12-7-2017

State v. Pieper Respondent's Brief Dckt. 44818

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 44818**
Plaintiff-Respondent,	)	
	)	**Kootenai County Case No.**
v.	)	**CR-2016-9592**
	)	
TYSON MICHAEL PIEPER,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

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District Judge

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STATEMENT OF THE CASE

Nature of the Case

Tyson Michael Pieper appeals from the judgment entered upon his guilty plea to possession of a controlled substance, methamphetamine. On appeal, Pieper argues that the district court erred when it denied his motion to suppress.

Statement of Facts and Course of Proceedings

At around 10:30 p.m., Officer Weidebush and Officer Johns drove through the Cherry Hill Park parking lot to do a patrol check. (11/2/16 Tr., p. 25, L. 23 – p. 28, L. 18, p. 41, L. 15 – p. 42, L. 7.) They saw two vehicles parked in the parking lot. (11/2/16 Tr., p. 25, L. 23 – p. 28, L. 18.) It was not normal for cars to be at the park at that time. (11/2/16 Tr., p. 43, Ls. 9-14.) One of the cars had a blue light coming from inside. (11/2/16 Tr., p. 41, L. 24 – p. 43, L. 14.) The officers parked their car and went to check on the vehicle, which turned out to be the vehicle in which Pieper was sitting. (11/2/16 Tr., p. 25, L. 23 – p. 28, L. 18.)

The police car did not block Pieper's car. (11/2/16 Tr., p. 28, Ls. 9-21, p. 50, Ls. 8-22.) The officers did not turn on their car's overhead lights. (11/2/16 Tr., p. 28, L. 22 – p. 29, L. 22.) Nor did the officers use their car's spotlight. (11/2/16 Tr., p. 51, Ls. 9-13.) Officer Johns approached the driver's side of the vehicle and Officer Weidebush approached the passenger side. (11/2/16 Tr., p. 20, Ls. 8-15; see also Defendant's Ex.

A.[1]) Both officers used flashlights to look into the interior of the car. (Id.)

Officer Johns asked Pieper, who was sitting in the driver's seat, "Can I talk to you guys?" (11/2/16 Tr., p. 37, L. 19 – p. 39, L. 10.) Pieper answered in the affirmative. (Id.) Within seconds of making contact, Officer Weideman saw a "big ol' jar of weed" sitting in plain view in the back seat of the car. (11/2/16 Tr., p. 39, L. 19 – p. 40, L. 7, p. 31, L. 5 – p. 32, L. 4.) The following is transcribed from the officers' body cameras starting when Officer Johns made initial contact with Pieper:

Officer Johns: Can I talk to you guys?

Pieper: Yup.

Officer Johns: You got any I.D. on ya? Both of ya?

Pieper: Yeah, I got some in my bag here.

Officer Johns: We just hanging out in the park today?

Pieper: We're just texting. I'm from Montana. We're just …

Officer Weidebush: Holy Cow. Big ol' jar of weed back here.

[1] Defendant's Exhibit A consists of recordings from Officer Johns' and Officer Weidebush's body cameras. (See 11/2/16 Tr., p. 70, L. 24 – p. 72, L. 8.) The exhibit is divided up into several files. The two most pertinent files are "1117441.avi" which is a recording of the initial encounter from Officer Johns' body camera, and "1117437.avi" which is a recording of the same initial encounter but from Officer Weidebush's body camera.

(Defendant's Exhibit A, 1117441.avi at 0:00 to 0:15; 1117437.avi a 0:09 to 0:24.[2]) Officer Weidebush observed the marijuana in plain view approximately 15 seconds after Officer Johns made the initial contact. (See id.)

After being informed about the marijuana in the car, Officer Johns instructed Pieper to step out of the vehicle and detained him in handcuffs. (11/2/16 Tr., p. 53, L. 13 – p. 54, L. 2.) Pursuant to the subsequent search, the officers found a gun, paraphernalia, methamphetamine, morphine, oxycodone, hydrocodone, scales and baggies. (R., pp. 14-22.)

The state charged Pieper with four counts of possession of a controlled substance. (R., pp. 67-69.) Pieper filed a motion to suppress, arguing that the initial encounter was not consensual and constituted a warrantless seizure. (R., pp. 51-53, 90-107.) The state responded and argued that the initial encounter was consensual and no seizure occurred until after Officer Weidebush observed marijuana in plain view in the backseat of the car. (R., pp. 108-114.) The district court held a hearing on the motion to suppress. (R., pp. 115-118.) Officer Johns and Officer Weidebush testified. (See id.)

Officer Weidebush testified he saw the marijuana sitting in plain view in the backseat of the car. (11/2/16 Tr., p. 32, L. 20 – p. 33, L. 10.) The officers also testified

[2] Both of the officers' body camera recordings were utilized in the above transcription, which was transcribed by counsel for the respondent. The court also admitted a transcript of various video clips as Defendant's Exhibit B. (See 11/2/16 Tr., p. 70, L. 24 – p. 72, L. 8.) For reasons that are not clear in the record, these transcriptions separate out the interaction between Officer Johns and Pieper and the interaction between Officer Weidebush and the car passenger. (See Defendant's Ex. B.) However, for purposes of determining when the encounter changed from a consensual encounter to a detention, it is important to note when Officer Weidebush informed Officer Johns there is a "big ol' jar of weed back here."

that when they approached the car, they did not have their guns drawn, nor did they issue any commands, orders or threats. (11/2/16 Tr., p. 33, L. 11 – p. 34, L. 22, p. 51, L. 18 – p. 53, L. 12.)

The district court denied Pieper's motion to suppress. (R., pp. 119-120.) The district court found that the encounter was consensual up until Officer Weidebush observed the marijuana and Officer Johns ordered Pieper out of the car. (11/2/16 Tr., p. 67, L. 17 – p. 70, L. 16.) Pieper pled guilty to possession of a controlled substance, methamphetamine, and reserved his right to challenge the denial of his motion to suppress on appeal. (R., pp. 122-130.) The state dismissed the remaining charges. (Id.) The district court entered judgment and sentenced Pieper to five years with one year fixed. (R., pp. 134-136.) Pieper timely appealed. (R., pp. 137-141.)

ISSUE

Pieper states the issue on appeal as:

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

(Appellant's brief, p. 6.)

The state rephrases the issue as:

> Has Pieper failed to show the district court erred when it denied his motion to suppress?

ARGUMENT

The District Court Did Not Err When It Determined That The Initial Encounter Between The Officers And Pieper Was Consensual

A. Introduction

Officer Johns and Officer Weidebush approached Pieper's parked car and asked to speak with him and the other occupant of the vehicle. (11/2/16 Tr., p. 37, L. 19 – p. 39, L. 10.) Pieper agreed. (Id.) Officer Johns asked if Pieper had any identification and, while Pieper was looking for his identification, Officer Weidebush saw a "big ol' jar of weed" in the back seat. (11/2/16 Tr., p. 39, L. 19 – p. 40, L. 7, p. 31, L. 5 – p. 32, L. 4.) Officer Johns then ordered the occupants out of the car. (11/2/16 Tr., p. 53, L. 13 – p. 54, L. 2.) The district court ruled that no seizure occurred until Officer Johns gave the order to exit the car. (11/2/16 Tr., p. 67, L. 17 – p. 70, L. 16.) The district court did not err.

B. Standard Of Review

"The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, the appellate court accepts the trial court's findings of fact that are supported by substantial evidence, but freely reviews the application of constitutional principles to those facts." State v. Diaz, 144 Idaho 300, 302, 160 P.3d 739, 741 (2007). The power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court. State v. Valdez-Molina, 127 Idaho 102, 106, 897 P.2d 993, 997 (1995); State v. Fleenor, 133 Idaho 552, 555, 989 P.2d 784, 787 (Ct. App. 1999). The appellate court also gives deference to any implicit findings of the trial court supported by substantial evidence. State v. Brauch, 133 Idaho 215, 218, 984 P.2d 703, 706 (1999).

C. Pieper Has Failed To Show The District Court Erred When It Determined That The Initial Approach And Question About Identification Did Not Constitute A Seizure

"An encounter between a law enforcement officer and a citizen does not trigger Fourth Amendment scrutiny unless it is nonconsensual." State v. Willoughby, 147 Idaho 482, 486, 211 P.3d 91, 95 (2009) (citations omitted). To constitute a seizure, the officer must, "by means of physical force or show of authority," in some way restrain an individual's liberty. Id. This "requires words or actions, or both, by a law enforcement officer that would convey to a reasonable person that the officer was ordering him or her to restrict his or her movement." Id. (citations omitted). "[A] request for identification or mere questioning is not enough, by itself[,] to constitute a seizure." State v. Landreth, 139 Idaho 986, 990, 88 P.3d 1226, 1230 (2004) (citations omitted). "This is so because the person approached need not answer any question put to him and may decline to listen to the questions at all and go about his business." State v. Osborne, 121 Idaho 520, 523-524, 826 P.2d 481, 484-485 (Ct. App. 1991) (citing Florida v. Royer, 460 U.S. 491, 497-498 (1983)). "Thus, where an officer merely approaches a person who is standing on the street, or seated in a non-moving vehicle located in a public place, and poses a few questions, no seizure has occurred." Id. (citation omitted). The relevant inquiry is whether, under the totality of the circumstances, "a reasonable person would feel free to disregard the law enforcement officer"; if so, "then the encounter is consensual." Willoughby, 147 Idaho at 486, 211 P.3d at 95.

Here, the district court found that the initial encounter between Pieper and Officer Johns was consensual. (11/2/16 Tr., p. 67, L. 17 – p. 70, L. 16.) The district court examined applicable law that officers "may generally ask the individual questions and ask

to examine identification." (Id.) The district court found that the officers gave no commands until Officer Weidebush saw the marijuana in plain view and Officer Johns ordered Pieper out of the car. (Id. ("There's no command until: 'Get out of the car. Put your hands behind you back,' after the statement being made by Weidebush that he saw a big old jar of weed.").) The Court reasoned:

> So, what did the police do here or not do to convey a message that compliance with their requests is required?
>
> This by all appearances happened very rapidly. And I'm finding that there is no – well, regardless of where you put the burden of proof, whether the defendant has the burden of proving seizure, or the plaintiff has the burden of proving consensual encounter. The plaintiffs met that burden. The defendant has failed to meet its burden.
>
> At all times up to when Officer Johns told the defendant to get out of the car, put his hands behind their back, this is at all times a consensual encounter.
>
> The fact there's two officers; that fact that it's at night, everything is – that doesn't change my analysis. It's consensual. It's asking questions. There's no command until: "Get out of the car. Put your hands behind you back," after the statement being made by Weidebush that he saw a big old jar of weed.
>
> And from that point and – and the "big old jar of weed" isn't going to be suppressed. It's only statements that were made from that point in time on, from the time that Johns said based on Weidebush's response, "There's a big old jar of weed; put your hands behind your back," and cuffs him, until Miranda is read, if it's ever read, I don't know if it is, then any statements are suppressed, any statements by the defendant are suppressed, but not the evidence, not the – not the weed.
>
> So, I mean, up until that point in time, there's no suppression of any statements. And there's – there's no suppression of the – of the – if it's weed that was found.
>
> And I don't know of any – I haven't been cited any case law that would say that you can't use a flashlight to find out what's and who's inside a car. And that's plain view with the assistance of a flashlight at night. I don't know. I have not been cited to anything that tells me that that's improper.
>
> Certainly, the location of the officers' car is not something that would make a reasonable citizen feel that he was being restrained, didn't have the ability to leave. And that's the standard. It's not what happens at Wendy's. It's whether a reasonable person would feel free to disregard the police officer's requests and leave. And – and I find that that isn't the

> case; that hasn't been proven up until the time that John – or that – yeah – that Johns says based on Weidebush's claim that there's a big old pot of weed in the back, jar of weed in the back, "Get out of the car," Johns says, and, "Put your hands behind your back." That's when there's a seizure. That's when it's no longer consensual. That's when Miranda was needed for anything not to be suppressed.
>
> So that's my ruling.

(11/2/16 Tr., p. 68, L. 16 – p. 70, L. 16.)

The district court did not err. Up and until Officer Weidebush saw the marijuana and Johns ordered Pieper out of the car, the encounter was consensual. On appeal, Pieper first argues that the encounter was not consensual because Pieper was seized when Officer Johns and Officer Weidebush approached his car with flashlights. (See Appellant's brief, pp. 12-13.) Second, Pieper argues he was seized when Officer Johns asked for identification because, if he ignored the request for identification, he would have violated Idaho Code §§ 18-705 (resisting and obstructing officers) and 49-316 (driver's license to be carried and exhibited on demand). (See id.) Both of Pieper's arguments fail.

First, the fact that the officers approached the car with flashlights did not transform an otherwise consensual encounter into a seizure. Simply approaching a car with flashlights is not physical force or a show of authority that would restrain Pieper's individual liberty. "A majority of jurisdictions have held that 'the mere approach and questioning of [persons in parked vehicles] does not constitute a seizure.'" State v. Zubizareta, 122 Idaho 823, 839 P.2d 1237 (Ct. App. 1992) (quoting W. LaFave, Search and Seizure § 9.2(h), at 415–16 and 408–409 n. 230 (2nd ed. 1987)); cf. State v. Ramirez, 121 Idaho 319, 322, 824 P.2d 894, 897 (Ct. App. 1991) ("An officer's use of a flashlight to illuminate the darkened interior of a vehicle" is not a search.).

> Examples of circumstances that might indicate seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

State v. Liechty, 152 Idaho 163, 168, 267 P.3d 1278, 1283 (Ct. App. 2011) (quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980)). "Other circumstances that may indicate seizure include whether the officer used overhead emergency lights and whether the officer took action to block a vehicle's exit route." Id. (citing Willoughby, 147 Idaho at 487–88, 211 P.3d at 96–97; State v. Schmidt, 137 Idaho 301, 302–03, 47 P.3d 1271, 1272–73 (Ct. App. 2002); State v. Fry, 122 Idaho 100, 103, 831 P.2d 942, 945 (Ct. App. 1991)). The Court of Appeals in Liechty explained that "no seizure occurred when the officer approached Liechty's parked vehicle and tapped on his window." Id. "Further, the officer, without activating his overhead lights, approached Liechty's vehicle alone, without a weapon drawn, and did not physically touch Liechty or use threatening language upon opening the passenger door." Id. The seizure in Liechty only occurred because the officer opened the passenger door without Liechty's consent, stood in the open passenger doorway, blocked Liechty's exit, and questioned him. Id. at 169, 267 P.3d at 1284; compare State v. Osborne, 121 Idaho 520, 523, 826 P.2d 481, 484 (Ct. App. 1991) (no seizure initially occurred when the police first approached Osborne's vehicle, which was parked on a public street).

In Fry, the Idaho Court of Appeals determined that the police encounter was not consensual and that Fry was "seized." See Fry, 122 Idaho at 103, 831 P.2d at 945. In Fry, the officers approached Fry who was sitting in a parked vehicle. Id. The Court of

Appeals found it significant that one of the officers, Officer Dunbar, "placed himself directly behind Fry's vehicle, the front end of which was nearly against the wall of a building, making it impossible for Fry to drive away without running over Officer Dunbar." Id. (citation omitted).

Here, Officer Johns and Officer Weidebush approached Pieper's car, which was parked in a public parking lot, did not block Pieper's exit, did not activate overhead lights, did not physically touch Pieper, and did not use threatening language. Because the officers simply approached Pieper's car with flashlights and did not utilize physical force or a show of authority to restrain Pieper's individual liberty, the encounter was consensual and no seizure occurred.

Second, Officer Johns' inquiry about identification did not turn the consensual encounter into a seizure. "Even when officers have no basis for suspecting a particular individual, they may generally ask the individual questions and ask to examine identification." Fry, 122 Idaho at 102, 831 P.2d at 944 (citing Florida v. Rodriguez, 469 U.S. 1 (1984); INS v. Delgado, 466 U.S. 210 (1984); State v. Zapp, 108 Idaho 723, 701 P.2d 671 (Ct. App. 1985)). Here, Officer Johns asked for permission to speak to Pieper, which was granted, and then asked if Pieper had any identification.

Pieper's arguments regarding Idaho Code §§ 18-705 (resisting and obstructing officers) and 49-316 (driver's license to be carried and exhibited on demand) are similarly unavailing. Idaho Code § 18-705 states that anyone who "willfully resists, delays or obstructs any public officer, in the discharge, or attempt to discharge, of any duty of his office or who knowingly gives a false report to any peace officer" is guilty of a misdemeanor. I.C. § 18-705. Nothing in Idaho Code § 18-705 makes it illegal to refuse

to give identification to an officer. Further, contrary to Pieper's assertions, Officer Johns never "demanded" to see his identification. Rather, after Pieper agreed to talk with him, Officer Johns simply asked whether Pieper and the passenger had "got any I.D." on them. Because Officer Johns never ordered Pieper to produce identification, Pieper would not have been subject to criminal liability by not giving it to him.

For similar reasons, Pieper also would not have been subject to liability under Idaho Code § 49-316. That statute states: "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." I.C. § 49-316. Again, asking if Pieper had any I.D. was not a demand to produce a license. Even if it was, Pieper was not required by Idaho Code § 49-316 to produce a license because he was not "operating" a motor vehicle at the time. The vehicle was parked, and at no time during the interaction was the vehicle in operation. Additionally, Officer Johns never actually took possession of Pieper's driver's license. According to the video recording, Pieper was still looking for the license when Officer Weidebush saw the marijuana in plain view.

In Osborne, supra the Court noted that a seizure does not occur when "an officer merely approaches a person who is ... seated in a non-moving vehicle located in a public place, and poses a few questions[.]" Osborne, 121 Idaho at 523, 826 P.2d at 484 (citations omitted). In Osborne, the Court of Appeals concluded that no seizure occurred when the police approached Osborne's vehicle, which was parked on a public street. Id. However, because Osborne was sitting in the driver's seat with the engine running, a seizure occurred when the officers asked for Osborne's driver's license. Id. The Court

reasoned that because Idaho Code § 49-316 required Osborne to have a license when operating a motor vehicle, Osborne was legally required to comply with the officer's request and could not drive away without violating the law. Id. Thus, under those circumstances, Osborne could not have reasonably believed he was at liberty to ignore the officers and go about his business. Id.

In contrast, Pieper was not operating his motor vehicle. He was sitting in a fully stopped and parked car in a parking lot. Further, there was no evidence in Osborne that the officers first asked permission to speak with Osborne. See id. Here, before asking whether Pieper had any I.D., Officer Johns asked "Can I talk to you guys?" Based upon the totality of the circumstances, the question regarding whether Pieper possessed any identification did not constitute a seizure.

In addition, the Osborne Court concluded, "Accordingly, we conclude that Osborne was 'seized' within the meaning of the fourth amendment when Deputy Costello took his license." Id. In the present case, Deputy Johns never actually took, much less retained, Pieper's license prior to the discovery of the marijuana. "This Court has previously held that a limited detention does occur when an officer retains a driver's license or other paperwork of value." State v. Page, 140 Idaho 841, 844,103 P.3d 454, 457 (2004) (citing State v. Godwin, 121 Idaho 491, 493, 826 P.2d 452, 454 (1992); State v. Martinez, 136 Idaho 436, 439, 34 P.3d 1119, 1122 (Ct. App. 2001)). As the video evidence establishes, Officer Johns asked if Pieper had any identification, and while Pieper was looking for it, Officer Weidebush observed the marijuana in plain view. (See Defendant's Exhibit A, 1117441.avi at 0:00 to 0:15; 1117437.avi a 0:09 to 0:24.)

Further, even if the inquiry about identification constituted a "seizure," it was reasonable seizure under the Fourth Amendment. The Idaho Supreme Court has held that if the initial contact is valid and lawful, a brief detention of a driver to do a status check on the driver's license is reasonable for purposes of the Fourth Amendment. State v. Godwin, 121 Idaho 491, 495, 826 P.2d 452, 456 (1992) ("[W]e conclude … that a police officer's brief detention of a driver to run a status check on the driver's license, after making a valid, lawful contact with the driver, is reasonable for purposes of the fourth amendment."). Here, Officer Johns' initial contact with Pieper ("Can I talk to you guys?") followed by Pieper's consent was a valid, lawful contact. Thus even if Officer Johns had actually taken Pieper's driver's license and run a status check on that license, that would have been reasonable under the Fourth Amendment.

Pieper was not detained until after Officer Weidebush observed the marijuana in plain view. An officer may seize an individual if the officer has reasonable, articulable suspicions that the individual has committed or is about to commit a crime. See Florida v. Royer, 460 U.S. 491, 498 (1983); Terry v. Ohio, 392 U.S. 1, 22 (1968); Fry, 122 Idaho at 103, 831 P.2d at 945. Officer Weidebush's observation of the marijuana was not a "search" within the meaning of the Constitution. Ramirez, 121 Idaho at 322, 824 P.2d at 897 ("An officer's use of a flashlight to illuminate the darkened interior of a vehicle does not raise the officer's observation to the level of a search.") (citation omitted). "It is well-established that the observation of items in public view is not a 'search' within the meaning of the Constitution and therefore is not subject to fourth amendment scrutiny." Id. (citations omitted). Once Officer Weidebush observed the marijuana in plain view, he and Officer Johns had reasonable suspicion to detain Pieper and the passenger of the car.

The district court did not err by finding that the initial 15-second encounter was consensual.

CONCLUSION

The state respectfully requests this Court affirm the judgment of the district court.

DATED this 7th day of December, 2017.

/s/ Ted S. Tollefson
TED S. TOLLEFSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 7th day of December, 2017, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

SALLY J. COOLEY
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Ted S. Tollefson
TED S. TOLLEFSON
Deputy Attorney General

TST/dd