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State v. McComas Appellant's Brief Dckt. 48105

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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 48105-2020**
Plaintiff-Respondent,	)	
	)	**BONNEVILLE COUNTY**
	)	**NO. CR10-19-3112**
v.	)	
	)	
JOHN MORGAN MCCOMAS,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

HONORABLE DANE H. WATKINS JR.
District Judge

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STATEMENT OF THE CASE

Nature of the Case

John Morgan McComas appeals from the district court's order denying his motion to suppress drug evidence obtained after a police officer conducted a warrantless search of his vehicle. He argues that, contrary to the district court's conclusion, a police officer's sniff "alert" to the presence of marijuana was insufficient, based on the totality of the circumstances, to provide probable cause to search. Because probable cause was lacking, the warrantless search violated Mr. McComas' Fourth Amendment rights, and suppression should have been granted. Mr. McComas therefore respectfully asks this Court to reverse the denial of his motion to suppress, vacate his drug convictions, and remand his case to the district court.

Statement of the Facts and Course of Proceedings

In April of 2019, Mr. McComas was stopped by Post Falls Police Officer David Shanor for an unlawful turn. (Tr., p.28, Ls.23-24.) The officer walked up the vehicle and spoke to Mr. McComas for several minutes through the driver's window. (Tr., p.19, Ls.5-14.) Mr. McComas indicated he had several firearms with him in the vehicle, all legally possessed, and gave the officer permission to have them checked out. (Tr., p.28, Ls.5-10.) Officer Shanor returned to his patrol car to run the vehicle checks and call for a backup officer; he also requested a drug dog. (Tr., p.29, Ls.4-8.) No drug dog was readily available, but Officer Dustin Howell responded to the call for a backup. (Tr., p.20, Ls.8-17.) When Officer Howell arrived, he stuck his head in the vehicle's passenger door (where Mr. McComas's large dog, Tetra, was seated)

and said, "smells like weed." (Ex. At 11:32.)[1] Officer Howell later testified the smell was of "unburnt marijuana" and was "overwhelming" (Tr., p.8, Ls.20-22).

However, Officer Shanor smelled *no* marijuana odor whatsoever, despite the fact that he had spoken with Mr. McComas for several minutes through the open driver's window while the passenger's doors and windows were all closed, before, during, and after Officer Howell put his head in, and had also spoken with Mr. McComas through the passenger side of the vehicle. (Tr., p.17, L.10 – p.19, L.21; *see generally* Ex.)

The officers completed the firearms checks and wrote out the traffic citation, but the canine officer reported that his arrival with the drug dog was still another five to eight minutes out. (Tr., p.20, Ls.8-17.) Officer Shanor muted his bodycam microphone and had a discussion with Officer Howell. (Ex. at 17:51-24:00.) After unmuting his microphone, Officer Shanor walked back to Mr. McComas and told him the other officer had smelled marijuana in the car. (Ex. at 24:35-40.) Mr. McComas declined giving his consent to search, but Officer Shanor instructed him to leave the vehicle and conducted a search of the vehicle anyway. (Tr., p.20, Ls.22-25, p.31, Ls.17-18; Ex. at 24:35-40.)

As a result of the search, the police found marijuana "edibles" (a form of marijuana Officer Howell testified he is unable to smell) and various items of apparent drug paraphernalia, including a closed empty duffle bag identified as a "skunk bag" that suppresses the odor of items sealed inside. (Tr., p.12, L.1 – p.13, L.20, p.31, Ls.23-25.) Officer Shanor reportedly smelled a marijuana odor after he opened up the empty bag. (Tr., p.21, Ls.4-6.) Based on this evidence,

[1] Citations to "Ex." are to the video file, labeled "DavidShanor_201904132008_VXL1002210_14061125.mp4." This video file is the largest of the four (4) videos from Officer Shanor's body-worn camera, and reflects the earliest portions of the officer's encounter with Mr. McComas.

the State charged Mr. McComas with one count of possessing marijuana with intent to deliver or manufacture, and one count of possessing paraphernalia. (R., pp.10, 51-52.)

Mr. McComas moved to suppress the evidence asserting that Officer Shanor lacked probable cause to conduct a warrantless search of his vehicle, in violation of his Fourth Amendment rights. (R., pp.92-98.)[2] Mr. McComas acknowledged that a positive alert on a vehicle by a trained, reliable drug-detection *dog* is sufficient to give an officer probable cause to search. (R., p.97.) He also acknowledged that in *State v. Gonzalez*, 117 Idaho 518, 519 (Ct. App. 1990), the Idaho Court of Appeals upheld a finding of probable cause based on the smell of marijuana by a human officer, where the trial court had found was trained to recognize by smell the presence of raw marijuana. (R., p.97.) Mr. McComas argued, however, that under the totality of the circumstances of this case, particularly the fact that Officer Shanor did *not* smell any marijuana, Officer Howell's purported recognition of a marijuana odor was insufficient to provide Officer Shanor with probable cause to search. (R., p.98; Tr. p.21, L.22 – p.23, L.5.)

In a ruling from the bench, the district court found Officer Howell's testimony that he smelled marijuana while inside the vehicle to be credible. (Tr., p.35, Ls.10-23, p.37, Ls.21-23.) Then, drawing upon the reasoning of *State v. Anderson*, 154 Idaho 703 (2012) (a drug-dog alert case), the court ruled the fact that Officer Shanor did *not* smell marijuana failed to "negate" that probable cause. (Tr., p.36, Ls.10-20, p.37, Ls.19-23.) The district court found that Officer Howell's "alert," like the positive alert of a drug-detection dog, provided probable cause to

[2] According to the district court, Mr. McComas stipulated that the initial stop was lawful based on the unlawful turn. (Tr., p.32, Ls.6-8.) Mr. McComas does not challenge that finding on appeal.

search. (Tr., p.27, Ls.11-18.) Accordingly, the court concluded the search of Mr. McComas's vehicle was valid and denied the motion to suppress. (Tr., p.36, Ls.18-23.)

Thereafter, Mr. McComas entered conditional guilty pleas to the charges, expressly reserving his right to appeal the district court's denial of his motion to suppress. (R., p.147.) The court sentenced him to four years, with two years fixed, suspended, and granted an order of probation. (R., p.167.)

Mr. McComas filed a timely Notice of Appeal. (R., p.174.)

ISSUE

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

ARGUMENT

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

A. Introduction

Mr. McComas argues the warrantless search of his vehicle violated his Fourth Amendment rights because probable cause to search was lacking. First, the State failed to make the requisite threshold showing that Officer Howell's "alert" to marijuana odor was reliable, *i.e.*, that the officer's "sniff" was "up to snuff." Second, assuming arguendo that the State made the requisite threshold showing, Officer Shanor's failure to detect any marijuana odor undermined Officer Howell's positive "alert," and there are no significant additional circumstances that add up to probable cause. Accordingly, the district court erred when it concluded Officer Shanor had probable cause to search Mr. McComas's vehicle and the evidence should have been suppressed.

B. Standard Of Review

When an appellate court reviews a district court's order granting or denying a motion to suppress, the standard of review is bifurcated. *State v. Gonzales*, 165 Idaho 667, 772 (2019). The appellate court "will accept the trial court's findings of fact unless they are clearly erroneous," but "may freely review the trial court's application of constitutional principles in light of the facts found." *Id.* Relevant here, when reviewing a finding of probable cause, the appellate court defers to the trial court's findings of facts that are supported by substantial evidence, but reviews de novo whether those facts as found constitute probable cause. *State v. Martinez–Gonzalez*, 152 Idaho 775, 778 (Ct. App. 2012); *Moldowan v. City of Warren*, 578 F.3d 351, 396 (6th Cir. 2009).

C. The District Court Erred In Denying The Motion To Suppress Because Officer Shanor Conducted A Warrantless Search Of The Vehicle Without Probable Cause, In Violation Of The Fourth Amendment

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. CONST. amend IV. The Fourth Amendment is enforceable against the states through the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961); *State v. Johnson*, 110 Idaho 516, 524 (1986). Warrantless searches are *per se* unreasonable and are presumed to violate the Fourth Amendment. *Mincey v. Arizona*, 437 U.S. 385, 390 (1978). The State may overcome this presumption only if it demonstrates that one of the well-established and well-delineated exceptions to this requirement is applicable to the facts. *Id*. at 390-91.

One of those exceptions is the automobile exception, which allows officers to search the vehicle and containers therein if they have "probable cause" to believe contraband is inside. *United States v. Ross*, 456 U.S. 798, 823-24 (1982); *State v. Gallegos*, 120 Idaho 894, 898 (1991); *State v. Ramirez*, 121 Idaho 319, 323 (Ct. App. 1991). "Probable cause" is established if the facts available to the officer at the time of the search would warrant a person of reasonable caution in the belief that the area or items to be searched contained contraband or evidence of a crime. *Florida v. Harris*, 568 U.S. 237, 243 (2013); *State v. Yeoumans*, 144 Idaho 871, 873 (Ct. App. 2007). An officer's determination of probable cause must be based on objective facts which would be sufficient to convince a magistrate to issue a warrant under similar circumstances. *Yeoumans*, 144 at 873. The reviewing court does "not evaluate probable cause in hindsight, based on what a search does or does not turn up." *Harris*, 568 U.S. at 249.

A positive "alert" by a *reliable* drug-detection dog can provide probable cause to search a vehicle. *Harris*, 568 U.S. at 246-48; *Yeoumans*, 144 Idaho at 873. However, the United States

Supreme Court admonished in *Harris*, the "sniff" must be "up to snuff." 568 U.S. at 248. The Court explained:

> [A] probable-cause hearing focusing on a dog's alert should proceed much like any other. The court should allow the parties to make their best case, consistent with the usual rules of criminal procedure. And the court should then evaluate the proffered evidence to decide what all the circumstances demonstrate. *If the State has produced proof from controlled settings that a dog performs reliably in detecting drugs*, and the defendant has not contested that showing, *then* the court should find probable cause. If, in contrast, the defendant has challenged the State's case (by disputing the reliability of the dog overall or of a particular alert), then the court should weigh the competing evidence. . . . The question—similar to every inquiry into probable cause—is whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime. *A sniff is up to snuff when it meets that test.*

Harris, at 247-48 (emphasis added).

The *Harris* Court set forth a two-step analysis. First, the State is required to make a threshold showing and "produce proof" that the dog "performs reliably in detecting drugs." *Id*. "If" the State makes this initial requisite showing – and if the defense has not contested that showing – "then" the court may find probable cause. *Id*. However, if the State makes this initial requisite showing and the defense *has* presented evidence to dispute the reliability of the dog or the alert, then court engages in a second step and weighs the competing evidence to determine the if the alert is reliable. *Id*.

As explained below, the "alert" by a human officer, like that of a drug dog, also requires an indication of reliability based on training or proficiency in identifying the presence of drugs by smell or odor.

1. The State Failed To Make A Threshold Showing That Officer Howell's "Sniff" Was "Up To Snuff"; The State's Evidence Was Insufficient To Establish The Reliability Of The Officer's "Alert"

As set forth in *Harris*, to base a finding of probable cause on a drug dog's positive alert, the State must "produce proof" that the dog "performs reliably." *Harris*, at 248. Similarly, as recognized by the Idaho Court of Appeals, probable cause may be based on the "smell" of marijuana by a human officer "trained to recognize *by smell* the presence of raw marijuana." *Gonazalez*, 117 Idaho at 519 (emphasis added). In either case, a "smell" or "alert" provides probable cause only if there is proof of its reliability. As demonstrated below, the State failed to make this requisite threshold showing, and therefore the totality of the circumstances are insufficient to show probable cause.

In *Harris*, the U.S. Supreme Court considered whether the State presented sufficient evidence of the reliability of a drug dog's positive alert to provide probable cause to search. *Id*. at 247. The Court first found that the State had introduced "substantial evidence of [the dog's] training and proficiency *in finding* drugs," citing to evidence of the successful completion of "recent drug-detection courses" together with other training. *Id*. at 248. The Court held that this evidence "sufficed to establish [the dog's] reliability." *Id*. Then, the Court considered the evidence presented by the defendant, and concluded Harris had "failed to undermine that showing" of reliability. *Id*. at 250. The Court ultimately concluded that, "[1] [b]ecause training records established [the dog's] reliability *in detecting* drugs and [2] Harris failed to undermine that showing, we agree with the trial court that [the officer] had probable cause to search Harris's truck." *Id*. at 250 (emphasis added).

Relatedly, in *Gonzalez*, the Idaho Court of Appeals concluded there was probable cause based on the "smell" of marijuana by a human officer, where the district court had made the

"finding that the officer was trained to recognize *by smell* the presence of raw marijuana." 117 Idaho at 519 (emphasis added). In observing "the smell of marijuana alone *can* satisfy the probable cause," the *Gonzalez* Court cited *United States v. Bowman*, 489 F.2d 1229, 1230 (10th Cir. 1973), which holds that "a border patrol agent *who has learned how to identify* by sight or *by its odor* has probable cause to search." 117 Idaho at 519. (emphasis added.) The *Gonzalez* Court also cited to *State v. Capps*, 641 P.2d 484, 487 (N.M. Ct. App. 1982), which cites *Bowman* and other U.S. Tenth Circuit cases. 117 Idaho at 519.

Thus, just as the State must make a threshold showing that an alert by a dog is reliable based on training and proficiency, so too must the State make a threshold showing that a smell of marijuana by a human is reliable by evidence that such human is trained or has learned "to recognize *by smell*" and "identify … *by its odor*." *See Gonzalez*, 117 Idaho at 519.

In Mr. McComas's case – and although the district court compared Officer Howell's "alert" to that of a drug dog (*see* Tr., p.37, Ls.13-18) – there is no evidence that Officer Howell had training, experience, or proficiency in "detecting" or "finding" drugs *based on odor* (as required of dogs), or that the officer was trained "to recognize *by* smell" or to "identify" the presence of marijuana "*by* its odor" (as required of humans). *(See generally* Tr.) Rather, Officer Howell testified to the following training and experience:

- "I've been an officer for 11 years"
- "I've also experimented when I was in high school with marijuana."
- "I went to a NIK certified [class]. They brought out all sorts of different drugs. We were able to manipulate, smell, see."
- "I've taken several classes that we discussed the ins and outs of drugs."
- "I am also a drug recognition expert" and

- I "had made countless stops that I've seized marijuana," and had the opportunity to smell marijuana on those occasions, estimating that number of times to be "Hundreds."

(Tr., p.8, L.23 – p.9, L.19.)

While this testimony shows the officer took a class about "drugs," was a "drug recognition expert," and had seen, touched, and even smelled drugs, the evidence does not show Officer Howell had the requisite training or experience in recognizing or identifying solely "by smell" or "by odor" the presence of marijuana. (*See generally* Tr., p.8, L.23 – p.9, L.19.) There is no evidence that Officer Howell had *ever* detected or found marijuana *by* its odor, nor does this evidence show him capable of doing so.

By comparison, a man may have examined the appearance, aroma, and taste of French Cabernet wine hundreds of times, but that does not demonstrate the man is trained in, or capable of, distinguishing a Cabernet from a Bordeaux, or common table wine. Similarly, a woman may possess and wear countless diamonds, but that does not make her capable of distinguishing diamonds from cubic zirconia, crystals, or cut glass. In short, the mere fact that Officer Howell had previously encountered – and even smelled – marijuana does not establish the officer was able to identify it, reliably, by odor alone.

Moreover, there is no testimony or other evidence showing that "unburnt marijuana" had a distinctive or otherwise recognizable smell. (*See generally* Tr.) Thus, having failed to present proof of Officer Howell's proficiency or training in finding, or identifying marijuana "by smell," and therefore having failed to make the requisite threshold showing of reliability required by *Harris* and *Gonzalez*, Officer Howell's testimony that he smelled marijuana is inadequate to support a finding of probable cause. The district court erred in concluding otherwise. The warrantless search of Mr. McComas's vehicle was unlawful and suppression should have been granted.

2. Officer Shanor's Failure To Detect Any Marijuana Odor Undermined Officer Howell's "Positive Alert"; Absent Significant Additional Circumstances, Probable Cause Is Lacking

Assuming, arguendo, that the State's evidence of Officer Howell's training or experience was sufficient to make the requisite threshold showing of reliability under the first part of the *Harris* analysis, *see* 568 U.S. at 247, under the second step in the analysis, the district court erred in failing to conclude that the reliability of Officer Howell's reported smell, or "alert" to marijuana odor, was undermined by the fact that Officer Shanor detected no such odor.

The district court attempted to simply reconcile the discrepancies by stating the officers had "separate roles" and "different observations, different conclusions, and perhaps even a different basis." (Tr., p.36, Ls.10-17.) However, the court's attempted reconciliation of the two officers' reports does not render Officer Howell's the more reliable one. Neither of the officers had the "role" of detecting drugs, both of the officers were present at the same vehicle, and both officers had reached into the vehicle from its passenger side prior to the search. (*See* Ex. at 25:15-50.) However, the one officer who spent time at Mr. McComas's open windows before, during, and after Officer Howell reportedly smelled the "weed" was Officer Shanor, and Officer Shanor had detected *no* marijuana odor prior to his search of the vehicle. (Tr., p.17, Ls.7-13, p.21, Ls.1-6.)

In support of its decision finding probable cause, the district court analogized the canine-sniff case of *State v. Anderson*, 154 Idaho 703 (2012), and stated a positive alert, or smell of marijuana, is not negated by the other officer's failure to alert, or smell it. (Tr., p.37, Ls.13-18.) In *Anderson*, the Idaho Supreme Court held that "a failed alert is not per se dispositive of probable cause, but rather merely one factor to be considered in the totality of the circumstances analysis." *Id*. at 707. "More specifically … a subsequent failed alert does not *necessarily* negate a prior positive alert. In other words, the positive-alert-negative-alert issue is not a zero-sum

equation." *Id*. (emphasis added.) "Nor does the subsequent failure to alert indicate a positive indication that no drugs existed." *Id.* at 708.

However, and while a failed alert does not necessarily negate a positive alert, the Court's discussion in *Anderson* makes clear that a positive alert may well be "undercut" by a subsequent failed sniff. *Id*. Thus, the circumstance of a failed alert may reduce a positive alert to a circumstance that is merely "color" for the officer's perception of the other surrounding circumstances. *Id*. In *Anderson*, the Court ultimately upheld the finding of probable cause because there were "significant additional circumstances" that added to the officer's suspicion, and which "when coupled with" the dog's initial alert, ultimately amounted to probable cause. *Id*.

Under a correct application of A*nderson*'s reasoning to the undisputed facts of Mr. McComas's case, Officer Shanor's failure to detect any marijuana odor should be weighed as a circumstance that, while not necessarily negating Officer Howell's report of a marijuana odor, "somewhat undercuts" its reliability. 154 Idaho at 708. In Mr. McComas's case, moreover – and unlike in *Anderson* – the district court found no significant additional circumstances adding to the officer's suspicion.[3] (*See generally* Tr., p.27, L.1 – p.36, L.20.) Without such

[3] The prosecutor asserted as fact that Mr. McComas was seen leaving "a known drug house." (*See* Tr., p.24, Ls.18-24, p.25, Ls.4-5.) However, the district court made no finding that the house Mr. McComas was leaving was a "known drug house." (*See generally* Tr., p.27, L.1 – p.36, L.20.) Nor is there substantial evidence in the record that would support such a finding. In the video, Officer Shanor *told* Mr. McComas, "this house, they sell marijuana" (Ex.at 03:50-54) prior to requesting his consent to search, and at the suppression hearing Officer Howell referred to the house as "known drug house." (Tr., p.15, Ls.15-23.) However, on cross-examination, the sole fact identified by Officer Howell was that there had been a search warrant executed at the house, weeks earlier, and that warrant "was based on an individual going into the house and trying to rob the individuals there." (Tr., p.15, Ls.15-23.) However, there is no testimony tying the warrant or its execution to the known sales of drugs. (*See generally* Tr.) In any event, the district court made no finding that it was a "known drug house." (*See generally* Tr., p.27, L.1 – p.36, L.20.)

additional circumstances, Officer Howell's "alert," was undermined by Officer Shanor's "failed alert," and was insufficient to provide Officer Shanor with probable cause to search Mr. McComas's vehicle. *See id*. The district court erred in concluding otherwise, and the court should have ordered the evidence suppressed.

D. The Exclusionary Rule Required Suppression

Pursuant to the exclusionary rule, the district court should have suppressed all of the evidence obtained as a result of the unlawful search as the fruit of the poisonous tree. *See Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (holding that evidence obtained directly or indirectly through unconstitutional police conduct is subject to exclusion); *State v. Guzman*, 122 Idaho 981, 988-98 (1992) (same); *State v. Bishop*, 146 Idaho 804, 810–11 (2009) (same). The State did not argue that any exceptions to the exclusionary rule applied in the district court, and therefore is precluded from raising such an argument on appeal. *State v. Hoskins*, 165 Idaho 217, 226 (2019). The district court should have granted Mr. McComas' suppression motion.

CONCLUSION

Mr. McComas respectfully asks this Court to reverse the denial of his motion to suppress, vacate his convictions, and remand his case to the district court for further proceedings consistent with his plea agreement.

DATED this 5th day of May, 2021.

/s/ Kimberly A. Coster
KIMBERLY A. COSTER
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of May, 2021, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF to be served as follows:

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/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

KAC/eas