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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	No. 45317
Plaintiff-Appellant,	)	
	)	Kootenai County Case No.
v.	)	CR-2016-18157
	)	
CORA LEE BURGESS,	)	
	)	
Defendant-Respondent.	)	
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

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ARGUMENT

The District Court Erred When It Concluded That Probation Status Is Beyond The Scope Of A Routine Records Check Conducted Pursuant To A Traffic Stop

A. Introduction

The district court concluded that checking probation status is not "a permissible task tied to the traffic infraction." (R., p. 101.) The opinions the district court relied on do not support its holding. (Appellant's brief, pp. 6-7.) Other courts that have considered this question have universally held the opposite. (Appellant's brief, pp. 5-6.)

Burgess argues the district court was correct for three reasons. First, she argues that no background check on a passenger (as opposed to a "driver or owner of the vehicle, or the apparent traffic violator") is allowed. (Respondent's brief, p. 10.) Second, she argues that ascertaining Craig's probation status was not "justified as an officer safety measure." (Respondent's brief, pp. 11-12.) Finally, she argues that other courts holding that probation status was part of an allowable routine background check did not actually hold that probation status was part of an allowable routine background check. (Respondent's brief, pp. 13-14.[1]) Burgess' arguments do not withstand analysis. On the contrary, application of relevant legal authority shows the district court erred when it concluded that checking Craig's probation status was beyond the scope of an allowable traffic stop of Burgess.

[1] Burgess did not respond to the state's argument that the authority relied on by the district court does not support its holding. (See generally Respondent's brief.)

B. The Fourth Amendment Is Not Offended By Routine Background Checks Of Passengers

An officer is allowed to ascertain the identity of a passenger in a traffic stop. State v. Roe, 140 Idaho 176, 181–82, 90 P.3d 926, 931–32 (Ct. App. 2004); State v. Butcher, 137 Idaho 125, 44 P.3d 1180 (Ct. App. 2002). Once that identification is ascertained, a routine background check of the passenger is allowed. United States v. Soriano-Jarquin, 492 F.3d 495, 500 (4th Cir. 2007) ("a request for identification and a subsequent check of the occupants' criminal history constitute steps reasonably necessary to protect officers' personal safety" (internal quotes and brackets omitted)); United States v. Pack, 612 F.3d 341, 351 (5th Cir. 2010), opinion modified on denial of reh'g, 622 F.3d 383 (5th Cir. 2010) (check on "vehicle and its occupants" is "within the legitimate scope of the stop"); United States v. Sanford, 806 F.3d 954, 956 (7th Cir. 2015) (checking "the occupants' criminal histories on the computer in his car" in a traffic stop is a "procedure permissible even without reasonable suspicion"); United States v. Diaz-Castaneda, 494 F.3d 1146, 1152-53 (9th Cir. 2007) (no Fourth Amendment violation in "requesting [the passenger's] identification and checking [his] driver's license or Oregon ID card with radio dispatch"); United States v. Rice, 483 F.3d 1079, 1084 (10th Cir. 2007) ("an officer may ask for identification from passengers and run background checks on them as well"). Application of these relevant legal standards shows that ascertaining the passenger, Craig's, identity and running a background check on him during the course of the traffic stop did not violate the Fourth Amendment.

Burgess cites no cases to the contrary. Rather, her whole argument is premised on the fact that the Supreme Court of the United States in Rodriguez v. United States, 135

S.Ct. 1609, 1615 (2015), couched its language in terms of checking the driver's identity. (Respondent's brief, p. 10.[2]) In Rodriguez, however, there was a passenger and a records check on that passenger, conducted after the records check on Rodriguez but before issuing Rodriguez a warning in lieu of a citation. Id. at 1613. The Court held that Rodriguez was unreasonably detained "after completion of a traffic stop." Id. at 1612. Nothing in the holding or analysis of the Court suggests the traffic stop was unconstitutionally extended prior to issuance of the warning by conducting a records check on the passenger.

Furthermore, the Court also stated: "In [Pennsylvania v. Mimms, 434 U.S. 106, 110-11 (1977)], we reasoned that the government's 'legitimate and weighty' interest in officer safety outweighs the '*de minimis'* additional intrusion of requiring a driver, already lawfully stopped, to exit the vehicle." Id. at 1615. The Court's use of the word "driver" here was certainly not intended to overturn Maryland v. Wilson, 519 U.S. 408, 410 (1997), which extended the Mimms rule to passengers.

Burgess' argument that Rodriguez stands for the proposition that permissible background checks are limited to the driver is without merit.

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[2] The quote in question: "Typically such inquiries involve 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 v. United States, 135 S.Ct. 1609, 1615 (2015). Use of the word "typically" indicates the language is inclusive, rather than exclusive.

C. Checking Probation Status Is A Legitimate Part Of A Routine Background Check

As noted in the state's initial brief, courts that have directly addressed the question of whether a check of probation or parole status is within the scope of a *Terry* or traffic stop have held that it is. (Appellant's brief, pp. 5-6.[3]) Burgess cites no cases to the contrary. (Respondent's brief, pp. 11-12.)

Burgess again relies on Rodriguez, and a case cited therein, United States v. Holt, 264 F.3d 1215, 1221-22 (10th Cir. 2001). (Appellant's brief, pp. 5-6.) The entirety of the quote (citations and internal quotations omitted) is as follows:

> Unlike a general interest in criminal enforcement, however, the government's officer safety interest stems from the mission of the stop itself. Traffic stops are especially fraught with danger to police officers, so an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely. On-scene investigation into other crimes, however, detours from that mission. So too do safety precautions taken in order to facilitate such detours. Thus, even assuming that the imposition here was no more intrusive than the exit order in *Mimms,* the dog sniff could not be justified on the same basis. Highway and officer safety are interests different in kind from the Government's endeavor to detect crime in general or drug trafficking in particular.

Rodriguez, 135 S.Ct. at 1616. In Holt the court, applying the general principle that running a "criminal history check" in the course of a traffic stop is justified, "in part," by "officer safety," held that an officer may ask about "the presence of loaded weapons." 264 F.3d at 1221-26. Notably absent from these analyses is any discussion of whether checking on probation status is a separate criminal investigation or, rather, a "negligibly burdensome precaution[] in order to complete his mission safely." As set forth by the

[3] The state will address Burgess' attempt to distinguish these cases below.

state before, a check on probation or parole status is a safety precaution akin to a check on warrants or criminal history. (Appellant's brief, pp. 5-8.)

Burgess also argues that the officers' subjective reasons for running the background check negates a finding that checking probation status as part of a background check promotes officer safety. (Appellant's brief, p. 12.) Even assuming one or more of the officers hoped that the probation check would result in the ability to search Craig or the car, such a hope is not exclusive of a background check promoting officer safety. Certainly an officer's hope that a background check reveals an arrest warrant that might also result in such a search would not render such a check for warrants improper. To the contrary, the "actual motivations of the individual officers involved" are irrelevant to the determination of the reasonableness of the traffic stop. State v. Schwarz, 133 Idaho 463, 467, 988 P.2d 689, 693 (1999) (internal citation and quotation omitted).

Burgess' argument that including probation or parole status in a standard background check is inconsistent with Fourth Amendment standards is not supported by precedent. Her claim that the officers' subjective intent is relevant to this analysis is contrary to applicable authority. Application of relevant standards shows that, like checks on criminal backgrounds and for outstanding warrants, a check on probation or parole status is within the scope of the routine checks allowed in traffic stops such as this one.

D. Persuasive Authority Supports The Conclusion That Probation And Parole Status Are Within The Scope Of Reasonable Background Checks Pursuant To A Traffic Stop

Courts that have directly considered whether questions about probation or parole are within the scope of a routine records check that is permissible during a traffic or *Terry*

stop have concluded they are. United States v. Hendrix, 143 F.Supp.3d 724 (M.D. Tenn. 2015); United States v. Rodriguez, 100 F.Supp.3d 905, 924 (C.D. Cal. 2015); United States v. Singleton, 608 F.Supp.2d 397, 404 (W.D.N.Y. 2009); Miller v. State, 922 A.2d 1158, 1163 (Del. 2007). (Cited Appellant's brief, pp. 5-6.) Burgess' attempts to distinguish these cases are unpersuasive.

Burgess first argues that the court in Hendrix "explicitly found that the officer's actions before receiving a valid consent to search did *not* 'add time' to the stop." (Respondent's brief, p. 13 (emphasis original).) The court's factual findings, however, were that the officer learned in the course of his background check that the driver (not Hendrix) had recently been charged with drug crimes, which led the officer to suspect the driver was on probation. Id. at 728. He got the driver out of the vehicle and told him he would be issuing him a "warning ticket." Id. After that the officer questioned the driver whether he was on probation (he was), asked for consent to search his person, questioned the driver about his plans, and only thereafter asked for consent to search the car. Id. at 729. The only way that questioning the driver about his probation status did not "add time" to the stop is in the legal sense.

Burgess next tries to distinguish Rodriguez, 100 F.Supp.3d 905, by pointing out the opinion was issued six days before Rodriguez, 135 S.Ct. 1609. (Respondent's brief, p. 13.) This argument is irrelevant. If the Supreme Court of the United States had held that probation and parole status is not within the scope of a routine records check allowable during a traffic stop, the *timing* of the issuance of the opinion vis-à-vis lower court decisions would not matter. However, as set forth above, the Supreme Court of the United States did not hold, state, or even suggest that inquiries about probation or parole

status are outside the scope of a reasonable traffic stop. Burgess has provided no basis for distinguishing Rodriguez' holding that questioning related to probation or parole status is "related to officer safety and sought information that would be revealed by a routine records check," which "militate[s] against a finding of unreasonableness." 100 F.Supp.3d at 924. Nor does Burgess mention the seven cases the Rodriguez court cited as supporting the position. Id.

Finally, Burgess attempts to distinguish Singleton and Miller on the basis that "[i]n neither case was there a finding that the questioning measurably prolonged the detention." (Respondent's brief, p. 14.) However, such a finding is not a prerequisite to a holding that inquiry into probation or parole status is allowed during the course of a *Terry* stop. In Miller the court held that it was "permissible" for the officer "to ask Miller if he was on probation, while Miller was lawfully detained initially to enforce the loitering statute." 922 A.2d at 1163. In Singleton the court held that the officer was "justified in asking defendant some basic questions about whether [he] was carrying any weapons, or whether he was then on probation or parole." 608 F.Supp.2d at 404. Both of these holdings, that such questioning is "permissible" and "justified," are that the inquiry into probation or parole status is a legitimate part of an investigative detention.

Although none of these opinions are controlling, and this Court's responsibility is not to merely count the number of courts ruling one way versus another, it is significant that several decisions support the state's argument while Burgess has been unable to cite any supporting the district court's conclusion, not even the opinions cited by the district court itself. The reasoning of these courts, in the overall context that routine background checks are permissible in traffic stops, shows the district court erred in concluding that

inquiries into probation status are beyond the scope of permissible inquiries in the context of a traffic stop.

CONCLUSION

The state requests this Court to reverse the district court's order suppressing evidence and remand for further proceedings.

DATED this 2nd day of March, 2018.

/s/ Kenneth K. Jorgensen________________
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 2nd day of March, 2018, served a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT by emailing an electronic copy to:

KIMBERLY A. COSTER
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Kenneth K. Jorgensen________________
KENNETH K. JORGENSEN
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KKJ/dd