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

STATE OF IDAHO,	)	
	)	**No. 46097**
Plaintiff-Appellant,	)	
	)	**Ada County Case No.**
v.	)	**CR01-2017-51545**
	)	
MICHAEL AARON BONNER,	)	
	)	
Defendant-Respondent.	)	
	)	

BRIEF OF APPELLANT

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

HONORABLE PETER G. BARTON
District Judge

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STATEMENT OF THE CASE

Nature Of The Case

The state appeals from the district court's order suppressing evidence.

Statement Of The Facts And Course Of The Proceedings

The state charged Michael Aaron Bonner with felony DUI, with a persistent violator enhancement, and enhanced misdemeanor DWP. (R., pp. 27-28, 44-46.) Bonner filed a motion to suppress, asserting an insufficient basis for the stop. (R., pp. 37-41.) The state opposed the motion. (R., pp. 49-56.) The state contended that Bonner lacked a reasonable expectation of privacy because of a parole waiver of Fourth Amendment rights. (R., pp. 51-52; see also State's Exhibit 1, 2.) Bonner, as a parolee, consented to a "search of [his] person" by "a law enforcement officer" and "waiv[ed his] rights under the Fourth Amendment and the Idaho constitution concerning searches." (State's Exhibit 1; see also State's Exhibit 2.) The state also argued that the encounter started consensually. (R., pp. 52-53.) Finally, it argued that the officer had reasonable suspicion, developing into probable cause, for a detention. (R., pp. 54-56.)

The motion proceeded to hearing. (R., pp. 66-67; Tr.) The district court ultimately found that Officer Linn noticed a Jetta at the Eagle Road exit from I-84 going faster than the other traffic, although he could not have said how fast. (R., pp. 70-71.) It was during the evening, and dark. (R., pp. 70, 72; see Defendant's Exhibit A.) The Jetta also had a temporary license in the back window, though Officer Linn could not see the dates on it. (R., p. 71.) Officer Linn watched the driver pull off Eagle Road into an empty portion of the hospital parking lot about 100 yards from the hospital. (R., p. 71.) Officer Linn suspected the driver of the car was trying to evade him. (R., p. 71.) The driver exited the

car and approached a building other than the hospital, also about 100 yards from where the Jetta parked. (R., p. 71.) The building was dark and both apparently and actually closed. (R., p. 71.) This reinforced Officer Linn's belief the driver was trying to avoid him. (R., p. 71.)

Officer Linn approached Bonner and asked, "What are you doing?" (R., p. 72.) Bonner at some point claimed to be attempting to find his girlfriend and visit her grandparents in the hospital. (R., p. 72.) Officer Linn asked for identification, which Bonner provided. (R., p. 73.) Officer Linn asked about the Jetta and instructed Bonner to sit down and to take his hands out of his pockets. (R., p. 73.) Officer Linn learned that Bonner's license was suspended and that he was on parole. (R., p. 73.) Testing showed Bonner was under the influence of alcohol. (R., p. 73.)

The district court concluded that requesting identification was not a detention, but that the instruction to sit was. (R., pp. 75-78.) The district court concluded that Officer Linn lacked reasonable suspicion to detain Bonner at that point. (R., pp. 77-80.) The district court also concluded that Bonner had a reasonable expectation of privacy because Officer Linn did not know of the parole waiver of Fourth Amendment rights at the time the officer detained him. (R., pp. 80-81.) The district court granted the motion to suppress. (R., p. 81.) The state filed a notice of appeal within 42 days of the filing of the order granting suppression. (R., pp. 84-86.)

ISSUES

1. Did the district court err by concluding that Bonner retained a privacy right despite his waiver?

2. If Bonner retained a privacy right, did the officer have reasonable suspicion to detain him?

ARGUMENT

I.
Bonner Showed No Privacy Right Infringed Upon By His Detention

A. Introduction

In granting the suppression motion, the district court reasoned that Bonner had a privacy right because the parole waiver of his Fourth amendment rights was "ineffective" because "Officer Linn did not know that Mr. Bonner had waived his Fourth Amendment rights." (R., p. 80.) The district court erred because Officer Linn's knowledge was irrelevant to the question of whether Bonner had a reasonable expectation of privacy that society was willing to recognize as reasonable.

B. Standard Of Review

This Court reviews suppression motion orders with a bifurcated standard. State v. Wulff, 157 Idaho 416, 418, 337 P.3d 575, 577 (2014). When a decision on a motion to suppress is challenged, the appellate court accepts the trial court's findings of fact that are not clearly erroneous, but freely reviews the application of constitutional principles to those facts. Id.

C. The District Court Erred By Applying An Incorrect Legal Standard

Constitutional protections against unreasonable searches and seizures "apply only to a person's reasonable expectation of privacy—one which the party subjectively held and which society is willing to recognize as reasonable." State v. Ashworth, 148 Idaho 700, 702, 228 P.3d 381, 383 (Ct. App. 2010). "A person challenging a search has the burden of showing that he or she had a legitimate expectation of privacy in the item or place

searched." State v. Pruss, 145 Idaho 623, 626, 181 P.3d 1231, 1234 (2008) (citing Rawlings v. Kentucky, 448 U.S. 98, 104 (1980)).

Whether protections against unreasonable searches and seizures apply "involves a two-part inquiry: (1) Did the person have a subjective expectation of privacy in the object of the challenged search? and (2) Is society willing to recognize that expectation as reasonable?" Id. at 626, 181 P.3d at 1234. See also Ashworth, 148 Idaho at 702, 228 P.3d at 383 ("Therefore, a Fourth Amendment analysis involves a determination of whether the defendant had an actual, subjective expectation of privacy and, if so, whether the defendant's expectation of privacy, when viewed objectively, was reasonable under the circumstances."); State v. Fancher, 145 Idaho 832, 837, 186 P.3d 688, 693 (Ct. App. 2008) ("An expectation of privacy is objectively reasonable when it is legitimate, justifiable, and one society should both recognize and protect."). "The burden is on the defendant to prove the existence of a legitimate expectation of privacy." State v. Spencer, 139 Idaho 736, 739, 85 P.3d 1135, 1138 (Ct. App. 2004).

"Idaho appellate courts have long-recognized that parolees and probationers have a diminished expectation of privacy and will enforce Fourth Amendment waivers as a condition of parole or probation." State v. Cruz, 144 Idaho 906, 908, 174 P.3d 876, 878 (Ct. App. 2007). See also Samson v. California, 547 U.S. 843 (2006); United States v. Knights, 534 U.S. 112 (2001). "[P]ersons conditionally released to societies have a reduced expectation of privacy, thereby rendering intrusions by government authorities 'reasonable' which otherwise would be unreasonable or invalid under traditional constitutional concepts." State v. Gawron, 112 Idaho 841, 843, 736 P.2d 1295, 1297

(1987). Thus, "the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee." Samson, 547 U.S. at 856.

The district court did not apply these standards. (R., pp. 80-81.) It held that "Mr. Bonner's waiver is ineffective as to this seizure because the [sic] Officer Linn did not know of the waiver or know or reasonably believe that Mr. Bonner was a parolee or probationer at the time of the seizure." (R., p. 81.) As noted above, the proper test is whether Bonner had a subjective expectation of privacy, and whether society would recognize that expectation as reasonable. Notably absent from this standard is any third party's knowledge of Bonner's privacy interests. Officer Linn's ignorance of Bonner's parole status did not, and cannot, confer upon Bonner an expectation of privacy he did not possess.

"[T]he touchstone of [Fourth] Amendment analysis has been the question whether a person has a constitutionally protected reasonable expectation of privacy." Oliver v. United States, 466 U.S. 170, 177 (1984) (internal quotation omitted). Bonner's waiver of his Fourth Amendment rights extinguished his expectation of privacy. Gawron, 112 Idaho at 843, 736 P.2d at 1297. The Supreme Court of the United States has held, "the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee." Samson, 547 U.S. at 857. The district court's holding that the officer's ignorance of Bonner's parole status and waiver somehow restored Bonner's privacy expectation to the same as a non-parolee who had not waived his Fourth Amendment rights is without legal basis. The district court erred by adding a requirement of officer knowledge to the expectation of privacy inquiry.

Nor did the district court reach the correct result by an erroneous analysis. As a condition of release on parole, Bonner "consent[ed] to the search of [his] person" and

waived his constitutional rights "concerning searches." (State's Exhibit 1.) BAC testing is a search of Bonner's person. Birchfield v. North Dakota, 136 S. Ct. 2160, 2173, 195 L. Ed. 2d 560 (2016) ("our cases establish that the taking of a blood sample or the administration of a breath test is a search"). Because Bonner had waived his privacy expectation against BAC searches, Officer Linn did not violate his rights by detaining him or having such a search conducted. State v. Purdum, 147 Idaho 206, 210, 207 P.3d 182, 186 (2009).

Bonner failed to establish that he had an expectation of privacy infringed by his detention and BAC testing. He therefore failed to show that any of the evidence the state acquired in this case was subject to suppression. The district court's analysis—that the evidence should be suppressed because Bonner had a privacy expectation unless Officer Linn knew that he did not—is without legal or logical basis. Because Bonner's rights were not violated, he was not entitled to suppression. The district court erred and should be reversed.

II.
Officer Linn Had Reasonable Suspicion To Detain Bonner

A. Introduction

Even if Officer Linn's unawareness of Bonner's parole status conferred upon Bonner a privacy interest against being detained and submitting to BAC testing, Officer Linn did not act in a constitutionally unreasonable manner when he detained Bonner because he had reasonable suspicion. The district court reasoned that Officer Linn "knew that Mr. Bonner was not running away from him" because Bonner explained that he was trying to visit his girlfriend's grandparents in the hospital. (R., p. 78.) Bonner's

explanation for his actions did not dispel reasonable suspicion that Bonner was deliberately trying to evade Officer Linn.

B. Standard Of Review

"Determinations of reasonable suspicion are reviewed de novo." State v. Morgan, 154 Idaho 109, 111, 294 P.3d 1121, 1123 (2013). "On review of a suppression motion ruling, this Court will accept the district court's findings unless they are clearly erroneous." State v. Danney, 153 Idaho 405, 410, 283 P.3d 722, 727 (2012).

C. The District Court Employed An Erroneous Legal Standard When It Held That Ambiguous Conduct Will Not Justify An Investigative Detention

"An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." United States v. Cortez, 449 U.S. 411, 417 (1981). "[T]he Fourth Amendment is satisfied if the officer's action is supported by reasonable suspicion to believe that criminal activity 'may be afoot.'" United States v. Arvizu, 534 U.S. 266, 273 (2002) (quoting United States v. Sokolow, 490 U.S. 1, 7 (1989)). The court must "look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." Id. (quoting Cortez, 449 U.S. at 417-18). "Although an officer's reliance on a mere 'hunch' is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard." Id. (quoting Terry v. Ohio, 392 U.S. 1, 27 (1968)). "The Fourth Amendment requires some minimal level of objective justification for making the stop." Sokolow, 490 U.S. at 7. Furthermore, reasonable suspicion "need not rule out the possibility of innocent conduct." Arvizu, 534 U.S. at 277. "[E]vasive

behavior is a pertinent factor in determining reasonable suspicion." Illinois v. Wardlow, 528 U.S. 119, 124 (2000).

Officer Linn believed Bonner was intentionally evading him because: 1) Bonner drove by him on a freeway off-ramp "too fast for the amount of roadway left to actually make a stop" if the traffic light did not cycle to green or if anything else unexpected happened (Tr., p. 41, L. 5 – p. 42, L. 5; p. 58, L. 25 – p. 59, L. 11; p. 64, L. 17 – p. 67, L. 23; p. 70, L. 24 – p. 72, L. 1); 2) Bonner was "looking around" as he drove (Tr., p. 42, L. 23 – p. 43, L. 7; p. 46, Ls. 10-16); 3) the car had a temporary registration, which Officer Linn could not determine was valid (Tr., p. 42, Ls. 16-22; p. 62, Ls. 7-24); 4) Bonner "moved lanes from where we were at all the way to the right lane" and turned into the St. Luke's hospital complex (Tr., p. 43, Ls. 1-4; p. 46, Ls. 10-16; p. 68, L. 3 – p. 69, L. 8); 5) Bonner pulled into the parking lot and parked "a distance away" from an outpatient surgery building, and "even further away from the hospital itself," even though there were spots "close to the building" because "there were no other vehicles in the parking lot" (Tr., p. 43, L. 8 – p. 44, L. 3; p. 69, L. 10 – p. 70, L. 15); 6) the outpatient surgery center appeared closed because of the lack of cars in the parking lot and the low light levels in the building (Tr., p. 44, Ls. 4-14); 7) Bonner approached the outpatient surgery building and tried, but failed, to get in (Tr., p. 46, L. 17 – p. 47, L. 2); 8) Bonner then walked away, in a direction away from both the building and his car (Tr., p. 47, Ls. 7-16); and 9) when Officer Linn asked whether the car he had seen was Bonner's, Bonner did not respond (Tr., p. 50, L. 24 – p. 51, L. 17). This behavior, based on his training and experience, aroused Officer Linn's suspicion that "more was going on" and that Bonner may have been trying to evade

detection of an unregistered or stolen car. (Tr., p. 47, L. 17 – p. 48, L. 15; p. 72, L. 2 – p. 73, L. 8.)

The totality of the circumstances supports Officer Linn's belief that Bonner was attempting to evade him, and may have been doing so to avoid detection of a crime such as possession of a stolen car or a registration violation. Bonner drove unusually fast under the circumstances; was looking around for the officer when he changed lanes more than once to make what appeared to be an unplanned exit from Eagle Road into the St. Luke's complex; parked well away from the buildings and approached what appeared to be (and proved in fact) a closed business; and then walked away from both the car and the area of the complex where the hospital was located. To top it off, Bonner did not respond when asked about whether the car the officer had seen was Bonner's. Applying the correct legal standards to the totality of the circumstances shows Officer Linn had reasonable suspicion justifying a temporary investigative detention of Bonner to ascertain whether Bonner was trying to avoid detection of a crime involving Bonner or his car.

In deciding otherwise, the district court erred as a matter of law when it applied a standard of avoiding "an analysis whereby 'a vague suspicion could be transformed into probable cause for arrest by reasons of ambiguous conduct.'" (R., p. 80 (quoting Wong Sun v. United States, 371 U.S. 471, 484 (1963)). While that may be an appropriate standard for evaluating probable cause to arrest, it is wrongly applied in the investigative detention context. To the contrary, in the investigative detention context ambiguous conduct can give rise to reasonable suspicion. Arvizu, 534 U.S. at 277 (reasonable suspicion for an investigative stop "need not rule out the possibility of innocent conduct"). Indeed, ambiguous conduct was what justified the stop in Terry v. Ohio, 392 U.S. 1, 5-6 (1968)

(officer saw two men conferring on a street corner, then take turns walking up the street to a store 300 to 400 feet away and looking in a window before returning to the corner, something that both men did five or six times). In addressing Terry the Court later stated:

> Even in *Terry*, the conduct justifying the stop *was ambiguous and susceptible of an innocent explanation*. The officer observed two individuals pacing back and forth in front of a store, peering into the window and periodically conferring. All of this conduct was by itself lawful, but it also suggested that the individuals were casing the store for a planned robbery. *Terry* recognized that the officers could detain the individuals to resolve the ambiguity.

Wardlow, 528 U.S. at 125 (emphasis added, citations omitted). The court erred when it held that ambiguous conduct would not create reasonable suspicion.

Likewise, Bonner's behavior was not merely "unusual," nor rendered suspicionless by facts such as his decision to not run when confronted. (R., pp. 78-80.) Officer Linn reasonably believed that Bonner's conduct in driving unusually fast away from him, checking to see where he was, moving across two lanes of traffic to duck into a mostly empty parking lot, and then trying to walk away from his car was an attempt to evade police contact and disassociate himself from the car. Attempting to evade police contact is not merely unusual, it is suspicious. Wardlow, 528 U.S. at 124 (2000) ("evasive behavior is a pertinent factor in determining reasonable suspicion"). The district court erred by ignoring or excusing it.

Nor is the district court's analysis supported by the cases it cited. (R., pp. 77-80.) In State v. Pachosa, 160 Idaho 35, 39, 368 P.3d 655, 659 (2016), the Court found reasonable suspicion to detain Pachosa for giving a false name when the name she gave officers did not return from a driver's license database when it should have. In State v. Bishop, 146 Idaho 804, 811-15, 203 P.3d 1203, 1210-14 (2009), a "hearsay upon hearsay" tip that

Bishop attempted to sell methamphetamine to carnival workers provided reasonable suspicion to stop him. The facts found insufficient to justify an investigative detention in State v. Page, 140 Idaho 841, 842, 103 P.3d 454, 455 (2004), were as follows:

> At approximately 2:00 a.m. on March 1, 2003, Post Falls City police officer David Marshall was on patrol when he observed the defendant Arnold Page walking down the middle of a roadway carrying some bags. There were no vehicles on the roadway and the street was located in a residential area that lacked sidewalks.

Obviously Page was not trying to evade police by walking down the middle of a road at 2:00 a.m. In contrast, the evidence suggesting that Bonner was attempting to evade police, perhaps to avoid detection of an expired registration or association with a stolen car, is much stronger. That Bonner's behavior was "unusual" did not shield him from an investigative detention based on reasonable suspicion.

The district court employed an incorrect legal standard whereby Bonner's unusual conduct had to be more than "ambiguous" as to its suggestion of criminal activity. Although ambiguous, and perhaps innocent (although subsequent events proved otherwise, albeit Bonner was attempting to avoid detection for DUI), Bonner's attempts to evade police contact under the totality of the circumstances of this case justified a limited detention to investigate a possible registration violation or the possibility of a stolen car.

CONCLUSION

The state respectfully requests this Court to reverse the district court's order granting suppression of evidence.

DATED this 24th day of October, 2018.

/s/ Lori A. Fleming
for KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 24th day of October, 2018, served a true and correct copy of the foregoing BRIEF OF APPELLANT to the attorney listed below by means of iCourt File and Serve:

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/s/ Lori A. Fleming
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KKJ/dd