10-25-2017

State v. Harper Respondent's Brief Dckt. 44819

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 44819**
Plaintiff-Respondent,	)	
	)	**Canyon County Case No.**
v.	)	**CR-2015-24285**
	)	
DAVID JOHN HARPER,	)	
	)	
Defendant-Appellant.	)	
	)	
	)	

BRIEF OF RESPONDENT

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

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District Judge

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STATEMENT OF THE CASE

Nature of the Case

David John Harper appeals from the judgment of the district court, entered upon the jury verdict finding him guilty of Trafficking in Marijuana. On appeal, Harper claims the district court erred when it denied his motion to suppress.

Statement of Facts and Course of Proceedings

Corporal Chris Cottrell of the Idaho State Police stopped Harper for following another vehicle too closely, in violation of I.C. § 49-638(1). (R., pp. 68-69.) Officer Cottrell observed Harper driving at approximately 65 miles per hour while only about 1.5 car lengths behind another vehicle. (Id.) When Officer Cottrell approached Harper's vehicle he smelled the "immediate and strong" odor of marijuana. (Id.) A drug detecting canine altered to the presence of drugs. (Id.) Officer Cottrell searched Harper's vehicle and found boxes loaded with packages of marijuana. (Id.) Harper had 31 individually wrapped packages of marijuana weighing approximately 17.38 pounds. (Id.)

The state charged Harper with Trafficking in Marijuana. (R., pp. 29-30.) Harper filed a motion to suppress alleging that Officer Cottrell lacked reasonable suspicion for the stop and that I.C. § 49-638, the statute prohibiting following too closely, is void for vagueness and unconstitutional. (R., pp. 33-34, 37-41, 62-63.)

Officer Cottrell testified at the hearing on Harper's motion to suppress. (R., pp. 66-67.) Officer Cottrell testified that he observed Harper's vehicle "following another white pickup truck very closely." (6/13/16 Tr., p. 4, Ls. 24.) Officer Cottrell estimated

that Harper was following the white pickup by only "one-and-a-half car lengths." (6/13/16 Tr., p. 4, L. 25 – p. 5, L. 3.)

> Q. Okay. And you said he was following too closely. Why did you think that he was following too closely?
>
> A. At their speed, roughly 65 miles an hour, they're traveling at right around 95 feet per second. So from my training and experience the average reaction time for the average person is about one to one-and-a-half seconds. That's the perception/reaction time. So in that one-and-a-half seconds they're going to travel anywhere from 95 to 140 feet.
>
> Q. Okay. So let's break this down so we're using the same units of measurement. How far in feet do you think one-and-a-half car lengths is?
>
> A. That's roughly -- I put a car length at about 20 feet, so it's about 30, 35 feet.
>
> Q. Okay. So at that speed you said 95 feet per second. I'm going to ask you to do a little math if you can for us. If he's following 30, 35 feet, how long in seconds would it take to travel the following distance? Does that make sense?
>
> A. Yes. It's going to take less than a half second.

(6/13/16 Tr., p. 5, Ls. 4-25.) Officer Cottrell testified that, based upon his training, the average reaction time for a driver is "one-and-a-half seconds." (6/13/16 Tr., p. 6, Ls. 1-19.) Officer Cottrell watched Harper follow too closely to make sure it was not a "fluke" and eventually pulled in behind him. (6/13/16 Tr., p. 7, L. 8 – p. 9, L. 21.) Officer Cottrell has "pretty regularly" made stops for driving too closely and, based upon his training and experience, Harper was following too closely. (Id.)

The district court entered a written order denying Harper's motion to suppress. (R., pp. 68-76.) The district court found Idaho Code § 49-638(1) provided Harper with fair notice that his conduct was prohibited. (R., p. 73.) The district court also found that Harper failed to prove the statute gave police unbridled discretion in determining whether

to arrest. (R., pp. 73-74.) The district court found that Officer Cottrell had reasonable articulable suspicion to stop Harper for following too closely in violation of Idaho Code § 49-638(1). (R., pp. 74-75.)

> Here, Officer Cottrell testified Harper was driving 65 mph (95 feet per second) and keeping a mere distance of about 1.5 car lengths (30-35 feet) between himself and the vehicle he was following. As previously noted, he also testified his training and experience has taught him 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.

(R., p. 75.) The district court cited two non-binding decisions that supported its finding that Officer Cottrell had reasonable suspicion to believe Harper was following too closely. (R., p. 75 (citing United States v. Rosales, 2006 WL 120053, at *3 (D. Idaho Jan. 12, 2006) (officer had reasonable suspicion driver violated I.C. § 49-638 where driver followed another vehicle at a distance of 1-2 car lengths for approximately 1-2 minutes at 70-72 mph); State v. Lloyd, 2010 WL 3723207 (First Judicial Dist. Idaho, 2010) (was reasonable to stop defendant for following at one car length while traveling at 50 mph, the defendant should have kept a distance of three car lengths).

The case proceeded to jury trial. (R., pp. 84-101.) The jury found Harper guilty of Trafficking in Marijuana. (R., p. 106.) The district court entered judgment and sentenced Harper to three years fixed. (R., pp. 133-134.) Harper timely appealed. (R., pp. 130-132.)

ISSUE

Harper states the issue on appeal as:

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

(Appellant's brief, p. 6.)

The state rephrases the issue as:

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

ARGUMENT

Harper Has Failed To Show The District Court Erred When It Denied His Motion To Suppress

A. Introduction

Harper challenges the denial of his motion to suppress, arguing that Idaho Code § 49-638(1), following too closely, is void for vagueness. (See Appellant's brief, pp. 7-14.) Contrary to Harper's argument, Idaho Code § 49-638(1) is not void for vagueness and other jurisdictions reviewing similar statutes have repeatedly found that they are not unconstitutionally vague. Further, even if Idaho Code § 49-638(1) is void for vagueness, United States Supreme Court precedent holds that suppression is not proper.

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. Klingler, 143 Idaho 494, 496, 148 P.3d 1240, 1242 (2006).

Whether a statute is unconstitutional is purely a question of law, therefore, the appellate court considers the trial court's ruling *de novo*. State v. Cobb, 132 Idaho 195, 969 P.2d 244 (1998) (citing State v. Hansen, 125 Idaho 927, 930, 877 P.2d 898, 901 (1994); Sun Valley Co. v. City of Sun Valley, 109 Idaho 424, 428, 708 P.2d 147, 151 (1985)). "There is a strong presumption of the validity of an ordinance, and an appellate court is obligated to seek an interpretation of a statute that upholds its constitutionality. Id. (citations omitted). A statute should not be held void for uncertainty if any practical

interpretation can be given it. Id. (citing City of Lewiston v. Mathewson, 78 Idaho 347, 351, 303 P.2d 680, 682 (1956)).

C. The District Court Did Not Err When It Denied Harper's Motion To Suppress

"A traffic stop by an officer constitutes a seizure of the vehicle's occupants and implicates the Fourth Amendment's prohibition against unreasonable searches and seizures." State v. Young, 144 Idaho 646, 648, 167 P.3d 783, 785 (Ct. App. 2006) (citing Delaware v. Prouse, 440 U.S. 648, 653 (1979)). Ordinarily, a warrantless seizure must be based on probable cause to be reasonable. Florida v. Royer, 460 U.S. 491, 499-500 (1983); State v. Bishop, 146 Idaho 804, 811, 203 P.3d 1203, 1210 (2009).

However, limited investigatory detentions, based on less than probable cause, are permissible when justified by an officer's reasonable, articulable suspicion that a person has committed, or is about to commit, a crime. Royer, 460 U.S. at 498; Bishop, 146 Idaho at 811, 203 P.3d at 1210. "An officer may also stop a vehicle to investigate possible criminal behavior if there is reasonable articulable suspicion that the vehicle is being driven contrary to traffic laws." Young, 144 Idaho at 648, 167 P.3d at 785 (citing United States v. Cortez, 449 U.S. 411 (1981)). Whether an officer possessed reasonable suspicion is evaluated based on the totality of the circumstances known to the officer at or before the time of the stop. Bishop, 146 Idaho at 811, 203 P.3d at 1210; State v. Sheldon, 139 Idaho 980, 983, 88 P.3d 1220, 1223 (Ct. App. 2003).

Officer Cottrell stopped Harper because he had reasonable articulable suspicion that Harper was following another car too closely, a violation of Idaho Code § 49-638(1). (See R., pp. 68-69.) On appeal, Harper does not argue that Officer Cottrell lacked

reasonable articulable suspicion that he was following too closely, but instead contends the district court should have granted his motion to suppress because Idaho Code § 49-638(1) is unconstitutionally vague. (See Appellant's brief, pp. 7-14.) Harper's argument fails. Idaho Code § 49-638(1) is not unconstitutionally vague, and even if it is, suppression is not the proper remedy.

1. Idaho Code § 49-638(1) Is Not Unconstitutionally Vague As Applied To Harper's Conduct

In determining whether a statute is void for vagueness the court must first ask whether it regulates constitutionally protected conduct. State v. Bitt, 118 Idaho 584, 587-588, 798 P.2d 43, 46-47 (1990). Harper does not argue, nor could he establish, that Idaho Code § 49-638(1) regulates constitutionally protected conduct. (See Appellant's brief, pp. 7-14.) Since the statute does not regulate constitutionally protected conduct the "next and last step is to ask whether (a) the ordinance gives notice to those who are subject to it, and (b) whether the ordinance contains guidelines and imposes sufficient discretion on those who must enforce the ordinance." Bitt, 118 Idaho at 588, 798 P.2d at 47.

The United States Supreme Court has explained that "[a] conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained 'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.'" F.C.C. v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012) (quoting United States v. Williams, 553 U.S. 285, 304 (2008)). Statutes have a "strong presumption of validity" and the court must, if it can, "construe, not condemn" them. Skilling v. United States, 561 U.S. 358, 403 (2010) (internal quotes and cites omitted).

That "close cases can be envisioned" is insufficient to "render[] a statute vague" because the state must still prove its case beyond a reasonable doubt. United States v. Williams, 553 U.S. 285, 305-306 (2008). Even if a statute's "outermost boundaries" are "imprecise," such uncertainty has "little relevance" if the "appellant's conduct falls squarely within the 'hard core' of the statute's proscriptions." Broadrick v. Oklahoma, 413 U.S. 601, 608 (1973); see also Skilling, 561 U.S. at 411 (citing Broadrick). Furthermore, sufficient clarity "may be supplied by judicial gloss on an otherwise uncertain statute." United States v. Lanier, 520 U.S. 259, 266 (1997). "'One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.'" Alcohol Beverage Control v. Boyd, 148 Idaho 944, 949, 231 P.3d 1041, 1046 (2010) (quoting Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 n. 7 (1982) (internal quote omitted)).

"In order to determine whether a statute is unconstitutionally vague, the statute should not be evaluated in the abstract, but should be considered in reference to the particular conduct of the defendant challenging the statute." State v. Hansen, 125 Idaho 927, 932, 877 P.2d 898, 903 (1994) (citing State v. Marek, 112 Idaho 860, 866, 736 P.2d 1314, 1320 (1987); State v. Carringer, 95 Idaho 929, 930, 523 P.2d 532, 533 (1974)). Thus, "the void-for-vagueness doctrine addresses concerns about (1) fair notice and (2) arbitrary and discriminatory prosecutions." Skilling, 561 U.S. at 412 (2010) (citing Kolender v. Lawson, 461 U.S. 352, 357 (1983)). Here, Harper fails to establish that I.C. § 49-638(1) is unconstitutionally vague because he has failed to show either that: 1) the statute did not give him fair notice of the prohibited conduct; or 2) the statute grants unlimited discretion to police.

a. Idaho Code § 49-638(1) Provides Fair Notice That Harper's Conduct Was Prohibited

Idaho Code § 49-638(1) – Following too closely, states:

> (1) 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.

I.C. § 49-638(1). The district court concluded this statute provides fair notice because a "reasonably intelligent person" could determine whether he or she was following another vehicle too closely, also known as "tailgating." (R., p. 73.)

> As previously stated, to avoid violating I.C. § 49-638(1), one should refrain from following 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." In this Court's opinion, 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.
>
> More specifically, 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. Accordingly, Harper failed to show I.C. § 49-638(1) fails under the first prong of the analysis.

(R., p. 73.) The district court was correct.

Even if Idaho Code § 49-638 contains some uncertainty, that uncertainty is of "little relevance" because Harper's conduct falls within the "hard core" of the statute's proscriptions. Idaho Code § 49-638 proscribes following another vehicle "more closely than is reasonable and prudent" while considering speed, traffic and the conditions of the highway. See I.C. § 49-638(1).

> Here, Officer Cottrell testified Harper was driving 65 mph (95 feet per second) and keeping a mere distance of about 1.5 car lengths (30-35 feet) between himself and the vehicle he was following.

(R., p. 75) A person has an average reaction time of 1 to 1.5 seconds during which the average driver will travel between 95 and 140 feet before stopping. (Id.) If it takes 95 to 140 feet to stop – following another vehicle at a distance of 30-35 feet – is not "reasonable and prudent." Harper was driving way too close to the vehicle in front of him. Harper's conduct falls within the "hard core" of the statute's proscriptions.

Because the statute clearly provides notice, and Harper's own conduct falls squarely within, Harper cannot show the statute is vague. On appeal, Harper argues that Idaho Code § 49-638(1) did not give him adequate notice because the statute "does not specify at what distance following another vehicle becomes following 'more closely than is reasonable and prudent.'" (See Appellant's brief, p. 10.) He argues that drivers are "'left to do the guesswork as to what would be illegal at any given point in time given the circumstances of traffic.'" (Id. (quoting R., pp. 39-40).) Harper's argument fails.

Idaho Code § 49-638(1) prohibits following another car more closely than is "reasonable and prudent." I.C. § 49-638(1). While Idaho law does not appear to have directly addressed the constitutionality of the "reasonable and prudent" language, similar state statutes "have been uniformly upheld against constitutional challenges." See United States v. Hunter, 663 F.3d 1136, 1142 (10th Cir. 2011). Hunter was stopped for violating Kansas Statute § 8-1523(a), which states:

> The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway.

Id. at 1141 (citing K.S.A. § 8-1523(a)). Hunter argued this statute was unconstitutionally vague as applied to his conduct "because the term 'reasonable and prudent' is too subjective to inform ordinary drivers as to its meaning, and the statute does not establish minimum standards to guard against discriminatory enforcement." Id. The district court and the Tenth Circuit Court of Appeals rejected his argument. Id. at 1141-1142. The Tenth Circuit found that similar "reasonable and prudent" statutes have been found to be constitutional:

> Mr. Hunter cites no authority on point in support of his position. On the other hand, as the district court and the government both emphasize, identical or very similar "reasonable and prudent" standard statutes are ubiquitous throughout the United States, and have been uniformly upheld against constitutional challenges. *See*, *e.g.*, *United States v. Mendez–Cejas*, 2009 WL 914873, at *4 (D.Nev. Jan. 15, 2009), *aff'd*, 2009 WL 961464 (D.Nev. April 2, 2009); *United States v. Johnson*, 2006 WL 435975, at **3–4 (W.D.N.C. Feb. 21, 2006), *aff'd*, 258 Fed.Appx. 510 (4th Cir. 2007); *Smith v. State*, 237 So.2d 139 (Fla.1970); *United States v. Marmolejo,* 2007 WL 915195 (S.D. Ohio 2007); *State v. Coppes*, 247 Iowa 1057, 78 N.W.2d 10 (1956); *State v. Shapiro*, 751 So.2d 337, 341–42 (La.Ct.App. 1999); *State v. Giovengo*, 692 So.2d 462 (La.Ct.App. 1997); *State v. Heid*, 50 Misc.2d 409, 270 N.Y.S.2d 474 (N.Y.Cnty.Ct. 1966); *State v. Quinones*, 2003 WL 22939467, at **4–5 (Oh.Ct.App. 2003); *State v. Bush*, 182 N.E.2d 43 (Ohio Com.Pl. 1962); *State v. Harton*, 108 S.W.3d 253, 260 (Tenn.Crim.App. 2002); *Logan City v. Carlsen*, 585 P.2d 449 (Ut.1978).

Id. at 1142; see also Nolan v. State, 182 So.3d 484, 492-494 (Miss. Ct. App. 2016) (providing recent list of jurisdictions that have upheld "tailgating" statutes containing the same "reasonable and prudent" language). The Tenth Circuit went on to explain that the "reasonable and prudent" statutes provide needed flexibility while maintaining easily understood standards. Id.

> As these cases make clear, imprecision in statutes such as the one here simply build in needed flexibility while incorporating a comprehensible, normative standard easily understood by the ordinary driver, and giving

> fair warning as to what conduct on his or her part is prohibited. Further, references in these statutes to considerations such as speed, traffic and road conditions, channel enforcement.

Id. (footnote omitted).

A statute gives adequate notice when it gives a "person of ordinary intelligence" fair notice of what activity is prohibited. See State v. Cobb, 132 Idaho 195, 197, 969 P.2d 244, 246 (1998) (citing Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971)). In Bitt, supra, the ordinance prohibited loitering or prowling "in a place at a time or in a manner not usual for law-abiding individuals." Bitt, 118 Idaho at 589, 798 P.2d at 48. "Such loitering or prowling must 'warrant alarm for the safety of persons or property.'" Id. The Idaho Supreme Court held this language gave sufficient notice to those who wished to avoid violating the ordinance. Id. "We are certain that a reasonably intelligent individual could, if pressed, be able to form some idea of what sort of conduct the ordinance proscribes, and that may be sufficient." Id. Here, Idaho Code § 49-638(1) prohibits a driver from following another vehicle more closely than is "reasonable and prudent" considering the circumstances. As other jurisdictions have repeatedly found, a reasonably intelligent individual could form some idea of what it means to follow another vehicle more closely than is "reasonable and prudent." Harper has failed to establish that Idaho Code § 49-638(1) failed to give him adequate notice his behavior was prohibited.

b. Idaho Code § 49-638(1) Does Not Authorize Or Encourage Arbitrary And Discriminatory Enforcement

Along with providing fair notice, Idaho Code § 49-638(1) also provides sufficient guidelines for law enforcement. The district court determined that Idaho Code § 49-638(1) does not vest complete discretion in law enforcement because the Idaho Driver's

Education Manual recommends a safe following distance of three seconds, and Officer Cottrell testified regarding safe following distances. (See R., pp. 73-74.)

> Unlike the ordinance in *Bitt*, the statute at issue here does not vest complete discretion in law enforcement officers. As asserted by the State, the Idaho Driver's Education Manual recommends a minimum of three second following distance, a standard Officer Cottrell testified to being familiar with. Moreover, Officer 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. Harper argues following another vehicle at a distance of 1.5 vehicles while going 65 mph is a "typical distance for many areas of highway in many parts of the nation." However Harper fails to support that claim with any facts or authority. Consequently, I.C. § 49-638(1) is not void for vagueness and it does not grant law enforcement officers unbridled discretion.

(R. p. 74 (italics added).)

Citing Kolender v. Lawson, 461 U.S. 352 (1983), Harper argues that the "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)." (Appellant's brief, p. 13.) Harper argues that to pass constitutional muster the statute would need to include language specifically setting forth the three-second following rule or other specific following distances. (See Appellant's brief, pp. 10-14.) Harper is incorrect.

A following too closely statute employing a "reasonable and prudent" standard does not need to include such specific calculations to pass constitutional muster. See, e.g., Hunter, 663 F.3d at 1142 (list of jurisdictions finding "reasonable and prudent" language to be constitutional); Nolan, 182 So.3d at 492-494 (same); see also State v. Gonzalez, 539 N.E.2d 641, 643 (Ohio App. 1987) (holding that statute prohibiting

following another vehicle "more closely than is reasonable and prudent" was not unconstitutionally vague because absolute mathematical certainty is not required in a statute).

Nor does Kolender help Harper's argument. In Kolender, Lawson challenged the constitutionality of California Penal Code § 647(e), which "require[d] that an individual provide 'credible and reliable' identification when requested by a police officer who has reasonable suspicion of criminal activity sufficient to justify a *Terry* [*v. Ohio*, 392 U.S. 1 (1968)] detention." Kolender, 461 U.S. at 356. The United States Supreme Court first expressed a concern regarding the constitutionally of the statute "based upon the 'potential for arbitrarily suppressing First Amendment liberties.'" Id. at 358 (citing Shuttlesworth v. City of Birmingham, 382 U.S. 87, 91 (1965)). The Court also explained that the statute contained "no standard for determining what a suspect has to do in order to satisfy the requirement to provide a 'credible and reliable' identification" and thus, vested the police with "virtually complete discretion" to determine whether the statute has been violated. Id.

The language "reasonable and prudent" distance for driving a car, unlike "credible and reliable" standard for identification, provides guidelines to the officers. Following a car more closely than is "reasonable and prudent" is not arbitrary. A car is following too closely when it cannot reasonably stop in time to prevent a collision with the car in front of it. The physics of car travel is not arbitrary.

On the other hand, as explained by the Kolender court, the "credible and reliable" language regarding identification cards is arbitrary. Nothing about the circumstances in which an officer would ask for identification gives guidelines to an officer to determine

whether a means of identification was "credible and reliable." Kolender is distinguishable.

Harper has failed to show that Idaho Code § 49-638(1) is void for vagueness. The language is clear, provides fair notice, and is not subject to arbitrary enforcement. In addition, a plethora of other jurisdictions have upheld virtually identical statutes against void for vagueness challenges. Officer Cottrell had reasonable suspicion to stop Harper for following too closely and the district court did not err in denying Harper's motion to suppress.

2. Even If Idaho Code § 49-638(1) Is Unconstitutionally Vague, Suppression Is Not Warranted

Idaho Code § 49-638(1) is not unconstitutionally vague. However, even if this Court determines that it is, suppression is not required. Because the district court determined the statute was not unconstitutionally vague, this argument was not raised before the district court. "[W]here an order of the district court is correct but based upon an erroneous theory, this Court will affirm upon the correct theory. This doctrine is sometimes called the 'right result-wrong theory' rule." State v. Garcia-Rodriguez, 162 Idaho 271, 396 P.3d 700, 704 (2017) (quoting Idaho Sch. for Equal Educ. Opportunity v. Evans, 123 Idaho 573, 580, 850 P.2d 724, 731 (1993)); but see State v. Cohagan, Docket No. 44800 (August 24, 2017) (petition for rehearing pending) (court refused to consider correct legal theory on appeal because it was not raised below). Therefore, if this Court finds Idaho Code § 49-638(1) is unconstitutionally vague, it should still affirm the district court's order denying suppression based upon the "right result-wrong theory" rule.

Under United States Supreme Court precedent, a constitutionally valid seizure is not rendered invalid by a subsequent determination that the law on which the seizure was based is unconstitutionally vague. See Michigan v. DeFillippo, 443 U.S. 31, 37-40 (1979); see also United States v. Dexter, 165 F.3d 1120, 1125 (7th Cir. 1999) ("even if the statute was unconstitutional as applied, suppression would not be justified because Trooper Lewis reasonably relied on the statute when he determined that there was a violation.").

In DeFillippo, the defendant was arrested for violating a Detroit municipal ordinance providing that it was "unlawful for any person [suspected of criminal activity] to refuse to identify himself and produce evidence of his identity." Id. at 33. DeFillippo was charged with possession of a controlled substance recovered from a search incident to that arrest. Id. at 34. The trial court denied DeFillippo's motion to suppress. Id. at 34-35. The Michigan Court of Appeals reversed, holding that the city ordinance under which DeFillippo had been arrested was unconstitutionally vague and, therefore, the arrest and the search were invalid. Id.

The United States Supreme Court reversed the Michigan Court of Appeals and found, "On this record there was abundant probable cause to satisfy the constitutional prerequisite for an arrest." Id. at 37. The Court noted that, at the time of DeFillippo's arrest, "there was no controlling precedent that this ordinance was or was not constitutional, and hence the conduct observed violated a presumptively valid ordinance." Id. "Police are charged to enforce laws until and unless they are declared unconstitutional." Id. at 38. "Society would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled

to enforcement." Id. The Court concluded, "The subsequently determined invalidity of the Detroit ordinance on vagueness grounds does not undermine the validity of the arrest made for violation of that ordinance, and the evidence discovered in the search of respondent should not have been suppressed." Id. at 40.

The state acknowledges the Idaho Court of Appeals' recent decision in State v. Pettit, Docket Nos. 44198/44199 (Idaho. App. Sept. 29, 2017) (petition for review pending), questioned the applicability of DeFillippo under the Idaho Constitution. In Pettit, the Court of Appeals determined that DeFillippo did not impact the Idaho Supreme Court precedent interpreting the Idaho Constitution. Here, while Harper provided a cursory citation to the Idaho Constitution on appeal (see Appellant's brief, p. 8) and before the district court (R., p. 37), Harper's argument is based upon the United States Supreme Court decision in Kolender and United States Constitution, and thus DeFillippo is still controlling. Therefore, even if Idaho Code § 49-638(1) is subsequently determined by this Court to be unconstitutionally vague, that determination should not negate Officer Cottrell's reasonable suspicion at the time of the traffic stop that Harper was violating the statute by following too closely.

CONCLUSION

The state respectfully requests this Court affirm Harper's conviction.

DATED this 25th day of October, 2017.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 25th day of October, 2017, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

BEN P. McGREEVY
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