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State v. Ashbey Appellant's Brief Dckt. 47251

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

STATE OF IDAHO,	)	
	)	**NOS. 47251-2019, 47252-2019,**
Plaintiff-Respondent,	)	**& 47253-2019**
	)	
v.	)	**KOOTENAI COUNTY**
	)	**NOS. CR28-19-2202, CR28-19-2258,**
ROBERT SCOTT ASHBEY,	)	**& CR28-19-3208**
	)	
Defendant-Appellant.	)	**APPELLANT'S BRIEF**
	)	
	)	

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

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STATEMENT OF THE CASE

Nature of the Case

Robert Scott Ashbey entered conditional guilty pleas in each of three cases, reserving his right to appeal the district court's orders denying his motions to suppress. Mr. Ashbey sought to suppress evidence discovered as the result of a traffic stop that an officer prolonged to facilitate a dog sniff, in violation of his Fourth Amendment rights. The district court expressly found the officer had acted as safety backup for the dog handler, instead of pursuing the traffic violation. However, the district court concluded there was no unlawful prolonging of the stop because the officers had "information" that Mr. Ashbey might be transacting in narcotics, and alternatively, because the normal traffic-related tasks could have been completed within the same timeframe as the dog sniff.

On appeal, Mr. Ashbey argues that district court's rulings are erroneous. First, the officers' "information," which the officer attributed to unspecified "street sources," was bare bones, and according to the holdings in *Alabama v. White*, 496 U.S. 325, 330 (1990), and *State v. Bishop*, 146 Idaho 804, 811 (2009), lacked the requisite indicia of reliability to meet the Fourth Amendment's reasonable suspicion standard. Second, the district court's alternative rationale, that the officers "could have" completed the traffic related tasks within the same timeframe as dog sniff, was expressly rejected in *Rodriguez v. United States*, 575 U.S. 348 (2015), and *State v. Linze*, 161 Idaho 605 (2016), and therefore cannot justify the officers' conduct. The district court's orders denying suppression should be reversed, and in accordance with the plea agreement, Mr. Ashbey should be allowed to withdraw his guilty pleas.

Statement of the Facts and Course of Proceedings

The following facts were established at the suppression hearing.[1] On December 21, 2018, Officer Cannon was surveilling an apartment building based on "information" from unspecified "street sources" that Mr. Ashbey and his roommate had been selling drugs out of the second floor unit, and allowing other people to use drugs there. (Tr., p.5, Ls.16-21; Conf.Exhibits, p.10.)[2] Officer Cannon observed two people leave the building and drive off in a Toyota 4Runner, headed east, and he radioed this information to Officer Nordman. (Tr., p.5, Ls.16-22; Conf.Exhibits, p.10.) Based on the description of the vehicle and the direction it was headed, Officer Nordman located the Toyota and followed it until he observed a turn-signal violation, and then he conducted a traffic stop. (Tr., p.5, L.16 – p.6, L.3.) Upon approaching the Toyota, Officer Nordman recognized and greeted Mr. Ashbey, sitting in the front passenger seat, next to a female driver. (Tr., p.6, Ls.2-12.) The State's video shows that Officer Nordman told the driver he had stopped the vehicle because of the turn-signal violation, and he obtained the driver's license and vehicle registration documents, and also obtained Mr. Ashbey's I.D. card. (Ex.A, at 1:00-2:00; *see also* Tr., p.6, L.17 – p.7, L.8.) After being handed these documents, Officer Nordman ordered the driver out of the car. (Ex.A, at 1:00-2:00.) After the driver stepped out of the Toyota, the Officer Nordman walked her back to the patrol car and then asked if he could search her person; the woman complied with the officer's request to search, and the

[1] Unless otherwise indicated, "Tr." refers to the 141-page electronic file entitled "Transcript," filed in Appeal No.47251, which contains the transcripts of the preliminary hearing (Tr., pp.1-37), the evidentiary hearing on the motion to suppress (Tr., pp.38-87), the district court oral ruling on that motion (Tr., pp.88-122), and the change of plea/sentencing hearing (Tr., pp.123-141). "Conf.Exhibits" refers to the 18-page electronic file entitled "Confidential Exhibits," filed in Appeal No.47251. References to "Ex.A." are to Officer Nordman's bodycam recording, also filed in Appeal No.47251.

[2] Officer Nordman testified that he and Officer Cannon were assigned to a five-member "community action team." (Tr., p.38, L.7-14.)

officer searched the woman's pants pockets, over the front of her shirt,[3] and inside her boots. (Ex.A., at 2:00-5:00.) During this time, Officer Bangs arrived at the scene with his drug dog, Halo, in the patrol car. (Tr., p.97, L.23 – p.98, L.7; p.100, Ls.4-5; Ex.A., at 2:00-5:00.) Officer Nordman asked Officer Bangs to "go grab Mr. Ashbey." (Ex.A, at 2:30.) Officer Nordman later testified that it he had ordered both occupants outside their car for officer safety reasons, because he saw a cylindrical object in the front seat area that could be used as weapon. (Tr., p.7, Ls.17-22.) As requested, Officer Bangs retrieved Mr. Ashbey and escorted him over to the side of the road where Officer Nordman was standing with the female driver. (Ex.A, at 2:30-5:09.) Officer Nordman then told Officer Bangs to go get his dog and to conduct an exterior sniff of the Toyota. (Ex.A, at 5:09-6:00; Tr., p.40, Ls.9-10.) For the next fifty seconds, Officer Nordman acted "as cover for Officer Bangs as he was running his dog." (Tr., p.40, Ls.9-10, p.98, Ls.14-18; Ex.A, at 5:09-6:00.) During this time, Officer Nordman was doing nothing to pursue the traffic infraction. (*See* Ex.A, at 5:09-6:00; Tr., p.40, Ls.9-10, p.98, Ls.14-18.)[4]

Soon after the sniff began, the drug dog alerted. (Ex.A, at 6:00.) A plastic baggie containing what appeared to be trace amounts of methamphetamine was discovered and seized during the ensuing vehicle search. (Tr., p.18, Ls.17-25.) The officers did not arrest Mr. Ashbey at that time. (Tr., p.56, L.1-3.)

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[3] There is no record the officer found anything of evidentiary value during this search. (*See generally*, Tr.; R.)

[4] Officer Nordman explained the purpose of that portion of the detention to Mr. Ashbey and the driver, as follows:

> So right now, we are just going to make sure there is nothing else inside of the vehicle. The officer is going to use his K-9 partner; if the dog doesn't alert to the vehicle, then you're on your way. If he does alert, then that warrants [us to do] a search of the vehicle.

(Ex.A, at 5:09-6:00.)

Instead, Officer Nordman later swore out a criminal complaint charging Mr. Ashbey with possession of a controlled substance, based on the evidence discovered and seized on December 21, 2018, and requested and obtained a felony arrest warrant. (Appeal No.47251, R., pp.8-24; Tr., p.56, L.4 – p.57, L.19; Conf.Exhibits, pp.2-10.) Based on that arrest warrant, on February 6, 2019, Mr. Ashbey was stopped, arrested, and taken into custody. (Tr., p.56, L.4 – p.57, L.19.) As a result of this second stop and the ensuing searches, officers discovered evidence of drug paraphernalia, drug residue, and a credit card that was not his. (Tr., p.59, Ls.2-8, p.80, Ls.5-15.) Based on the evidence from this second stop, the State filed a second case, charging Mr. Ashbey with possession of paraphernalia and possession of a controlled substance. (Appeal No. 47252, R., pp.10, 69.)

Following his booking and detention on those charges, a search of Mr. Ashbey's belongings resulting in the discovery of heroin. (Tr., p.82, L.13 – p.83, L.24.) Based on that evidence, the State filed a third case, charging Mr. Ashbey with possessing a controlled substance, and introducing major contraband into a correctional facility. (Appeal No. 47523, R., pp.7, 47-48.)

Mr. Ashbey filed motions to suppress in each of his three cases claiming that the original traffic stop on December 21, 2018, was unlawfully prolonged, in violation of his Fourth Amendment rights.[5] (Appeal No. 47251 R., pp.50-58; Appeal No. 47252 R., pp.78-86; Appeal No. 47253 R., pp.58-69.) In each of his cases, he argued the evidence was derived directly or indirectly as the result of that Fourth Amendment violation, and that the exclusionary rule applied to require evidence in all three cases be suppressed as the tainted fruit of the poisonous

[5] In his third case, involving the alleged introduction of contraband into the jail, CR28-19-3208, Mr. Ashbey's motion additionally raised issues regarding unwarned and uncounseled statements and having those statements suppressed at the jail disciplinary hearing. (Appeal No.47253, R., pp.65-68.) He does not pursue those particular issues on appeal.

tree. (Appeal No. 47251 R., pp.50-58; Appeal No. 47252 R., pp.78-86; Appeal No. 47253 R., pp.58-69.)

The State filed a memorandum in opposition in each of Mr. Ashbey's three cases. In the first two cases, the State argued only that the traffic stop on December 21, 2018, was not unlawfully prolonged,[6] and that even if it was, the evidence should not be suppressed pursuant to "the good faith exception to the exclusionary rule." (Appeal No. 47251 R., pp.64-68; Appeal No.47252, R., pp.87-94.) In the third case (alleging introduction of contraband into the jail), the State made the same assertions, but additionally argued for the application of three additional exceptions to the exclusionary rule: the independent source doctrine, the inevitable discovery doctrine, and the attenuation doctrine. (Appeal No. 47253, R., pp.76-78.)

The district court denied all three of Mr. Ashby's motions. (Appeal No. 47251 R., p.82; Appeal No.47252, R., p.122; Appeal No. 47253, R., p.90; Tr., p.89, L.4 – p.116, L.24.) In its oral ruling from the bench, the district court explained that the basis for suppression in all three cases "stemm[ed] back to the incidents of December 21." (Tr., p.91, Ls.1-2.) The district court then concluded, "there was no constitutional violation by Officer Nordman in stopping the vehicle on December 21, 2018." (Tr., p.105, Ls.10-12.)

Though the district court expressly found that, instead of pursuing the traffic violation Officer Nordman had acted as a safety backup while Officer Bangs ran his drug dog around the car (*see* Tr., p.98, Ls.14-18), the court concluded there was no unlawful prolonging of the stop because Officer Nordman was also pursuing a drug investigation. (Tr., p.105, L.20 – p.106,

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[6] In its briefing, the State argued that (1) that the officer was justified in having the occupants exit the vehicle based on officer safety concerns; (2) the officer was justified in expanding the scope of the traffic stop into a criminal investigation, based the officer's observation of a "makeshift weapon" next to an "argumentative and agitated passenger"; and (3) the dog sniff was permissible because it was conducted "simultaneous to the investigative stop" and did not prolong the stop. (Appeal No. 47251 R., pp.66-67.)

L.12.) Specifically, the district court found that the officers "had a suspicion that these folks could have been doing drug deals at this building," and that "the officers were there to confirm or deny [sic] information that the vehicle may have been part of some unlawful drug transaction." (Tr., p.107, Ls.9-11.)

Alternatively, the district court found that no unlawful prolonging had occurred because the tasks "normally done" for a traffic stop "could have been done" during the same timeframe as the dog sniff. (Tr., p.107, L.20 – p.108, L.4.)

Based on its ultimate conclusion that there was no unlawful prolonging of the stop on December 21, 2018, the district court denied Mr. Ashbey's motions to suppress in all three of his cases. In CR28-19-2202 (possession of drugs on December 21, 2018), the court stated only that it was denying the motion. (Tr., p.108, Ls.16-17.) Regarding the second case, CR28-2019-2258 (possession of paraphernalia, drugs, and the credit card, all found as the result of the arrest warrant), the district court ruled that it was denying the motion "[b]ased on the court's finding that there was no unlawful seizure on December 21." (Tr., p.109, Ls.7-9.)

Turning to the third case, CR28-2019-3208, the district court stated,

> it's alleged that that should be suppressed basically because of the allegedly unlawful arrest in the prior case and the allegedly unlawful search and seizure in the first case, incident No. 1, which I've already found not to be established. For those reasons, I will not suppress the evidence in case number CR-2019-3208.

(Tr., p.111, Ls.15-21.) The district court made no alternative findings regarding the application of any exception to the exclusionary rule. (*See generally* Tr., p.88, L.1 – p.116, L.20.)

Following the denials of his motions to suppress, Mr. Ashbey and the State entered into a global plea agreement resolving all three of these cases. (*See* R., pp.87-88.) According to the agreement's terms, Mr. Ashbey would plead guilty to charges in each of these three cases, and

also in a fourth case[7] that is unrelated to this appeal; in exchange, the State agreed that Mr. Ashbey's pleas in these three cases would be conditionally entered, pursuant to I.C.R. 11(a)(2), with Mr. Ashbey reserving his right to appeal the denials of his motions to suppress, and entitling him to withdraw his guilty pleas if he prevails on appeal. (Appeal No. 47251 R., pp.87, 94; Appeal No.47252, R., pp.132, 139; Appeal No. 47253, R., pp.100-02.)

Pursuant to the agreement, Mr. Ashbey pled guilty to felony charges in each of these three cases, as well as in the fourth case (Tr., p.132, L.21 – p.133, L.7), and in these three cases, he was sentenced to an aggregate term of seven years, with three years fixed (Tr., p.138, L.16 – p.139, L.20; *see* Appeal No. 47251 R., p.89; Appeal No.47252, R., p.134; Appeal No. 47253, R., p.95).

Mr. Ashbey filed notices of appeal in all three cases, and the appeals are consolidated by order of this Court. (Appeal No. 47251 R., p.98; Appeal No.47252, R., p.145; Appeal No. 47253, R., p.106; *see* Order Consolidating Appeals for All Purposes, dated August 15, 2020.)

[7] In the fourth case, CR28-19-10676, the State charged Mr. Ashbey with leaving the scene of an accident. (*See* R., p.87.)

ISSUE

Did the district court err in denying Mr. Ashbey's motions to suppress?

ARGUMENT

The District Court Erred When It Denied Mr. Ashbey's Motions To Suppress

A. Introduction

The district court erred as a matter of law when it concluded that Officer Nordman did not violate Mr. Ashbey's Fourth Amendment rights. As explained below, the officer prolonged the traffic stop beyond its mission, and the officer's bare-bones "information" purportedly obtained from "street sources" was inadequate to justify his detention.

B. Standard Of Review

In reviewing a district court order granting or denying a motion to suppress evidence, the standard of review is bifurcated. *State v. Bishop*, 146 Idaho 804, 810 (2009). In conducting that review, the appellate court accepts the trial court's findings of fact, unless the findings are shown to be clearly erroneous. *Id.* However, this Court maintains free review over whether the facts surrounding the search and seizure satisfy constitutional requirements. *State v. Henage*, 143 Idaho 655, 658 (2007). Determinations of reasonable suspicion are questions of law and reviewed de novo. *Ornelas v. United States*, 517 U.S. 690, 790 (1996); *State v. Morgan*, 154 Idaho 109, 111 (2013).

C. The District Court Erred In Concluding That The Officers Did Not Violate Mr. Ashbey's Fourth Amendment Rights

The Fourth Amendment of the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. The stop of a vehicle by law enforcement constitutes a seizure of its occupants to which the Fourth Amendment applies. *State v. Linze*, 161 Idaho 605, 608 (2016). Evidence obtained in violation of Fourth Amendment

protections is subject to the exclusionary rule, which requires the suppression of both primary evidence obtained as a direct result of an illegal search or seizure, and evidence later discovered and found to be derivative of an illegality, that is, "fruit of the poisonous tree." *See Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963); *State v. Guzman*, 122 Idaho 981, 988-98 (1992).

Here, all of the evidence seized was derived from the first stop, on December 21, 2018, and that stop was unlawful because Officer Nordman detoured from the traffic purpose of the stop and prolonged the stop to conduct a drug dog sniff, without sufficient reasonable suspicion of criminal activity. The district court's purported justification for the officer's conduct, that tasks "normally done" for a traffic stop "could have been done" during the same timeframe, is contrary to the controlling Fourth Amendment precedent. The district court's conclusion that the stop was justified based on "information" that Mr. Ashbey may be involved in drug activity is also erroneous because the officer's information was bare bones, lacking any indicia of reliability, and was insufficient to support a reasonable suspicion.

1. The Officer Prolonged The Stop Beyond Its Traffic Mission, When Instead Of Pursuing The Traffic Tasks, He Asked The K-9 Officer To Run His Drug Dog And Acted As Cover For The Dog Sniff

As stated by the United States Supreme Court, "the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission' [which is] to address the traffic violation that warranted the stop and attend to related safety concerns." *Rodriguez*, 575 U.S. at 353. "On-scene investigation into other crimes, however, detours from that mission. So too do safety precautions taken in order to facilitate such detours." *Id.* Thus, while a police officer is permitted to take certain safety measures "in order to complete his traffic mission safely," safety precautions taken to facilitate a dog sniff or other on-scene investigations – which are unrelated to the officer's traffic mission – violate the Fourth Amendment, if doing so

"prolongs– *i.e.* adds time to the stop," and is not "independently supported by individualized reasonable suspicion." *Rodriguez*, 575 U.S. at 357.

In explaining the holdings of *Rodriguez*, the Idaho Supreme Court in *State v. Linze* stated:

> The stop remains a reasonable seizure while the officer diligently pursues the purpose of the stop, to which that reasonable suspicion is related. However, should the officer abandon the purpose of the stop, the officer no longer has that original reasonable suspicion supporting his actions. Indeed, when an officer abandons his or her original purpose, the officer has for all intents and purposes initiated a new seizure with a new purpose; one which requires its own reasonableness under the Fourth Amendment. This new seizure cannot piggy-back on the reasonableness of the original seizure. In other words, unless some new reasonable suspicion or probable cause arises to justify the seizure's new purpose, a seized party's Fourth Amendment rights are violated when the original purpose of the stop is abandoned (unless that abandonment falls within some established exception).

161 Idaho at 608.

In addressing a defendant's claim that his detention was unlawfully prolonged, "[t]he burden is on the State to demonstrate that the seizure it seeks to justify was sufficiently limited both in scope, and duration." *Florida v. Royer*, 460 U.S. 491, 500 (1983) (emphasis added); *accord State v. Pannell*, 127 Idaho 420, 423 (1995).

In the present case, rather than run a license check in accordance with the mission of the traffic stop, Office Nordman chose to suspend his pursuit of the traffic violation to act in a safety role to facilitate a drug dog sniff by providing cover to Officer Bangs. (Tr., p.98, Ls.14-18, p.40, Ls.9-10; Ex.A, at 5:09-6:00.) As explained by Officer Nordman,

> Officer Bangs, while he conducts his exterior sniff, he is going to be concentrating on the dog's movement . . . . So for safety, I chose not to retreat back to my vehicle, access my computer. *Instead, I allowed Officer Bangs to conduct his exterior sniff of the vehicle while I essentially was safety and stood with both the defendant and the driver.*

(Tr., 69, L.20 – p.70. L.5 (emphasis added).)

Based on this testimony, the district court explicitly found that,

> *rather than running* the driver's license and other identifying information regarding the defendant and the driver, *he chose to stand and act as cover for Officer Bangs while he had the canine do the search.*

(Tr., p.102, Ls.2-12 (emphasis added).) While the district court made no specific finding regarding the length of time taken, the State's undisputed video evidence shows that Officer Nordman stood by, providing cover for Officer Bangs for approximately 50 seconds, before the dog alerted. (Ex.A, at 5:09-6:00.)

Under the clear holdings of *Rodriguez* and *Linze*, once Officer Nordman suspended his traffic mission to act as cover for the dog sniff, his actions were no longer justified by the reasonable suspicion of the traffic violation. Unless justified by other, independent reasonable suspicion, the officer's prolonging of the traffic stop violated Mr. Ashbey's Fourth Amendment rights.

2. The District Court's Alternative Reasoning For Finding No Prolonging Has Been Explicitly Rejected By The Controlling Authority

The district court provided an alternative, though legally erroneous, rationale for why there was no unlawful extension of the stop, concluding that,

> even if Officer Nordman did all the things that are normally done at a traffic stop, such as gathering the registration proof calling that information in, and then taking whatever steps are necessary after that . . . the drug dog still had the opportunity and within the time frames expressed in the video, actually did do the search. By the time all of that could have been done under most circumstances."

(Tr., p.107, L.20 – p.108, L.4.)

However, this reasoning – which hypothecates what the officer *could* have done rather than what he actually did – was explicitly addressed and flatly rejected in *Rodriguez*, 575 U.S. at 357 ("The reasonableness of a seizure, however, depends on what the police in fact do. . . . How could diligence be gauged other than by noting what the officer actually did and how he did it?),

and also in *Linze*, 161 Idaho at 608-09. The issue came up again in *Linze*, and the Idaho Supreme Court explained:

> The parties before this Court have suggested two competing interpretations of the United States Supreme Court's holding in *Rodriguez*. The State suggests that *Rodriguez* allows a seizing officer to deviate from the purpose of a traffic stop up until the time at which the stop s*hould have been reasonably completed.* In other words, for each traffic stop there is an objective amount of time within which that stop *should reasonably be completed* and any unrelated action taken by an officer within that amount of time does not violate the seized parties' Fourth Amendment rights.
>
> Conversely, Mr. Linze reasons that a deviation from the original purpose of a traffic stop will inevitably lengthen the time needed to complete the original purpose of the seizure, and, accordingly, will result in a stop that "exceed[s] the time needed to handle the matter for which the stop was made." Under Mr. Linze's suggested interpretation, *the timing of an officer's departure from the original purpose of the seizure is irrelevant, it only matters that the officer departed from that purpose.*
>
> *We hold that Mr. Linze's interpretation of* Rodriguez *is correct* [and] the State's interpretation cannot be reconciled with the United States Supreme Court's analysis [in *Rodriguez*].

Id. (Emphasis added.)

Thus, contrary to the alternative reasoning provided by the district court in this case, it is irrelevant whether[8] Officer Nordman *could have* accomplished "all of the things normally done during a traffic stop" during the same "timeframe" as the dog sniff, since that is not what the officer in this case *actually* did. What the officer actually did in this case was to detour from his traffic mission, and instead he suspended the license checks, and for 50 seconds acted act as cover for the safety of the officer conducting the dog sniff. Under the holdings of *Linze* and

[8] Additionally, the district court's factual finding that the time it would take Officer Nordman to do "all the normal things done during a traffic stop" is within "the same time frame as in the video," is not supported substantial evidence in the record as to what the "normal things" are, or how much time they take to complete, and such finding therefore is clearly erroneous and cannot be used to support the district court's decision. *See Stuart v. State*, 127 Idaho 806, 814 (1994).

Rodriguez, the detour prolonged the stop. Unless the added time is justified by independent reasonable suspicion, the prolonging violates the Fourth Amendment.

3. The State Failed To Carry Its Burden Of Showing That Extending The Stop To Conduct A Dog Sniff Was Justified By Reasonable Suspicion, Because The Information From Unspecified "Street Sources" Was Insufficient To Provide Reasonable Suspicion To Justify An Investigative Detention

When an officer detours from the traffic safety purpose of a traffic stop to conduct other investigations concerning possible other crimes, or to facilitate such investigation, for all intents and purposes abandoning the traffic stop, such other investigation must have its own, independent reasonable suspicion. *Linze*, 161 Idaho at 608 (describing *Rodriguez*, 575 U.S. at 357.) Unless justified by sufficient reasonable suspicion to investigate other possible crimes, the officer's conduct in prolonging the traffic stop violates the Fourth Amendment. *Rodriguez*, 575 U.S. at 358; *Linze*, 161 Idaho at 609.

In this case, the district court offered as additional justification for the extended traffic stop, that there was no unlawful prolonging "because the officers were there to confirm or deny information that the vehicle may have been part of some unlawful drug transaction." (Tr., p.107, Ls.4-11.) However, the brief investigative detention that is authorized by *Terry v. Ohio*, must be supported by sufficient facts to give rise to a reasonable articulable suspicion of criminal activity. 392 U.S. 1, 21 (1968); *see also Navarette v. California*, 572 U.S. 393, 396 (2014); *State v. Bishop*, 146 Idaho 804, 811 (2009). Absent a reasonable suspicion, prolonging the detention violates the Fourth Amendment. *Linze,* 161 Idaho at 608-09.

"The reasonable suspicion necessary to justify such a stop 'is dependent upon both the content of information possessed by police and its degree of reliability." *Navarette*, 572 U.S. at 396 (quotations omitted); *see also Bishop*, 146 Idaho at 811 (stating that, regarding an informant's tip, "reasonable suspicion depends on the totality of the circumstances including the

substance, source, and reliability of the information provided.") Reasonable suspicion may be based on the officer's personal observations, but also on information supplied by another person. *Navarette*, 572 U.S. at 397; *Bishop*, 146 Idaho at 811. However, such information must bear sufficient indicia of reliability. *Navarette*, 572 U.S. at 397; *Bishop*, 146 Idaho at 811. An officer may also rely solely on the report of another officer or law enforcement agency, but only so long as the person making such underlying report possessed the requisite reasonable suspicion. *United States v. Hensley*, 469 U.S. 221 (1985); *State v. Van Dorn*, 139 Idaho 961, 963-64 (Ct. App. 2004).

In *State v. Bishop*, the Idaho Supreme Court set forth eight factors gleaned from the controlling authorities which are "indicative of reliability," and which guide the reviewing court in assessing the reliability of third-party information provided to an officer; specifically,

> [1] whether the informant reveals his or her identity and [2] the basis of his or her knowledge, [3] whether the location of the informant is known, [4] whether the information was based on first-hand observations of events as they were occurring, [5] whether the information the informant provided was subject to immediate confirmation or corroboration by police, [6] whether the informant has previously provided reliable information, [7] whether the informant provides predictive information, and [8] whether the informant could be held criminally liable if the report were discovered to be false.

146 Idaho 804, 812 (2009) (internal citations omitted). Not one of these factors exist in Mr. Ashbey's case.

Indeed, this case resembles the facts of *Florida v. J.L.*, 529 U.S. 266 (2000), where the United States Supreme Court held that the information provided to police did not have the requisite indicia of reliability to support a reasonable suspicion. There, officers received information advising that a young black male in a plaid shirt standing at a bus stop was carrying a gun. *Id.* The identity of the informant was not disclosed and apparently unknown to the police. *J.L.*, 529 U.S. at 269. The Court held that, because the informant did not explain how he

knew about the gun, nor suggest he had any special familiarity with the young man's affairs, the police had no adequate basis for believing that the informant had knowledge of concealed criminal activity. *Id.* Later, in *Navarette v. California*, 572 U.S. at 398, the Court described such information, which included no predictions of future behavior that could be corroborated to assess the informant's reliability, as a "bare-bones" tip that did not provide reasonable suspicion and therefore did not justify an investigative stop.

In *Navarette*, the Court said its decisions in *J.L.* and in *Alabama v. White,* 496 U.S. 325 (1990), provided "useful guides" in determining whether information received from unidentified persons provided sufficiently reliable information. 572 U.S. at 398. In *White*, the informant told the police that a woman would drive from a particular apartment building, to a particular motel, in a particular car, and also that the woman would be transporting cocaine. 496 U.S., at 327. After confirming the innocent details – *i.e.*, the predicted behavior of the woman – the officer stopped the car as it neared the motel and found cocaine in the vehicle. *Id.,* at 331. The Court reasoned that by accurately predicting future behavior, the informant demonstrated "a special familiarity with respondent's affairs," which in turn implied that the informant had "access to reliable information about that individual's illegal activities." *Id.*, at 332. The Court recognized that an informant who has proven to tell the truth about some things is more likely to tell the truth about other things, "including the claim that the object of the tip is engaged in criminal activity." *Id.*, at 331. The Court noted that *White* had presented a "close case," and that the information was ultimately found credible because the informant provided *predictive information* which the officers had been able to corroborate. 572 U.S. at 398. The *Navarette* Court noted that reliability may also be gleaned where an informant is claiming eyewitness knowledge,

making a contemporaneous report, or using a traceable method of reporting. 572 U.S. at 398. However, no such factors are present in Mr. Ashbey's case.

Unlike in *White,* the information provided in this case by unspecified "street sources" includes no description of predictive behavior. There is no indication the officers were informed as to whether or when any suspects would be leaving the apartment, what they might be wearing, what car, if any, they would be driving, or in what direction they would be headed. (*See generally* Tr.; R.) Unlike in *Navarette*, there is no indication that the "street sources" claimed to have first-hand knowledge, had made a contemporaneous report, or used a traceable method of reporting. Rather, the "street sources" provided the officers with bare-bones information, lacking *any* of the requisite indicia of reliability. Just like in *J.L.*, such information did not rise to the level of reasonable suspicion to support an investigative detention of Mr. Ashbey.

Officer Nordman testified he had reasonable suspicion "based on the fact that an undercover police officer was watching a *known narcotics location*, witness[ed] two persons leave the suspected narcotics location, and those same two persons entered the vehicle which I had stopped." (Tr., p.64, Ls.11-22.) When asked to provide the specific factual basis for the underlying drug investigation, Officer Nordman answered only that it was based on "street sources" which had advised us "that persons were selling narcotics from the location that were watching." (Tr., p.76, L.23 – p.77, L.7.) Similarly, Officer Nordman's Incident Report identified that factual basis for the suspected criminal activity as follows:

> Information *gathered from street sources* is apartment #3, which is located on the second level, east end of the building is a known narcotics location. Robert Ashbey and William Mulkin *are said to be* selling narcotics out of apartment #3 and allowing narcotic[s] users to use while inside the apartment.

(Confidential Exhibits, p.10 (emphasis added).)

Nowhere in the record is there any explanation as to what the officer meant by "street sources." (*See generally* Tr., R.) The officer did not provide a definition for that term, nor can its meaning be derived from the evidence in record. The record does not indicate whether such "street sources" are simply the hunch or hunches of other officers, or a tip or tips provided by a citizen, and if so, whether the identity of tipster was known or knowable to the officer, or was been proven reliable in the past. (*See generally* Tr., R.) A "known" informant is one "whose reputation can be assessed and who can be held responsible if his or her allegations turn out to be fabricated." *J.L.*, 529 U.S. at 269; *accord State v. Van Dorne*, 139 Idaho 961, 965 (Ct. App. 2004) ("A known citizen is one who provides facts from which his or her identity can be readily ascertained"). Even an anonymous caller who uses the "911" – which has some features that allow for identify and tracing callers – can be a factor justifying reliance. *See Naverette*, 572 U.S. at 400-02. Officer Nordman stated only that the information came from unidentified "street sources." (*See generally* Tr., R.) Thus, like in *J.L.*, and unlike in *Navarette*, there is no basis for this Court to find that the "street sources" were other than unknown, or unknowable informants.

Likewise, the record is devoid of evidence that shows the purported street sources' basis of knowledge. There is no indication whether they were personally acquainted with Mr. Ashbey or his roommate or had ever stepped foot inside of their apartment. (*See generally* Tr.; R.) Nor is there anything within the information that shows the street sources' information was based on first-hand observations of events as they were occurring. (*See generally* Tr.; R.)

Therefore, because reasonable suspicion was absent, Officer Nordman's extension of the traffic stop to conduct a drug investigation violated Mr. Ashbey's Fourth Amendment rights. *Linze*, 161 Idaho at 608-09. The district court's contrary conclusion was error as a matter of law.

D. Mr. Ashbey Is Entitled To Withdraw His Conditional Guilty Pleas In All Three Of His Cases, Pursuant To The Terms Of His Plea Agreement

Because in all three of these cases, the district court based its denial of the motion to suppress on its erroneous conclusion that the stop was not unlawfully prolonged (*see* Tr., p.108, Ls.16-17, p.109, Ls.7-9, p.111, Ls.15-21), this Court should vacate Mr. Ashbey's convictions in all three cases, and remand them to the district court for further proceeding, in accordance with the terms of the plea agreements and the requirements of Idaho Criminal Rule 11(a)(2).

CONCLUSION

The district court erred in failing to conclude that the stop was unlawfully prolonged, in violation of Mr. Ashbey's Fourth Amendment rights. This Court therefore should reverse the district court's order denying Mr. Ashbey's motions to suppress in these three cases, vacate his judgments of conviction, and remand his cases to the district court for further proceedings, consistent with the terms of his plea agreements.

DATED this 20th day of May, 2020.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of May, 2020, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

KENNETH K. JORGENSEN
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/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

KAC/eas