

11-14-2016

# State v. Bonilla Appellant's Reply Brief Dckt. 43805

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs)

---

## Recommended Citation

"State v. Bonilla Appellant's Reply Brief Dckt. 43805" (2016). *Idaho Supreme Court Records & Briefs*. 6166.  
[https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs/6166](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/6166)

This Court Document is brought to you for free and open access by Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact [annablaine@uidaho.edu](mailto:annablaine@uidaho.edu).

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

STATE OF IDAHO, )  
 )  
 Plaintiff-Respondent, ) NO. 43805  
 )  
 v. ) ADA COUNTY NO. CR 2015-7022  
 )  
 ANTHONY ROBERT BONILLA, )  
 )  
 Defendant-Appellant. )  
 \_\_\_\_\_ )

\_\_\_\_\_  
**REPLY 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 LYNN G. NORTON**  
District Judge  
\_\_\_\_\_

**ERIC D. FREDERICKSEN**  
Interim State Appellate Public Defender  
State of Idaho  
I.S.B. #6555

**ANDREA W. REYNOLDS**  
Deputy State Appellate Public Defender  
I.S.B. #9525  
P.O. Box 2816  
Boise, ID 83701  
(208) 334-2712

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

**ATTORNEYS FOR  
DEFENDANT-APPELLANT**

**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 Facts and<br>Course of Proceedings .....   | 1           |
| ISSUES PRESENTED ON APPEAL .....  | 2           |
| ARGUMENT .....  | 3           |
| I. The District Court Erred When It Denied Mr. Bonilla’s<br>Motion To Suppress .....  | 3           |
| A. Officer Reimers Exceeded The Scope Of Mr. Bonilla’s<br>Consent, And Exceeded The Scope Of A <i>Terry</i> Frisk,<br>When He Lifted Up Mr. Bonilla’s T-Shirt Without First<br>Conducting A Pat Down Of His Clothing .....  | 3           |
| B. The State Did Not Meet Its Burden Of Proving In The<br>District Court The Applicability Of The Automobile<br>Exception To The Warrant Requirement And The<br>Record Is Not Sufficient For This Court To Apply<br>This Exception In The First Instance .....                                      | 5           |
| II. The District Court Abused Its Discretion When It Sentenced<br>Mr. Bonilla To A Unified Term Of Ten Years, With Two Years<br>Fixed, For Possession With Intent To Deliver, And For Five<br>Years, With Two Years Fixed, For Unlawful Possession<br>Of A Firearm, To Be Served Concurrently ..... | 7           |
| CONCLUSION .....  | 8           |
| CERTIFICATE OF MAILING .....  | 9           |

## **TABLE OF AUTHORITIES**

### Cases

|   |      |
|---|------|
| <i>State v. Bottelson</i> , 102 Idaho 90 (1981).....                      | 5    |
| <i>State v. Naranjo</i> , 159 Idaho 258 (Ct. App. 2015) .....             | 6    |
| <i>State v. Tyler</i> , 153 Idaho 623 (Ct. App. 2012).....                | 3, 4 |
| <i>Terry v. Ohio</i> , 392 U.S. 1 (1968) .....                            | 1, 3 |
| <i>United States v. Aquino</i> , 674 F.3d 918 (8th Cir. 2012).....        | 4    |
| <i>United States v. Winningham</i> , 140 F.3d 1328 (10th Cir. 1998) ..... | 6    |

## STATEMENT OF THE CASE

### Nature of the Case

The district court erred in denying Mr. Bonilla's motion to suppress and abused its discretion at sentencing. The district court denied Mr. Bonilla's motion to suppress because it concluded Mr. Bonilla consented to a frisk for weapons and the officer who conducted the frisk did not exceed the scope of his consent, or of a permissible frisk under *Terry v. Ohio*, 392 U.S. 1 (1968), when he lifted up Mr. Bonilla's t-shirt without first conducting a pat down of his clothing. The State contends the district court did not err in its ruling and also argues the evidence found in Mr. Bonilla's vehicle should not have been suppressed because it was supported by independent probable cause based on a drug dog's alert on Mr. Bonilla's vehicle. The State did not meet its burden of proving in the district court the applicability of the automobile exception to the warrant requirement and the record is not sufficient for this Court to apply this exception in the first instance. This Court should reverse the district court's order denying Mr. Bonilla's motion to suppress. Alternatively, this Court should conclude the district court abused its discretion at sentencing.

### Statement of Facts and Course of Proceedings

Mr. Bonilla included a statement of facts and course of proceedings in his opening brief. (App. Br., pp.1-5.). He relies on and incorporates that statement herein.

## ISSUES

1. Did the district court err when it denied Mr. Bonilla's motion to suppress?
2. Did the district court abuse its discretion when it sentenced Mr. Bonilla to a unified term of ten years, with two years fixed, for possession with intent to deliver, and for five years, with two years fixed, for unlawful possession of a firearm, to be served concurrently?

## ARGUMENT

### I.

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

##### A. Officer Reimers Exceeded The Scope Of Mr. Bonilla's Consent, And Exceeded The Scope Of A *Terry* Frisk, When He Lifted Up Mr. Bonilla's T-Shirt Without First Conducting A Pat Down Of His Clothing

Mr. Bonilla argued in his opening brief that Officer Reimers exceeded the scope of his consent, and the scope of a permissible frisk under *Terry*, when he lifted up Mr. Bonilla's t-shirt without first conducting a pat down of his clothing. (App. Br., pp.8-11.) The State argues the frisk was permissible because the officer's act of lifting up Mr. Bonilla's t-shirt was a reasonable way to search for weapons under the circumstances. (Resp. Br., pp.10-15.) The State's argument is based on an incorrect interpretation of *Terry* and its progeny and must be rejected. Where, as here, a search is based on consent, "the State must conform its search to the limitations placed upon the right granted by the consent." *State v. Tyler*, 153 Idaho 623, 626 (Ct. App. 2012). Officer Reimers did not conform his search to the limitations placed upon it, which was a *Terry* frisk, and the search thus violated Mr. Bonilla's rights under the Fourth Amendment.

In *Terry*, the United States Supreme Court defined a frisk as "a carefully limited search of the outer clothing." 392 U.S. at 30. Our courts have "repeatedly reiterated that under *Terry*, a protective frisk is generally limited to a pat-down of the outer clothing." *Tyler*, 153 Idaho at 627. The State argues in its brief that any limited intrusion designed to discover guns, knives, clubs or other instruments of assault is permissible under *Terry*. (Resp. Br., p.13.) The Court of Appeals rejected this exact

same argument in *Tyler*. See *Tyler*, 153 Idaho at 628 (rejecting the State’s argument that “the standard under *Terry* is merely whether the search was confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer”) (quotation marks omitted). The Court of Appeals explained in *Tyler* that this standard failed to “take into consideration the privacy interests of the person being searched” and “would provide virtually no limit to the scope of a frisk for weapons.” *Id.*

In *Tyler*, the Court of Appeals affirmed the district court’s grant of the defendant’s motion to suppress, recognizing “the officer did not first attempt a pat-down of [the defendant’s] outer clothing . . . which may have provided the basis for an additional intrusion depending on what the officer felt.” *Id.* at 628-29. This is consistent with case law from other jurisdictions holding “[a]n actual search of a person’s body is not authorized under *Terry* until *after* a pat down confirms the presence of a weapon or contraband.” *United States v. Aquino*, 674 F.3d 918, 925 (8th Cir. 2012) (discussing cases from the Second, Fourth and Eighth Circuits). Here, the State did not meet its burden of demonstrating the particular factual circumstances justified any intrusion beyond a pat-down of Mr. Bonilla’s clothing, which Officer Reimers never conducted. This was the basis for the district court’s order denying Mr. Bonilla’s motion to suppress, see R., pp.100-09, and that order must be reversed.

B. The State Did Not Meet Its Burden Of Proving In The District Court The Applicability Of The Automobile Exception To The Warrant Requirement And The Record Is Not Sufficient For This Court To Apply This Exception In The First Instance

Mr. Bonilla argued in his opening brief that all of the evidence discovered subsequent to Officer Reimers' discovery of marijuana in his pocket during the so-called frisk stemmed from the frisk and should have been suppressed. (App. Br., p.12.) The State argues in its brief that even if the frisk was unlawful, the evidence discovered in Mr. Bonilla's vehicle should not have been suppressed because the search of the vehicle was supported by independent probable cause—specifically, the drug dog's alert on Mr. Bonilla's vehicle—and the search thus fell within the automobile exception to the warrant requirement. (Resp. Br., pp.5-11.)

Mr. Bonilla anticipated the State would make this argument and thus, in his opening brief, argued the drug dog's alert did not provide an independent basis for the discovery of the evidence found in Mr. Bonilla's vehicle because, first, the State did not meet its burden of demonstrating the seizure of Mr. Bonilla was sufficiently limited in scope and duration; and, second, the drug dog's entry into Mr. Bonilla's vehicle was facilitated by law enforcement and was not instinctual. (App. Br., pp.12-14.) In order to satisfy the requirements of the Fourth Amendment, the State has the burden of proving a warrantless search falls within one of the exceptions to the warrant requirement. *State v. Bottelton*, 102 Idaho 90, 92 (1981). The State did not meet its burden of proving the search of Mr. Bonilla's vehicle was supported by independent probable cause based on the drug dog's alert.

The district court did not make any findings or conclusions regarding whether the traffic citation would have been issued to Mr. Bonilla, and the purpose of the stop

completed, prior to the deployment of the drug dog and absent the unlawful frisk. Without such findings or conclusions, this Court should not decide in the first instance that the traffic stop would not have been extended absent the illegal frisk.

The district court also did not make any findings or conclusions regarding the circumstances surrounding the dog's entry into the open door of Mr. Bonilla's vehicle. The State asserts in its brief that Mr. Bonilla "apparently failed to shut the vehicle's door" but the State did not present any evidence in the district court to support this claim. Officer Reimers testified at the preliminary hearing that he deployed his drug dog around Mr. Bonilla's vehicle after he placed him under arrest, beginning at the front license plate and proceeding counterclockwise, and the dog jumped into the vehicle through the open driver's side, and alerted after jumping in the vehicle. (6/17/15 Tr., p.10, Ls.6-14.) The State did not present any evidence regarding the reason the door was open, including whether the dog was leashed at the time it was deployed, which would be critical in determining whether the dog's entry into the vehicle was instinctual or facilitated. *Compare State v. Naranjo*, 159 Idaho 258, 259-61 (Ct. App. 2015) (concluding dog's entry into vehicle was instinctual, not facilitated, where defendant "left his driver's side window open" and the dog "spontaneously moved his head up to the open window" when the officer directed the dog to sniff at the door's seam) *with United States v. Winningham*, 140 F.3d 1328, 1331 (10th Cir. 1998) (concluding dog's entry into vehicle was facilitated search where police opened van door, unleashed dog as he neared the door, and dog entered the van).

This Court is not in a position to make factual findings on whether the stop would have been extended absent the illegal frisk and whether the dog's entry into

Mr. Bonilla's vehicle was facilitated or instinctual. If the State wanted to rely on the automobile exception to the warrant requirement, it was the State's responsibility to introduce sufficient evidence in the district court to support this exception. The State did not do so. The district court denied Mr. Bonilla's motion to suppress because it concluded Mr. Bonilla consented to a frisk for weapons, and the search conducted by Officer Reimers did not exceed the scope of a *Terry* frisk. (10/8/15 Tr., p.18, Ls.11-21; R., pp.100-09.) As discussed above, the district court erred as a matter of law in concluding Officer Reimers did not exceed the scope of Mr. Bonilla's consent and of a permissible *Terry* frisk when he lifted Mr. Bonilla's t-shirt without first patting down his clothing.

## II.

The District Court Abused Its Discretion When It Sentenced Mr. Bonilla To A Unified Term Of Ten Years, With Two Years Fixed, For Possession With Intent To Deliver, And For Five Years, With Two Years Fixed, For Unlawful Possession Of A Firearm, To Be Served Concurrently

On this issue, Mr. Bonilla relies on the argument contained in his opening brief. (See App. Br., pp.14-17.)

CONCLUSION

For the reasons stated above, as well as those set forth in his opening brief, Mr. Bonilla respectfully requests that this Court vacate his conviction, reverse the district court's order denying his motion to suppress, and remand this case to the district court for further proceedings. Alternatively, if this Court finds no error in the district court's order denying his motion to suppress, Mr. Bonilla respectfully requests that this Court reduce his sentences as it deems appropriate or vacate his sentences and remand this case to the district court for resentencing.

DATED this 14<sup>th</sup> day of November, 2016.

\_\_\_\_\_  
/s/  
ANDREA W. REYNOLDS  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 14<sup>th</sup> day of November, 2016, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

ANTHONY ROBERT BONILLA  
INMATE #117647  
SICI  
PO BOX 8509  
BOISE ID 83707

LYNN G NORTON  
DISTRICT COURT JUDGE  
E-MAILED BRIEF

CRAIG A STEVELEY  
ADA COUNTY PUBLIC DEFENDER  
E-MAILED BRIEF

KENNETH K JORGENSEN  
DEPUTY ATTORNEY GENERAL  
CRIMINAL DIVISION  
E-MAILED BRIEF

\_\_\_\_\_/s/\_\_\_\_\_  
EVAN A. SMITH  
Administrative Assistant

AWR/eas