7-27-2020

State v. Mack Appellant's Reply Brief Dckt. 47262

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7/27/2020 12:12 PM
Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NO. 47262-2019**
	)	
v.	)	**CANYON COUNTY NO. CR14-18-13017**
	)	
MALCOLM CORNELIUS MACK,	)	**REPLY BRIEF**
	)	
Defendant-Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

HONORABLE CHRISTOPHER S. NYE
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Malcolm Cornelius Mack appeals from the district court's order denying his motion to suppress evidence discovered during a traffic stop. Mr. Mack claims the officer violated his Fourth Amendment rights by unlawfully prolonging the stop, first by making inquiries about drug trafficking activity, and then later, by conducting a dog sniff. The evidence should have been suppressed and the district court's order should be reversed.

This Reply Brief is necessary to address the initial State's claims regarding Mr. Mack's argument that the stop was unlawfully prolonged while the officer was questioning the driver about transporting drugs, and to demonstrate that Mr. Mack's argument is properly before this Court for review, and that the officer's conduct violated Mr. Mack's Fourth Amendment rights. Because the State's remaining claims are unremarkable, Mr. Mack respectfully refers this Court to his Appellant's Brief as his response.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Mack's Appellant's Brief, and will not be repeated here.

ISSUE

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

ARGUMENT

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

A. Mr. Mack's Argument That The Officer's Unrelated Questioning Unlawfully Prolonged The Traffic Stop Is Properly Before This Court On Appeal

In this appeal, Mr. Mack asserts, as he did in the district court, that Officer Cottrell violated his Fourth Amendment rights by prolonging the traffic stop to conduct inquiries unrelated to the mission of the traffic stop; specifically, (a) by questioning the driver about possible drug trafficking activities, and (b) by conducting a dog sniff. (Appellant's Brief, pp.8-25.)

With regard to his argument (a), Mr. Mack claims that the district court erred in failing to find that the officer prolonged the traffic stop by asking questions about the transportation contraband, instead of pursuing the traffic tasks related to the investigation of the traffic stop, in violation of his Fourth Amendment rights, under the controlling precedent of *Rodriguez v. United States*, 575 U.S. 348 (2015), and *State v. Linze*, 161 Idaho 605 (2016), (*See* Appellant's Brief, pp.12-14.) Specifically, he argues that the State's uncontested evidence shows that the officer had detoured from his traffic mission when, *after* obtaining the driver's license, insurance document, and the vehicle's current registration, the officer began an additional line of questioning, wholly unrelated to the traffic infractions for which the vehicle had been stopped. (Appellant's Brief, pp.12-14.)

The State has argues that Mr. Mack's argument is not preserved. (Respondent's Br., p.10.) The State claims Mr. Mack never asserted, in the district court, that the traffic stop was extended by the officer's unrelated questioning, only that the dog sniff extended the stop. (Respondent's Br., p.10.) The State's preservation argument fails for several reasons. First, as a threshold matter, the State's argument misapprehends the parties' respective burdens on this

suppression motion where a defendant challenges the legality of his warrantless seizure by the police. As the State properly conceded below, Mr. Mack was "seized," and that the burden therefore shifted to the State to justify the seizure under an exception to warrant requirement. (R., p.97.) As noted in the Appellant's Brief, at page 11: "Importantly, 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). That burden never shifted to Mr. Mack, and thus, Mr. Mack did not have a burden in the district court to argue or demonstrate how or why his seizure was unlawfully prolonged. *Royer*, 460 U.S. at 500; *Pannell*, 127 Idaho at 423. The opposite was true: the burden was on *the State* to argue and prove that the officer *did not* unlawfully extend traffic stop. *Rodriguez v. United States*, 575 U.S. 348, 353 (2015).

Second, the State wrongly asserts that Mr. Mack's motion to suppress was "framed, argued, and analyzed" as being about the constitutionality of the dog sniff, only. (Respondent's Br., p.10.) Certainly, that was *one* of the ways in which this stop was extended, and *one* of the arguments Mr. Mack had made below. (*See* R., pp.75-77.) However, Mr. Mack's position on the "unlawful extension" issue was in no way limited to the time added by the dog sniff. On the contrary, his Affidavit, his Brief in Support of Motion, and his cross-examination of Officer Cottrell at the hearing, encompass the position that Officer Cottrell had extended the traffic stop by asking questions that were not related to the pursuit of the traffic stop; his position was never limited to an extension only by virtue of the dog sniff. (*See* R., pp.61-87; Tr., p.38, L.16 – p.39, L.39, L.19.) For example, in his Affidavit, Mr. Mack alleges Officer Cottrell abandoned his traffic mission by asking questions, e.g., "Instead of checking to see if [the driver] had

outstanding warrants, Officer Cottrell continued to make small talk with me," and "Officer Cottrell abandoned the reasons for the stop" and "extended the stop unnecessarily," rather than pursuing the traffic stop's purposes of issuing the traffic citation or verifying identities." (R., pp.61-64.) Additionally, in his Brief in Support of Motion to Suppress, Mr. Mack sets forth the salient facts, including the fact that after the driver had produced the requested information, Officer Cottrell continued to question him, asking "whether anyone had asked them to transport anything across state lines," and "if there was anything in the trunk which [the officer] needed to be concerned about," and then told the driver he had "a drug detection dog in the patrol car." (R., pp.66, 69.) The Brief in Support also set forth argument and authority detailing *how* and *why* unrelated questioning, including questions about drugs, "cannot be justified as part of the traffic stop," and quoted extensively from *State v. Gutierrez*, 137 Idaho 647 (Ct. App. 2002). (R., pp.72-75.) Notably, the traffic stop in *Guitierrez* was unlawfully extended as the result of officer questioning; *Guitierrez* did *not* involve a dog sniff. *Gutierrez*, 137 Idaho at 647-53.

Mr. Mack's position further evolved at the evidentiary hearing, as his counsel cross-examined Officer Cottrell, making it clear that Mr. Mack was pursuing the fact that the officer had begun questioning the driver about criminal activities during the traffic stop. (Tr., p.38, Ls.17-23.) Specifically, counsel examined Officer Cottrell about asking the driver whether there was "anything in the car that's illegal or anything that you should be worried about – those types of questions . . . that was the point where you began your drug investigation," and counsel elicited the following testimony from the officer:

> At that point, I'm addressing the original reasons for the stop *and then I'm asking questions pertinent to the multiple vent clip air fresheners*, yeah. So yep, *I'm starting to ask him questions relative to anything criminal . . . .*"

(Tr., p.39, Ls.2-6 (emphasis added).)

Finally, given the above, it is clear that Mr. Mack's appellate argument fits squarely within the recent holdings of the Idaho Supreme Court regarding issue preservation: "so long as a substantive issue is properly preserved, a party's appellate argument may evolve on appeal," *State v. Hoskins*, 165 Idaho 217, 223 (2019) (citing *Ada County Hwy. Dist. v. Brooke View, Inc.*, 162 Idaho 138, 142 n.2 (2017)); and "both the issue *and* the party's position on the issue must be raised before the trial court," *State v. Gonzalez*, 165 Idaho 95, 99 (2019) (citing *Brooke View*, 162 Idaho at 142 n.2). The Supreme Court distilled the salient points of *Brooke View* as follows:

> The case involved a takings claim after the Highway District used eminent domain to install a drainage ditch and walkway on Brook View's[1] property. Brook View first contested the amount paid in just compensation, but the litigation shifted its focus to separate damages when the Highway District's construction destroyed portions of a decorative dividing wall. After repeatedly rejecting the Highway District's argument that the damage should not be considered as part of the just-compensation calculus, the district court held that the damage was part of the takings claim. On appeal, the Highway District maintained its position, but supplemented its argument with citation to two relevant Idaho statutes dealing with the interpretation of the just-compensation statute. *This Court rejected Brook View's argument that this additional authority represented an unpreserved issue on appeal.* We held that the Highway District *could fine-tune its argument because the issue was properly raised below and its position on that issue had not changed.*

Hoskins, 165 Idaho at 224 (emphasis added).

Like in *Booke View*, the substantive issue raised on appeal in Mr. Mack's case is the same as the substantive issue he raised in the district court: Did Officer Cottrell's "seizure" violate Mr. Mack's Fourth Amendment rights by unlawfully exceeding the limited scope *and duration* justified by the traffic stop's original purpose, without independent reasonable suspicion? (R., pp.59-67; Appellant's Brief, pp.9-14.) Likewise, Mr. Mack's position on that issue below, was the same as his position on appeal: that Officer Cottrell unlawfully extended the duration of

[1] The Respondent, "Brooke View, Inc.," is referenced as "Brook View" throughout the Court's opinion.

the traffic stop by deviating from his traffic mission to question the driver about carrying contraband, specifically about drugs, without having reasonable suspicion of criminal activity. (R., pp.59-67; Tr., p.39, Ls.2-19; Appellant's Brief, pp.9-14.)

Thus, just as in *Brooke View,* Mr. Mack's unlawful extension argument had permissibly "evolved" during the litigation and on appeal, but the substantive issue, and Mr. Mack's position on it, remain unchanged. Regardless of how the State chose to brief the issue below, or how the district court chose to frame the question in its written decision, the issue and Mr. Mack's position on it were presented in the district court, and his argument is properly before this Court for review, in accordance with the controlling precedent. *Gonzalez*, 165 Idaho at 99. The State's preservation argument fails and should be rejected.

B. The District Court Erred In Failing To Find That The Officer Prolonged The Traffic Stop By Questioning The Driver About Transporting Contraband

The State goes on to argue that the officer's questioning about possible drugs or contraband was nonetheless permissible as part of the traffic stop; the original purpose of the traffic stop was for following too closely and a possible window-tint infraction. (Respondent's Br., pp.11-14.) The State bases its argument, in part, on the Court of Appeals' statement in *State v. Still*, 166 Idaho 351, _, 458 P.3d 220, 225 (2019), that *Rodriquez* "does not prohibit all conduct that in any way slows the officer from completing the stop as fast as humanly possible." (Respondent's Br., p.14.) The State's reliance on *Still* is woefully misplaced. First, the quoted sentence from *Still* is taken directly from the Eleventh Circuit's decision in *United States v. Campbell*, 912 F.3d 1340, 1353 (11th Cir. 2019). *See Still*, 458 P.3d at 225 n.2. However, as made clear by the next sentence in *Campbell*, *Rodriguez does* prohibit an officer from slowing the stop's completion in order "to investigate other crimes." 912 F.3d at 1353. In context, the *Campbell* statement reads:

> [Campbell] suggests, for example, that the officer unlawfully prolonged the stop by taking a few seconds to retrieve his coat or by looking Campbell in the eye while they conversed rather than exclusively focusing on writing the ticket. But *Rodriguez* does not prohibit all conduct that in anyway slow the officer from completing the stop as fast as humanly possible. It prohibits prolonging a stop *to investigate other crimes*.

Id. at 1353 (emphasis original to the *Campbell*).)

The *Campbell* Court also made the point that even where an officer is generally diligent, "diligence does not provide an officer with cover to slip in a few unrelated questions." 912 F.3d at 1352-53. The Court went on to conclude that the officer had asked unrelated questions about contraband and drugs, and that this questioning violated the defendant's Fourth Amendment rights. *Campbell*, at 1353.

Even in *Still*, the Idaho Court of Appeals appears recognize that, absent an independent justification, investigations into other crimes are expressly prohibited under *Rodriguez*. 458 P.3d at 225. As set forth in the Appellant's Brief, the officer in Mr. Mack's case had plainly detoured from his traffic mission when he took about twenty-seven seconds to question the driver about the contents of the Lexus, specifically asking whether there was "anything in the vehicle I should be concerned about?" and, aside from the vehicle itself, whether "anyone has asked you to drive anything across state lines?" whether there was "anything in the trunk that I should be concerned about?" and "any reason that you can think of that the dog would alert – any drugs in the vehicle?" (Ex., at 8:25-9:07.) (Appellant's Brief, pp.2-3, 12-13.) Thus, under the controlling precedent of *Rodriguez*, and even under *Still*, the officer's questioning about other crimes cannot be justified as part of an investigation of the traffic violations for which the car was originally stopped (following too closely and a possible window-tint violation), and, in the absence of other independent reasonable suspicion, violated Mr. Mack's Fourth Amendment rights.

As to the State's argument that the officer must completely "abandon"[2] his traffic mission before an unlawful prolonging may be found, and that "brief questions" about other crimes are permissible and do not rise to the level of a Fourth Amendment violation (Respondent's Br., p.14), such argument is manifestly wrong and contradicts *Rodriguez*, and finds no support in *Linze*.[3] In *Rodriguez*, the United States Supreme Court rejected the "overall reasonableness" standard that the State seems to promote. In *Rodriguez*, the government had argued, unsuccessfully, that it was acceptable under the Fourth Amendment for an officer to "incrementally prolong the stop" for unrelated inquiries, "so long as the officer is reasonably diligent and *the overall duration of the stop remains reasonable*" and the officer "completes all traffic-related tasks expeditiously." *Rodriguez*, 575 U.S. at 357 (emphasis added). The *Rodriguez* Court explicitly rejected this argument, noting that the government's position would effectively allow "bonus time to pursue an unrelated criminal investigation." *Id*. The Court held that if an officer makes unrelated inquiries in a way that "measurably extend" or "'prolongs' –

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[2] As set forth in his Appellant's Brief, page 12, note 5, *Rodriguez* does not require an "abandonment" of the traffic stop in order to find a Fourth Amendment violation. Rather, *Rodriguez* recognizes that an officer may conduct inquiries during an otherwise lawful traffic stop, but a Fourth Amendment violation occurs if, in doing so, the officer "'prolongs' – *i.e.*, adds time to-'the stop.'" 575 U.S. at 349.

[3] To the extent that the Court of Appeals decisions in *State v. Still*, 166 Idaho 351, _, 458 P.3d 220, 225 (2019), and *State v. McGraw*, 163 Idaho 736, 741 (Ct. App. 2018), purport to stand for the proposition now argued by the State (*see* Respondent's Br., p.9), *Still* and *McGraw* are manifestly wrong and should be rejected by the Idaho Supreme Court. It has long been held that an individual "may not be detained even momentary without reasonable objective grounds," *Florida v. Royer*, 460 U.S. 491, 498 (1983), and in *Rodriguez*, the Court held that even *de minimis* extensions of a traffic stop, which some courts had previously found acceptable under the Fourth Amendment's "general reasonableness" standard, violate the Fourth Amendment. 575 U.S. at 349. The Court of Appeals' insistence in *Still* and *McGraw* that counting "pauses" during the traffic stop is "inimical to the Fourth Amendment reasonableness requirement" is contrary to the clear, controlling precedent, and should be rejected by the Idaho Supreme Court.

i.e., adds time to – 'the stop,'" the officer violates the Fourth Amendment. *Id.* 575 U.S. at 355, 356.

Likewise, the *Rodriguez* Court rejected the Eighth Circuit's *de minimis* standard, under which minor extensions of seizures had been tolerated by some courts as "reasonable" under the Fourth Amendment. *Id.* The Supreme Court made clear that the length of the extension is immaterial, and that unless the unrelated inquiries do not measurably prolong, *i.e.*, add time to, the stop, the inquiries violate the defendant's Fourth Amendment rights. *Id.* 575 U.S. at 357, 359.

As argued in the Appellant's Brief, the information available to Officer Cottrell when he extended the stop to question the driver about the transportation of drugs or other contraband, was insufficient as a matter of law to provide reasonable suspicion of criminal activity to justify the prolonging. (Appellant's Brief, pp.18-24.)

C. The State's Remaining Arguments Are Unremarkable And Mr. Mack Refers This Court To His Appellant's Brief As His Arguments In Reply

The State's remaining arguments are unremarkable and Mr. Mack respectfully refers this court to his Appellant's Brief as his arguments in reply.

CONCLUSION

The district court erred in failing to conclude the officer unlawfully prolonged the stop in violation of Mr. Mack's Fourth Amendment rights. For the reasons set forth in his Appellant's Brief, and those herein, this Court should reverse the district court's order denying Mr. Mack's motion to suppress, vacate his judgment of conviction for marijuana trafficking, and remand his case to the district court for further proceedings to allow Mr. Mack to withdraw his guilty plea.

DATED this 27th day of July, 2020.

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

CERTIFICATE OF SERVICE

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

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KAC/eas