

8-15-2017

## State v. Vargas Respondent's Brief Dckt. 44843

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

STATE OF IDAHO, )  
 ) No. 44843  
 Plaintiff-Respondent, )  
 )  
 v. ) Ada County Case No.  
 ) CR-MD-2015-7985  
 TANYA ANDREA VARGAS, )  
 )  
 Defendant-Appellant. )  
 )  
 )  
 )

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**BRIEF OF RESPONDENT**

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**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF ADA**

---

**HONORABLE GERALD F. SCHROEDER**  
District Judge

---

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## STATEMENT OF THE CASE

### Nature Of The Case

Tanya A. Vargas appeals from the district court's appellate opinion affirming the judgment entered upon the jury verdict finding Vargas guilty of misdemeanor eluding a police officer. On appeal, Vargas argues the district court erred in affirming the magistrate's denial of Vargas' motion in limine, which sought to suppress the investigating officer's out-of-court and in-court identifications of Vargas on the alleged basis that the out-of-court identification procedure employed by the officer was impermissibly suggestive.

### Statement Of The Facts And Course Of The Proceedings

At approximately 10:50 p.m. on May 8, 2015, Boise City Police Officer Natalie Wing was on patrol in a marked police car when she observed a blue Mazda with "a non-functioning taillight" travelling in front of her. (3/15/16 Tr., p.24, L.18 – p.27, L.15, p.41, L.19 – p.42, L.13.) Officer Wing followed the Mazda and called the license plate number of the vehicle into dispatch. (3/15/16 Tr., p.27, Ls.20-25, p.29, L.8 – p.30, L.1.) The registration information returned to "an individual out of Ogden, Utah." (3/15/16 Tr., p.37, Ls.15-18; see also 3/15/16 Tr., p.29, Ls.8-16.) After choosing a safe location to conduct a traffic stop, Officer Wing activated the "red and blue lights" on her patrol car. (3/15/16 Tr., p.28, L.17 – p.30, L.3.) In response, the driver of the Mazda slowed down and "pull[ed] almost to the curb" but did not stop. (3/15/16 Tr., p.30, Ls.3-14.) Officer Wing "turn[ed] on [her] siren to get the driver's attention," at which point the driver of the Mazda "accelerated rapidly" and sped away. (3/15/16 Tr., p.30,

Ls.5-14.) In accordance with police department policy, Officer Wing discontinued the pursuit so as not to endanger the general public. (3/15/16 Tr., p.35, L.19 – p.36, L.16.)

From the time Officer Wing began following the Mazda to the time the driver of the Mazda sped away, approximately two minutes had elapsed. (3/15/16 Tr., p.40, L.3 – p.41, L.3.) During that time, the driver of the Mazda “made multiple glances ... toward the side driver’s mirror and then back toward the road.” (3/15/16 Tr., p.31, L.16 – p.32, L.10, p.45, Ls.12-20.) Although it was dark outside, the area in which the officer and the Mazda were travelling was illuminated intermittently by street lights, and Officer Wing was able to get a good look at the driver of the Mazda as the driver looked in her driver’s side mirror. (3/15/16 Tr., p.32, L.19 – p.33, L.3, p.41, Ls.4-18, p.45, Ls.12-23.) In fact, while in a well-lit intersection, the driver of the Mazda made “almost a full turn toward that mirror,” allowing the officer to see the driver’s entire face and her profile. (3/15/16 Tr., p.32, L.19 – p.33, L.3.) Based on her observations, Officer Wing believed the driver of the Mazda was “a female of Hispanic nationality,” in her “mid to upper 30’s.” (3/15/16 Tr., p.33, Ls.4-12, p.45, L.24 – p.46, L.6.)

After she discontinued the pursuit, Officer Wing contacted dispatch to conduct a further investigation into the registered owner of the Mazda. (3/15/16 Tr., p.37, Ls.11-25.) That investigation ultimately led Officer Wing to the name, Tanya Vargas. (3/15/16 Tr., p.38, Ls.1-10.) Officer Wing pulled up Vargas’ state issued identification card and determined from the photograph on that card that

Vargas was the individual she had seen driving the Mazda. (3/15/16 Tr., p.38, L.9 – p.39, L.12.)

The state charged Vargas with misdemeanor eluding a police officer. (R., pp.8-9.) Before trial, Vargas filed a motion in limine seeking to suppress Officer Wing's "out of court, and expected in-court, identification[s]" of her, arguing the out-of-court identification was the product of an impermissibly suggestive "single photograph lineup" and that any in-court identification would be "irreconcilably taint[ed]." (R., pp.41-48.) After a hearing, the magistrate denied the motion. (3/15/16 Tr., p.11, L.8 – p.20, L.8.) The magistrate questioned whether the officer's act of looking at Vargas' identification card photograph constituted "a lineup in the sense that the cases identify" but ruled that, "even so," under the facts of this case, the reliability of the identifications would be an issue for the jury. (3/15/16 Tr., p.15, L.11 – p.19, L.10.)

At the trial that followed, the parties agreed that the only issue before the jury was the identification of the driver who eluded Officer Wing. (3/15/16 Tr., p.21, L.10 – p.22, L.19, p.22, L.25 – p.24, L.2.) Officer Wing testified to having identified Vargas from her state issued identification card photograph on the night of the charged incident. (3/15/16 Tr., p.37, L.11 – p.39, L.18.) The officer also made an in-court identification of Vargas. (3/15/16 Tr., p.37, Ls.1-10.) At the conclusion of the trial, the jury found Vargas guilty of misdemeanor eluding. (R., p.81; 3/15/16 Tr., p.68, L.16 – p.69, L.9.)

Vargas timely appealed from the judgment (R., pp.82-86) and, on appeal, challenged the denial of her motion in limine (R., pp.113-26, 140-51; 11/17/16

Tr., p.6, L.14 – p.12, L.8, p.21, L.8 – p.28, L.13). The district court affirmed (R., pp.154-63), holding that Vargas failed to show Officer Wing's identification of her "by viewing her driver's license [sic] photo ... was the result of improper ('tainted') state conduct" (R., p.160). Specifically, the court reasoned:

One may have serious concerns about the reliability of the identification, but the process leading to the identification is not violative of due process. Had the officer presented a single photo lineup to an independent witness due process concerns would certainly be apparent. But those concerns are not apparent when the officer is the investigator attempting to locate and identify the offender.

(R., pp.160-61.) The district court also held "[t]he magistrate did not violate [Vargas'] due process rights in allowing the officer's in-court identification," again reasoning, "[r]eliability concerns exist but they are not the product of improper police conduct." (R., p.161.)

Vargas timely appealed from the district court's intermediate appellate opinion. (R., pp.164-68.)



## ISSUE

Vargas states the issue on appeal as:

1. Did the Appellate Opinion err in affirming the trial court's denial of Ms. Vargas's motion in limine seeking suppression of Officer Wing's identification of her, both in and out of court?

(Appellant's brief, p.3.)

The state rephrases the issue as:

Has Vargas failed to show that the district court erred in affirming the magistrate's denial of Vargas' motion in limine seeking suppression of the investigating officer's identifications of her because, contrary to Vargas' assertions, the investigative methods employed by the officer to confirm for herself that Vargas was the individual who eluded her did not implicate, much less violate, Vargas' due process rights?

## ARGUMENT

### Vargas Has Failed To Show That The District Court Erred In Affirming The Magistrate's Denial Of Her Motion In Limine Seeking Suppression Of The Investigating Officer's Identifications Of Her

#### A. Introduction

Vargas argues the district court erred in affirming the magistrate's denial of her motion in limine seeking suppression of Officer Wing's identifications of her. As she did below, Vargas characterizes Officer's Wing's use of Vargas' driver's license photo to identify her as a "single photo lineup" which, she contends, is "inherently suspicious and impermissibly suggestive as a matter of law." (Appellant's brief, pp.4-13.) She also argues "[t]he out of court identification was so suggestive as to be useless, and it irreconcilably taint[ed]" Officer Wing's in-court identification. (Appellant's brief, p.14.) Vargas' arguments fail. Application of the law to the facts supports the lower courts' conclusions that the investigative methods the officer employed to confirm Vargas' identity were not impermissibly suggestive and did not implicate, much less violate, Vargas' due process rights. Vargas has failed to show any basis for reversal of the district court's appellate decision affirming the denial of her motion in limine.

#### B. Standard Of Review

On review of a decision rendered by a district court in its intermediate appellate capacity, the reviewing court "directly review[s] the district court's decision." State v. DeWitt, 145 Idaho 709, 711, 184 P.3d 215, 217 (Ct. App. 2008) (citing Losser v. Bradstreet, 145 Idaho 670, 183 P.3d 758 (2008)). The

appellate court “examine[s] the magistrate record to determine whether there is substantial and competent evidence to support the magistrate’s findings of fact and whether the magistrate’s conclusions of law follow from those findings.” Id. “If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the magistrate’s decision, [the appellate court] affirm[s] the district court’s decision as a matter of procedure.” Id. (citing Losser, 145 Idaho 670, 183 P.3d 758; Nicholls v. Blaser, 102 Idaho 559, 633 P.2d 1137 (1981)).

“Due process issues are generally questions of law,” over which the appellate court exercises free review. Kootenai Medical Center ex rel. Teresa K. v. Idaho Dept. of Health and Welfare, 147 Idaho 872, 216 P.3d 630 (2009) (citations and quotations omitted).

C. The Investigative Methods Employed By The Officer To Confirm For Herself Vargas’ Identity Did Not Implicate, Much Less Violate, Vargas’ Due Process Rights

“Due process requires the exclusion of identification evidence if police suggestiveness created a substantial risk of mistaken identification, except where the reliability of the identification is sufficient to outweigh the corrupting effect of the suggestive identification.” Wurdemann v. State, 161 Idaho 713, \_\_\_, 390 P.3d 439, 444 (2017) (quoting State v. Trevino, 132 Idaho 888, 892, 980 P.2d 552, 556 (1999)); accord State v. Payne, 146 Idaho 548, 562, 199 P.3d 123, 137 (2008). “[R]eliability is the linchpin in determining the admissibility of identification testimony.” Manson v. Brathwaite, 432 U.S. 98, 114 (1977), quoted in Wurdemann, 161 Idaho at \_\_\_, 390 P.3d at 444; State v. Hoisington,

104 Idaho 153, 161, 657 P.2d 17, 25 (1983). Thus, in cases where police action has created a risk of misidentification, Idaho's appellate courts apply a two-step test "[t]o determine whether evidence of an out-of-court identification violates due process." State v. Almaraz, 154 Idaho 584, 593, 301 P.3d 242, 251 (2013) (citing Hoisington, 104 Idaho at 162, 657 P.2d at 26). "First, the defendant must establish that the identification procedure was overly suggestive." Almaraz, 154 Idaho at 593, 301 P.3d at 251 (citations omitted). "Second, if the defendant meets that burden, courts consider whether the identification was nonetheless reliable under the totality of the circumstances." Id. (citations omitted). "For an out-of-court identification to taint an in-court identification, the out-of-court identification must have been 'so suggestive that there is a very substantial likelihood of misidentification.'" Payne, 146 Idaho at 562, 199 P.3d at 137 (quoting Trevino, 132 Idaho at 892, 980 P.2d at 556).

Both the Supreme Court of the United States and the Idaho Supreme Court have recognized the fallibility of eyewitness identifications. See, e.g., Perry v. New Hampshire, 565 U.S. 228, 245 (2012); Brathwaite, 432 U.S. at 109-14; Almaraz, 154 Idaho at 593, 301 P.3d at 251. However, both Courts have also recognized that, absent "improper police conduct," the "due process check for reliability" does not "come[] into play." Perry v. New Hampshire, 565 U.S. 228, 241 (2012); see also Payne, 146 Idaho at 562, 199 P.3d at 137 (where there was "no state action and no police suggestiveness creating a risk of misidentification" the witness' identification was "insulate[d] ... from Payne's arguments about the suggestiveness of the single photo lineup"). As explained

by the United States Supreme Court in Perry, “[a] primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances ... is to deter law enforcement use of improper lineups, showups, and photo arrays in the first place.” Perry, 565 U.S. at 241 (citing Brathwaite, 432 U.S. at 112). “When no improper law enforcement activity is involved ... it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence,” and the giving of appropriate jury instructions. Id. at 233. In other words, “the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement.” Id. at 248. Rather, in such circumstances “the evidence (if admissible in all other respects) should be submitted to the jury.” Id. at 239 (footnote omitted).

Application of the foregoing principles to the facts of this case supports the district court’s conclusions that Officer Wing’s use of Vargas’ identification card photograph to confirm Vargas’ identity did not implicate Vargas’ due process rights and that the reliability of the identifications was an issue for the jury. (See R., pp.155-61.) Although Officer Wing is herself a law enforcement officer, her identification of Vargas was not the result of any improper or unnecessarily suggestive police activity. Rather, after the driver of the Mazda eluded her, Officer Wing conducted an independent investigation regarding the ownership of the vehicle and, in that process, she received Vargas’ name.

Following up on that lead, the officer pulled up Vargas' state issued identification card and confirmed for herself that Vargas was the individual she had seen driving the Mazda. Because Officer Wing's identification of Vargas occurred as a result of her own observations and investigation, and was not "procured under unnecessarily suggestive circumstances arranged by law enforcement," Perry, 565 U.S. at 248, the "due process check for reliability" of the identification did not "come[] into play," Id. at 241. See also Payne, 146 Idaho at 562, 199 P.3d at 137.

The reasoning of State v. Hooks, 752 N.W.2d 79 (Minn. Ct. App. 2008), relied on by the district court (see R., pp.157-59), is instructive. "Hooks sold cocaine from his car to an undercover police officer who later identified Hooks as the seller by obtaining and viewing Hooks's driver's license photograph from the Department of Motor Vehicles electronic database." Hooks, 752 N.W.2d at 82. In the prosecution that ensued, Hooks moved to suppress the officer's identification of him "on the theory that it resulted from an unfairly suggestive, one-person photographic lineup." Id. at 83. The district court denied the motion, and the Minnesota Court of Appeals later affirmed. Id. at 83-85.

Citing United States Supreme Court precedent, the Hooks Court explained that "[t]he reason a due process issue arises when a pretrial identification procedure is unnecessarily suggestive in the typical circumstance is that the defendant was unfairly singled out by police for the witness to identify." Id. at 84 (citing Simmons v. United States, 390 U.S. 377, 383-84 (1968); Foster v. California, 394 U.S. 440 (1969)). The "traditional" two-part test that examines

“whether the identification procedure was unnecessarily suggestive and, if so, whether the identification is nonetheless reliable” is “designed to measure whether *police influence* rather than *the witness’s own reasoning and recollection* led to the witness’s identification of the defendant.” Id. (emphasis original, citations omitted). Where, as in Hooks’ case, “the facts include[d] no conceivable identification-inducing interaction between police and the identifying witness,” the “constitutional concern about police-induced identification is not present.” Id.

In rejecting Hooks’ challenge to the identification procedure employed in his case, the Hooks Court explained in detail the reasons “*why* single-person lineups trigger a constitutional concern.” Id. (emphasis original). Because the police solve crimes and are perceived by the public to be especially credible, witnesses place confidence in them and are easily influenced by any suggestion that the police have narrowed their own identification of a suspect to one (or very few) individual(s). Id. at 84-85. Recognizing these concerns, the Hooks Court held that “an investigating officer who obtains and observes *for himself* a driver’s license photograph to identify *for himself* the person he observed committing the investigated crime does not implicate that person’s due process rights.” Id. at 85 (emphasis original). Specifically regarding the identification at issue in Hooks’ case, the Court reasoned:

Unlike the eyewitness to whom a single police-supplied photograph might suggest the photographed person’s guilt, Officer Urbanski could not have been unduly influenced by his own identification procedure. Acting as the investigating officer, Urbanski decided for himself which photograph to view to confirm his reasoning that the licensed driver of the car that officers stopped leaving the scene of

the crime was the offending drug dealer. The lineup options therefore narrowed to a single photograph based on Urbanski's own reasoning, not based on the influence of an authority whose narrowing would tend to suggest a particular suspect to a witness.

Id. Having concluded that the investigative process used by the officer to confirm Hooks' identity did "not raise any fairness concerns that require[d] application of [the traditional] two-part test" to determine the reliability of an eyewitness identification obtained as a result of improper police conduct, the Hooks Court affirmed the district court's order denying Hooks' motion to suppress the identification evidence. Id.

The reasoning and result of Hooks apply with equal force in this case. Like the officer in Hooks, Officer Wing "obtained and observed for [herself]" Vargas' state issued identification card photograph in order to "identify for [herself] the person [she] observed committing the investigated crime." Hooks, 752 N.W.2d at 85. Also like the officer in Hooks, Officer Wing "could not have been unduly influenced by [her] own identification procedure." Id. This is not a case in which an officer supplied an identifying witness with a single photograph, thereby potentially suggesting to the witness the photographed person's guilt. Rather, like the officer in Hooks, Officer Wing "decided for [herself] which photograph to view" to confirm Vargas' identity, thereby narrowing the "lineup options ... to a single photograph based on [Officer Wing's] own reasoning, not based on the influence of an authority whose narrowing would tend to suggest a particular suspect to a witness." Id. Because, as in Hooks, the facts of this case "include no conceivable identification-inducing interaction between police and the identifying witness," the identification procedure did not even implicate, much



less violate, Vargas' due process rights. Id. at 84-85. The district court therefore correctly affirmed the magistrate's order denying Vargas' motion in limine to exclude the officer's identification testimony at trial.

On appeal, Vargas recognizes the rationale of Hooks, but he urges this Court to reject it, contending it "directly contravene[es]" the United States Supreme Court's decision in Manson v. Brathwaite, supra, and "serves to inoculate all identifications made by law enforcement from ever reaching the second step of scrutiny under the *Manson* reliability factors." (Appellant's brief, pp.6-11.) Vargas' reliance on Brathwaite for the proposition that an analysis of the reliability factors articulated in that case is required in every case where a law enforcement officer uses a single photograph to identify a suspect because such an identification procedure is inherently suggestive finds no support in either the law or the facts of that case.

In Brathwaite, an undercover police officer purchased heroin from an individual whose identity he did not know. Brathwaite, 432 U.S. at 99-101. Upon returning to police headquarters, the undercover officer gave a second officer a physical description of the seller. Id. at 101. Suspecting from the description that Brathwaite might be the seller, the second officer obtained a photograph of Brathwaite and left it in the undercover officer's office. Id. The undercover officer viewed the photograph two days later and identified the person in the photograph as the individual from whom he had purchased narcotics. Id.

The issue before the Supreme Court in Brathwaite was "whether the Due Process Clause of the Fourteenth Amendment compels the exclusion, in a state

criminal trial, apart from any consideration of reliability of pretrial identification evidence obtained by a police procedure that was both suggestive and unnecessary.” Id. at 99. The Court ultimately answered that question in the negative, holding that where an identification is obtained by unnecessarily suggestive police procedures, the identification evidence may nevertheless be admissible if certain factors – including “the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation” – outweigh “the corrupting effect of the suggestive identification itself.” Id. at 109-14. Because the petitioner in Brathwaite “acknowledged that the procedure in [that] case was suggestive (because only one photograph was used) and unnecessary,” id. at 109, the Brathwaite Court weighed the “corrupting effect of the suggestive identification” against the reliability factors and ultimately concluded the identification was sufficiently reliable to go to the jury, id. at 114-17.

Contrary to Vargas’ assertions, neither the facts nor the holding of Brathwaite mandate a conclusion that all police identifications that result from the viewing of a single photograph are impermissibly suggestive and require an analysis of the reliability factors set forth in that case. The undercover officer in Brathwaite identified Brathwaite as the perpetrator of the crime, not as a result of his own investigation, but based on a single photograph supplied to him by a second officer who, based on the description provided to him, had formed his

own suspicion that Brathwaite was the suspect. While the Brathwaite Court treated that identification procedure as unnecessarily suggestive and, therefore, requiring consideration of the reliability factors, nothing in the Brathwaite opinion suggests that an identification made by a police officer viewing a photograph he or she has obtained for him or herself while investigating a crime is in any way suggestive or improper.

Notably, in arguing that Brathwaite requires an analysis of the due process reliability factors under the facts of this case, Vargas utterly ignores the Supreme Court's opinion in Perry v. New Hampshire, supra, which, as noted above, explicitly held that "the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement." Perry, 565 U.S. at 248; see also Payne, 146 Idaho at 562, 199 P.3d at 137 (witness' identification was insulated from due process challenge where there was "no state action and no police suggestiveness creating a risk of misidentification"). In reaching that holding, the Perry Court rejected "Perry's contention that improper police action was not essential to the reliability check *Brathwaite* required," noting that deterring law enforcement from using "improper lineups, showups, and photo arrays in the first place" was "a key premise of the *Brathwaite* decision." Perry, 565 U.S. at 241. Where, as in this case, the identification was not arranged by law enforcement but was instead the product of the officer's independent investigation, "[t]his deterrence rationale is inapposite." Id. at 242. See also Hooks, 752 N.W.2d at

84-85; Terry v. State, 857 N.E.2d 396, 409 (Ind. Ct. App. 2006) (“[W]hen a police officer who is both an investigator and a witness views a single photograph in order to verify a suspect’s identity, the identification procedure is not unduly suggestive.” (citation omitted)); Miles v. State, 764 N.E.2d 237, 240 (Ind. Ct. App. 2002) (“[W]here, as here, the police officer is both the investigator and the witness, police misconduct is not at issue.”); State v. Manna, 539 A.2d 284, 312 (N.H. 1988) (police misconduct was not at issue where investigating officer identified suspect by obtaining and viewing a single photograph because the officer “could not be found through the photo identification process to have impermissibly suggested *to himself* the person whom he arrested” (emphasis original)).

Because the procedure Officer Wing used to identify Vargas was not the result of any police suggestiveness creating a risk of misidentification, the district court correctly concluded the identification did not implicate, much less violate, Vargas’ due process rights. (R., pp.160-61.) As such, any questions regarding the reliability of the identification were for the jury to resolve. See Perry, 565 U.S. at 245 (“The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness.”). Vargas has failed to show the district court erred in affirming the magistrate’s order denying her motion in limine to exclude Officer Wing’s out-of-court and in-court identifications.

CONCLUSION

The state respectfully requests that this Court affirm the district court's appellate decision affirming Vargas' conviction for misdemeanor eluding a police officer.

DATED this 15th day of August, 2017.

/s/ Lori A. Fleming  
LORI A. FLEMING  
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 15th day of August, 2017, served two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

RANDALL S. BARNUM  
MATTHEW G. GUNN  
BARNUM HOWELL & GUNN PLLC  
P. O. BOX 2616  
BOISE, ID 83701-2616

/s/ Lori A. Fleming  
LORI A. FLEMING  
Deputy Attorney General

LAF/dd