Electronically Filed
4/9/2020 11:55 AM
Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 47275-2019**
Plaintiff-Appellant,	)	
	)	**Bannock County Case No.**
v.	)	**CR03-18-14071**
	)	
ANDREW REED WILSON,	)	
	)	
Defendant-Respondent.	)	
	)	

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

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District Judge

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ARGUMENT

I.
Wilson Has Failed To Show That The District Court's Reasonable Suspicion Analysis Is Beyond Appellate Review

Wilson first argues that the district court's reasonable suspicion analysis and holding cannot be challenged on appeal. (Respondent's brief, pp. 5-8.) The argument that the district court's holding cannot be challenged is without merit.

This Court "will not hold that a trial court erred in making a decision on an issue or a party's position on an issue that it did not have the opportunity to address." State v. Gonzalez, 165 Idaho 95, ___, 439 P.3d 1267, 1271 (2019). The prosecution, in its post-hearing briefing, specifically argued that the encounter was initially consensual, but "[o]nce [the] officer had reasonable suspicion he was allowed to extend the stop into a full DUI investigation to determine whether or not the defendant was operating a motor vehicle while impaired." (R., p. 102.) The record shows that the state took the position that the DUI investigation was supported by reasonable suspicion and the district court addressed that position. The record shows that the issue of reasonable suspicion to conduct a DUI investigation is preserved for appellate review.

Wilson's argument that the state did not preserve the argument that the seizure was justified by reasonable suspicion of DUI confuses two issues: when the detention occurred, and whether the detention was supported by probable cause. (Respondent's brief, pp. 5-8.) He acknowledges that the state asserted that reasonable suspicion supported Wilson's detention, but because the state argued that detention occurred *later in the sequence of events* the state forfeited the argument that reasonable suspicion supported a detention that the district court found occurred earlier. (Respondent's brief, p. 5.) Wilson's argument is

that the state's position that the officer had reasonable suspicion "when Mr. Wilson got out of the car" is insufficient to preserve an argument that the officer "possessed reasonable suspicion when he detained him originally." (Respondent's brief, p. 5.) This argument is without merit as it miscomprehends both the rules of preservation and the underlying dynamics of a motion to suppress.

"'When a defendant seeks to suppress evidence allegedly obtained as a result of an illegal seizure, the burden of proving that a seizure occurred is on the defendant.'" State v. Page, 140 Idaho 841, 843, 103 P.3d 454, 456 (2004) (quoting State v. Reese, 132 Idaho 652, 654, 978 P.2d 212, 214 (1999)). "[T]he government carries the burden of proving that the search or seizure in question was reasonable." State v. Bishop, 146 Idaho 804, 811, 203 P.3d 1203, 1210 (2009). See State v. Kimball, 141 Idaho 489, 491, 111 P.3d 625, 627 (Ct. App. 2005) ("It is the State's burden to demonstrate reasonable suspicion for a stop."); State v. Gomez, 136 Idaho 480, 483, 36 P.3d 832, 835 (Ct. App. 2001) (state has burden of demonstrating that a warrantless detention is based upon objectively reasonable suspicion, and thus "reasonable under the Fourth Amendment"). Here Wilson argued the detention occurred in the drive-through lane, while the state argued the detention occurred later, in the parking lot. (R., pp. 85, 101-02.) The state then, as noted above, argued that the detention was supported by reasonable suspicion. (R., p. 102.) Wilson's argument that the state had to prevail on the first issue (when the detention occurred) in order to preserve for appellate review the second issue (whether the detention was reasonable) is without merit.

Indeed, the fact that the district court decided the reasonable suspicion issue after ruling against the state on the detention issue (R., pp. 119-28) shows that the reasonable

suspicion issue was presented regardless of how the district court resolved the detention issue. Because the state had the burden of showing reasonable suspicion, the fact that the district court directly ruled on the reasonable suspicion issue after it ruled against the state on the detention issue demonstrates that the district court believed the issue was presented by the state's argument. The district court certainly had "the opportunity to address," Gonzalez, 165 Idaho at ___, 439 P.3d 1271, the issue of reasonable suspicion, and in fact did so.

The state argued that the detention was supported by reasonable suspicion. That it argued that the detention happened at a different point in the sequence of events than ultimately found by the district court does not show that the state did not take the position that the detention was justified by reasonable suspicion of DUI. The district court's determination that the seizure was not supported by reasonable suspicion is preserved for appellate review.

II.
The District Court's Determination That The Seizure Was Not Supported By Reasonable Suspicion Is Erroneous

A. Introduction

At the time the officer seized Wilson by telling him to pull into the parking lot once he had gotten his food, the officer (1) knew that a restaurant employee had reported suspicion that Wilson was driving under the influence (1/9/19 Tr., p. 10, Ls. 11-18; 4/18/19 Tr., p. 5, L. 17 – p. 6, L. 1; R., p. 118); (2) had seen several empty large (32 ounce) beer cans in the car (1/9/19 Tr., p. 11, Ls. 9-10; R., p. 118); and (3) smelled a strong odor of alcohol emanating from the car (1/9/19 Tr., p. 11, Ls. 11-14; R., p. 127). Were Wilson alone in the car it would be beyond cavil that the officer had reasonable suspicion to

investigate Wilson for DUI. Thus, the only issue presented in this case is whether the presence of additional occupants of the car rendered the officer's suspicion of DUI constitutionally unreasonable. The district court's conclusion it did is contrary to logic and applicable legal authority. (Appellant's brief, pp. 4-9.)

Wilson argues that the officer was engaged in a "fishing expedition" and that his suspicion was "unparticularized." (Respondent's brief, pp. 9-10.) These arguments are, respectively, contrary to the facts and contrary to the law.

B. The Officer Was Not Engaged In A "Fishing Expedition"

Wilson argues the officer was engaged in a "fishing expedition" because "nothing about the phone call [from the restaurant employee] established reasonable suspicion of criminal activity," the officer neither smelled alcohol on Wilson's "person" nor detected nystagmus in his eye movement until after the detention, and neither the officer nor the restaurant employee witnessed a "driving pattern." (Respondent's brief, pp. 9-10.) To the extent these claims are accurate, they are incomplete.

The restaurant employee testified that he called in a "drunk driver" at 2:30 in the morning. (4/18/19 Tr., p. 4, L. 21 – p. 5, L. 20.) The occupants of the car were "really laughing," which the employee took as "a sign of something." (4/18/19 Tr., p. 5, Ls. 21-23.) When the occupants of the car were told that the restaurant was busy and their food would be delayed, Wilson responded by saying that they had alcohol in the car "so it's okay for the wait." (4/18/19 Tr., p. 5, Ls. 19-25; p. 6, Ls. 15-21; p. 9, Ls. 19-22.) The restaurant employee told dispatch that he "suspected the person was drunk and that they had alcohol in the car, that they said they had alcohol in the car." (4/18/19 Tr., p. 10, Ls. 1-8.) Contrary to Wilson's incomplete rendition of this evidence, the fact that the police

had a citizen report of a potential DUI because he suspected Wilson was drunk and had alcohol in his car was an important part of the totality of the circumstances showing reasonable suspicion of DUI. When combined with the evidence gathered by the officer after making contact but before the detention (several large empty beer cans and the strong smell of alcohol from the vehicle), the officer was not engaged in a "fishing expedition," but a constitutionally reasonable DUI investigation.

C. The Officer's Suspicions Were Sufficiently Particularized

Police must have "a suspicion that the particular individual being stopped is engaged in wrongdoing." United States v. Cortez, 449 U.S. 411, 418 (1981). "An investigatory stop does not deal with hard certainties, but with probabilities." State v. Munoz, 149 Idaho 121, 126, 233 P.3d 52, 57 (2010) (internal quotation omitted). The mere inability to exclude other occupants of a car does not render suspicion insufficiently particularized. Maryland v. Pringle, 540 U.S. 366, 368 (2003); State v. Zentner, 134 Idaho 508, 510, 5 P.3d 488, 490 (Ct. App. 2000). Here the mere possibility that Wilson could have been sober but merely hanging out with drunks did not render the officer's suspicions of DUI insufficiently particularized so as to be unreasonable.

Wilson argues that his "'presence in an area of expected criminal activity, standing alone,'" and his "'proximity to others suspected of or associated with criminal activity, without more,'" is not enough to support a reasonable particularized suspicion that he was committing a crime. (Respondent's brief, p. 11 (quoting State v. Gonzales, 165 Idaho 667, ___, 450 P.3d 315, 322 (2019)).) Wilson was not, however, merely in a high crime area or near others committing crimes. He was in a car in the drive-through lane of a fast-food restaurant with two other people *not* suspected of committing any crimes. The officer

reasonably believed one or more or all of the people in that car had been drinking, and the only question is whether the presence of passengers eliminated reasonable suspicion that Wilson was one of the people who had been drinking. The well-established rule that proximity to criminal activity does not alone give rise to reasonable suspicion articulated in Gonzalez does not answer that question.

In Maryland v. Pringle, 540 U.S. 366, 373 (2003), the Supreme Court of the United States held that evidence that cocaine and cash was in a car occupied by three men created particularly individualized probable cause as to all three men because they all had access to the contraband and the evidence did not exclude any one of them. The rule that mere proximity was insufficient did not apply in that case because "it was reasonable for the officer to infer a common enterprise among the three men." Id. It was no less reasonable in this case to infer that Wilson was involved in a "common enterprise" of drinking with the others in his car under the facts of this case. The reasonable suspicion in this case, even more so than the probable cause in Pringle, was not based on mere proximity to someone else's criminal conduct.[1]

In this case a concerned citizen reported a suspected drunk driver. The officer was able to corroborate that report with evidence that the interior of the car smelled strongly of an alcoholic beverage and contained multiple empty large beer cans. This created reasonable suspicion of DUI, not suspicion that only the passengers had been drinking.

[1] In State v. Zentner, 134 Idaho 508, 510, 5 P.3d 488, 490 (Ct. App. 2000), there was even more evidence that the contraband in the car was a joint enterprise by the car's occupants, such as evidence that all three were engaged in trying to hide the incriminating evidence. Wilson tries to distinguish Zentner based on this additional evidence, but makes no attempt to distinguish Pringle. (Respondent's brief, pp. 11-13.)

The district court erred in concluding that the presence of passengers in Wilson's car negated reasonable suspicion of DUI.

CONCLUSION

The state respectfully requests this Court to reverse the district court's order suppressing evidence and dismissing the felony DUI charge.

DATED this 9th day of April, 2020.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 9th day of April, 2020, served a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT to the attorney listed below by means of iCourt File and Serve:

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