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

STATE OF IDAHO,	)	
	)	**No. 46219-2018**
Plaintiff-Respondent,	)	
	)	**Ada County Case No.**
v.	)	**CR01-2018-881**
	)	
SPENCER EDWARD COX,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE STEVEN J. HIPPLER
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Spencer Edward Cox appeals from the judgment of conviction entered upon his conditional guilty plea to possession of methamphetamine. On appeal, he challenges the denial of his motion to suppress.

Statement of Facts and Course of Proceedings

The state adopts the following factual findings made by the district court in its memorandum order denying Cox's motion to suppress:

> On January 8, 2018, at approximately 1:48 a.m., Officer Jason Green, with the Boise Police Department, was driving through the parking lot of the Super 8 hotel in Boise when he noticed what appeared to be a person sleeping in the driver's seat of a running four-door sedan. Earlier, around 11:00 p.m. on January 7, Officer Green had noticed the same car pull into the parking lot and the occupant did not emerge from the car. At approximately 12:30 a.m., Officer Green returned to the parking lot and noticed the same car located in a different parking spot. Thus, when he returned again at 1:48 a.m. to see the car in yet another parking spot with the engine running, he decided to investigate. He had previously been informed by Super 8 management that they did not wish to have anyone sleeping in their parking lot. This is a known high crime area and a common location of illegal drug transactions.
>
> Officer Green called Officer Marshall Plaisted for assistance. They both approached the car on foot and, while standing at the door, Officer Green noticed the driver's seat was down and a male, later identified as Defendant, lying asleep in the driver's seat. He also noticed that there was a small baseball bat with the hilt of the bat next to Defendant's hand as well as a large folding knife in between his legs in his lap. While standing there, Officer Green shined his flashlight inside of the vehicle and on Defendant, who did not respond. Officer Johnson then arrived on scene to assist. Officer Johnson stood at the front passenger side door while Officer Plaisted stood at the rear driver's side door.

Officer Green then knocked on the driver's side window with his flashlight. Defendant startled awake and opened the driver's side door.[1] Officer Green asked him to place his hands on the steering wheel. Defendant was quite excitable, speaking quickly and acting agitated. Officer Green had to continually remind Defendant to keep his hands on the steering wheel. Defendant appeared to Officer Green as though he was under the influence of a stimulant. Officer Green reached into the vehicle to remove the knife from between Defendant's legs.

Once Officer Green took the knife, he told Defendant he was going to remove him from the vehicle by holding his left hand. Officer Green did so to prevent Defendant from grabbing any additional weapons, such as the baseball bat. Defendant stepped out while Officer Green was holding his left hand and, once out, Officer Green then took Defendant's right hand and held both hands behind Defendant's back while standing next to the open driver's side door. Officer Green did not shut the driver's side door after Defendant exited, nor did Defendant ask him to shut the door other otherwise attempt to shut the door. It is the practice of Boise Police Department officers to "leave things as they lie," meaning that if the officer opens a door or window to a vehicle, (s)he will subsequently close it. If the detainee opens the door or window, officers will leave it open unless asked to close it by the detainee.[2]

After Officer Green performed a pat search for weapons, he had Defendant walk to the front bumper of his patrol car. Once at the patrol car, Officer Green obtained the Defendant's information verbally and ran it through dispatch. While Officer Green and the Defendant were standing next to his patrol vehicle, Officer Plaisted walked his certified narcotic detection canine, Geno, around the vehicle. Geno and Officer Plaisted have been working together for four years, although Officer Plaisted has been a certified canine handler for seven years. From his experience working with Geno, Officer Plaisted is familiar with

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[1] There was conflicting testimony about who opened the door and how it was opened. The audio/video footage from Officer Johnson's body camera clearly reveals that Defendant opened the door when Officer Green knocked with his flashlight. Further, at no time did Officer Green, or any of the other officers, order Defendant to open the door. Rather, Officer Green knocked on the window and Defendant opened the door. Though Officer Green testified that he may [have] asked the Defendant to open the door, this clearly was not the case as is revealed by the videos.

[2] Further, Officer Green – who was a canine officer for several years – and Officer Plaisted testified that for purposes of an exterior canine sniff, it makes little difference whether a door or window is opened or closed. A trained drug detection canine's sense of smell is sensitive such that its ability to detect odors is unaffected by openings to a vehicle.

> Geno's changes in behavior when he detects an odor of narcotics, including rapid sniffing, head snapping towards the odor, closed mouth and drooling. Geno's final response is to sit. To ensure that Geno's sit is indeed a final response, Officer Plaisted will attempt to direct Geno away from the odor. If Geno remains seated, Officer Plaisted knows the sit is an alert because Geno is trained to stay with the odor.
>
> Here, Officer Plaisted approached Defendant's vehicle with Geno and he saw that it was still running, with all the windows rolled up, the heater on, and the driver's door open. He walked Geno to the passenger side of the vehicle [where] Geno commenced an exterior sniff, moving in a counter-clockwise direction while Officer Plaisted walked beside him. As Geno rounded the front of the car, Geno pulled hard on the leash towards the open door. Officer Plaisted noticed a change in Geno's behavior at this point, as Geno began drooling and sniffing quickly, with his mouth closed and his head pulling toward the open door. Geno began sniffing the driver's door pocket and sat down in the area between the open door and the interior compartment. Officer Plaisted attempted to redirect Geno's attention, giving him another command to sniff. However, Geno's head snapped towards the interior of the vehicle, he sniffed along the driver's floorboard and sat down again. At no point did Geno actually get into the vehicle.
>
> Based upon Geno's change in behavior and through his training and experience, Officer Plaisted knew this was an alert. Officer Plaisted then looked at the areas [where] Geno had alerted and, in the driver's door pocket, saw a pack of cigarettes. He opened the cigarette box and saw a small baggie that had a crystal-like substance in it that later tested positive for methamphetamine.

(R., pp.70-72 (footnotes in original, but renumbered in this brief); see also State's Exhibit 1 (Officer Green's body camera video), State's Exhibit 2 (Officer Plaisted's body camera video).)[3]

The state charged Cox with possession of methamphetamine, possession of drug paraphernalia, and resisting and/or obstructing an officer (for attempting to flee from officers after he was placed under arrest). (R., pp.25-26.)

[3] The parties also stipulated to augment the appellate record with the portion (between 0:35 and 0:43) of Officer Johnson's body camera video that the district court considered below. (2/20/19 Order).

Cox filed a motion to suppress the evidence obtained during the search of his vehicle. (R., pp.38-41.) In the motion, Cox asserted that the drug dog's sniff of the interior of his vehicle constituted a warrantless search and violated his Fourth Amendment and Idaho Constitutional rights. (Id.) More specifically, Cox asserted that because he had no opportunity to close the open door after officers removed him and led him away from the vehicle, the officers had a duty to close the door themselves prior to deploying the drug dog around the vehicle. (Id.)

After a subsequent hearing on Cox's motion to suppress (see generally Tr.[4]), the district court denied the motion (R., pp.69-77). Citing State v. Naranjo, 159 Idaho 258, 359 P.3d 1055 (Ct. App. 2015), and numerous federal decisions holding similarly, the court concluded that the officers did not violate Cox's constitutional rights because the drug dog's intrusion into the vehicle was the culmination of an instinctual progression from the sniff's initiation at the passenger side of the vehicle. (Id.) Therefore, the court concluded, the sniff did not constitute a Fourth Amendment search where Cox, and not the officers, initially opened the vehicle door, and where Cox did not attempt to close the door himself or request that the officers do so. (Id.) Finally, the court concluded that the officers had no affirmative duty to close the door prior to deploying the drug dog. (Id.)

Cox entered a conditional guilty plea to possession of methamphetamine, preserving his right to challenge the district court's denial of his motion to suppress. (R., pp.80-88.) The state

[4] Because it is the only transcript cited by the state in this brief, the state refers to the transcript of the hearing on Cox's motion to suppress simply as "Tr."

agreed to dismiss the remaining charges. (Id.) The district court imposed a unified seven-year sentence with two years fixed. (R., pp.92-95.) Cox timely appealed. (R., pp.98-100.)

ISSUES

Cox states the issues on appeal as:

I. Whether the officers facilitated Geno's entry into the car, such that the dog sniff of the interior was [a] warrantless search in violation of the Fourth Amendment, by not shutting the car door, which had been opened in response to their knock.

II. Alternatively, whether Article I, Section 17 of the Idaho Constitution provides greater protections against warrantless entries into, and thus, unreasonable searches of, the protected interiors of cars by drug dogs.

(Appellant's brief, p.6.)

The state rephrases the issue on appeal as:

Has Cox failed to show error in the district court's denial of his motion to suppress?

ARGUMENT

Cox Has Failed To Show Error In The District Court's Denial Of His Motion To Suppress

A. Introduction

Cox contends that the district court erred in denying his motion to suppress. (See generally Appellant's brief.) Specifically, Cox contends that the district court erred in concluding that the officers did not violate the Fourth Amendment in searching his vehicle. (Id., pp.7-14.) Further, Cox contends that the district court erred by not specifically ruling on his contention that the search was also unlawful pursuant to the Idaho Constitution. (Id., pp.14-22.)

Cox's arguments fail. A review of the record and applicable caselaw supports the district court's conclusion that the drug dog's intrusion into Cox's vehicle did not constitute a Fourth Amendment search. Further, a review of the record reveals that the district court impliedly rejected Cox's Idaho Constitution claim, and in any event, that Cox has failed to demonstrate that the officers' actions violated the Idaho Constitution.

B. Standard Of Review

In reviewing a decision on a motion to suppress, the appellate court accepts the trial court's findings of fact that are supported by substantial evidence, but freely reviews the application of constitutional principles to those facts. State v. Diaz, 144 Idaho 300, 302, 160 P.3d 739, 741 (2007).

C. The District Court Correctly Concluded That The Drug Dog's Instinctive Act Of Entering The Interior Portions Of The Vehicle Was Not A Fourth Amendment Search And Did Not Violate Cox's Fourth Amendment Rights

The Fourth Amendment of the United States Constitution provides that "[t]he 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. Warrantless searches are "*per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967). One such exception to the warrant requirement is the "automobile exception," which allows warrantless searches of vehicles when there is probable cause to believe that the vehicle contains contraband or evidence of criminal activity. See California v. Acevedo, 500 U.S. 565, 572 (1991); State v. Tucker, 132 Idaho 841, 842, 979 P.2d 1199, 1200 (1999).

Law enforcement may deploy a drug dog to sniff the exterior of a lawfully stopped vehicle without suspicion of drug activity so long as doing so does not prolong the detention beyond what is necessary to effectuate the purpose of the stop. Illinois v. Caballes, 543 U.S. 405 (2005); State v. Wigginton, 142 Idaho 180, 183-184, 125 P.3d 536, 539-540 (Ct. App. 2005). "When a reliable drug-detection dog indicates that a lawfully stopped automobile contains the odor of controlled substances, the officer has probable cause to believe that there are drugs in the automobile and may search it without a warrant." State v. Yeoumans, 144 Idaho 871, 873, 172 P.3d 1146, 1148 (Ct. App. 2007) (quoting State v. Gibson, 141 Idaho 277, 281, 108 P.3d 424, 428 (Ct. App. 2005)).

In this case, the district court denied Cox's motion to suppress after concluding that the drug dog's partial entry into the interior portion of the vehicle did not constitute a Fourth Amendment search. (R., pp.69-77.) Specifically, the court concluded that the dog's entry constituted an instinctual progression from the sniff's initiation at the passenger side of the vehicle, and that the officers had no affirmative duty to close the door that Cox had initially opened prior to the deploying of the drug dog. (Id.)

In reaching this conclusion, the district court properly relied upon Naranjo, 159 Idaho 258, 359 P.3d 1055. (R., pp.72-73.) In that case, during a traffic stop, a deployed drug dog spontaneously moved his head up and into the vehicle's open window and then alerted to the presence of narcotics. Naranjo, 159 Idaho at 259-260, 359 P.3d at 1056-1057. Naranjo, and not the officers, had opened the window in the course of the traffic stop. Id. The Idaho Court of Appeals held that the dog's intrusion through the window did not constitute a Fourth Amendment search because the dog instinctively, without facilitation from the officer, followed an odor into Naranjo's vehicle. Id. at 259-261, 359 P.3d at 1056-1058.

Both the district court in this case (R., pp.73 n.4, 74-75, 75 n.5), and the Court of Appeals in Naranjo, 159 Idaho at 260-261, 359 P.3d at 1057-1058, cited numerous federal appellate cases which have held similarly. In United States v. Lyons, 486 F.3d 367, 369-370, 372-374 (8th Cir. 2007), officers approached the passenger side of Lyons' vehicle during a traffic stop. Id. at 369. Lyons' passenger opened the passenger side window without any specific order or request from the officer. Id. at 373. A deployed drug dog subsequently stuck his head through this still-open passenger-side window and alerted. Id. at 370. The Eighth Circuit Court of Appeals rejected

Lyons' argument (similar to the argument made by Cox in this case), that because the officers created the opportunity for the dog intrusion into the window by detaining Lyons and thus impliedly requiring him or his passenger to open the window, the officers had an affirmative duty to close the window prior to deploying a drug dog to sniff the exterior of the car. Id. at 373. The Court found that Lyons' reliance on United States v. Winningham, 140 F.3d 1328, 1329-1330 (10th Cir. 1998), was misplaced because, in that case, the *officers* opened the vehicle's sliding door, took the drug dog off its leash near the open door, and allowed the dog to jump in and smell the interior of the van. Id. This was different than the facts in Lyons where the officers merely, in the words of the trial court, "took the situation as [they] found it," and did not direct the dog to stick his head through the vehicle's window. Id. Thus, as in Naranjo, the Eighth Circuit Court of Appeals held that the drug dog's intrusion into the vehicle was instinctive and did not constitute a Fourth Amendment search. Id. at 373-374.

As noted, numerous other federal cases cited by the district court in this case, and by the Idaho Court of Appeals in Naranjo, have held similarly. See, e.g., United States v. Sharp, 689 F.3d 616, 620 (6th Cir. 2012) (finding no Fourth Amendment search when dog jumped through open window without facilitation by police because "absent police misconduct, the instinctive acts of trained canines...do[] not violate the Fourth Amendment") (citation omitted); United States v. Pierce, 622 F.3d 209, 214 (3rd Cir. 2010) (finding no Fourth Amendment search when, without facilitation by police, dog instinctively entered car door that defendant opened and left open after officers asked him to leave vehicle, and noting that in this context, "instinctive" implies that the dog "enters the car without assistance, facilitation, or other intentional action by

its handler"); United States v. Stone, 866 F.2d 359, 362-364 (10th Cir. 1989) (finding no Fourth Amendment search when dog jumped in hatchback that was not opened for the purpose of permitting dog to enter, and police did not otherwise encourage entry); United States v. Hutchinson, 471 F.Supp.2d 497, 510-511 (M.D. Pa. 2007) (finding no Fourth Amendment search where drug dog entered car window that suspect had opened without facilitation from officer, equating the scenario with the plain smell/plain view doctrines); United States v. Woods, 2008 WL 11396770 *5 (D. Kan. 2008) (citing Stone and finding no Fourth Amendment search in similar circumstances); see also Felders ex rel. Smedley v. Malcom, 755 F.3d 870, 880 (10th Cir. 2014) (collecting cases); compare Winningham, 140 F.3d at 1331; United States v. Gastelo-Armenta, 2010 WL 1440451 *21-23 (D. Neb. 2010) (finding Fourth Amendment search where officer opened car doors, ordered occupants out, shut one car door but deliberately left another open, and where canine officer instructed dog to enter vehicle through open door).

As in these cases, there was no Fourth Amendment search in the present case. Cox himself opened the car door, and the officers did not facilitate the drug dog's intrusion into the interior portions of the vehicle. Some of the cases relied upon by the district court presented, in fact, closer questions than presented by this case. Unlike in Naranjo[5] and Stone, the drug dog in the present case exhibited behaviors consistent with alerting *prior* to entering the interior portion of the vehicle, and thus was clearly following the scent of an odor into the vehicle. (R., pp.71-

[5] In Naranjo, the Idaho Court of Appeals stated that it "[did] not believe a drug dog's behavior before entering a vehicle is constitutionally significant." Naranjo, 159 Idaho at 260-261, 359 P.3d at 1057-1058.

72.) Further, unlike in Sharp, Pierce, and Stone, the drug dog's intrusion into the car was minimal – the dog did not jump entirely into the car. The district court properly denied Cox's motion to suppress.

On appeal, Cox first asserts that two of the district court's factual findings were clearly erroneous and not supported by substantial evidence. (Appellant's brief, pp.7-9.) First, he asserts that the court's factual finding that "[a]t no point did Geno actually get into the vehicle" was clearly erroneous because the video from one of the officer's body cameras shows the drug dog pulling his nose across the threshold of the vehicle, and entering the "negative space between the [open] door and the body of the car." (Appellant's brief, pp.7-8.) Second, Cox asserts that the court's factual finding that Cox "voluntarily opened the door for officers" was clearly erroneous because, while the officers did not *verbally* ask Cox to open the door, Officer Green, Cox asserts, "actually did make a *nonverbal* request by knocking on the window," a request that Cox notes that few citizens would feel free to ignore. (Appellant's brief, p.9 (emphasis in original).) Both of these contentions fail because a review of the district court's memorandum denial order clearly demonstrates that the court understood what was depicted in the videos in both instances.

When the district court stated that the drug dog did not "actually get into the vehicle," it is clear that the court meant that the dog did not, unlike the drug dogs in Sharp, Pierce, and Stone, *fully* enter the vehicle, but instead merely crossed the threshold of the open door. Immediately prior to the factual finding in question, the court stated that the drug dog "sat down in the area between the open door and interior compartment," and "snapped towards the interior

and the vehicle" and "sniffed along the driver's floorboard." (R., p.72.) Further, the district court's entire legal analysis and reliance upon the caselaw discussed above was based upon the drug dog's intrusion into the vehicle. (R., pp.72-76.) While Cox, on appeal (Appellant's brief, p.8.), emphasizes the privacy interest in the space between the open door and the door itself, this is of no significance in this case because the drug dog clearly intruded into both this area and into the car itself, and because the officer did not encourage the dog's intrusion into either area (R., pp.71-72; see also State's Exhibit 2, 5:41-6:11).

Likewise, it is clear that the district court's statement that Cox "voluntarily opened the door for officers," was limited to factual findings that: (1) Cox, and not the officers, physically opened the door; and (2) officers did not directly order Cox to open the door. The court understood that Cox opened the door in response to the officers knocking on the window. (R., pp.70, 75.)

Cox also frames the alleged involuntary nature of his opening of the car door in the context of his legal argument that the officers ultimately facilitated the drug dog's intrusion into the vehicle by "nonverbally" compelling him to open the car door. (Appellant's brief, pp.11-13.) Cox also appears to attempt to distinguish Naranjo and the federal cases discussed above by arguing that, after he was compelled to open the door, he had no practical opportunity to close it when he was ordered to leave the vehicle, and then led immediately away from the vehicle. (Appellant's brief, pp.9-14.)

Initially, the state asserts that whether or not Cox felt he was compelled to open the car door, or had a subsequent opportunity to close it, is of no constitutional significance in this case,

and that the district court's analysis of these factors was unnecessary. Each of the cases relied upon by the district court in this case and by the Idaho Court of Appeals in Naranjo involved traffic stops[6] – scenarios where a detained vehicle occupant, like Cox, would likely feel compelled to open the door or window upon the officer's approach. Still, in none of these cases did the courts find that these lawful traffic stops, and the open doors or windows that resulted from them, imposed a duty upon the officers to close the open door or window themselves prior to deploying a drug dog. Likewise, none of these cases turned on the degree of a suspect's opportunity or lack thereof to close the door or window prior to deploying the drug dog.

A drug dog's instinctive intrusion into an open car door or window only constitutes a Fourth Amendment search where: (1) an officer opens the door or window (or orders the suspect to do so), for the *purpose* of facilitating the drug dog's intrusion; (2) the officer encourages the drug dog to cross the threshold into the vehicle; or (3) the officer commits some other misconduct to facilitate the drug dog's intrusion. A car door or window opened by a detained vehicle occupant in the context of a traffic stop or other lawful detention does not improperly facilitate a subsequent drug dog's intrusion into the vehicle, and an officer deploying a drug dog may, as Officer Green testified was his policy (Tr., p.22, L.17 – p.23, L.5), "leave it as they left it." See Felders ex. rel. Smedley, 755 F.3d at 880 ("[I]t is...well-established that officers cannot rely on a dog's alert to establish probable cause if the officers open part of the vehicle *so the dog*

[6] In the present case, though Cox did not challenge the officers' initial detention of him and the district court correspondingly did not analyze it, Officer Green testified that he considered Cox to be detained on suspicion of disorderly conduct as soon as he observed Cox sleeping in the vehicle. (Tr., p.30, L.24 – p.31, L.10.)

may enter the vehicle or otherwise facilitate its entry.") (emphasis added); Stone, 866 F.2d at 363 ("There is no evidence, nor does Stone contend, that the police asked Stone to open the hatchback *so the dog could jump in*. Nor is there any evidence the police handler encouraged the dog to jump in the car.") (emphasis added); Winningham, 140 F.3d at 1329-1331 (holding that officers conducted Fourth Amendment search when, after occupants were already removed from van, officers opened van door, deployed unleashed drug dog near the open door, and the dog jumped into the vehicle).

Even if there is constitutional significance to a detained vehicle occupant's opportunity to close an open door or window prior to the deployment of a drug dog, Cox had such an opportunity in this case. Cox could have chosen to fully or partially open his car window rather than his car door, and then could have attempted to close the window upon being ordered to exit the vehicle. Cox also could have requested that officers close his car door after he was ordered to exit the car – a request that Officer Green testified he has "no issue" granting. (Tr., p.24, Ls.17-20.)

Further, even if Cox had a relatively more limited opportunity to close the door due to the manner in which he was removed and led away from the car, the officers' actions resulting in this limited opportunity were reasonable. Before even knocking on the car window, the approaching officer observed two weapons in Cox's vicinity – a small baseball bat next to Cox's hand and a large folding knife in between his legs on his lap. (R., p.70.) After the officer knocked on the window, Cox was agitated, continuously failed to comply with Officer Green's request to keep his hands on the steering wheel, and appeared to Officer Green to be under the influence of a

stimulant. (R., pp.70-71.) In light of these factors posing a threat to their safety, the officers reasonably removed Cox from the vehicle and led him away.

Cox has failed to show that the district court erred in concluding that the officers violated his Fourth Amendment rights in obtaining the contraband from his vehicle. Cox has therefore failed to show that the district court erred in denying his motion to suppress.

D. The District Court Implicitly Rejected Cox's Assertion That The Idaho Constitution Provided Him More Protection Than The Fourth Amendment In the Circumstances Of This Case, And Cox Has Failed To Demonstrate That The District Court Erred In Reaching This Conclusion

The Idaho Constitution, like the United States Constitution, protects individuals against unreasonable government searches. Idaho Const. art. I, § 17 ("[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated.").

Idaho appellate courts are free to extend greater protections under the state constitution than those granted by the United States Supreme Court under the federal constitution. State v. Thompson, 114 Idaho 746, 748, 760 P.2d 1162, 1164 (1988) (holding that the installation of a "pen register" on suspect's telephone was a search within the meaning of the Idaho Constitution); see also State v. Arregui, 44 Idaho 43, 254 P. 788 (1927) (early adoption of exclusionary rule); State v. Guzman, 122 Idaho 981, 842 P.2d 660 (1992) (declining to adopt "good faith" exception to exclusionary rule); State v. Pettit, 162 Idaho 849, 854-855, 406 P.3d 370, 375-376 (Ct. App. 2017) (declining to adopt reasonable mistake of law exception to exclusionary rule).

Although the United States Supreme Court establishes no more than the floor of constitutional protection, the Idaho Supreme Court has found there is "merit in having the same rule of law applicable within the borders of our state, whether an interpretation of the Fourth Amendment or its counterpart – Article I, § 17 of the Idaho Constitution – is involved. Such consistency makes sense to the police and the public." State v. Charpentier, 131 Idaho 649, 653, 962 P.2d 1033, 1037 (1998). Indeed "when interpreting the Idaho Constitution, this Court will use federal rules and methodology unless clear precedent or circumstances unique to the state of Idaho or its constitution indicates that Idaho's constitution provides greater protection than the analogous federal provision."). CDA Dairy Queen Inc., v. State Insurance Fund, 154 Idaho 379, 384, 299 P.3d 186, 191 (2013).

Several neutral, nonexclusive criteria may be examined when an argument is made for a divergence between federal and state constitutional law. These criteria include: 1) the textual language of the state constitution; 2) significant differences in the text of parallel provisions of the federal and state constitutions; 3) state constitutional and common law history; 4) preexisting state law; 5) differences in structure between the federal and state constitutions; 6) matters of particular state interest or local concern; 7) public attitudes; and 8) state traditions. See, e.g., State v. Wheaton, 121 Idaho 404, 825 P.2d 501 (1992) (Bistline, J., concurring) (citing State v. Gunwall, 720 P.2d 808, 812-813 (Wash. 1986)); see also State v. Donato, 135 Idaho 469, 472, 20 P.3d 5, 8 (2001) (noting that instances, to that point, of the Idaho Constitution providing more protection than the United States Constitution was because of the "uniqueness of our state, our Constitution, and our long-standing jurisprudence.")

In his motion to suppress, Cox argued that the officers violated both the Fourth Amendment and Article I, § 17 of the Idaho Constitution in obtaining the contraband from his vehicle. (R., pp.38-39.) However, Cox did not argue, in the motion, that the Idaho Constitution provided greater protection than the Fourth Amendment in the circumstances of this case. (See R., pp.38-48.) Near the conclusion of the hearing on the motion to suppress, Cox argued, for the first time, that Article I, § 17 provided more protection "against this type of intrusion." (Tr., p.62, Ls.11-14.) In support of the proposition, Cox referenced the fact that the Idaho exclusionary rule existed before the equivalent federal constitutional rule, see Arregui, 44 Idaho 43, 254 P. 788; and cited Thompson, 114 Idaho at 748, 760 P.2d 1164 (1988) (holding that the installation of a "pen register" on suspect's telephone was a search within the meaning of the Idaho Constitution). (Tr., p.62, L.11 – p.63, L.13). Cox did not argue that there was anything uniquely state-specific about the constitutional issue presented, or that Idaho appellate precedent specifically supported his position.[7] (See id.) When the district court skeptically expressed that it was "not aware, in this setting, [of] anything particularly different" with respect to the Idaho Constitution, Cox's counsel replied that "it's not necessarily precedent, it's more argument I guess is how I would clarify that." (Tr., p.63, Ls.3-13.) The district court did not specifically reference the Idaho Constitution in its order denying Cox's motion to suppress. (See R., pp.69-77.)

[7] While Cox's attorney did express an asserted anecdotal observation that she has seen "more and more exterior K9 sniffs with vehicle doors left open" (Tr., p.63, Ls.15-21), this did not constitute evidence of some Idaho-specific reason to interpret the Idaho Constitution differently than the Fourth Amendment in this context.

On appeal, Cox argues that this case should be remanded so that the district court can consider the Idaho Constitution issue. (Appellant's brief, pp.14-16.) He also argues that should this Court reach the issue, it should conclude that the Idaho Constitution provides greater protections than the United States Constitution in the circumstances of this case, and that the officers violated his Idaho Constitutional rights in obtaining the contraband. (Appellant's brief, pp.16-22.) However, a review of the record reveals no remand is necessary because the district court's denial order constituted an implicit rejection of the arguments Cox actually raised to it. Further, Cox has failed to show that the court erred in this implicit conclusion that the officer's actions violated the Idaho Constitution.

The district court's denial order constituted an implicit denial of Cox's argument raised under the Idaho Constitution. As noted, the argument Cox made in his motion to suppress and at the hearing at the motion to suppress was substantially less detailed than the one he now raises on appeal. Because Cox provided the district court no "cogent reason why our state constitution should have been applied differently than the Fourth Amendment with the search involved here," the district court properly responded to the argument by implicitly rejecting it. See State v. Schaffer, 133 Idaho 126, 130, 982 P.2d 961, 965 (Ct. App. 1999); see also Wheaton, 121 Idaho at 406-407, 825 P.2d at 503-504 (declining to consider claim that the Idaho Constitution affords greater protection absent supporting argument). Further, the district court's statements dismissing Cox's argument at the hearing made clear that the court had considered, and rejected, the argument. See Lester v. Salvino, 141 Idaho 937, 941, 120 P.3d 755 (Ct. App. 2005) ("While the court does not explicitly state its finding that Ramsden failed to make a reasonable inquiry

into the facts and legal theories, it is clear from the district court's statements at the two hearings and in its memorandum decision and order that the finding was implicitly made.").[8]

Cox has failed to demonstrate that the district court erred in implicitly denying his Idaho Constitutional claim. On appeal, Cox has substantially expanded his argument to assert that his purported interpretation of Article I, § 17 of the Idaho Constitution is supported by, among other things: (1) the holding in Pettit, 162 Idaho at 854-855, 406 P.3d at 375-376, in which the Idaho Court of Appeals declined to adopt the reasonable mistake of law exception to the exclusionary rule, and instead provided relief to a defendant-appellant even though the officer's actions were reasonable; (2) his proposition that the analysis utilized in the related federal cases "appears to run contrary to several fundamental legal principles," including that it turns on an evaluation of the officer's subjective intentions; and (3) his proposition that the analysis utilized in the related federal cases does not account for the documented concern that trained animals will only appear to act instinctively when, in fact, they are actually reacting to subconscious or subtle cues from their handlers. (Appellant's brief pp.16-22.) Cox has failed to demonstrate that the Idaho Constitution provided him greater protections in the circumstances of this case, and thus, for the reasons discussed above, has necessarily failed to demonstrate that the officers violated the Idaho Constitution in obtaining the contraband from his vehicle.

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[8] Even if the district court's denial order did not constitute an implicit denial of Cox's Idaho Constitutional claim, this Court may still consider the issue on appeal rather than remand the case. Cox has already had a full opportunity to legally and factually develop this argument before the district court, and this Court freely applies constitutional principles to facts found by the district court. Diaz, 144 Idaho at 302, 160 P.3d at 741.

The Idaho Court of Appeals' holding in Pettit has no application to the current case because it addressed a completely different constitutional question. In Pettit, the Idaho Court of Appeals relied upon State v. Guzman, 122 Idaho 981, 842 P.2d 660 (1992), in which the Idaho Supreme Court held that the good faith exception to the exclusionary rule did not apply under the Idaho Constitution. Pettit, 162 Idaho at 854-855, 406 P.3d at 375-376. Both Guzman and Pettit recognized the existence of an independent Idaho exclusionary rule, which was established long before its federal counterpart in Arregui, 44 Idaho 43, 254 P. 788. Pettit, 162 Idaho at 854-855; 406 P.3d at 375-376; Guzman, 122 Idaho at 984-998, 842 P.2d at 663-677. The present case, however, is not about the remedies available to a criminal defendant subject to an unconstitutional privacy intrusion at the hands of a well-meaning officer. The present case is about whether a particular search implicates the constitution in the first place. Further, if Cox's proposed interpretation of Article I, § 17 of the Idaho Constitution were adopted, this issue would be completely removed from the underlying Pettit/Guzman rationale of providing relief to defendants for well-meaning officers' mistakes – as officers would then be on notice of their affirmative duty to close car doors and windows in circumstances similar to this case; and future violations of this constitutional provision would not be viewed as reasonable mistakes or well-intentioned errors.

Next, the fact that the analyses set forth by the federal cases relied upon by the district court in this case may examine an officer's subjective intent is not: (1) a necessary part of the analysis of these types of cases; (2) "contrary" to fundamental legal principles when it does

occur; or (3) offer justification for a different interpretation of Article I, § 17 of the Idaho Constitution.

While the nature of a particular challenge raised under the Naranjo framework (and that of the related federal cases), *may* include an examination of an officer's subjective intent (such as when the defendant-appellant alleges officer misconduct), this is not necessarily the case. For example, in Naranjo, the Court of Appeals did not analyze any officer's subjective intent, and instead based its holding on the fact that Naranjo, and not the officer, opened the window of the vehicle; and that was no indication in the record that the drug dog was doing anything but acting instinctively when it crossed the threshold of the window. Naranjo, 159 Idaho at 259-261, 359 P.3d at 1056-1058.

While Cox is correct that the subjective intent of the officer is *usually* irrelevant to a Fourth Amendment analysis, it is not always so, and it is not necessarily "improper" to consider such intent when a particular constitutional question reasonably requires it. For example, the United States Supreme Court has held that an officer's failure to provide Miranda[9] warnings does not render subsequent warned admissions inadmissible unless the officers made a conscious decision to employ a "question-first" strategy to withhold Miranda warnings for the purposes of soliciting incriminating statements. Missouri v. Seibert, 542 U.S. 600, 604-616 (2004); see also State v. Doe, 163 Idaho 323, 329 n.2, 413 P.3d 424, 430 n.2 (Ct. App. 2017) (applying Seibert). Examining an officer's subjective intent is thus occasionally appropriate in order to apply a

[9] Miranda v. Arizona, 384 U.S. 436 (1996).

constitutional provision and to reveal the existence of a constitutional violation. In the circumstances of the present case and in some of the related federal cases cited above, where an officer may have the authority to detain a vehicle occupant and compel him to open the car door or window, an examination of the officer's subjective intent may be necessary to reveal whether the officer's otherwise-lawful actions are, in fact, unlawful (such as if an officer opens a door, or orders a door to be opened or left open, specifically for the purpose of subsequently deploying a drug dog in the interior of a vehicle). Further, and in any event, Cox has not attempted to demonstrate that there is anything about analyzing an officer's subjective intentions that is at odds with Idaho's particular jurisprudence or unique characteristics. See Donato, 135 Idaho at 472, 20 P.3d at 8.

Likewise, Cox has not attempted to establish an Idaho-specific connection to the "documented concern that trained animals will only appear to act instinctively, when in fact, they are actually reacting to subconscious or subtle cues from their handlers." (See Appellant's brief, pp.18-19.) To the contrary, it was long-established in Idaho, even before the United States Supreme Court opinion in Caballes, 543 U.S. 405, that probable cause for a vehicle search is developed when a drug dog alerts on the vehicle. State v. Gallegos, 120 Idaho 894, 898, 821 P.2d 949, 953 (1991); State v. Martinez, 129 Idaho 426, 432, 925 P.2d 1125, 1131 (Ct. App. 1996). Further, Cox's concern that the drug dog be reliable is already a threshold Fourth Amendment requirement of such searches. Florida v. Harris, 568 U.S. 237 (2013). Challenges that a particular drug dog, or that drug dogs in general, "will only appear to act instinctively," may be made under existing Fourth Amendment jurisprudence relating to drug dogs. Id. Thus,

Cox has identified no particular weakness in this jurisprudence that requires greater protection under the Idaho Constitution.[10]

Cox has failed to demonstrate that the Idaho Constitution provided him greater protections than the United States Constitution in the circumstances of this case.[11] For all of the reasons discussed above as to why the officers did not violate Cox's Fourth Amendment rights, the officers likewise did not violate Cox's rights under the Idaho Constitution. This Court should therefore affirm the district court's order denying Cox's motion to suppress.

CONCLUSION

The state respectfully requests that this Court affirm Cox's judgment of conviction and the district court's denial of Cox's motion to suppress.

DATED this 6th day of June, 2019.

/s/ Mark W. Olson
MARK W. OLSON
Deputy Attorney General

[10] Additionally, to the extent Cox supports his argument with evidence not presented to the trial court (law review articles critiquing the general reliability of drug dogs) (Appellant's brief, pp.18-19), this Court should not consider this evidence. State v. Mitchell, 124 Idaho 374, 376 n.1, 859 P.2d 972, 974 n.1 (Ct. App. 1993) (In rendering a decision on the issues raised on appeal, the appellate court is "limited to review of the record made below" and "will not consider new evidence that was never before the trial court.")

[11] With respect to any other arguments made by Cox pertaining to the Idaho Constitution, the state asserts that Cox has failed to demonstrate that the Fourth Amendment analysis of the relevant issues in this case, as set forth by the state in this brief and the federal cases cited therein, is at odds with Idaho's particular jurisprudence or unique characteristics.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 6th day of June, 2019, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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MWO/dd