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# State v. McGraw Respondent's Brief Dckt. 44935

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,

Plaintiff-Appellant,

vs.

BRIAN McGRAW,

Defendant -Respondent.

Ada Co. Case No. CR01-16-27824  
Supreme Court No. 44935

STATE OF IDAHO,

Plaintiff-Appellant,

vs.

LACEY KILLEEN,

Defendant -Respondent.

Ada Co. Case No. CR01-16-25070  
Supreme Court No. 44942

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BRIEF OF RESPONDENT LACEY KILLEEN

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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

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HONORABLE MICHAEL REARDON  
District Judge

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ROBYN FYFFE, ISB#7063  
Fyffe Law  
800 W. Main St., Ste. 1460  
Boise, Idaho 83702  
(208) 338-5231  
[robyn@fyffelaw.com](mailto:robyn@fyffelaw.com)  
ATTORNEY FOR DEFENDANT-  
RESPONDENT LACEY KILLEEN

LAWRENCE G. WASDEN  
Idaho Attorney General  
KENNETH K. JORGENSEN  
PO Box 83720  
Boise, Idaho 83720  
(208) 334-4534  
[ecf@ag.idaho.gov](mailto:ecf@ag.idaho.gov)  
ATTORNEYS FOR PLAINTIFF-  
APPELLANT

ERIC D. FREDERICKSEN  
State Appellate Public Defender  
ANDREA W. REYNOLDS  
Deputy State Appellate Public Defender  
322 E. Front Street, Suite 570  
Boise, Idaho 83702  
(208) 334-2712  
E-mail: [documents@sapd.state.id.us](mailto:documents@sapd.state.id.us)  
ATTORNEYS FOR DEFENDANT-RESPONDENT BRIAN MCGRAW

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## II. STATEMENT OF THE CASE

### A. Nature of the Case

This is the state's appeal from the district court's order granting Defendant Lacey Killeen's motion to suppress. R. 95-97.

### B. General Course of Proceedings

On a slow night just after midnight on August 14, 2016, Boise Police Officer Jason Green patrolled a Walmart parking lot with his drug detention dog while "running" the license plates of random vehicles. Tr. p. 35, ln. 11 - p. 36, ln. 9. Officer Green encountered Ms. Killeen's vehicle and recognized her name from an occasion several months earlier in which she was present with someone arrested on drug related charges. Tr. p. 33, ln. 1-4; p. 35, ln. 14-24. Officer Green decided to follow Ms. Killeen's vehicle until a traffic infraction allowed him to initiate a traffic stop during which he could utilize his drug detection dog on the vehicle. Tr. p. 9, ln. 4-14; p. 29, ln. 4-11; p. 32, ln. 3-19; p. 36, ln. 10-16; p. 40, ln. 5-21.

Approximately four miles later, Officer Green observed Ms. Killeen change lanes on the freeway after signaling for less than the required five seconds. Tr. p.10, ln. 6-10; p. 22, ln. 1-13; Exh. 1, 1:38-2:23. After another (correct) lane change, the officer noted the vehicle drift a few inches into the other lane while signaling to change lanes. Tr. p. 10, ln. 11 – p.11, ln. 5, p.22, ln. 2-13. Officer Green initiated a traffic stop based on the two infractions. Tr. p.11, ln. 6-15.

Officer Green requested and received Ms. Killeen's license and proof of insurance. Tr. p.12, ln. 3-13; p.13, ln. 16-22. The passenger identified himself as Brian McGraw and admitted to being on parole in response to Officer Green's question regarding probation or parole status. Tr. p.12, ln. 14-25; p.13, ln. 16-22. Officer Green did not smell drugs or alcohol and neither passenger moved in a threatening manner. Mr. McGraw's parole status nonetheless solidified Officer Green's decision to utilize his narcotics detection canine around the vehicle. Tr. p. 13, ln. 1-8; p. 28, ln. 24 - p. 29, ln. 11; p. 32, ln. 3-19.

Meanwhile, Boise Police Officer Plaisted — also a canine handler — arrived on the scene and stood the passenger window as Officer Green spoke with Ms. Killeen at the driver's side window. Tr. p. 41, ln. 8-16; p. 44, ln. 14-18; p. 45, ln. 5 - p.46, ln. 9. Dispatch verified that Ms. Killeen's license and registration were valid and that neither occupant had outstanding warrants. Tr. p. 14, ln. 6-14.

Officer Green then informed Ms. Killeen that he was going to write a citation for failing to maintain a lane. Exhibit 1, 5:23-5:31. Officer Green continued "so in a minute I'm going to begin that" but "for the time being" directed Ms. Killeen to exit her vehicle. Exhibit 1, 5:23 - 5:35. Ms. Killeen inquired "why do I have to get out of the car?" and Officer Green replied: "Well, because in a minute here . . . I'll have that conversation with you out here." Exhibit 1, 5:40-5:50.

After Ms. Killeen exited the vehicle, Officer Green informed her that he planned to walk his drug dog around the vehicle while the citation was being written. Exhibit 1, 6:25-6:33. Officer Green inquired regarding the presence of any narcotics and sought consent to search, which she denied and declined. Exhibit 1, 6:37-6:41. Ms. Killeen informed the officer that Mr. McGraw's parole did not allow him to search her car and Officer Green responded that he was "not even going off his parole." Exhibit 1, 7:02-7:16; Tr p. 15, ln. 7-14.

Officer Green directed Ms. Killeen to sit on the curb, retrieved his citation book and began writing the citation. Tr. p. 15, ln. 6-9; p. 30, ln. 11-15. Officer Plaisted removed Mr. McGraw from the vehicle, sat him on the curb and turned down Officer Green's overhead lights. Tr. p. 47, ln. 3-13; p. 52, ln. 5-18. Officer Green handed his citation book to Officer Plaisted, who then went to the rear of Officer Green's vehicle and turned off the overhead lights. Tr. p.15, ln. 23 – p.16, ln. 5; p. 53, ln. 19 - p. 54, ln. 24. Officer Plaisted walked around the patrol vehicle and positioned himself where he could simultaneously observe the vehicle occupants and cover Officer Green when he ran his canine around Ms. Killeen's car. Exhibit 2, 3:02-3:35; Tr. 70, 18 - p. 71, ln. 4. With Officer Plaisted in position, Officer Green retrieved his drug dog. 3:11-3:35. Forty seconds after receiving the citation from Officer Green, Officer Plaisted "ostensibly" filled it out on an intermittent basis while covering Officer Green. Tr. p.55, ln. 4-; p. 70, ln. 22 - p. 71, ln. 6



The dog alerted at an open window. Tr. p.16, ln. 8-18. The officer searched the vehicle and found marijuana, methamphetamine and paraphernalia. Tr. p.17, ln. 11 – p.18, ln. 9. The state charged Ms. Killeen with felony possession of a controlled substance and possession of paraphernalia. R. 37-38. The district court consolidated Mr. McGraw’s case with Ms. Killeen’s case. R. 51.

Ms. Killeen moved to suppress, arguing that the officer extended the stop to accomplish the dog sniff by interrogating her regarding drugs and seeking consent to search. R 62-70, 88-90. The district court found that while the stop was “entirely pre textual,” it was objectively supported by the traffic violations. Tr. p. 69, ln. 21 - p. 70, ln. 1 The district court found that Officer Green lacked any basis to expand the scope of the stop and that he abandoned its purpose when he handed the citation to Officer Plaisted. Tr. p. 70, ln. 7-15. The district court also noted Officer Plaisted delayed resuming the citation and then intermittently wrote the citation while covering Officer Green. Tr. p. 70, ln. 18 - p. 71, ln. 7. The district court concluded Officer Green abandoned the stop’s purpose within the meaning of *Rodriguez v. United States*, \_\_ U.S. \_\_, 135 S.Ct. 1609 (2015) and *State v. Linze*, 161 Idaho 605, 389 P.3d 150 (2016) and granted Ms. Killeen’s motion. R 93-94. The state appealed. R 95-97.

### III. ISSUE PRESENTED ON APPEAL

The state phrases the issue on appeal as:

Did the district court err in concluding that the initial officer's action of handing the ticket book to a second officer, combined with the second officer's actions of turning off the flashing lights on a patrol car and paying attention to his surroundings while writing the ticket, constituted an abandonment of the traffic stop?

Ms. Killeen re-phrases the issue on appeal as:

Should this Court affirm because the district court's finding that the dog sniff added time to the traffic stop was supported by substantial evidence?

### IV. ARGUMENT

On review from the district court's order on a motion to suppress, this Court freely reviews constitutional principles while accepting the trial court's factual findings when supported by substantial and competent evidence. *State v. Munoz*, 149 Idaho 121, 128, 233 P.3d 52, 59 (2010); *State v. Fees*, 140 Idaho 81, 84, 90 P.3d 306, 309 (2004). The trial court has wide discretion to determine witness credibility, the weight to be given to conflicting evidence, and factual inferences to be drawn. *Munoz*, 149 Idaho at 128, 233 P.3d at 59; *State v. Bishop*, 146 Idaho 804, 810, 203 P.3d 1203, 1209 (2009). This Court also examines the "implicit" findings that support the trial court's ruling in the absence of an explicit factual ruling. *State v. Schevers*,

132 Idaho 786, 789, 979 P.2d 659, 662 (Ct. App. 1999).

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. Courts must presume that a warrantless search is unreasonable and violates the Fourth Amendment. *State v. Smith*, 152 Idaho 115, 118, 266 P.3d 1220, 1223 (Ct. App. 2011); *State v. Weaver*, 127 Idaho 288, 290, 900 P.2d 196, 198 (1995). The state may overcome this presumption by demonstrating that a warrantless search either fell within a well-recognized exception to the warrant requirement or was otherwise reasonable under the circumstances. *Id.*

A detention's scope must be carefully tailored to its underlying justification. *Royer*, 460 U.S. at 500; *State v. Aguirre*, 141 Idaho 560, 561, 112 P.3d 848, 851 (Ct. App. 2005). "A seizure for a traffic violation justifies a police investigation of that violation." *Rodriguez*, 135 S. Ct. at 1614. Beyond determining whether to issue a traffic ticket, an officer's mission includes ordinary inquiries incident to [the traffic] stop such as checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance. *Rodriguez*, 135 S. Ct. at 1615. An officer can also investigate issues unrelated to the initial basis for the stop *if* the routine traffic stop reveals circumstances justifying a reasonable suspicion of criminal activity. *Aguirre*, 141 Idaho 560, 562, 112 P.3d 848, 850 (Ct. App. 2005); *State v. Parkinson*, 135 Idaho 357, 362, 17 P.3d 301, 306 (Ct. App. 2000).

An individual “may not be detained even momentarily without reasonable, objective grounds for doing so.” *State v. Gutierrez*, 137 Idaho 647, 651-52, 51 P.3d 461, 465-66 (Ct. App. 2002), *citing Royer*, 460 U.S. at 498. A seizure justified only by a police-observed traffic violation becomes unlawful “if it is prolonged beyond the time reasonably required to complete th[e] mission’ of issuing a ticket for the violation.” *Rodriguez*, 135 S. Ct. at 1612, *citing Illinois v. Caballes*, 543 U.S. 405, 407 (2005). In the context of a dog sniff, the critical question is whether conducting the sniff prolongs or adds time to the stop rather than whether the dog sniff occurs before or after the officer issues a ticket. *Id.* at 1616. Any deviation from the traffic stop’s original purpose inevitably lengthens the time needed to complete that purpose. *Linze*, 161 Idaho at 608-609, 389 P.3d at 153-54.

Here, the district court correctly determined that Officer Green “abandoned” the purpose of the stop by deviating from its purpose to facilitate the dog sniff. The state asks this Court to reverse, arguing that “handing the citation book to another officer so the second officer could complete filling out the ticket . . . was exactly the opposite of abandoning the purpose of the stop.” Appellant’s Brief, p. 6.

However, in addition to the time spent physically handing the citation to the second officer, the fact that Officer Green handed over the citation-writing task at all added time to the stop. *See Tr.*, p.58, ln. 10-17 (Officer Plaisted acknowledged it took him more time to complete the citation than it would have for Officer Green). The

district court also found that Officer Plaisted “ostensibly” wrote the citation while covering Officer Green and that he did not continually write the citation during that time. Tr. p. 70, ln. 22 - p. 71, ln. 6. This finding is supported by Officer Plaisted’s video recording. *See also Rodriguez*, 135 S. Ct. at 1616 (“on-scene investigation into other crimes” is a detour from traffic stop’s mission and “safety precautions taken in order to facilitate such detours” do not justify prolonging the stop).

The district court correctly found that Officer Green abandoned the purpose of the stop when he assigned Officer Plaisted with the citation writing. The district court also correctly found that Officer Plaisted did not continually write the citation while covering Officer Green. These deviations added time to the stop and thus violated the constitutional protections against unreasonable searches and seizures. The district court correctly suppressed all fruits of the dog sniff.

Moreover, Officer Green also deviated from the initial purpose of the stop when he removed Ms. Killeen from her vehicle so that he could inform her that he intended to use his drug dog and seek consent to search her vehicle. Officer Green claimed he removed Ms. Killeen for safety reasons related to retrieving his citation book but acknowledged that Officer Plaisted was already standing at the passenger window at that time. Tr. p. 15, ln. 1-5; p. 27, ln. 2-5. Requiring Ms. Killeen and Mr. McGraw to exit the vehicle facilitated the dog sniff and was unrelated to citing Ms. Killeen for failing to maintain her lane. *See also* Tr. p. 67, ln. 24 - p. 68, ln. 7.

Further, rather than begin writing a citation after Ms. Killeen exited the vehicle, Officer Green instead informed her that he planned to walk his drug dog around the vehicle. Exhibit 1, 6:25-6:33. Officer Green asked whether his dog would alert on any narcotics and asked for permission to search the vehicle. Exhibit 1, 6:37-7:16; Tr. p. 15, ln. 7-14. Officer Green did not retrieve his citation book until after Ms. Killeen denied consent to search.

Thus, Officer Green abandoned the purpose of the stop from the time he removed Ms. Killeen from the vehicle until he retrieved his citation book. While the district court did not make explicit findings regarding this evidence, the implicit finding supports its ruling, is consistent with its finding that the stop was pretextual, and is supported substantial evidence.

The state's primary complaint in this appeal appears to be that the delay was minimal. However, *Rodriguez* applies to all extensions of traffic stops including those that could reasonably be considered *de minimis*. *Linze*, 161 Idaho at 609, 389 P.3d at 153. Officers are free to target motorists based on vague hunches (as occurred here), based on racial profiling or based on whether the vehicle bears an Oregon or Washington license plate. Where any *de minimis* traffic violation provides an officer with an opportunity to use his drug detection dog, it seems only fair that law enforcement's *de minimis* detour from the justification for the stop requires exclusion of the evidence.

## V. CONCLUSION

Officer Green followed and stopped Ms. Killeen's vehicle in hopes of using his drug detection dog. Officers Green and Plaisted deviated from the stop's only justification — issuing a citation for failing to maintain lane — in order to facilitate the drug sniff on several occasions. The district court correctly concluded that the officers abandoned the stop's purpose within the meaning of *Rodriguez* and *Linze*. This Court should therefore affirm the district court's order granting the motion to suppress.

Respectfully submitted this 5th day of September, 2017.

FYFFE LAW

/s/ Robyn Fyffe  
ROBYN FYFFE  
Attorney for Lacey Killeen

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 5, 2017, I served a true and correct copy of the foregoing BRIEF OF RESPONDENT LACEY KILLEEN by emailing an electronic copy to:

ERIC D. FREDERICKSEN  
STATE APPELLATE PUBLIC DEFENDER  
ANDREA REYNOLDS, DEPUTY DEFENDER  
at the following email addresses: [briefs@sapd.state.id.us](mailto:briefs@sapd.state.id.us) & [areynolds@sapd.state.id.us](mailto:areynolds@sapd.state.id.us)

KENNETH K JORGENSEN  
DEPUTY ATTORNEY GENERAL  
CRIMINAL DIVISION  
at the following email address: [ecf@ag.idaho.gov](mailto:ecf@ag.idaho.gov)

    /s/ Robyn Fyffe      
ROBYN FYFFE