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

STATE OF IDAHO,	)	
	)	**No. 46863-2019**
Plaintiff-Respondent,	)	
	)	**Ada County Case No.**
v.	)	**CR01-17-19498**
	)	
AUDREY MARIE BYRUM,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

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

HONORABLE JAMES S. CAWTHON, JR., Magistrate Judge
HONORABLE GERALD F. SCHROEDER, District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Audrey Marie Byrum appeals from the district court's intermediate appellate order affirming the magistrate court's denial of her motion to suppress.

Statement Of The Facts And Course Of The Proceedings

In June 2017, an anonymous tipster driving on I-84 near Meridian called police to report an erratic driver. (Tr.[1], p.8, L.7 – p.9, L.10; p.22, Ls.14-17.) The tipster reported that the vehicle was unable to maintain its lane, and provided police with a description of the vehicle (a Toyota SUV), and license plate information. (10/16/17 Tr., p.9, Ls.2-10.)

Idaho State Police Trooper Eric Pesina was patrolling in the area, heard the dispatch report, and began looking for the vehicle described by the tipster. (10/16/17 Tr., p.7, Ls.13-16; p.9, L.5 – p.10, L.1.) One or two minutes after hearing the dispatch call, Trooper Pesina saw a vehicle that matched the description provided by the tipster, in the area from which the tipster provided the information. (10/16/17 Tr., p.10, L.4 – p.11, L.6.)

Trooper Pesina followed the vehicle for approximately two miles to a gas station off of the highway. (10/16/17 Tr., p.11, L.17 – p.13, L.9; p.17, Ls.15-19.) In this time, Trooper Pesina observed that the vehicle "was having a hard time maintaining their lane" and twice saw the vehicle weaving and "making sharp turns to stay within its lane." (10/16/17 Tr., p.12, Ls.16-20;

[1] Citations to the 10/16/17 transcript of the hearing on the motion to suppress are from the version of the transcript that was lodged on April 28, 2019, which has different pagination than the version lodged on June 6, 2018 for the intermediate appeal.

p.23, L.13 – p.24, L.2.) Trooper Pesina did not remember seeing the vehicle cross any fog or dotted street lines. (10/16/17 Tr., p.13, Ls.21-25.) Trooper Pesina effectuated a traffic stop near the gas station. (10/16/17 Tr., p.13, Ls.2-9.)

The driver of the vehicle was identified as Audrey Byrum. (10/16/17 Tr., p.13, Ls.12-16.) Trooper Pesina smelled the odor of an alcoholic beverage coming from the vehicle and observed that Byrum's eyes were glassy. (R.[2], p.11.) Byrum failed the standard field sobriety tests and was arrested on suspicion of driving under the influence. (Id.) She provided breath samples of .107 and .096. (Id.) The state charged Byrum with second-offense driving under the influence. (R., p.9.)

Byrum filed a motion to suppress, asserting that Trooper Pesina lacked reasonable suspicion to effectuate the traffic stop. (R., pp.16-18.) After a hearing, the magistrate court denied the motion to suppress. (10/16/17 Tr., p.35, L.11 – p.38, L.9.) The court concluded that substantial details of the anonymous tip were corroborated by Trooper Pesina's observations, resulting in reasonable suspicion to justify the traffic stop. (Id.) The magistrate court subsequently denied Byrum's motion for reconsideration that was based upon Byrum's submission of an audio recording of the communications between dispatch and Trooper Pesina. (R., pp.27-28, 30-32; 12/6/17 Tr.[3], p.5, Ls.2-13.)

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[2] Citations to the appellate record are to the Amended appellate record, which contains 139 pages.

[3] The transcript of the 12/6/17 hearing on Byrum's motion for reconsideration appears in the lodged exhibits of this appeal.

Byrum entered a conditional guilty plea to second-offense driving under the influence, preserving her right to appeal the magistrate court's denial of her motion to suppress. (R., pp.42-47.) The court imposed jail time and placed Byrum on supervised probation. (R., p.42.) Byrum appealed to the district court. (R., pp.48-49.) In its intermediate appellate capacity, the district court affirmed on substantially the same grounds as set forth by the magistrate court and agreed that Trooper Pesina possessed reasonable suspicion that Byrum was driving under the influence. (R., pp.128-135.) The district court also affirmed the magistrate court's denial of Byrum's motion for reconsideration. (R., pp.135-136.) Byrum timely appealed to the Idaho Supreme Court. (R., pp.139-141.)

ISSUES

Byrum states the issues on appeal as:

1. Did the magistrate err by denying Ms. Byrum's motion to suppress?

2. Did the magistrate abuse its discretion in denying Ms. Byrum's motion to reconsider the denial of her motion to suppress after reviewing the dispatch audio recordings?

(Appellant's brief, p.3.)

The state rephrases the issues as:

1. Has Byrum failed to show that the district court erred by affirming the magistrate court's denial of her motion to suppress?

2. Has Byrum failed to show that the district court erred by affirming the magistrate court's denial of her motion for reconsideration?

ARGUMENT

I.
Byrum Has Failed To Show That The District Court Erred By Affirming The Magistrate Court's Denial Of Her Motion To Suppress

A. Introduction

Byrum contends that the magistrate court erred by denying her motion to suppress.[4] (Appellant's brief, pp.3-9.) A review of the record, however, reveals that the district court correctly recognized the applicable law, concluded that Trooper Pesina possessed reasonable suspicion that Byrum was driving under the influence, and affirmed the magistrate court's denial of Byrum's motion to suppress.

B. Standard Of Review

On review of a decision rendered by a district court in its intermediate appellate capacity, the reviewing court "directly review[s] the district court's decision." State v. DeWitt, 145 Idaho 709, 711, 184 P.3d 215, 217 (Ct. App. 2008) (citing Losser v. Bradstreet, 145 Idaho 670, 183 P.3d 758 (2008)). If the district court properly applied the law to the facts the appellate court

[4] Though a reviewing Idaho appellate court directly reviews the district court's intermediate appellate decision, Bryum has not asserted any district court error. (See Appellant's brief.) Instead, she makes no reference to the district court's intermediate appellate decision and asserts only that the magistrate court erred in denying her motion to suppress. (See id.) The party alleging error has the burden of showing it in the record, and the appellate court will not search the record for error. Akers v. D.L. White Const., Inc., 156 Idaho 37, 48, 320 P.3d 428, 439 (2013). Because Byrum has not attempted to meet her burden to show district court error, this Court may affirm the district court's intermediate appellate order on that basis. Because the arguments and issues presented to and decided by the magistrate and district courts in this case were substantially similar, the state argues in this brief that the district court correctly affirmed the magistrate court's denial orders, but does not specifically address the arguments made by Bryum regarding the magistrate court's decisions.

will affirm the district court's order. See id. (citing Losser, 145 Idaho 670, 183 P.3d 758; Nicholls v. Blaser, 102 Idaho 559, 633 P.2d 1137 (1981)).

The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, 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. Klingler, 143 Idaho 494, 496, 148 P.3d 1240, 1242 (2006).

C. The District Court Correctly Affirmed The Magistrate Court's Denial Order

"A traffic stop by an officer constitutes a seizure of the vehicle's occupants and implicates the Fourth Amendment's prohibition against unreasonable searches and seizures." State v. Young, 144 Idaho 646, 648, 167 P.3d 783, 785 (Ct. App. 2006) (citing Delaware v. Prouse, 440 U.S. 648, 653 (1979)). Ordinarily, a warrantless seizure must be based on probable cause to be reasonable. Florida v. Royer, 460 U.S. 491, 499-500 (1983); State v. Bishop, 146 Idaho 804, 811, 203 P.3d 1203, 1210 (2009). However, limited investigatory detentions, based on less than probable cause, are permissible when justified by an officer's reasonable, articulable suspicion that a person has committed, or is about to commit, a crime. Royer, 460 U.S. at 498; Bishop, 146 Idaho at 811, 203 P.3d at 1210. Such a detention "is permissible if it is based upon specific articulable facts which justify [reasonable] suspicion." State v. Sheldon, 139 Idaho 980, 983, 88 P.3d 1220, 1223 (Ct. App. 2003) (citing Terry v. Ohio, 392 U.S. 1, 21 (1968); United States v. Cortez, 449 U.S. 411, 417 (1981)).

The relatively low standard required for reasonable suspicion does not require the police to identify a specific crime. Rather, reasonable suspicion only requires a "showing of objective and specific articulable facts giving reason to believe that the individual has been or is about to be involved in *some* specific criminal activity." State v. Perez-Jungo, 156 Idaho 609, 615, 329 P.3d 391, 397 (Ct. App. 2014) (emphasis in original).

Whether an officer possessed reasonable suspicion is evaluated based on the totality of the circumstances known to the officer at or before the time of the stop. Bishop, 146 Idaho at 811, 203 P.3d at 1210; Sheldon, 139 Idaho at 983, 88 P.3d at 1223. While a driving pattern not amounting to a traffic infraction may provide reasonable suspicion of driving under the influence, the relevant test is whether the driving pattern falls outside "the broad range of what can be described as normal driving behavior." State v. Neal, 159 Idaho 439, 443, 362 P.3d 514, 518 (2015) (quoting State v. Emory, 119 Idaho 661, 664, 809 P.2d 522, 525 (Ct. App. 1991)). Therefore, "two instances of moving on the fog line," without more, is not sufficient to arouse reasonable suspicion of DUI. Id. at 443-444, 262 P.3d at 518-519.

The reasonable suspicion necessary to support an investigative detention may be supplied by an informant's tip or a citizen's report of suspected criminal activity. Alabama v. White, 496 U.S. 325, 329 (1990); Bishop, 146 Idaho at 811, 203 P.3d at 1210; State v. Linenberger, 151 Idaho 680, 685, 263 P.3d 145, 150 (Ct. App. 2011); State v. Larson, 135 Idaho 99, 101, 15 P.3d 334, 336 (Ct. App. 2000).

"Whether a tip amounts to reasonable suspicion depends on the totality of the circumstances including the substance, source, and reliability of the information provided."

Bishop, 146 Idaho at 811, 203 P.3d at 1210. An information's tip is considered more reliable if the informant reveals the basis of knowledge of the tip – how the informant came to know the information. See United States v. Rowland, 464 F.3d 899, 908 (9th Cir. 2006).

"An anonymous tip, standing alone, is generally not enough to justify a stop because an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity." Linenberger, 151 Idaho at 685, 263 P.3d at 150 (citing White, 496 U.S. at 329; Florida v. J.L., 529 U.S. 266, 269 (2000)); see also Bishop, 146 Idaho at 812, 203 P.3d at 1211 (anonymous tip that provides only description of subject and alleges commission of crime "generally will not give rise to reasonable suspicion"). "However, when the information from an anonymous tip bears sufficient indicia of reliability or is corroborated by independent police observations, it may provide justification for a stop." Linenberger, 151 Idaho at 685, 263 P.3d at 150 (citing White, 496 U.S. at 331-332).

In White, an anonymous telephone tipster told authorities that White would be leaving a particular apartment building at a particular time, driving a Plymouth station wagon, to a particular motel, and that she would be in possession of cocaine. White, 496 U.S. at 327. Officers stopped the vehicle after observing it leave the named apartment and drive towards the named motel. Id. The Supreme Court first recognized that because reasonable suspicion is a less demanding standard than probable cause, not only can reasonable suspicion be established with information that is different in quantity or content than that required to establish probable cause, but reasonable suspicion can arise from information than is less reliable than is required to show probable cause. Id. at 330.

The Court then held that while "not every detail mentioned by the tipster was verified," (and where the officers did not themselves observe any criminal activity), the police were able to corroborate enough details from the tip so that there was "reason to believe that the caller was honest and well informed," and thus the totality of circumstances could "impart some degree of reliability to [the tipster's] allegation that White was engaged in criminal activity." Id. at 326. The Court explained:

> The Court's opinion in [Illinois v. Gates, 462 U.S. 213 (1983)] gave credit to the proposition that because an informant is shown to be right about some things, he is probably right about other facts that he has alleged, including the claim that the object of the tip is engaged in criminal activity. Thus, it is not unreasonable to conclude in this case that the independent corroboration by the police of significant aspects of the informer's predictions imparted some degree of reliability to the other allegations made by the caller.

Id. at 331-332.

In the present case, the district court recognized and applied the relevant law as set forth above regarding reasonable suspicion and anonymous tips. (R, pp.122-132.) The court affirmed the conclusions of the magistrate court. (Id.) Specifically, the district court found that the totality of the combined circumstances of: (1) the anonymous tip that the driver of the suspect vehicle was "unable to maintain his lane;" (2) Trooper Pesina's soon-after locating of the vehicle described by the tipster in a location which matched the tip; and (3) Trooper Pesina's own observations that the driver of the suspect vehicle "was having a hard time maintaining their lane" and was "making sharp turns to stay within its lane;" constituted reasonable suspicion to stop the vehicle. (Id.) This conclusion is supported by the record.

Significant details of the anonymous tip were corroborated by Trooper Pesina. Trooper Pesina was able to locate the vehicle described by the tip within minutes of receiving the information from dispatch, in a geographic location which was consistent with the tip. (10/16/17 Tr., p.10, L.2 – p.11, L.14.) The subject vehicle of the tip was definitively identified through its vehicle make, type, and license plate information. (Id.) Further, unlike in cases such as Alabama v. White, where there was no known basis for the tipster's knowledge (but where reasonable suspicion was found nonetheless), here, the basis of the knowledge was clear – the tipster was on the highway observing the suspect vehicle. This enhances the credibility of the tip. See Navarette v. California, 572 U.S. 393, 399 (2014) ("[b]y reporting that she had been run off the road by a specific vehicle – a [redacted] – the [anonymous] caller necessarily claimed eyewitness knowledge of the alleged dangerous driving. That basis of knowledge lends significant support to the tip's reliability.")

The tipster specifically reported that the suspect vehicle was "unable to maintain its lane." (10/16/17 Tr., p.9, Ls.5-7.) This indicates that the vehicle was not simply drifting slightly within its own lane, but actually failed to stay within its own lane. This observation, at the very least, contributed to a finding of reasonable suspicion. See State v. Burns, 2015 WL 5009867 at *1-3 (N.J. Super Ct. App. Div. 2015) (unpublished) (affirming denial of motion to suppress where officer stopped vehicle based upon anonymous tip that vehicle was "unable to maintain his lane while driving" and "was all over the road," and where tipster described the vehicle with specificity); State v. Ostrander, 2015 WL 4366693 at *1-3 (N.M. Ct. App. 2015) (unpublished) (anonymous tip that vehicle was unable to maintain its lane was sufficiently reliable to constitute

reasonable suspicion for DUI where evidence indicated tipster personally observed the conduct, even where the responding officer did not observe such a driving pattern himself). The tipster in the present case was concerned enough to engage police about the vehicle while the tipster was driving upon the highway. This also enhances the credibility of the tip. See Navarette, 572 U.S. at 401 (recognizing that the credibility tips made through the 911 system[5] may be bolstered in light of "foregoing technological and regulatory developments" from which a "reasonable officer could conclude that a false tipster would think twice before using such a system.")

Trooper Pesina's own observations of the vehicle's driving strengthened the suspicion provided by the tipster. Trooper Pesina observed that the vehicle "was having a hard time maintaining their lane" and twice saw the vehicle weaving and "making sharp turns to stay within its lane." (10/16/17 Tr., p.12, Ls.16-20; p.23, L.13 – p.24, L.2.) While these observations may not have themselves generated reasonable suspicion of driving under the influence, see Neal, 159 Idaho at 443-444, 362 P.3d at 518-519, they provided more than did the officer's observation in Neal. In Neal, the officer twice observed the suspect drive his vehicle onto, but not across, the fog line. Neal, 159 Idaho at 441, 362 P.3d at 516. The Idaho Supreme Court found that "[w]ithout more, the two instances of moving onto the fog line are not sufficient to arouse reasonable suspicion of DUI under Idaho precedent." Id. at 443, 362 P.3d at 518. However, in the present case, the magistrate court described Trooper Pesina's testimony as

[5] Though it would have been a reasonable inference for him to make at the time he received the information, Trooper Pesina did not specifically testify that the anonymous tip came through the 911 system. However, both of the parties described the tip as coming through the 911 system in their briefing to the district court. (R., pp.88, 102-104.)

relaying observations of "corrective measures" of "sharp turns to stay within the lane." (10/16/17 Tr., p.37, Ls.17-21.) The district court adopted these findings (R., pp.124-125), and properly recognized that this driving pattern did not constitute "normal driving behavior." (R., p.127 n.2 (citing State v. Just, 2006 WL 2616379 at *5 (Minn. Ct. App. 2006) (unpublished) ("Deputy Wright testified that, shortly after midnight, he saw Just make a jerkish sharp turn onto the highway, weave within his own traffic lane several times, jerk the car back after it touched the fog line, and travel at a rate of speed that was lower than the speed limit…Although Deputy Wright saw no criminal activity, his observations provided a sufficient basis for the stop."); State v. Dalios, 635 N.W.2d 94, 98 (Minn. Ct. App. 2001) (Concluding that "weaving within one's own lane continuously is enough, by itself, to provide a reasonable articulate suspicion"); West v. State, 143 A.3d 712, 718 (Del. 2016) ("[W]hat happened here is much more than weaving within the same lane…the weaving, coupled with the sharp turn to avoid hitting a concrete island is easily recognized as driving behavior indicative of drunk driving").

The district court recognized the applicable law, and correctly applied it to the facts found by the magistrate court. The court therefore properly affirmed the magistrate court's decision to deny Byrum's motion to suppress. This Court should affirm that determination.

II.
Byrum Has Failed To Show That The District Court Erred By Affirming The Magistrate Court's Denial Of Her Motion For Reconsideration

A. Introduction

Byrum contends that the magistrate court erred by denying her motion for reconsideration that was based upon an audio recording of the communications between dispatch and Trooper

Pesina. (Appellant's brief, p.9.) However, a review of the record reveals that the district court properly affirmed the magistrate court's use of discretion in denying the motion.

B. Standard Of Review

The denial of a motion to reconsider is reviewed for an abuse of discretion. State v. Montague, 114 Idaho 319, 320, 756 P.2d 1083, 1084 (Ct. App. 1988). In evaluating whether a lower court abused its discretion, the appellate court conducts a four-part inquiry, which asks "whether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason." State v. Herrera, 164 Idaho 261, 272, 429 P.3d 149, 160 (2018) (citing Lunneborg v. My Fun Life, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018)).

C. The District Court Correctly Affirmed The Magistrate Court's Denial Order

While the Idaho Criminal Rules omit mention of motions or requests for reconsideration, trial courts are free to entertain such motions when they are made. Montague, 114 Idaho at 321, 756 P.2d at 1085.

In this case, after the magistrate court denied Byrum's motion to suppress, Byrum obtained an audio recording of the communications between dispatch and Trooper Pesina. (R., pp.27-28, 30-32.) The district court would later transcript this audio recording as follows:

Dispatch: Units, westbound I-84 at 44, traffic complaint, possible DUI, standby.

Dispatch: Units, control, continuing westbound from 44, grey 2003 Toyota 4-Runner, home address in Meridian, reporting party is still behind.

Dispatch: 630 control, are you in a position for this call?

Officer: Affirm, I am in position.

Dispatch: Cannot stay in lane, will continue to give milepost. Vehicle is in far left lane.

Officer: Control 630, have they passed 44 yet?

Dispatch: Affirmative, westbound from 44. Approaching 44, correction approaching 42, one mile.

Officer: Control 630, I am behind the vehicle. What was the complaint?

Dispatch: Unable to maintain lane, has been all over, reporting party will not give a name.

Officer: Copy, did they give a license plate?

Dispatch[redacted]

(R., pp.115-116 (footnote omitted).)

Byrum argued that the magistrate court should change its ruling on the motion to suppress because this audio recording indicated that Trooper Pesina did not receive specific information about the nature of the anonymous tip until he was behind the suspect vehicle, and even then, he was given only a "vague description of the driving pattern" (that the driver was "unable to maintain lane" and "has been all over"). (R., pp.30-32.) The state argued that the audio recording did not demonstrate that the magistrate court's prior ruling was incorrect. (R., pp.34-38; 12/6/17 Tr., p.3, L.11 – p.4, L.10.)

After a hearing, the magistrate court denied the motion for reconsideration. (See generally, 12/6/17 Tr.) The court noted that it had reviewed the argument submitted and the transcription of the dispatch recording, but that it maintained its original ruling on the motion to suppress. (12/6/17 Tr., p.5, Ls.3-13.) The district court recognized the discretionary authority of the magistrate court to consider Byrum's motion for reconsideration, and then affirmed the magistrate court's decision to deny the motion. (R., pp.115-116.) A review of the record supports the district court's conclusion.

The magistrate court's underlying decision to deny the motion to suppress was based on the totality of the combined circumstances of: (1) the anonymous tip that the driver of the suspect vehicle was "unable to maintain his lane;" (2) Trooper Pesina's soon-after locating of the vehicle described by the tipster in a location which matched the tip; (3) and Trooper Pesina's own observations that the driver of the suspect vehicle "was having a hard time maintaining their lane" and was "making sharp turns to stay within its lane." (10/16/17 Tr., p.35, L.11 – p.38, L.9.) The dispatch recording did not cast doubt on any of the facts relied upon by the magistrate court in making its determination, but rather confirmed that Trooper Pesina obtained the relevant information prior to stopping Byrum.

The only apparent difference between the audio recording and Trooper Pesina's suppression hearing testimony that may be inferred is that Trooper Pesina testified that dispatch "broadcast[ed] a traffic complaint that evening of a vehicle unable to maintain its lane" *prior* to when Trooper Pesina located the suspect vehicle. (10/16/17 Tr., p.9, Ls.2-19.) Whereas the dispatch audio indicates that dispatch first broadcasted only that there was a traffic complaint of

a "possible DUI," and *then* provided specific information about the suspect vehicle's driving pattern only after Trooper Pesina was behind the vehicle on the highway. (R., pp.115-116.) This minor apparent discrepancy is of no importance where all of this information was relayed by dispatch before Byrum effectuated a traffic stop on the vehicle. In any event, the extent to which any minor discrepancy impacted the credibility of Trooper Pesina's testimony was within the province of the magistrate court to determine. See State v. Cobler, 148 Idaho 769, 773, 229 P.3d 374, 378 (2010).

If anything, the audio recording added information supporting the magistrate court's finding that Trooper Pesina possessed reasonable suspicion to stop the vehicle. While Trooper Pesina's suppression hearing testimony indicated that he was informed that the anonymous tipster reported the suspect vehicle was "unable to maintain lane" (10/16/17 Tr., p.9, Ls.2-10; p.17, L.23 – p.18, L.2), the audio recording additionally provided that dispatch informed Trooper Pesina that the tipster observed that the suspect vehicle "has been all over" (R., p.116). Additionally, the audio recording clarified that the tipster was able to relay the entire license plate number of the suspect vehicle. (Id.)

The district court correctly affirmed the magistrate court's discretionary decision to deny Byrum's motion for reconsideration. This Court should therefore affirm the district court's intermediate appellate order.

CONCLUSION

The state respectfully requests this Court to affirm the district court's intermediate appellate order affirming the magistrate court's denials of Byrum's motion to suppress and motion for reconsideration.

DATED this 18th day of February, 2020.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 18th day of February, 2020, 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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/s/ Mark W. Olson
MARK W. OLSON
Deputy Attorney General

MWO/dd