the time the detention was prolonged. *See, e.g., Bishop*, 146 Idaho at 811.

Here, as in *Kelley*, Mr. Britton's behaviors were not inherently indicative of criminal conduct, as opposed to simply nervous behavior. In fact, the totality of the circumstances, particularly those surrounding Mr. Britton's dog, disperses any such connection. (*See* Tr., p.99, Ls.23-25 (defense counsel asking the officer about this point).) Although Officer Klitch said he did not remember Mr. Britton being overly concerned about his dog, (Tr., p.100, Ls.1-7), the video still shows the officer was aware of the dog during the initial minute of the encounter and felt it was necessary to tell Mr. Britton: "Why don't you very carefully step out so your dog doesn't jump out," and, as he got out, "Hey, watch your dog!" (Exhibit 1, ~8:04:50.) The inference from those two comments is that, though Mr. Britton was not overly concerned about the dog doing something unexpected, he still had to dedicate some of his attention to his dog during the initial part of the encounter. As such, any oddity in Mr. Britton's movements during the initial part of the encounter could be attributed to that split in his focus, and thus, was less indicative of potential criminal conduct, and so, was of less value in finding reasonable suspicion, even when viewed alongside the condition of Mr. Britton's eyes. *Compare Kelley*, 160 Idaho at 763; *see also Perez-Jungo*, 156 Idaho at 616 (explaining that, even when facts may not be sufficient to independently give rise to a reasonable suspicion, they may still did so when viewed together).

When viewed in the totality of the circumstances of this stop, those two facts of inherently-limited value, even taken together, do not show a reasonable suspicion to justify a DUI investigation, particularly when so many other, more concrete signs of impairment were demonstrably absent from the totality. Rather, the officer's attempt to extrapolate a pattern from only two data points of inherently-limited value is the very definition of a hunch. A hunch cannot base a prolonged detention. *See Rodriguez*, 135 S. Ct. at 1615; *Linze*, 161 Idaho at 609.

As such, the district court erred by denying Mr. Britton's motion to suppress the evidence found during that unlawfully-prolonged detention.

CONCLUSION

Mr. Britton 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 18th day of September, 2019.

/s/ Brian R. Dickson
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of September, 2019, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

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BRD/eas