6-13-2016

State v. Demint Respondent's Brief Dckt. 43367

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 43367**
Plaintiff-Respondent,	)	
	)	**Ada Co. Case No.**
v.	)	**CR-2014-12188**
	)	
WILLIAM SCOTT DEMINT,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

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

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District Judge

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATEMENT OF THE CASE

Nature of the Case

William Scott Demint appeals from the judgment of conviction entered upon his conditional guilty plea to trafficking in methamphetamine and unlawful possession of a firearm.

Statement of Facts and Course of the Proceedings

In August 2014, narcotics officers requested that Ada County Sheriff's Deputy Kevin Lowry look for a specific pickup truck that was traveling on I-84 near Boise. (2/25/15 Tr., p.86, L.22 – p.88, L.1.) Deputy Lowry located the vehicle and began following it. (2/25/15 Tr., p.88, Ls.4-18.) Deputy Lowry soon effectuated a traffic stop on the vehicle after observing it traveling at speeds in excess of posted limits, and changing lanes without signaling. (2/25/15 Tr., p.88, L.16 – p.89, L.2.) The driver of the vehicle was identified as William Demint. (2/25/15 Tr., p.94, Ls.16-23.)

While another officer checked Demint's license and warrant information through dispatch, Deputy Lowry deployed his drug dog around the vehicle. (2/25/15 Tr., p.96, L.23 – p.98, L.5.) The dog alerted near the open driver's side window. (2/25/15 Tr., p.98, L.25 – p.99, L.8.) Deputy Lowry opened the driver's side door to allow the dog to search the extended passenger cab area of the truck. (2/25/15 Tr., p.100, Ls.1-18.) The dog did not alert in this area. (2/25/15 Tr., p.100, Ls.10-21.) Deputy Lowry then deployed the dog in the enclosed truck bed. (2/25/15 Tr., p.100, L.19 – p.101, L.1; see also State's Exhibits A, B, C.) There, the drug dog alerted near a first-aid kit. (2/25/15 Tr., p.101, Ls.2-16.)

Deputy Lowry searched the first-aid kit and recovered 441 grams of methamphetamine separated into multiple bags, 12.79 grams of marijuana, hydromorphone pills, and $12,794 in cash. (2/25/15 Tr., p.44, L.21 – p. 45, L.11; p.101, Ls.2-16; PSI, pp.3-4, 95, 110-114.) Officers also recovered a loaded 9mm handgun and numerous glass pipes and bongs from elsewhere in the vehicle. (PSI, p.4, 114.)

The state charged Demint with trafficking in methamphetamine, possession of drug paraphernalia with intent to deliver, unlawful possession of a firearm, possession of hydromorphone, misdemeanor possession of marijuana, misdemeanor possession of drug paraphernalia, and the persistent violator sentencing enhancement. (R., pp.53-55, 126-128.)

Prior to trial, Demint moved to suppress evidence recovered from the vehicle. (R., pp.80-82.) Prior to the suppression hearing, the district court permitted Demint to join in the issues raised by the motion to suppress and supporting brief filed by his co-defendant, who was a passenger in the pickup truck. (See generally 2/24/15 Tr.[1]) In his motion to suppress, Demint's co-defendant argued that the drug dog's alert on the passenger compartment of the truck did not provide probable cause to search the enclosed truck bed. (2/17/15 Memorandum in Support of Motion to Suppress, pp.3-6.[2]) After a hearing, the district court denied the joint motion to suppress. (2/25/15 Tr., p.169, L.5 –

[1] The Idaho Supreme Court granted Demint's motion to augment the appellate record with this transcript. (1/19/16 Order.)

[2] The Idaho Supreme Court granted Demint's motion to augment the appellate record with Demint's co-defendant's motion to suppress and memorandum in support. (1/19/16 Order.)

p.174, L.17.) The court concluded that the drug dog's alert near the driver's side window of the vehicle gave the officers probable cause to search the entire vehicle, including the enclosed truck bed. (Id.)

Pursuant to a plea agreement with the state, Demint entered a conditional guilty plea to trafficking in methamphetamine and unlawful possession of a firearm. (R., pp.148-157; 3/31/15 Tr, p.175, L.4 – p.191, L.3.) The state agreed to dismiss the remaining charges and to withdraw the sentencing enhancement. (R., p.150; 3/31/15 Tr., p.175, Ls.12-15.) As a condition of the plea agreement, Demint preserved his right to appeal the district court's denial of his motion to suppress. (R., pp.150, 156-157; 3/31/15 Tr., p.175, Ls.17-21.)

The district court imposed a unified 20-year sentence with 10 years fixed for trafficking in methamphetamine, and a consecutive five-year sentence with two and one-half years fixed for unlawful possession of a firearm. (R., pp.166-170; 5/25/15 Tr., p.235, L.14 – p.241, L.17.) Demint timely appealed. (R., pp.176-179.)

ISSUE

Demint states the issue on appeal as:

> Did the district court err by denying Mr. Demint's motion to suppress?

(Appellant's brief, p.4.):

The state rephrases the issue as:

Did Demint fail to preserve the ground for suppression he raises on appeal?

ARGUMENT

Demint Failed To Preserve The Ground For Suppression He Raises On Appeal

A. Introduction

Demint appeals from the district court's order denying his motion to suppress evidence obtained from his vehicle after a traffic stop. (Appellant's brief, pp.5-14.) Specifically, he contends that whatever probable cause officers acquired to search the vehicle following the drug dog's alert on the driver's side window of the vehicle dissipated after the drug dog failed to alert inside the extended passenger cab. (Id.)

This ground for suppression was waived because Demint failed to preserve it for appeal by raising it below. In any event, a review of the record and applicable law reveals that the officers had sufficient probable cause to justify a search of the entire truck, including the enclosed truck bed. Therefore, Demint cannot show that the district court erred in denying his suppression motion.

B. Standard Of Review

In reviewing an order granting or denying a motion to suppress evidence, the appellate court applies a bifurcated standard of review. State v. Purdum, 147 Idaho 206, 207, 207 P.3d 182, 183 (2009) (citing State v. Watts, 142 Idaho 230, 232, 127 P.3d 133, 135 (2005)). The appellate court will accept the trial court's findings of fact unless they are clearly erroneous, but will freely review the trial court's application of constitutional principles and determinations of reasonable suspicion, in light of the facts found. Purdum, 147 Idaho at 207, 207 P.3d at 183

(citing State v. Diaz, 144 Idaho 300, 302, 160 P.3d 739, 741 (2007)), State v. Munoz, 149 Idaho 121, 127, 233 P.3d 52, 58 (2010).

C. Demint Failed To Preserve The Ground For Suppression He Raises On Appeal

It is a fundamental tenet of appellate law that a proper and timely objection must be made in the trial court before an issue is preserved for appeal. State v. Vondenkamp, 141 Idaho 878, 885, 119 P.3d 653, 660 (Ct. App. 2005) (citing State v. Carlson, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000)). Further, when a defendant pursues a suppression motion, only the specific grounds raised in the district court are preserved for appeal. See e.g., State v. Anderson, 154 Idaho 703, 705-706, 302 P.3d 328, 330-331 (2012) (holding that the defendant preserved only two of the three grounds for suppression that he attempted to raise on appeal).

In this case, Demint argues that whatever probable cause officers acquired to search his pickup truck following the drug dog's alert on the driver's side window of the vehicle dissipated after the drug dog failed to alert inside the extended passenger cab. (Appellant's brief, pp.5-14.) Demint did not raise this argument below. Instead, Demint argued to the district court that the drug dog's alert on the driver's side window of the vehicle, and other circumstances known to the officer, did not provide sufficient probable cause to search the enclosed truck bed. (See 2/17/15 Memorandum in Support of Motion to Suppress; 2/25/15 Tr., p.152, L.6 – p.169, L.4.) The district court therefore did not have the opportunity to rule on the probable cause dissipation argument Demint now

raises on appeal. This argument is therefore waived, and should not be considered by this Court.

D. In The Alternative, The District Court Did Not Err In Denying Demint's Motion to Suppress

The Fourth Amendment prohibits unreasonable searches and seizures. "A warrantless search is presumptively unreasonable unless it falls within certain special and well-delineated exceptions to the warrant requirement." State v. Kerley, 134 Idaho 870, 873, 11 P.3d 489, 492 (Ct. App. 2000) (citing Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971); see also State v. Ferreira, 133 Idaho 474, 479, 988 P.2d 700, 705 (Ct. App. 1999).) The automobile exception is a well-established exception to the warrant requirement. Colorado v. Bannister, 449 U.S. 1, 3 (1980); State v. Buti, 131 Idaho 793, 800, 964 P.2d 660, 667 (1998).

The "automobile exception" to the warrant requirement allows the police to search a vehicle without a warrant when there is probable cause to believe the vehicle contains contraband or evidence of a crime. Carroll v. United States, 267 U.S. 132 (1925); Arkansas v. Sanders, 442 U.S. 753, 760 (1979); State v. Buti, 131 Idaho 793, 964 P.2d 660 (1998); State v. Bottelson, 102 Idaho 90, 93, 625 P.2d 1093, 1096 (1981). The existence of probable cause to believe a vehicle contains evidence of criminal activity "authorizes a search of any area of the vehicle in which the evidence might be found." Arizona v. Gant, 556 U.S. 332, 347 (2009) (citing United States v. Ross, 456 U.S. 798, 820-21 (1982)).

In Ross, the Supreme Court of the United States reasoned that a "lawful search of fixed premises" such as a home "generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search." Ross, 456 U.S. at 820-21. Because such distinctions were not drawn in relation to home searches, there is no reason to draw them in relation to vehicle searches. Id. at 821. Thus, "[w]hen a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand." Id. The Court concluded, "[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." Id. at 825

Furthermore, "[a] reliable drug dog's alert on the exterior of a vehicle is sufficient, in and of itself, to establish probable cause for a warrantless search of the interior." Anderson, 154 Idaho at 706, 302 P.3d at 331. Probable cause established by the dog alert "'authorizes a search of any area of the vehicle in which the evidence might be found.'" Id. (quoting Gant, 556 U.S. at 347). Put another way, the dog alert establishing probable cause "justifies the search of every part of the vehicle and its contents that may conceal the object of the search." Id. at 707, 302 P.3d at 332 (internal quotations omitted).

In Anderson, as a matter of first impression, the Idaho Supreme Court addressed the question of whether probable cause, once established, can dissipate. Id. at 705-708, 302 P.3d at 330-333. In that case, a drug dog alerted on the passenger side door of Anderson's van following a traffic stop. Id. at 705, 302 P.3d at 330. The dog subsequently failed to alert inside the van. Id. Officers later manually searched the van and recovered an illegally-possessed rife. Id. On appeal, Demint argued, among other things, that any probable cause obtained by the officers when the drug dog alerted outside the passenger side of the van dissipated after the dog failed to alert inside the van. Id. at 705-706, 302 P.3d at 330-331.

The Idaho Supreme Court recognized that "[i]f probable cause is established at an early stage of the investigation, it may be dissipated if the investigating officer later learns additional information that decreases the likelihood that the defendant has engaged, or is engaging, in criminal activity." Id. at 706-707, 302 P.3d at 331-332 (quoting United States v. Ortiz-Hernandez, 427 F.3d 567, 574 (9th Cir. 2005). The Court then summarized cases from other jurisdictions which "generally held that a drug dog's failure to alert is only one factor to be considered in the probable cause analysis." Id. at 707, 302 P.3d at 332 (citations omitted). The Court applied these concepts to the case before it and concluded:

> Here, we find that the officers conducting the search of Anderson's vehicle maintained probable cause even after the drug dog failed to alert in its interior. We agree with the courts noted above that a failed alert is not *per se* dispositive of probable cause, but rather merely one factor to be considered in the totality of the circumstances analysis. More specifically, as the court in [State v.

> Siluk, 567 So.2d 26 (Fla. App. 1990)] found, a subsequent failed alert does not necessarily negate a prior positive alert. In other words, the positive-alert-negative-alert issue is not a zero-sum equation. Thus, although in this case the drug dog's subsequent failure to alert may call its initial alert into some question in the mind of a reasonable person, it does not neutralize the first alert completely. Nor did the subsequent failure to alert indicate a positive indication on the part of the dog that no drugs existed. Moreover, as other courts facing the issue have found, couriers of drugs often mask the scent of contraband such that they may go undetected by trained canines. Thus, it is entirely possible that a drug dog may reliably detect drugs in a sniff on one occasion but fail to detect them on another, particularly where the two sniffs are conducted in separate parts of the area to be searched.

Id. at 708, 302 P.3d at 333.

The Idaho Supreme Court concluded that "even if the initial alert was somewhat undercut by the subsequent failed sniff," there was still sufficient probable cause to manually search the vehicle, particularly in light of additional circumstances, including Anderson's erratic driving pattern and failure to follow the officers' commands during the stop. Id.

In the present case, as the district court correctly concluded, once the drug dog alerted near the open driver's side window of the pickup truck, the officers had probable cause to search the entire vehicle, including the enclosed cab. (2/25/25 Tr., p.169, L.5 – p.174, L.17.) After obtaining this probable cause to search the entire vehicle, the officer could have lawfully engaged in a manual search of any part of the vehicle. Instead, the officer chose to utilize the drug dog to first target his search on the extended passenger cab area of the truck. (2/25/15 Tr., p.100, L.1-18.) After the dog failed to alert in the extended passenger cab (2/25/15 Tr., p.100, Ls.10-21), the officer deployed the drug dog in a *separate* area of the vehicle, in the enclosed truck bed (2/25/15 Tr., p.100,

L.19 – p.101, L.1). There, the drug dog alerted (2/25/15 Tr., p.101, Ls.2-16), and the officers ultimately recovered controlled substances and paraphernalia in that area. (2/25/15 Tr., p.44, L.21 – p. 45, L.11; p.101, Ls.2-16; PSI, pp.3-4, 95, 110-114.)

The drug dog's failure to alert in the first place the officer happened to look -- the extended passenger cab -- did not dissipate the probable cause possessed by the officer after the dog initially alerted on the outside of the vehicle. The drug dog's failure to alert in the extended passenger cab did not decrease the likelihood that controlled substances would be recovered in *other* parts of the vehicle. Instead, the dog's failure to alert was simply the functional equivalent of an officer failing to recover contraband in the first part of a vehicle (or other location or object), the officer searches after obtaining probable cause. The Fourth Amendment does not require an officer who has probable cause to search an entire vehicle to correctly predict, on the officer's first attempt, where in the vehicle contraband may be located.

Therefore, application of the probable cause dissipation analysis utilized by the Idaho Supreme Court in Anderson reveals that there was *no* such dissipation in the present case. Unlike the drug dog deployed by the officer in and around Demint's vehicle, the drug dog utilized in Anderson did not alert *anywhere* inside the van. See Anderson, 154 Idaho at 705-706,

302 P.3d at 330-331.[3] The drug dog's failure to alert anywhere inside Anderson's van, after the dog previously alerted outside of the van, decreased, somewhat, the likelihood that the officers would subsequently recover contraband in the *same areas* inside the van where the dog failed to alert. To the contrary, in the present case, the drug dog's failure to alert in the extended passenger cab of Demint's truck did not decrease the likelihood that officers would subsequently recover contraband in the enclosed truck bed area. Therefore, no probable cause dissipation occurred with respect to the enclosed truck bed.

Likewise, the authorities cited in Anderson, which have recognized the concept of probable cause dissipation, addressed fact patterns involving either: (1) a drug dog's failure to alert on a single object, such as a suitcase, which is subsequently searched by police, see e.g., United States v. Ramirez, 342 F.3d 1210, 1211-1213 (10th Cir. 2003); United States v. Gill, 280 F.3d 923, 925-929, (9th Cir. 2002); United States v. Frost, 999 F.2d 737, 743-744, (3rd Cir. 1993); or (2) a drug dog's failure to alert on an entire vehicle which is subsequently searched by police, see e.g., McKay v. State, 814 A.2d 592, 598-599 (Md. App. 2002); State v. Sanchez–Loredo, 220 P.3d 374, 378 (Kan. App. 2009). In both types of instances, officers' probable cause dissipated, (to some limited degree), due to the dogs' failure to alert on the very same object or portion of a vehicle

[3] The Idaho Supreme Court's opinion in Anderson stated that the drug dog "failed to alert a second time while inside the van" after previously alerting on the passenger side door. Anderson, 154 Idaho at 705, 302 P.3d at 330. The Idaho Court of Appeals' related preceding opinion, State v. Anderson, 2011 WL 1744274 *1 (Idaho App. 2011), more specifically provided that "the dog did not alert while inside the van."

where contraband was ultimately found. This is different from the present case, where the drug dog *did* alert both outside Demint's truck, and inside a specific portion of the truck.

For similar reasons, even if this Court finds that the drug dog's failure to alert inside the extended passenger cab of Demint's truck resulted in *some* dissipation of probable cause to search the enclosed bed area, the dissipation was not enough to render the probable cause invalid in the circumstances of this case. As discussed above, the drug dog's failure to alert in one area of Demint's truck did not make it less likely that contraband would be found in a different area of the same truck. That is particularly apparent in the circumstances of this case where the drug dog initially alerted at an *open window* of the truck. This alert indicated that the targeted odor was passing through the vehicle as a whole, and that controlled substances were likely present *somewhere* in the truck – though not necessarily in the extended passenger cab.

Demint has failed to demonstrate that the probable cause possessed by officers dissipated after the drug dog failed to alert in the extended passenger cab area of the truck. Therefore, even if this issue had been preserved for appeal, Demint failed to demonstrate that the district court erred in denying his motion to suppress.

CONCLUSION

The state respectfully requests this Court to affirm the district court's denial of Demint's motion to suppress.

DATED this 13th day of June, 2016.

__/s/ Mark W. Olson___
MARK W. OLSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 13th day of June, 2016, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

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__/s/ Mark W. Olson____
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MWO/dd