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State v. Randall Appellant's Reply Brief Dckt. 46893

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NO. 46893-2019**
	)	
v.	)	**BANNOCK COUNTY**
	)	**NO. CR-2017-10456**
JACOB STEELE RANDALL,	)	
	)	**REPLY BRIEF**
Defendant-Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

HONORABLE ROBERT C. NAFTZ
District Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Additional Authorities

STATEMENT OF THE CASE

Nature of the Case

Jacob Randall entered a conditional guilty plea to one count of trafficking in marijuana preserving his right to appeal the denial of his motion to suppress. Mr. Randall asserts that his detention was unlawfully extended to allow a drug detection dog, "Bingo," to sniff his vehicle. Trooper Tyler Scheierman abandoned the purpose of the traffic stop when, absent reasonable articulable suspicion of criminal activity, he began questioning Mr. Randall about whether there were drugs in the car. He then instructed Mr. Randall to stand on the side of the road, led Bingo to the driver's side door, and then helped the dog through the open window. Without the boost from Trooper Scheierman, Bingo would not have been able to enter Mr. Randall's car through the window. Once inside the car, Bingo alerted. Mr. Randall also asserts that Bingo's entry into the open car window prior to any probable cause, facilitated by Trooper Scheierman, was an unlawful search and the evidence gathered should be suppressed.

Further, Mr. Randall contends that his seven-year sentence, with three years fixed, represents an abuse of the district court's discretion, as it is excessive given any view of the facts.

This Reply Brief is necessary to address the State's new argument on appeal, its mischaracterization of Mr. Randall's purported nervousness, and its erroneous contention that Trooper Scheierman had a reasonable articulable suspicion of criminal wrongdoing because he believed Mr. Randall was trying to avoid police contact.

Statement of the Facts and Course of Proceedings

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

ISSUES

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

II. Did the district court abuse its discretion when it imposed a unified sentence of seven years, with three years fixed, upon Mr. Randall following his plea of guilty to trafficking in marijuana?[1]

[1] Mr. Randall fully addressed his sentencing claims in his initial Appellant's Brief and the State's response does not merit further argument.

ARGUMENT

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

First, the State mischaracterizes Trooper Scheierman's testimony as stating Mr. Randall was "extraordinarily nervous" (Resp. Br., pp.2, 17), and exhibited "extreme nervousness" (Resp. Br., p.12). This claim is not based on facts in the record as the officer testified only that Mr. Randall was nervous, which he had also observed in drivers on normal traffic stops, and that Mr. Randall's "nervousness" increased when asked for more details about his travel plans.[2] (Tr., p.30, Ls.5-12; p.49, L.25 – p.50, L.4; p.71, L.16 – p.72, L.18; p.75, L.12 – p.76, L.8; p.78, Ls.4-18.) Nor did the district court find that Mr. Randall was "excessively" or "extraordinarily" nervous. (*See* R., pp.114, 119-20.)

The State claims that Mr. Randall's actions, of slowing his car upon seeing law enforcement, and of sitting "in an awkward manner with his face shielded from view" as he drove by the trooper, provided reasonable articulable suspicion of criminal wrongdoing. (Resp. Br., pp.11, 17.) In support of this notion, the State cites older Court of Appeals decisions. (*See* Resp. Br., p.11 (citing *State v. Nevarez*, 147 Idaho 470, 475-76 (Ct. App. 2009)), and *State v. Troughton*, 126 Idaho 406, 410 (Ct. App. 1994).) However, these cases are distinguishable, and the State's arguments are controverted by more recent, controlling precedent.

In *Nevarez*, the officer heard from dispatch that a convenience store had just been robbed by two Hispanic individuals. 147 Idaho at 472. The officer watched traffic traveling on the highway coming from the direction of the convenience store, and when he passed the car containing the Hispanic defendants, the four people in the car exhibited "quite a bit of reaction"

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[2] Although Trooper Scheierman testified that Mr. Randall's nervousness increased when being questioned about his travel plans, the trooper did not document any such "increased nervousness" in his police report. (Tr., p.78, Ls.4-18.)

upon seeing a police car, including looks of concern or exclamation and the individuals moved around in the car, as if hiding contraband or a weapon. *Id.* The driver was driving 13 miles per hour below the speed limit and was overly cautious in the employment of a turn signal, and the individuals in the car were sitting very low in their seats. *Id.* at 475. The Court concluded that, based on a totality of circumstances, the officer had reasonable, articulable suspicion that the individuals in the car were involved in the robbery of the convenience store. *Id.*

Troughton was a case in which the officer, while speaking to the occupants of an unlawfully parked vehicle, saw open containers of alcohol. 126 Idaho at 410. Mr. Troughton, the passenger, covered his face when speaking to the officer, who recognized him, and knew he had provided a false name. *Id.* 126 Idaho at 408-10. The Idaho Court of Appeals held that under the totality of the circumstances, the initial investigatory stop and the following detention of the vehicle and of Mr. Troughton were reasonable. *Id.* 126 Idaho at 410. However, the *Troughton* Court's findings regarding the face covering was combined with Mr. Troughton's providing a false last name, which formed a basis for reasonable suspicion. *Id.* Here, Trooper Scheierman testified that Mr. Randall's face was partially and temporarily obscured by his car's doorpost: "as he passed Trooper Scheierman, [the driver] sat in an awkward manner with his face shielded from view." (Resp. Br., p.11) (citing Tr., p.20, L.6 – p.21, L.11; p.45, L.11 – p.46, L.1.) Although the State focuses on Mr. Randall's conduct in initially driving by Trooper Scheierman (Resp. Br., p.11), the district court made no findings regarding any suspicion attaching to that conduct, even when considered with the totality of the circumstances. Despite the trooper's suspicion that Mr. Randall was trying to avoid him, the district court did not use these facts in formulating its conclusion that "Trooper Scheierman gained the reasonable suspicion necessary to expand the initial detention to a drug investigation" from information obtained during the

encounter, not upon the moment he first saw Mr. Randall. (R., pp.122-23.) The district court reasoned:

> [T]he totality of the circumstances surrounding the stop of the Defendant's vehicle show there were specific and articulable facts that justify the reasonable suspicion necessary to permit the investigative detention of the Defendant. For example, the Defendant appeared nervous and shaking. His travel plans were also suspicious and confusing based upon the Defendant's statements that he had taken a $75.00 flight to Las Vegas and then spent over $500.00 to rent a car to drive home to Minnesota. The Defendant also exhibited nervousness and changed his answer when questioned about whether he had visited anywhere else during his trip to Las Vegas.

(R., p.120.) However, these facts, even when considered in totality, support only a hunch.

In *State v. Morgan*, the Idaho Supreme Court held that an officer's belief that a driver is trying to avoid him, without factual justification, does not create reasonable articulable suspicion of criminal wrongdoing. 154 Idaho 109, 112 (2013). In *Morgan*, after the defendant made a series of four left-hand turns, the officer developed a belief that the driver may have been trying to avoid him. *Morgan*, 154 Idaho at 112. However, the Idaho Supreme Court held that the officer provided no factual justification for that belief, and "[a]bsent other circumstances, driving around the block on a Friday night does not rise to the level of specific, articulable facts that justify an investigatory stop." *Id.*

In late 2019, the Idaho Court of Appeals decided *State v. Gonzales*, 165 Idaho 667, 450 P.3d 315 (2019). In *Gonzales*, the driver of a parked car walked away from the officer and refused to speak to him. *Gonzales*, 165 Idaho at ___, 450 P.3d at 318. When the officer went back to her car, he observed the passenger was either lying on the back seat or on the floorboards, out of the line of vision of the police officer. *Id.* The Court of Appeals held that the passenger's conduct and appearance of avoiding police interaction, did not give rise to

reasonable, articulable suspicion of criminal wrongdoing. 450 P.3d at 322. The Idaho Court of Appeals held:

> While we agree that finding an individual horizontal on the floor of a vehicle may be suspicious, without more it cannot be a sufficient basis on which an officer finds reasonable suspicion of criminal activity. The fatal flaws in the State's case are that [the officer] never *articulated* what *criminal* suspicion he had of Gonzales' behavior, other than the fact that Gonzales was perhaps hiding from him. As we have iterated above, an officer must "have a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. [411, 417-18 (1981)].

Gonzales, 165 Idaho at 774 (citations omitted). Similarly, Trooper Scheierman initially had a hunch that Mr. Randall was trying to avoid him, which was not tied to a particular criminal suspicion. [3]

In *State v. Kelley*, 160 Idaho 761 (Ct. App. 2016), the Idaho Court of Appeals concluded that Mr. Kelley's nervous demeanor—avoiding eye contact, trembling, and a pulsating artery, even combined with a story that the car Mr. Kelley was driving belonged to his friend and he was traveling from Oregon to Nebraska to return the car were not circumstances which "justified the officer's suspicion that Kelley was involved in criminal activity." *Id.* 160 Idaho at 764. The Court held:

> Kelley's nervousness, evidenced by lack of eye contact, trembling, and pulsing carotid artery, is of limited significance in establishing the presence of reasonable suspicion. *See State v. Neal*, 159 Idaho 919, 924, 367 P.3d 1231, 1236 (Ct. App. 2016) (holding "[a] nervous demeanor during an encounter with law enforcement is 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").

Id. 160 Idaho at 763.

As for Mr. Kelley's unusual travel itinerary, the Court reasoned:

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[3] Although Trooper Scheierman testified that he found the fact that Mr. Randall slowed down upon seeing the officer's patrol car parked by the side of the road was suspicious, thereafter the officer admitted that he himself slows down when he sees a law enforcement vehicle by the side of the road. (*See* Tr., p.47, Ls.8-21.)

> Kelley's lawful, albeit unusual, travel itinerary is also not enough to establish reasonable suspicion. *See United States v. Digiovanni*, 650 F.3d 498, 512–513 (4th Cir. 2011) (holding that while an unusual travel itinerary, coupled with other facts, may support a finding of reasonable suspicion, facts such as an unusual travel itinerary, renting a car from a source state, and traveling on a known drug corridor, without more, does not create reasonable suspicion of criminal activity because it renders suspect a substantial portion of innocent travelers).

Id. 160 Idaho at 763.

The Court concluded that the route traveled also did not rise to reasonable suspicion:

> Finally, Kelley's presence on I–84, a "drug-trafficking corridor," is insufficient to establish reasonable suspicion. Interstate 84 is the primary east-west interstate in this area and is used routinely by many innocent individuals who happen to be traveling from east to west, or vice versa, and wish to do so in a relatively quick and convenient manner. Using the only interstate freeway available, despite the fact that it may be used by individuals engaged in a whole host of criminal activity, cannot give rise to reasonable suspicion to search a vehicle as it would subject thousands of innocent travelers to an invasion of their privacy for no more of a reason than the use of the road. *See United States v. White*, 584 F.3d 935, 951-952 (10th Cir. 2009) (reasoning the probativeness of a particular defendant's route is minimal because officers have offered countless cities as drug source cities); *United States v. Yousif*, 308 F.3d 820, 829 (8th Cir. 2002) (holding traveling on a highway that was known to officers as a drug trafficking corridor cannot alone justify reasonable suspicion because too many people fit this description); *O'Boyle v. State*, 117 P.3d 401, 411 (Wyo. 2005) ("While we acknowledge the importance of drug interdiction, we are deeply concerned by the resulting intrusion [of searches justified based on our location along a nationally recognized drug trafficking corridor] upon the privacy rights of Wyoming citizens.").

Id. 160 Idaho at 763-64. Like the facts in *Kelley*, Mr. Randall's nervousness, travel plans, and beating artery do not equate to reasonable suspicion of drug activity. The car's "lived-in" look and an unconventional travel itinerary, or increased nervousness when asked additional questions about the areas traveled to, are not objective facts linking the travel plans or increased nervousness to drug activity. The State claims that Trooper Scheierman believed Mr. Randall's origin and destination were related to drug trafficking. (Resp. Br., pp.16-17.) However, similar to *Kelley*, Mr. Randall was traveling on the primary east-west interstate which was the quickest and most efficient means of traveling across the State of Idaho. (R., p.113.) "The use of a

commonly traveled road does not give an officer suspicion to prolong a traffic stop." *Kelley*, 160 Idaho at 764. "The officer's suspicion that Kelley's route from Oregon to Nebraska was somehow related to drug activity was nothing more than a hunch." *Id.*

Because Trooper Scheierman prolonged the traffic stop for an unrelated purpose, a drug investigation, that investigation must be supported by a reasonable suspicion of drug-related criminal activity. *Rodriguez v. United States*, 135 S. Ct. 1609, 1615 (2015); *State v. Aguirre*, 141 Idaho 560, 564 (Ct. App. 2005). In light of the totality of the circumstances, the information known to Trooper Scheierman does not create a reasonable suspicion of drug-related criminal activity to justify the prolonged stop.

A. The District Court Erred In Denying Mr. Randall's Motion To Suppress Because The Dog's Entry Into The Interior Of Mr. Randall's Car Absent Probable Cause Constituted An Unlawful Search Where That Entry Was Facilitated By Trooper Scheierman

The State concedes that Bingo only jumped halfway into the car (Resp. Br., pp.27-28), but claims that the circumstances of this case are unique such that the trooper's conduct was objectively reasonable (Resp. Br., pp.17-28).[4] The State also makes a new argument on appeal, one phrased as a "but-for" discovery exception. (Resp. Br., pp.18-20.) The State claims that even if Bingo's entry into Mr. Randall's car "was a Fourth Amendment violation, it was not the but-for cause of the discovery of the evidence Randall seeks to suppress." (Resp. Br., p.18.) The State asserts that Trooper Scheierman search the car and discovered the marijuana in the trunk only after Bingo alerted on the exterior of the trunk, *i.e.*, it was only the second alert, the one on

[4] Mr. Randall's arguments regarding the dog sniff were fully discussed in Mr. Randall's Appellant's Brief and will not be reiterated herein. Mr. Randall submits this Reply Brief to address the State's new argument on appeal.

the exterior, that provided the trooper with probable cause to search the car.[5] (Resp. Br., p.19.) Because of that alert," the State argues, "Trooper Scheierman had probable cause to search the car that was entirely independent of Bingo's entry." (Resp. Br., p.19.)

In making this new argument on appeal, the State neglects to mention the fact that the first time the dog alerted, it was inside Mr. Randall's car. (Resp. Br., pp.17-20.) The district court found:

> After climbing into the car, the drug dog went to the backseat and signaled the detection of the smell of controlled substances. Trooper Scheierman then removed the dog from the interior of the car and had the dog sniff the exterior of the car where the dog also alerted to the trunk.

(R., p.123.) The State appears to be arguing that the first alert was irrelevant; that Trooper Scheierman had probable cause to search the car after the dog's *second* alert on the vehicle. (Resp. Br., p.19.) Such an assertion is preposterous and unpreserved for argument on appeal.

In a sly attempt to avoid issue preservation requirements, the State phrases its argument without using the legal terminology for the well-known exceptions to the exclusionary rule. In *Wong Sun v. United States*, the United States Supreme Court stressed that evidence that has been illegally obtained need not always be suppressed:

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

371 U.S. 471, 487-88 (1963) (quoting J. Maguire, Evidence of Guilt 221 (1959)). But the State has not argued those exceptions here.

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[5] Trooper Scheierman testified that he saw Bingo alert in the backseat of the car. (1/25/18 Tr., p.36, Ls.13-19.) He then got Bingo out of Mr. Randall's car and redeployed him to the outside of the car, "just for almost training purposes, because it really wasn't necessary. . . ." (1/25/18 Tr., p.36, Ls.22-25.)

Instead of arguing causation exceptions through attenuation, independent source doctrine, or inevitable discovery, the State crafts a new "but-for" exception. However, the State's new position was not taken or argued below and is thus not preserved for appellate review. *See State v. Garcia-Rodriguez*, 162 Idaho 271, 275 (2017) (holding "[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."); *State v. Wolfe*, 165 Idaho 338, ___, 445 P.3d 147, 152 (2019) (same).

"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." *Halen v. State*, 136 Idaho 829, 833 (2002). One exception to the warrant requirement is the independent source exception. *State v. Downing,* 163 Idaho 26, 31 (2017). "[F]acts improperly obtained do not 'become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it' simply because it is used derivatively." *Nardone v. United States*, 308 U.S. 338, 341 (1939). Here, the evidence was not obtained from a source independent of the unlawful detention and dog sniff.

Nor is the State's "but-for" exception an attenuation argument. Evidence is attenuated, allowing it to be admitted "when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that 'the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.'" *Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016) (quoting *Hudson v. Michigan*, 547 U.S. 586, 591 (2006)); *State v. Cohagan*, 162 Idaho 717, 721 (2017). Here, the unconstitutional police conduct happed seconds before and/or was ongoing when the

exterior sniff occurred—the second positive indication was not attenuated from the first indication in the car or the unlawful extension of the traffic stop.

Perhaps the State's new "but-for" argument would best be classified as an inevitable discovery argument, but even this assertion falls flat, preservation problems notwithstanding. The inevitable discovery doctrine provides:

> If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale has so little basis that the evidence should be received. Anything less would reject logic, experience, and common sense.

Nix v. Williams, 467 U.S. 431, 444 (1984). However, "[t]he doctrine must presuppose inevitable hypotheticals running in parallel to the illegal actions, not in series flowing directly from the officers' unlawful conduct." *State v. Downing*, 163 Idaho 26, 32 (2017). "The [inevitable discovery] doctrine 'is not intended to swallow the exclusionary rule whole by substituting what the police should have done for what they really did.' " *Id.* (quoting *State v. Holman*, 109 Idaho 382, 392 (Ct. App. 1985)). Here, the State failed to demonstrate that legitimate means would have inevitably led to Mr. Randall's arrest for violation of I.C. § 37-2732B(a)(1)(C), and thus the exception does not apply in this case.

In *Wolfe*, the Idaho Supreme Court refused to consider the State's independent source doctrine argument, finding it was not asserted below and thus not properly preserved for appeal. 445 P.3d at 152. The Court explained:

> Further, although independent source and attenuation are similar doctrines, it cannot be said that raising one necessarily implicates the other. While these exceptions, as well as the inevitable discovery exception, all concern the causal relationship between an unconstitutional act and law enforcement's later discovery of evidence, their relationship is not so indistinguishable that it creates an "all for one, one for all" method of argument. Should this be the case, there would be no need for three distinct exceptions. The fact that each exception is analyzed under a different test supports this conclusion.

Id. Below, the prosecutor argued that: (1) a canine sniff is not considered a search and (2) Mr. Randall consented to the dog sniff. (R., p.100.) The prosecutor did not make any argument regarding the causal relationship between the trooper's unconstitutional act and his later discovery of evidence in briefing or during the suppression hearing. (*See* 1/25/18 Tr.; R., pp.97-102.) Thus, the State's "but-for" argument, whether couched as "but-for", attenuation, independent source doctrine, or inevitable discovery, fails because it is unpreserved.

CONCLUSION

Mr. Randall respectfully requests that this Court vacate the district court's judgment and conviction and reverse the order which denied his motion to suppress. Alternatively, Mr. Randall respectfully requests that this Court reduce his sentence as it deems appropriate or remand his case to the district court for a new sentencing hearing.

DATED this 27th day of March, 2020.

/s/ Sally J. Cooley
SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of March, 2020, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, to be served as follows:

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