4-9-2020

State v. Anderson Appellant's Reply Brief Dckt. 47024

Electronically Filed
4/9/2020 1:26 PM
Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Murriah Clifton, Deputy Clerk

SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NO. 47024-2019**
	)	
v.	)	**KOOTENAI COUNTY**
	)	**NO. CR28-18-16962**
	)	
DAVID CHARLES ANDERSON,	)	**REPLY BRIEF**
	)	
Defendant-Appellant.	)	
	)	

REPLY 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 SCOTT WAYMAN
District Judge

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

KIMBERLY A. COSTER
Deputy State Appellate Public Defender
I.S.B. #4115
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

PAGE

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

STATEMENT OF THE CASE

Nature of the Case

David Charles Anderson entered a conditional plea of guilty to possessing a controlled substance, expressly reserving his right to appeal the district court's order denying his motion to suppress. In his Appellant's Brief, Mr. Anderson argues that he was unlawfully seized when, without reasonable suspicion or other constitutional justification, an officer approached him while he was sitting in his vehicle, requested his identification, and then retained his driver's license to run his information through dispatch. He further argues that because the evidence later discovered was the product of the officer's unlawful conduct, suppression was required under the exclusionary rule, since no exception to that rule had been argued or found to apply in the district court below.

This Reply Brief is necessary to address the arguments made in the Respondent's Brief, to demonstrate that: (1) Mr. Anderson was "seized" within the meaning of the Fourth Amendment when the officer requested and then retained his license; and (2) that under the controlling precedent, the seizure of a citizen requires reasonable suspicion, even when the citizen is the driver of a parked car.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Anderson'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 in denying Mr. Anderson's motion to suppress, where the evidence discovered was the fruit of the officer's suspicionless, unjustified detention of Mr. Anderson, and the State failed to establish the applicability of any exception to the exclusionary rule?

ARGUMENT

The District Court Erred In Denying Mr. Anderson's Motion To Suppress, Where The Evidence Discovered Was The Fruit Of The Officer's Suspicionless, Unjustified Detention Of Mr. Anderson, And The State Failed To Establish The Applicability Of Any Exception To The Exclusionary Rule

A. Officer Herbig's Conduct Violated Mr. Anderson's Fourth Amendment Rights

Contrary to the State's arguments, and as demonstrated below, Mr. Anderson was "seized" as a matter of law when Officer Herbig requested his identification and then retained his license, and the State failed to meet its burden to show that the seizure was justified by reasonable suspicion or any other constitutional justification.

1. Taking Mr. Anderson's License Was A "Seizure"

Contrary to the State's argument (see Resp. Br., pp.6-9), Mr. Anderson was "seized" within the meaning of the Fourth Amendment when the officer requested his ID and retained his license.

The State's recites the test for determining if a seizure has occurred as whether, under the circumstances surrounding the encounter, a reasonable person would have felt free to leave or otherwise decline the officer's request and terminate the encounter. (Respondent's Br., p.6.) Otherwise stated, "so long as a reasonable person would feel free to disregard the police and go about his business, an encounter between police and an individual is consensual." *State v. Page*, 140 Idaho 841 (2004) (quoting *Florida v. Bostick*, 501 U.S. 429, 434 (1991)). Police may approach an individual on the street or in a public place and ask to examine identification, "[s]o *long as police do not convey a message that compliance with their requests is required." Id.* However, "when the officer, by means of physical force *or show of authority*, has in some way

restrained the liberty of a citizen," then "a 'seizure' has occurred." *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (citations omitted) (emphasis added).

The State claims, erroneously, that there was no "seizure" here, and asserts that Mr. Anderson was "free to terminate" the encounter:

> The fact that officer Herbig held Anderson's license for 29 seconds while he ran a warrants check would only be sufficient to transform the contact into a seizure if a reasonable person would not feel free to "terminate the encounter." Anderson could have easily asked for his license back; that he did not does not mean he was seized.

(Resp. Br., pp.7-8.)

The State's argument ignores the established law and the facts in this case. By virtue of Idaho Code § 49-316,[1] Mr. Anderson had a legal duty to surrender his license upon demand of an officer, and *no* reasonable persons under the circumstances – *i.e.*, a person seated in the driver's seat of a vehicle, keys in the ignition, parked in a public parking lot – would believe he was free to ignore the officer's request for his identification and not produce his driver's license.

Because the same statute *required* that Mr. Anderson have his license "in his immediate possession at all times when operating a motor vehicle," he was legally obligated to comply with the officer's request and could not drive away without violating the law. No reasonable person under these circumstances would have believed he was "at liberty to ignore the police presence and go about his business." Mr. Anderson was required to surrender his license and was restricted by law from driving away. Therefore, as a matter of law, Mr. Anderson was "seized" within the meaning of the Fourth Amendment when the officer requested and took his license. *See Bostick*, 501 U.S. at 429.

---

[1] Idaho Code § 49-316 provides, in relevant part:

> Every licensee shall have his driver's license in his immediate possession at all times when operating a motor vehicle and shall, upon demand, surrender the driver's license into the hands of a peace officer for his inspection. . . . .

Moreover, because the relevant inquiry is whether a reasonable person in *Mr. Anderson's position* would have felt free to ignore the request and leave, and contrary to the State's argument (Resp.Br., p.7), Officer Herbig's testimony that he would not have "forced" Mr. Anderson to give him the license is completely irrelevant; the statute compelled Mr. Anderson's compliance with the officer's request. Officer Herbig's subjective intentions have no bearing on this issue.

Next, the State's cites *State v. Page*, 140 Idaho 841, 843 (2004), and *United States v. Drayton*, 536 U.S. 194, 201 (2002), for the proposition that "requesting identification does not, without more, constitute a seizure." (*See* Resp. Br., pp.7-8.) However, neither case involved a *driver* obligated by statute to comply with an officer's requests. In *Page*, the defendant was a pedestrian, *see* 140 Idaho at 842; and in *Drayton*, the defendant was a passenger on a bus, *see* 536 U.S. at 201. Neither defendant had a legal duty to produce their driver's licenses in response to the officers' requests, which distinguishes those cases from Mr. Anderson's.

Additionally, and as acknowledged by the State (Resp.Br., p.8 n.8), the Court in *Page* held that, although the pedestrian was not seized as the result of an officer's *request* for identification (because a reasonable *pedestrian* would have felt free to disregard such request), the defendant was "seized at the point in time when Officer Marshall secured his driver's license and ran his name through dispatch to check for outstanding warrant." *Page*, 140 Idaho at 843. "[A] limited detention does occur when an officer retains a driver's license or other paperwork of value." *Id.* (citing *State v. Godwin*, 121 Idaho 491, 493 (1992), and *State v. Martinez*, 136 Idaho 436, 439 (Ct.App.2001) (applying the holding of *Godwin* to conclude that a seizure occurred when the officer took the driver's vehicle registration)).

Thus, there can be no serious argument that Mr. Anderson was free to ignore the officer's request for his license and leave.[2] He was "seized" the moment the officer requested and took his license.

2. The State Failed To Carry Its Burden Of Showing That Mr. Anderson's Seizure Was Reasonable Under The Fourth Amendment

The State asks this Court to hold that a seizure of a motorist is constitutionally reasonable, even where there is no basis for suspecting that the motorist is violating the law or is in need of assistance, so long as the encounter with the motorist was initially "consensual." (Resp. Br., p.10.) The State relies primarily on the Idaho Supreme Court's plurality decision in *State v. Godwin*, 121 Idaho 491 (1992), and the Idaho Court of Appeals decision in *State v. Landreth*, 139 Idaho 986 (2004). However, and contrary to the State's argument, neither controls in Mr. Anderson's case.

a. *Godwin* Does Not Control The Issue Of Reasonableness, Because It Is A Plurality Opinion

Godwin is not controlling for several reasons. First, *Godwin* is a plurality decision. Though *Godwin* provides clear and controlling authority that taking a motorist's driver's license constitutes a "seizure," *see* 121 Idaho at 493, there was no majority opinion as to rationale for *why* the seizure in that case was constitutionally "reasonable." Only two justices agreed that the public interest served by allowing an officer to run a license check outweighed the minimal intrusion to a motorist when the motorist is already stopped. *Godwin*, 121 Idaho at 492-96 (Bakes, J., joined by Boyle, J.) They based their opinion on two distinct rationales: (1) a

[2] The State asserts that the seizure at issue was not conceded below and is therefore preserved for appeal. (Resp. Br., p.9.) However, as accurately noted in the Appellant's Brief, the prosecutor did concede, at least in part, the effect of Idaho Code § 49-316. (*See* Appellant's Br., p.9 n.3.)

"motorist assist" under the community caretaking function, citing *State v. Ellenbecker*, 159 Wis.2d 91, 464 N.S.2d 427 (App.1990); and (2) an incident of a traffic stop, citing *State v. Reed*, 107 Idaho 172 (Ct. Appp.1984). *Godwin*, 121 Idaho at 492-96 (Bakes, J., joined by Boyle, J.) ("We are convinced that the views expressed in both *Reed* and *Ellenbecker* are correct.") However, there were no facts or findings that the officer had a reasonable suspicion that Godwin was violating any law, or was in need of assistance. 121 Idaho at 492-96. Rather, these justices agreed that the reasonable suspicion required by *Delaware v. Prouse*, 440 U.S. 648 (1979), was not required here, because the officers in this case had not stopped *Godwin* while he was driving, his car was already stopped. *Id.*

The two dissenting justices opined, in a lengthy dissent, that the seizure in this case could not be squared with the Fourth Amendment, since there was no evidence to support a reasonable suspicion that he had violated a traffic law or was engaged in criminal activity, and no evidence that Godwin was in need of assistance. *Godwin*, 121 Idaho at 457-501(Bistline, J., dissenting; Johnson, J., concurring in dissent).

Critically, however, Justice McDevitt, casting the decisive vote to ultimately affirm, wrote specially to concur "in the result only." *Godwin*, 121 Idaho at 45 (McDevitt, J., concurring in the result). In a separate concurring opinion, Justice McDevitt specifically declined to accept the "motorist assist" rationale, and indicated the correct standard to apply in this case was the standard set forth in *Terry v. Ohio*, 392 U.S. 1 (1968) – which is *not* the standard used in the two-justice lead opinion. *Godwin*, 121 Idaho at 45.[3]

[3] Additionally, and as noted Appellant's Brief, *Godwin* presented unusual facts. The seizure of Godwin was tied to the officer's valid stop of Godwin's girlfriend's vehicle, and the two were traveling together. *See* 121 Idaho at 495.

Thus, because *Godwin* does not provide a majority of justices agreeing on the rationale for why the seizure was "reasonable," the rationale contained in the two-justice lead opinion is not a "decision of the Court and is not controlling in other case." *See Osick v. Public Employee Retirement System of Idaho*, 122 Idaho 457, 460 (1992); Idaho Const., Art. V, § 6.

b. *Landreth* Does Not Control

Nor does the decision in *Landreth* control. First, to the extent that *Landreth* purports to apply the controlling authority of *Godwin*, the *Landreth* Court's holdings do not have such weight, for the reasons above. Additionally, to the extent the State reads *Landreth* as allowing an officer to detain an individual, so long as the initial encounter is valid (Resp. Br., p.13-14), such a reading cannot be reconciled with Fourth Amendment precedent. Moreover, the *Landreth* court expressly warned *against* allowing officer-initiated license requests of motorists as "consensual contacts," stating,

> We caution that our decision does not countenance officers initiating "consensual contacts" with individuals merely in order to follow that contact with a request for identification to run a license or warrants check. Such law enforcement tactic would run afoul of the Supreme Court decision in *Brown* [*v. Texas*].

139 Idaho at 991.

In *Brown v. Texas*, 443 U.S. 47 (1979), the United States Supreme Court held that an officer must have "reasonable suspicion" before detaining an individual to request identification, and that a state statute requiring the individual to produce identification upon request did not alter that requirement. The *Landreth* Court reasoned that the officer who seized Landreth complied with *Brown*, because "the officer had a *legitimate reason* to make contact with Landreth, even though that reason may not have justified a detention at the onset of the encounter." 139 Idaho at 991 (emphasis added).

Even if *Landreth* is read to allow for a seizure of an individual on less than reasonable suspicion, (*i.e.,* if the officer had a "legitimate reason" for initiating the contact), such an understanding cannot be reconciled with the U.S. Supreme Court's holding in *Brown v. Texas*, which requires an officer to have "reasonable suspicion." 443 U.S. at 447.

And finally, as argued in the Appellant's Brief, even under *Landreth's* "legitimate reason for initiating the contact" standard, the State failed meet its burden. In *Landreth*, the officer was at least suspicious of criminal activity (the officer received a report of a suspicious person and he initially suspected the theft of electricity), even if that suspicion did not rise to the level of reasonable suspicion. 139 Idaho at 990. In Mr. Anderson's case, by contrast, Officer Herbig failed to articulate *any* reason – legitimate or otherwise – for initiating the contact with Mr. Anderson. (*See* Appellant's Brief, p.13.)

c. The Rationale Of *State v. Osborne* Is Factually Similar And Legally Correct

Unlike *Godwin* and *Landreth*, the case most factually similar to Mr. Anderson's seizure is *State v. Osborne*, 121 Idaho 520 (1991). *Osborne* most accurately reflects the controlling Fourth Amendment precedent. *Id.* In that case, officers saw Osborne standing behind a parked truck with the truck's engine running and the driver's door open. *Id.* at 523. Osborne entered the driver's side of the truck and closed the door. *Id.* One of the officers walked up to Osborne and asked to see his driver's license. *Id.* After asking for the license, the officer detected the smell of alcohol and had Osborne step out of the truck and ultimately arrested him for driving under the influence of alcohol. *Id.* The Court of Appeals held that Osborne was "seized" when the officer took his license, and that the seizure was unreasonable because the record was devoid of any evidence to support an officer's reasonable suspicion, at the moment of the seizure, that

Osborne was unlicensed or was violating of any law, and there was no basis for the officer to exercise his community caretaking function. *See* 121 Idaho at 525-27.

The facts of *Osborne* are analogous to the present case, in that the record in this case is undisputedly devoid of an evidentiary basis to support a reasonable suspicion that Mr. Anderson was unlicensed or violating any law, or for the Officer to believe that Mr. Anderson was in need of assistance. (*See generally* Tr.) The State has never asserted otherwise. *(See generally* R., Tr., Respondent's Brief.)

Also, as discussed below, *Osborne* is relevant in addressing the State's faulty assertion that a motorist is entitled to less protection, under the Fourth Amendment, than a pedestrian. (Resp. Br., pp.14-15.)

d. Motorists, Like Pedestrians, Are Entitled To Protection Against Suspicionless Seizures; Being Parked Does Authorize An Officer To Conduct A Seizure

The State also argues that because Mr. Anderson "was already stopped" and was "not a pedestrian" the officer should be allowed to take his license, even though the officer did not have reasonable suspicion that Mr. Anderson was in violation of the law or a belief that Mr. Anderson was in need of help. This argument is incorrect for several reasons.

First, the State's argument confuses the meaning of a "stop" in the purely physical sense, with a "stop" in the legal sense; a stop in the legal sense is a limited detention, and it is a "seizure" under the Fourth Amendment that requires reasonable suspicion. *See e.g. Terry v. Ohio*, 392 U.S. 1 (1968) ("investigatory stop" is a seizure); *Rodriguez v. United States*, 575 U.S. 348, 354 (2015) ("traffic stop" is a seizure). The fact that Mr. Anderson was sitting in a vehicle that was not in motion did not authorize the officer to seize him. In *Osborne*, the driver was already physically stopped, in that his truck was not moving, but he was not "seized" until the

Officer took his license. 121 Idaho at 534. The Court held that seizure was unreasonable because it was not supported by a reasonable suspicion. 121 Idaho at 525.

Second the fact that Mr. Anderson was a motorist and not a pedestrian only means that, because of Idaho Code § 49-316 (1) he was required to carry driver's license, and (2) *if* the officer had reasonable suspicion to justify the seizing him, such as for a traffic violation, *then* the officer would be permitted to check his license as an ordinary inquiry incident to the mission of *that* seizure. *Rodriguez*, 575 U.S. at 355. However, Officer Herbig had no reasonable suspicion that Mr. Anderson was unlicensed or violating any other law. (*See generally* Tr.) Just as in *Osborne,* the taking of Mr. Anderson's license violated the Fourth Amendment. *Osborne*, 121 Idaho at 525. As explained in *Osborne*, Idaho Code § 49-316 does not – and cannot because of the Fourth Amendment's protections – permit an officer to detain the driver of a parked vehicle without objective, reasonable suspicion:

> We first consider whether the detention was justified as an appropriate licensing check. Idaho Code § 49-316 mandates that every licensee possess a license for driving and that the "driver shall upon demand, surrender the driver's license into the hands of a peace officer for his inspection." However, a field officer is not permitted to randomly stop motorist for the purpose of conducting routine license checks. As noted by the United States Supreme Court,
>
> > To insist neither upon an appropriate factual basis for suspicion direct at a particular automobile nor upon some other substantial and objective standard or rule to govern the exercise of discretion would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches"
> > ...
> > The "grave danger" of abuse of discretion does not disappear simply because the automobile is subject to state regulation resulting in numerous instances of police contact ... *If the government intrudes ... the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards.*

121 Idaho at 525 (quoting *Delaware v. Prouse*, 440 U.S. 648, 661 (1979) (internal quotations omitted) (emphasis added by the Court of Appeals).

In *Prouse*, the United States Supreme Court held that the police practice of random, suspicionless license checks violated the Fourth Amendment. 440 U.S. at 666. The Court stated that "[a]n individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation." 440 U.S. at 662. The Court concluded that the same objective test it had established in *Terry v. Ohio* standard applied to detentions of persons who are drivers and passengers of automobiles, and held that, for an officer to seize a vehicle and its occupants, the officer is required to have reasonable articulable suspicion. 440 U.S. at 662.

Although *Prouse* involved a stop of a moving vehicle and the detention of its occupants, which may be more intrusive than detaining the passengers of the vehicle which is already stopped, the Court of Appeals concluded the reasoning in *Prouse* was "equally applicable" to the seizure of individuals in cars that are parked. 121 Idaho at 525. Quoting *Prouse*, the Court of Appeals stated,

> People are not shorn of all fourth amendment protections when they step from their homes on public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles.

121 at 525 (quoting *Prouse*, 440 U.S. at 663).

Thus, contrary to the State's arguments, and as explained in *Osborne*, Idaho Code § 49-316 does *not* give officers an independent basis for seizing a motorist to check his license. 121 Idaho 525. Nor *could* a state statute provide such an exception to the Fourth Amendment. *See Brown v. Texas*, 443 US 47, 50 (1979) (holding that, a Texas statue requiring individuals to

identify themselves to police upon request, did not alter the requirement that the requesting officer must first have reasonable suspicion to justify detaining the individual.)

Thus, under the controlling precedent of the United States Supreme Court, an officer must have reasonable articulable suspicion before he may detain an individual. The standard is the same whether the individual is a pedestrian or a motorist, and the same whether the motorist is moving or is parked. And this same standard applies, even though there is a statute that imposes a duty on the individual who is driving to surrender his license (and be detained) upon the request of an officer.

B. The Exclusionary Rule Requires Suppression Because The Evidence Was Discovered As The Result Of The Officer's Illegal Conduct And The State Has Failed To Argue, In the District Court Or On Appeal, Any Exception To The Rule

The State has not responded to Mr. Anderson's claims that the exclusionary applies in this case, and that the State, by failing to argue the application of any exception to the exclusionary rule in the district court, has waived that issue on appeal. (*See generally* Resp. Br.) Regarding the exclusionary rule and its application in this case, Mr. Anderson respectfully refers this Court to his argument in the Appellant's Brief, at pages 14-16.

CONCLUSION

For the above reasons and those set forth in his Appellant's Brief, Mr. Anderson respectfully asks that his Court reverse the district court's order denying suppression, vacate his judgment of conviction, and remand his case to the district court to permit him to withdraw his guilty plea.

DATED this 9th day of April, 2020.

/s/ Kimberly A. Coster
KIMBERLY A. COSTER
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of April, 2020, I caused a true and correct copy of the foregoing APPELLANT'S REPLY 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

KAC/eas