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State v. Farrell Appellant's Reply Brief Dckt. 46095

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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. 46095**
	)	
v.	)	**NEZ PERCE CO. NO. CR-2017-2016**
	)	
JACOB FARRELL,	)	**REPLY BRIEF**
	)	
Defendant-Appellant.	)	
_____	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

HONORABLE JAY P. GASKILL
District Judge

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STATEMENT OF THE CASE

Nature of the Case

In his appellant's brief, Mr. Farrell argued the district court erred when it denied his motion to suppress because the window tinting in the car was original equipment that fell under the statutory exception, but Officer Reese ignored his statements to that effect and failed to investigate whether the exception applied. In response, the State argues Officer Reese's investigation was reasonable, and thus suggests it is reasonable for law enforcement to ignore the exception in the statute. Moreover, the investigation was clearly not reasonable as the window tinting did fall under the exception.

Additionally, instead of responding to Mr. Farrell's argument that an investigation conducted in this way renders the statutory exception meaningless, the State attempts to reframe the issue. It claims Mr. Farrell's request for the Court to second-guess the investigative method employed by Officer Reese is contrary to law. This is a red herring. The Court would not have to second-guess Officer Reese's "investigative method" because the statute required him to investigate whether the exception applied, and—even though Mr. Farrell repeatedly told him it did apply—the video shows Officer Reese failed to even try to investigate that. Instead, he issued an unwarranted citation, which unlawfully prolonged the stop. Further, Officer Reese's tint meter could not show whether the rear window fell under the exception. It could only show the degree of tinting, and the statute makes it clear that factory window tinting is not illegal. Thus, it was incumbent upon Officer Reese to determine whether the tint was original equipment or the result of an aftermarket product such as a tinting film. The marking showed the rear window had a tint of 20%. The dealer documentation showed the rear window was original equipment. Therefore, the district court erred when it denied Mr. Farrell's 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. Farrell's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference.

ISSUE

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

ARGUMENT

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

In his appellant's brief, Mr. Farrell argued that the district court erred when it denied his motion to suppress because Officer Reese acted unreasonably and unlawfully prolonged the traffic stop when he failed to investigate whether the window tinting fell under the statutory exception in I.C. § 49-944(5) and issued an unwarranted citation. (App. Br., pp.8-11.) In response, the State claims it was reasonable for Officer Reese to pursue his investigation with his tint meter. (Resp. Br., pp.6-7.) However, whether a window falls under the exception in I.C. § 49-944(5) cannot be determined with a tint meter. As such, in order to conduct a reasonable and complete investigation of whether a violation of the statute had occurred and a citation was warranted, Officer Reese had to look at the window and determine from the marking[1] whether it was original equipment, or whether some type of film had been applied to the window to cause the reading on his tint meter. He did not do that. Instead, he continued to ignore Mr. Farrell's statements, not to mention the plain language of the statute, used his tint meter only, and then instructed his back-up officer to write an unwarranted citation, so he could run his drug dog around the car. Nevertheless, the State asserts it was reasonable for Officer Reese "to continue the traffic mission" by writing a citation. (Resp. Br., p.7.) It was clearly not

[1] The State claims Mr. Farrell presented no "evidence of the marking's location other than to say it was on 'Defendant's car window.'" (Resp. Br., p.6 n.2.) This is baffling because the rear window was the only window at issue in this case. It was the window that Officer Reese said he was "concerned about." (Exhibit B at 8:15 – 9:45; *see also* R., p.21.) It was also the window for which the citation was issued. (R., pp.21, 131-32.) Thus, it was unnecessary for defense counsel to state in his affidavit that the marking was on the rear window. Further, the photo of the window, which showed the marking indicating the window had a factory tint of 20% and was attached to defense counsel's affidavit, clearly showed multiple defroster lines. (R., p.121.) It is common knowledge that only rear windows have multiple defroster lines.

reasonable because Officer Reese ignored the statute's exception and concluded the rear window was in violation of the statute when in fact it was not.

The State also claims that Mr. Farrell's argument would require "the Court to second-guess the investigative method employed by" Officer Reese, and this is "contrary to law" because an "officer's diligence is not subject to a '*post hoc* evaluation' for 'some alternative means by which the objectives of the police might have been accomplished.'" (Resp. Br., p.5 (quoting *United States v. Sharpe*, 470 U.S. 675, 686 (1985)). However, *Sharpe* is inapposite here. This was not a situation where Officer Reese could choose not to investigate whether the exception applied; I.C. § 49-944 required him to do so. There was no such controlling statute at issue in *Sharpe*.

The *Sharpe* Court wrote that it was "appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." *Id.* at 686 (citations omitted). It then stated, "A court making this assessment should take care to consider whether the police are acting in a swiftly developing situation, *and in such cases* the court should not indulge in unrealistic second-guessing." *Id.* (emphasis added) (internal citation omitted). The Court held the extended duration of the traffic stop was reasonable precisely because the delay was "attributable almost entirely to the evasive actions of [a codefendant], who sought to elude the police as Sharpe moved his Pontiac to the side of the road. Except for [the codefendant's] maneuvers, only a short and certainly permissible pre-arrest detention would likely have taken place." *Id.* at 687-88 (footnote omitted). Therefore, the Court stated that the "somewhat longer detention was simply the result" of a graduated response to the demands of that specific situation. *Id.* at 688 (citation omitted). The Court thus found that the agent who stopped

Mr. Sharpe "pursued his investigation in a diligent and reasonable manner," and there was no evidence presented "that the officers were dilatory in their investigation." *Id.* at 687.[2]

In this case, the traffic stop was not a "swiftly developing situation." Indeed, the video of the stop shows that Mr. Farrell and the driver were cooperative, and Mr. Farrell was calmly telling the officers that the windows in the car were "factory" or "stock" tint. (*See* Exhibit B at 1:50 – 9:40.) More importantly, this case does not require the Court to imagine some alternative means by which Officer Reese's objective could have been accomplished, nor does the Court have to engage in unrealistic second-guessing of Officer Reese's actions. The video of the stop clearly shows Officer Reese was dilatory in his investigation because, pursuant to I.C. § 49-944(5), he was required to investigate whether the window fell under the exception. He never made any attempt to do so. Failing to do so was unreasonable as it rendered the exception meaningless, and the State itself emphatically agrees that, in the context of a traffic stop, "*[t]he question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it.*" (Resp. Br., p.5 (quoting *Sharpe*, 470 U.S. at 687) (emphasis in original).) Like the district court, the State ignores the fact that the video showed Officer Reese failed to conduct a complete investigation of whether there was actually a violation of the statute.[3]

[2] The State also relies on *State v. Buti*, 131 Idaho 793, 796-97 (1998). (Resp. Br., p.5.) However, that opinion was also focused on the duration of the stop in light of the specific circumstances. *Id.* There was no controlling statute at issue that required the officer to investigate whether an exception applied.

[3] Even if Officer Reese was not aware of the exception, and such a "mistake of law" could somehow be considered objectively reasonable for an officer who actually carries a tint meter in his patrol car, Idaho has not adopted a good faith mistake of law exception to the exclusionary rule. *State v. Pettit*, 162 Idaho 849, 855 (Ct. App. 2017).

The district court wrote, "The limited issue before this Court is whether Officer Reese had reasonable and articulable suspicion that the vehicle was being driven contrary to traffic laws due to his suspicion of an equipment violation based upon the darkness of the tint . . . ." (R., p.152.) It also found, "Officer Reese then investigated his observation by applying the tint meter to the window, which confirmed the tint was darker on the back window tha[n] allowed by the statute." (R., p.154.) Based on this, the district court implicitly found that issuing a citation was reasonable at that point. (R., p.154.) However, it was clearly not reasonable because the vehicle was not being driven contrary to traffic laws.

Indeed, the district court's analysis was incomplete because the tint meter could not show whether the window tinting fell under the exception. Nor could it show whether a tinting film had been applied to the rear window to make it darker than allowed. After all, this is what the statute is intended to control: "It is unlawful for any person to *place, install, affix or apply any window tinting film or sunscreening device to the windows* of any motor vehicle . . . ." I.C. § 49-944(1) (emphasis added). And the relevant subsection reads as follows: "*Nonreflective window tinting film or sunscreening devices* that have a light transmission of not less than thirty-five percent (35%) with a tolerance limit of plus or minus three percent (3%) . . . may be applied to . . . the rear window." I.C. § 49-944(1)(b) (emphasis added).

Idaho Code § 49-944(5), however, makes it clear that the statute is not intended to penalize drivers whose cars are originally equipped with darker windows. And Officer Reese could determine, *only through further investigation,* whether window tinting film had been applied to the window, or the car came equipped with the window tinting. The marking showed the window had 20% tinting originally (R., p.121.), but Officer Reese failed to investigate this at all. He never even looked at the marking. If officers are not required to investigate this statutory

exception for factory tinting in the field, the exception is meaningless. (*See* App. Br., pp.10-11.) Further, as argued by defense counsel, the marking also showed the tint was original equipment "affixed by the manufacturer GM . . . ." (R., p.111.) Had he looked at the window, that is what Officer Reese would have seen.

In its respondent's brief, the State engages in a similarly flawed analysis. It states, "Initially, there was nothing unreasonable with the officer investigating whether the window complied with I.C. § 49-944(1)." (Resp. Br., p.6) This is accurate as to subsection (1), but it is only the first part of what is required for an investigation to be reasonable under the statute. The State also argues, "Using the light meter was a reasonable way to make this determination, and had the meter shown 35% or better light transmission, the investigation would have been complete." (Resp. Br., p.6.) Again, while the tint meter could show whether the window was in compliance with subsection (1), it could *not show* whether it fell under the exception in subsection (5).

The State also argues that "[n]othing in the marking shows that the window was original equipment on the car." (Resp. Br., p.7.) This argument is, in point of fact, largely irrelevant. It is irrelevant because Officer Reese never looked at the window marking. Indeed, he never looked at the window to investigate subsection (5) of the statute. (Exhibit B at 5:30 – 10:00.) And that was the argument made to the district court. (R., pp.111-13.) The State has not acknowledged that I.C. § 49-944(5) must also be investigated. Instead, the State's only argument is that if a tint meter shows that subsection (1) of the statute is violated, a citation should issue. It even argues that the marking might not have shown that the tint was factory applied. (Resp. Br., pp.6-7.)

That is simply not the way the law operates. Indeed, a window marking is no different than a temporary permit, which "carries with it a presumption of validity, not of invalidity." *State v. Salois*, 144 Idaho 344, 348 (Ct. App. 2007). As *Salois* noted with regard to permits, "[t]he State's position would allow law enforcement officers to presume that temporary permits are invalid *per se*. . . ." *Id.* While *Salois* was about the reasonableness of the initial stop, the notion that when an officer sees something that indicates legality, that officer cannot assume that it is nevertheless probably illegal applies here. Yet that is the State's argument—that there was no photographic evidence showing that the marking Officer Reese would have seen would have proven it was placed there by the manufacturer of the car. (Resp. Br., pp.6-7.) Thus, the State argues that it is reasonable for an officer to assume illegality and issue a citation. There was no evidence presented by the State, however, to show that what Officer Reese would have seen, had he conducted a complete investigation and looked at the marking, would indicate an after-market application of the tint either.

The district court had a photo showing part of the marking that was on the rear window. (R., p.121.) That photo does not depict everything written on the window. (R., p.111.) Had Officer Reese looked at the marking, he, of course, would have seen everything written on the window. The district court never mentioned the photo of the marking, and it ignored the fact that Officer Reese never looked at the marking before issuing a citation, so it apparently assumed, contrary to *Salois*, that what was not shown in the photo would not have indicated factory-placed tint. However, the district court had before it evidence to the contrary—the dealer documentation supported what Mr. Farrell had been telling Officer Reese and what the factory-applied markings showed (R., pp.138-43, 154.), but it presumed that looking at the rear window

marking would not have revealed something useful to Officer Reese regarding the exception in the statute. The district court erred when it denied Mr. Farrell's motion to suppress.

CONCLUSION

Mr. Farrell respectfully requests that this Court vacate the district court's judgment of conviction and reverse the order denying his motion to suppress.

DATED this 8th day of May, 2019.

/s/ Reed P. Anderson
REED P. ANDERSON
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of May, 2019, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, to be served as follows:

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RPA/eas