8-8-2017

State v. Harper Appellant's Brief Dckt. 44819

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 44819**
Plaintiff-Respondent,	)	
	)	**CANYON COUNTY NO. CR 2015-24285**
v.	)	
	)	
DAVID JOHN HARPER,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

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 THOMAS J. RYAN
District Judge

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STATEMENT OF THE CASE

Nature of the Case

The State charged David John Harper with trafficking in marijuana. Mr. Harper filed a motion to suppress the statements and evidence obtained as a result of his traffic stop, on the basis that I.C. § 49-638(1), the statute used to justify reasonable suspicion for the traffic stop, was unconstitutionally vague as applied to his conduct. The district court denied the motion to suppress. The matter proceeded to a jury trial, where the jury found Mr. Harper guilty. The district court imposed a unified sentence of three years fixed. On appeal, Mr. Harper asserts the district court erred when it denied his motion to suppress.

Statement of the Facts and Course of Proceedings

According to the district court's findings of fact in its Memorandum, Decision, and Order Upon Defendant's Motion to Suppress, Corporal Chris Cottrell of the Idaho State Police conducted a traffic stop on Mr. Harper's car in Canyon County. (*See* R., p.68.) Mr. Harper's car had Oregon plates and was travelling eastbound on I-84. (R., p.68.) Corporal Cottrell stopped Mr. Harper for following another vehicle too closely, about one-and-one-half car lengths at a speed of about 65 miles per hour, in apparent violation of I.C. § 49-638(1). (*See* R., p.68.) Upon approaching the passenger side of Mr. Harper's car, the corporal smelled the "immediate and strong" odor of marijuana. (R., p.69.) Corporal Cottrell noticed two large gift-wrapped boxes in the back seat of the car, and decided to deploy his drug-detection dog. (R., p.69.) The dog alerted to the odor of drugs on the outside of the car and on the boxes inside the car. (R., p.69.) The corporal then searched the car and the boxes, and found freezer-style packages of suspected marijuana inside the boxes. (*See* R., p.69.)

The district court found Corporal Cottrell later arrested and booked Mr. Harper into the Canyon County Jail. (R., p.69.) He also field tested the suspected marijuana and received a presumptive positive result. (R., p.69.) Corporal Cottrell weighed the 31 individually-wrapped packages, which had a total weight of approximately 17.38 pounds. (R., p.69.)

The State charged Mr. Harper by Information with trafficking in marijuana, felony, I.C. § 37-2732B(a)(1). (R., pp.29-30.) Mr. Harper entered a not guilty plea. (R., pp.31-32.)

Mr. Harper subsequently filed a Motion to Suppress. (R., pp.33-34.) Mr. Harper asserted there was a "[l]ack of reasonable suspicion for the stop," and that he "was pulled over for I.C. § 49-638 Following too Closely: Defense Counsel believes this statute is void for vagueness and unconstitutional." (R., p.33.) Thus, Mr. Harper asked "for all statements and evidence obtained in this case as a result of this illegal stop to be suppressed." (R., p.33.)

In his Memorandum in Support of Motion to Suppress, Mr. Harper moved "pursuant to the Fourteenth Amendment of the United States Constitution, and Article I, Section 17 of the Idaho Constitution for an Order suppressing all statements and evidence obtained as a result of an illegal search and seizure." (R., pp.37-41.) Mr. Harper asserted I.C. § 49-638 is void for vagueness as applied to his case, because the statutory terms had not been clearly defined so that average individuals would understand what conduct is prohibited by the statute. (R., p.38.) He further asserted the statute's wording lacked sufficient clarity, inviting arbitrary and discriminatory enforcement. (R., p.38.)

More specifically, Mr. Harper asserted Section 49-638(1) "does not give specific enough guidance to inform a person as to when his conduct would be in violation of the law. He is left to do the guesswork as to what would be illegal at any given point in time given the circumstances of traffic." (*See* R., pp.39-40.) The statute "does not give persons of ordinary

intelligence adequate notice as [to] when they are following another vehicle too closely. The standard is completely arbitrary and persons of ordinary intelligence from different traffic conditions and driving standards would likely come to very different conclusions as to what satisfied the statute." (R., p.40.) Thus, Mr. Harper asserted Section 49-638(1) "is unconstitutionally void for vagueness as written and as applied in this case." (*See* R., p.41.)

The State filed a Brief in Support of Objection to Motion to Suppress Evidence. (R., pp.42-47.) The district court set the motion to suppress for hearing. (R., pp.35-36, 48-49.) At the motion to suppress hearing, Mr. Harper clarified he was asserting the statute is void for vagueness, but also arguing "that there was lack of reasonable suspicion for the stop itself, that he was not, in fact, following too closely." (Tr. June 13, 2016, p.1, Ls.17-24.) Corporal Cottrell then testified at the hearing. (*See generally* Tr. June 13, 2016, p.2, L.14 – p.27, L.17.)

In the following oral argument, Mr. Harper asserted Corporal Cottrell "could not be specific enough with regard to either, (a), what the traffic was that day. He said it stuck out to him. It's too vague. And, (b), he could not say whether or not there was an actual standard that took into account traffic conditions." (Tr. June 13, 2016, p.28, Ls.14-20.) Mr. Harper further asserted it was unknown how congested the road was at the time of the traffic stop, and without knowing the level of congestion one could not be sure whether or not Mr. Harper was, in fact, in violation of the statute. (*See* Tr. June 13, 2016, p.29, Ls.3-12.)

While Corporal Cottrell testified he had presumably been taught to follow three seconds behind under certain conditions and four-and-a-half seconds under other conditions, Mr. Harper asserted, "[i]t's not codified in anything. It's not written down for the reasonable person to look at." (*See* Tr. June 13, 2016, p.29, L.23 – p.30, L.2.) Mr. Harper asserted there was no way "for anyone in this room to know for sure when they are following another vehicle too closely than is

reasonable and prudent because, quite frankly, that is going [to] vary according to where you are." (Tr. June 13, 2016, p.30, Ls.2-7.) According to Mr. Harper, "if we simply can't know whether or not we're in violation of the law, then the statute itself does not pass constitutional muster . . . ." (Tr. June 13, 2016, p.30, Ls.15-17.) Mr. Harper also asked the district court to review the video recording of the traffic stop. (*See* Tr. June 13, 2016, p.33, Ls.8-11.)

The district court subsequently issued its Memorandum, Decision, and Order upon Defendant's Motion to Suppress. (R., pp.68-76.) With respect to whether I.C. § 49-638(1) gives notice to those who are subject to it, the district court determined "a reasonably intelligent person could form an idea about what subsection (1) of the statute proscribes: do not 'tailgate' another vehicle under any circumstance; if the weather makes it difficult for a driver to see, that driver should follow another vehicle at a greater distance than it would if it were a dry, cloudy day; be aware of traffic flow; etc." (R., pp.70-73.) The district court also determined Mr. Harper "has failed to show that he himself was void of adequate notice. The law allows a statute to hold a driver criminally liable of a public welfare offense where the driver acted with ordinary negligence. As a consequence, Harper is lawfully required to drive as a reasonably prudent person and decipher whether he is following another vehicle too closely." (R., p.73.)

Regarding whether I.C. § 49-638(1) contains guidelines and imposed sufficient discretion on that who must enforce it, the district court determined the statute "does not vest complete discretion in law enforcement officers." (R., pp.73-74.) The district court noted "the Idaho Driver's Educational Manual recommends a minimum of three second[s] following distance, a standard Officer Cottrell testified to being familiar with." (R., p.74.) The district court also stated Corporal Cottrell "testified that his training and experience shows the average person has a reaction time of about 1 to 1.5 seconds, during which time the average driver will travel from

between 95 and 140 feet if going 65 mph. These statistics may lawfully and effectively guide an officer in determining whether one vehicle is following another too closely." (R., p.74.) Thus, the district court determined Section 49-638(1) "is not void for vagueness and it does not grant law enforcement officers unbridled discretion." (R., p.74.)

On whether there was reasonable suspicion to justify the traffic stop, the district court determined "Officer Cottrell was reasonable in stopping Harper for following too closely." (R., pp.74-75.) The district court denied Mr. Harper's motion to suppress. (R., p.76.)

The matter proceeded to a two-day jury trial. (*See* R., pp.84-101.) At the conclusion of the trial, the jury found Mr. Harper guilty of trafficking in marijuana. (R., pp.100, 106.) The district court imposed a unified sentence of three years fixed. (R., pp.133-34.)

Mr. Harper filed a Notice of Appeal timely from the district court's Judgment and Commitment. (R., pp.130-32; *see* R., pp.140-45 (Amended Notice of Appeal).)

ISSUE

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

ARGUMENT

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

A. Introduction

Mr. Harper asserts the district court erred when it denied his motion to suppress, because I.C. § 49-638(1) is void for vagueness as applied to his conduct. Because Section 49-638(1), the statute used to justify Mr. Harper's traffic stop, is unconstitutionally vague as applied to his conduct, there was no reasonable and articulable suspicion that his car was being driven contrary to traffic laws. The traffic stop therefore violated Mr. Harper's constitutional right to be free from unreasonable searches and seizures. The district court should have suppressed the statements and evidence obtained as a result of the traffic stop.

B. Standard Of Review

As the Idaho Supreme Court has held, "[t]he standard of review of a district court's denial of a motion to suppress is two-fold. The appellate court will not overturn the trial court's factual findings unless they are clearly erroneous. However, the application of constitutional standards to the facts found by the district court is given free review." *State v. Wright*, 134 Idaho 79, 81 (2000).

The constitutionality of a statute is a question of law that is reviewed *de novo*. *State v. Cobb*, 132 Idaho 195, 197 (1998). A party challenging the constitutionality of a statute must overcome a strong presumption of validity. *Id.* The Idaho Supreme Court in *Cobb* explained that "an appellate court is obligated to seek an interpretation of a statute that upholds its constitutionality," and "[a] statute should not be held void for uncertainty if any practical interpretation can be given in." *Id.* (citation omitted).

C. Idaho Code § 49-638(1) Is Unconstitutionally Vague As Applied To Mr. Harper's Conduct

Mr. Harper asserts I.C. § 49-638(1) is unconstitutionally vague as applied to his conduct. The Fourth Amendment to the United States Constitution and Article I, Section 17 of the Idaho Constitution prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Idaho Const. art. I, § 17. Evidence obtained in violation of this constitutional right is generally inadmissible against the accused as the "fruit of the poisonous tree." *See Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961).

A traffic stop by law enforcement constitutes a seizure of the vehicle's occupants and implicates the Fourth Amendment's prohibition against unreasonable searches and seizures. *See Delaware v. Prouse*, 440 U.S. 648, 650 & n.1, 653 (1979). A traffic stop is akin to a limited investigative detention and analyzed under the principles set forth in *Terry v. Ohio*, 392 U.S. 1 (1968). *See Rodriguez v. United States*, ___ U.S. ___, 135 S. Ct. 1609, 1614 (2015). Determining whether an investigative detention is reasonable involves a dual inquiry into whether the officer's action was justified at its inception and whether it was reasonably related in scope to the circumstances that justified the interference in the first place. *See Terry*, 392 U.S. at 19-20.

An investigative detention is permissible if it is based upon specific articulable facts which justify reasonable suspicion that the detained person is, has been, or is about to be engaged in criminal activity. *See United States v. Cortez*, 449 U.S. 411, 417 (1981); *Terry*, 392 U.S. at 21. Under the Fourth Amendment, an officer may stop a vehicle to investigate possible criminal behavior if there is reasonable and articulable suspicion that the vehicle is being driven contrary to traffic laws. *See Cortez*, 449 U.S. at 417; *Prouse*, 440 U.S. at 663.

Here, Mr. Harper asserts there was no reasonable and articulable suspicion that his car was being driven contrary to traffic laws, because I.C. § 49-638(1), the statute used to justify the traffic stop, is unconstitutionally vague as applied to his conduct.[1] Section 49-638(1) provides: "The driver of a vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of the vehicle, the traffic upon and the condition of the highway." Whether Section 49-638(1) is unconstitutionally vague as applied appears to be a question of first impression in Idaho.

The void for vagueness doctrine is rooted in the Due Process Clause of the Fourteenth Amendment. *See Rogers v. Tennessee*, 532 U.S. 451, 457 (2001). This "doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

The Idaho Supreme Court has held, "[a] statute may be challenged as unconstitutionally vague on its face or as applied to a defendant's conduct." *State v. Korsen*, 138 Idaho 706, 712 (2003), *abrogated on other grounds by Evans v. Michigan*, 568 U.S. 313 (2013). The *Korsen* Court explained that "[t]o succeed on an 'as applied' vagueness challenge, a complainant must show that the statute, as applied to the defendant's conduct, failed to provide fair notice that the defendant's conduct was proscribed or failed to provide sufficient guidelines such that the police had unbridled discretion in determining whether to arrest him." *Id.* According to the United States Supreme Court in *Kolender*, "[t]he more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine – the requirement that a legislature

[1] *But see, e.g., United States v. Hunter*, 663 F.3d 1136 (10th Cir. 2011) (holding a similar Kansas statute was not unconstitutionally vague as applied).

establish minimal guidelines to govern law enforcement.'" *Kolender*, 461 U.S. at 358 (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)).

1. Idaho Code § 49-638(1) Failed To Provide Fair Notice That Mr. Harper's Conduct Was Proscribed

Mr. Harper asserts I.C. § 49-638(1) failed to provide fair notice that his conduct was proscribed. As Mr. Harper asserted before the district court, the statute "does not give specific enough guidance to inform a person as to when his conduct would be in violation of the law. He is left to do the guesswork as to what would be illegal at any given point in time given the circumstances of traffic." (*See* R., pp.39-40.) Section 49-638(1) does not specify at what distance following another vehicle becomes following "more closely than is reasonable and prudent." *See* I.C. § 49-638(1). Thus, the statute does not give adequate notice for when one is following another vehicle too closely. (*See* R., p.40.) Put otherwise, "[p]ersons of ordinary intelligence can only guess at the statute's directive in this circumstance. Therefore, the statute is unconstitutionally vague as applied . . . ." *Cf. Burton v. State, Dep't of Transp.*, 149 Idaho 746, 749 (Ct. App. 2010) (holding a statute governing the duty to signal when moving left or right upon a highway was unconstitutionally vague as applied to circumstances where two lanes merged into a single lane, with neither lane clearly ending or continuing). The statute is unconstitutionally vague as applied to Mr. Harper's conduct.

2. Idaho Code § 49-638(1) Failed To Provide Sufficient Guidelines, Such That The Police Had Unbridled Discretion In Determining Whether To Seize Mr. Harper

Even if I.C. § 49-638(1) provided fair notice that his conduct was proscribed, Mr. Harper asserts the statute failed to provide sufficient guidelines, such that the police had unbridled discretion in determining whether to seize him. As discussed above, the United States Supreme

Court has held the requirement that a legislature establish minimal guidelines to govern law enforcement is the more important part of the vagueness doctrine. *See Kolender*, 461 U.S. at 358. The *Kolender* Court warned that "[w]here the legislature fails to provide such minimal guidelines, a criminal statute may permit a 'standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections.'" *Id.* (quoting *Smith*, 415 U.S. at 575). However, "[l]egislatures may not so abdicate their responsibilities for setting the standards of the criminal law." *Smith*, 415 U.S. at 575. Rather, the "absence of any ascertainable standard for inclusion or exclusion is precisely what offends the Due Process Clause." *Id.* at 578 (citation omitted). Simply put, a law is void for vagueness when it subjects a person "to criminal liability under a standard so indefinite that police, court, and jury [are] free to react to nothing more than their own preferences . . . ." *Id.*

Idaho Code § 49-638(1) provides no guidelines for law enforcement officers to determine when a person is following another person "more closely than is reasonable and prudent, having due regard for the speed of the vehicle, the traffic upon and the condition of the highway." *See* I.C. § 49-638(1). As Mr. Harper asserted before the district court, "[t]he standard is completely arbitrary and persons of ordinary intelligence from different traffic conditions and driving standards would likely come to very different conclusions as what satisfied the statute." (*See* R., p.40.) The statute therefore "vests complete discretion in individual police officers." *See State v. Bitt*, 118 Idaho 586, 589 (1990).

A comparison of I.C. § 49-638(1) with the ordinance in *Bitt* is instructive. In *Bitt*, the loitering ordinance at issue provided that, generally, "a peace officer shall prior to any arrest for an offense under this section afford the actor an opportunity to dispel any alarm which would otherwise be warranted by requesting him to identify himself and explain his presence and

conduct." *Bitt*, 118 Idaho at 588. Reviewing the ordinance for vagueness, the Idaho Supreme Court held it was similar to the unconstitutionally-vague statute struck down in *Kolender*, in that the "ordinance vests complete discretion in individual police officers." *Id.* at 589. By providing "that a person cannot be arrested or convicted unless he fails to identify himself and offer an explanation of his presence and conduct which dispels the police officer's alarm," the ordinance "vests complete discretion in the hands of the police officer to determine whether the person has provided a credible and reliable explanation." *Id.* at 590. The *Bitt* Court therefore held the ordinance "creates the potential for arbitrary and discriminatory arrests condemned in *Kolender*, and condemned by our State Constitution." *Id.*

Similarly, I.C. § 49-638(1) provides a person may not follow another vehicle "more closely than is reasonable and prudent, having due regard for the speed of the vehicle, the traffic upon and the condition of the highway." Thus, Section 49-638(1) vests complete discretion in the hands of the police officer to determine whether a person followed more closely than is reasonable and prudent. *See Bitt*, 118 Idaho at 590. Just as officers under the ordinance in *Bitt* had full discretion to determine whether a person provided a credible and reliable explanation, *see id.* at 589-90, under the statute here, officers would have full discretion to determine whether a person had due regard for the speed of the vehicle, traffic, and the condition of the highway. Like the ordinance in *Bitt*, Section 49-638(1) "creates the potential for arbitrary and discriminatory arrests." *See id.* at 590.

The district court determined I.C. § 49-638(1) did not vest complete discretion in law enforcement officers, because the Idaho Driver's Education Manual recommended a minimum three-second following distance, and Corporal Cottrell had been trained that the average person has a reaction time of one to one-and-one-half seconds, during which a person going 65 mph

could travel between 95 and 140 feet. (*See* R., p.74.) However, the above cannot serve as guidelines for purposes of the vagueness doctrine, because they do not appear in the statute itself. The United States Supreme Court held in *Kolender* this aspect of the vagueness doctrine constitutes "the requirement that a *legislature* establish minimal guidelines to govern law enforcement." *See Kolender*, 461 U.S. at 358 (emphasis added). The legislature is responsible for setting the standards of criminal law, not police officers, prosecutors, or juries. *See Smith*, 415 U.S. at 575. Thus, recommendations from the driver's manual, or factoids from police training, cannot serve as guidelines because they were not set by the Idaho Legislature as part of Section 49-638(1).

The situation would perhaps be different if the Idaho Legislature saw fit to include in I.C. § 49-638 the three-second following distance recommendation highlighted by the district court here. In *State v. Cobb*, 132 Idaho 195 (1998), the Idaho Supreme Court held, "[i]t is the list of examples in the Boise City disorderly conduct ordinance that distinguishes it from the Pocatello ordinance which the Court in *Bitt* found to be vague, generalized and giving no guidelines for the exercise of discretion." *Cobb*, 132 Idaho at 199. The disorderly conduct at issue in *Cobb* outlined "a generalized description of conduct deemed to be disorderly," but also included a non-exclusive list of specific violations. *See id.* at 197-99. However, unlike the ordinance in *Cobb*, Section 49-638(1) does not contain a list of examples of prohibited conduct that would form a "core of circumstances" to "direct[] the exercise of discretion of the police." *See id.* at 199. Further, the three-second following distance recommendation was not included in Section 49-638(1) as an example of "reasonable and prudent" following.

Idaho Code § 49-638(1) vests complete discretion in the hands of the police officer to determine whether a person followed more closely than is reasonable and prudent. Thus, Section

49-638 failed to provide sufficient guidelines, such that the police had unbridled discretion in determining whether to arrest Mr. Harper. *See Bitt*, 118 Idaho at 590. The statute is unconstitutionally vague as applied to Mr. Harper's conduct.

Because I.C. § 49-638(1), the statute used to justify Mr. Harper's traffic stop, is unconstitutionally vague as applied to his conduct, there was no reasonable and articulable suspicion that his car was being driven contrary to traffic laws. *See Cortez*, 449 U.S. at 417; *Prouse*, 440 U.S. at 663. The traffic stop therefore violated Mr. Harper's constitutional right to be free from unreasonable searches and seizures. *See Cortez*, 449 U.S. at 417. The district court erred when it denied Mr. Harper's motion to suppress. The district court should have suppressed the statements and evidence obtained as a result of the traffic stop. *See Wong Sun*, 371 U.S. at 487-88; *Mapp*, 367 U.S. at 643.

CONCLUSION

For the above reasons, Mr. Harper respectfully requests that this Court vacate the district court's order of judgment and commitment, reverse the order denying his motion to suppress, and remand the case to the district court for further proceedings.

DATED this 8th day of August, 2017.

_____/s/_____
BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 8th day of August, 2017, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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