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State v. Albertson Appellant's Reply Brief Dckt. 45607

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

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NO. 45607**
	)	
v.	)	**MINIDOKA COUNTY**
	)	**NO. CR 2016-2231**
DARRYL JOE ALBERTSON,	)	
	)	**REPLY BRIEF**
Defendant-Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

HONORABLE JONATHAN BRODY
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Darryl "Joe" Albertson contends the district court erroneously concluded the No Trespassing sign posted on a pole at the entrance to his property did not revoke the implied license to enter his property. There are two relevant questions in the analysis – what the law requires, and how the law applies to the facts of this case. The State offers little in the way of analysis in regard to the first question, and its arguments on the second are inconsistent with the testimony and factual findings below and contrary to the applicable precedent. As such, this Court should reject those arguments and reverse the district court's erroneous order denying the motion to suppress.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Albertson's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUE

Whether the district court erred by denying Mr. Albertson's motion to suppress the evidence found as a result of the officer's observations while he was trespassing on Mr. Albertson's property.

ARGUMENT

The District Court Erred By Denying Mr. Albertson's Motion To Suppress The Evidence Found As A Result Of The Officer's Observations While He Was Trespassing On Mr. Albertson's Property

A. The Law Requires A Property Owner To Give Notice In Order To Revoke The Implied License To Enter His Property, And A No Trespassing Sign, By Itself, Is Sufficient To Do That

The critical question the law asks in regard to the whether the implied license is revoked turns on notice. *See Breard v. City of Alexandria*, 341 U.S. 622, 626 (1951), *abrogated on other grounds.* The State's responses fail to appreciate this fundamental point, and, as a result, its responses on the legal question are meritless. For example, the State's argument – that the Idaho Supreme Court's decision in *State v. Christensen*, 131 Idaho 143 (1998), is all about the gate, rather than the No Trespassing sign (Resp. Br., pp.12-13) – ignores the underlying concept of notice.

While a fence or a closed gate are, indeed, ways in which such notice may be given, the *Christensen* Court was clear that they are not the *only* ways to give notice: "While the presence of a fence is a factor to consider in determining whether an area is open to the public, it is not dispositive. . . . The no trespassing sign was clearly posted on a gate across the only public access to the property. In light of this unambiguous message, it is unclear what the presence of a fence would add." *Christensen*, 131 Idaho at 147; *see also* I.C. § 18-7008(2)(a)(iv) (specifically addressing trespass on unfenced land when notice of privacy is posted). The considerations *Christensen* identified apply just as directly to gates as to fences themselves – if a sign or a fence would convey the requisite notice, the presence of a gate would add nothing to the analysis. *See id.*; *compare State v. Howard*, 155 Idaho 666, 672 (Ct. App. 2013) (suggesting a no trespassing sign on a fence would make the land behind private even though there was no gate on the road

giving access to the property). Thus, under *Christensen*, either the sign or the gate or the fence may be sufficient to convey notice that the property is closed to others, including officers. *Id*.

Moreover, the State's focus on the presence of a gate in order to claim privacy sounds suspiciously like requiring the modern equivalent of a portcullis in order to keep property private, which is not what the law requires. *Id*. ("Idaho citizens, especially those in rural areas, should not have to convert the areas around their homes into the modern equivalent of a medieval fortress in order to prevent uninvited entry by the public, including police officers."). However, if the analysis is properly focused on whether a reasonable person would be on notice, the analysis becomes more apparent – the presence of a sign, a fence, or a gate are all factors which can be considered in determining whether notice was given, and just because a person chooses to use one as opposed to the others does not mean he has failed to give the requisite notice.

Additionally, the State misreads I.C. § 18-7008, as it focuses on the amount of barriers rather than the question of notice. The State contends that the statute requires a person to post multiple signs at the access point in order to keep the property private. (Resp. Br., p.12.) However, properly read, that statute, like *Christensen*, is all about notice. *See* I.C. § 18-7008(2)(a)(iii)-(iv) (requiring the signs or paint "is posted in a manner that a reasonable person would be put on notice that it is private land"). The reason it uses the plural "signs" is because it requires that some sort of notice be given at every access point to the property, where "navigable streams, roads, gates, and rights-of-way enter[] the private land," and there may be several such access points on a given piece of property. *Id*. However, under that statute, a single sign at each such entry point would be sufficient to convey notice to a person as he is entering that property that his presence is not welcome. *Compare Christensen*, 131 Idaho at 147 (noting that the sign

on the gate at the only access point provided the necessary notice). Using *Christensen*'s imagery, there may, in fact, be aesthetic or economic reasons a person chooses not to bedeck his property with myriad No Trespassing signs, but that does not mean he still has not sufficiently given notice that the public is unwelcome on his property.

The State's position in regard to the circuit split, should *Christensen* be deemed ambiguous, also ignores the underlying concept of notice. In fact, the State does not even believe there is a split. (Resp. Br., p.14 (asserting the split is "for the most part, illusory").) The State is mistaken, as the courts have clearly divided into two primary groups, each of which applies a different rule to this sort of scenario – one holding a No Trespassing sign, by itself, is sufficient to give notice that the implied license has been revoked, and the other holding that there needs to be a sign and some additional barrier to protect one's privacy.[1] *See, e.g., United States v. Carloss*, 818 F.3d 988, 1003-15 (10th Cir. 2016) (Gorsuch, J., dissenting); *State v. Christensen*, 517 S.W.3d 60, 72-73 (2017). The critical point, however, is not whether there is a split, but rather, what rule Idaho should adopt if *Christensen* is does not answer the question of whether a sign alone is sufficient to give the requisite notice. As Mr. Albertson explained in his Appellant's Brief, the first of those two rules is the better one, as, for the reasons explained in detail in now-Justice Gorsuch's dissent in *Carloss*, it more appropriately focuses on the actual underlying constitutional consideration of notice. (App. Br., pp.11-17.)

The State does not offer any counterargument to Mr. Albertson's analysis on the critical point. (*See generally* Resp. Br.) Rather, it takes issue with how he presented the split for this Court's consideration. For example, it criticizes his reference to authorities as "collecting cases"

[1] When their opinions are properly understood, the courts are actually split fairly evenly between the two camps. (App. Br., pp.12-13.)

rather than providing an extensive, unwieldy string cite listing each case which has addressed this issue. (Resp. Br., p.15.) The State's criticism in this regard is not well-taken, as the Idaho Supreme Courts has done precisely the same thing when it identified such a split of authority. *Grazer v. Jones*, 154 Idaho 58, 66 (2013) ("We recognize that there is a split in authority on this issue: some states apply their respective statutes of limitations . . . , while other states take the opposite view. *See Potomac Leasing Co., v. Dasco Tech. Corp.*, 10 P.3d 972, 974 (Utah 2000) (collecting cases)."). Moreover, Mr. Albertson actually discussed several of the ways other courts, including Idaho's courts, have tried to address this issue to show why the rule he advocates for is the better rule. (App. Br., pp.11-16.) The fact that he did not go on *ad nauseam* to address every decision ever issued in this area of the law does not undermine his analysis on that point.

The State also contends that not every case in the collected lists will directly support Mr. Albertson's argument. (Resp. Br., p.15.) First, that point actually belies the State's asserted belief that this is an illusory split – that different courts are using different analyses to reach different results is the definition of a split of authority. Regardless, the fact that different courts used different analyses even within one side of the overarching split does not disprove the merits of the argument Mr. Albertson has actually made – that this Court should, if *Christensen* is ambiguous, adopt the rule articulated in now-Justice Gorsuch's dissent in *Carloss* because it is the best of the rules involved in the split.

The fact that the State has resorted to these sort of stylistic critiques, rather than actually engaging on the merits of the argument, speaks volumes. By failing to offer any argument on the actual merits of the issue, it has effectively conceded the critical part of this issue. *See State v. Zichko*, 129 Idaho 259, 263 (1996) ("A party waives an issue cited on appeal if either authority

or argument is lacking . . ."). Therefore, applying the proper understanding of the relevant law – that a No Trespassing sign alone may be sufficient to provide the notice required to revoke the implied license – the next question for this Court to consider is how that law applies to the facts of Mr. Albertson's case.

B. The Officer Testified That The Sign Could Be Seen As A Person Drove Past The Entrance To Mr. Albertson's Property, And, Old And Faded Though It May Be, It Is Still Sufficiently Legible To Give Notice And Revoke The Implied License

Whether the sign in this case was posted sufficiently to give notice that the implied license has been revoked turns on how a "reasonably respectful citizen" would see that sign. *Christensen*, 131 Idaho at 147. To that point, the officer expressly testified that, "a week later I did see it [the sign] when I drove down the side of the road." (Tr., p.53, Ls.15-17.) He explained the sign would be particularly apparent to a person headed southbound. (Tr., p.24, Ls.1-7; *see* Defense Exhibit A.) Thus, according to the officer's own testimony, the sign itself was visible to a reasonably respectful citizen on the road going past Mr. Albertson's property.

The State takes exception Mr. Albertson's assertion that the sign was visible because that assertion was based on the district court's "assumption" that the sign was actually posted on the day in question. (Resp. Br., p.10.) The State's argument – that such an assumption is not due deference by this Court – is frivolous because, as the Idaho Supreme Court has long since explained, "[t]hough the evidence is equivocal and somewhat in dispute, that finding of fact is one *reasonable inference* which may be drawn from the record, and thus it will not be disturbed by this Court on appeal." *State v. Post*, 98 Idaho 834, 837 (1978), *overruled on other grounds* (emphasis added); *accord State v. Lutton*, 161 Idaho 556, 562 (Ct. App. 2017). In other words, when the district court infers or assumes a fact based on the evidence in the record, that *is* a finding of fact which is entitled to deference. *Id*. Here, the district court's assumption that the

sign was posted on the day in question was based on Mr. Albertson's testimony that the sign has been posted there for some years and the officer's testimony that it was also there a week later. (*See* Tr., p.53, Ls.15-16, p.55, Ls.13-16.) Thus, it was reasonable for the district court to draw that particular inference, to assume that the sign was, in fact, displayed as shown in the pictures on the day in question. That factual finding is, therefore, entitled to deference.

Furthermore, the State's argument confuses the concept that *the sign itself* was visible with the concept of whether *the words* on the sign were legible. (*See* Resp. Br., p.10.) The two concepts are not synonymous. The term "visible" means "'capable of being seen,' 'perceptible by vision,' 'easily seen.'" *State v. Tregeagle*, 161 Idaho 763, 767 (Ct. App. 2017) (quoting WEBSTER'S THIRD NEW INT'L DICT. 2557 (3d ed. 1993)). The term "legible," on the other hand, means "'capable of being deciphered'" and "'distinct to the eye.'" *State v. Kinch*, 159 Idaho 96, 100-01 (Ct. App. 2015) (quoting, *inter alia*, WEBSTER'S THIRD NEW INT'L DICT. 1291).

Thus, in *Tregeagle*, a license plate which was mounted behind a trailer hitch was not "visible" because the trailer hitch prevented a person from actually seeing the license plate itself, regardless of whether the numbers on the license plate were themselves capable of being deciphered. *See Tregeagle*, 161 Idaho at 767. In *Kinch*, on the other hand, even though the officer could actually see that there was a temporary permit taped in the back window of the car (*i.e.*, the permit was "visible"), he could not read the information on that permit, and so, the permit was not legible as the statute required. *Kinch*, 159 Idaho at 97, 100-01. The *Kinch* Court specifically contrasted situation with another, which required applications for specialty license

plates needed to be "display[ed]," as opposed to be "readily legible, readable, or even viewable."[2] *Id* at 100.

In this case the sign on the pole at the entrance to Mr. Albertson's property, like the permit in *Kinch*, was "visible" because the sign itself was capable of being seen by a person on the road going past Mr. Albertson's property. (Tr., p.24, Ls.1-7, p.53, Ls.15-17; *see* Defense Exhibit A.) That description remains true whether or not the words on that sign were legible from a distance. To that point, Mr. Albertson has never contended that the sign was not old and faded, nor has he contended that the sign can be read from a distance. (*See, e.g.*, App. Br., pp.1, 9 (directing this Court to the exhibits showing the condition of the sign).) He only argued that the placement of the sign itself, at the main entrance to the property, was more prominent than the placement of the sign in *Howard*, which the Court specifically noted was not at the point where the road entered the property, but rather, was off to one side. (App. Br., p.9 (referencing *Howard*, 155 Idaho at 672).)

This distinction is important because a reasonably respectful citizen would see the sign itself as they started to enter Mr. Albertson's property.[3] (*See* Defense Exhibit A.) A reasonably respectful citizen would also be aware that property owners will put up signs to indicate a desire

[2] The *Kinch* Court indicated that the language "readily legible" in the statute at issue in that case (I.C. § 49-432(4)) seemed to require that the information on the temporary permit had to be legible (meaning both visible and readable) from a distance, but it ultimately did not answer the distance question. *Kinch*, 159 Idaho at 100-01. The Idaho Supreme Court has just recently granted review after the Court of Appeals affirmed that *Kinch*'s indication was accurate. *See State v. Cook*, 2018 WL 3653064 (Ct. App. 2018), *rev. granted*. Ultimately, though, the continuing validity of *Kinch* in that respect is of no issue to this case because there is no corresponding requirement that the notice be *readily* legible from a particular distance; the question here is simply whether it was sufficient to give notice to a reasonably-respectful citizen. *See Christensen*, 131 Idaho at 147; I.C. § 18-7008(2)(a)(iii)-(iv).

[3] It also appears that there is a plastic sleeve attached to the front of the pole protecting a wire which comes down that side of the pole, and that plastic sleeve may prevent a more forward-facing placement of the sign. (*See* Defense Exhibits A and B.)

to restrict unwanted visitors and announce their expectations of privacy. *E.g., State v. Hiebert*, 156 Idaho 637, 642 (Ct. App. 2014) (recognizing that "[p]osting 'no trespassing' signs may indicate a desire to restrict unwanted visitors and announce one expectations of privacy."). As such, a reasonably respectful citizen, especially one in rural Paul, Idaho,[4] would check to see if this was one such sign before entering the property, rather than, as the State seems to suggest, disregard its presence entirely. And since this particular sign is old and faded, and so, is not legible from a distance, a reasonably respectful citizen who sees the sign would get closer to it in order to be able to read it. Therefore, the State's point about the sign not being legible from across the road actually has little relevance to the proper analysis in this case.

On the other hand, the State's concession that the sign was, in fact, legible at a closer distance is, of paramount relevance. (*See* Resp. Br., p.8 (admitting that "only some of the words are legible"); *see* Defense Exhibit B (depicting the words on the sign from closer distance).) Given the fact that the sign can be read as a person approaches it, a reasonably respectful citizen would, in fact, be put on notice that this was "Private Property" and that there was to be "No Trespass" thereon. (*See* Defense Exhibit B.) As a result, while this notice certainly could have been posted *more* clearly or *more* conspicuously, it was still posted *sufficiently* to give a reasonably respectful citizen the requisite notice that the implied license to enter this property had been revoked. After all, the Fourth Amendment is not premised on what is best; it is premised on what is reasonable. *See Christensen*, 131 Idaho at 147 (noting that a person could

[4] As always, the analysis of whether consent has been revoked is based on the totality of the circumstances. *State v. Wulff*, 157 Idaho 416, 423 (2014). The fact that this occurred in a rural area is a relevant factor to consider. *See Christensen*, 131 Idaho at 147 ("In short, Idaho citizens, *especially those in rural areas*, should not have to convert the areas around their homes into the modern equivalent of a modern fortress in order to prevent uninvited entry by the public, including police officers") (emphasis added).

erect extensive fencing to better keep people off their land, but such is beyond what is sufficient to maintain one's privacy).

Since the totality of the circumstances shows that a reasonably respectful citizen would see the sign and the sign gave sufficient notice, the officer, who admitted he did not have permission to enter from Mr. Albertson when he entered onto Mr. Albertson's property, was not lawfully on the property. As a result, any evidence which he discovered as a result of that unlawful entry should have been suppressed.

CONCLUSION

Mr. Albertson respectfully requests this Court reverse the order denying his motion to suppress and remand this case for further proceedings, if any are necessary.

DATED this 23rd day of October, 2018.

/s/ Brian R. Dickson
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of October, 2018, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, to be served as follows:

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BRD/eas